



WINNING STRATEGIES SEMINAR

The Panel Attorney's Big Concern: Tackling the Voucher and Getting Paid!

**Donna Shearer, CJA Supervisory
Attorney, District of Maryland**



CONFIDENTIAL MEMORANDUM

To: Chief Judge William B. Traxler, Jr.
United States Court of Appeals for the Fourth Circuit

From: Judge
United States District Court

Re: Advance Authorization of expenditures by Court-appointed defense counsel for experts and other services.

It is requested that advance authorization be granted to obtain experts and services in an amount in excess of the maximum allowed under the provisions of 18 U.S.C.A. §3006A(e)(3) as follows:

Case Name and Designation: United States of America v.
Criminal Action No.:

1. MEDICAL EXPERT

Name of Expert: , M.D.

Estimated Compensation: \$8,000.00, if testimony is required an additional \$ 8,000.00 is estimated this does not include travel expenses.

I have attached a copy of the ex parte motions filed by counsel in this case requesting approval of expert services in excess of the \$1,600.00 statutory maximum. The defendant in this case is charged in a one hundred sixty-one count indictment with mail fraud, health care fraud, wire fraud, tax evasion, and money laundering. The indictment also contains a two million dollar-plus forfeiture count.

The fraud charges relate to the defendant's former medical practice, where he treated patients with chronic pain related disorders. The defendant specialized in the field of interventional pain management. "The practice of interventional pain management is an emerging specialty." Interventional Techniques: Evidence-based Practice Guidelines in the Management of Chronic Spinal Pain, Pain Physician 2007; 10:7-111. The primary treatment modality offered by the defendant in his interventional pain management practice was ultrasound-guided spinal nerve blocks. Within the new field of interventional pain management, the use of ultrasound is in an "embryonic state." Gofeld M., Ultrasonography in pain medicine: a critical review., Pain Pract., 2008 Jul-Aug;8(4):226-40, 2008.

Counsel has requested funding to retain _____, M.D. as an expert in the field of ultrasound-guided interventional chronic pain management techniques. Dr. _____, who is the author of the above-referenced article on ultrasound in pain medicine, is a visiting professor of medicine at the University of Washington. Counsel states that Dr. _____ is apparently one of the few doctors in this country who actually uses ultrasound in a chronic pain management practice setting.

Dr_____ fee is \$____per hour. Counsel has estimated that Dr_____ preliminary review and subsequent consultation with them will require 20 hours of his time. Then, depending on whether Dr. _____ is willing and able to participate further in the case, he may be asked to testify as an expert at the trial. At this time, counsel is requesting authority to incur up to \$_____for Dr. _____ services.

Given the nature and complexity of the issues in this case, I believe it would be appropriate to approve counsel's request for compensation in excess of the statutory maximum for Dr_____ services. As noted above, the fraud charges in this case relate to an extremely narrow and specialized field of medicine. Consequently, there appear to be very few experts who would be qualified to consult and testify on the medical procedures in question. This case is further complicated by the fact that the Government claims that every treatment that the defendant billed for in his medical practice for over two years was either not provided, not medically necessary, or both. Thus, there are literally thousands of medical procedures that Dr. ____ may need to review. Counsel requested a reduction in Dr. ____ hourly rate but the expert has refused to reduce his rate. Given that there are so few experts in this field, I have no choice but to approve the hourly rate. Counsel will make every effort to be fiscally responsible in the experts use, but they must have an expert to review the government's expert report and the some of the medical records at issue.

Accordingly, I certify that compensation in excess of the maximum set forth in 18 U.S.C.A. §3006A for Dr_____ services as a medical expert in this case is necessary to provide fair compensation for services of an unusual character or duration.

2. PSYCHIATRIST

Name of Expert: To be determined

Estimated Compensation: \$_____

Counsel also anticipates that they will need a psychiatrist to review the mental health records of some of the Defendant's former patients to determine their credibility as witnesses. It is my understanding that from counsel that many of the Defendant's patients have extensive histories of physical and mental illness for which they have taken multiple psychotropic and narcotic drugs over many years. Counsel seeks a psychiatrist to review the former patients' records and provide opinions on whether their memories would likely be impaired because of their long-term use of certain medications. Counsel contends that the ability of patients to remember events is critical to the case because, according to the Government, many of them do not recall receiving the treatment or procedures allegedly provided by the Defendant.

