

USAM (superseded)



United States Attorneys' Manual

Justice Management Division

Title 3

USAM (superseded)

FOR USE OF ADMINISTRATIVE OFFICER

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UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

SUMMARY TABLE OF CONTENTS

3-1.000	<u>INTRODUCTION</u>
3-2.000	<u>WITNESSES</u>
3-3.000	<u>MEDICAL EXAMINATIONS: PHYSICAL AND PSYCHIATRIC</u>
3-4.000	<u>EXPUNGEMENT OF RECORDS UNDER 21 U.S.C. §844(b)</u>
3-5.000	<u>REMOVAL AND MAINTENANCE OF DOCUMENTS</u>
3-6.000	<u>AUTOMATED INFORMATION SYSTEMS POLICIES</u>
3-7.000	<u>DEPARTMENT OF JUSTICE IDENTIFICATION DOCUMENTS</u>

USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL
TITLE 3—JUSTICE MANAGEMENT DIVISION

FORM FOR RECORDING INSERTION
OF MANUAL TRANSMITTALS
TITLE 3--JUSTICE MANAGEMENT DIVISION

NUMBER	CHAPTER(S)	DATE OF TEXT	INSERTED BY	DATE
B-1				
B-2				
B-3				
B-4				
B-5				
B-6				
B-7				
B-8				
B-9				
B-10				
B-11				
B-12				
B-13				
B-14				
B-15				
B-16				
B-17				
B-18				
B-19				
B-20				

Request Manual Transmittals from your Administrative Officer
For use of Manual holders
FORM AAA-3

USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL
TITLE 3—JUSTICE MANAGEMENT DIVISION

DETAILED
TABLE OF CONTENTS
FOR CHAPTER 1-

	<u>Page</u>
3-1.000 <u>INTRODUCTION</u>	1

USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

3-1.000 INTRODUCTION

This Title contains general administrative instructions and guidance prepared by the Justice Management Division, Department of Justice. The contents of this Title represent a summarization of Orders which have been issued as part of the Administrative Directives System. Specifically, the directives from which the contents of this Title have been derived consist of DOJ Orders, which are initiated by the Justice Management Division and apply to the Department as a whole and OBD Orders, which are initiated by the Justice Management Division and apply to U.S. Attorneys' offices. The prefix "OBD" precedes the identification number on these directives.

Title 3 contains a concise narrative explanation of directives pertaining to the following areas:

Witnesses
Medical Examinations
Expungement of Records Under 18 U.S.C. §844

Those topics not summarized herein are covered in the Administrative Directives Systems discussed in other Titles of this Manual. If you desire further information concerning the three subject areas listed above or are taking action in areas not covered in this Title or elsewhere in the Manual, you are advised to obtain and review carefully the pertinent Administrative Directives.

USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

DETAILED
TABLE OF CONTENTS
FOR CHAPTER 2

	<u>Page</u>
3-2.000 <u>WITNESSES</u>	1
3-2.100 REGULAR WITNESSES	1
3-2.110 <u>General</u>	1
3-2.111 Pre-Appearence Interviews	1
3-2.112 Subpoenas	1
3-2.120 <u>Fees</u>	2
3-2.121 Allowances	2
3-2.122 Advances	3
3-2.130 <u>Certificate of Attendance and Payment</u>	3
3-2.200 WITNESS'S EXPENSES INCURRED ON BEHALF OF INDIGENT PERSONS	4
3-2.210 <u>Responsible Payor</u>	4
3-2.300 WITNESSES RESIDING OUTSIDE UNITED STATES	9
3-2.310 <u>U.S. Citizens and Alien Residents</u>	
<u>Abroad</u>	9
3-2.311 Subpoena	9
3-2.312 Witness' Fees	10
3-2.320 <u>Foreign National Residing in Foreign</u> <u>Countries</u>	10
3-2.321 Obtaining Attendance	10
3-2.322 Fees	11
3-2.330 <u>Sample Court Orders</u>	12
3-2.331 When a Transportation Request is to be Tendered	12
3-2.332 When Cash is to be Tendered	13
3-2.400 FEDERAL GOVERNMENT EMPLOYEES AS WITNESSES (NON-MILITARY)	14
3-2.410 <u>Subpoena</u>	14
3-2.420 <u>Fees</u>	14

UNITED STATES ATTORNEYS' MANUAL
TITLE 3—JUSTICE MANAGEMENT DIVISION

		<u>Page</u>
3-2.421	Expenses for Travel	15
3-2.422	Procedure for Payment	15
3-2.500	ARMED FORCES WITNESSES	16
3-2.510	<u>Military Personnel</u>	16
3-2.511	<u>Fees and Travel Expenses</u>	17
3-2.520	<u>Civilian Employee of the Armed Forces</u>	17
3-2.600	PRISONERS AS WITNESSES	17
3-2.700	EXPERT WITNESSES	18
3-2.710	<u>General</u>	18
3-2.711	<u>Federal Government Employees as Expert Witnesses</u>	19
3-2.720	<u>FBI Services</u>	19
3-2.730	<u>Name-Check</u>	20
3-2.740	<u>Negotiations</u>	20
3-2.750	<u>Authorization Procedure: Forms OBD-47 and OBD-12</u>	21
3-2.760	<u>Supplemental Requests</u>	22
3-2.770	<u>Procedure for Payment</u>	22
3-2.800	DEPOSITIONS	23
3-2.810	<u>General</u>	23
3-2.820	<u>Letters Rogatory; Depositions; Service of Summons and Other Court Orders to Witnesses Abroad</u>	25

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

3-2.000 WITNESSES

3-2.100 REGULAR WITNESSES

3-2.110 General

General assistance on witness matters is available by calling FTS 633-5785 or writing to the Assistant Attorney General for Administration, Attention: Special Authorizations Unit, Procurement and Contracts Staff, Justice Management Division.

3-2.111 Pre-Appearance Interviews

Neither the U.S. Attorney nor his/her Assistants are empowered to issue subpoenas directing witnesses to appear at the U.S. Attorney's office. United States v. Thomas, 320 F. Supp. 527 (D.C. D.C. 1970). The usual procedure is for the U.S. Attorney to request that the witness appear at the U.S. Attorney's office a few days prior to the witness' scheduled appearance in court. Where the witness is willing to be interviewed prior to his/her scheduled appearance in court, the witness may be compensated. If the interview occurs during the time that the witness is under subpoena, compensation is granted pursuant to 28 U.S.C. §1821. See USAM 3-2.120, infra. If the interview occurs prior to the return date of the subpoena, compensation is granted pursuant to 28 U.S.C. §524. United States v. Thomas, supra. In the latter situation, payment is made on the Form OBD-3 Witness Attendance Fee, Travel and Miscellaneous Expense Claim.

Expenses for travel solely for these interviews, separate from travel to respond to subpoena, are not normally authorized. In exceptional circumstances, however, where such travel is unavoidable, a request must be submitted in advance by completing a Request and Authorization for Fees and Expenses of Witnesses, Form OBD-47. See USAM 3-2.750, infra.

3-2.112 Subpoenas

Praecipies for subpoenas for witnesses are not required by Rule 17(a), Fed. R. Crim. P., and Rule 45(a), Fed. R. Civ. P. Praecipies for subpoenas should not be prepared unless local rules or practice makes their use mandatory. Any praecipies necessary should be prepared by the U.S. Attorney or the Assistant in charge of the case.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3—JUSTICE MANAGEMENT DIVISION

To facilitate service of the subpoena, the proper address of each witness should be obtained. If the witness' office and residence addresses are known they should both be given. The U.S. Marshal should be advised as to the race, height, sex, weight, age, and any unusual mark or identification of the witness so that the proper service may be made from the description given.

3-2.120 Fees

Pub. L. No. 95-535, 92 Stat. 2033 increased the witness allowances provided for in 28 U.S.C. §1821. The fee provided is \$30.00 per day.

Witnesses in the district courts for the District of Guam and the Virgin Islands shall receive the same fees and allowances provided for witnesses in other district courts of the United States.

3-2.121 Allowances

The following miscellaneous rules govern witness fee allowances:

A. Allowances for per diem for travel and attendance require that an overnight stay be involved. These allowances are based upon the allowances payable to government employees.

B. Unusual witness expenses such as babysitting fees, ambulance service, high seasonal accommodations, etc., which cannot be absorbed from witness allowances, require prior approval from the Special Authorization Unit. Application for such approval should be made on Form OBD-47.

C. No constructive or double mileage fees shall be allowed for any person summoned both as a witness and a juror. See 28 U.S.C. §1824.

D. When a witness is subpoenaed in more than one case at the same court, only one travel fee and one per diem compensation shall be allowed for attendance. Both shall be allotted to the case first disposed of, after which the per diem attendance fee alone shall be allotted to the other cases in the order in which they are disposed of.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

E. The appropriation acts provide that no witness is to be paid more than one attendance fee for any one day. This also applies to witnesses before United States Magistrates.

F. Witnesses who reside where the court sits shall not be paid for days on which court is not in session and no service is rendered.

G. No officer of any court of the United States located in any State, Territory or the District of Columbia shall be entitled to witness fees for attendance before any court or magistrate where he/she is officiating. See 5 U.S.C. §5537.

H. The Attorney General has ordered that mileage payable to witnesses shall be computed on the basis of highway distances as stated in any general accepted mileage guide which contains a short-line nation-wide table of distances and which is designated by the Assistant Attorney General for Administration for such purpose. In areas for which no such mileage guide exists, mileage payable under 28 U.S.C. §1821 shall be based on the mode of travel used, the mileage of a usually-traveled route, and distances as generally accepted in that locality.

Since August 1, 1956, U.S. Marshals have used the short-line nation-wide distance tables and maps in the Rand-McNally Standard Highway Mileage Guide. Mileage from residence to the nearest point appearing in the Guide will be computed via the direct highway route.

