

**Report to the Committee on Defender Services
Judicial Conference of the United States
Update on the Cost and Quality of Defense Representation
in Federal Death Penalty Cases**

**Jon B. Gould
Lisa Greenman**

September 2010

This report updates the 1998 Spencer Report. It includes revised commentary, endorsed by the Judicial Conference Committee on Defender Services, to the 1998 recommendations approved by the Judicial Conference.

Table of Contents

Executive Summary	viii
I. Introduction	1
II. Decisions by the Department of Justice to Seek the Death Penalty: Their Implications for Defense Costs	3
A. Defendants Subject to Capital Prosecution: Potential Death Penalty Cases, 1989-2009	3
B. The Attorney General’s Decision-Making and How It Has Changed	5
C. Resolution of Authorized Cases	8
D. Geographic Distribution of Authorized Cases	12
III. Costs of Defending Federal Capital Cases	17
A. Cases Examined	17
B. Data Examined	20
IV. Findings	24
A. Total Case Costs	24
B. Comparison to the Spencer Report	26
C. Attorney Costs	28
D. Expert Costs	31
E. Transcript Costs	32
V. Explanations for and Predictors of Case Costs	33
A. Hypotheses	33
B. Use of Experts	35
C. Case Characteristics	37
D. The Attorney General Making the Authorization Decision	39

E.	Exceptional Cases.....	41
1.	High Cost Trials.....	41
2.	Lowest Cost Trials.....	43
a.	“Bad Facts”.....	46
b.	Defense Experience.....	48
c.	Geography.....	50
VI.	Qualitative Data from Judges and Counsel.....	57
A.	Interviewees.....	57
B.	Overview of Interviews.....	59
1.	Judges.....	59
2.	Defense Counsel.....	60
C.	Federal Death Penalty Resource Counsel.....	61
D.	The Role of Federal Defender Organizations.....	64
E.	Quality of Representation: Trial Counsel.....	66
F.	Case Budgeting.....	69
G.	Expert Services.....	71
1.	Guilt Phase Experts.....	72
2.	Mental Health Experts.....	72
3.	Mitigation Specialists.....	74
4.	Jury Consultants.....	75
5.	Victim Liaisons.....	75
6.	Future Dangerousness and Prison Conditions Experts.....	77
7.	Requests for Expert Services.....	77
8.	\$7,500 Threshold for Circuit Approval of Expert Payments.....	78

H.	Case Management.....	78
1.	Severance.....	81
2.	Discovery.....	82
3.	Jury Selection.....	82
I.	The Capital Authorization Process.....	84
J.	Appellate and Post-Conviction Representation.....	86
1.	Quality and Availability of Appellate Counsel.....	86
2.	Quality and Availability of Post-Conviction Counsel.....	87
VII.	Conclusion.....	89
VIII.	Recommendations & Commentary.....	90
1.	Qualifications for Appointment.....	90
a.	Quality of Counsel.....	90
b.	Qualifications of Counsel.....	90
c.	Special Considerations in the Appointment of Counsel on Appeal.....	90
d.	Special Considerations in the Appointment of Counsel in Post-Conviction Proceedings.....	90
e.	Hourly Rate of Compensation for Counsel.....	90
2.	Consultation with Federal Defender Organizations or the Administrative Office.....	98
a.	Notification of Statutory Obligation to Consult.....	98
b.	Consultation by Courts in Selecting Counsel.....	98
c.	Consultation by Federal Defender Organizations and the Administrative Office in Recommending Counsel.....	98
3.	Appointment of More than Two Lawyers.....	102

4.	Appointment of the Federal Defender Organization	103
	a. FDO as Lead Counsel	103
	b. FDO as Second Counsel	103
5.	The Death Penalty Authorization Process	106
	a. Streamlining the Authorization Process.....	106
	b. Court Monitoring of the Authorization Process.....	106
6.	Federal Death Penalty Resource Counsel.....	108
	a. Information from Resource Counsel.....	108
	b. Technology and Information Sharing	108
7.	Expert	111
	a. Salaried Positions for Penalty Phase Investigators	111
	b. Negotiating Reduced Rates.....	111
	c. Directory of Experts.....	111
8.	Training.....	114
9.	Case Budgeting	115
	a. Consultation with Prosecution	115
	b. Prior to Death Penalty Authorization.....	115
	c. After Death Penalty Authorization	115
	d. Advice from Administrative Office and Resource Counsel	115
	e. Confidentiality of Case Budgets	115
	f. Modification of Approved Budget.....	115
	g. Payment of Interim Vouchers	115
	h. Budgets in Excess of \$250,000.....	115
	i. Death Penalty Not Authorized.....	115

