FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION

Prepared by

Subcommittee on Federal Death Penalty Cases
Committee on Defender Services
Judicial Conference of the United States

Honorable James R. Spencer, Subcommittee Chair
Honorable Robin J. Cauthron
Honorable Nancy G. Edmunds

May 1998

The recommendations in this report were adopted by the Judicial Conference of the United States on September 15, 1998

EXECUTIVE SUMMARY

This report addresses the cost, availability and quality of defense representation in federal death penalty cases and recommends steps which should be taken in order to keep expenditures in these cases within reasonable limits. It has been prepared by the Subcommittee on Federal Death Penalty Cases of the Judicial Conference Committee on Defender Services. The report was prompted by judicial and congressional concerns about the costs involved in providing defense services in federal death penalty cases and is the product of extensive study and data collection.

Federal death penalty prosecutions are large-scale cases that are costly to defend. They require more lawyers, working more hours, at a higher hourly rate than other federal criminal matters. The number of federal death penalty prosecutions has grown dramatically in the last several years, and their impact on the defender services appropriation cannot responsibly be ignored. The judiciary has a duty to ensure that its funds are spent wisely, and to identify the best ways to provide cost-effective representation in these challenging cases.

To this end, the Subcommittee has thoroughly examined the nature of defense representation in federal death penalty cases. Part I of this report sets forth the Subcommittee's analysis and findings, which are based upon qualitative and quantitative information gathered from many sources. This part of the report describes the number of federal death penalty cases and the cost of defending them, and discusses the characteristics of federal death penalty cases and the special duties they impose on defense counsel. This information is essential to a full understanding of the recommendations set forth in Part II of the report. Also contained in Part I are data on the expense of prosecuting federal death penalty cases, which have been provided by the Department of Justice.

In general, the Subcommittee on Federal Death Penalty Cases has concluded that judges assigned to federal death penalty cases have been appropriately conscious of the need to monitor defense costs and that, for the most part, their efforts to control expenses have been successful. In the vast majority of cases, moreover, judges have been able to appoint well-qualified lawyers with sufficient experience in death penalty litigation to make cost-effective decisions about the resources required to present a defense. Overall, the average cost of representation in each major category of federal death penalty cases is reasonable in relation to the obligations imposed on defense counsel and the costs of prosecuting such cases. Nevertheless, the Subcommittee believes the additional cost-containment measures proposed in its recommendations should be implemented.

Among the most important findings presented in Part I of the report are the following:

1. The number of federal prosecutions in which an offense punishable by death is charged, and to which special statutory requirements for the appointment and compensation of counsel apply, increased sharply after the 1994 Federal Death Penalty Act increased the number of federal crimes punishable by death.

- Number of defendants charged with offenses punishable by death (by year of indictment):
  1991 -- 12
  1992 -- 45
  1993 -- 28
  1994 -- 45
  1995 -- 118
  1996 -- 159
  1997 -- 153

2. The cost of defending cases in which the Attorney General decides to seek the death penalty for commission of an offense potentially punishable by death (authorized cases) is much higher than the cost of defending cases in which the Attorney General declines to authorize the death penalty for an offense punishable by death. The number of authorized cases has increased since 1994.

- Number of cases where the Attorney General has authorized seeking the death penalty, by year in which the authorization decision was made (figures provided by the Department of Justice):

  1990 -- 2
  1991 -- 6
  1992 -- 16
  1993 -- 5
  1994 -- 7
  1995 -- 17
  1996 -- 20
  1997 -- 31

- Average total cost per representation of a sample of cases in which the defendant was charged with an offense punishable by death and the Attorney General did not authorize seeking the death penalty (1990-1997): **$55,772**
- Average total cost per representation of a sample of cases in which the defendant was charged with an offense punishable by death and the Attorney General authorized seeking the death penalty (includes cases resolved by guilty plea as well as cases resolved by trial) (1990-1997): **$218,112**

3. The cost of defending a federal death penalty case that is resolved by means of a trial is higher than the cost of defending a case that is resolved through a guilty plea, even though many guilty pleas are entered after most of the preparation for trial has been completed. The number of federal death penalty trials, and the number of individual defendants tried on capital charges, has increased since the federal death penalty was revived by Congress in 1988.

- Number of federal death penalty trials/defendants, by calendar year:

  1988 -- 0
  1989 -- 0
  1990 -- 1 trial, 1 defendant
  1991 -- 4 trials, 5 defendants
  1992 -- 1 trial, 1 defendant
  1993 -- 3 trials, 7 defendants
  1994 -- 1 trial, 3 defendants
  1995 -- 4 trials, 7 defendants
  1996 -- 5 trials, 7 defendants
  1997 -- 8 trials, 11 defendants

- Average total cost per representation of a sample of authorized federal death penalty cases resolved through a guilty plea (1990-1997): **$192,333**

- Average total cost per representation of a sample of authorized federal death penalty cases resolved through a trial (1990-1997): **$269,139**

4. The costs of *defending* federal death penalty cases appear to be reasonable in relation to the costs of

prosecuting such cases. The Department of Justice collected data regarding its prosecution costs in a sample of authorized cases, including some that went to trial and some that ended in guilty pleas. These cost data did not include non-attorney investigative costs or the value of services provided to the prosecution by law enforcement agencies.

- Average total cost of prosecuting an authorized federal death penalty case (based on a sample of cases resolved by guilty plea and by trial selected by the Department of Justice; does not include any non-attorney investigative costs or the costs of expert and other assistance provided by law enforcement agencies; figures provided by the Department of Justice): **$365,000**

5. The overall cost of providing representation in federal death penalty cases is due to the growing number of such prosecutions (in particular the growing number of trials), the special duties of counsel in federal death penalty cases, and the higher hourly rate paid to counsel. The number of cases depends upon prosecutorial decisions, over which the judiciary has no control. The special obligations of counsel are due to a combination of those responsibilities inherent in any capital case and the unusual complexity of many federal death penalty prosecutions, particularly drug conspiracy cases. The higher maximum rate for counsel in federal death penalty cases is actually lower than the market rates charged by the lawyers appointed in federal death penalty cases, and is required in order to assure an adequate supply of qualified lawyers. Generally, courts have succeeded in appointing counsel with the experience and judgment needed to make prudent use of resources in defending federal death penalty cases. Federal defender organizations are not at this time ready to assume a major portion of the responsibility for representation in federal death penalty cases, so that courts must continue to appoint panel attorneys and must offer an adequate rate of compensation.

In Part II of this report, the Subcommittee recommends additional steps designed to contain and reduce the cost of capital defense representation. In the death penalty area in particular, cost-effectiveness is inseparable from high quality representation: assuring appropriate resources for the defense at the trial stage minimizes the risk of time-consuming and expensive post-conviction litigation later on. Therefore, in addition to recommendations designed to monitor and limit expenditures, the Subcommittee has proposed a number of measures intended to assure the appointment of well-qualified counsel and to make other improvements in the delivery of defense services. The most significant of the Subcommittee's recommendations can be summarized as follows:

- Courts should assure the appointment of highly qualified counsel whenever the defendant is charged with an offense punishable by death. The hourly rate authorized for compensation of counsel in federal death penalty cases should remain high enough to attract a sufficient number of qualified attorneys. **Recommendation 1.**

- Courts should consult with the local federal public defender, or, in districts not served by a federal public defender, with the Administrative Office of the U.S. Courts to identify counsel. In districts served by a community defender organization, courts should consult with the community defender organization. **Recommendation 2.**

- Courts should not appoint more than two lawyers to represent a defendant in a federal death penalty case except in exceptional circumstances; however, courts should authorize appointed counsel to utilize the services of other lawyers to assist them on a more limited basis when this would contain costs or when additional staff might be required to meet time limits. **Recommendation 3.**

- Courts should appoint federal defender organizations as lead or second counsel in federal death penalty cases only if the federal defender organization has staff with the appropriate qualifications and experience and other resources sufficient to undertake the representation without unduly disrupting the operation of the office. **Recommendation 4.**

- The Department of Justice should streamline the review of federal death penalty cases so that cases in which a request for the death penalty is very unlikely will be reviewed more quickly. An earlier decision not to seek the death penalty will reduce the length of time the case must be treated as a federal death penalty case where the defendant is entitled to two lawyers who may be paid at a higher hourly rate. Expediting review of cases in which a request for the death penalty is unlikely, such as cases in which the local United States Attorney strongly recommends against seeking the death penalty, will significantly reduce defense costs without diminishing the usefulness of centralized review. **Recommendation 5.**

- The Administrative Office of the U.S. Courts should continue to support the Federal Death Penalty Resource Counsel Project, which has become essential to the delivery of high quality, cost-effective defense representation, and it should consider expanding the availability of model pleadings and other information needed by counsel in federal death penalty cases through the use of technology. **Recommendation 6.**

- Federal defender organizations should consider creating salaried positions for penalty phase investigators who would coordinate preparation for the penalty phase in federal death penalty cases at a lower cost than a mitigation specialist retained as an expert at an hourly rate. Lawyers should be encouraged to negotiate reduced rates with experts. Also, information about qualified experts in fields often involved in federal death penalty cases and about the rates they charge should be made available to counsel. **Recommendation 7.**

- The Administrative Office of the U.S. Courts should continue to support training for counsel in federal death penalty cases. **Recommendation 8.**

- Courts should require lawyers to develop case budgets to ensure the most effective and economical use of resources. Case budgeting should be done both before the prosecution makes a decision whether it will seek the death penalty and after, if the death penalty is authorized. Case budgets should be reviewed if circumstances change. The Judicial Conference should develop guidelines for case budgeting, and judges and lawyers should be trained in the budgeting process. **Recommendation 9.**

- In multi-defendant federal death penalty cases, courts should consider making early decisions about whether to sever non-capital defendants from defendants facing capital charges. Courts should also consider using case management techniques to diminish the cost of document production and distribution and to reduce duplication of effort among defense counsel. **Recommendation 10.**

- The Judiciary should improve its capacity to track costs in federal death penalty cases. **Recommendation 11.**

INTRODUCTION

This report responds to judicial and congressional concerns about the cost of providing representation in federal death penalty cases. Congress revived the death penalty for federal crimes in 1988, authorizing capital punishment for "drug kingpin" murders.(1) In 1994, Congress expanded to fifty the number of federal crimes punishable by death.(2) The portion of the Defender Services appropriation allocated to federal death penalty cases has increased over the past decade, especially since fiscal year (FY) 1995. Federal death penalty cases consumed almost six percent of the Defender Services obligations for payments to panel attorneys for fiscal year 1997, although they comprised approximately 0.3 percent of the caseload.(3)

In order to understand better the reasons for the high cost of representation in federal death penalty cases in comparison to non-capital cases, Judge Emmett Ripley Cox, the Chair of the Judicial Conference Committee on Defender Services, in May 1997 appointed a Subcommittee on Federal Death Penalty Cases to study the judiciary's current approach to the appointment and compensation of counsel in these cases, its success in recruiting qualified attorneys, and the quality and cost of services provided. Judge Cox named three members of the Committee on Defender Services to the Subcommittee: Judge James R. Spencer, of the Eastern District of Virginia, Chair of the Subcommittee; Judge Robin J. Cauthron, of the Western District of Oklahoma; and Judge Nancy G. Edmunds, of the Eastern District of Michigan. Norman Lefstein, Dean of the Indiana University School of Law at Indianapolis, was selected to serve as the Subcommittee's chief consultant.

The Subcommittee gathered both qualitative and quantitative information about federal death penalty cases. Dean Lefstein and his staff (4) conducted extensive interviews with lawyers and judges representing a wide range of perspectives, and covering more than half of the judicial districts in which a federal death penalty prosecution has been authorized. The Subcommittee's staff also reviewed articles and reports concerning representation in death penalty cases, including the recent Report on Costs and Recommendations for the Control of Costs of the Defender Services Program prepared by Coopers & Lybrand Consulting. Additionally, staff compiled a database containing cost information regarding federal death penalty cases from 1990, the year the first post-*Furman* federal death penalty case was authorized, to the end of fiscal year 1997. The Subcommittee's staff analyzed these data by correlating cost information with descriptive information (case demographics), and by comparing costs in federal death penalty cases with costs in non-capital homicide cases. The Subcommittee also obtained information concerning the time spent by attorneys in federal defender organizations (FDOs) on representation in federal death penalty cases and the costs incurred by local United States Attorney's Offices in prosecuting them. Because of the small number of federal death penalty cases that have been reviewed on direct appeal or in post-conviction proceedings, the quantitative analyses in this report focus on representation at the trial stage, and therefore do not reflect the overall cost of representation in a case in which a death sentence is imposed.(5)

The Subcommittee's findings are set out in Part I of this Report. The Subcommittee has proposed eleven recommendations to enhance the judicial administration of federal death penalty cases. These recommendations, supported by commentary, are set out in Part II. The recommendations alone are reproduced in Appendix A. The Subcommittee's methodology and the sources consulted are described in Appendix B. Additional statistical and other supporting data are contained in Appendix C.

I. ANALYSIS AND FINDINGS

In general, the high cost of providing representation in federal death penalty cases is a result of the heavy demands these cases place on the time and skill of counsel and the growing number of federal criminal cases in which the defendant faces a potential sentence of death. The cost of representation in each federal death

penalty case depends upon several elements: the number of hours each attorney must work to discharge his or her ethical obligation to the client; the hourly rate at which the attorney is compensated; and the nature, type, and cost of investigative and expert services reasonably required. To understand *why* federal death penalty cases cost so much, and how these costs may be controlled consistent with constitutional and statutory mandates, requires first and foremost an understanding of the characteristics of federal death penalty cases and the special responsibilities of defense counsel appointed to such cases.