3-2.122 Advances

It is the responsibility of the U.S. Marshal serving a subpoena or summons to determine whether or not the witness requires an advance in order to attend court. Advances no longer have to be requested or authorized by the U.S. Attorney requesting the appearance of the witness.

3-2.130 Certificate of Attendance and Payment

Form OBD-3 (Witness Attendance Certificate) is a three-part, four copy snap-out form and provides for certification of attendance by the U.S. Attorney for the regular (fact) witness claim for fees and allowances, and for payment of the claim by the appropriate, paying office. Payments are made by the U.S. Marshal for the district in which the trial or hearing is held, or by the Accounting Operations Group, Justice Management Division. The four copies are distributed as follows:

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

A. Original--when paid by U.S. Marshal's office, attach to Standard Form 1156 (Public Voucher for Fees and Mileage) and forward to Accounting with monthly accounts.

B. Green--Retained by paying office for reference.

C. Pink--Retained by witness.

D. Yellow--Retained by office certifying attendance.

3-2.200 WITNESS'S EXPENSES INCURRED ON BEHALF OF INDIGENT PERSONS

Generally, expenses incurred on behalf of indigent persons will be handled in the same manner as expenses incurred on behalf of the government. See USAM 3-2.422, infra.

For certification as to witness fees and expenses, see "Certificate of Attendance and Payment" in USAM 3-2.130, supra.

For stenographic and notarial charges related to depositions, refer to Depositions, USAM 3-2.800, supra.

Expenses pursuant to a court's order allowing witnesses for an indigent under Rule 17(b) may include those of state or federal guards, etc., in producing prisoners under writs of habeas corpus ad testificandum.

3-2.210 Responsible Payor

The enactment of 18 U.S.C. §3006A resulted in changes of responsibility for payment of certain expenses of litigation for persons allowed to proceed in forma pauperis. The chart on the following pages reflects these changes and sets forth the appropriations chargeable for expenses in indigent proceedings:

**Expense Responsibility for Proceedings In Forma Pauperis
Listed Numerically by Controlling Law or Rule**

<u>Controlling Law or Rule</u>	<u>Nature of Expense</u>	<u>Agency & Appropriation Chargeable</u>
(1) <u>18 U.S.C. §3006A(e)</u> <u>Adequate Representation</u> <u>of Defendants - Services</u> <u>Other than Counsel</u> <u>(Criminal Justice Act of</u> <u>1964)</u>	A. <u>Expert Witnesses -</u> Witness fees and expenses	Administrative Office of U.S. Courts. USAM 3-3.110(B), <u>supra</u>
	B. <u>Expert Services -</u> For example: Examination (not at request of U.S. Attorney or Department of Justice attorney) to deter- mine mental responsibility at time of offense. (NOTE: If the purpose of the mental examination is twofold, i.e., to determine competency to stand trial and to determine mental re- sponsibility at the time of alleged offense, the charges shall be shared equally between the Department of Justice and the Administra- tive Office of U.S. Courts.)	Administrative Office of U.S. Courts - USAM 3-3.110(A)(1), <u>supra</u> - USAM 3-3.140, <u>supra</u>
(2) <u>18 U.S.C. §3191</u> <u>Witnesses for Indigent</u> <u>Fugitives</u>	A. <u>Fact Witnesses -</u> Witness fees and expenses	Department of Justice Fees and Expenses of Witnesses
	B. <u>Expert Witnesses -</u> Witness fees and expenses	Administrative Office of U.S. Courts

AUGUST 4, 1983
Ch. 2, p. 5

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

Controlling Law or Rule

Nature of Expense

Agency & Appropriation
Chargeable

(3) 18 U.S.C. §3495
Fees and Expenses of
Counsuls, Counsel,
Interpreters and
Witnesses

A. Fact Witnesses -

Department of Justice
Fees and Expenses of Witnesses

B. Expert Witnesses -
Witness fees and expenses

Administrative Office Of
U.S. Courts

(4) 18 U.S.C. §3503(c)
Depositions to Preserve
Testimony; Rule 15(c),
F.R.Crim.P. Depositions -
Defendant's Counsel and
Payment of Expenses

A. Travel and Subsistence of
indigent and his/her attorney
for attendance at deposi-
tion

1. Requested by indigent

Administrative Office of U.S.
Courts

2. Requested by DOJ Attorney

DOJ - Litigative expenses
upon court order

B. Depositions - Fact Wit-
nesses - Limited to witnes-
ses who might have been com-
pelled under Rule 17(b),
F.R.Crim. P.

1. Deponent's fees and
expenses

Department of Justice Fees
and Expenses of Witnesses

2. Stenographic or notarial
expenses for taking de-
position of subpoenaed
deponent.

Department of Justice
Litigative Expense

C. Depositions - Expert Wit-
nesses Deponent's fees and
expenses

Administrative Office of
U.S. Courts

(5) 18 U.S.C. §4244
Mental Incompetency After
Arrest and Before Trial

Expert Services
Examination to determine mental
competency to stand trial.

Department of Justice Fees
and Expenses of Witnesses.
USAM 3-3.120(C)(1), supra

<u>Controlling Law or Rule</u>	<u>Nature of Expense</u>	<u>Agency & Appropriation Chargeable</u>
(6) 28 U.S.C. §753(f) <u>Reporters</u>	<u>Transcripts -</u> Fees of Transcripts	Administrative Office of U.S. Courts
(7) 28 U.S.C. §1825 <u>Payment of Fees (Habeas Corpus and 2255 Proceed- ings)</u>	<u>Fact Witnesses -</u> Witness fees	Department of Justice Fees and Expenses of Witnesses
(8) 28 U.S.C. §1915 <u>Proceedings In Forma Pauperis</u>	A. <u>Fact Witnesses -</u> See Rule 17(b), Fed.R.Crim.P.; <u>infra Controlling Law or</u> <u>Rule: (11) Subpoena -</u> <u>Defendants Unable to Pay</u>	
	B. <u>Expert Witnesses -</u> See 18 U.S.C. §3006A(e); <u>supra</u> <u>Controlling Law or Rule: (1)</u> <u>Adequate Representation of</u> <u>Defendants - Services Other</u> <u>than Counsel</u>	
	C. <u>Taxation of Costs -</u> Judgment taxing costs	United States not liable
	D. <u>Collection -</u> Of non-prepaid expenses in habeas corpus cases	a. If federal confinement involved - Marshal collects only if costs imposed on petitioner. b. If state confinement involved - Marshal collects from unsuccess- ful party.
(9) 28 U.S.C. §1916 Seaman's/Seawoman's Suits	<u>Collection -</u> Of non-prepaid expenses in Seaman's/Seawoman's Cases	Marshals required to collect at conclusion of case.

<u>Controlling Law or Rule</u>	<u>Nature of Expense</u>	<u>Agency & Appropriation Chargeable</u>
(10) 28 U.S.C. §2250 <u>Indigent Petitioner</u> <u>Entitled to Documents</u> <u>Without Cost (Habeas</u> <u>Corpus)</u>	<u>Documents -</u> Cost of certified copies of documents or parts of record	Administrative Office of U.S. Courts
(11) Rule 17(b), Fed.R.Crim.P. <u>Subpoena - Defendants</u> <u>Unable to Pay</u>	<u>Fact Witnesses -</u> Witness fees and expenses	Department of Justice Fees and Expenses of Witnesses
(12) Rule 28, Fed.R.Crim.P. <u>Interpreters (Court-</u> <u>Appointed)</u>	<u>Interpreter Fees & Expenses</u>	Administrative Office of U.S. Courts, USAM 3-3.110 (D), <u>supra</u>

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

3-2.300 WITNESSES RESIDING OUTSIDE UNITED STATES

See also Deposition, USAM 3-2.820, infra.

3-2.310 U.S. Citizens and Alien Residents Abroad

3-2.311 Subpoena

United States Nationals, and Alien Residents who are in foreign countries and whose status as United States immigrants is unchanged, are subject to subpoena. United States Nationals are citizens of the United States, or persons who, though not citizens, owe permanent allegiance to the United States. Alien Residents are persons who have been lawfully admitted for permanent residence in the United States as United States immigrants in accordance with the immigration laws.

Although 28 U.S.C. §1783 no longer requires that subpoenas be served by consular officers, the State Department has declared its willingness to continue assisting the Department of Justice whenever possible. A subpoena which specifically provides for service by a consular officer will receive expeditious handling.

There will be instances when service will have to be made by one of the alternative methods prescribed by Rule 4(i), Federal Rules of Criminal Procedure, because the country involved (e.g., Switzerland) does not permit foreigners to serve legal documents of any kind. In such instances, the attorney in charge of the case should request special instructions from the Office of the Assistant Attorney General for Administration, Attention: Special Authorizations Unit.

It is important that all U.S. Attorneys and Department attorneys observe the following procedure to insure effective service:

A. Secure a court order in accordance with the above instructions and 28 U.S.C. §1783 at least two weeks prior to trial, if possible.

B. Send the original and one copy of the subpoena and court order to: Office of Special Consular Services, Department of State, Room 4811, New State, Washington, D.C. 20520. That office will send your communication by diplomatic pouch to the appropriate United States Consular Mission, and also transmit disbursing authorization with the subpoena. In your letter of transmittal, advise the consular officer that the return may be made on the subpoena at the bottom or on a separate paper, and indicate where the return should be forwarded.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

C. Send one copy of the court order to the Special Authorizations Unit, to serve as a basis for disbursing authorization.