j.	Judicial Conference Guidelines	115
k.	Judicial Training for Death Penalty Cases.....	115
10.	Case Management.....	119
a.	Non-lawyer Staff.....	119
b.	Multi-defendant Cases	119
i.	Early Decision Regarding Severance.....	119
ii.	Regularly Scheduled Status Hearings.....	119
iii.	“Coordinating Counsel”	119
iv.	Shared Resources	119
v.	Voucher Review.....	119
11.	Availability of Cost Data	122
	Appendix A: Data Examined	123
	Appendix B: Supplemental Data	124
	Appendix C: Authorized versus Non-authorized Case Costs.....	128
	Appendix D: Cost Estimates in 2010 Dollars.....	129

Figures and Tables

Figure or Table	Page
Figure 1: “Death Eligible” Federal Capital Defendants, 1989-2009, by Calendar Year of Indictment	5
Figure 2: U.S. Department of Justice Capital Authorizations, 1989-2009, by Year of Authorization	8
Figure 3: Number of Federal Capital Defendants Tried, 1989-2009, by Calendar Year.....	9
Figure 4: Number of Federal Death Sentences, 1989-2009, by Calendar Year	11
Table 1: Federal Death Penalty Prosecutions, 1989-2009	12
Figure 5: Number of Authorized Federal Capital Defendants, 1989-1997 and 1998-2009, by Circuit	13
Figure 6: Number of Federal Defendants Authorized for Capital Prosecution, by State, 1989-1997	15
Figure 7: Number of Federal Defendants Authorized for Capital Prosecution, by State, 1998-2009	16
Figure 8: Federal Death-Eligible Cases Studied, 1998-2004.....	19
Table 2: Total Cost for Defense Representation in Federal Capital Cases, 1998-2004	25
Figure 9: Cost Variance in Authorized Capital Cases, Trials vs. Pleas, 1998-2004.....	26
Table 3: Total Case Cost, Spencer Report Compared to Update.....	27
Table 4: Attorney Cost, 1998-2004	28
Table 5: Attorney Hours, Spencer Report Compared to Update	29
Table 6: Attorney In-Court Hours, Spencer Report Compared to Update	30
Table 7: Attorney Out-of-Court Hours, Spencer Report Compared to Update	30
Table 8: Expert Costs, Spencer Report Compared to Update.....	32
Table 9: Transcript Cost Per Defendant, 1998-2004	33

Figure 10: Division of Expert Costs for Trial Cases.....	36
Figure 11: Division of Expert Costs for Plea Cases	37
Table 10: Factors that Predict Increased Case Cost, Bivariate Relationships	39
Table 11: Effect of Attorney General's Decision-Making on Capital Case Length and on Plea vs. Trial	41
Table 12: Cost Drivers in High Cost Capital Trials.....	42
Table 13: Relationship Between Defense Cost and Death Sentence	45
Table 14: Attorneys in Low-Cost and Other Cases	50
Table 15: Regional Variation in Capital Trials by State, 1998-2004	51
Table 16: Outcomes of Federal Death Penalty Trials by Cost, 1998-2004	54
Figure B.1: Number of Federal Capital Defendants Going to Trial/Trials Commencing, by Calendar Year	124
Table B.1: Number of Federal Capital Defendants Going to Trial/Trials Commencing, by Calendar Year	125
Figure B.2: Current Population of Federal Death Row by State and Circuit	126
Figure B.3: Federal Death Sentences in the Modern Era by State and Circuit.....	127
Figure C.1: Median Costs for Defense Representation in Federal Capital Cases, 1998-2004	128
Figure D.1: Estimated Median Costs in 2010.....	129

Executive Summary

It has been more than 10 years since publication of the Spencer Report of the United States Judicial Conference Committee on Defender Services Subcommittee on Federal Death Penalty Cases, which contained findings on the cost, quality, and availability of defense representation in federal death penalty cases. The Subcommittee's recommendations for the judiciary and defense counsel, aimed at containing costs while ensuring high quality defense services in capital cases, were approved by the Judicial Conference in September 1998. At the request of the Defender Services Committee and the Office of Defender Services of the Administrative Office of the U.S. Courts, these issues have been re-examined and the findings updated.