A. Number and Overall Cost of Federal Death Penalty Cases.

The total cost of providing representation in federal death penalty cases depends upon the number of such cases, as well as the cost of representation in each case. As described more fully below, special standards affecting the cost of representation apply to all federal criminal cases in which an offense charged is punishable by death, whether or not the prosecution ultimately decides to seek the death penalty.[(6)] Although many factors affect the cost of representation, two particularly significant ones are the prosecution's decisions whether to seek the death penalty and whether to accept a plea agreement to a sentence less than death.[(7)]

1. The Decision to Prosecute in Federal Court. The total number of federal death penalty cases depends, in the first instance, on the decision to prosecute an offense in federal rather than in state court.[(8)] The number of federal prosecutions including an offense punishable by death has increased dramatically, particularly since the enactment of the Federal Death Penalty Act as part of the 1994 crime bill. No exact count of federal death penalty cases filed nationwide by United States Attorney's offices since 1988 is available; a reasonable estimate,

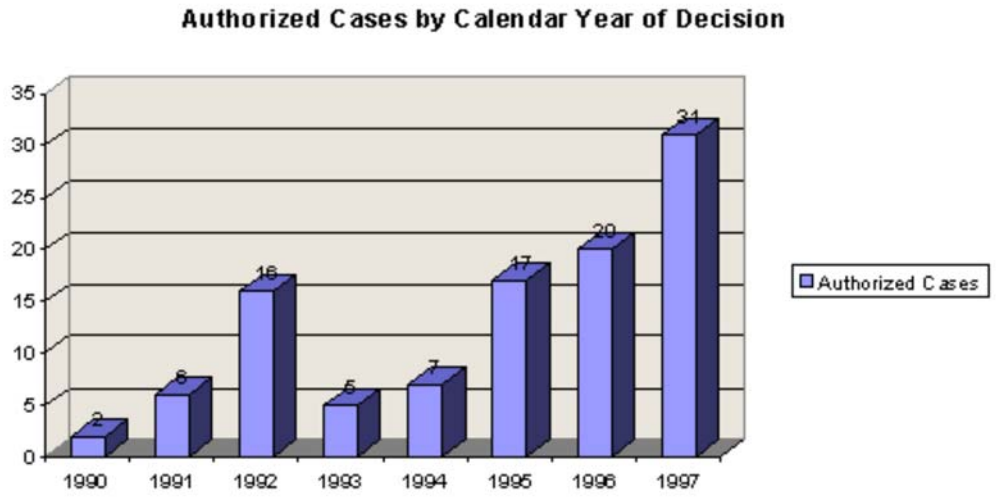
however, is 560 cases[(9)] over the period 1991 to 1997, increasing from 12 cases in 1991, to 118 in 1995, 159 in 1996, and 153 in 1997.[(10)]

The average total cost per federal death penalty representation in a sample of cases prosecuted from 1990 to 1997 (including cases in which the prosecution ultimately declined to seek the death penalty) was $142,000.[(11)] However, the prosecution's decision to seek the death penalty -- as would be expected -- makes a substantial difference in the cost of representation, so

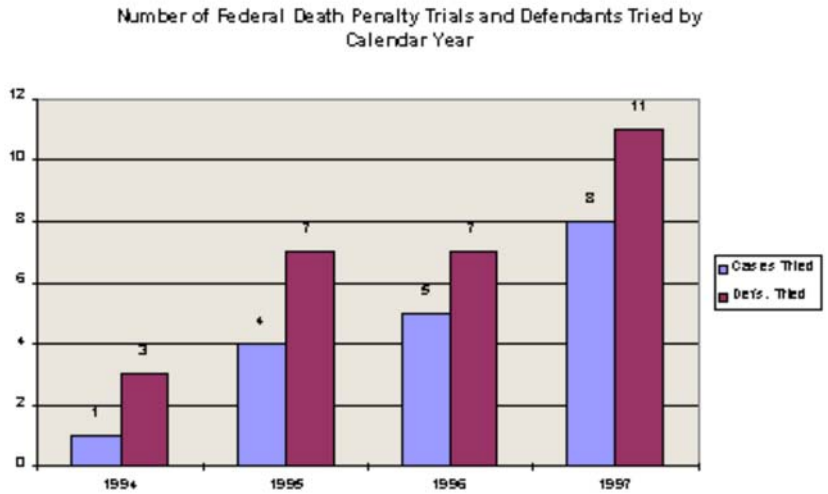
that this overall average is not useful in assessing the resources required for a case in which the prosecution does decide to seek the death penalty.

2. The Decision to Authorize the Death Penalty. The cost of representation in a federal death penalty case depends heavily upon whether the prosecution does or does not seek the death penalty. (See Charts C-4, C-5,

and C-6, comparing the total costs and elements of total cost of cases in which death penalty authorization was granted with those in which it was denied.) While the decision to charge an offense punishable by death is made by a local U.S. Attorney, no federal prosecutor may actually seek the death penalty unless specifically authorized to do so by the Attorney General of the United States.



The Attorney General has authorized seeking the death penalty in a total of 111 cases between 1988 and December 1997.[(12)] The average total cost (for counsel and related services) of authorized cases in the Subcommittee's sample was $218,112, as compared to $55,772 for cases in which the death penalty was never authorized; the average total cost of cases in which the prosecution was authorized to seek the death penalty, but later formally withdrew its request before trial was $145,806. The number of cases in which the Attorney General authorized seeking the death penalty rose from two cases in 1990 to 31 cases in 1997. Twenty-two cases in which the prosecution has been authorized to seek the death penalty were pending as of December 1997.



3. The Decision to Go to Trial. The third prosecutorial decision affecting the cost of representation is the decision whether to enter into a guilty plea agreement with the defendant or to try the case. (See Table C-7 and Chart C-8.) Of the 111 defendants against whom the Attorney General has sought the death penalty, the total number of defendants *tried* on capital

charges in federal court was 41 through December 1997. The average total cost for authorized cases ending in

capital trials was $269,139,[(13)] as compared to $192,333 for authorized cases

resolved by a guilty plea. To date, nineteen defendants have been sentenced to death; one death sentence was later overturned on appeal and the case remanded for resentencing.

B. Factors Affecting the Scope and Cost of Defense Representation.

1. Death Penalty Cases Involve Two Trials. Federal law provides for a two part (bifurcated) trial in a capital case. [(14)] In the first part, the guilt phase, the jury is asked to determine whether the prosecution has proven, beyond a reasonable doubt, that the defendant has committed a crime punishable by death. If a conviction is returned on a capital count, then in the second part, the penalty phase, the jury must first determine whether the prosecution has proven additional facts (aggravating circumstances) in order to satisfy threshold requirements for imposing the death penalty. If so, the jury considers evidence offered by the prosecution to justify the death penalty, including aggravating circumstances in addition to those required for the threshold finding, and evidence the defense offers as a reason not to sentence the defendant to death (mitigating circumstances).

Lawyers in a death penalty case must prepare for both trials, and must develop an overall strategy that takes the penalty phase into account even in the guilt phase. This means that the way the defense proceeds differs from a non-capital case in important ways beginning with jury selection. For example, facts that make no difference in the determination of guilt or innocence may become very important to the jury's assessment of the defendant's culpability in the penalty phase. Lawyers interviewed by the Subcommittee, for instance, described cases in which both the prosecution and the defense invested substantial resources in obtaining expert opinions concerning the precise manner of the victim's death, even though this would not affect the guilt phase verdict, because of the importance of this information to the determination of the appropriate penalty.

2. Complexity of the Guilt Phase. Federal death penalty cases generally are highly complex criminal prosecutions, even without taking the penalty phase into account. As a representative of the Department of Justice remarked at a meeting with Subcommittee staff to discuss compilation of cost data, federal death penalty cases have more in common with complex drug conspiracy cases than with non-capital federal homicide cases,[(15)] many of which are comparatively simple cases brought in federal court only because they occurred on federal land. (See Table C-7.)

Most cases in which the prosecution has sought a death sentence have invoked the "drug kingpin" provision of the 1988 Anti-Drug Abuse Act, 21 U.S.C. § 848(e). This statute authorizes the death penalty for intentional killings in furtherance of a "continuing criminal enterprise" (CCE), or serious drug offense, and for intentional killings of law enforcement officers to avoid prosecution for a drug offense. CCE cases, together with prosecutions of drug organizations under the RICO death penalty provision added in 1994, comprised approximately 62 percent of the authorized federal death penalty cases through December 1997.[(16)] CCE and RICO cases typically involve investigations stretching over years, and encompassing numerous acts of violence. They often include several homicide charges, many witnesses, and evidence in the guilt phase derived from wiretaps, video surveillance, informants, and experts. The magnitude of some of these cases is illustrated by a judge's estimate that the prosecution listed 500 potential witnesses in one case, and another judge's estimate that the prosecution disclosed 30,000 pages of documents in discovery.

Another reason drug conspiracy cases are so complex is that they often involve many defendants joined in a single indictment. Multi-defendant cases generally tend to cost more to defend, per defendant, than single defendant cases.[(17)] This effect may be magnified in a case in which some defendants face the death penalty and other defendants face only non-capital charges, as the difference in the potential penalty may produce significant differences in strategy both before and during trial.

In most cases, judges have severed defendants facing capital charges from those facing only non-capital charges,[(18)] with the expectation that this will, among other things, reduce the overall cost of representation. Severance practices with regard to defendants facing *capital* charges have varied. Some judges have followed the more common state practice and tried each defendant separately. Others have severed only the penalty phase trials, so that the same jury determined the penalty for each defendant, but in separate hearings. Others have conducted joint penalty phase trials.

Drug conspiracy cases (including both CCE and RICO prosecutions) are the most expensive federal death penalty cases to defend. The total cost of representation in drug conspiracy cases in which the prosecution authorized seeking the death penalty averaged $244,185,[(19)] or nearly 12 percent more than the average total cost of all authorized cases. (See Table C-7 and Chart C-8.)

3. Scope of the Penalty Phase. Evidence in the penalty phase of a federal death penalty trial typically includes a wide range of information about the defendant, the victim, and the nature of the offense that is not admissible in the guilt phase. Defense counsel in a federal death penalty case must investigate and prepare to respond to information offered by the prosecution to justify a death sentence. Federal law allows prosecutors to offer reliable information in the penalty phase, even if it does not satisfy the normal rules of evidence.[(20)] Although the prosecution must prove certain aggravating circumstances spelled out by statute, it is not limited to proving these factors. Defense counsel must therefore investigate and prepare to meet potential "non-statutory aggravating circumstances," such as an allegation that the defendant will be dangerous in the future. The penalty phase of a federal death penalty case therefore may include yet another "trial" in which the jury is required to determine whether the defendant is responsible for crimes in addition to those charged in the indictment. In one federal death penalty case, for example, the government attempted to prove the defendant committed another murder in the penalty phase, even though charges against him for that crime had been dismissed in a state court proceeding. Mini-trials of other criminal charges can be costly in terms of time and resources to prosecute and defend.

In addition to defending against the prosecution's case for a death sentence, counsel must also plan and present a case for a lesser sentence. In order to effectuate the defendant's constitutional right to present any information in mitigation of sentence, counsel must conduct a broad investigation of the defendant's life history. "Although it makes no express demands on counsel, the [right to offer mitigating evidence] does nothing to fulfill its purpose unless it is understood to presuppose the defense lawyer will unearth, develop, present and insist on consideration of those 'compassionate or mitigating factors stemming from the diverse frailties of humankind.'"[(21)] Indeed, one of the most frequent grounds for setting aside state death penalty verdicts is counsel's failure to investigate and present available mitigating information.[(22)] The broad range of information that may be relevant to the penalty phase requires defense counsel to cast a wide net in the investigation of any capital case.[(23)]

4. Special Obligations of Counsel in a Death Penalty Case. The nature of a criminal prosecution in which the defendant's life is at stake transforms counsel's role from start to finish. The quality of defense counsel's work must always remain in accord with the gravity of the proceeding. The special obligations of counsel appointed to a federal death penalty case are reflected in a comparison of hours billed in capital as compared to non-capital homicide cases.[(24)] The average number of hours billed in non-capital homicide cases from FY 1992 to FY 1997 was 117, as compared to 962 in a sample of federal death penalty cases (including cases never authorized). The average number of hours billed in authorized cases was 1,464. While representation in a federal death penalty case differs from representation in a non-capital federal criminal case in many ways, there are several particularly notable differences.

Average Number of Attorney Hours Billed in Capital and Non-Capital Homicide Cases				
	Case Type	In Court Hours	Out of Court Hours	Avg. Total Attorney Hours Per Representation
Non-Capital	Homicides	18	100	117
Capital	Auth. Denied	38	391	429
	Auth. Granted	231	1,233	1,464
	Capital Trial	409	1,480	1,889
	Plea	61	1,201	1,262
	Drug Cases	277	1,343	1,619

a. Consultation with the client. An important element of death penalty representation is the establishment of a professional relationship with the client.[(25)] Although it is important in every case, lawyers emphasized that consultation with the client is vastly more time consuming and demanding in a death penalty case for several reasons. First, the nature of the penalty phase inquiry requires a relationship which encourages the client to disclose his or her most closely guarded life history with the lawyer. Experiences of mental illness, substance abuse, emotional and physical abuse, social and academic failure, and other "family secrets" must be revealed, researched and analyzed for the insight they may provide into the underlying causes of the client's alleged conduct. The establishment of trust and confidence is also vitally important if the lawyer is to convince the defendant to consider an offer to plead guilty, especially because what is offered is likely to be life imprisonment without the possibility of parole. Accepting such a "deal" requires tremendous faith in counsel. Another reason the attorney-client relationship is particularly time-consuming stems from the enormous stress that the risk of a death sentence imposes on both the client and the lawyer; special care must be taken in order to avoid a rupture of the professional relationship that would force counsel to withdraw, delaying the trial.

b. Motions Litigation. The relative novelty of the federal death penalty laws, particularly those enacted in the 1994 crime bill, means that many legal issues concerning the interpretation and constitutionality of those statutes have not been authoritatively resolved. To date, the circuit courts of appeals have decided only a handful of federal death penalty cases. Lawyers and judges agree that these issues are time-consuming to litigate. Several judges commented that they, or their law clerks, devoted months of preparation to a federal death penalty case. Defense lawyers have an ethical obligation to raise challenges to the manner in which both the guilt and penalty phases of the trial are conducted, because if an issue is not raised at trial, the defendant generally cannot benefit, even if a ruling by a higher court subsequently favors the defense position.[(26)] Consequently, newer statutes tend to produce more constitutional and interpretive issues than statutes that have already been the subject of extensive appellate and Supreme Court consideration. Many issues may arise in a single case. In one multi-defendant case, for example, a judge estimated that 2,800 legal pleadings had been filed by the parties.

c. Jury Selection. The lawyer in a death penalty case also has additional responsibilities in jury selection.

Because the same jury will generally decide the penalty phase as a well as the guilt phase, the court must determine whether jurors should be disqualified because their views about the imposition of the death penalty, for or against, would make them unable to follow the law governing penalty phase deliberations. Typically the "death qualification" inquiry is conducted on an individual basis. The usual voir dire in a federal criminal case is conducted by the judge, with limited participation by counsel. In death penalty cases, however, the lawyers generally participate in drafting questionnaires for prospective jurors, and take part in questioning the venire. Jury selection takes much longer in federal death penalty cases than in non-capital federal criminal cases both because the total number of jurors questioned is larger to allow for those who may be excused due to the death qualification inquiry, pretrial publicity or other factors related to the nature of the case, and because of the more extensive questioning of each individual prospective juror. For example, one judge who ordinarily selects a jury for a criminal case in an afternoon reported that it took three weeks to complete jury selection in a federal death penalty case.

As part of its recent study of the Defender Services program, Coopers & Lybrand reviewed records of federal death penalty cases (including cases that were not authorized and cases resolved by guilty plea) from FY 1995 to FY 1997, and found a similar distribution of attorney hours for each year.[(27)] In-court hearings, including trials, comprised 14%. The largest components were legal research (20%) and reviewing documents (16%). Legal research and writing is of great importance in federal capital cases because the federal death penalty statutes have not been definitively construed.[(28)] Judges as well as lawyers reported they had to devote extraordinary amounts of time to the analysis of legal issues in federal death penalty cases. Conferences with the client comprised 9% of attorney hours, reflecting the time required to establish and sustain a professional relationship in a federal death penalty case.[(29)] Another element, not directly captured in the available payment data, is the additional in- and out-of- court attorney time associated with jury selection in a death penalty case.

5. Effect of Prosecution Resources. Coopers & Lybrand found that "[t]he prosecution's resources are a key driver of capital representation costs."[(30)] Interviews with lawyers and judges confirmed this. Judges generally reported that prosecution resources in death penalty cases seemed unlimited. Typically, at least two and often three lawyers appeared for the prosecution in federal death penalty cases, who were assisted in court by one or more "case agents" assigned by a law enforcement agency. Investigative work and the preparation of prosecution exhibits for trial, including charts, video and audiotapes, is generally performed by law enforcement personnel. Law enforcement agencies also performed scientific examinations and provided expert witnesses at no direct cost to the prosecution. In some cases, which arose from joint state and federal investigations, state law enforcement agencies contributed resources to the prosecution effort.

At the request of the Subcommittee, the Department of Justice gathered cost information concerning 21 of 24 completed federal death penalty prosecutions in which the Attorney General had decided to seek the death penalty after January 1995.[(31)] Some of these prosecutions involved more than one defendant. The set of cases included some cases that were resolved by guilty pleas and some cases that went to trial. The Department of Justice reported an average total cost per prosecution of $365,296, but this figure does not include the cost of investigation or the cost of scientific testing and expert evaluations performed by law enforcement personnel.[(32)] The average cost of payments to private retained experts (such as psychiatrists or other experts not employed by a government agency) was $30,269 per prosecution.

