Guide to Judiciary Policy

Vol. 7: Defender Services
Pt. A: Guidelines for Administering the CJA and Related Statutes

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§ 110 Defender Services Program

§ 110.10 Mission

The mission of the Defender Services program is to ensure that the right to counsel guaranteed by the Sixth Amendment, the Criminal Justice Act (18 U.S.C. § 3006A) (CJA), and other congressional mandates is enforced on behalf of those who cannot afford to retain counsel and other necessary defense services. By fulfilling its mission, the Defender Services program helps to:

- maintain public confidence in the nation's commitment to equal justice under law; and
- ensure the successful operation of the constitutionally based adversary system of justice by which both federal criminal laws and federally guaranteed rights are enforced.

§ 110.20 Goals

The Defender Services program has four goals:

Goal 1: Provide timely assigned counsel services to all eligible persons.

Goal 2: Provide appointed counsel services that are consistent with the best practices of the legal profession.

Goal 3: Provide cost-effective services.

Goal 4: Protect the independence of the defense function performed by assigned counsel so that the rights of individual defendants are safeguarded and enforced.

§ 110.30 Authority

(a) The Defender Services program operates under the statutory authority of the CJA and related statutes.

- Adequate Representation of Defendants (18 U.S.C. § 3006A)
- Counsel and Witnesses in Capital Cases (18 U.S.C. § 3005)
- Counsel for Financially Unable Defendants (18 U.S.C. § 3599)
- General Rules for Civil Forfeiture Proceedings (18 U.S.C. § 983(b))

(b) Under 18 U.S.C. § 3006A(h), the Judicial Conference of the United States is authorized to issue rules and regulations governing the operation of district plans created to furnish representational services (including counsel and investigative, expert, and other services necessary for adequate representation) to financially eligible persons. *Guide*, Volume 7A is a compendium of Conference policy adopted under that authority.

§ 120 Purpose

This volume sets forth Judicial Conference policy on:

- appointment of counsel under the CJA and related statutes;
- payment of private "panel" attorneys;
- authorization and payment for services other than counsel in federal criminal representations; and
- policies specific to federal defender organizations.

§ 130 Applicability

The guidance contained in this volume applies to the providers of services under the CJA and related statutes, federal courts, judiciary personnel, and all others responsible for the operation of any aspect of the Defender Services program.

§ 140 The eVoucher System

(a) The eVoucher system is the judiciary's primary method for CJA panel voucher submission and processing. It enables:

- the administration of CJA panel appointments;
- attorney voucher submission, review, and payments;
- service provider authorization, voucher submission, review, and payments;
- local reporting on CJA panel operations; and
- the implementation of case budgets.

(b) Policies on voucher review and approval are provided in Guide, Vol. 7A, Ch. 2 (Appointment and Payment of Counsel). CJA forms and accompanying instructions contain Judicial Conference policies and guidance for voucher administration and should be consulted in conjunction with this *Guide* volume and eVoucher's online help materials. PDF versions of the CJA forms and accompanying instructions are posted on the judiciary's public website.

§ 150 Contact Information

For inquiries on the policies in *Guide*, Volume 7A, contact the Legal and Policy Division Duty Day Attorney in the AO's Defender Services Office at 202-502-3030 or by email at dso_lpd@ao.uscourts.gov.

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§ 210 Representation under the Criminal Justice Act (CJA)

§ 210.10 District Plans

§ 210.10.10 Overview

(a) Each district court, with the approval of the judicial council of the circuit, is required to have a plan for furnishing representation for any person financially unable to obtain adequate representation. **See:** 18 U.S.C. § 3006A(a).

(b) "Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation." **See:** 18 U.S.C. § 3006A(a).

(c) The CJA, 18 U.S.C. § 3006A(a), mandates that each district plan provide for representation in the circumstances identified in § 210.20 and specify how such representation will be delivered as provided in § 210.10.20.

(d) A Model Plan for Implementation and Administration of the Criminal Justice Act (Model Plan) is included as Appx. 2A.

(e) Each district court should review, and amend as appropriate, the CJA Plan every five years to ensure compliance with applicable statutory authorities, CJA Guidelines, and other relevant Judicial Conference policies.

§ 210.10.15 Developing a CJA Plan

(a) All districts must develop, regularly review and update, and adhere to a CJA plan. **See:** § 210.10.10(e), above.

(b) A district's CJA plan should reference the most recent model plan and best practices.

(c) The plan should include:

(1) Provision for appointing CJA panel attorneys to a sufficient number of cases per year so that these attorneys remain proficient in criminal defense work.

(2) A training requirement to be appointed to and then remain on the panel.

(3) A mentoring program to increase the pool of qualified candidates.

See: JCUS-SEP 2018, pp. 39-40. **See also:** Guide, Vol. 7A, Appx. 2A, §§ VIII.B.7; IX.B.2, IX.C; and XI.B.1-5.

§ 210.10.20 Attorneys Who May Be Appointed Under the CJA

(a) Each district plan must include a provision for private attorneys. "Private attorneys shall be appointed in a substantial proportion of the cases." **See:** 18 U.S.C. § 3006A(a)(3).

(b) The district plan may include, in addition to a provision for private attorneys, either of the following or both:

- attorneys furnished by a bar association or a legal aid agency; or
- attorneys furnished by a defender organization established according to the provisions of 18 U.S.C. § 3006A(g).

See: 18 U.S.C. § 3006A(a)(3).

§ 210.10.25 Managing the Selection, Appointment, Retention, and Removal of Panel Attorneys

Every district should form a committee or designate a CJA supervisory or administrative attorney or a defender office, to manage the selection, appointment, retention, and removal of panel attorneys from the district's CJA panel. The process must incorporate judicial input into panel administration. **See:** JCUS-SEP 2018, p. 39. **See also:** Guide, Vol. 7A, Appx. 2A, § VIII.A.

§ 210.10.30 Counsel's Obligation to Advise the Court of Client's Ability to Pay

Each plan should contain a provision to the effect:

If, at any time after appointment, counsel obtains information that a client is financially able to make payment, in whole or in part, for legal or other services in connection with the client's representation, and the source of the attorney's information is not protected as a privileged communication, counsel will advise the court.

§ 210.20 Proceedings Covered by and Compensable under the CJA

§ 210.20.10 Mandatory Appointments

The CJA, 18 U.S.C. § 3006A(a)(1), requires that representation must be provided for any financially eligible person who is:

(a) charged with a felony or with a Class A misdemeanor;

(b) a juvenile alleged to have committed an act of juvenile delinquency as defined in 18 U.S.C. § 5031 (**see:** 18 U.S.C. § 5034 (on appointment of counsel); Guide, Vol. 7A, § 320.50 (on appointment of a guardian ad litem));

(c) charged with a violation of probation;

(d) under arrest, when such representation is required by law;

(e) entitled to appointment of counsel in parole proceedings;

[**Note:** The reference to representation at parole proceedings was deleted from the CJA according to the November 1, 1987 repeal of 18 U.S.C. chapter 311. However, the savings provisions of the Sentencing Reform Act of 1984, as amended by the United States Parole Commission Extension Act of 2018 (Pub. L. No. 115-274 (October 31, 2018)), state that existing law pertaining to parole will remain effective for 33 years after November 1, 1987, with regard to persons specified in the savings provisions, and certain laws relating to parole will remain effective until the expiration of the sentence received by other persons specified in the savings provisions. This includes laws governing the right to counsel in parole proceedings.]