Part I of this report offers an introduction and overview of the research.

Part II examines the way prosecution policies and practices have developed from 1989, the beginning of the modern federal death penalty era, through the end of 2009. Prosecution decisions – whether, where, and how to charge death-eligible cases in the federal courts; whether or not to pursue a sentence of death for an eligible defendant; and how that death penalty “authorization” decision is made – are significant drivers of the cost of defense representation. Among the findings discussed in Part II are the following:

- The 1994 Federal Death Penalty Act vastly increased the number of crimes eligible for capital prosecution, with dramatic effect on the number of cases requiring capital defense services. The impact of this increase was only partially felt by the time the Spencer Report was published in 1998 and has had greater impact in the years since then.
- The process by which the Attorney General decides whether to seek the death penalty for a defendant charged with a capital offense (i.e., “authorizes” capital prosecution for a “death-eligible” defendant) has changed, increasingly removing discretion from local prosecutors and centralizing decisionmaking in the Department of Justice. Among other things, this has resulted in more defendants being authorized for capital prosecution without the request of local prosecutors.

- A higher proportion of authorized cases has been proceeding to trial rather than reaching settlement through a plea agreement.
- As the Justice Department has sought to nationalize the federal death penalty, more capital cases have been authorized in states that historically did not prosecute many (or any) capital cases in state court.
- Since 1989, the Attorney General has sought the death penalty against approximately 463 federal defendants. Approximately 262 of those defendants have stood trial, and 66 individuals, or approximately one quarter of those tried, have received a sentence of death.

Parts III, IV, and V of this report discuss the costs associated with defending a federal capital case. All authorized federal death penalty representations furnished by panel attorneys that began and ended between 1998 and 2004 were examined, along with a sample of cases in which the defendant was eligible for capital prosecution but the case was not authorized. Cost and other quantitative data from those cases were collected and analyzed to determine the factors that influence defense costs.

Among the findings are:

- The median cost of a case in which the Attorney General authorized seeking the death penalty was nearly eight times greater than the cost of a case that was eligible for capital prosecution but in which the death penalty was *not* authorized.
- The median cost of a case that was authorized and went to trial was more than twice the cost of a case that was authorized but resolved through a plea agreement.
- The cost of defending cases has increased substantially since the 1998 Spencer Report. Numerous factors likely account for this increase, including inflation, a higher degree of complexity in the cases, legal developments heightening obligations on counsel, expanded areas of litigation, advances in forensic science, as well as the geographic location where prosecutions are brought.

The following chart summarizes median defense costs in cases between 1998 and 2004:

Median Costs for Defense Representation by Panel Attorneys in Federal Capital Cases, 1998-2004

Type of Case	Total Cost	Attorney Cost	Attorney Total Hours	Attorney In-Court Hours	Attorney Out-of-Court Hours	Expert Cost	Transcript Cost
Death Eligible, Not Authorized	\$44,809	\$42,148	436	34	350	\$5,275	\$210
Authorized	\$353,185	\$273,901	2,014	306	1,645	\$83,029	\$5,223
Trials	\$465,602	\$352,530	2,746	353	2,373	\$101,592	\$10,269
Pleas	\$200,933	\$122,772	1,028	42	992	\$42,049	\$82

It should be noted that the figures in this chart are medians, and therefore the subparts do not sum to the whole (e.g., attorney in-court and out-of-court hours cannot be added to yield attorney total hours, and so on). In addition, it should be noted that the maximum hourly rate of compensation in capital cases for panel attorneys during the period of the study was \$125. The maximum hourly rate effective January 1, 2010, is \$178.