6. Effect of the Authorization Process. Another obligation unique to federal capital cases is advocacy on behalf of the client in the Justice Department death penalty authorization process. In January 1995 the Department promulgated a formal "protocol" describing the manner in which the Attorney General would review federal death penalty cases to determine whether to file a notice of an intention to seek the death penalty.[(33)] Initially, the local United States Attorney reviews the case and makes a non-binding recommendation to the Justice Department about whether the death penalty should be sought. Generally, the

Attorney General has followed recommendations against seeking the death penalty, but has overriden such recommendations in at least two cases. All cases are reviewed by a committee of senior Department of Justice officials, who submit their views to the Attorney General, who then makes the final decision. The Death Penalty Review Committee offers defense counsel the opportunity to present information in writing and in a face-to-face meeting in Washington, D.C.[(34)]

The Department of Justice authorization process has two important implications for the cost of defense representation in federal capital cases. First, because any case involving an offense punishable by death remains a potential death penalty case until a final decision is made by the Attorney General, a longer authorization process increases the length of time that the defendant remains statutorily entitled to at least two lawyers who are compensated at a higher hourly rate. (See Section C.5, infra.) A number of judges reported "riding herd" on the authorization process by requiring reports from the prosecution or setting deadlines to expedite a final decision. All other things being equal, including the number of capital prosecutions ultimately approved, a shorter authorization review process would mean lower defense costs.

The second cost implication of the authorization process is that it creates another forum in which defense counsel must advocate on behalf of the client facing a possible death sentence.[(35)] One of defense counsel's most important functions is to present information first to the local United States Attorney and then to the Justice Department that would justify a lesser sentence. Effective advocacy requires counsel to explore all of the issues that are likely to enter into the Attorney General's decision whether to authorize a federal death penalty prosecution, including the nature and strength of the federal interest, the evidence of guilt, and the aggravating and mitigating factors. Although the written and oral presentations made to the Death Penalty Review Committee are not as detailed or comprehensive as a penalty phase presentation to a jury, counsel must conduct a wide-ranging preliminary investigation of facts relevant to sentencing *before* the Justice Department makes the decision whether to file a notice seeking the death penalty, if it is to have an effect on the authorization process.

It was impossible to quantify the effect of defense participation on the death penalty review process in terms of outcome and cost. Department of Justice officials said they view the participation by defense counsel as valuable, and that they encourage oral and written presentations. Defense lawyers offered divergent opinions about the value of participating in the central Department of Justice review, but the majority made presentations and would do so in future cases.

Because development of mitigating information early in the case may convince the prosecution that the death penalty should not be authorized, delaying preparation for the penalty phase is likely to increase the number of cases authorized, and therefore increase total costs. In a small number of instances, judges were reluctant to approve expenditures related to the penalty phase until an authorization decision was made. However, if the result of such a decision is that cases are authorized which should not be, this approach may cost more money than it saves, for cases that are never authorized cost much less than cases that are authorized, even if a guilty plea to a sentence less than death eventually is negotiated. This is illustrated by a comparison of the average total cost of cases in which the prosecution declines to seek the death penalty in the first instance ($55,772), as compared to the average total cost of cases in which the prosecution grants authorization, and then withdraws it ($145,806), and the average total cost of cases ending in guilty pleas ($192,333). (See also Recommendation 5, "The Death Penalty Authorization Process," in Part II of this report.)

7. Importance of Experts and their Cost. Another factor affecting the cost and complexity of capital cases is the importance of expert testimony in both the guilt and penalty phases. Payments to experts are a substantial component of defense costs in federal death penalty cases. Coopers & Lybrand found that about 19% of payments for representation in federal capital cases for FY 1997 went to services other than counsel: primarily experts and investigators.[(36)] This figure may understate the total spending on these services, because some of these costs are included as reimbursable expenses on attorney vouchers, rather than in

separate vouchers submitted by the expert or investigator.

As with attorney compensation, there were significant differences between cases in which the Attorney General authorized seeking the death penalty, and those in which the death penalty was not authorized. (See Chart C-10.) The average amount spent on non-attorney compensation in cases in which authorization was *denied* was $10,094, as compared with $51,889 in cases in which authorization to seek the death penalty was *granted*.

Average Amount of Non-Attorney Compensation in Capital and Non-Capital Homicide Cases

	Case Type	Avg. Amount of Non-Attorney Comp.	Avg. Total Cost of Representation (Attorney and Non-Attorney)
Non-Capital	Homicides	$ 1,515	$ 9,159
Capital	Auth. Denied	$10,094	$ 55,773
	Auth. Granted	$51,889	$218,113
	Capital Trial	$53,143	$269,139
	Plea	$51,028	$192,333
	Drug Cases	$52,218	$244,186

In general, both the prosecution and the defense rely more extensively on experts in death penalty cases than in other federal criminal cases. Although prosecution forensic science experts typically are salaried employees of law enforcement agencies, the defense generally must hire experts who charge an hourly rate for their services. In the guilt phase, the prosecution is likely to call experts to testify about scientific analyses, such as DNA profiling, ballistics comparisons, or hair, fiber, or metallurgical evidence that may connect the defendant to a crime. Other types of experts common in large drug conspiracy cases include experts in the interpretation or authentication of audiotapes, and experts in the structure of drug organizations. To assure the reliability of this evidence and the manner in which it is presented to the jury, defense lawyers must consult with experts in these fields as well.

The defense depends on experts to develop information relevant to sentencing, even before the prosecution makes a final decision about whether to seek the death penalty.

"Because the first job of the defense is to convince the Department of Justice not to certify the case as a capital case, mitigation expenses, including the use of increasingly specialized experts, are increasing and are occurring early in the process."[(37)] Both the prosecution and the defense also typically hire experts to evaluate the defendant's mental condition in order to develop evidence related to culpability and future dangerousness relevant to the penalty phase. (See Charts C-11 and C-12, comparing expert and investigative costs in federal death penalty cases and non-capital federal homicide cases.)

Two important categories of expert services frequently used in federal death penalty cases but not in non-capital federal criminal cases are mitigation specialists and jury consultants. Mitigation specialists typically have graduate degrees, such as a Ph.D. or masters degree in social work, and have extensive training and experience in the defense of capital cases. They are generally hired to coordinate an investigation of the defendant's life history, identify issues requiring evaluation by psychologists, psychiatrists or other medical professionals, and assist attorneys in locating experts and providing documentary materials for them to review. Although most often they assist counsel in assembling and interpreting the information needed in the penalty phase of a capital case, in some cases mitigation specialists are also called to testify about their findings.

Without exception, the lawyers interviewed by the Subcommittee stressed the importance of a mitigation specialist to high quality investigation and preparation of the penalty phase. Judges generally agreed with the importance of a thorough penalty phase investigation, even when they were unconvinced about the persuasiveness of particular mitigating evidence offered on behalf of an individual defendant. The work performed by mitigation specialists is work which otherwise would have to be done by a lawyer, rather than an investigator or a paralegal. Because the hourly rates approved for mitigation specialists are substantially lower than those authorized for attorneys,[(38)] the appointment of a mitigation specialist or penalty phase investigator generally produces a substantial reduction in the overall costs of representation.

Jury consultants provide a range of services in federal death penalty cases. They assist in drafting questionnaires for prospective jurors to aid in the jury selection process. The use of questionnaires has become standard in federal capital cases as a way to streamline and expedite the process of jury selection. In addition, in some cases jury consultants are retained to organize and interpret the results of jury questionnaires, advise attorneys about follow-up questions to be asked during the in court voir dire, and to advise the attorneys about whether or not to strike a particular juror. Jury consultants are routinely retained in high stakes civil litigation, and have been engaged by the prosecution in federal death penalty cases. Most of the attorneys interviewed by the Subcommittee were emphatic about the value of jury consultants, and regarded the availability of a jury expert as a top priority. However, some lawyers were willing to forego a jury consultant in order to assure judicial approval of other needed services. Judges generally indicated greater willingness to approve jury consultants when the prosecution retained a jury consultant than when the prosecution did not. (See also Recommendation 7, "Experts," in Part II of this report.)

C. Factors Affecting the Availability, Cost and Quality of Counsel.

1. Importance of "Learned" Counsel. Since the first Judiciary Act in 1789, federal law has required the appointment of "learned" counsel in a capital case. Currently, 18 U.S.C. § 3005 explicitly requires the appointment of two lawyers, at least one of whom is learned in the law related to capital punishment. An American Bar Association study several years ago summarized the special demands on counsel in a capital case:

> Counsel must not only be able to deal with the most serious crime--homicide-- in the most difficult circumstances, but must also be thoroughly knowledgeable about a complex body of constitutional law and unusual procedures that do not apply in other criminal cases. Bifurcated capital cases involve two trials with two different sets of issues. Investigation must often be conducted in several states, and, in some cases, in foreign countries. And penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history.[(39)]

In interviews, judges and lawyers attested to the importance of the statutory "learned counsel" requirement. A number of judges, particularly those with experience reviewing state death penalty trials in federal habeas corpus proceedings underscored the importance of "doing it right the first time," i.e., minimizing

time-consuming post-conviction proceedings by assuring high quality representation in federal death penalty cases at the trial level.(40) Similarly, a former Florida Attorney General testified before an American Bar Association Task Force studying representation in state death penalty cases that, "[b]eyond peradventure, better representation at trial and on appeal will benefit all concerned."(41)

Federal death penalty cases require knowledge of the extensive and complex body of law governing capital punishment *and* the intricacies of federal criminal practice and procedure. Neither one alone is sufficient to assure high quality representation. Lawyers and judges recounted cases in which seasoned federal criminal lawyers who lacked death penalty experience missed important issues. For example, one judge described a situation in which experienced and highly esteemed felony trial lawyers who had no capital experience simply did not know how to pursue the mitigation investigation required by the case. After many months had been invested, the court appointed an experienced capital litigator from outside the jurisdiction as "learned counsel." A series of mental health tests arranged by this attorney resulted in a decision by the Justice Department to withdraw the request for the death penalty on the eve of trial. The judge credited the "learned counsel" with obtaining that result, which the judge believed could have been achieved much earlier. On the other hand, differences between state and federal practice place a lawyer who may have prior capital experience but no prior federal criminal trial experience at a disadvantage. The federal sentencing guidelines, speedy trial act, rules of evidence and procedure, and the specifics of the federal death penalty law play an important role in representation. Also, because federal death penalty cases frequently involve complex drug conspiracies, familiarity with this specialized area of practice is often desirable. When lawyers with experience in both the federal trial and death penalty arenas cannot be found, some courts have attempted to combine strengths by appointing a team which includes an experienced federal criminal practitioner and an experienced state court capital litigator.

Judges praised the quality of the representation provided by the lawyers they appointed as higher than the ordinary standard of practice in federal criminal cases. Judges familiar with state death penalty trials found that the quality of representation in federal death penalty cases was superior to the norm in state death penalty cases as well. In a few cases, judges expressed disappointment with the quality of representation, but in these instances they generally had replaced the lawyers whose performance they considered deficient.

After having handled their first federal death penalty case, a number of learned counsel have accepted subsequent appointments to such cases. This is a significant trend and one which the judiciary should seek to perpetuate. Judges and lawyers agreed that counsel with federal death penalty experience were more efficient than lawyers without such experience. The availability of these highly skillful and knowledgeable lawyers has been an important resource, particularly in districts that lack attorneys with death penalty trial experience. (See Section C.4.b, infra.) In contrast, in federal capital habeas corpus cases, very few lawyers have been willing to accept repeat appointments, so that the learning curve remains steep (and therefore time-consuming and costly) in almost every new case. The continued willingness of these learned counsel to accept appointments in federal death penalty cases is an important element of any strategy for managing the costs of representation while maintaining quality.(42) (See also Recommendation 1, "Qualifications for Appointment," in Part II of this report.)

2. Federal Death Penalty Resource Counsel Project. The federal defender program has no systemic counterpart to the Criminal Division of the Department of Justice, which centrally supports the work of federal prosecutors nationwide. While a U.S. Attorney's Office bringing a federal death penalty prosecution can obtain training, advice, legal research and brief-writing assistance, sample pleadings and supplemental staffing from the Justice Department,(43) the private panel attorneys defending federal death penalty cases are, for the most part, sole practitioners or partners in small law firms comprised of fewer than half a dozen attorneys. Furthermore, although federal defender organizations are centrally funded, the representation they provide is entirely de-centralized. In order to improve the quality of representation and the cost effectiveness of defense services, in FY 1992 the judiciary established the Federal Death Penalty Resource Counsel Project

(RCP). The RCP currently consists of three experienced capital litigators who support the work of appointed counsel and provide advice to the Administrative Office of the U.S. Courts on a part-time basis.[(44)] The Resource Counsel Project has become essential to the delivery of high quality, cost-effective representation in federal death penalty cases.

Dividing the work regionally, Resource Counsel are available to provide assistance to defense counsel in every federal death penalty case. Judges, defense counsel, Administrative Office staff and Department of Justice death penalty policy makers praised their efforts and effectiveness. Resource Counsel's legal advice and pleadings have prevented lawyers from having to "reinvent the wheel" in every case. They have provided substantial assistance to courts and counsel in developing and implementing case budgeting procedures. They have assisted the Administrative Office and federal public defenders in discharging their statutory responsibilities to recommend qualified counsel for appointment. They have provided training opportunities for counsel. In addition, by monitoring prosecution decisions and following developments in this important area, they have provided critical statistical information and policy advice to the Administrative Office. (See also Recommendations 6, 8 and 9 ("Federal Death Penalty Resource Counsel," "Training," and "Case Budgeting") in Part II of this report.)

3. Consultation Prior to Appointment of Counsel. Since 1995, federal law has required the court, before appointing counsel in a federal death penalty case, to consult with the federal public defender for the district, or, if there is no federal public defender (or the defender has a conflict), with the Administrative Office of the United States Courts. This statutory requirement has generally, although not universally, been honored. In a very few cases, judges have appointed counsel without formally consulting either the federal public defender or the Administrative Office. For the most part, judges have taken a case-by-case approach to seeking advice about the appointment of counsel, although in one district the court directed the federal public defender to provide a list of lawyers qualified to handle federal death penalty cases instead of consulting as each case arose. In districts not served by a federal public defender, judges have consulted with the Administrative Office, which generally refers the court to one of the three Federal Death Penalty Resource Counsel, who provide training and support to lawyers handling federal death penalty cases nationwide.[(45)] The consultation process assists judges in identifying qualified lawyers to appoint to federal death penalty cases. (See also Recommendation 2, "Consultation with Federal Defender Organizations or the Administrative Office," in Part II of this report.)

4. Availability and Recruitment of Qualified Lawyers. A defendant charged with an offense punishable by death is entitled to two lawyers by statute. (18 U.S.C. § 3005). A judge assigned a federal death penalty case may appoint private lawyers compensated on an hourly basis ("panel" attorneys) or, in a district served by a federal defender organization,[(46)] the court may appoint a lawyer employed by the FDO together with a panel attorney.[(47)] For the reasons discussed below, panel attorneys have been appointed in the vast majority of federal death penalty cases.

a. Federal Defender Organizations. Federal defender organizations are not currently able to provide representation in a large proportion of federal death penalty cases.[(48)] A few federal defender offices employ lawyers with prior death penalty experience gained in state court, but most do not. Indeed, lawyers in federal defender offices may also lack significant experience trying homicide cases, because few such cases are brought in the federal courts. Even federal defenders with extensive federal criminal experience feel themselves unqualified to provide representation without the participation of a "learned" counsel with capital case experience. Trial experience in non-capital cases is no substitute for the training required to prepare for the penalty phase of a capital case and to develop an overall trial strategy that integrates both phases. In almost all instances in which a judge has appointed a federal defender organization as counsel, the FDO has been joined by a panel attorney with death penalty experience.