3-2.312 Witness's Fees

American citizens are entitled to receive compensation for necessary travel to the United States and attendance expenses. The Consular Mission can make such payments directly from Department of Justice funds when effecting service of the subpoena, provided the Special Authorizations Unit, Justice Management Division arranges for disbursing authorization. To guard against possible misuse of large sums of cash and failure of witnesses to appear, it is urged that the cooperation of the court be obtained in drafting court orders to provide for a Government Transportation Request and a ticket for the transportation. See Sample Court Orders, USAM 3-2.330, *infra*. The attendance may be paid in cash with rates prescribed by 28 U.S.C. §1821 for the first day's absence from home. There also may be a cash allowance in an estimated amount for incidental expenses such as transportation to and from terminals.

3-2.320 Foreign Nationals Residing in Foreign Countries

3-2.321 Obtaining Attendance

Since foreign nationals residing in the foreign countries are not subject to the subpoena power of United States Courts, their attendance can be obtained only on a voluntary basis. Obtaining testimony from foreign nationals is often a delicate matter, and care must be taken to avoid offending the sovereignty of the foreign country involved.

When the testimony of employees of foreign governments is needed, the attorney should submit an appropriate request to the Office of Special Consumer Services, Department of State, Washington, D.C. 20520, and communicate directly with the witness of the foreign government. This office will request the United States Consular Mission to obtain the approval of the foreign government concerned. Even though a definite trial date may not be known, certain negotiations can be conducted by the consular officer in advance.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

3-2.322 Fees

The present witness allowances under 28 U.S.C. §1821 are generally acceptable to foreign nationals. Therefore, payment of the statutory rates, subsistence and actual cost of transportation may be made on the basis of the witness attendance certificate, and Form OBD-47 is not necessary. If the witness requires an advance of travel funds from the Embassy or Consulate, the U.S. Attorney should notify the Special Authorization Unit a week in advance, if possible, so that the consular officer can be authorized to furnish a ticket and, if necessary, the first day's witness allowance. The U.S. Marshal of the trial district will be notified of such authorization, so that payments can be adjusted accordingly.

USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

3-2.330 Sample Court Orders

3-2.331 When a Transportation Request is to be Tendered

UNITED STATES DISTRICT COURT
DISTRICT OF

UNITED STATES OF AMERICA,

v.

_____, Defendant.

ORDER

Upon the affidavit of _____, Assistant United States Attorney
for the _____ District of _____, sworn to this _____
day of _____ it is

ORDERED that a subpoena issue, in accordance with the provisions
of Section 1783, Title 28, United States Code, as revised, (and Rule 17(e)
(2) of the Federal Rules of Criminal Procedure), to the United States
Consular Officer in _____ commanding _____ to appear on the
_____ day of _____ before the United States District Court for the
_____ District of _____, Room _____, United States Courthouse, _____
(and, to produce _____ records) 1/, and it is

FURTHER ORDERED that the United States Consular Officer in _____
be and he/she hereby is directed to serve said subpoena and a copy of the
order upon _____ and upon serving said subpoena tender a Government
Transportation Request for coach air-fare for () one-way or () roundtrip
between _____ and _____ and \$40. 2/, constituting
the amount necessary for travel expenses to and from terminals and for one
day's attendance.

Dated:

U.S.D.J.

1/ Insert if applicable.

2/ Suggested amount - 1 day at \$30, plus \$10 for transportation to and from
terminals.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

3-2.332 When Cash is to be Tendered

UNITED STATES DISTRICT COURT
DISTRICT OF

UNITED STATES OF AMERICA,

v.

_____, Defendant.

ORDER

Upon the affidavit of _____, Assistant United States Attorney for the District of _____, sworn to this _____ day of _____ it is

ORDERED that a subpoena issue in accordance with the provisions of Section 1783, Title 28, United States Code, as revised, (and Rule 17 (E) (2) of the Federal Rules of Criminal Procedure), to the United States Consular Officer in _____ commanding _____ to appear on the _____ day of _____ before the United States District Court for the _____ District of _____, Room _____, United States Courthouse, (and to produce _____ records) 1/, and it is

FURTHER ORDERED that the United States Consular Officer in _____ be and he/she hereby is directed to serve said subpoena and a copy of the order upon _____ and upon serving said subpoena tender to \$ _____ cash for a ticket at the coach air-fare rate available for () one-way or () round trip between _____ and _____, and \$40. 2/, constituting the amount necessary for traveling expenses to and from terminals and for one day's attendance. Affiant has been informed by experienced travel counsel of the (name of travel office) that the actual expense of travel by _____ at _____ rate between _____ and _____ is \$ _____.

Dated:

U.S.D.J.

1/ Insert if applicable.

2/ Suggested amount - 1 day at \$30, plus \$10 for transportation to and from terminals.

AUGUST 4, 1983
Ch. 2, p. 13

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

3-2.400 FEDERAL GOVERNMENT EMPLOYEES AS WITNESSES (NON-MILITARY)

3-2.410 Subpoena

Marshals have been instructed that expenses of travel and subsistence solely for the purpose of serving subpoenas upon government officers, agents or employees should not be incurred. The U.S. Attorney may be called upon by the Marshal to have said subpoenas delivered by mail directly to the officer whose attendance is desired, or in the case of agents or other employees, to the head of the office in which they are employed, in sufficient time to enable them to acknowledge the receipt of the subpoenas and to reach the place at which their attendance is desired at the time specified. Form No. USA-150 may be used in lieu of subpoena at the discretion of the U.S. Attorney. Its use should be limited to investigative personnel who have worked on the case. When used, it should be forwarded in duplicate to the prospective witness.

A. Special Agents of the FBI and federal government agents generally should not be subpoenaed from distant points unless their testimony is material and there is every reason to believe that there will be no postponement of the trial. Contact your local FBI office when FBI witnesses are needed.

B. Federal government employees stationed in Washington but needed for testimony in other districts should be secured in the same manner as armed forces witnesses outside the district, i.e., by submission of Form No. OBD-16. See USAM 3-2.510, infra. A subpoena may be mailed directly to the witness at the same time the request is submitted to the Department.

C. Federal government employees stationed outside Washington may be secured by the U.S. Attorney through direct communication (preferable) with witness or subpoena. The employing agency should be requested to supply any necessary travel advance.

3-2.420 Fees

Federal government employees shall not be paid witness's fees but the period of such service shall be without loss of salary or compensation and shall not be deducted from any authorized leave of absence with pay. 5 U.S.C. §§5537 and 6322.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

3-2.421 Expenses For Travel

Any officer or employee of the United States or any agency thereof, summoned as a witness on behalf of the United States, shall be paid his/her necessary expenses incident to travel in accordance with the provisions of the Standardized Government Travel Regulations.

Expenses for appearing as a witness in any case involving the activity related to that person's employment, shall be payable from the appropriation otherwise available for travel expenses of such officer or employee. Proper certification by a certifying officer of the department or agency concerned is required. If the case does not involve the activity of the employing agency, the Department of Justice is chargeable with the travel expenses.

The following federal officers or employees who testify on behalf of the United States in cases handled by U.S. Attorneys at times when they are not in a duty status, and thus receive no additional compensation for testifying, are entitled to the same fees, mileage, and allowances as regular witnesses under 28 U.S.C. §1821:

A. Persons employed without compensation, except Selective Service personnel. See Selective Service Law Reporter (after 1972: Military Law Reporter).

B. Temporary or substitute employees. See 4 Comp. Gen. 748.

C. Employees compensated wholly by fees.

D. When-actually-employed persons, i.e., persons not employed on a regular basis.

Payment shall be made to federal employees in the above four categories from the Department of Justice witness's appropriation without regard to the nature of the witness's testimony.

3-2.422 Procedure for Payment

In those cases where expenses are properly payable from the Department of Justice appropriation, payment should be issued to the witness by the Marshal from the appropriation "Fees and Expenses of Witnesses, Department of Justice."

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

Officers and employees must not be "reimbursed" for return fare and per diem until after the expense has been incurred and proper slip furnished. An effort should be made to secure the employee's consent to have settlement in full for all expenses deferred until after his/her return to his/her official headquarters. This will eliminate the necessity of preparing two accounts.

3-2.500 ARMED FORCES WITNESSES

3-2.510 Military Personnel

A. Within district--If the witness is a member of the armed forces and is known to be stationed within the U.S. Attorney's district, the Staff Judge Advocate or legal officer should be contacted to determine the place where the witness may be subpoenaed by the U.S. Marshal. This will avoid conflict with the military justice regulations prohibiting the service of summons or other civil process on military personnel at military establishments.

B. Exception--When Air Force personnel must incur traveling expenses to appear as witnesses, from within or outside the U.S. Attorney's district, the procedure set forth below for obtaining witnesses from outside the district should be followed.

C. Outside of district--To obtain a member of the armed forces who is not stationed within the district, Form No. OBD-16 (original only) should be sent promptly to the office of the Assistant Attorney General for Administration, Attention: Special Authorizations Unit, with all the necessary data. This does not preclude the issuance of a subpoena at the same time but the U.S. Attorney should be prepared to answer any inquiry from the court regarding service on the witness.

Form OBD-16 should be received in the Department two weeks before the desired appearance if possible. In emergency cases, the U.S. Attorney may call or teletype the Special Authorizations Unit.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

D. Certification and Payment--When the witness is discharged, the U.S. Attorney should certify, on the back of the member of the service's travel orders the date and hour of his/her discharge as a witness. The U.S. Attorney should then return the copy of the orders bearing his/her certificate to the witness to deliver to his/her commanding officer. In the absence of written orders, a separate statement will be prepared by the U.S. Attorney.

3-2.511 Fees and Travel Expenses

The rules governing the payment of fees and travel expenses are the same for military employees as for nonmilitary employees. See USAM 3-2.420, supra.

