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ROSENFELD V. WILKINS

The Criminal Justice Act of 1964¹ (CJA) provides appointed counsel to indigent defendants accused or convicted of certain federal crimes and governs payment of private attorneys who accept such appointments.² The CJA requires the government to compensate appointed attorneys for time reasonably expended and allows the government to reimburse the attorneys for costs and expenses reasonably incurred.³ At the close of representation, the attorney may submit a claim for compensation and reimbursement to each court in which the attorney appeared on behalf of the client.⁴ Each court that receives a claim ultimately determines the compensation that the government will pay.⁵

In response to the CJA's requirement that all federal courts implement the CJA,⁶ the Judicial Conference of the United States⁷ publishes guidelines for the creation and maintenance of plans to implement the CJA.⁸ The Fourth Circuit's judicial council has used the guidelines to develop a plan for implementing the CJA (CJA Plan).⁹ Under the CJA Plan, counsel must "submit a voucher for compensation and reimbursement" to the Clerk of Court within sixty days of the final disposition of the case.¹⁰ The Clerk of Court initially determines the amount to be paid, but it is the chief judge who ultimately approves that amount by signing the voucher and forwarding it to the court's Administrative Office for payment.¹¹

The CJA is silent as to the availability of judicial review of the compensation determination.¹² Likewise, for many years the Fourth Circuit did not provide for judicial review of the determination of CJA attorneys' fee

1. 18 U.S.C. § 3006A (2006).

2. *See id.* § 3006A(a)–(d).

3. *Id.* § 3006A(d)(1).

4. *See id.* § 3006A(d)(5).

5. *See id.*

6. *See id.* § 3006A(a).

7. The Judicial Conference is a body of judges whose "fundamental purpose . . . is to make policy with regard to the administration of the U.S. courts." Judicial Conference of the United States, <http://www.uscourts.gov/judconf.html> (last visited May 17, 2009). The Judicial Conference comprises the Chief Justice of the United States, "the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit" who meet annually to make such decisions. 28 U.S.C. § 331 (2006).

8. *Rosenfield v. Wilkins*, 280 F. App'x 275, 277 (4th Cir. 2008).

9. *See* JUDICIAL COUNCIL OF THE FOURTH CIRCUIT, PLAN OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN IMPLEMENTATION OF THE CRIMINAL JUSTICE ACT 1 (2008), available at <http://www.ca4.uscourts.gov/pdf/CJAPlan.pdf> [hereinafter CJA PLAN]. The Fourth Circuit recognizes that "the 'judicial council' in each circuit is a policy-making body responsible for 'mak[ing] all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit.'" *Rosenfield*, 280 F. App'x at 277 n.3 (alteration in original) (quoting 28 U.S.C. § 332(d)(1) (2006)). Each federal circuit has a judicial council, which consists of the circuit's chief judge "and an equal number of circuit judges and district judges of the circuit." 28 U.S.C. § 332(a)(1).

10. CJA PLAN, *supra* note 9, pt. VI(1), at 7.

11. *Id.*

12. *See Rosenfield*, 280 F. App'x at 278.

payments.¹³ However, in March 2006, the Judicial Conference approved a CJA guideline requiring that “[i]f the court determines that a claim should be reduced, appointed counsel should be provided (a) prior notice of the proposed reduction with a brief statement of the reason(s) for it, and (b) an opportunity to address the matter.”¹⁴ This language simultaneously became part of the CJA Plan for the Fourth Circuit.¹⁵

In *Rosenfield v. Wilkins*,¹⁶ the United States Court of Appeals for the Fourth Circuit held that former Chief Judge William W. Wilkins had not violated the procedural due process rights of a private, court-appointed attorney when he reduced the attorney’s CJA fee award without explanation or an opportunity for the attorney to appeal the reduction.¹⁷ However, during the pendency of the case, the court’s administrative machinery provided guidance for attorneys seeking review of court-reduced CJA fee awards in the future.¹⁸

The Fourth Circuit appointed Steven Rosenfield to represent an indigent death row inmate from Virginia in federal habeas corpus petitions on appeal before the Fourth Circuit as well as in a clemency petition to the Governor of Virginia.¹⁹ After concluding the representation in 2003, Rosenfield submitted a voucher to the Fourth Circuit’s clerk requesting compensation of \$35,456.25, in accordance with the practice and statutory rates in place at the time.²⁰ The Circuit Executive’s Office reviewed the voucher, as did the three-judge panel that heard the appeal of Rosenfield’s client.²¹ That panel then forwarded its recommendations to Chief Judge Wilkins.²² The chief judge issued a summary order approving payment for \$10,000.²³ Without explanation, the Fourth Circuit denied Rosenfield’s petition for an en banc review of the fee award.²⁴