(f) charged with a violation of supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release (e.g., *Guide to Judiciary Policy*, Vol. 8G (Criminal Monetary Penalties (Monograph 114)), Ch. 6);

(g) subject to a mental condition hearing under 18 U.S.C. chapter 313 (**see:** Guide, Vol. 7A, § 220.30(f) and § 230.23.20(i)(5));

(h) in custody as a material witness;

(i) entitled to appointment of counsel under the sixth amendment to the Constitution, or faces loss of liberty in a case and federal law requires the appointment of counsel;

[**Note:** This provision obviates the need for future amendments to the CJA each time the right to counsel is extended to new situations by judicial decision or federal statute.]

(j) seeking to set aside or vacate a death sentence in proceedings under 28 U.S.C. § 2254 or § 2255; or

(k) is entitled to appointment of counsel in connection with prisoner transfer proceedings under 18 U.S.C. § 4109.

For applicable case compensation limits, **see:** § 230.23.20.

§ 210.20.20 Discretionary Appointments

(a) Whenever the U.S. magistrate judge or the court determines that the interests of justice so require, representation **may** be provided for any financially eligible person who is:

(1) charged with a petty offense (Class B or C misdemeanor, or an infraction) for which a sentence to confinement is authorized; or

(2) seeking relief under 28 U.S.C. §§ 2241, 2254, or 2255 (**but see:** Guide, Vol. 7A, § 210.20.10(j) on the mandatory appointment of counsel in death penalty habeas corpus cases and § 220.45 on the requirement for appointment of counsel for an evidentiary hearing).

(b) Counsel may be appointed under the CJA for a person charged with civil or criminal contempt who faces loss of liberty.

(c) Upon application of a witness before a grand jury, a court, the Congress, or a federal agency or commission which has the power to compel testimony, counsel may be appointed where there is reason to believe, either prior to or during testimony, that the witness could be subject to a criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty.

(d) Counsel may be appointed for financially eligible persons proposed by the U.S. attorney for processing under a “pretrial diversion” program.

(e) Counsel may be appointed for persons held for international extradition under 18 U.S.C. chapter 209.

(f) For appointments in civil forfeiture proceedings, **see:** § 210.20.40.

For applicable case compensation limits, **see:** § 230.23.20.

§ 210.20.30 Ancillary Matters

(a) Representation may be furnished for financially eligible persons in "ancillary matters appropriate to the proceedings" under 18 U.S.C. § 3006A(c).

(b) In determining whether a matter is ancillary to the proceedings, the court should consider whether the matter, or the issues of law or fact in the matter, arose from, or are the same as or closely related to, the facts and circumstances surrounding the principal criminal charge.

(c) In determining whether representation in an ancillary matter is appropriate to the proceedings, the court should consider whether such representation is reasonably necessary to accomplish, among other things, one of the following objectives:

(1) to protect a Constitutional right;

(2) to contribute in some significant way to the defense of the principal criminal charge;

(3) to aid in preparation for the trial or disposition of the principal criminal charge;

(4) to enforce the terms of a plea agreement in the principal criminal charge;

(5) to preserve the claim of the CJA client to an interest in real or personal property subject to a civil forfeiture proceeding under 21 U.S.C. § 881, 19 U.S.C. § 1602 or similar statutes, which property, if recovered by the CJA client, may be considered for reimbursement under 18 U.S.C. § 3006A(f) and Guide, Vol. 7A, § 210.40.30; or

(6) to effectuate the return of real or personal property belonging to the CJA client which may be subject to a motion for return of property under Fed. R. Crim. P. 41(g), which property, if recovered by the CJA client, may be considered for reimbursement under 18 U.S.C. § 3006A(f) and Guide, Vol. 7A, § 210.40.30.

(d) The scope of representation in the ancillary matter should extend only to the part of the ancillary matter that relates to the principal criminal charge and to the **correlative objective sought** to be achieved in providing the representation (e.g., a CJA defendant in a criminal stock fraud case should be represented by CJA counsel at the defendant's deposition in a

parallel civil fraud action for the limited purpose of advising the defendant concerning the defendant's Fifth Amendment rights).

(e) Representation in an ancillary matter is compensable as part of the representation in the principal matter for which counsel has been appointed and is not considered a separate appointment for which a separate compensation maximum would be applicable under § 230.23.10(g).

(f) A private panel attorney appointed under the CJA may obtain, through an *ex parte* application to the court, a preliminary determination that the representation to be provided in an ancillary matter is appropriate to the principal criminal proceeding and compensable under 18 U.S.C. § 3006A(c) and this guideline. However, failure to obtain such a preliminary determination does not bar the court from approving compensation for representation in an ancillary matter provided that the services and compensation related thereto are justified in a memorandum submitted by the attorney to the court at the conclusion of the principal criminal matter and the presiding judicial officer finds that such representation was appropriate.

§ 210.20.40 Civil Forfeiture Proceedings

(a) Under 18 U.S.C. § 983(b)(1), if a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the person is represented by counsel appointed under 18 U.S.C. § 3006A in connection with a related criminal case, the court may authorize counsel to represent that person with respect to the claim.

(b) In determining whether to authorize counsel to represent a person in a judicial civil forfeiture proceeding under a civil forfeiture statute, the court must take into account such factors as:

- the person's standing to contest the forfeiture; and
- whether the claim appears to be made in good faith.

§ 210.20.50 Proceedings Not Covered by or Compensable under the CJA

Cases or proceedings which are not covered by or compensable under the CJA include the following:

(a) Petty offenses (Class B or C misdemeanors or infractions), except where confinement is authorized by statute and the court or U.S. magistrate judge determines that appointment of counsel is required in the interest of justice. **See:** § 210.20.20(a)(1).

(b) Representation of corporations or other business entities.

(c) Prisoners bringing civil rights actions under 42 U.S.C. § 1983. Care should be taken to ensure that a prisoner is not denied the appointment of counsel due to the mislabelling of the prisoner's action as "civil rights" when the proceedings could also be considered as seeking relief under 28 U.S.C. § 2254.

(d) Administrative proceedings before the U.S. Citizenship and Immigration Services (USCIS), removal or deportation proceedings before the Immigration Court, review of the Immigration Court's decision by the Board of Immigration Appeals, and judicial review by the federal courts of appeals of petitions for review from these administrative decisions. **But see:** § 210.20.30 (ancillary matters) and § 210.20.20(a)(2) (habeas corpus cases).