3-2.520 Civilian Employee of the Armed Forces

If the witness is a civilian employee of the armed forces, the U.S. Attorney must first determine the civilian's present office address since records of civilians in the field are not maintained in the headquarters office in Washington. If the civilian is located outside the district of trial, the witness should be obtained in the same manner as military personnel. See USAM 3-2.510, infra. If the witness is located within the district of trial, he/she may be subpoenaed.

3-2.600 PRISONERS AS WITNESSES

A federal prisoner serving a sentence may be produced to testify or to be prosecuted in another district only upon a writ of habeas corpus in proper form. (Writs ad testificandum must not be used to produce federal prisoners for examination by U.S. Attorneys or investigative agencies.)

The marshal serving the writ of habeas corpus and the warden or superintendent having custody of the prisoner must be named in the writ. The marshal of the district in which the prisoner is in custody should serve the writ or, if this is impossible, the marshal in the issuing district may serve the writ requiring production of the prisoner. The U.S. Attorney should consult with the marshal for his/her district to insure that the writ will be directed to the proper individuals.

A prisoner (federal, state, or county) in custody awaiting trial may be paid the regular attendance fee if testifying as a witness. See 6 Comp. Gen. 588. Conversely, no attendance fee shall be paid to persons already convicted, whether under state or federal law. See 18 Comp. Gen. 609. Further, no mileage or per diem is allowable for any prisoners.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

U.S. Attorneys are directed to arrange for the prisoner's trial or testimony as soon as possible after arrival so that the prisoner may be returned to the institution without undue delay.

3-2.700 EXPERT WITNESSES

3-2.710 General

Whenever the U.S. Attorney expects to use expert testimony of any kind, he/she should make every effort to secure government employees in specialized fields from field offices of agencies such as the FBI, Bureau of Standards, Securities and Exchange Commission, Department of Interior, Army Corps of Engineers, Veterans Administration, etc., unless disadvantageous for tactical or strategic considerations. U.S. Attorneys should familiarize themselves with the government facilities available in their localities in order to be prepared when cases arise. There are also instances when certain government agencies in Washington can offer special assistance.

Each U.S. Attorney's office should establish a panel or list of expert witnesses in the most frequently used categories showing the fees and other allowances each will accept. Additional names of qualified medical experts may be secured from local federal hospitals, many of which have contracts with local doctors for specialized work. Although these contracts would not include service as expert witnesses, many of these doctors may be willing to serve at reasonable fees. The United States Navy District Headquarters Offices maintain lists of Navy Reserve doctors who are now in private practice and who might make suitable witnesses. These lists, which may be of assistance to U.S. Attorneys, can be obtained from the Legal Officer at the Navy District Headquarters. Legal officers at other military posts and the Veterans Administration may also be of assistance. Additional information may be obtained upon request to the Assistant Attorney General for Administration.

Fact witnesses, entitled only to the regular statutory fees, should not be hired as expert witnesses. The following guide is set forth to assist in determining whether a person qualifies as an expert witness.

If the testimony covers more than a mere recitation of facts such as opinions on hypothetical situations, diagnoses, analyses of facts, drawing conclusions, etc., all of which involve technical thought or effort independent of mere facts, the individual qualifies as an expert witness. However, testimony with respect to knowledge acquired on the job, although technical in nature, does not entitle one to an expert's fees if the testimony is purely factual. Type or nature of the testimony is the ultimate test.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

3-2.711 Federal Government Employees as Expert Witnesses

When federal government employees are used as expert witnesses in cases involving their own agencies, they usually appear in their official capacities. In such instances no witness fees of any kind are payable. They are allowed only their regular travel expenses as provided in 5 U.S.C. §5537. When, however, they appear in cases not affecting their own agencies, they are regarded as witnesses on loan or detail. In this capacity they are either paid their regular salaries by their own agency or are engaged by the Department on a fee basis. If paid by their agency, their agency may be reimbursed by the Department of Justice (depending on prior arrangements with the Special Authorizations Unit). To be entitled to a fee as an expert witness, the government employee must be qualified on the stand and the nature of his/her testimony must be the same as that of any expert witness. He/she also must testify on his/her own time (i.e., while on leave, leave without pay, or on his/her non-duty day). A fee under these circumstances is not a violation of the dual compensation statutes.

Government doctors and physicians may accept the expert witness fees for services rendered as expert witnesses in separate cases on behalf of the United States without violating the dual compensation statute (31 Comp. Gen. 566), provided such fees are on a per job basis as distinguished from a rate of compensation per day. In these cases they must take leave.

3-2.720 FBI Services

The FBI laboratory facilities are available for handwriting and type-writing comparisons and other document studies, as well as for studies in chemistry, toxicology, ballistics, hair, fibers, metallurgy, and other related subjects. The FBI is prepared to supply technical assistance and information in the fields of dynamics, electrical engineering, electricity, fluorescence, histology, light, mathematics, mechanical engineering, metallography, mineralogy, and physical chemistry.

To facilitate the assignment of expert witnesses from the FBI laboratory, it is desirable that as much notice as possible be given to the Bureau concerning the date upon which the testimony of the expert witness who has made a laboratory examination will be required.

Evidence should be sent directly to the FBI laboratory in Washington, D.C., for examination. Contact the local office of the FBI for assistance in obtaining FBI expert witnesses and in packing and transmitting evidence properly.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

There are no charges for FBI services.

3-2.730 Name-Check

In the interest of internal security and the proper handling of the government's litigation, extreme caution should be exercised in the employment of expert witnesses, consultants, etc. In particular, careful consideration should be given to their professional ability, personal character and integrity, and loyalty to the country. If there is any doubt as to the latter, a name-check should be secured from the FBI.

3-2.740 Negotiations

Actual arrangements for expert witnesses must be made by the U.S. Attorney since he/she alone has the opportunity to explore the local situation. Through judicious negotiation and bargaining with prospective witnesses, the U.S. Attorney exerts a decided influence on the terms of the final arrangement. Approval from the Department must be secured prior to the signing of an agreement. A Form OBD-47 should be submitted. The prospective expert witness should be requested to specify his/her fee prior to submission of the Form OBD-47. After approval, Form OBD-12 (contract) must be submitted to meet the Federal Procurement regulations requirement that all contracts be set forth in writing. Form OBD-12 need not be used, however, for an expert conducting a psychiatric examination pursuant to a court order which sets forth the name of the psychiatrist and the rate of compensation. Form OBD-12 is to be used as the agreement between the witness and the government concerning fees and allowances. This contract remains in effect until the conclusion of the service unless amended by a supplemental authorization and agreement. See USAM 3-2.760, infra. Termination for the convenience of the government, which is a required part of all government contracts, has been made a part of the "Other Conditions" section.

The Assistant Attorney General for Administration establishes the rates to be paid to expert witnesses. All fees for expert witnesses shall be negotiated based on these rates. Expert witnesses are not entitled to receive and must not be paid the regular witness fees in addition to their negotiated fees.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

A daily or hourly fee for witness preparation for trial is preferable to a fixed fee. The witness should be advised that a day represents eight or more hours of service. Daily fees will be pro-rated when less than eight hours of service is rendered. If incidental expenses, such as charts, chemical analysis, etc., are anticipated, they should be described and estimated.

The fee for court attendance may be negotiated on a daily basis when the estimated time of attendance is four or more hours. When it is known in advance that the expert's attendance will be for less than four hours, the fee should be negotiated at less than daily rates.

Separate arrangements should be made between the trial or negotiating attorney and the witness as to specific details of the service to be rendered, extent and type of work, type of report, etc.

Reimbursement for necessary expenses of transportation by the most economical mode of transportation available will be allowed. Coach or less than first-class accommodations should be utilized if available.

The rate negotiated for subsistence, submitted and approved on the request (Form OBD-47) should be inserted into Form OBD-12. In negotiating the rate for subsistence, every effort should be made to keep the rate within that established for government employees in accordance with the Standardized Government Travel Regulations. The witness must be in a travel status in order to be eligible to receive a subsistence allowance.

The rate negotiated for mileage reimbursement, submitted and approved on the request (Form OBD-47) should also be included on Form OBD-12. In negotiating the rate for mileage, every effort should be made to keep the rate within that established for government employees. Actual expenses, when allowed, should be limited to reasonable and personal expenses for the expert only and must be itemized on the travel voucher.

3-2.750 Authorization Procedure: Forms OBD-47 and OBD-12

Approval by the Special Authorizations Unit must be obtained prior to the employment of an expert witness. If an emergency occurs, approval by telephone should be secured and a Form OBD-47 should follow. Form OBD-47, in triplicate, should be submitted to the Department as soon as it is learned that an expert witness will be needed.

Request for authorization (Form OBD-47) shall be submitted by teletype for U. S. Attorneys' offices having access to the Department's teletype network (JUST System--Routing Indicator JACCT) and by mail or messenger service for those U. S. Attorneys' offices not having such access.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

Prior to approval, the following distribution will be made: Form OBD-47: original and one copy to Special Authorizations Unit, one copy retained as office record. Do not give witness Form OBD-47.

OBD-47 need not be used for an expert conducting a psychiatric examination pursuant to a court order which sets forth the name of the psychiatrist and the rate of compensation. No service should be performed until the approved Form OBD-47 and OBD-12, if required, are received from the Special Authorization Unit.

For all approved requests (Form OBD-47) which indicate that the expert will hire assistants, or which are for more than \$10,000, the original will be returned directly to the requesting office and a signed copy will be forwarded to the Procurement and Contracts Staff. The Procurement and Contracts Staff will either conduct the negotiation of the agreement, or furnish guidance to the trial (or negotiating) attorney.

3-2.760 Supplemental Requests

Supplemental requests should be submitted on Form OBD-47 when additional preparation will exceed the amount originally authorized by more than \$100.00 or when incidental expenses exceed the original estimate of such expenses by 20% or when the duration of court attendance will exceed the time estimated by more than one day. In an emergency, a supplemental request may be made to the Department by telephone, to Special Authorizations Unit. Such requests shall be confirmed promptly by teletype or OBD-47.