Because the Government has stated that it may call all of the Defendant's former patients as witnesses at trial, Counsel originally proposed that a psychiatrist would be called upon to review the medical charts for every patient. However, at earlier ex parte conference with counsel, I indicated that the expense for such an extensive review would not be acceptable. Instead, I suggested that counsel ask the psychiatrist to provide opinions, in general, regarding the effects of the various drugs in question on the mental

capacities of a person. Then, depending on whether a particular patient has used the drugs in question, counsel could argue to the jury that his credibility should be weighed accordingly.

With those strictures in mind, counsel believes that the cost to retain a psychiatrist to review the case and testify at trial will be not less than \$____. Since the credibility of the Defendant's patients may be suspect because of their long-term use of certain medications, I believe it would be appropriate to approve counsel's request for compensation in excess of the statutory maximum for the services of a psychiatrist.

Accordingly, I certify that compensation in excess of the maximum set forth in 18 U.S.C.A. §3006A for an expert psychiatrist's services as a medical expert in this case is necessary to provide fair compensation for services of an unusual character or duration.

3. MEDICAL LITERATURE RESEARCHER

Name of Expert: To be determined.

Estimated Compensation: \$____

Counsel also seeks approval to incur expenses for a medical researcher to locate and provide the defense with articles or other literature from medical text, journals and periodicals relative to the unique medical specialty practiced by the Defendant. Counsel intends to ask the researcher to locate medical literature on the various practices and procedures in the field of interventional pain management and the sub-specialty of ultrasound guided procedures. The literature would be used to educate counsel and to question Government and defense expert witnesses. Counsel proposes to retain a medical student at W.V.U. to conduct the research. Because of the medical student's training and free access to medical literature, he would be able to conduct the research more efficiently and at less cost than counsel. Counsel expects to pay the medical researcher \$50 per hour for his work, which is estimated to take approximately 50 hours. Again, given the complex and unique nature of the medical issues in this case, I believe it would be appropriate to approve counsel's request for compensation in excess of the statutory maximum for the services of a psychiatrist. Certainly, this will cost less than if Counsel undertakes this investigation at a rate of \$ 110.00 per hour.

Accordingly, I certify that compensation in excess of the maximum set forth in 18 U.S.C.A. §3006A for a medical researcher's services in this case is necessary to provide fair compensation for services of an unusual character or duration.

4. PRIVATE INVESTIGATOR

Name of Expert:

Estimated Compensation: \$____

Previously, counsel made a request to incur up to \$1,600.00 for the services of a private investigator. I approved that request. Subsequently, counsel requested authority

to incur an additional \$_____ for private investigative services, for a total of \$ _____ in such expenses.

Given the nature and complexity of the issues in this case, I believe it would be appropriate to approve counsel's request for compensation in excess of the statutory maximum for private investigator services. As mentioned, the Government claims that every one of the over one hundred patients that the defendant treated received fraudulent medical care. The Government has also stated that it may call all of his former patients as witnesses. Most of these patients reside in the -----area, which is located over four hours from the defendant's counsel's office. The private investigator that counsel has retained is located in_____. Even with the private investigator being located in_____, counsel advises that it will take many hours to find and interview the defendant's former patients. In that regard, counsel further advises that locating the present whereabouts of these former patients is often quite difficult and time consuming as many of them have moved, changed telephone numbers, or do not have telephones at all.

Accordingly, I certify that compensation in excess of the maximum set forth in 18 U.S.C.A. §3006A for a private investigator in this case is necessary to provide fair compensation for services of an unusual character and duration.

Furthermore, the investigative firm has been involved in this case for some time. Counsel has requested in their *ex parte* motion that interim payments be allowed for the investigative firm. This will provide the firm with 80% of the claimed compensation, more importantly; it will allow Counsel to track the investigator's claims against the approved budget.

5. PARALEGAL SUPPORT SERVICES

Counsel has requested budget authorization for paralegal support services for document review and organization. They point out that the discovery in this case is unusually voluminous. The latest disclosure from the Government ended with Bates number 23,091. The Defendant has also obtained thousands of pages of medical records by way of recent subpoenas. Counsel states that organizing this large amount of discovery can be handled by paralegal support at a much cheaper rate than counsel. According to counsel, at \$40.00 per hour a paralegal trained in document management not only saves counsel time, but, also, if this matter proceeds to trial, the document control regarding expert witnesses and the scheduling of those witnesses can be coordinated by the paralegal. Counsel estimates that 500 hours of paralegal time will be expended through the trial of this case.

Given the volume of discovery and number of witnesses in this case, I believe it would be appropriate to approve counsel's request for paralegal support. The Government's investigation and prosecution, which began in 2007, has utilized the vast resources of several federal agencies including the Internal Revenue Service, Department of Health and Human Services, F.B.I., and Asset Forfeiture and Money Laundering Division of the Department of Justice. Upon information and belief, the U.S.