Another obstacle to relying on federal defender organizations to provide representation in a larger proportion of federal death penalty cases is the effect of an appointment on the defender office as a whole. Death penalty cases consume resources: the time of experienced lawyers and supervisors, investigators, and support staff; and budgetary allocations for experts. Defenders reported to the Subcommittee that the time commitment involved in handling a death penalty case was disruptive, especially in districts in which it was difficult for the federal defender organization to compensate for the appointment in the death penalty case by reducing the number of non-capital cases assigned to the office. Lawyers assigned to federal death penalty cases generally transferred their existing cases to other attorneys and reduced or eliminated their intake of new cases. Especially in smaller offices, where the added caseload had to be divided among fewer lawyers, death penalty cases interfered with the office's ability to fulfill its obligations to other clients.

b. Panel Attorneys. To date, courts generally have been able to locate and recruit a sufficient number of qualified lawyers to meet the need for representation. In some areas of the country, particularly those with state death penalty statutes, a substantial number of lawyers have developed experience defending capital cases. Not all of these lawyers, however, are fully qualified to provide representation in *federal* death penalty cases, because of unfamiliarity with important aspects of federal criminal practice. In other areas, especially those in which there is not a state death penalty statute, courts have been unable to recruit qualified lawyers from within the district, and have appointed lawyers with death penalty experience from other states. The Subcommittee found that judges who appointed counsel from outside their districts in order to meet qualification standards experienced a very high degree of satisfaction with the representation provided in their cases.[(49)] Typically, these judges had appointed one of the small (but growing) number of litigators who have provided representation in two or more federal death penalty cases. Both the appointing judges and the local counsel reported a range of resulting benefits, including the on-the job training of the local co-counsel.[(50)] (See also Recommendation 4, "Appointment of the Federal Defender Organization," in Part II of this report.)

5. Adequacy of Compensation to Attract Qualified Counsel. Current federal law authorizes an attorney in a federal death penalty case to be paid up to $125 per hour.[(51)] At present, this maximum hourly rate appears adequate. Several years ago, the Judicial Conference reported that, "[w]hile many courts find the quality of panel attorneys [in non-capital cases] to be very high, serious funding difficulties and inadequate compensation hamper many courts in their ability to recruit and retain experienced attorneys as members of the CJA panel."[(52)] If the "real" (inflation-adjusted) hourly rate were to decline substantially, as it has for non-capital federal criminal representation, fulfillment of the judiciary's statutory and constitutional obligations to appoint qualified counsel might be jeopardized.[(53)]

Panel attorneys who are qualified for appointment to a federal death penalty case are generally among the most experienced and respected criminal practitioners. Consequently, many of them command high fees for retained criminal work and, in some instances, for civil litigation. Without exception, lawyers appointed in federal death penalty cases reported earning hourly rates from private clients that are much higher than (and often double) the maximum rate that may be paid for their representation in a federal capital case. Although the hourly rates of compensation in federal capital cases are higher than those paid in non-capital federal criminal cases,[(54)] they are quite low in comparison to hourly rates for lawyers generally, and to the imputed hourly cost of office overhead.[(55)] Most of the lawyers interviewed said they would not be willing to accept appointment to federal death penalty cases at the hourly rates which are authorized for non-capital representation.

One of the reasons it is sometimes difficult to recruit qualified counsel for a federal death penalty case is that lawyers in federal death penalty cases have to decline work they would otherwise accept while the capital case is pending. A single death penalty case can preclude a lawyer from accepting any other clients for a significant period.[(56)] Especially in the months preceding trial, defending a death penalty case often consumes

all of an attorney's time. A lawyer's unavailability can significantly damage the network of referrals and name recognition vital to sustaining a small practice. One judge in a district with a very active criminal defense bar found that several lawyers declined appointment to a capital case because of the anticipated length of the trial and the effect the case would have on their retained practice.

A number of lawyers recounted the detrimental effect of a single capital case on their practices. "You do lose business. People know you're busy and don't call," said one attorney who was interviewed. Another lawyer described the effect of a lengthy death penalty case involving a drug conspiracy on his practice as "devastating." Some lawyers also feel they lose potentially lucrative white-collar business once they become categorized as death-penalty lawyers. Lawyers also believe they lose future clients because of lack of exposure. One lawyer who had been devoting all of his professional time to a large, multi-defendant case recounted running into a journalist who said he had thought the lawyer must have left town because he had not seen him at the state courthouse for so long.

Another factor discouraging lawyers with active practices from accepting appointment to a federal death penalty case is a reluctance to become economically dependent on the timely payment of vouchers. Although generally lawyers did not complain about the timeliness of payments, in more than one case a long delay in the approval of vouchers forced lawyers to borrow money to pay office expenses. (See Recommendation 1(e), "Hourly Rate of Compensation for Counsel," in Part II of this report.)

6. Number of Counsel. Since the First Judiciary Act in 1789, federal law has provided for the appointment of a minimum of two lawyers per defendant in a capital case. Judges have generally appointed two lawyers in federal death penalty cases, although there have been rare instances in which the court has not done so until after the prosecution has filed notice of its intention to seek the death penalty, effectively delaying defense preparation. In a few cases, a judge has formally appointed more than two lawyers. This usually has occurred because the judge was dissatisfied with one or more of the lawyers originally appointed, but felt the overall ability of the defense team to meet statutory time limits and to provide an effective defense would be better accomplished by adding a new lawyer with needed skills rather than by replacing the lawyer originally appointed.

The defense team in federal capital cases may include paralegals, investigators and less experienced lawyers, generally billing at an hourly rate substantially below that of lead counsel. The additional lawyers who work on the case generally are not formally appointed, but rather are authorized by the court to work on limited and discrete tasks. When these assistant counsel are used effectively, total costs of attorney compensation are reduced, because the average hourly rate is reduced. For example, one appointed lawyer, who was authorized by the court to receive the statutory maximum of $125 per hour, hired a less experienced lawyer at $45 per hour to listen

to thousands of hours of wiretap tapes and identify the important parts, thus achieving substantial

savings.[(57)] (See Recommendation 3, "Appointment of More than Two Lawyers," in Part II of this report.)

D. Efforts to Control the Cost of Representation.

Judges presiding over federal capital cases have been mindful of the need to closely monitor and control costs, and have pursued several strategies to this end. Probably the paramount concern has been to appoint responsible, trustworthy and experienced lawyers who will themselves exercise judgment about the reasonableness of costs. After closely reviewing vouchers, the judges interviewed indicated their satisfaction with the integrity of the lawyers they had appointed. In a very few instances, judges removed the lawyers who had first been appointed to the case, sometimes by a different judicial officer. The most common reason for removal was lack of death penalty experience evidenced in the lawyers' failure to identify and focus on the

more promising lines of investigation, thus wasting resources.

Judges have used a variety of techniques to control costs. Many judges, particularly those presiding over cases filed in the last two years, have established budgets for the cost of defense representation. In one complex multi-defendant case, a judge directed the clerk of court to develop a computer program to assist in the tracking of expenditures. Other judges recounted denying or reducing requests for experts, and asking counsel to determine whether a qualified expert could be found at a lower rate or to persuade the expert to reduce the requested fee.

Judges also authorized the hiring of paralegals to reduce the costs of coordinating and distributing materials among defense counsel in multi-defendant cases.

Interviews with lawyers also revealed a reassuring degree of restraint. A number of lawyers recounted decisions not to request funds for certain experts or services, and almost all of them negotiated reduced rates or obtained some services from experts on a pro bono basis, recognizing that by reducing costs whenever possible, it would be easier to obtain judicial approval for other needed services. In multi-defendant cases, lawyers, both on their own and with judicial prompting, coordinated discovery and motions practice, thereby reducing the

potential for duplicative work. (See Recommendations 9 and 10 ("Case Budgeting" and "Case Management") in Part II of this report.)

CONCLUSION

The recommendations set forth in Part II of this report should be adopted by the Judicial Conference of the United States and implemented by the judiciary.

II. RECOMMENDATIONS AND COMMENTARY

1. Qualifications for Appointment.

a. Quality of Counsel. Courts should ensure that all attorneys appointed in federal death penalty cases are well qualified, by virtue of their prior defense experience, training and commitment, to serve as counsel in this highly specialized and demanding type of litigation. High quality legal representation is essential to assure fair and final verdicts, as well as cost-effective case management.

b. Qualifications of Counsel. As required by statute, at the outset of every capital case, courts should appoint two counsel, at least one of whom is experienced in and knowledgeable about the defense of death penalty cases. Ordinarily, "learned counsel" should have distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in *state* death penalty trials, appeals, or post-conviction review that, in combination with co-counsel, will assure high quality representation.

c. Special Considerations in the Appointment of Counsel on Appeal. Ordinarily, the attorneys appointed to represent a death-sentenced federal appellant should include at least one attorney who did not represent the appellant at trial. In appointing appellate counsel, courts should, among other relevant factors, consider:

i. the attorney's experience in federal criminal appeals and capital appeals;
ii. the general qualifications identified in paragraph 1(a), above; and
iii. the attorney's willingness, unless relieved, to serve as counsel in any post-conviction proceedings that may follow the appeal.

d. Special Considerations in the Appointment of Counsel in Post-Conviction Proceedings. In appointing post-conviction counsel in a case where the defendant is sentenced to death, courts should consider the attorney's experience in federal post-conviction proceedings and in capital post-conviction proceedings, as well as the general qualifications set forth in paragraph 1(a).

e. Hourly Rate of Compensation for Counsel. The rate of compensation for counsel in a capital case should be maintained at a level sufficient to assure the appointment of attorneys who are appropriately qualified to undertake such representation.

Commentary

As Recommendation 1(a) indicates, the first responsibility of the court in a federal death penalty case is to appoint well-trained, experienced and dedicated defense counsel. Federal law requires the appointment of two counsel to represent a defendant in a federal death penalty case, of whom at least one must be "learned in the law applicable to capital cases." 18 U.S.C. § 3005. Additional requirements relating to counsel's experience are codified at

21 U.S.C. § 848(q)(5)-(7). Legislatures, courts, bar associations, and other groups that have considered the qualifications necessary for effective representation in death penalty proceedings have consistently demanded a higher degree of training and experience than that required for other representations. Such heightened standards are required to ensure that representation is both cost-effective and commensurate with the complexity and high stakes of the litigation. The standards listed in Recommendations 1(b) - (d) are designed to assist courts in identifying the specific types of prior experience which have been deemed most valuable in the experience of the federal courts thus far. They emphasize the importance of bringing to bear both death penalty expertise and experience in the practice of criminal defense in the federal courts.

Recommendation 1(b) calls for the appointment of specially qualified counsel "at the outset" of a case, because virtually all aspects of the defense of a federal death penalty case, beginning with decisions made at the earliest stages of the litigation, are affected by the complexities of the penalty phase. Early appointment of "learned counsel" is also necessitated by the formal "authorization process" adopted by the Department of Justice to guide the Attorney General's decision-making regarding whether to seek imposition of a death sentence. (See United States Attorney's Manual § 9-10.000.) Integral to the authorization process is a presentation to Justice Department officials of the factors which would justify not seeking a death sentence against the defendant. A "mitigation investigation" therefore must be undertaken at the commencement of the representation. Since an early decision not to seek death is the least costly way to resolve a potential capital charge, a prompt preliminary mitigation investigation leading to effective advocacy with the Justice Department is critical both to a defendant's interests and to sound fiscal management of public funds.

Trial courts should appoint counsel with "distinguished prior experience" (Recommendation 1(b)) in death penalty trials or appeals, even if meeting this standard requires appointing a lawyer from outside the district in

which a matter arises. The preparation of a death penalty case for trial requires knowledge, skills and abilities which are absent in even the most seasoned felony trial lawyers, if they lack capital experience. An attorney knowledgeable about the nature of capital pretrial litigation, the scope of a mitigation investigation and the impact of the sentencing process on the guilt phase is indispensable and generally produces cost efficiencies. The costs of travel and other expenses associated with "importing" counsel from another jurisdiction can be minimized with careful planning by counsel and the court. With appropriate forethought, investigations, client counseling, court appearances and other obligations can be coordinated to maximize the efficient use of counsel's time and ensure cost-effectiveness.

Recommendations 1(c) and (d), with respect to the appointment of appellate and post-conviction counsel, respond to the requirement of 21 U.S.C. § 848(q) that representation in death penalty cases continue through post-conviction proceedings. Because trial counsel ordinarily will be precluded by a conflict of interest from representing the defendant in a post-conviction proceeding under 28 U.S.C. § 2255, continuity of representation and the efficient use of resources generally will best be achieved by appointing, at the appellate stage, at least one new lawyer who may continue to provide representation in any post-conviction proceedings. This should promote continuing representation by a lawyer who is already familiar with the record. In determining which, if any, of a death-sentenced defendant's prior counsel to appoint as post-conviction or appellate counsel, courts should consult with those counsel, the district's federal defender organization and/or the Administrative Office (See Recommendation 2).

Recommendation 1(e) reflects the fact that appropriate rates of compensation are essential to maintaining the quality of representation required in a federal capital case. The time demands of these cases are such that a single federal death penalty representation is likely to become, for a substantial period of time, counsel's exclusive or nearly exclusive professional commitment. It is therefore necessary that the hourly rate of compensation be fair in relation to the costs associated with maintaining a criminal practice. Federal statute currently provides for an hourly rate of up to $125 (21 U.S.C. § 848 (q)(10)(A)), which the Subcommittee finds to be adequate at the present time. However, this figure should be reviewed at least every three years, to ensure that it remains sufficient in light of inflation and other factors. (See 18 U.S.C. § 3006A(d)(1).)

2. Consultation with Federal Defender Organizations or the Administrative Office.

a. Notification of Statutory Obligation to Consult. The Administrative Office of the U.S. Courts (Administrative Office) and federal defender organizations should take appropriate action to ensure that their availability to provide statutorily mandated consultation regarding the appointment of counsel in every federal death penalty case is well known to the courts. (See 18 U.S.C. § 3005.)

b. Consultation by Courts in Selecting Counsel. In each case involving an offense punishable by death, courts should, as required by 18 U.S.C. § 3005, consider the recommendation of the district's Federal Public Defender (FPD) (unless the defender organization has a conflict) about the lawyers to be appointed. In districts not served by a Federal Public Defender Organization, 18 U.S.C. § 3005 requires consultation with the Administrative Office. Although not required to do so by statute, courts served by a Community Defender Organization should seek the advice of that office.

c. Consultation by Federal Defender Organizations and the Administrative Office in Recommending Counsel. In discharging their responsibility to recommend defense counsel, FDOs and the Administrative Office should consult with Federal Death Penalty Resource Counsel in order to identify attorneys who are well qualified, by virtue of their prior defense experience, training and commitment, to serve as lead and second counsel.

Commentary

Since 1994, courts have been required to consider the recommendation of their federal public defender organization[(58)] or the Administrative Office regarding the appointment of counsel in each federal death penalty case. The Administrative Office has notified courts of this relatively recent innovation, and it has been largely followed and yielded results satisfying to judges, defense counsel and prosecutors. In a small number of cases, however, the Subcommittee found that courts had ignored or been unaware of the consultation requirement. For that reason, Recommendation 2(a) suggests that the Administrative Office take further steps to ensure that all courts are familiar with their obligations in this area and with the nature of the assistance which will be provided to them upon their request (see Commentary accompanying Recommendation 2(c)).