3-2.770 Procedure for Payment

The U.S. Attorney should notify payees to submit the following voucher forms:

A. For compensation--Form OBD-84/85.

B. For travel or subsistence allowance for government employee witness Standard Form 1012 (not needed for expert witnesses except government expert witnesses not receiving witness fees. See USAM 9-2.711, infra).

The U.S. Attorney should certify on the invoice that the services were received and include the Fiscal Control Number assigned by the Special

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

Authorizations Unit. A copy of OBD-12, if applicable, must be attached to the voucher. See USAM 3-2.750, supra, for exception. For all psychiatric examinations, attach two copies of the court order. (Insure that name of psychiatrist and rate of compensation are included if available.) If vouchers contain charges for Sunday compensation, it must be shown affirmatively that services were actually and necessarily rendered on such days. On travel vouchers the purpose for each trip must be shown.

3-2.800 DEPOSITIONS

3-2.810 General

Depositions should be taken whenever possible in order to reduce expenditures. This rule should be particularly applied when it is necessary to secure testimony of a witness living more than 100 miles from the place of trial.

Depositions should be taken before notarial officers or other officers authorized to administer oaths. Depositions before United States Magistrates should be taken only when such other officers are not available.

No payments from Department appropriations will be made to magistrates, or stenographers before a magistrate, for taking depositions. The magistrate's fee (established by 28 U.S.C. §633) is held to include the writing of the deposition either by himself/herself or his/her stenographer and is allowed in his/her account, payable from court funds.

In all other circumstances, U.S. Attorneys are authorized to incur the necessary expenses of taking depositions. Whenever a salaried reporter takes a deposition, he/she is entitled to compensation for the original transcript and for such number of copies as are ordered at rates to be agreed upon with the U.S. Attorney, but no attendance fee may be paid. It should be noted that the rules applicable to reporting court proceedings (including the rates established by the court) do not necessarily apply to the transcription of depositions, and further, payment for stenographic service should be in accordance with rates prevailing in the locality.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

Payment for reporting or transcribing depositions and expenses of notaries, etc., will be made from the appropriation "Salaries and Expenses, United States Attorneys and Marshals, Department of Justice." Vouchers covering payment for notarial fees must be submitted in the name of the individual rendering the service since firms cannot be notaries. Voucher Form No. OBD-84/85 will be used for notarial fees, and for payment to individuals for reporting or transcribing depositions; if reporting services are performed under contract with a reporting company, as distinct from personal services, use voucher Form No. S.F. 1034.

The district which requires or uses the deposition may be charged with all expenses (including witness's payments) even though the deposition may have been taken in another district.

Stenographic and notarial charges related to depositions for indigent persons should be certified by an authorized certifying officer of the U.S. Attorney's office, since he/she can better evaluate the correctness or reasonableness of the charges.

Depositions to be taken in a foreign country must be channeled through the State Department, Office of Special Consular Services, Washington, D.C. If a foreign witness must travel to the place designated for the taking of the deposition, notify the Special Authorizations Unit, approximately one week in advance. That office can then authorize the consular officer to pay the witness in the same manner as witnesses appearing in federal district courts are paid. Similar authorization is available to pay for the services of interpreters and stenographers if such services are not available in the embassy or consulate.

If, in connection with depositions to be taken in a foreign country, it is anticipated that witnesses will be examined on the premises of our Diplomatic or Consular Mission, arrangements can be made through the Special Authorizations Unit, granting advance authority to the consular officer to reimburse these witnesses in the same manner as witnesses appearing in federal district courts. Similar authorization can be given to the consular officer to pay for the services of interpreters and stenographers, if such services are not available in the Embassy or in the Consulate. Please submit such requests to the Executive Office for U.S. Attorneys as soon as the need is anticipated.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

3-2.820 Letters Rogatory; Depositions; Service of Summons and Other Court Orders to Witnesses Abroad

U.S. Attorneys' offices desiring to send any of the above legal papers to foreign countries should forward them to the office of Special Consular Services, Department of State, Main State, Room 4811, Washington, D.C. 20520. That office will place your communication in the diplomatic pouch to the country involved. In cases where U.S. Attorneys desire further assistance, the letters rogatory should be forwarded to the Civil Division, Attention: Foreign Litigation Unit, for transmittal to the State Department. It is necessary to indicate the method of handling desired for the consular officer or other person performing the services. Certain foreign countries do not permit consular officials to perform these services. In those countries, public officials or local attorneys are required to effect the service or to conduct the examination. Letters rogatory should be addressed "To the Appropriate Judicial Authority in (name the country)." As explained in the Advisory Committee's Note concerning the changes in Rule 28(b), Fed. R. Civ. P., there will be instances where letters rogatory will be the least expensive and the preferred method of obtaining testimony from witnesses abroad.

USAM (superseded)

DETAILED
TABLE OF CONTENTS
FOR CHAPTER 3

		Page
3-3.000	<u>MEDICAL EXAMINATIONS: PHYSICAL AND PSYCHIATRIC</u>	1
3-3.100	PHYSICAL EXAMINATIONS	1
3-3.110	<u>Department of Justice</u>	1
3-3.120	<u>Administrative Office of U.S. Courts</u>	1
3-3.200	PSYCHIATRIC EXAMINATIONS IN TORT CASES	2
3-3.300	PSYCHIATRIC EXAMINATIONS IN CRIMINAL CASES	2
3-3.301	Requirement for Court Order	2
3-3.302	Reason for Examination	2
3-3.303	Preparation of Request and Court Order and for Examination	3
3-3.310	<u>Psychiatrists and Hospitals Available</u>	3
3-3.320	<u>Determining Who Should be Charged with the Expenses</u>	4
3-3.321	Testimony Relating to Psychiatric Examinations	5
3-3.322	Examinations Involving Hospitalization of Prisoners	5
3-3.330	<u>Responsible Payors</u>	6
3-3.331	Private Parties	6
3-3.332	Administrative Office of U.S. Courts	6
3-3.333	Department of Justice	7
3-3.340	<u>Authorization to Incur Expenses</u>	7
3-3.350	<u>Commitment to the Attorney General</u>	8
3-3.351	Prolonged Hospitalization: Periodic Follow-ups	8

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

3-3.000 MEDICAL EXAMINATIONS: PHYSICAL AND PSYCHIATRIC

3-3.100 PHYSICAL EXAMINATIONS

3-3.110 Department of Justice

The Department of Justice pays for:

A. Physical examinations of the persons described below for the primary purpose of making a record for future use:

1. Injured persons, to determine extent of injuries;
2. Defendants in criminal cases who allege illness to delay trial, etc.; and
3. Witnesses who allege illness for failure to respond to subpoenas.

For examinations of these types, Form OBD-47 should not be submitted. These expenses are treated as litigative expenses.

B. Physical examinations for the purpose of preparing the examining physician to serve as an expert witness.

These expenses are chargeable to the witness appropriation. See USAM 3-2.700, supra (authorization).

3-3.120 Administrative Office of U.S. Courts

The Administrative Office of U.S. Courts pays for:

A. Fees of expert witnesses on behalf of persons proceeding under the Criminal Justice Act, including probationers and petitioners, where appointments are made after February 10, 1971.

B. Physical examinations of convicted defendants to aid the court in discharging its duties such as determining length or type of sentence, to evaluate the effect of imprisonment, to predict the chance of rehabilitation, to determine disposition in a proceeding to revoke probation, etc.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

3-3.200 PSYCHIATRIC EXAMINATIONS IN TORT CASES

Psychiatric examinations in tort cases, to determine the extent of injuries, require the approval of the Assistant Attorney General for which requests for other expert witnesses are submitted, as described in USAM 3-2.700, supra. Include all expected expenses for the examination, hospitalization if necessary, and testimony.

These examinations must not take place without written consent of the opposing counsel, or a court order under Fed. R. Civ. P. 35. An examination without written consent or a court order may leave the United States liable for a suit, by the person being examined, for violation of his/her civil rights.

3-3.300 PSYCHIATRIC EXAMINATIONS IN CRIMINAL CASES

3-3.301 Requirement for Court Order

All psychiatric examinations in criminal cases SHALL TAKE PLACE PURSUANT TO A COURT ORDER. A psychiatric examination which takes place without a court order may leave the United States liable for a suit, by the person being examined, for violation of his/her civil rights.

3-3.302 Reasons for Examination

Psychiatric examinations are conducted for two primary reasons:

A. To determine sanity at the time of the event in question (alleged crime, alleged probation violation, etc.); and

B. To determine competency at the time of trial.

An examination which is conducted for both purposes is known as a dual-purpose examination.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

3-3.303 Preparation of Request and Court Order for Examination

The U.S. Attorney should inspect requests and court orders for examinations to ensure that such documents correctly describe the examinations involved. Many requests and court orders incorrectly describe an examination for sanity at, the time of the event as being "under the provisions of 18 U.S.C. §4244," whereas §4244 only covers examinations to determine present competency. Each request and court order should correctly describe the purpose of the examination involved. A reference to the U.S. Code is not adequate.

If possible, the U.S. Attorney should have the court order name the examining psychiatrist (or institution) and set the fee and expenses. The fee should be kept within guidelines established in USAM 3-2.744, supra, and the expenses should be on an actual cost basis.

3-3.310 Psychiatrists and Hospitals Available

In many jurisdictions the court will desire assistance in the selection of qualified psychiatrists and hospitals or other appropriate facilities where persons whose mental competency is in question may be detained for observation and examination. The following may be of assistance.