§ 210.20.60 Civil Actions to Protect Federal Jurors' Employment

(a) Although not an appointment under the authority of the CJA, Congress has included statutory language in the annual appropriation for the federal judiciary's Defender Services account to authorize "the compensation of attorneys appointed to represent jurors in civil actions for the protection of their employment, as authorized by 28 U.S.C. § 1875(d)."

(b) In these cases, the court appoints counsel under the standard provided in 28 U.S.C. § 1875(d)(1), which does not require a finding of financial eligibility.

(c) The court will appoint a private attorney, who may be a member of the CJA panel and should have employment law experience. A federal defender should not be appointed.

(d) The court should use the eVoucher system and Form CJA 20 (Appointment of and Authority to Pay Court-Appointed Counsel) for the appointment and pay counsel "to the extent provided by [the CJA]," 28 U.S.C. § 1875(d)(1), and the CJA Guidelines.

(e) The court may, as authorized by 28 U.S.C. § 1875(d)(2), order a defendant employer to pay the fees and expenses of counsel appointed under 28 U.S.C. § 1875(d)(1); in such event, the court should follow the reimbursement procedures in Guide, Vol. 7A, § 230.40.

§ 210.30 Composition and Management of the CJA Panel

§ 210.30.10 Overview

(a) The CJA Panel must be designated or approved by the court. **See:** 18 U.S.C. § 3006A(b).

(b) The membership of the panel should be large enough to provide a sufficient number of experienced attorneys to handle the CJA caseload, yet small enough so that panel members receive an adequate number of appointments to maintain their proficiency in criminal defense work and thereby provide a high quality of representation.

(c) Members should serve at the pleasure of the court.

(d) The Model Plan for Implementation and Administration of the Criminal Justice Act is included as Appx. 2A.

§ 210.30.20 Selection of Panel Members

In part, 18 U.S.C. § 3006A(b) provides that:

> Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan.

§ 210.30.30 *Pro Hac Vice* Appointments

(a) If the district judge presiding over the case, or the chief judge if a district judge has not yet been assigned to the case, determines that the appointment of an attorney, who is not a member of the CJA panel, is in the interest of justice, judicial economy or continuity of representation, or there is some other compelling circumstance warranting the attorney's appointment, the attorney may be admitted to the CJA panel *pro hac vice* and appointed to represent the CJA defendant.

(b) Consideration for preserving the integrity of the panel selection process suggests that *pro hac vice* appointments should be made only in exceptional circumstances.

(c) The attorney, who may or may not maintain an office in the district, should possess such qualities as would qualify the attorney for admission to the district's CJA panel in the ordinary course of panel selection.

§ 210.30.40 Centralization of Panel Administration and Management

Administration and management of the CJA Panel should be centralized in one organizational element (such as the clerk's office or, where appropriate, the federal defender organization) to ensure that counsel is appointed as expeditiously as possible, appointments are equitably distributed, and information on availability of counsel is maintained.

§ 210.30.50 Distribution of Appointments

(a) Appointments should be made in a manner which results in both

- a balanced distribution of appointments and compensation among members of the CJA Panel, and
- quality representation for each CJA defendant.

(b) These objectives can be accomplished by making appointments on a rotational basis, subject to the court's discretion to make exceptions due to the nature and complexity of the case, an attorney's experience, and geographical considerations.

§ 210.40 Determining Financial Eligibility for Representation Under the CJA

§ 210.40.10 Timely Appointment of Counsel

A person financially eligible for representation should be provided with counsel as soon as feasible after being taken into custody, when first appearing before the court or U.S. magistrate judge, when formally charged, or when otherwise entitled to counsel under the CJA, whichever occurs earliest.

§ 210.40.20 Fact-Finding

(a) The determination of eligibility for representation under the CJA is a judicial function to be performed by the court or U.S. magistrate judge after making appropriate inquiries concerning the person's financial condition.

(b) Unless it will result in undue delay, fact-finding concerning the person's eligibility for appointment of counsel should be completed prior to the person's first appearance in court.

(c) Other officers or employees of the court (e.g., clerk, deputy clerk, or pretrial services officer) may be designated by the court to obtain or verify the facts upon which such determination is to be made.

(d) Relevant information bearing on the person's financial eligibility should be reflected on Form CJA 23 (Financial Affidavit) and the form must be completed and executed before a judicial officer or employee.

(e) Employees of law enforcement agencies or U.S. attorney offices should not participate in the completion of the Form CJA 23 (Financial Affidavit) or seek to obtain information from a person requesting the appointment of counsel concerning the person's eligibility.

(f) The person seeking appointment of counsel has the responsibility of providing the court with sufficient and accurate information upon which the court can make an eligibility determination. For guidance on counsel's obligation to advise the court about the client's ability to pay, **see:** § 210.10.30.

(g) The prosecution and other interested entities may present to the court information concerning the person's eligibility, but the judicial inquiry into financial eligibility must **not** be utilized as a forum to discover whether the person has assets subject to forfeiture, or the ability to pay a fine, make restitution, or compensate another person under the Victim/Witness Protection Act or other purposes not related to the appointment of counsel. Such determinations, if appropriate, must be made at other stages of the proceedings in which the person seeking counsel is a party.

(h) Financial affidavits (such as Form CJA 23) seeking the appointment of counsel should not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access. If the financial affidavit is docketed it should be filed under seal. **See:** Privacy Policy for Electronic Case Files.

§ 210.40.30 Standards for Eligibility

(a) A person is "financially unable to obtain counsel" within the meaning of 18 U.S.C. § 3006A(b) if the person's net financial resources and income are insufficient to obtain qualified counsel. In determining whether such insufficiency exists, consideration should be given to:

(1) the cost of providing the person and his dependents with the necessities of life, and

(2) the cost of the defendant's bail bond if financial conditions are imposed, or the amount of the case deposit defendant is required to make to secure release on bond.

(b) Any doubts as to a person's eligibility should be resolved in the person's favor; erroneous determinations of eligibility may be corrected at a later time.

(c) At the time of determining eligibility, the court or U.S. magistrate judge should inform the person of the penalties for making a false statement, and of the obligation to inform the court and the appointed attorney of any change in financial status.

(d) Prior to sentencing, the court should consider pertinent information contained in the presentence report, the court's intention with respect to fines and restitution, and all other available data bearing on the person's financial condition, in order to make a final determination concerning whether the person then has funds available to pay for some or all of the costs of representation. At the time of sentencing, in appropriate circumstances, it should order the person to reimburse the CJA appropriation for such costs. **See:** § 230.40.

(e) Future earnings should not be considered or subject to a reimbursement order; however, other income or after-acquired assets which will be received within 180 days after the date of the court's reimbursement order may be available as a source of reimbursement.

§ 210.40.40 Partial Eligibility

If a person's net financial resources and income anticipated prior to trial are in excess of the amount needed to provide the person and that person's dependents with the necessities of life and to provide the defendant's release on bond, but are insufficient to pay fully for retained counsel, the judicial officer should find the person eligible for the appointment of counsel under the CJA and should direct the person to pay the available excess funds to the clerk of the court at the time of such appointment or from time to time after that.