Recommendation 2(b) reflects the Subcommittee's view that recommendations concerning appointment of counsel are best obtained on an individualized, case-by-case basis. The relative infrequency of federal death penalty appointments, and the typically swift response which any court requesting a recommendation can expect, makes lists or "panels" of attorneys both unnecessary and, in some respects, impractical. Currently, within approximately 24 hours of receipt of a request, the Administrative Office or federal defender provides the court with the names of attorneys who not only are qualified to serve as counsel but who also have been contacted and indicated their willingness to serve in the particular case.[(59)] These individualized recommendations help to ensure that counsel are well-suited to the demands of a particular case and compatible with one another and the defendant. Case-specific consultation is also required by existing Judicial Conference policy (see paragraph 6.01B of the Guidelines for the Criminal Justice Act (CJA Guidelines), Volume VII, Guide to Judiciary Policies and Procedures, explaining the 18 U.S.C. § 3005 consultation requirement and suggesting that in developing a recommendation, consideration be given to "the facts and circumstances of the case.")

Recommendation 2(b) also suggests that in districts served by a Community Defender Organization (rather than a Federal Public Defender Organization) courts extend the statutory requirement and seek the recommendation of the head of that organization about appointment of counsel in federal death penalty cases. The omission of specific reference to Community Defender Organizations in the statute is not explained in any legislative history, and consultation with a Community Defender Organization is likely to be as valuable as consultation with a Federal Public Defender Organization.

To assist federal defender organizations and the Administrative Office in discharging their responsibility to recommend counsel, the judiciary has contracted with three Federal Death Penalty Resource Counsel, experienced capital litigators whose work is described in Section C.2 of Part I of this report. Recommendation 2(c) recognizes the value of the assistance provided by Resource Counsel and urges federal defenders and the Administrative Office to continue to work closely with them. Resource Counsel are knowledgeable about and maintain effective communication with defense counsel nationwide. Their ability promptly to match attorneys with cases is of great value to the judiciary.

3. Appointment of More Than Two Lawyers.

> Number of Counsel. Courts should not appoint more than two lawyers to provide representation to a defendant in a federal death penalty case unless exceptional circumstances and good cause are shown. Appointed counsel may, however, with prior court authorization, use the services of attorneys who work in association with them, provided that the employment of such additional counsel (at a reduced hourly rate) diminishes the total cost of representation or is required to meet time limits.

Commentary

The norm in federal death penalty cases is the appointment of two counsel per defendant. More than two attorneys should be appointed only in exceptional circumstances. Courts contemplating the appointment of a third counsel might consider contacting the Administrative Office for information and advice about whether circumstances warrant such appointment. Notwithstanding this suggested limit on the number of attorneys charged with responsibility for the defense in its entirety, courts are encouraged to permit appointed counsel to employ additional attorneys to perform more limited services where to do so would be cost-effective or otherwise enhance the effective use of resources. For example, in many federal death penalty cases the prosecution provides to defense counsel an extensive amount of discovery material which must be reviewed for relevance and organized for use by the defense. Providing legal assistance to appointed counsel at a lower hourly rate may prove economical or it may be a necessity in light of court deadlines. This is consistent with existing Judicial Conference policy with respect to all Criminal Justice Act representations (see CJA Guideline 2.11A), and is emphasized here because of its cost containment potential in capital litigation.

4. Appointment of the Federal Defender Organization (FDO).

a. FDO as Lead Counsel. Courts should consider appointing the district's FDO as lead counsel in a federal death penalty case only if the following conditions are present:

i. the FDO has one or more lawyers with experience in the trial and/or appeal of capital cases who are qualified to serve as "learned counsel"; and

ii. the FDO has sufficient resources so that workload can be adjusted without unduly disrupting the operation of the office, and the lawyer(s) assigned to the death penalty case can devote adequate time to its defense, recognizing that the case may require all of their available time; and

iii. the FDO has or is likely to obtain sufficient funds to provide for the expert, investigative and other services reasonably believed to be necessary for the defense of the death penalty case.

b. FDO as Second Counsel. Courts should consider appointing the district's FDO as second counsel in a federal death penalty case only if the following conditions are present:

i. the FDO has sufficient resources so that workload can be adjusted without unduly disrupting the operation of the office, and the lawyer(s) assigned to the death penalty case can devote adequate time to its defense, recognizing that the case may require all of their available time; and

ii. the FDO has or is likely to obtain sufficient funds to provide for the expert, investigative and other services reasonably believed to be necessary for the defense of the death penalty case.

Commentary

Federal defender organizations have provided representation in only a small number of the federal death penalty cases filed to date. In many cases, representation by defender organizations has been precluded because of conflicts of interest which arise because the organization has represented either another defendant or a witness in the case. Even where the defender organization is not disqualified by a conflict, however,

there are good reasons to proceed with caution in making appointments in this area. A decision to appoint a defender organization either as lead or as second counsel in a capital case should be made only after consideration of the factors identified in this Recommendation and consultation between the court and the federal defender.

Recommendation 4(a) is intended to inform courts, which are accustomed to relying on federal defenders to undertake the most difficult representations, that few federal defender attorneys currently possess appropriate qualifications and experience to act as lead counsel in a federal death penalty case. Because violent felony offenses, particularly homicides, rarely are prosecuted in the federal courts, there is little opportunity for federal court practitioners to learn even the fundamentals relevant to the guilt phase defense of a federal death penalty case. Unless they gained such experience in state court before joining the defender organization, most federal defender attorneys have little to no experience defending a homicide case; of those who did bring with them such state court background, few have capital experience.

Notwithstanding these considerations, however, there is much to be gained from the involvement of a defender organization in the defense of a federal capital case. Recommendation 4(b) suggests pairing a defender organization as co-counsel with an experienced capital litigator, an approach which has successfully been employed in some cases. In these cases, the defender organization has benefitted from the expertise of the "learned counsel" and gained valuable capital litigation experience as well. At the same time, the "learned counsel" has benefitted from the institutional resources and local court expertise of the defender staff. Whether as lead or second counsel[(60)], a federal defender organization should not be required to undertake more than one federal death penalty representation at a time unless the head of the organization believes such an arrangement is appropriate. Recommendations 4(a) and (b) acknowledge that capital cases inevitably and seriously disrupt the normal functioning of an office. To undertake too much death penalty litigation would seriously threaten the effective performance of a defender organization's overriding responsibility to provide representation to a substantial number of financially eligible criminal defendants in its district each year.

5. The Death Penalty Authorization Process.

a. Streamlining the Authorization Process. The Department of Justice should consider adopting a "fast track" review of cases involving death-eligible defendants where there is a high probability that the death penalty will not be sought.

b. Court Monitoring of the Authorization Process. Courts should exercise their supervisory powers to ensure that the death penalty authorization process proceeds expeditiously.

Commentary

A decision not to seek the death penalty against a defendant has large and immediate cost-saving consequences. The sooner that decision is made, the larger the savings. Since the death penalty ultimately is sought against only a small number of the defendants charged with death-punishable offenses, the process for identifying those defendants should be as expeditious as possible in order to preserve funding and minimize the unnecessary expenditure of resources. Recommendation 5(a) calls upon the Department of Justice to increase the speed with which it makes decisions not to authorize seeking the death penalty. Recommendation 5(b) urges judges to oversee the authorization process by monitoring the progress of the decisionmaking and imposing reasonable deadlines on the prosecution in this regard. Courts should also ensure that the prosecution's timetables allow for meaningful advocacy by counsel for the defendant.

6. Federal Death Penalty Resource Counsel.

a. Information from Resource Counsel. In all federal death penalty cases, defense counsel should obtain the services of Federal Death Penalty Resource Counsel in order to obtain the benefit of model pleadings and other information that will save time, conserve resources and enhance representation. The judiciary

should allocate resources sufficient to permit the full value of these services to be provided in every case.

b. Technology and Information Sharing. The Administrative Office should explore the use of computer-based technology to facilitate the efficient and cost-effective sharing of information between Resource Counsel and defense counsel in federal death penalty cases.

Commentary

Recommendation 6(a) urges the judiciary and counsel to maximize the benefits of the Federal Death Penalty Resource Counsel Project (described in Section C.2 of Part I of this report), which has become essential to the delivery of high quality, cost-effective representation in federal death penalty cases, and to ensure the Project's continued effectiveness.

Recommendation 6(b) recognizes that recent innovations in computer technology are making it increasingly easy and inexpensive for individuals who are geographically dispersed to share information. The Administrative Office should explore the feasibility and cost-effectiveness of using computer and other technology to enhance the delivery of support to appointed counsel in federal death penalty cases.

7. Experts.

a. Salaried Positions for Penalty Phase Investigators. The federal defender program should consider establishing salaried positions within FDOs for persons trained to gather and analyze information relevant to the penalty phase of a capital case. FDOs should explore the possibility that, in addition to providing services in death penalty cases to which their FDO is appointed, it might be feasible for these investigators to render assistance to panel attorneys and to other FDOs.

b. Negotiating Reduced Rates. Counsel should seek to contain costs by negotiating reduced hourly rates and/or total fees with experts and other service providers.

c. Directory of Experts. A directory of experts willing to provide the assistance most frequently needed in federal death penalty cases, and their hourly rates of billing, should be developed and made available to counsel.

Commentary

Penalty phase investigators, or "mitigation specialists," as they have come to be called, are individuals trained and experienced in the development and presentation of evidence for the penalty phase of a capital case. Their work is part of the existing "standard of care" in a federal death penalty case. (See Section B.7 of Part I of this Report.) Because the hourly rates charged by mitigation specialists are lower than those authorized for appointed counsel, employment of a mitigation specialist is likely to be a cost-effective approach to developing the penalty phase defense.

Mitigation specialists are, however, in short supply. In most of the federal death penalty cases the Subcommittee examined, penalty phase investigators were not available locally. Courts thus were required to pay for the costs of travel and related expenses in addition to paying the mitigation specialist's hourly rates. Recommendation 7(a) suggests ameliorating this problem by employing and training persons for this work in federal defender organizations. Because of the cost containment potential, the feasibility of having these salaried employees work not only on cases to which their federal defender organization is appointed, but on others within their region, should be explored as well.

Recommendation 7(b) encourages counsel to negotiate a reduced hourly rate for expert services whenever possible. Private experts must be employed in death penalty cases, but the cost of their services can and should be contained. When asked to provide services for the defense of an indigent criminal defendant, many experts are willing to accept fees lower than their customary hourly rates for private clients. In addition, courts and counsel should agree in advance to a total amount which may be expended for a particular expert. If it appears that costs will exceed the agreed-upon amount, counsel should return to the court for prior authorization to secure them. If travel costs are to be incurred, government rates should be obtained.

8. Training.

Federal Death Penalty Training Programs. The Administrative Office should continue to offer and expand training programs designed specifically for defense counsel in federal death penalty cases.

Commentary

All of the defense counsel interviewed by the Subcommittee stressed the importance of participating in specialized death penalty training programs. Although the individuals appointed as "learned counsel" comprised a highly experienced group of lawyers, they nevertheless continued to attend training programs to update and refine their skills and knowledge, and emphasized that they availed themselves of such opportunities whenever possible. There are, however, very few training programs anywhere in the country specializing in the defense of death penalty cases, and there is only one -- an annual one-day program organized by the Federal Death Penalty Resource Counsel Project and funded by the Administrative Office -- focusing entirely on federal death penalty representation. Almost all of the defense counsel the Subcommittee interviewed had attended this program and identified it as a significant resource. With the case law relatively undeveloped and so many issues being litigated for the first time, the opportunity for counsel to benefit from the research of others and to share information and ideas was considered especially important and cost-effective. The Administrative Office and Federal Death Penalty Resource Counsel should ensure that training opportunities continue to meet the needs of appointed counsel in this area.

9. Case Budgeting.

a. Consultation with Prosecution. Upon learning that a defendant is charged with an offense punishable by death, courts should promptly consult with the prosecution to determine the likelihood that the death penalty will be sought in the case and to find out when that decision will be made.

b. Prior to Death Penalty Authorization. Ordinarily, the court should require defense counsel to submit a litigation budget encompassing all services (counsel, expert, investigative and other) likely to be required through the time that the Department of Justice(DOJ) determines whether or not to authorize the death penalty.

c. After Death Penalty Authorization. As soon as practicable after the death penalty has been authorized by DOJ, defense counsel should be required to submit a further budget for services likely to be needed through the trial of the guilt and penalty phases of the case. In its discretion, the court may determine that defense

counsel should prepare budgets for shorter intervals of time.

d. Advice from Administrative Office and Resource Counsel. In preparing and reviewing case budgets, defense counsel and the courts should seek advice from

the Administrative Office and Federal Death Penalty Resource Counsel, as may be appropriate.

e. Confidentiality of Case Budgets. Case budgets should be submitted ex parte and should be filed and maintained under seal.

f. Modification of Approved Budget. An approved budget should guide counsel's use of time and resources by indicating the services for which compensation is authorized. Case budgets should be re-evaluated when justified by changed or unexpected circumstances, and should be modified by the court where good cause is shown.

g. Payment of Interim Vouchers. Courts should require counsel to submit vouchers on a monthly basis, and should promptly review, certify and process those vouchers for payment.

h. Budgets In Excess of $250,000. If the total amount proposed by defense counsel to be budgeted for a case exceeds $250,000, the court should, prior to approval, submit such budget for review and recommendation to the Administrative Office.

i. Death Penalty Not Authorized. As soon as practicable after DOJ declines to authorize the death penalty, the court should review the number of appointed counsel and the hourly rate of compensation needed for the duration of the proceeding pursuant to CJA Guideline 6.02.B(2).

j. Judicial Conference Guidelines. The Judicial Conference should promulgate guidelines on case budgeting for use by the courts and counsel.

k. Judicial Training for Death Penalty Cases. The Federal Judicial Center should work in cooperation with the Administrative Office to provide training for judges in the management of federal death penalty cases and, in particular, in the review of case budgets.

Commentary

The Judicial Conference has endorsed the use of case budgets to manage the cost of capital habeas corpus cases. (CJA Guideline 6.02.F.) Case budgets for federal death penalty cases are designed to serve purposes similar to those accomplished by case budgets for capital habeas corpus cases. A complete case budget will require the lawyer to incorporate cost considerations into litigation planning and will encourage the use of less expensive means to achieve the desired end. For example, a budget might request appointment of an expert to perform a task that could be accomplished by a lawyer, justifying the request by showing that the expert's work will produce a corresponding reduction in the attorney hours required.

Submission and review of a budget will also assist the court in monitoring the overall cost of representation in the case, and determining the reasonableness of costs. Case budgets are increasingly being requested by courts or submitted by lawyers in federal death penalty cases. Most judges and lawyers interviewed by the Subcommittee were receptive to the idea of case budgeting, provided that persons with expertise in the defense of federal death penalty cases were available to assist in the development or the review of a case budget. Recommendation 9(d) encourages courts and counsel to seek such assistance from the Administrative Office and Federal Death Penalty Resource Counsel.

Because of the unpredictability of pretrial litigation, it is impractical to require counsel to budget for an entire case from start to finish. At a minimum, the budgeting process should be in two stages, as suggested in

Recommendations 9(b) and (c). The first stage begins when the lawyer is sufficiently familiar with the case to be able to present a budget reasonably related to the anticipated factual and legal issues in the case and continues until the Department of Justice makes its decision as to whether it will seek the death penalty. If a death penalty notice is filed, a further budget should be prepared. The court may require a single budget from authorization to trial, or a series of budgets covering shorter increments of time. If the prosecution will not seek the death penalty, Recommendation 9(i) calls for the court to review the case in accordance with CJA Guideline 6.02.B(2), to determine whether the number or compensation of counsel should be reduced.

Because case budgeting is time consuming, and because federal death penalty cases in which the prosecution decides not to seek the death penalty cost much less than cases in which the death penalty is authorized, it may not be cost-effective for counsel to prepare a case budget if authorization is improbable. For this reason, Recommendation 9(a) encourages courts to inquire of the prosecution whether authorization is unlikely. Furthermore, inquiring into the date by which the authorization decision will be made will provide information about how long a period the initial budget should cover, which will assist courts in reviewing budgets.