In December 2005, Rosenfield sued Chief Judge Wilkins in the United States District Court for the Western District of Virginia, alleging that the Fourth Circuit’s CJA attorney compensation procedures in effect when Rosenfield submitted his voucher violated his Fifth Amendment right to procedural due process because the court reduced his compensation below the amount requested “without (1) an explanation of why the request was not paid in full, (2) notice as

13. *See id.*

14. *Id.* (alteration in original) (quoting JUDICIAL CONFERENCE OF THE U.S., GUIDELINES FOR THE ADMINISTRATION OF THE CRIMINAL JUSTICE ACT AND RELATED STATUTES, 7 GUIDE TO JUDICIARY POLICIES AND PROCEDURES § 2.22(E), http://www.uscourts.gov/defenderservices/Chapter_2.cfm#222 (last visited May 2, 2009)).

15. *See* CJA PLAN, *supra* note 9, pt.VII(1), at 9 (providing that the CJA Plan automatically incorporates the CJA rules adopted by the judicial conference).

16. 280 F. App’x 275 (4th Cir. 2008).

17. *Id.* at 283–84.

18. *Id.* at 278 (quoting JUDICIAL CONFERENCE OF THE U.S., *supra* note 14, § 2.22(E)).

19. *Id.* at 278.

20. *Id.* (citing 21 U.S.C. § 848(q)(10)(A) (1988) (repealed 2006)).

21. *Id.* at 278.

22. *Id.*

23. *Id.* at 278–79.

24. *Id.* at 279.

to what work would or would not be compensated, and (3) rules or procedures permitting a lawyer to seek review of the amount awarded.”²⁵ Rosenfield sought an injunction requiring the Fourth Circuit to implement procedural safeguards like those adopted by the Judicial Conference. Rosenfield also asked for reconsideration of his voucher under these new procedures.²⁶

Chief Judge James B. Loken of the United States Court of Appeals for the Eighth Circuit accepted an intercircuit assignment to act as the district court judge.²⁷ Chief Judge Wilkins moved for dismissal, arguing that Rosenfield failed to state a claim upon which relief could be granted.²⁸ The district court granted the motion, finding that because Rosenfield did not have a property right to the specific amount of attorneys’ fees he requested, he had no due process cause of action.²⁹ Rosenfield appealed the dismissal to the Fourth Circuit.³⁰

The Fourth Circuit affirmed the dismissal on the ground that Rosenfield’s demand for prospective injunctive relief was moot,³¹ thus avoiding the question of whether the CJA creates a property interest in compensation for appointed attorneys.³² Judge Allyson Duncan, writing for a unanimous panel, summarized Rosenfield’s suit as a complaint that the Fourth Circuit did not “publish[] standards governing fee awards” or provide “rules or procedures for seeking an explanation of the reasons for the amount awarded or review of the chief judge’s decision” and as a demand for such notice and review.³³ The court found that the notice and review requirements of section 2.22(e) of the amended CJA Guidelines, which the Fourth Circuit’s judicial council adopted and incorporated into the CJA Plan *after* Rosenfield filed his complaint, satisfied Rosenfield’s demands.³⁴ The court concluded that a decision on the merits would be meaningless and dismissed Rosenfield’s request for an injunction requiring the Fourth Circuit to promulgate new rules.³⁵

25. *Id.*

26. *Id.*

27. *Id.* The district court judge initially assigned the case, concerned about the possible impropriety of hearing a case pertaining to a judge who regularly heard appeals from his court, recused himself. *Id.*

28. *Id.*; see *Rosenfield v. Wilkins*, 468 F. Supp. 2d 806, 809 (W.D. Va. 2006), *aff’d*, 280 F. App’x 275 (4th Cir. 2008); see also FED. R. CIV. P. 12(b)(6) (allowing for the dismissal of a complaint when the allegations do not state a claim for relief).

29. *Rosenfield*, 468 F. Supp. 2d at 811. Chief Judge Loken stated that the CJA did not create a protected property interest, indicate an entitlement to the compensation, or meaningfully limit the Fourth Circuit’s discretion in deciding the amount of compensation. See *id.* at 810–11.

30. *Rosenfield*, 280 F. App’x at 276.

31. *Id.* at 282–83.

32. See *id.* at 283 n.11.

33. *Id.* at 282.