(a) Such funds must be held subject to the provisions of 18 U.S.C. § 3006A(f).

(b) The judicial officer may increase or decrease the amount of such payments and may impose such other conditions from time to time as may be appropriate.

(c) With respect to the disposition of such funds, **see:** § 230.40.

§ 210.40.50 Family Resources

The initial determination of eligibility should be made without regard to the financial ability of the person's family unless the family indicates willingness and financial ability to retain counsel promptly. At or following the appointment of counsel, the judicial

officer may inquire into the financial situation of the person's spouse (or parents, if the person is a juvenile) and if such spouse or parents indicate their willingness to pay all or part of the costs of counsel, the judicial officer may direct deposit or reimbursement.

§ 210.50 CJA Forms

The Judicial Conference of the United States, at its meeting in January 1965, approved the recommendation of its Committee to Implement the Criminal Justice Act of 1964 (subsequently renamed the Committee on Defender Services), that every district incorporate in its plan a requirement that the standard forms, approved by the Conference, be used. **See:** JCUS-JAN 1965, p. 6. The majority of CJA forms are now incorporated into the eVoucher system. In addition, copies of the pertinent forms may be found on the public judiciary website.

§ 220 Appointment of Counsel

§ 220.10 Timely Appointment of Counsel

As noted in § 210.40.10, a person financially eligible for representation should be provided with counsel as soon as feasible after being taken into custody, when first appearing before the court or U.S. magistrate judge, when formally charged, or when otherwise entitled to counsel under the CJA, whichever occurs earliest.

§ 220.15 Forms for the Appointment of Counsel

Forms for the appointment of counsel, together with instructions for their use, may be found on the public judiciary website.

§ 220.18 Notification of Relationship

Prior to appointment, counsel should notify the presiding judicial authority if counsel is aware that he or she is related (as the term is defined in 5 U.S.C. § 3110) to any attorney on the same representation, or any attorney being considered for appointment. If appointment of related counsel is made prior to notification, counsel should provide notification as soon as practicable.

§ 220.20 Duration of Appointment

In part, 18 U.S.C. § 3006A(c) provides that:

> A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the U.S. magistrate judge or the court through appeal, including ancillary matters appropriate to the proceedings.

§ 220.25 Continuity of Representation

(a) If the attorney appointed by the U.S. magistrate judge is to continue to represent the defendant in the district court, no additional appointment by the district court should be made, except on appeal from a judgment rendered by the U.S. magistrate judge in a misdemeanor case.

(b) Counsel's time and expenses involved in the preparation of a petition for a writ of certiorari are considered applicable to the case before the U.S. court of appeals and should be included on the voucher for services performed in that court.

(c) An order extending Appointment on Appeal (Form CJA 20) should be executed for each appellant for whom counsel was appointed by a U.S. district judge or magistrate judge for representation at the trial level. In a federal capital prosecution, or a proceeding under 28 U.S.C. § 2254 or § 2255 challenging a death sentence, the appointment should be made on a Form CJA 30 (Death Penalty Proceedings: Appointment of and Authority to Pay Court-Appointed Counsel).

(d) Absent special circumstances, whenever a case is transferred to another district, such as under Federal Rules of Criminal Procedure Rules 20, 21, and 40, appointment of counsel should be made in the transferee district.

§ 220.30 New Appointments Following Earlier Representations

A new appointment on Form CJA 20 should be made for each person represented in the following proceedings:

(a) new trial after motion, mistrial, reversal, or remand on appeal;

(b) probation or supervised release revocation proceedings;

(c) appeal, including interlocutory appeals;

(d) bail appeals to a court of appeals;

(e) extraordinary writs;

(f) mental condition hearings under:

(1) 18 U.S.C. § 4243 (Hospitalization of a Person Found Not Guilty only by Reason of Insanity);

(2) 18 U.S.C. § 4245 (Hospitalization of an Imprisoned Person Suffering From Mental Disease or Defect); and

(3) 18 U.S.C. § 4246 (Hospitalization of a Person Due for Release but Suffering From Mental Disease or Defect). **See also:** Guide, Vol. 7A, § 230.23.20.

Note: The chart below explains when a mental condition hearing is considered a new appointment or part of the case in chief.

§ 220.30(f) Insanity Defense Reform Act of 1984			
U.S. Code Section	**Type of Hearing**	**New Case**	**Part of Case in Chief**
18 U.S.C. § 4241(a)	Motion to determine competence to stand trial.	No	Yes
18 U.S.C. § 4241(e)	Hearing to determine whether person temporarily hospitalized as a result of incompetence to stand trial has recovered competence.	No	Yes
18 U.S.C. § 4243(c)	Hearing to determine whether release of person found not guilty by reason of insanity would create substantial risk of injury to person or property.	Yes	No
18 U.S.C. § 4243(f)	Hearing to determine whether person hospitalized following finding of not guilty by reason of insanity may be released conditionally or unconditionally.	Yes	No
	Hearing to modify or eliminate conditions of release.	Yes	No
18 U.S.C. § 4243(g)	Hearing on revocation of conditional release imposed under § 4243(f).	Yes	No
18 U.S.C. § 4244(a)	Hearing to determine present mental condition of convicted defendant prior to sentencing.	No	Yes
18 U.S.C. § 4245(a)	Hearing to determine whether imprisoned person suffering from mental disease or defect should be hospitalized.	Yes	No
18 U.S.C. § 4246(a)	Hearing to determine whether a hospitalized person due for release is presently suffering from a mental disease or defect so that release would create a substantial risk of injury to persons or property.	Yes	No

§ 220.30(f) Insanity Defense Reform Act of 1984			
U.S. Code Section	**Type of Hearing**	**New Case**	**Part of Case in Chief**
18 U.S.C. § 4246(e)	Hearing to determine whether a person whose hospitalization was extended following a hearing under § 4246(a) may be released or conditionally released.	Yes	No
18 U.S.C. § 4246(f)	Hearing on revocation of conditional release imposed under § 4246(e).	Yes	No

§ 220.35 Federal Defender Organizations

When cases are assigned to a federal public or community defender organization, the appointment should be made in the name of the organization (i.e., the federal public defender or community defender), rather than in the name of an individual staff attorney within the organization. **See:** Guide, Vol. 7A, § 440.

§ 220.40 Appointment of Counsel to Represent More Than One Individual in a Case

(a) Unless good cause is shown or in the absence of a waiver on the record by the defendants, in a criminal prosecution involving more than one defendant, or where separate charges arising out of the same or similar transactions are concurrently pending against two or more defendants, separate counsel should normally be appointed for each defendant. If an attorney is appointed to represent more than one person, a separate order of appointment must be entered with respect to each person.

