

Six Things Counsel Should Keep in Mind When Seeking Due Process Costs to Be Paid Through JAC

1. With limited exceptions, court authorization is required prior to Counsel incurring due process costs.

Except where JAC has indicated prior court approval is not required, due process costs must be authorized through court order. The motion should be filed and resolved prior to the defense incurring the costs. A written motion seeking authorization to incur costs must be filed with the trial court with service on JAC prior to the trial court considering the motion. JAC is entitled to reasonable notice, typically at least five business days, of any hearing set on a motion for due process costs.

2. JAC has standing to participate in the proceedings on a motion seeking authorization for due process costs.

Counsel must serve a copy of the written motion along with any attachments upon JAC prior to the court considering the motion. JAC has standing to contest the authorization for any due process costs and the amount of said due process costs. JAC will respond to any motion for due process costs typically within five business days following receipt of the motion. JAC's response will indicate whether JAC desires a hearing on the motion.

3. The motion needs to set forth the basis for the requested due process costs.

The defense has the burden to establish that the requested due process costs are reasonable and necessary to the defense of the case. If Counsel is seeking the services of a private investigator, mitigation specialist, or expert, then Counsel needs to establish the particularized need for the services. In particular, Counsel needs to show how the failure to provide the services would prejudice the defense of the case. In essence, Counsel needs to provide sufficient information in the motion so that the court and JAC can assess the reasonableness of the requested service.

4. The motion should indicate the estimated amount needed for the requested due process services and the applicable rates for those services.

With the exception of costs associated with the taking of depositions such as appearance fees, service of process fees, and transcripts, the motion should indicate the estimated amount needed for the requested due process services. The amount

requested should be based upon a reasonable estimate of the amount necessary for the service at issue.

The rates authorized for due process services are posted on JAC's website. For court reporting and investigator services, the legislature has established uniform statewide rates. For other services, the rates vary for each circuit. Current rate charts are posted on JAC's website. If Counsel is seeking an hourly rate in excess of the established rates or if there is no rate set for the type of service, then the motion also needs to indicate the rate requested for the services. The motion should also set forth the diligent efforts Counsel made to procure services within the established rates and any other allegations that may justify services in excess of those rates.

5. The order should reflect the maximum amount authorized for the authorized due process services and the rates authorized for those services.

As a general rule, the order authorizing due process costs needs to contain sufficient information for JAC to process a billing for payment. With the exception of costs associated with the taking of depositions, the order should indicate the maximum amount authorized by the court for the due process services. This amount should be based upon the estimated amount needed for the service as set forth in the motion for due process costs. Additionally, if the court is authorizing a rate in excess of the established rates or if there is no rate established for the service, then the order must reflect the rate authorized by the court. JAC cannot pay any rate in excess of the established rates without court approval. If the order reflects the amount authorized for a due process service and the rates authorized for that service, then JAC can pay a billing from the due process provider without the need for further court order as long as the billing comports with the terms of the order as well as any statutory or contractual requirements.

6. If the due process provider will exceed the amount authorized, then Counsel needs to file a motion seeking authorization for additional funds.

Counsel should inform the due process provider of the amount authorized for the provider's services. When the amount is exhausted, the provider should immediately notify Counsel if additional services are required so that the attorney can take appropriate action. Upon exhaustion of the amount authorized, Counsel should file a motion to authorize additional services prior to the due process provider providing any additional services in the matter. The motion and order thereto should reflect the additional amount to be authorized. As with any other motion for due process costs, the motion seeking authorization for additional funds needs to be served on JAC prior to the court considering the motion.