This section of the report also takes a closer look at the cases at the high and low end of the cost continuum, finding that:

- As a group, the highest cost cases (top 20 percent) were distinguishable from the group of all other cases based on the presence of a number of factors associated with higher costs. In general, in the higher cost cases there were more offenses alleged and a greater number of defendants and victims, and these cases also were more likely to include complex conspiracy-related charges, such as Continuing Criminal Enterprise (CCE), Racketeering Influenced and Corrupt Organizations Act (RICO), and terrorism-related offenses, as well as allegations of “future dangerousness” of the defendant. In addition, the group of highest cost cases generally was more likely to involve, singly or in combination, such factors as geographically far-ranging investigations, non-English speaking persons, diverse cultures, and complex issues of mental health or forensic science. In contrast, an absence of the aforementioned cost-increasing factors did not distinguish the group of low-cost cases (lowest 30 percent) from the group of all other cases.
- There was a strong association between a lower cost defense representation and an increased likelihood of a death sentence at trial. For trial cases in which defense spending was among the lowest one-third of all trial cases, the rate of death sentencing was 44 percent. For trial cases in which defense resources were in the remaining two-thirds of cost, the likelihood of a death sentence was 19 percent. Thus, the lowest cost cases were more than twice as likely to yield sentences of death.

- Geography and state court death penalty practices appear to be significantly correlated both with defense cost and with the likelihood of a death sentence at trial. There was a strong association between the state in which a prosecution was brought and the likelihood of a death sentence.

Section VI describes qualitative data obtained through interviews of federal judges who had presided over a federal death penalty case and experienced federal capital defense counsel on topics such as the quality of defense representation, case budgeting and case management practices, the role of experts, and the death penalty authorization process.

Reported findings include the following:

- Judges expressed satisfaction with the quality and availability of defense counsel, while lawyers identified some concerns about the quality of representation.
- Judges voiced concern about the length of time that passes before a decision is made by the Attorney General regarding whether or not a case will be authorized for capital prosecution, and lawyers highlighted concerns about the lack of deference to the wishes of local U.S. Attorneys, particularly when the prosecution and defense have arrived at a mutually acceptable plea agreement.
- The assistance of the Federal Death Penalty Resource Counsel Project and an expansion to include separate projects for trial, appellate, and post-conviction cases was viewed favorably by lawyers and judges, who found the services to be helpful.
- Case budgeting is now the norm in federal death penalty trials, and the process is valued by both judges and lawyers.
- Expert services, including expert witnesses, investigators, and all services other than counsel, are a significant component of capital defense costs.
- Federal capital trials are extremely complex from a case management perspective. They consume enormous amounts of time and other resources and also exact a significant emotional toll on all participants. Particular areas of focus were court practices relating to severance, discovery, and jury selection.

Finally, in Sections VII and VIII, the Recommendations of the 1998 Spencer Report are reaffirmed, and the Commentary associated with those recommendations is updated to reflect the past 12 years of experience with federal capital litigation. The Recommendations suggest strategies to contain costs while ensuring the high quality of defense representation that

capital cases demand. They address areas including qualifications for appointed counsel, case management and case budgeting, the number of appointed counsel, appointment of federal defender organizations, and death penalty training programs. Updated Commentary addresses numerous areas, including:

- The skills and experience required for capital defense counsel at trial, on appeal, and in post-conviction, and what is meant by the policy that capital defense counsel have “distinguished prior experience” in capital representation.
- The benefits of appointing new counsel on appeal.
- The need for courts to consult with the district’s federal defender organization or the Administrative Office of the U.S. Courts with respect to each capital case, and the availability of Resource Counsel to assist in this process at every stage of litigation.
- The potential benefits of relying on federal defender organizations to provide representation in capital cases where appropriate resources are available.
- Encouragement for communication between the judiciary and the Department of Justice about federal death penalty policies and practices that may enhance efficiency and cost savings.
- Case management practices, such as approaches to discovery, that are intended to have a beneficial impact on defense costs.

The 1998 Spencer Report remains pertinent today. It is a helpful primer on the distinguishing characteristics of a federal death penalty case and the unique demands these cases place on counsel. Its Recommendations, likewise, remain sound. The following report builds on the Spencer Report’s foundation, providing a more current view of federal capital practice, more recent data on the cost of defense representation, and additional ideas on cost containment.