(b) An attorney who represents joint defendants may be compensated for services up to the statutory maximum for each person represented, unless the case involves extended or complex representation, in which case the attorney may be entitled to additional compensation above the statutory maximum rate. **See:** § 230.50 (Proration of Claims) and § 230.23.10(c).

§ 220.45 Appointment of Counsel in Habeas Corpus and Proceedings Under 28 U.S.C. § 2255

While the Rules Governing Section 2254 Cases in the U.S. District Courts and the Rules Governing Section 2255 Proceedings in the U.S. District Courts mention the appointment of counsel only with regard to discovery and evidentiary hearings, the CJA in 18 U.S.C. § 3006A(a)(2)(B) permits discretionary appointment at any stage of the proceedings in the interest of justice. **See:** Guide, Vol. 7A, § 210.20.20(a)(2). Also,

18 U.S.C. § 3599(a)(1) **requires** the appointment of one or more attorneys in death penalty federal habeas corpus cases. **See:** Guide, Vol. 7A, § 620.10.

§ 220.50 Waiver of Counsel

A waiver of assigned counsel by a defendant should be in writing. If the defendant refuses to sign the waiver, the court or U.S. magistrate judge should certify thereto. No standard form has been prescribed for this purpose.

§ 220.55 Standby Counsel

§ 220.55.10 Overview

(a) Criminal defendants have both a constitutional and statutory right to self-representation in federal court. **See:** *Faretta v. California*, 422 U.S. 806 (1975); 28 U.S.C. § 1654.

(b) In some cases, however, the court or U.S. magistrate judge may find it necessary to appoint "standby" counsel to be available to assist a pro se defendant in that defendant's defense and also to protect the integrity and ensure the continuity of the judicial proceedings. **See:** *McKaskle v. Wiggins*, 465 U.S. 168 (1984); *Faretta*, supra.

§ 220.55.20 Standby Counsel Services Accepted by a Pro Se Defendant

(a) The CJA provides that unless the financially eligible person waives representation by counsel, the court must appoint counsel to represent the person. 18 U.S.C. § 3006A(b).

(b) While the court has inherent authority to appoint standby counsel, such appointments may not be made and counsel may not be compensated **under the CJA** unless:

- the defendant qualifies for appointed counsel, and
- representation is actually rendered by counsel.

Therefore, if a financially eligible pro se defendant agrees to be represented, at least in part, by standby counsel, compensation may be provided under the CJA.

(c) Similarly, if at any time during the course of the proceedings the services of standby counsel are accepted by a financially eligible pro se defendant, a *nunc pro tunc* CJA appointment order should be effected and counsel may be compensated under the CJA.

§ 220.55.30 Standby Counsel Appointed Under the Court's Inherent Authority

(a) In circumstances in which standby counsel is appointed under the court's inherent authority, and counsel serves exclusively on behalf of the court to protect the integrity and continuity of the proceedings, and does not represent the defendant, any compensation to be paid counsel must be in the capacity of an "expert or consultant" under 5 U.S.C. § 3109.

(b) Therefore, an appointment under this section may be made regardless of whether the defendant is financially able to obtain adequate representation. In such cases, compensation will be determined by the judicial officer according to CJA hourly rates and case compensation maximums.

(c) The Administrative Office of the U.S. Courts' (AO) Defender Services Office should be consulted regarding appointment and payment procedures. If, during the course of the proceedings, a pro se defendant who is financially able to retain counsel elects to do so, the court's appointment of an attorney under 18 U.S.C. § 3006A(c) may be terminated.

§ 220.60 Termination of Appointment

In any case in which appointment of counsel has been made under the CJA and the court subsequently finds that the person is financially able to obtain counsel, such appointment should be terminated using the eVoucher system or Form CJA 7 (Order Terminating Appointment of Counsel and/or Authorization for Distribution of Available Private Funds).

§ 230 Compensation and Expenses of Appointed Counsel

§ 230.10 Forms for Compensation and Reimbursement of Expenses

The eVoucher system is the judiciary's primary method for CJA panel voucher submission and processing. **See:** Guide, Vol. 7A, § 140. Legacy forms for the compensation and reimbursement of expenses to appointed counsel, together with instructions for their use, may be found on the public judiciary website. A copy of all supporting documents that itemize or expand the amounts shown on the face of Form CJA 20 must be attached when submitting vouchers in the eVoucher system.

§ 230.13 Time Limits

(a) Vouchers should be submitted no later than 45 days after the representation concludes, unless good cause is shown. The clerks or CJA supervisory attorneys of the concerned courts should ensure that

panel attorneys comply with the prescribed limits. Every effort should be made to have counsel submit the claim as soon as possible upon completion of services rendered. While extremely late submissions may impact the ability to adequately substantiate claims, voucher reductions based solely on submissions outside of the 45-day time limit are not authorized. **See:** § 230.33.10 (Standard for Voucher Review).

(b) Absent extraordinary circumstances, judges should act upon panel attorney compensation claims within 30 days of submission.

§ 230.16 Hourly Rates and Effective Dates in Non-Capital Cases

(a) Except in federal capital prosecutions and in death penalty federal habeas corpus proceedings, compensation paid to appointed counsel for time expended in court or out of court or before a U.S. magistrate judge may not exceed the rates in the following table. For information on compensation of counsel in federal capital cases and death penalty federal habeas corpus proceedings, **see:** Guide, Vol. 7A, § 630.

§ 230.16(a) Non-Capital Hourly Rates	
If services were performed between...	**The maximum hourly rate is...**
01/01/2024 to present	$172
01/01/2023 through 12/31/2023	$164
01/01/2022 through 12/31/2022	$158
01/01/2021 through 12/31/2021	$155
01/01/2020 through 12/31/2020	$152
02/15/2019 through 12/31/2019	$148
03/23/2018 through 02/14/2019	$140
05/05/2017 through 03/22/2018	$132
01/01/2016 through 05/04/2017	$129
01/01/2015 through 12/31/2015	$127
03/01/2014 through 12/31/2014	$126
09/01/2013 through 02/28/2014	$110
01/01/2010 through 08/31/2013	$125
03/11/2009 through 12/31/2009	$110

§ 230.16(a) Non-Capital Hourly Rates	
If services were performed between...	**The maximum hourly rate is...**
01/01/2008 through 03/10/2009	$100
05/20/2007 through 12/31/2007	$94
01/01/2006 through 05/19/2007	$92
05/01/2002 through 12/31/2005	$90

(b) For rates applicable to services performed prior to May 1, 2002 for non-capital cases, please contact the AO's Defender Services Office, Legal and Policy Division Duty Day Attorney, at 202-502-3030 or via email at DSO_LPD@ao.uscourts.gov.

§ 230.20 Annual Increase in Hourly Rate Maximums

Under 18 U.S.C. § 3006A(d)(1), the Judicial Conference is authorized to increase annually all hourly rate maximums by an amount not to exceed the federal pay comparability raises given to federal employees. Hourly rate maximums will be adjusted automatically each year according to any federal pay comparability adjustment, contingent upon the availability of sufficient funds. The new rates will apply with respect to services performed on or after the effective date.