If a significant mitigation investigation is to be undertaken, the Subcommittee recommends that a budget be developed for this work.

Recommendation 9(e) calls for case budgets to be submitted ex parte and maintained permanently under seal. A case budget requires defense counsel to spell out the overall litigation plan for the case. Consequently, it is an extremely sensitive document and contains privileged information. This approach is consistent with Judicial Conference policy regarding capital habeas case budgets. (CJA Guideline 6.02F.)

Review of case budgets greater than $250,000 by the Administrative Office should assist courts in determining whether the cost of representation is reasonable in light of experience in other similar cases and in identifying areas in which expenses might be reduced.

10. Case Management.

a. Non-Lawyer Staff. Where it will be cost-effective, courts should consider authorizing payment for services to assist counsel in organizing and analyzing documents and other case materials.

b. Multi-defendant Cases.

i. Early Decision Regarding Severance. Courts should consider making an early decision on severance of non-capital from capital co-defendants.

ii. Regularly Scheduled Status Hearings. Status hearings should be held frequently, and a schedule for such hearings should be agreed upon in advance by all parties and the court.

iii. "Coordinating Counsel." In a multi-defendant case (in particular a multi-defendant case in which more than one individual is eligible for the death penalty), and with the consent of co-counsel, courts should consider designating counsel for one defendant as "coordinating counsel."

iv. Shared Resources. Counsel for co-defendants should be encouraged to share resources to the extent that doing so does not impinge on confidentiality protections or pose an unnecessary risk

of creating a conflict of interest.

v. Voucher Review. In large multi-defendant cases, after approving a case budget, the court should consider assigning a magistrate judge to review individual vouchers. The court should meet with defense counsel at regular intervals to review spending in light of the case budget and to identify and discuss future needs.

Commentary

Recommendation 10(a) recognizes that the large volume of discovery materials and pleadings associated with a federal death penalty case may make it cost-effective for courts to authorize (and appointed counsel to employ) the services of law clerks, paralegals, secretaries or others to perform organizational work which would otherwise have to be performed by counsel at a higher hourly rate. (See also Commentary accompanying Recommendation 3, endorsing the practice of authorizing counsel to obtain the services of additional attorneys under appropriate circumstances.) Judicial Conference policy provides that, in general, appointed counsel may not be reimbursed for expenses deemed part of their office overhead (CJA Guideline 2.28); however, unusual expenses of this nature may be compensated (CJA Guideline 3.16). The Guidelines suggest that in determining whether an expense is unusual or extraordinary, "consideration should be given to whether the circumstances from which the need arose would normally result

in an additional charge to a fee paying client over and above that charged for overhead expenses" (CJA Guideline 3.16).

Recommendations 10(b)(i) - (iv) address some of the particular management burdens associated with multi-defendant federal death penalty cases. Special efforts are required to ensure the orderly administration of justice in these matters, which tend to become costly and cumbersome for courts and counsel.

Recommendation 10(b)(i) suggests that courts make early decisions concerning severance of non-capital from capital co-defendants. In general, capital cases remain pending longer than non-capital cases and involve far greater amounts of pre-trial litigation. Separating the cases of non-capital co-defendants, where appropriate, may lead to swifter and less costly dispositions in those cases. The earlier such a decision is implemented, the greater will be the cost savings.

Recommendation 10(b)(ii) suggests that courts schedule frequent status hearings so that discovery and other matters may proceed efficiently and so that problems may be noted early and swiftly resolved. If the schedule for such status hearings (on a monthly or other basis) is agreed upon in advance, then all parties can plan accordingly and valuable time will not be wasted while counsel and judges try to find a mutually convenient time for their next meeting.

Recommendation 10(b)(iii) suggests that, if all counsel agree, courts consider designating the attorneys for one defendant as "coordinating counsel." Coordinating counsel might be responsible for arranging the efficient filing and service of motions and responses among the co-defendants, scheduling co-counsel meetings and court dates, facilitating discovery, or any other tasks deemed appropriate by counsel and the court. In multi-defendant cases where the federal defender organization represents a defendant eligible for the death penalty, courts should (taking into account the views of the federal defender) consider designating the FDO as coordinating counsel because of its institutional capabilities. In the event that a panel attorney is designated as coordinating counsel, the additional time and resources demanded by this role should be compensated.

11. Availability of Cost Data

The Administrative Office should improve its ability to collect and analyze information about case budgets and the cost of capital cases.

Commentary

Only because there have been a comparatively small number of federal death penalty cases was it possible to assemble -- by painstaking manual collection -- the cost data relied upon by the Subcommittee. This process was necessitated by the limitations of the only available information source, the CJA payment system. The Administrative Office is in the process of replacing that system. Given the heightened significance of capital case costs to the federal defender program, the Administrative Office should give priority to ensuring that its new system will provide capital case data which is accurate, reliable and accessible. In addition, the Administrative Office should continuously track capital case costs so that the impact of appellate and post-conviction litigation can be analyzed, trends in case costs can be readily identified, and appropriate cost-containment mechanisms can be developed.

Footnotes

1. 21 U.S.C. § 848, *codifying* Pub. L. 100-690, 102 Stat. 4382 (1988). The Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), had invalidated the previously existing federal death penalty statutes.

2. Pub. L. 103-322, 108 Stat. 1959 (1994).

3. Coopers & Lybrand Consulting, Report on Costs and Recommendations for the Control of Costs of the Defender Services Program (C&L) at Appendix Table 0.1 (Jan. 28, 1998).

4. Dean Lefstein was assisted by Lisa Greenman, Attorney Advisor in the Defender Services Division of the Administrative Office of the U.S. Courts, and David Reiser, a consultant to the Division. In addition, Kathleen O'Connor, Budget Analyst, and Sylvia Fleming, Systems Support Analyst, assisted in the quantitative analysis.

5. Cost averages reported here do not include estimates of the cost of representation in cases in which a federal defender organization (FDO) served as sole or co-counsel. The available data were inadequate to make reliable estimates of the cost of work performed by FDO attorneys and staff, and using panel attorney payments alone in cases in which FDOs served as co-counsel would have understated the actual cost of representation. Because panel attorneys, rather than FDOs, have provided representation in the vast majority of cases, the actual payments approved for panel attorneys are a better source of information on the cost of representation than estimates of FDO costs. The cost averages in this report also do not include expenditures attributable to the case that arose from the bombing of the federal building in Oklahoma City. Payment information related to the defense of that extraordinary case remains under seal pursuant to court order. However, the data available to the Subcommittee affords an adequate basis for assessing the cost of the typical range of federal death penalty cases.

6. See 18 U.S.C. § 3005 (requiring appointment of two lawyers, including at least one "learned" counsel); 21 U.S.C. § 848(q) (setting higher maximum hourly rate for capital cases, establishing special qualifications for appointment, and setting special threshold for review of services other than counsel). These standards are discussed more fully in Sections B.7 (expert services), C.1 (learned counsel), C.5 (compensation of counsel), and C.6 (number of counsel).

7. Other factors considered by the Subcommittee included regional variations and variations over time. Although there have been too few federal death penalty cases to draw any statistically meaningful conclusions about whether the cost of representation varies regionally, the data which do exist suggest that there are not substantial differences such as those which have been noted in federal capital habeas corpus cases. Also, while annual costs of representation have varied -- probably as a result of the number of new cases for which few vouchers have yet been approved in a given fiscal year -- the average total cost per representation has remained stable and even declined from year to year. (See Appendix C, Chart C-1.) One possible explanation is that the proportion of highly complex drug conspiracy cases has declined, so that the average federal death penalty case is slightly less complex and expensive.

8. There is a small category of offenses over which the federal government has exclusive criminal jurisdiction. See 18 U.S.C. §§ 7,

13. Such cases cannot be prosecuted in a state court. However, most of the offenses charged in federal death penalty cases could also be prosecuted in a state court. Of the federal death penalty cases filed to date, it is uncertain precisely how many could have been prosecuted as *capital* cases in state court, because not all state laws provide for the death penalty, and the statutory standards for death penalty prosecutions vary from state to state. Interview data indicate, however, that the vast majority of federal death penalty cases could also have been prosecuted as state capital cases.

9. This estimate is based on cases tracked by the Federal Death Penalty Resource Counsel Project, which is described in Section C.2, *infra*.

10. Since January 1995, the Justice Department has reviewed all federal death penalty cases in order to monitor and centralize decisionmaking as to those cases in which the death penalty will be sought. Prior to that time, there was centralized review only of cases in which the local U.S. Attorney requested permission to seek the death penalty, and there was no requirement that the Attorney General review cases in which the local United States Attorney did not request such authorization. (The Department of Justice reports that 46 such cases were reviewed by the Attorney General from 1990 to 1994, of which 36 were authorized.) Between January 1995 and December 1997, the Attorney General reviewed 162 federal death penalty cases in which she did not seek the death penalty; however, this statistic cannot be extrapolated to determine the likely number of unauthorized cases for the period from 1988 to 1995, because fewer federal offenses were punishable by death before the enactment of the 1994 crime bill.

11. The sample consists of 78 authorized federal death penalty cases, 58 cases in which authorization was denied, and 7 cases in which the authorization decision was still pending. The $142,000 figure reflects the average (mean) total cost of vouchers approved for the representation of a single defendant prior to the end of FY 1997. Because federal death penalty cases typically extend over more than one fiscal year, *total* costs are more helpful in analyzing costs and making recommendations for case budgeting and other controls than *annual* costs. The distribution of costs for a representation on an annual basis may reflect more about how quickly vouchers are submitted and approved in a particular case than about the reasonable cost of the work required in the case in any given year. Average cost statistics reported are based on the total of payments made through the end of FY 1997, and may not be complete for any given case. The Subcommittee's sample over-represents the proportion of federal death penalty cases in which authorization was granted; therefore the average cost of the cases in the sample is greater than the average total cost of all federal death penalty cases.

12. This number was provided by the Department of Justice in a letter to the Honorable William Terrell Hodges, Chair of the Executive Committee of the Judicial Conference of the United States, dated April 14, 1998. The Department provided the Subcommittee with a list identifying 113 authorized cases through December 12, 1997.

13. The "capital trials" in the Subcommittee's sample include one case in which defendants were acquitted of capital charges, and which therefore did not include a penalty phase, and one case in which the government withdrew its request for the death penalty mid-trial, because these cases were prepared and litigated through the guilt phase as capital cases, even though there was no penalty phase. Two cases resolved by guilty pleas after the commencement of jury selection but before the presentation of evidence have not been classified as capital trials, although in these cases the vast majority of costs associated with the trial of a federal death penalty case had been incurred.

14. See 21 U.S.C. § 848(i) (separate sentencing hearing); 18 U.S.C. § 3593(b) (same). All post-*Furman* state death penalty laws likewise provide for a bifurcated sentencing proceeding.

15. A report by the General Accounting Office (GAO) prepared shortly after the revival of the federal death penalty examined existing data concerning the additional costs associated with a death penalty prosecution. GAO, Limited Data Available on Costs of Death Sentences (Sept. 1989). Subsequently, the State Justice Institute sponsored a study responding to some of the GAO's methodological critiques of earlier studies. Phillip J. Cook & Donna B. Slawson, The Cost of Processing Murder Cases in North Carolina (1993). Cook and Slawson found that both the prosecution and the defense devoted much more time to a capital murder trial than to a non-capital murder trial, and that the capital trials lasted much longer. Id. at 61.

16. Source: Federal Death Penalty Resource Counsel Project data. In addition, some of the federal death penalty prosecutions not brought under the CCE or RICO provisions also involve drug conspiracies. For example, one prosecution under the civil rights law arose from a federal investigation into a related drug conspiracy. Another case in which the capital charge was based on a kidnapping statute also grew out of a drug conspiracy, as did a robbery case.

17. C&L at IV.81.

18. Source: Federal Death Penalty Resource Counsel Project data.

19. The number of representations in other offense categories was too small to generate meaningful averages; however, the average cost per representation in each category was lower than the average for drug cases.

20. As a result, the scope of the penalty phase in a federal capital case may be even wider than it is in states that adhere to the rules of evidence in the penalty phase.

21. Louis D. Bilionis & Richard A. Rosen, Lawyers, Arbitrariness and the Eighth Amendment, 75 Tex. L. Rev. 1301, 1316-17 (1997) (citing Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, & Stevens, JJ.).

22. Recent decisions illustrating this point include: Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997); Hall v. Washington, 106 F.3d 742 (7th Cir. 1997); Emerson v. Gramley, 91 F.3d 898 (7th Cir. 1996), cert. denied, 117 S.Ct. 1260 (1997); Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995), cert. denied, 117 S.Ct. 273 (1996); Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995), cert. denied, 116 S.Ct. 1335 (1996); Clabourne v. Lewis, 64 F.3d 1373 (9th Cir. 1995); Antwine v. Delo, 54 F.3d 1357 (8th Cir. 1995), cert. denied, 116 S.Ct. 753 (1996); Baxter v. Thomas, 45 F.3d 1501 (11th Cir.), cert. denied, 116 S.Ct. 385 (1995); Jackson v. Herring, 42 F.3d 1350 (11th Cir.), cert. denied, 116 S.Ct. 38 (1995).

23. See ABA Guideline 11.8.3; New York Guideline 10.3.

24. Cook and Slawson found an enormous difference in the amount of time defense counsel devoted to a non-capital murder case as compared to a capital murder case in their study of North Carolina cases. The Costs of Processing Murder Cases in North Carolina at 61. (See note 15, *supra*.)

25. See ABA Guideline 11.4.2.

26. In other words, lawyers have to raise issues that may previously have been decided against them in their district or circuit. If they fail to do so, they will be barred by procedural default from obtaining relief from a death sentence, even if the Supreme Court later finds their positions meritorious. *See* Hitchcock v. Dugger, 481 U.S. 393 (1987) (upholding challenge to application of Florida death penalty statute that had been repeatedly rejected by the circuit and district courts).

27. C&L at IV.50. Prior to 1994, attorneys did not categorize their hours on vouchers, so reliable data concerning the attorney workload do not exist prior to FY 1995.

28. It is too early to tell from the data whether attorney time associated with legal research and writing will decline as unresolved issues are decided by the appellate courts.

29. Comparable data are not available for non-capital homicides, or other non-capital cases, because the voucher form used in non-capital cases does not break down attorney hours into these categories.

30. C&L at IV.22.

31. The Department did not identify cases by name; therefore it was impossible to compare the cost of prosecution and defense in specific cases.

32. In addition, the Department's estimate of its personnel costs for each prosecution was based on the share of attorney and non-attorney staff salary and benefits devoted to each prosecution, and therefore did not include "overhead" costs.

33. Department of Justice, United States Attorney's Manual § 9-10.000.

34. In some districts, U.S. Attorney's offices have also implemented a similar process for obtaining defense counsel's input into the decision regarding whether or not to recommend authorization to the Attorney General.

35. Another, less important, cost factor is the direct cost of participating in the authorization process. This includes the attorney time devoted to drafting a written submission to the Death Penalty Review Committee and the costs of travel to and from Washington to meet with the Committee. The CJA payment system does not separately track these costs.

36. C& L at IV.49. For non-capital homicides, the portion of payments for services other than counsel was approximately 16.2% in FY 1997, and 18% over the period FY 1992-97. The distribution of these costs was different from that in capital cases. Investigators were used much more frequently in federal death penalty cases (88/136) than in non-capital homicides (128/639 from FY 1992-1997). In those cases in which investigators were hired, the average cost was $22,438 for death penalty cases, compared to $3,502 for non-capital homicide cases. Psychologists were also hired much more frequently (50/136 versus 62/639). The average spending for each case in which a psychologist was hired was $8,723 for death penalty cases compared to $1,382 for non-capital homicide. Similarly, "other" experts were hired in 94/136 federal death penalty cases versus 78/639 non-capital homicides, with an average cost in each case in which an "other" expert was hired of $21,928 in death penalty cases versus $3,980 for non-capital homicides.

