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**To: Assignment Judges
Trial Court Administrators**

From: Glenn A. Grant

**Subj: Public Defender Responsibility for Certain Ancillary Defense Costs –
Reissuance of Cannady Procedures**

Date: January 26, 2023

This memorandum is a reissuance of the “Cannady procedures” memo that was originally issued in 1992, modified in 1993, and recirculated in 2000. As such, those prior memoranda are now superseded. This reissuance is at the request of the Office of the Public Defender.

In In the Matter of Cannady, 126 N.J. 486 (1991), the Supreme Court decided that the Office of the Public Defender (OPD) is responsible for certain ancillary defense costs, even if the defendant was represented by a private attorney, if the defendant cannot afford the costs. Those costs would include expert fees, costs associated with mental health evaluations, and transcripts. A March 5, 1992 memorandum to Assignment Judges provided interim guidelines on the joint handling by the courts and the OPD of indigency applications affected by the Cannady decision. A March 12, 1993 memorandum to Assignment Judges promulgated modified procedures. Those procedures were subsequently recirculated by an Assignment Judge memorandum dated February 7, 2000. Given the passage of time since that 2000 recirculation, a subsequent memorandum was issued. The OPD has requested this reissuance given a recent change in oversight of ancillary services.

Applications for ancillary services, including requests for transcripts, should be submitted to the Office of the Public Defender to the attention of Joseph J. Russo, First Assistant Public Defender at Joseph.Russo@opd.nj.gov or (609) 292-7087.

The following steps should be taken when making either an application for a transcript or an application for other ancillary services:

1. Private attorneys requesting payments for ancillary services should put the requests in writing and email the request to Joseph J. Russo at Joseph.Russo@opd.nj.gov. Applicants should familiarize themselves with the criteria in In the Matter of Cannady to see if eligibility seems likely and to understand the authority of the OPD under the case law.
2. The OPD requires that an indigency investigation from the Criminal Division Manager's Office also be emailed with the application. In order to ensure appropriate processing, the applicant should advise the Criminal Division Manager's Office that the purpose of the determination of indigency is the requested ancillary service. (The Criminal Division should not advise the applicant at that time whether or not the client is determined to be indigent. Such findings should be forwarded to Joseph J. Russo, who will make the determination in light of the particular cost of any services approved for payment. The OPD will advise the attorney of the decision.)
3. The retainer agreement, or, if none exists, an attorney certification regarding the fee must be forwarded to the OPD.
4. A judge should not entertain a motion for ancillary service determination, unless it is a challenge of the OPD's denial of the request, and the motion seeks the court's review of the denial.

The trio of 1991 Supreme Court decisions in In the Matter of Cannady, 126 N.J. 486 (1991); In the Matter of Kaufman, 126 N.J. 499 (1991); and In the Matter of Arenas, 126 N.J. 504 (1991), outline the procedures in three specific scenarios for supplying ancillary services and transcripts to indigents not represented by the OPD. The procedures, where appropriate, also apply to indigent pro se defendants.

As set forth in Cannady:

1. The court or court-support office must determine if the defendant is indigent pursuant to N.J.S.A. 2A:158-14 to 158A-15.1. However, where a non-OPD client requests ancillary services, "the OPD must play an integral role in the indigency determination." 126 N.J. at 493-494.
2. Defendant applies directly to OPD for funds and must support the application with pertinent discovery and a copy of the retainer agreement or counsel's certification of the amount of retainer. The OPD may require the applicant to set forth the defense theory. The application is protected by attorney-client privilege. 126 N.J. at 494.
3. The OPD may request further information and grant or deny the request. The issue is whether services are "necessary." 126 N.J. at 494-495 (sets forth criteria).
4. The OPD may also consider whether retained counsel could reasonably have anticipated needing ancillary services at the time of the retainer, and whether fees

are “disproportionate” to the services required. If so, payment for some or all of the services must come out of the retainer. 126 N.J. at 495-496.

5. If the OPD provides services, the OPD decides how much to spend. 126 N.J. at 497.
6. If the OPD denies services, the reasons will be reduced to writing. 126 N.J. at 497.
7. The granting or denial of services is reviewable by a trial judge, the assignment judge, or designee. A protective order for privileged information should be available. 126 N.J. at 497.

As set forth in Kaufman (indigent seeking trial services, represented by pro bono counsel):

1. This decision re-emphasized the OPD’s right to “review and determine” whether the court’s indigency determination is correct. 126 N.J. at 502.
2. This follows the same procedure as in Cannady except:
 - a. No retainer or certification is required. 126 N.J. at 503.
 - b. Pro bono counsel need not “re-allocate” a non-existent fee to cover services. But even pro bono counsel should consider, before taking the case, if the costs of ancillary services are “potentially great” and pro bono counsel is unwilling to assume them. 126 N.J. at 503.

As set forth in Arenas (indigent seeking transcripts for appeal, represented by counsel retained by third parties):

1. Procedures in Cannady apply. 126 N.J. at 509.
2. Also, the OPD may consider counsel’s fee arrangement and whether counsel could reasonably have anticipated the need for transcripts when he or she accepted the case, by inspecting the docket sheet and consulting the client. 126 N.J. at 509.
3. If the OPD finds the applicant qualified, the applicant is to submit the date and the name of the reporter for each transcript to OPD. The OPD will then order “on the same terms as apply to its own cases.” 126 N.J. at 509.

Questions regarding this reissuance memo may be directed to the Assistant Director of the Criminal Practice Division by phone at (609)-815-2900, ext. 55300.

G.A.G.

cc: Chief Justice Stuart Rabner
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