Since the term "qualified psychiatrist" is not defined in 18 U.S.C. §4244, and determination of qualifications is left to the court, the policies of the American Psychiatric Association may be of assistance to the court in making that determination. If a psychiatrist has passed the examination in psychiatry given by the American Board of Psychiatry and Neurology, he/she may be presumed to be qualified. If no psychiatrist is available who has passed such examination, a psychiatrist who is a member of the American Psychiatric Association may meet the requirements. Names of psychiatrists in a given state who are members of the American Psychiatric Association or who have passed the examination of the American Board of Psychiatry and Neurology may be obtained from the Director, Bureau of Prisons.

Each U.S. Attorney's office should establish a panel of psychiatrists and hospitals with a schedule of rates.

In many instances it is more practical and economical to pay a private doctor an examination fee rather than to pay a hospital fee of 20 days or more.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

Consideration should be given to examinations on an outpatient basis at a local hospital, preferably a government institution. The facilities of the Veterans Administration, the Department of the Army and Navy, and many state institutions are often available for examinations. Considerable time and money can be saved by using the services and facilities of the foregoing rather than sending defendants to the Springfield Medical Center (which entails both transportation difficulties and extended periods of time). The courts should be informed of this.

If the court is of the opinion that an accused should be committed for observation and the court or U.S. Attorney does not know of a suitable hospital or facility, the Director, Bureau of Prisons, is available to assist in the location of a suitable facility. Where commitment for observation is ordered and there is a choice of hospital or facility for commitment, the one which does not require the employment of guards should be selected.

Referrals to federal institutions should be accompanied by all available information concerning the individual together with a presentence report, if available, or in the case of commitment, a copy of the report on psychiatric examination.

3-3.320 Determining Who Should be Charged with the Expenses

Two factors determine the party chargeable for the expense of the examination: (1) the reason for the examination and (2) the person requesting the examination. The following sections detail the various combinations which may occur in requesting examinations. Determination is made as follows:

A. Examinations to Determine Present Competency

1. When the court orders an IMPARTIAL examination to determine competency to stand trial pursuant to 18 U.S.C. §4244, with the report being made to the court, all expenses are chargeable to the Department of Justice.

2. When a present competency examination is performed without a court order or under a court order citing the Criminal Justice Act, to assist in the presentation of the defense, all expenses of the examination are chargeable to the party requesting the examination.

B. Examinations to Determine Sanity at the Time of the Alleged Offense.
All expenses of the examination are chargeable to the party requesting the examination.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

C. Examinations for Dual Purposes. If the examination is requested by a party other than the U.S. Attorney, one-half of the expenses of the examination are chargeable to the Department of Justice. See A.1., above.

If the examination is requested by the U.S. Attorney, all expenses of the examination are chargeable to the Department of Justice.

3-3.321 Testimony Relating to Psychiatric Examinations

Most court orders specify that a report will be made to the court; this is usually interpreted to mean that a written report will be submitted to the court, not that the psychiatrist will appear in court as a witness.

A. Competency Hearing. If the psychiatrist who made the impartial examination is called to appear at a hearing the purpose of which is to determine competency to stand trial, the expenses of his/her appearance are chargeable to the Department of Justice, regardless of which party requested the hearing. The expenses are chargeable to the appropriation "Fees and Expenses of Witnesses."

B. Trial Appearances. If the psychiatrist making the impartial report is later called into a regular session to testify as a witness, THE PARTY CALLING THE PSYCHIATRIST IS CHARGEABLE FOR THE EXPENSES OF THE APPEARANCE AND TESTIMONY, no matter which party is chargeable for the expenses of the examination. If the psychiatrist is called by a U.S. Attorney, the expenses are chargeable to the appropriation "Fees and Expenses of Witnesses," and a request must be submitted as described in USAM 3-2.700, supra.

3-3.322 Examinations Involving Hospitalization of Prisoners

The expenses for maintenance of a prisoner who is being examined while hospitalized under court order in a federal, state, or local facility are not considered part of the expenses of the examination. Consequently, the Department of Justice pays all maintenance expenses for all prisoners, IN CUSTODY in criminal cases, who are committed to a hospital for examination. The expenses of maintaining the prisoner are not chargeable to the appropriation "Fees and Expenses of Witnesses" and are not included on the OBD-47, Request and Authorization for Fees and Expenses of Witnesses.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

When a person who has private counsel is free on bail and enters a hospital for psychiatric examination without first obtaining a court order, the expenses of the examination and maintenance of the private party should be paid by the private party, even if the examination is to determine present competency or has dual purpose. Although the Department of Justice is responsible for the expenses of impartial examinations to determine present competency, a private party must not be allowed to incur expenses payable by the Department for the private party's own benefit.

3-3.330 Responsible Payors

The following joint guideline, agreed upon by the Department of Justice and the Administrative Office of U.S. Courts, incorporates the Comptroller General's decision and the amendment to 18 U.S.C. §3006A, and is to be used in determining the chargeability of expenses to private parties, the Administrative Office of U.S. Courts and the Department of Justice.

3-3.331 Private Parties

A private party not proceeding under the Criminal Justice Act is responsible for all his/her expenses of litigation, including examinations to present an insanity plea or to determine sanity at the time of alleged offense.

3-3.332 Administrative Office of U.S. Courts

The Administrative Office of U.S. Courts pays for:

A. Psychiatric Examinations upon the motion or request of the court or court-appointed attorney, of:

1. Persons financially unable to obtain an adequate defense, when the purpose is to determine mental responsibility at the time of the alleged offenses, and where appointments were made after February 10, 1971. See USAM 3-3.320, supra, when the purpose is twofold; and

2. Probationers and petitioners seeking relief under Sections 2241, 2254 or 2255 of Title 28 or Section 4245 of Title 18, when the purpose is to determine mental responsibility at the time of the alleged offense, and where appointments were made after February 10, 1971. See USAM 3-3.320, supra, when the purpose is twofold.

B. Fees of expert witnesses on behalf of persons proceeding under the Criminal Justice Act, including probationers and petitioners, where appointments are made after February 10, 1971.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

C. Psychiatric examinations of convicted defendants to aid the court in discharging its duties, such as determining length or type of sentence, to evaluate the effect of imprisonment, to predict the chance of rehabilitation, to determine disposition in a proceeding to revoke probation, etc.

3-3.333 Department of Justice

The Department of Justice pays for:

A. Psychiatric Examinations of:

1. All defendants, including those who are financially unable to obtain adequate representation, when the purpose is an impartial examination to determine competency to stand trial pursuant to 18 U.S.C. §4244;

2. Defendants, at the request of the U.S. Attorney, when the purpose is to determine sanity at the time of the alleged offense and when necessary for rebuttal purposes;

3. Probationers, when the purpose is an impartial examination to determine competency, pursuant to 18 U.S.C. §4244, at the time of the original trial or at the time of the revocation proceedings;

4. Persons in custody as material witnesses; and

5. Persons seeking relief under Sections 2241, 2254, or 2255 of Title 28 or Section 4245 of Title 18, when the purpose is to determine competency.

B. Expert witness fees of all experts appearing on behalf of the U.S. Attorney.

3-3.340 Authorization to Incur Expenses

After the purpose and chargeability of the examination or testimony has been clearly determined, authorization to incur these expenses is requested by submission of Form OBD-47, Request and Authorization for Fees and Expenses of Witnesses. Instructions on the submission of this form are contained in USAM 3-2.700, *supra*. Whenever there is a written court order, two copies of the order shall be submitted with the OBD-47.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

If the examining psychiatrist is to be called into a regular session of court to testify as a witness, and the expenses are chargeable to the Department, these expenses must also be submitted on OBD-47.

3-3.350 Commitment to the Attorney General

Where commitment is made to the Attorney General, as, for example, under 18 U.S.C. §4082, the investigation and making of arrangements should be expedited so that insane or incompetent persons will not remain in local jails or temporary facilities any longer than necessary. Prompt action should also be taken where defendants are committed to institutions for observation. Action should be taken to dispose of the matter at the earliest possible time and the court's attention should be directed to any order which fails to specify a date of return of the prisoner.

3-3.351 Prolonged Hospitalization: Periodic Follow-Ups

There should be a periodic follow-up of persons committed to hospitals for examination or observation to ensure that the commitment period provided in the court order is not exceeded. Such follow-ups will also serve as reminders to hospitals to expedite examinations and promptly furnish reports. If the court order does not provide for a copy of the doctor's report to be sent to the U.S. Attorney, it is suggested that the U.S. Attorney arrange for immediate notification from the hospital when a report is being sent to the judge. The U.S. Attorney is then in a position to request prompt disposition of the case. A procedure should be set up in each district for notifying the U.S. Marshal to pick up the defendant promptly upon completion of the examination.

USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

DETAILED
TABLE OF CONTENTS
FOR CHAPTER 4

		<u>Page</u>
3-4.000	<u>EXPUNGEMENT OF RECORDS UNDER 21 U.S.C. §844(b)</u>	1
3-4.100	RETENTION OF NONPUBLIC RECORD	1
3-4.200	EXPUNGEMENT OF RECORDS	1
3-4.210	<u>Multiple Defendants</u>	2
3-4.300	AVAILABILITY OF NONPUBLIC RECORDS	2

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

3-4.000 EXPUNGEMENT OF RECORDS UNDER 21 U.S.C. §844(b)

Reference: Order 2710.7B, dated August 12, 1976.

Certain procedures are prescribed to be followed pursuant to the Controlled Substances Act, 21 U.S.C. §844, for the retention of a nonpublic record by the Department of Justice, and the expungement of official records pursuant to court order.

Cross Reference: USAM 9-8.250 Expungement of FBI Criminal Identification Records Under the Youth Corrections Act (18 U.S.C. §5021).

Questions regarding the expungement of Department of Justice records ordered under statutes other than 21 U.S.C. §844 and 18 U.S.C. §5021 should be referred to Records Management Services, Library Staff, Office of Information Technology, Justice Management Division.