37. C&L at IV.24. See ABA Guideline 11.8.3 (preparation for the sentencing phase should begin immediately upon counsel's entry into the case).

38. The precise amounts and hourly rates paid to mitigation specialists in all cases could not be determined, because the standard death penalty expert expense form does not include a distinct code for mitigation specialist or the equivalent, who are therefore coded "other." It was possible, however, to tie CJA payment system information to other data concerning the use of mitigation specialists for several cases. Hourly rates paid to mitigation specialists in those cases ranged from $35 to $80 per hour.

39. American Bar Association, Toward a More Just and Effective System of Review in State Death Penalty Cases, 40 Am. U. L. Rev. 1, 63 (1990).

40. Id. at 65, 69, 70.

41. Id. at 70.

42. See Judicial Conference of the United States, Committee on Defender Services, Subcommittee on Death Penalty Representation at 5 (1995) (discussing the problem of constant reinvention of the wheel in capital habeas cases).

43. In fact, the Justice Department is in the process of enhancing the support already available to prosecutors in federal death penalty cases. Although in the past the Criminal Division did not have a designated death penalty unit, approximately eight new attorney positions are to be dedicated exclusively to assisting U.S. Attorney's Offices involved in federal death penalty prosecutions.

44. The Federal Death Penalty Resource Counsel Project is modeled on the CJA Panel Attorney Resource Counsel program, in which, in a limited number of federal districts which are not served by a federal defender organization, a private panel attorney provides, on a part-time, hourly fee basis, training and advice to appointed counsel and serves as a liaison with the court and the Administrative Office when necessary. The Federal Death Penalty Resource Counsel Project should not be confused with the former Post-Conviction Defender Organizations, or Death Penalty Resource Centers, which were fully staffed law offices providing representation and other services in death penalty habeas corpus proceedings arising from state court death sentences, and which no longer receive any federal funding.

45. See Section C.2, supra.

46. There are two types of FDO. A federal public defender (FPD) is a federal agency staffed by federal employees. A community defender organization (CDO) is a non-profit agency funded by a grant from the judiciary. The fifty FPD offices serve 58 of the 94 federal districts. Thirteen CDOs serve an additional 15 districts.

47. In a small number of cases, courts have appointed two attorneys from an FDO as counsel and have not appointed a panel attorney. There has been one capital trial in which representation was provided exclusively by the FDO. In all other cases in which the death penalty was authorized, a panel attorney was appointed together with the FDO.

48. In many federal death penalty cases, conflict of interest rules have precluded the FDO from accepting appointment. These conflicts typically arise because the FDO has previously represented a co-defendant or witness in the case, and are particularly common in multi-defendant prosecutions.

49. Although 21 U.S.C. § 848(q)(5) requires appointment of at least one attorney who has been admitted to practice *in the court in which the prosecution is to be tried* for not less than five years, the statute provides an exception, for good cause, which permits the court to appoint instead "an attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation. 21 U.S.C. § 848(q)(7).

50. Concerns have been raised, however, about whether lawyers from out-of-district might be less effective than local attorneys in jury trials. Those interviewed disagreed about this point, and it may be more true in some areas than in others. At one extreme, there were those who believed it would be disadvantageous to appoint a lawyer from *a larger city within the same district* to a case in a more rural area. It may also be, as some interviewees suggested, that familiarity with the local jury pool is especially important in a capital case, and that counsel without local trial experience is more likely to need an expert to assist in jury selection. See Section B.7, *supra*.

51. 21 U.S.C. § 848(q)(10)(A). There is no statutory maximum for cases filed prior to April 24, 1996, however Judicial Conference guidelines recommend an hourly rate ranging between $75 and $125 per hour. Courts authorized rates higher than $125 per hour only in a handful of federal death penalty cases filed before the enactment of the statutory maximum. Coopers & Lybrand attributed a substantial portion of the increase in the cost per federal death penalty representation to a "real increase in [hourly] rates." (C&L IV.37). This conclusion, however, is not correct, as it was based on a projection from the *highest* hourly rates paid in a case during a

fiscal year, rather than the average rate paid per hour billed over the fiscal year. Using the latter method, the average hourly rate fluctuated from year to year. FY 1991: $115.82; FY 1992: $108.22; FY 1993: $99.44; FY 1994: $79.92; FY 1995: $88.16; FY 1996: $113.84; FY 1997: $108.84. Calculating average hourly rates billed *per representation* showed a similar pattern of fluctuation, rather than a consistent rise in the hourly rate of attorney compensation. Therefore, it cannot be said that the rate of attorney compensation accounted for a significant portion of the overall increase in spending on federal death penalty cases.

52. Report of the Judicial Conference of the United States on the Federal Defender Program at 12 (1993).

53. The national average (mean) billing rate for law firm *associates*, as of January 1, 1997, was $134 per hour. The median billing rate for associates was $125 per hour, which means that half of the country's non-partner lawyers (who typically have less experience than qualified federal death penalty lawyers) bill at a higher rate than the highest rate that may be authorized for a lawyer capable of undertaking the most challenging criminal representation. Altman, Weil, and Pensa, The 1997 Survey of Law Firm Economics at II-3 (1997). For small firms, the mean for associates was $127 per hour, and the median was $125 per hour. For partners in small firms -- the most comparable source for the rate panel attorneys in capital cases would command in the private market, the mean was $169 per hour, and the median was $160 per hour. Id. at II-6. For lawyers with at least five years of experience, the minimum required by statute, the mean billing rate was $150 per hour, with a median of $145. For lawyers with 15 years of experience -- much more typical of the lawyers considered qualified for federal death penalty cases -- the mean was $179 per hour, and the median was $175 per hour. Id. at II-9. The 1996 national average hourly cost of office overhead, assuming 1800 billable hours yearly, was $64.3 per hour. Id. at VII-5. In some areas, billing rates and overhead costs are much higher than the national average, yet the maximum rate for representation in a federal death penalty case is limited to $125 per hour.

54. The maximum rate which may be paid to appointed counsel in non-capital cases is $75 per hour. Although the Judicial Conference has approved this rate for all districts, funding has been provided by Congress only for 12 districts (or portions of districts) at this rate. The remaining districts are limited to $45 for out-of-court work and $65 for in court work.

55. These factors are relevant to the determination of a reasonable rate of compensation for legal representation under the ABA Model Rules of Professional Conduct and caselaw interpreting federal "fee-shifting" statutes. See Model Rules of Professional Conduct 1.5(a)(1), (3) and (7).

56. See Model Rules of Professional Conduct 1.5(a)(2) (inability to accept other employment is a factor in setting reasonable fee).

57. In the sample of federal death penalty cases assembled for this report, there were two cases in which a total of five lawyers were compensated, however in both cases some of the lawyers were replaced by others, so that no more than three lawyers worked on the case at one time. In eight cases, four lawyers were compensated, however in some of these cases lawyers replaced others who had been removed. In 12 cases three lawyers were compensated. In the remaining 95 cases (81% of the total), only two lawyers were compensated.

58. A district court which chooses to provide representation through a federal defender organization may elect one of two organizational models. A Federal Public Defender Organization (FPDO) is a federal agency, headed by a Federal Public Defender who is selected by the Circuit Court of Appeals. The attorneys and other staff of a federal public defender organization are government employees. A Community Defender Organization (CDO) is a not-for-profit corporation governed by a board of directors and led by an executive director. Both types of organization are funded and administered by the federal judiciary pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A. The term "federal defender organization," or "FDO," as used in this report, includes both organizational models.

59. The distinction between being qualified to serve and willing to do so is significant. Most defense counsel interviewed by the Subcommittee indicated that they would not be willing to accept appointment to more than one federal death penalty case at a time. Furthermore, since accepting a federal death penalty appointment requires a substantial time commitment which may ultimately cause the attorney to become entirely unavailable for any other fee-generating work, appointment to such a case is not lightly undertaken.

60. In a very small number of cases, federal defender organizations have served as both lead and second counsel, without the assistance of a panel attorney; such appointments should not be made unless the federal defender believes it is in the best interests of the client and the organization.

APPENDIX A

RECOMMENDATIONS

1. Qualifications for Appointment.

a. Quality of Counsel. Courts should ensure that all attorneys appointed in federal death penalty cases are well qualified, by virtue of their prior defense experience, training and commitment, to serve as counsel in this highly specialized and demanding type of litigation. High quality legal representation is essential to assure fair and final verdicts, as well as cost-effective case management.

b. Qualifications of Counsel. As required by statute, at the outset of every capital case, courts should appoint two counsel, at least one of whom is experienced in and knowledgeable about the defense of death penalty cases. Ordinarily, "learned counsel" should have distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in *state* death penalty trials, appeals, or post-conviction review that, in combination with co-counsel, will assure high quality representation.

c. Special Considerations in the Appointment of Counsel on Appeal. Ordinarily, the attorneys appointed to represent a death-sentenced federal appellant should include at least one attorney who did not represent the appellant at trial. In appointing appellate counsel, courts should, among other relevant factors, consider:

i. the attorney's experience in federal criminal appeals and capital appeals;

ii. the general qualifications identified in paragraph 1(a), above; and

iii. the attorney's willingness, unless relieved, to serve as counsel in any post-conviction proceedings that may follow the appeal.

d. Special Considerations in the Appointment of Counsel in Post-Conviction Proceedings. In appointing post-conviction counsel in a case where the defendant is sentenced to death, courts should consider the attorney's experience in federal post-conviction proceedings and in capital post-conviction proceedings, as well as the general qualifications set forth in paragraph 1(a).

e. Hourly Rate of Compensation for Counsel. The rate of compensation for counsel in a capital case should be maintained at a level sufficient to assure the appointment of attorneys who are appropriately qualified to undertake such representation.

2. Consultation with Federal Defender Organizations or the Administrative Office.

a. Notification of Statutory Obligation to Consult. The Administrative Office of the U.S. Courts (Administrative Office) and federal defender organizations should take appropriate action to ensure that their availability to provide statutorily mandated consultation regarding the appointment of counsel in every federal death penalty case is well known to the courts. (See 18 U.S.C. § 3005.)

b. Consultation by Courts in Selecting Counsel. In each case involving an offense punishable by death, courts should, as required by 18 U.S.C. § 3005, consider the recommendation of the district's Federal Public Defender (FPD) (unless the defender organization has a conflict) about the lawyers to be appointed. In districts not served by a Federal Public Defender Organization, 18 U.S.C. § 3005 requires consultation with the Administrative Office. Although not required to do so by statute, courts served by a Community Defender Organization should seek the advice of that office.

c. Consultation by Federal Defender Organizations and the Administrative Office in Recommending Counsel. In discharging their responsibility to recommend defense counsel, FDOs and the Administrative Office should consult with Federal Death Penalty Resource Counsel in order to identify attorneys who are well qualified, by virtue of their prior defense experience, training and commitment, to serve as lead and second counsel.

3. Appointment of More Than Two Lawyers.

Number of Counsel. Courts should not appoint more than two lawyers to provide representation to a defendant in a federal death penalty case unless exceptional circumstances and good cause are shown. Appointed counsel may, however, with prior court authorization, use the services of attorneys who work in association with them, provided that the employment of such additional counsel (at a reduced hourly rate) diminishes the total cost of representation or is required to meet time limits.

4. Appointment of the Federal Defender Organization (FDO).

a. FDO as Lead Counsel. Courts should consider appointing the district's FDO as lead counsel in a federal death penalty case only if the following conditions are present:

i. the FDO has one or more lawyers with experience in the trial and/or appeal of capital cases who are qualified to serve as "learned counsel"; and

ii. the FDO has sufficient resources so that workload can be adjusted without unduly disrupting the operation of the office, and the lawyer(s) assigned to the death penalty case can devote adequate time to its defense, recognizing that the case may require all of their available time; and

iii. the FDO has or is likely to obtain sufficient funds to provide for the expert, investigative and other services reasonably believed to be necessary for the defense of the death penalty case.

b. FDO as Second Counsel. Courts should consider appointing the district's FDO as second counsel in a

federal death penalty case only if the following conditions are present:

i. the FDO has sufficient resources so that workload can be adjusted without unduly disrupting the operation of the office, and the lawyer(s) assigned to the death penalty case can devote adequate time to its defense, recognizing that the case may require all of their available time; and

ii. the FDO has or is likely to obtain sufficient funds to provide for the expert, investigative and other services reasonably believed to be necessary for the defense of the death penalty case.

5. The Death Penalty Authorization Process.

a. Streamlining the Authorization Process. The Department of Justice should consider adopting a "fast track" review of cases involving death-eligible defendants where there is a high probability that the death penalty will not be sought.

b. Court Monitoring of the Authorization Process. Courts should exercise their supervisory powers to ensure that the death penalty authorization process proceeds expeditiously.

6. Federal Death Penalty Resource Counsel.

a. Information from Resource Counsel. In all federal death penalty cases, defense counsel should obtain the services of Federal Death Penalty Resource Counsel in order to obtain the benefit of model pleadings and other information that will save time, conserve resources and enhance representation. The judiciary should allocate resources sufficient to permit the full value of these services to be provided in every case.

b. Technology and Information Sharing. The Administrative Office should explore the use of computer-based technology to facilitate the efficient and cost-effective sharing of information between Resource Counsel and defense counsel in federal death penalty cases.

7. Experts.

a. Salaried Positions for Penalty Phase Investigators. The federal defender program should consider establishing salaried positions within FDOs for persons trained to gather and analyze information relevant to the penalty phase of a capital case. FDOs should explore the possibility that, in addition to providing services in death penalty cases to which their FDO is appointed, it might be feasible for these investigators to render assistance to panel attorneys and to other FDOs.

b. Negotiating Reduced Rates. Counsel should seek to contain costs by negotiating reduced hourly rates and/or total fees with experts and other service providers.

c. Directory of Experts. A directory of experts willing to provide the assistance most frequently needed in

federal death penalty cases, and their hourly rates of billing, should be developed and made available to counsel.

8. Training.

Federal Death Penalty Training Programs. The Administrative Office should continue to offer and expand training programs designed specifically for defense counsel in federal death penalty cases.

9. Case Budgeting.

a. Consultation with Prosecution. Upon learning that a defendant is charged with an offense punishable by death, courts should promptly consult with the prosecution to determine the likelihood that the death penalty will be sought in the case and to find out when that decision will be made.

b. Prior to Death Penalty Authorization. Ordinarily, the court should require defense counsel to submit a litigation budget encompassing all services (counsel, expert, investigative and other) likely to be required through the time that the Department of Justice (DOJ) determines whether or not to authorize the death penalty.

c. After Death Penalty Authorization. As soon as practicable after the death penalty has been authorized by DOJ, defense counsel should be required to submit a further budget for services likely to be needed through the trial of the guilt and penalty phases of the case. In its discretion, the court may determine that defense counsel should prepare budgets for shorter intervals of time.

d. Advice from Administrative Office and Resource Counsel. In preparing and reviewing case budgets, defense counsel and the courts should seek advice from the Administrative Office and Federal Death Penalty Resource Counsel, as may be appropriate.

e. Confidentiality of Case Budgets. Case budgets should be submitted ex parte and should be filed and maintained under seal.

f. Modification of Approved Budget. An approved budget should guide counsel's use of time and resources by indicating the services for which compensation is authorized. Case budgets should be re-evaluated when justified by changed or unexpected circumstances, and should be modified by the court where good cause is shown.

g. Payment of Interim Vouchers. Courts should require counsel to submit vouchers on a monthly basis, and should promptly review, certify and process those vouchers for payment.

h. Budgets In Excess of $250,000. If the total amount proposed by defense counsel to be budgeted for a case exceeds $250,000, the court should, prior to approval, submit such budget for review and recommendation to the Administrative Office.

i. Death Penalty Not Authorized. As soon as practicable after DOJ declines to authorize the death penalty, the court should review the number of appointed counsel and the hourly rate of compensation needed for the duration of the proceeding pursuant to CJA Guideline 6.02.B(2).

j. Judicial Conference Guidelines. The Judicial Conference should promulgate guidelines on case budgeting for use by the courts and counsel.

k. Judicial Training for Death Penalty Cases. The Federal Judicial Center should work in cooperation with the Administrative Office to provide training for judges in the management of federal death penalty cases and, in particular, in the review of case budgets.