§ 230.23 Case Compensation Maximums

§ 230.23.10 Applicability and Exclusions

(a) In General

All compensation limits apply to each attorney in each case.

(b) Federal Death Penalty Cases and Federal Capital Habeas Corpus Proceedings

The case compensation limits are not applicable in federal death penalty cases and federal capital habeas corpus proceedings. **See:** Guide, Vol. 7A, § 630.10.20.

(c) Excess Compensation Vouchers

(1) As further explained in § 230.23.40, the CJA places limitations on the general authority of presiding judicial officers to unilaterally approve attorney compensation.

(2) Payments above case compensation limits referred to in § 230.23.20 may be authorized when certified by the presiding judicial officer and approved by the chief judge of the circuit. The chief judge of the circuit is permitted to delegate this approval authority to another active or senior circuit judge.

(3) Presiding judicial officers should certify excess compensation payments to counsel whenever in their judgment the case involves extended or complex representation and the amount certified is necessary to provide fair compensation. **See:** § 230.23.40.

(d) Limitations Inapplicable to Expense Reimbursement

Case compensation limits apply only to attorney fees. There is no limit on the presiding judicial officer's authority to approve the reimbursement of expenses of counsel, and the chief judge of the circuit has no role in authorizing the payment of such expenses. For an explanation of reimbursable out-of-pocket expenses, **see**: § 230.63. **But see:** § 230.46 (Prior Authorization for Appointed Counsel to Incur Expenses).

(e) Change in Offense Classification Level

If a case is disposed of at an offense level lower than the offense originally charged, the compensation maximum is determined by the higher offense level.

(f) More than One Counsel

In difficult cases in which the court finds it necessary to appoint more than one attorney, the limitations apply separately to each attorney.

(g) Ancillary Matters

Representation in ancillary matters is compensable as part of the representation in the principal matter for which counsel has been appointed and is not considered a separate appointment for which a separate compensation maximum would apply.

(h) Increases to the Maximum Compensation Rate

Under 18 U.S.C. § 3006A(d)(2), the attorney case compensation maximums increase "simultaneously" with aggregate changes in the maximum attorney hourly compensation rate. Current case maximum amounts are identified below in § 230.23.20.

§ 230.23.20 Current Attorney Case Compensation Maximums

For work performed on or after January 1, 2024, the case compensation maximums are as follows:

§ 230.23.20 Current Attorney Case Compensation Maximums	
If the case is a...	**the case maximum is...**
(a) Felony (except federal capital prosecutions)	$13,400 for trial court level $9,600 for appeal
(b) Misdemeanors (including petty offenses (class B or C misdemeanors or infractions) as provided in 18 U.S.C. § 3006A(a)(2)(A))	$3,800 for trial court level $9,600 for appeal
(c) Proceedings under 18 U.S.C. § 4106A (in connection with paroled prisoners transferred to the United States)	$2,900 for representation before the U.S. Parole Commission $9,600 for appeal
(d) Proceedings under 18 U.S.C. § 4107 or § 4108 (for counsel and guardians ad litem providing services in connection with prisoner transfer proceedings). **Note:** For information on appointment of counsel or guardians ad litem under 18 U.S.C. § 4109, **see:** Guide, Vol. 7B (International Prisoner Transfer Proceedings).	$3,800 for each consent verification proceeding
(e) Pre-Trial Diversion	$13,400 if offense alleged by the U.S. attorney is a felony $3,800 if offense alleged by the U.S. attorney is a misdemeanor
(f) Proceedings under 18 U.S.C. § 983 (for services provided by counsel appointed under 18 U.S.C. § 983(b)(1) in connection with certain judicial civil forfeiture proceedings)	$13,400 for trial court level $9,600 for appeal
(g) Non-Capital Post-Conviction Proceedings under 28 U.S.C. § 2241, § 2254 or § 2255	$13,400 for trial court level $9,600 for appeal
(h) Proceedings to Protect Federal Jurors Employment under 28 U.S.C. § 1875	$13,400 for trial court level $9,600 for appeal
(i) Other Representations Required or Authorized by the CJA **Note:** This category includes but is not limited to the following representations:	$2,900 for trial court level $2,900 for each level of appeal

§ 230.23.20 Current Attorney Case Compensation Maximums	
If the case is a...	**the case maximum is...**
(1) probation violation; (2) supervised release hearing (for persons charged with a violation of supervised release or facing modification, reduction, or enlargement of a condition or extension or revocation of a term of supervised release); (3) parole proceedings under 18 U.S.C. chapter 311 (repealed) (**but see:** note at Guide, Vol. 7A, § 210.20.10(a)(5)). (4) material witness in custody; (5) mental condition hearings under 18 U.S.C. chapter 313 (except for hearings under 18 U.S.C. § 4241 and § 4244, which are considered part of the case in chief with no separate compensation maximums applying. (For a chart detailing the treatment for the purpose of compensation of representation at each hearing under 18 U.S.C. chapter 313, **see:** Guide, Vol. 7A, § 220.30(f)); (6) civil or criminal contempt (where the person faces loss of liberty); (7) witness (before a grand jury, a court, the Congress, or a federal agency or commission which has the power to compel testimony, where there is a reason to believe either before or during testimony, that the witness could be subject to a criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty); and (8) international extradition (under 18 U.S.C. chapter 209).	

§ 230.23.30 History of Case Compensation Maximums

For work performed prior to January 1, 2024, the case compensation maximums are as follows:

§ 230.23.30 History of Case Compensation Maximums										
The case maximum if a case is a...	**And services were completed...**									
	3/1/2014-12/31/2014	**1/1/2015-12/31/2015**	**1/1/2016-5/4/2017**	**5/5/2017-3/22/2018**	**3/23/2018-2/14/2019**	**2/15/2019-12/31/2019**	**1/1/2020-12/31/2020**	**1/1/2021-12/31/2021**	**1/1/2022-12/31/2022**	**1/1/2023-12/31/2023**
(a) Felony (including pre-trial diversion of alleged felony)	$9,800	$9,900	$10,000	$10,300	$10,900	$11,500	$11,800	$12,100	$12,300	$12,800
(b) Misdemeanor (including pre-trial diversion of alleged misdemeanor)	$2,800	$2,800	$2,900	$2,900	$3,100	$3,300	$3,400	$3,400	$3,500	$3,600
(c) Proceeding under 18 U.S.C. § 4106A	$2,100	$2,100	$2,100	$2,200	$2,300	$2,500	$2,500	$2,600	$2,600	$2,700
(d) Proceeding under 18 U.S.C. § 4107 or § 4108 (for each verification proceeding)	$2,800	$2,800	$2,900	$2,900	$3,100	$3,300	$3,400	$3,400	$3,500	$3,600
(e) Proceeding under 18 U.S.C. § 983	$9,800	$9,900	$10,000	$10,300	$10,900	$11,500	$11,800	$12,100	$12,300	$12,800
(f) Post-conviction proceeding under 28 U.S.C. § 2241, § 2254 or § 2255	$9,800	$9,900	$10,000	$10,300	$10,900	$11,500	$11,800	$12,100	$12,300	$12,800
(g) Proceeding under 28 U.S.C. § 1875	$9,800	$9,900	$10,000	$10,300	$10,900	$11,500	$11,800	$12,100	$12,300	$12,800