3-4.100 RETENTION OF NONPUBLIC RECORD

The U.S. Attorney responsible for the case, upon obtaining a certified copy of the court order of dismissal and discharge, issued under 21 U.S.C. §844(b)(1), from the clerk of the court, shall obtain from his/her records all recordation relating to the person's arrest, indictment or information, and trial. The court orders relating to the finding of "guilty," the placing of defendant on probation without conviction, and dismissal and discharge shall be obtained from the clerk of the court. These recordations shall be prominently identified as a nonpublic record under the Controlled Substances Act under 21 U.S.C. §844(b)(1). A certified copy of the court order of dismissal and discharge, and executed Form OBD-160, Controlled Substances Act, Defendant Information (with the specific name, address and zip code of each individual or agency or component [federal, state, or local] thereof whom the U.S. Attorney knows or has reason to believe is maintaining a record) shall be forwarded as indicated on the form.

3-4.200 EXPUNGEMENT OF RECORDS

If the court enters an order under 21 U.S.C. §844(b)(2) to expunge from all official records (other than the aforesaid nonpublic records retained by the Department of Justice) all recordation relating to a person's investigation, arrest, indictment or information, trial, finding of "guilty," and dismissal and discharge, the U.S. Attorney responsible for the case shall:

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

A. Obtain from the clerk of the court a certified copy of the court order;

B. Prepare Form OBD-160, Controlled Substances Act, Defendant Information;

C. Expunge his/her own records and prepare Form DOJ-329, Certificate of Expungement; and

D. Forward to the Records Management Services the certified copy of the court order to expunge, Form OBD-160, and Form DOJ-329.

3-4.210 Multiple Defendants

If a court discharges a defendant and dismisses the proceedings against him/her under 21 U.S.C. §844(b)(1) and subsequently orders an expungement under 21 U.S.C. §844(b)(2), all recordation identifying the defendant and relating to his/her investigation, arrest, indictment or information, trial, finding of "guilty," and discharge and dismissal shall be expunged from the records of any codefendant.

3-4.300 AVAILABILITY OF NONPUBLIC RECORDS

A first-time offender convicted under 21 U.S.C. §844(a) of simple possession of a controlled substance is eligible only once for conditional discharge and (if not over 21 years of age) expungement of his/her records under 21 U.S.C. §844(b)(1). To ensure that simple possession offenders are not given the benefit of section 844's discharge and expungement provisions more than once, a nonpublic record of every offender's section 844 discharge or expungement is maintained by the Department of Justice for use by the courts in subsequent proceedings. The Department custodian of these records is Records Management Services, Library Staff, Office of Information Technology, Justice Management Division.

When a U.S. Attorney has reason to believe that an individual does not qualify for a dismissal and discharge because of a prior dismissal and discharge under 21 U.S.C. §844(b)(1), he/she should communicate with and forward pertinent information about the offender and fingerprints to the Records Management Services. The Unit will match them up with existing fingerprint files within the Unit's nonpublic records and advise the U.S. Attorney as to what the check reveals.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

The nonpublic records retained by the Department of Justice shall be available only to a federal court upon a federal court order issued to the Attorney General demanding such records, or upon the written request of a U.S. Attorney, for use by a federal court in determining whether or not a person qualifies under 21 U.S.C. §844(b). Such order or request should be made prior to the application of the sentencing provisions of 21 U.S.C. §844(a), or the dismissal and discharge provisions of 21 U.S.C. §844(b).

USAM (superseded)

3-5.000

REMOVAL AND MAINTENANCE
OF DOCUMENTS

USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

/
DETAILED
TABLE OF CONTENTS
FOR CHAPTER 5

		<u>Page</u>
3-5.000	<u>REMOVAL AND MAINTENANCE OF DOCUMENTS</u>	1
3-5.100	DEFINITIONS	1
3-5.200	POLICY	2
3-5.300	PROCEDURES	3
3-5.400	MISCELLANEOUS STATUTORY PROVISIONS	3

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

3-5.000 REMOVAL AND MAINTENANCE OF DOCUMENTS

Reference: Order DOJ 2710.8, dated May 27, 1977

Federal law, regulations and directives, as well as Department of Justice (DOJ) policy and guidelines, impose requirements on:

- A. The removal of documents by a departing employee;
- B. The maintenance of personal papers;
- C. The security and integrity of official records; and
- D. The responsibilities of personnel and Department officials to safeguard official records.

3-5.100 DEFINITIONS

A. Documents. Official records, personal papers, classified information in written form, other written materials, and copies thereof, regardless of form, content, or ownership.

B. Official Records. All books, papers, maps, photographs, machine readable materials, regardless of physical form or characteristics, made or received by an agency of the United States government under federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, EXTRA COPIES OF DOCUMENTS PRESERVED ONLY FOR CONVENIENCE OF REFERENCE, and stocks of publications and processed documents ARE NOT INCLUDED (44 U.S.C. §3301).

C. Personal Papers. Papers of a private or non-official character, which ordinarily pertain only to an individual's personal affairs, which will not affect the future conduct of agency business, and which are presumably devoid of substantial federal interest.

D. Classified Information. Official information or material which requires protection against unauthorized disclosure in the interest of national security and which is within the scope of 28 C.F.R. Part 17.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

E. Officer or Employee. An "officer" as defined by 5 U.S.C. §2104 and an "employee" as defined by 5 U.S.C. §2105. Hereinafter the term "employee" will be used to designate both officers and employees and refers to all personnel employed by the DOJ.

3-5.200 POLICY

A. The following types of documents may NOT be removed by a departing employee:

1. Official records;
2. Official or record file copies of documents other than personal papers;
3. Documents containing classified information;
4. Documents containing statutorily confidential information;
5. Documents containing information subject to the Privacy Act of 1974, 5 U.S.C. §552a, except under the conditions described in 5 U.S.C. §552a(b); and
6. Documents containing information which might reveal or prejudice the conduct of civil or criminal enforcement proceedings or litigation involving the interests of the United States or information which falls within the attorney-client privilege of the United States or of the party furnishing the information except as provided in 28 C.F.R. §§50.2, 50.8, and 50.12.

B. An employee may remove COPIES of documents if such documents are not otherwise excluded from removal pursuant to paragraph A, above.

C. An employee may remove personal papers. Diaries, for example, are ordinarily personal in character.

D. An employee's personal papers or personal copies of documents will at all times be designated by him/her as non-official and will be filed separately from official records.

E. In cases where matters requiring the transaction of official business are received in private personal correspondence, the portion of such correspondence that pertains to official business will be extracted and made an official record.

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

3-5.300 PROCEDURES

A. Each U.S. Attorney (USA) is responsible for appointing an official who will:

1. Apprise each employee of the contents of this section;
2. Obtain from each departing employee a Form DOJ-388, Document Removal Certification and assure that the signed form is retained in the employee's official personnel file for three years;
3. Advise each employee concerning his/her rights and responsibilities with respect to information acquired as a part of his/her duties while employed by the federal government; and
4. Coordinate administration of this order with appropriate records management personnel.

B. An employee may request an exemption from the requirements of this order by submitting such a request in writing to the United States of America. In the event that the person requesting the exemption is the United States of America, the request shall be referred to the Director of the Executive Office for U.S. Attorneys.

3-5.400 MISCELLANEOUS STATUTORY PROVISIONS

Administration of this policy shall be conducted with due regard to the following:

A. The alienation and destruction of official records in agency custody is governed by specific provisions of Chapter 33 of Title 44, United States Code;

B. Criminal penalties are provided in 18 U.S.C. §2071 for the unlawful removal or destruction of official records;

C. Criminal penalties are provided in 18 U.S.C. §§793, 794, and 798 for the unlawful disclosure of certain information pertaining to national security; and

D. The Attorney General is required by 44 U.S.C. §3106 to notify the Administrator of the General Services Administration of any actual or threatened unlawful removal or destruction of official records.

USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

DETAILED
TABLE OF CONTENTS
FOR CHAPTER 6

	<u>Page</u>
3-6.000 <u>AUTOMATED INFORMATION-SYSTEMS POLICIES</u>	1

USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

3-6.000 AUTOMATED INFORMATION-SYSTEMS POLICIES

Reference: Order DOJ 2830.1C, dated February 1, 1982.

Specific policies and a procedural approach are prescribed for the management of automated information systems. The order sets forth AIS planning, acquisition, and operating responsibilities and policies.

USAM (superseded)

USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

DETAILED
TABLE OF CONTENTS
FOR CHAPTER 7

		<u>Page</u>
3-7.000	<u>DEPARTMENT OF JUSTICE IDENTIFICATION BADGES</u>	1
3-7.100	IDENTIFICATION BADGES	1

USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

3-7.000 DEPARTMENT OF JUSTICE IDENTIFICATION DOCUMENTS

Reference: Order DOJ 2610.1A CHG 1, dated December 27, 1979.

3-7.100 IDENTIFICATION BADGES

Only Department law enforcement employees who are authorized by law to carry firearms and make arrests as part of their official duties may be issued or carry on their persons law enforcement identification badges. Authorized badges will remain the property of the United States Government, and will be controlled and protected against unauthorized use, using the same guidelines that are established for identification documents.