10. Case Management.

a. Non-Lawyer Staff. Where it will be cost-effective, courts should consider authorizing payment for services to assist counsel in organizing and analyzing documents and other case materials.

b. Multi-defendant Cases.

i. Early Decision Regarding Severance. Courts should consider making an early decision on severance of non-capital from capital co-defendants.

ii. Regularly Scheduled Status Hearings. Status hearings should be held frequently, and a schedule for such hearings should be agreed upon in advance by all parties and the court.

iii. "Coordinating Counsel." In a multi-defendant case (in particular a multi-defendant case in which more than one individual is eligible for the death penalty), and with the consent of co-counsel, courts should consider designating counsel for one defendant as "coordinating counsel."

iv. Shared Resources. Counsel for co-defendants should be encouraged to share resources to the extent that doing so does not impinge on confidentiality protections or pose an unnecessary risk of creating a conflict of interest.

v. Voucher Review. In large multi-defendant cases, after approving a case budget, the court should consider assigning a magistrate judge to review individual vouchers. The court should meet with defense counsel at regular intervals to review spending in light of the case budget and to identify and discuss future needs.

11. Availability of Cost Data

The Administrative Office should improve its ability to collect and analyze information about case budgets and the cost of capital cases.

APPENDIX B

SOURCES AND METHODOLOGY

The Subcommittee's conclusions are based on a combination of qualitative judgments about representation in federal capital cases obtained from interviews, pleadings, and training materials, and quantitative data concerning the number, characteristics, and cost of representation in federal death penalty cases.

QUALITATIVE AND BACKGROUND SOURCES

Standard of Practice in Death Penalty Cases. In order to fully understand the unique standards of practice applicable to death penalty cases in general, and to federal death penalty cases in particular, the Subcommittee reviewed works by judges, scholars, and lawyers concerning the duties of counsel in a capital case. Sources included works focusing on federal habeas corpus for state prisoners under sentence of death such as the Report of the Judicial Conference Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (Powell Committee report) (1989), the Report on Death Penalty Representation of the Committee on Defender Services Subcommittee on Death Penalty Representation (1995), and Ira P. Robbins, Towards a More Just and Effective System of Review in State Death Penalty Cases, 40 Am. U. L. Rev. 1 (1990), as well as materials related to the funding and quality of representation provided in state death penalty cases, such as: Louis D. Bilionis and Richard D. Rosen, Lawyers, Arbitrariness and the Eighth Amendment, 75 Tex. L. Rev. 1301 (1997); Michael D. Moore, Analysis of State Indigent Defense Systems and their Application to Death-Eligible Defendants, 37 Wm. & Mary L. Rev. 1617 (1996); Norman Lefstein, Reform of Defense Representation in Capital Cases: the Indiana Experience and its Implications for the Nation, 29 Ind. L. Rev. 495 (1996); Douglas W. Vick, Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences, 43 Buff. L. Rev. 329 (1995); Ruth E. Friedman & Bryan A. Stevenson, Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing, 44 Ala. L. Rev. 1 (1992); Anthony Paduano & Clive Stafford-Smith, The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases, 43 Rutgers L. Rev. 281 (1991); Albert L. Vreeland, II, The Breath of the Unfee'd Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation, 90 Mich. L. Rev. 626 (1991).

Appointment of Counsel Standards. The Subcommittee also examined standards for the appointment and compensation of counsel in death penalty cases, including the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989).

Nature of Federal Death Penalty Cases. To better grasp the characteristics of federal death penalty practice, the Subcommittee reviewed training materials for defense lawyers prepared by the Federal Death Penalty Resource Counsel Project and materials collected and distributed by the Federal Judicial Center (FJC) to assist judges assigned to preside over federal death penalty cases. The Subcommittee met with the three lawyers hired as Resource Counsel, and with the FJC staff assigned to develop a handbook on federal death penalty cases. The Subcommittee also reviewed an FJC newsletter entitled "Chambers to Chambers," several issues of which were devoted to the management of federal death penalty cases.

Analyses of Costs of Representation. In order to focus the Subcommittee's inquiry and to refine the

collection of empirical data, the Subcommittee surveyed a number of sources dealing with the costs of representation in general and the costs of representation in death penalty cases in particular. General analyses of defense costs included the Report of the Judicial Conference of the United States on the Federal Defender Program (1993) and the Economy Subcommittee of the Budget Committee of the Judicial Conference, Panel Attorney Total Hours Profiles (1996), and General Accounting Office, Cost of Providing Court-Appointed Attorneys is Rising, but Costs are Unclear (1995). The Subcommittee also reviewed sources dealing directly with death penalty cases, including: General Accounting Office, Limited Data Available on Costs of Death Sentences (1989); Philip J. Cook & Donna B. Slawson, The Costs of Processing Murder Cases in North Carolina (1993); and The Spangenberg Group, A Study of Representation in Capital Cases in Texas (1993). In addition, the Subcommittee reviewed the Report on Costs and Recommendations for the Control of Costs of the Defender Services Program prepared by Coopers & Lybrand Consulting for submission to Congress in February 1998.

Economic Factors Related to Availability of Counsel. In order to assess the market forces at work, the Subcommittee obtained information concerning the rates paid to lawyers for work of a complexity similar to federal death penalty cases, including General Accounting Office, Information on the Federal Government's Use of Private Attorneys (1992) and Altman, Weil, Pensa, The 1997 Survey of Law Firm Economics. For a theoretical perspective on the market for legal services, the Subcommittee examined works such as: Pauline Holden & Steven Balkin, Quality and Cost Comparisons of Private Bar Indigent Defense Systems: Contract Versus Ordered Assigned Counsel, 76 J. L. & Criminology 176 (1985) and Herbert M. Kritzer, et al, The Impact of Fee Arrangements on Lawyers' Effort, 19 L. & Soc. Rev. 251 (1985).

Interviews. The Subcommittee's primary sources of qualitative information consisted of lengthy, in-depth interviews with lawyers and judges who had participated in federal death penalty cases. The interviews were conducted by Subcommittee staff, who prepared detailed summaries promptly after completion of the interviews. The identity of the individuals interviewed was not revealed even to the judges of the Subcommittee.

Judges. The Subcommittee conducted detailed interviews of a total of thirteen federal district judges. The Subcommittee also made use of information related to the management of federal death penalty cases provided at a "focus group" meeting on capital habeas corpus cases in March 1997. In order to encourage candor, the individuals interviewed were promised that their identities would remain confidential, and that remarks would not be attributed to them in the final report. Although follow-up questions varied, the Subcommittee used a standardized structured protocol to guide each interview. The Subcommittee took care to assure that the interviews captured a variety of judicial perspectives. The Subcommittee spoke to judges from all across the country, including one from each federal circuit. Those interviewed included judges who had presided over cases that ended with lengthy capital trials, cases that ended in negotiated guilty pleas, and cases in which the Department of Justice declined to seek the death penalty. The judges included recent appointees to the bench, as well as more experienced judges. Some of the judges came from districts in states with long histories of post-Furman death penalty litigation, while others came from districts in states without the death penalty.

Department of Justice. The Subcommittee contacted the Department of Justice to obtain permission to interview prosecutors in federal death penalty cases. Although the Department agreed to provide certain quantitative information, further described below, it declined to authorize the Subcommittee to interview prosecutors or to collect data from prosecutors by a questionnaire.

Defense Counsel. The Subcommittee interviewed a total of 21 defense lawyers. In all, these lawyers had

participated in 45 federal death penalty cases. As with the judges, interviews were conducted using a standardized interview protocol, and those interviewed were promised that their names would not be directly or indirectly disclosed. The interview subjects included lawyers with extensive death penalty experience, who had participated in several federal death penalty cases, as well as lawyers who until their first federal death penalty appointment had had no prior death penalty experience. The Subcommittee interviewed panel attorneys as well as staff attorneys in federal defender organizations. The Subcommittee also met with a group of federal defenders during a national conference. The lawyers interviewed had participated in a wide range of types of federal death penalty cases. Some of the cases had proceeded through penalty phase trials, while others had been resolved by a plea of guilty. The cases included some in which the Department of Justice did not authorize seeking a death sentence and some in which authorization to seek the death penalty was granted and later withdrawn.

QUANTITATIVE DATA AND ANALYSIS.

The costs of providing representation in federal death penalty cases include direct payments to individual lawyers appointed by the court (panel attorneys) and to persons providing services other than counsel at the request of a panel attorney, and resources committed to representation in federal death penalty cases by federal public defender and community defender organizations. The Subcommittee attempted to obtain and analyze data from both sources.

CJA Payment Data. Payments to panel attorneys must be certified by counsel to be reasonable and necessary, and must be approved by the presiding judicial officer. Additionally, in cases filed after April 24, 1996, payments for services other than counsel exceeding $7500 must also be approved by the chief judge of the circuit court of appeals or the chief judge's designee. Payments are supported by vouchers submitted by the panel attorney (CJA 30) or the non-attorney service provider (CJA 31). Some, but not all of the information recorded on the voucher forms is entered into a computer by the district court clerk and then transmitted to the Administrative Office. The Administrative Office maintains computerized data concerning the nature of the service provided, the hours billed (for attorneys this is divided between in and out of court time), the hourly rate, and, for cases after FY 1994, the type of work the attorney performed, broken down into 8 subcategories.

In order to assess the relationship between the raw cost data and the characteristics of federal death penalty cases developed from the interviews and review of documents, the Subcommittee created tables of information concerning the histories of federal death penalty cases. This "case demographics" data came from information developed by the Federal Death Penalty Resource Counsel Project and from the Department of Justice. By relating case demographics to cost information, the Subcommittee hoped to produce a clearer understanding of how the nature of the representation influenced costs. For example, the Subcommittee compared costs in cases in which the Department of Justice authorized a request for the death penalty with cases in which authorization was denied. The Subcommittee also examined the costs of authorized cases terminating in guilty pleas and those resolved at trial.

In addition, for purposes of comparison, the Subcommittee obtained voucher information related to non-capital homicide cases. The Subcommittee compared average expenditures on various items in an effort to better understand how the requirements of representation in death penalty cases influenced costs.

The quantitative data sources utilized by the Subcommittee have certain limitations. As the Economy

Subcommittee of the Budget Committee of the Judicial Conference noted in a caveat to its 1996 report on panel attorney hours, the CJA payment system was designed only to process vouchers for payment, and not to serve as a management information system. Thus, this database does not include basic information on the disposition of a case, as a result of which cases that went to trial cannot be distinguished from those resolved by a guilty plea, despite the obvious relevance such differences would have in identifying the "typical" costs of representation. Similarly, the CJA payment system does not reflect factors such as the number of offenses charged or the number of codefendants joined in a case, although both may make a case more complicated and more costly. Also, the CJA payment system does not have an adequate mechanism to regularize the entry of names and other identifying information. As a result, small variations in the spelling of a defendant's name, for example, will lead the computer to treat the vouchers as if they relate to different cases. Average costs per representation computed without correcting this problem will be inaccurate because the case count will be artificially inflated. This creates a particularly serious problem in capital cases, because attorneys typically submit interim vouchers, rather than waiting until a case is entirely over to request payment. Because there are more vouchers submitted per case, there are likely to be more inconsistencies or variations in the way names (and even case numbers) are entered, and therefore more errors in the count.

Moreover, although the CJA 30 form was revised in 1994 to collect additional details about the type of work an attorney performed during the time period covered by the voucher, the forms are not designed to address some of the questions about the costs of representation the Subcommittee wished to answer. It is not possible, for example, to reliably isolate costs associated with the Department of Justice death penalty authorization process from other costs. Nor, unfortunately, do the categories for "services other than counsel" on the CJA 31 form correlate precisely to the service categories of greatest importance in a study of federal capital cases (there is no category, for example, for mitigation specialists; payments to such experts therefore are included within the category of "other"). Finally, the Subcommittee learned that the CJA payment system does not reliably track federal death penalty cases. Although in theory vouchers for each defendant charged in an indictment with an offense that carries a potential punishment of death should be coded "D2" (for a federal death penalty case), in fact some vouchers in death penalty cases are not coded properly. The Subcommittee could not, therefore, identify the universe of federal death penalty cases by selecting "D2" vouchers."

The Subcommittee attempted to address the deficiencies in the CJA payment data in several ways. In order to obtain a sample of federal death penalty cases which included both unauthorized as well as authorized cases, the Subcommittee obtained a case list from the Federal Death Penalty Resource Counsel Project, which tracks federal death penalty cases across the country.[(1)] This list included all cases in which the Department of Justice authorized a death penalty prosecution, as well as a number of cases in which the Department of Justice declined to authorize seeking the death penalty. Only cases in which CJA payment information had been placed under seal were excluded from this list. The Subcommittee then obtained all CJA payments relating to this list of cases. Administrative Office staff reviewed the payment information data, making revisions as needed to produce consistent name and case number fields, to assure an accurate count of representations for purposes of averaging. The resulting data were imported into a database. A small number of cases which were unrepresentative for various reasons were removed from the sample. For example, vouchers billed for appellate or post-conviction representation were eliminated, because these could not validly be compared to costs at the initial trial stage.[(2)] Also eliminated were cases in which the costs of representation were primarily borne by a federal defender organization, because in such cases the vouchers submitted by the panel attorney or other service providers would not have reflected the actual cost of representation, but rather would have understated it.

The Subcommittee also reviewed case disposition information from the Administrative Office SARD database, but found too many reliability problems to make these data useful.

Federal Defender Hours. Except for a very small number of cases in which representation was provided by retained counsel (the Subcommittee is aware of only one federal death penalty case handled entirely by a retained lawyer; in a small number of other cases a retained lawyer provided limited services), in cases not assigned to panel attorneys representation is provided by Federal Defender Organizations (FDOs), which may be either Federal Public Defender Organizations (FPDs) or Community Defender Organizations (CDOs). Attorneys in FDOs are salaried employees and do not submit bills by the hour, however they do keep a rough account of their hours using a system called "Timekeeper." The Subcommittee obtained records from the Timekeeper system for cases coded as federal death penalty cases, however the number of FDO cases identified in the Timekeeper database was so small, and the reliability of the hours so uncertain, that the Subcommittee limited itself to the analyses of federal defender hours previously performed by Coopers & Lybrand. Coopers & Lybrand also developed a methodology for estimating the imputed hourly costs of FDO attorneys, paralegals and investigators.

Department of Justice Data. The Department of Justice provided the Subcommittee with a list of federal death penalty cases by status as of December 12, 1997. The Department also gathered cost information from local U.S. Attorney's Offices concerning 24 completed federal death penalty prosecutions in which the Attorney General had authorized seeking the death penalty. The 24 cases included cases resolved by guilty plea as well as trial. Each case may involve one or more defendants, however the Department did not provide information concerning the number of defendants, case disposition, or the statutory basis for the prosecution.

Footnotes

1. The Subcommittee subsequently obtained a longer list of cases from the Department of Justice. This list included 107 authorized cases, and 162 cases reviewed by the Attorney General but never authorized. Even this list was not complete for the entire period, because it contained only cases reviewed, but not authorized after January 1995.

2. There were too few vouchers associated with appellate or post-conviction representation to allow meaningful analyses of these costs separately from trial.