§ 230.23.30 History of Case Compensation Maximums										
The case maximum if a case is a...	**And services were completed...**									
	3/1/2014-12/31/2014	**1/1/2015-12/31/2015**	**1/1/2016-5/4/2017**	**5/5/2017-3/22/2018**	**3/23/2018-2/14/2019**	**2/15/2019-12/31/2019**	**1/1/2020-12/31/2020**	**1/1/2021-12/31/2021**	**1/1/2022-12/31/2022**	**1/1/2023-12/31/2023**
(h) Appeal from felony, misdemeanor, proceeding under 18 U.S.C. § 4106A, 18 U.S.C. § 983, post-conviction proceeding under 28 U.S.C. § 2241, § 2254 or § 2255, and 28 U.S.C. § 1875	$7,000	$7,100	$7,200	$7,300	$7,800	$8,200	$8,400	$8,600	$8,800	$9,100
(i) Other representation required or authorized by the CJA (including, but not limited to probation, supervised release hearing, material witness, grand jury witness)	$2,100	$2,100	$2,100	$2,200	$2,300	$2,500	$2,500	$2,500	$2,600	$2,700
(j) Appeal of other representation	$2,100	$2,100	$2,100	$2,200	$2,300	$2,500	$2,500	$2,500	$2,600	$2,700

For inquiries concerning case compensation maximums, contact the AO's Defender Services Office, Legal and Policy Division Duty Day Attorney, at 202-502-3030 or via email at DSO_LPD@ao.uscourts.gov.

§ 230.23.40 Waiving Case Compensation Maximums

(a) Overview

Payments in excess of CJA compensation maximums may be made to provide fair compensation in cases involving extended **or** complex representation when so certified by the court or U.S. magistrate judge and approved by the chief judge of the circuit (or by an active or senior circuit judge to whom excess compensation approval authority has been delegated).

(b) Extended or Complex Cases

The approving judicial officer should first make a threshold determination as to whether the case **is either** extended or complex.

(1) If the legal or factual issues in a case are unusual, thus requiring the expenditure of more time, skill, and effort by the lawyer than would normally be required in an average case, the case is "complex."

(2) If more time is reasonably required for total processing than the average case, including pre-trial and post-trial hearings, the case is "extended."

(c) Determining Fair Compensation

After establishing that a case is extended or complex, the approving judicial officer should determine if excess payment is necessary to provide fair compensation. The following criteria, among others, may be useful in this regard:

- responsibilities involved measured by the magnitude and importance of the case;
- manner in which duties were performed;
- knowledge, skill, efficiency, professionalism, and judgment required of and used by counsel;
- nature of counsel's practice and injury thereto;
- any extraordinary pressure of time or other factors under which services were rendered; and
- any other circumstances relevant and material to a determination of a fair and reasonable fee.

§ 230.26 Case Budgeting

§ 230.26.10 Overview

Courts are encouraged to use case-budgeting techniques in representations that appear likely to become or have become extraordinary in terms of potential cost (ordinarily, a representation in which attorney hours are expected to exceed 300 hours or total expenditures are expected to exceed 300 times the prevailing CJA panel attorney non-capital hourly rate, rounded up to the nearest thousand, for appointed counsel and services other than counsel for an individual CJA defendant).

§ 230.26.15 Case-Budgeting Attorneys

(a) Every circuit should have available at least one case-budgeting attorney.

(b) Reviewing judges should give due weight to the case-budgeting attorney's recommendations in reviewing vouchers and requests for expert services, and must articulate their reasons for departing from those recommendations.

See: JCUS-MAR 2019, p. 19.

§ 230.26.20 Case-Budgeting Procedures

(a) If a court determines that case budgeting is appropriate (either on its own or upon request of counsel), counsel should submit a proposed initial litigation budget for court approval, subject to modification in light of facts and developments that emerge as the case proceeds.

(b) Case-budgeting forms (Forms CJA 28A – CJA 28H), together with instructions for their use, may be found on the public judiciary website.

(c) Case budgets should be submitted *ex parte* and filed and maintained under seal.

(d) For general information on case-budgeting principles relating to capital cases, **see:** Guide, Vol. 7A, § 640.

§ 230.26.30 Investigative, Expert, and Other Services

(a) Recognizing that investigative, expert, and other services may be required before there is an opportunity for counsel to prepare a case budget or for the court to approve it, courts should act upon requests for services where prompt authorization is necessary for adequate representation.

(b) Courts, in examining the case budget, may reconsider amounts authorized for services before the budget's approval; however, courts must not rescind prior authorization where work has already been performed.

§ 230.30 Supporting Memorandum Justifying Compensation Claimed

(a) Claim for Less than the Case Compensation Maximum

In any case in which the total compensation claimed is less than the statutory case compensation maximum, counsel may be required to submit a memorandum supporting and justifying the compensation claimed, when called for by local rule, standing order, or by the presiding judicial officer.

(b) Claim for More than the Case Compensation Maximum

(1) In any case in which the total compensation claimed is in excess of the statutory case compensation maximum, counsel will submit with the voucher a detailed memorandum supporting and justifying counsel's claim that:

- the representation given was in an extended or complex case (**see:** § 230.23.40(b)), and
- the excess payment is necessary to provide fair compensation (**see:** § 230.23.40(c)).

(2) Upon preliminary approval of such claim, the presiding judicial officer should furnish to the chief judge of the circuit a memorandum containing the recommendation and a detailed statement of reasons.

§ 230.33 Review and Approval of CJA Vouchers

§ 230.33.10 Standard for Voucher Review

Voucher reductions should be limited to:

(a) Mathematical errors;

(b) Instances in which work billed was not compensable;

(c) Instances in which work billed was not undertaken or completed; and

(d) Instances in which the hours billed are clearly in excess of what was reasonably required to complete the task.

See: JCUS-SEP 2018, p. 42. For guidance on problems related to CJA voucher cutting, **see:** *2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act*, pp. 96-103.

§ 230.33.20 Impact of an Appropriation Shortfall on Voucher Review

Vouchers should not be delayed or reduced for the purpose of diminishing Defender Services program costs in response to adverse financial circumstances.

§ 230.33.30 Notification of Proposed Reduction of CJA Compensation Vouchers

(a) The CJA provides that the reviewing judge must fix the compensation and reimbursement to be paid to appointed counsel. If the court determines that a claim should be reduced, appointed counsel should be provided:

- prior notice of the proposed reduction with a brief statement of the reason(s) for it, and
- an opportunity to address the matter.