34. *Id.* Interestingly, the court supported this finding in part by relying on Rosenfield’s reply brief, which stated that section 2.22(e) “‘could well have been drafted by Rosenfield.’” *Id.* (quoting Reply Brief of Petitioners-Appellants at 6, *Rosenfield v. Wilkins*, 280 F. App’x 275 (4th Cir. 2008) (No. 06-2182)).

35. See *id.* (quoting *Nationwide Mut. Ins. Co. v. Burke*, 897 F.2d 734, 739 (4th Cir. 1990)).

The court then analyzed Rosenfield's demand for reconsideration of his voucher according to section 2.22 under the factors of *Mathews v. Eldridge*,³⁶ stating that the level of process constitutionally required for a matter "depends upon (1) the nature of the private interest, (2) the adequacy of the existing procedure in protecting that interest, and (3) the governmental interest in the efficient administration of the applicable law."³⁷ First, even assuming that a court-appointed CJA attorney has a property interest in compensation, the interest would be in reasonable compensation as determined by the voucher-reviewing court, not the amount of compensation requested by the attorney.³⁸ Second, the purpose of the CJA Plan's explanation requirement is to assist an attorney in responding to a court's initial fee determination.³⁹ Although Rosenfield never received an explanation for the reduction,⁴⁰ the court reasoned that because Rosenfield's requests for rehearing and en banc consideration featured "extensive[ly] detail[ed]" arguments on the nature of CJA fee awards and due process rights, contemporaneous explanation of the reduction would not have protected his constitutional interests any more than did his own subsequent litigation research.⁴¹ Finally, because Rosenfield had already received notification of his fee reduction and made two substantive challenges to the reduction, the court concluded that, effectively, Rosenfield had already received an opportunity to address the chief judge's determination, even though section 2.22(e) was not in effect when Rosenfield filed for attorneys' fees.⁴² Any opportunities Rosenfield would have had under section 2.22(e) were not substantially different from the courses of action that he had already pursued.⁴³ The Fourth Circuit thus held that Rosenfield had "already received sufficient process" under the CJA Plan, and accordingly denied his request for reconsideration.⁴⁴

The overall import of *Rosenfield* as it relates to the issue of CJA attorneys' fees is that "CJA attorneys . . . will enjoy the procedural protections articulated in § 2.22 for the able service they provide in [the Fourth Circuit] going forward."⁴⁵ When challenging reductions in compensation, attorneys can reference *Rosenfield* for an understanding of their right to appeal, rather than

36. 424 U.S. 319 (1976).

37. *Rosenfield*, 280 F. App'x at 284 (citing *Mathews*, 424 U.S. at 335).

38. *Id.* at 284.

39. *Id.*

40. *See id.* at 283.

41. *See id.* at 284.

42. *See id.* ("[R]econsideration of Rosenfield's voucher under the new rules would serve no useful purpose.").

43. *See id.*

44. *Id.*

45. *Id.* at 282.

searching the CJA Plan and the CJA Guidelines.⁴⁶ Furthermore, the Fourth Circuit's opinion provides some clarification of section 2.22(e). For example, the availability of a motion for reconsideration and petition for en banc review constitutes an adequate opportunity to challenge the reduction.⁴⁷ Likewise, the court found that the chief judge's order provides sufficient notice of the fee reduction.⁴⁸

Unfortunately, *Rosenfield* left several questions unanswered. The court avoided answering the underlying question of what constitutes an adequate brief statement of the reasons for fee reduction by concluding that the court's statement could not have provided Rosenfield with any more information than he had already set forth in his brief requesting a rehearing and en banc review.⁴⁹ However, if attorneys read Rosenfield's briefs for guidance, his arguments only provide an example of what might constitute an adequate response to a notice of reduction in fees—not what actually constitutes notice.⁵⁰

Moreover, the court's conclusion implies that if Rosenfield's arguments had been less detailed or poorly constructed, he may actually have been entitled to further explanation from Chief Judge Wilkins upon issuance of the fee order.⁵¹ This self-notification test creates an unworkable standard for both lawyers and the Fourth Circuit in future award challenges. Attorneys appealing fee denials or reductions on the basis of failure to follow section 2.22(e) could lose their appeals by preparing their arguments too well because they provided what amounts to explanations after the fact; likewise, future chief judges could arguably have their fee award orders successfully overturned for inadequate explanation simply because the appealing attorney prepared a poor appeal.