Attorney's Office has also utilized the services of its own in-house paralegals, data analyst, computer analyst, witness coordinator, and paralegals. Fundamental fairness dictates that the Defendant be afforded at least a modicum of similar resources for his defense.

The Defendant, therefore, requests authorization to incur up to \$20,000.00 for in-house paralegal services without further approval of the Court. Counsel would further request that they be permitted to submit interim claims for compensation for their in-house paralegal support services. Again, I believe the request for interim payments is appropriate and I have attached an order for interim payments for expert or other services.

6. FEES AND COSTS FOR COPIES OF MEDICAL RECORDS

On February 2, 2009, the Defendant's former retained counsel filed a motion to serve Rule 17(c) subpoenas. The Defendant's motion, *inter alia*, requested subpoenas for two hospitals to produce medical records for ten of his former patients. These ten patients were relied upon by the Government as the basis for the Health Care Fraud counts of the indictment. After the Defendant's former retained counsel withdrew, his newly appointed CJA counsel made an oral motion for leave to amend the motion to serve Rule 17(c) Subpoenas to require the Marshals to serve them, pursuant to the CJA. The Government did not oppose the Defendant's motion for the subpoenas. Subsequently, I granted the motion and the subpoenas were served by the Marshals.

In response, the two hospitals produced several thousands of pages of medical records. The hospitals have requested payment for search fees, copying costs, shipping and taxes. One hospital has requested payment of \$4,077.98 and other has requested \$1,859.99. Counsel advises that the charges from both hospitals are in compliance with W.Va. Code § 16-29-2(a), which permits hospitals and other medical providers to charge a search fee of \$10.00 per request and ¢75 per page for copying.

At the time the Rule 17(c) subpoenas were issued, the counsel understood that the process costs, witness fees, and other charges incurred in connection with the subpoenas would be paid by the Marshals per Rule 17(b). However, counsel has since been informed by the Office of the Federal Public Defender that the charges from the hospitals must be paid from CJA funds.

Since the subpoenaed medical records were necessary to the defense, I believe that it is appropriate to use CJA funds to pay the hospitals for the substantial expenses that they incurred to produce the same.

I have attached the CJA form 21 from Saint Joseph's hospital for the copy work in this case. The rates for copy work are set by state statute and I recommend approval of the voucher claim. I certify that that the voucher claim is reasonable and that excess compensation in excess of the maximum set forth in 18 U.S.C. Section 3006A (e)(3) is necessary to provide fair compensation for services of an unusual character or duration.

RECAP

1.	Medical Expert	\$-----
2	Psychiatrist, to be determined	\$-----
3.	Medical Literature Researcher, to be determined	\$-----
4.	Private Investigator,	\$-----
5.	Paralegal support services	\$-----
6	Fees And Costs For Copies Of Medical Records	\$-----
	Total	\$

Please do not hesitate to contact me if you have any further questions or concerns regarding this request.

Date: _____

Judge

United States District Court Judge

Enclosures

Authorization for the experts and other services described above is hereby approved in the amounts requested.

Date: _____

William B. Traxler, Jr.
Chief Judge
U.S. Court of Appeals for the Fourth Circuit

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

United States of America

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v.

*

Case No.

Defendant

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**EX PARTE MOTION FOR PRE-AUTHORIZATION
OF PAYMENT FOR SERVICES OTHER THAN COUNSEL**

The Defendant, insert name, by his/her undersigned counsel moves pursuant to the regulations of the Criminal Justice Act (hereinafter "CJA") and 18 U.S.C. §3006A(e) for the entry of an order pre-authorizing payment for expert (or investigative) services which are necessary for him/her to prepare adequately his defense. In support of this ex parte motion, the defendant states:

Insert reasons

REMEMBER TO GIVE THE EXPERT'S NAME, HOURLY RATE, AND THE ESTIMATED AMOUNT OF COMPENSATION TO COMPLETE THE SERVICE

Wherefore, for the foregoing reasons, counsel respectfully moves the Court to enter an Order pre-authorizing counsel to retain the services of (insert name of expert/investigator) to provide expert (or investigative) services in connection with the representation of the defendant and to have all such services paid under the authority of the Criminal Justice Act.

Respectfully Submitted,

Firm name and address

I hereby declare under penalty of perjury that the factual basis as set forth above is true and correct to the best of my information and belief and that the compensation herein requested is constitutionally necessary for due process and a fair trial with effective assistance of counsel. Signed this day of _____, 2010.

Counsel for Defendant