USAM (superseded)

USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

INDEX

<u>Administrative Directives System</u>	3-1.000
Administrative Office of U.S. Courts, payment	
Dual-purpose examinations	3-2.770
Medical and psychiatric examinations	3-3.110
<u>Advances</u>	3-2.122
Foreign nationals, travel-funds	3-2.322
<u>Air-travel, fees</u>	3-2.120
<u>Alien residents of the United States</u>	3-2.311
<u>Allowances</u>	3-2.121
Incidental expenses	3-2.312
<u>Appearance</u>	
Pre-appearance interviews	3-2.111
<u>Appropriation</u>	
Fees and Expenses of Witnesses	3-3.131
Salaries and Expenses, U.S. Attorneys and Marshals	3-3.132
<u>Approval</u>	
Expert witness	3-2.740; 3-2.750
<u>Armed forces witnesses</u>	3-2.500
Civilian employees	3-2.520
<u>Attendance</u>	
Allowances for per diem	3-2.121
Certificate (OBD-47)	3-2.322
Court Order Samples	3-2.330
Expenses	3-2.312
Expert witnesses	3-2.770
Fees	
Court not in session	3-2.121; 3-2.321
Witness appearing in court more than one day	
Prisoners, obtaining	3-2.600

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

<u>Authorization for advances</u>	3-2.122
Deposition, expenses	3-2.810
Interpreter, services	3-2.810
Payment by Department of Justice	3-3.130
Stenographer, services	3-2.820
<u>Automated Information Systems Policies</u>	3-6.000
<u>Availability of non-public records under</u> 21 U.S.C. §844(b)	3-4.300
<u>Certificate of Attendance and Payment</u>	3-2.130
<u>Certification</u>	
Armed forces witnesses	3-2.510
Attendance for regular (fact) witnesses	3-2.130
Attendance of expert witnesses	3-2.770
Charges relating to deposition of indigents	3-2.810
<u>Citizens of U.S. abroad</u>	3-2.310
<u>Civilian employees of armed forces</u>	3-2.520
<u>Co-defendants, expungement of records under</u> 21 U.S.C. §844	3-4.210
<u>Commitment</u>	
For observation	3-3.210
To Attorney General	3-3.220
<u>Compensation of witnesses</u>	
Form OBD 84/85	3-2.770
Pre-appearance interviews	3-2.111
<u>Constructive Fees</u>	3-2.121
<u>Consular Officers, services performed</u>	3-2.820
<u>Contract (Form OBD-12)</u>	3-2.740
Termination of expert witness contract	3-2.740
<u>Criminal Justice Act of 1964</u>	3-2.210
Private party proceeding	3-3.120
<u>Court, fees for attendance</u>	3-2.740
<u>Court orders, fees for witness (sample)</u>	3-2.330

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

<u>Court reporter</u>	3-2.810
<u>Court reporting statute</u>	3-2.820
<u>Department of Justice Identification Documents</u>	3-7.000
<u>Depositions</u>	3-2.800
Court reporters	3-2.810
Stenographic and notarial charges	3-2.810
<u>Directives System</u>	3-1.000
<u>Documents, removal and maintenance</u>	3-5.000
<u>DQJ Orders</u>	3-1.000
<u>Examination, medical (physical & psychiatric)</u>	3-3.000
<u>Employee-witnesses</u>	
Federal Government (non-military)	3-2.400
Armed forces (civilian)	3-2.520
<u>Expenses, witness</u>	
Court order	3-2.200
Expert witnesses	3-2.711; 3-2.750
Indigents	3-2.200
Land-matters	3-2.770
Medical examinations	3-3.100
Prisoners	3-2.600
Travel-expenses, government employees	3-2.421
<u>Expert witnesses</u>	3-2.700
Authorization procedure	3-2.750
FBI services	3-2.720
Forms OBD-12 and 47	3-2.750
General	3-2.710
Government employees	3-2.711
Name-check	3-2.730
Negotiations	3-2.740
Payment, procedure	3-2.770
Request, procedure	3-2.750
Sunday compensation	3-2.770
Supplemental requests, submission procedures	3-2.760
Termination of contract	3-2.740

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

FBI

Services 3-2.720
Subpoena of special agents 3-2.410

Federal officer or employee, fees and expenses 3-2.420

Federal Rules

4(i), Fed R. Civ. P. 3-2.311
15(c), Fed. R. Crim. P. 3-2.210
17(a), Fed. R. Crim. P. 3-2.112
17(b), Fed. R. Crim. P. 3-2.210
28, Fed. R. Crim. P. 3-2.210
45(a), Fed. R. Civ. P. 3-2.112

Fees, court reporter, notarial 3-2.810

Fees, witness

Examinations (physical and psychiatric) 3-3.100
Court attendance 3-2.322
Fact-witnesses 3-2.120
Government employees 3-2.420; 3-2.710;
3-2.770
Witnesses outside U.S. 3-2.312; 3-2.322

Forms

DOJ-329 (Certificate of Expungement) 3-4.200
DOJ-388 (Document-Removal Certification)
Standard Form 1012 (Travel Voucher) 3-2.770
Standard Form 1034 (Public Voucher for Purchases
and Services other than Personal) 3-2.810
USA-150 (Letter from U.S. Attorney to
Material Witness) 3-2.410
OBD-3 (Witness-Attendance Certificate) 3-2.130; 3-2.770
OBD-12 (Expert-Witness Agreement) 3-2.740; 3-2.750
OBD-16 (Request for Armed Forces or
Government Employee-Witness) 3-2.410; 3-2.510

OBD-47 (Request and Authorization for Fees
and Expenses of Witnesses) 3-2.322; 3-2.740
3-2.750

OBD-84/85 (Pay-Voucher for Special Services) 3-2.770; 3-2.810

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

OBD-160 (Controlled Substances Act, Defendant Information)	3-4.200
<u>Federal government employees as witnesses</u>	3-2.400
<u>Government Transportation Requests (GTR)</u>	3-2.312; 3-2.421; 3-2.422; 3-2.740
<u>Government Travel Regulations</u>	3-2.421
<u>Highway Mileage Guide</u>	3-2.121
<u>Hospital, selection</u>	3-3.210
<u>Hospitalization, prolonged</u>	3-3.230
<u>Identification Badges</u>	3-7.100
<u>Incidental expenses., expert witnesses</u>	3-2.740
<u>Indigent</u> <u>Proceeding In Forma Pauperis</u>	3-2.210
<u>Interpreters, authorization for services</u>	3-2.810
<u>Invoices for expert witness services</u>	3-2.770
<u>JUST System</u>	3-2.750
<u>Laboratory services, FBI</u>	3-2.720
<u>Letters Rogatory</u>	3-2.820
<u>Magistrates, payments</u>	3-2.810
<u>Medical examinations (physical & psychiatric)</u>	3-3.000
<u>Mileage</u> Fact witnesses Prisoners	3-2.121 3-2.600
<u>Multiple defendants, expungement of records</u>	3-4.210
<u>Nationals (U.S.) abroad, subpoena</u>	3-2.311
<u>Negotiations for expert witnesses</u>	3-2.740

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

<u>Non-public record</u>	
Availability	3-4.300
Retention	3-4.100
<u>Notarial fees and expenses</u>	3-2.810
<u>Official Records</u>	3-5.100
<u>Orders (DOJ, OBD, Internal)</u>	3-1.000
<u>Payment</u>	
Certificate	3-2.130
Expert witnesses	3-2.770
Fact-witnesses, regular	3-2.130
Government employee witnesses	3-2.422; 3-2.711
Medical examination	3-3.120
Notaries	3-2.810
Psychiatric examination	3-3.120
Transcribing depositions	3-2.810
<u>Payor, Criminal Justice Act</u>	3-2.210
<u>Per diem</u>	3-2.121
<u>Periodic follow-up for prolonged hospitalization</u>	3-3.230
<u>Personal papers</u>	3-5.100
<u>Phone numbers</u>	
Witness -assistance	3-2.110
<u>Praecipe for subpoenas</u>	3-2.112
<u>Pre-appearance interviews</u>	3-2.111
<u>Psychiatric hospitals</u>	3-3.210
<u>Psychiatric examinations</u>	3-3.000
<u>Psychiatrist</u>	
Private examination	3-2.770
<u>Rand-McNally Standard Mileage Guide</u>	3-2.121
<u>Records, expungement</u>	3-4.000

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

<u>Reimbursement</u>	
Deposition	3-2.810
Government employees	3-2.422
Government employees as expert witnesses	3-2.711
<u>Responsible payor, witness's expenses for indigents</u>	3-2.210
<u>Regular witnesses</u>	3-2.100
<u>Service abroad</u>	3-2.311
<u>Standardized government travel regulations</u>	3-2.421
<u>Stenographers</u>	3-2.810
<u>Subpoena</u>	3-2.121
More than one case	
Praecipe	3-2.112
Pre-appearance interview	3-2.111
Special agents (FBI)	3-2.410
Witnesses abroad	3-2.311
<u>Subsistence, witness</u>	3-2.121
Witnesses abroad	3-2.322
<u>Supplemental requests</u>	
Expert witnesses	3-2.760
<u>Taxing of attendance fees</u>	3-2.121
<u>Technical assistance, FBI</u>	3-2.720
<u>Temporary (witness) duty while on leave</u>	3-2.421
<u>Transportation-request (government)</u>	3-2.312
<u>Travel expenses</u>	
Fact-witnesses	3-2.120
Government employee witnesses	3-2.120
More than one case	3-2.121
Pre-appearance interview	3-2.111
<u>Travel or subsistence allowance form (SF 1012)</u>	3-2.770
<u>Travel regulations standardized (government)</u>	3-2.421
<u>Voucher forms (OBD 84/85)</u>	3-2.770; 3-2.810

UNITED STATES ATTORNEYS' MANUAL
TITLE 3--JUSTICE MANAGEMENT DIVISION

Witness Attendance Certificate (Form OBD-3)

3-2.770

Witnesses

3-2.000

Abroad

3-2.300

Armed forces

3-2.500

Depositions

3-2.800

Expert

3-2.700

Federal Government employee

3-2.400

Indigents

3-2.200

Prisoners

3-2.600

Regular

3-2.100

USAM (superseded)

USAM (superseded)