These problems are complicated by the fact that *Rosenfield* appears to be the only case addressing this issue in any court within the Fourth Circuit since adoption of section 2.22(e). Because of the summary nature of both Chief Judge Wilkins's initial reduction order and the Fourth Circuit's eventual affirmation of that order, lawyers lack guidance as to what types of expenditures and services will qualify for payment under the CJA and, more importantly, will be approved by courts in the Fourth Circuit. Attorneys are not entirely without guidance, however, as other federal courts have provided some examples. Several opinions issued after the promulgation of section 2.22(e) reveal a variety of reasons courts have cited for fee reduction, including spending excessive time on legal

46. Practitioners should note, though, that *Rosenfield* is merely persuasive authority. 4TH CIR. R. 32.1 (noting that the Fourth Circuit “disfavor[s]” citations to unpublished opinions issued prior to 2007).

47. See *Rosenfield*, 280 F. App'x at 284.

48. See *id.* at 283.

49. *Id.* at 284.

50. See Reply Brief of Petitioners-Appellants, *supra* note 34, at 1–14; Opening Brief of Petitioners-Appellants at 11–29, *Rosenfield v. Wilkins*, 280 F. App'x 275 (4th Cir. 2008) (No. 06-2182).

51. *Rosenfield*, 280 F. App'x at 284.

research,⁵² case organization,⁵³ drafting,⁵⁴ or document review;⁵⁵ overestimating travel time⁵⁶ or distance;⁵⁷ submitting illegible time sheets;⁵⁸ submitting vague descriptions of work done;⁵⁹ and including alcohol in food expenses.⁶⁰ Likewise, courts often state their grounds for paying attorneys the full amount requested.⁶¹ Using cases like these to fill in the gaps left by section 2.22(e) and *Rosenfield*, attorneys in the Fourth Circuit appointed under the CJA can create a framework of persuasive authority to guide them in their planning of indigent representation expenditures and in challenging CJA fee award reductions.

The Judicial Conference and the Fourth Circuit adopted section 2.22(e), which sets forth the very procedures *Rosenfield* wanted, only after *Rosenfield* filed suit against the court itself.⁶² If the two events are not merely a coincidence, *Rosenfield* unofficially marks an improvement in procedural protections for attorneys in the Fourth Circuit seeking compensation for their services as CJA defense counsel. If, however, the timing of the amendment to the CJA Plan was a mere coincidence, *Rosenfield* still has value as a rough illustration of the application of section 2.22(e). As for the court's unusual suggestion regarding the relation of an attorney's arguments on review to the adequacy of notice previously provided by the court,⁶³ the Fourth Circuit should seek an opportunity to clarify its conclusions in *Rosenfield* and provide a clearer example of the CJA Plan's new requirements for compensating attorneys appointed under the CJA.

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52. See *United States v. Mukhtaar*, No. 06 Cr. 31 (SWK), 2008 WL 2151798, at *5 (S.D.N.Y. May 21, 2008); *United States v. Sepulveda*, 502 F. Supp. 2d 1104, 1109–10 (D. Mont. 2007).

53. See *Sepulveda*, 502 F. Supp. 2d at 1109–10.

54. See *Mukhtaar*, 2008 WL 2151798, at *5; *United States v. Jones*, No. 06-14049-CR, 2007 WL 3197654, at *2 (S.D. Fla. Oct. 29, 2007); *Sepulveda*, 502 F. Supp. 2d at 1110.

55. See *Jones*, 2007 WL 3197654, at *2; *Sepulveda*, 502 F. Supp. 2d at 1110.

56. See *United States v. Bernal-Benitez*, No. 07-20563-CR, 2008 WL 877216, at *4 (S.D. Fla. Apr. 1, 2008); *Jones*, 2007 WL 3197654, at *2.

57. See *Bernal-Benitez*, 2008 WL 877216, at *2.

58. See *Mukhtaar*, 2008 WL 2151798, at *5.

59. See *id.*

60. See *Sepulveda*, 502 F. Supp. 2d at 1110 (denying attorney's attempt to bill the court for three bottles of wine).

61. See, e.g., *United States v. Villafuerte*, No. 07-20563-CR, 2008 WL 2127992, at *2–4 (S.D. Fla. May 20, 2008) (approving full reimbursement for time spent on discovery, legal research, and client interviews); *United States v. Campuzano*, No. 06-14035-CR, 2007 WL 2462004, at *1 (S.D. Fla. Aug. 27, 2007) (approving full reimbursement of a CJA voucher for attorney's fees and costs).

62. See Reply Brief of Petitioners-Appellants, *supra* note 34, at 6; see also JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 15–16 (2006) (changing reduction procedures to require notice of reduction, a brief explanation for the reduction, and the opportunity to address the concerns motivating the reduction); *supra* note 15 and accompanying text.

63. *Rosenfield v. Wilkins*, 280 F. App'x 275, 284 (4th Cir. 2008).