(b) Notice need not be given to appointed counsel where the reduction is based on mathematical or technical errors.

(c) Nothing contained in this guideline should be construed as requiring a hearing or as discouraging the court from communicating informally with counsel about questions or concerns in person, telephonically, or electronically, as deemed appropriate or necessary.

§ 230.33.40 Independent Review Process

(a) Every district or division should implement an independent review process for panel attorneys who wish to challenge any reductions to vouchers that have been made by the presiding judge.

(b) Any challenged reduction should be subject to review consistent with this independent review process.

(c) All processes implemented by a district or division must be consistent with the statutory requirements for fixing compensation and reimbursement to be paid under 18 U.S.C. § 3006A(d).

See: JCUS-MAR 2019, p. 19.

§ 230.40 Payments by a Defendant

(a) An attorney appointed under the CJA may not accept a payment from or on behalf of the person represented without authorization by a U.S. district, circuit, or magistrate judge on Form CJA 7.

(b) If such payment is authorized, it should be deducted from the fee to be approved by the court under 18 U.S.C. § 3006A(d). The combined payment to any one attorney for compensation from both the person represented and the CJA is subject to applicable dollar limitations, unless excess compensation is approved under 18 U.S.C. § 3006A(d)(3).

(c) When the court determines that a person who received representation under the CJA was financially ineligible for those services at the time they were rendered, and directs that the person reimburse the government, the payment should be made by check or money order to the clerk of court for deposit into the Treasury. Such funds will be credited to the Defender Services appropriation.

(d) Under 18 U.S.C. § 3006A(f), a judicial officer is not authorized to require reimbursement as a condition of probation, and the Judicial Conference position is that reimbursement of the cost of representation under the CJA

should not be made a condition of probation under any other authority. **See:** JCUS-MAR 1985, p. 31.

§ 230.43 Approval Authority of U.S. Magistrate Judges

Absent delegated authority, U.S. magistrate judges may only approve vouchers for services rendered in connection with a case disposed of entirely before the U.S. magistrate judge.

§ 230.46 Prior Authorization for Appointed Counsel to Incur Expenses

Court plans may require advance authorization for such items as counsel's expenses over stipulated amounts or counsel's travel in excess of stipulated distances.

§ 230.50 Proration of Claims

(a) When a defendant is charged in one indictment with severable counts, one voucher should be submitted and one maximum applied under 18 U.S.C. § 3006A(d)(2), whether or not the counts are severed for trial.

(b) When a defendant is charged in two or more indictments (other than a superseding indictment or information), a separate voucher should be submitted, and a separate maximum applied under 18 U.S.C. § 3006A(d)(2), for each indictment, whether or not the indictments are consolidated for trial.

(c) Where single counsel is appointed to represent multiple defendants, separate vouchers should be submitted, and a separate maximum applied under 18 U.S.C. § 3006A(d)(2), for each defendant represented.

(d) Whenever appointed counsel submit separate vouchers, as provided by this section, time spent in common on more than one indictment or case must be prorated among the indictments or cases on which the time was spent, and each indictment or case must be cross-referenced on the supporting materials to the vouchers. Time spent exclusively on any one indictment or case must properly be charged on the voucher for that indictment or case.

(e) Time or expenses "spent in common" includes work performed simultaneously or within the same unit of time, or expenses incurred, for more than one representation (e.g., travel on behalf of more than one client). Double billing of time or expenses is prohibited (e.g., billing the same travel time or expenses to more than one representation).

(f) While time spent in common on more than one CJA representation must be prorated, the entire amount of travel or other expenses applicable to

more than one CJA representation must be billed to one representation. The supporting materials to the voucher on which the expenses are billed must cross-reference the other CJA representations.

(g) If the attorney is billing under the CJA for time or expenses, including travel, that were spent in common for a purpose other than a CJA representation, the attorney must report such information so that the court can determine whether, in fairness to counsel, the time or expenses should be apportioned and the attorney compensated for the time or expenses reasonably attributable to the CJA.

(1) The attorney should explain the rationale for billing under the CJA, and the court may conduct a further inquiry.

(2) In determining whether time or expenses spent in common for a purpose other than a CJA representation should be apportioned, the court should consider:

- the time or expenses reasonably expended in the performance of the attorney's duties under the CJA in relation to the time or expenses expended furthering other purposes;
- the significance to the CJA representation of the duties performed or expenses incurred; and
- the likelihood that the attorney would have performed the services or incurred the expenses under the CJA in the absence of the other purposes.

(h) Proration of time among CJA representations must not result in an appointed counsel billing a larger amount than would have been billed if all the time was assigned to one representation.

§ 230.53 Compensation of Co-Counsel

§ 230.53.10 Without Separate Appointment

(a) Unless separately appointed in accordance with § 230.53.20(b) or Guide, Vol. 7A, § 620.10, co-counsel or associate attorneys may not be compensated under the CJA.

(b) However, an appointed counsel may claim compensation for services furnished by a partner or associate or, with prior authorization by the court, counsel who is not a partner or associate, within the maximum compensation allowed by the CJA, separately identifying the provider of each service.

§ 230.53.20 With Appointment

(a) In an extremely difficult case where the court finds it in the interest of justice to appoint an additional attorney, each attorney is eligible to receive the maximum compensation allowable under the CJA.

(b) The finding of the court that the appointment of an additional attorney in a difficult case was necessary and in the interest of justice must appear on the Order of Appointment. For appointment of more than one attorney in capital cases, **see:** Guide, Vol. 7A, § 620.10.

§ 230.56 Substitution of Counsel

If an attorney is substituted for an attorney previously appointed for a defendant in the same case, the total compensation paid to both attorneys may not exceed the statutory maximum for one defendant, unless the case involves extended or complex representation. In such cases, vouchers for attorney's services will not be approved by a judicial officer until the conclusion of the trial so that the judicial officer may make such apportionment between the attorneys as may be just.

§ 230.60 Attorney Compensation for Travel Time

(a) Compensation must be approved for time spent in necessary and reasonable travel.

(b) Ordinarily, compensable time for travel includes only those hours actually spent **in or awaiting transit**. Therefore, if a trip necessarily and reasonably requires overnight lodging, compensable travel time to the destination from the claimant's office would terminate upon arrival and check-in at the hotel or other place of accommodation and would include travel time returning directly to the claimant's office from said destination.

(c) Compensation for travel time is paid at a rate not to exceed the rate provided in 18 U.S.C. § 3006A(d) for "time reasonably expended out of court."

(d) Necessary and reasonable travel includes travel time to meet and confer in-person with clients, including when clients are remotely detained, even if teleconferencing or videoconferencing technology is available.

[**Note:** The Judicial Conference Committee on Defender Services' Strategic Plan stresses the importance of CJA attorneys meeting in-person with their clients to build and maintain a relationship of trust necessary to provide high quality defense representation. Therefore, teleconferencing and videoconferencing technology should not be used as a substitute for in-person attorney-client meetings but may be used to

supplement in-person visits, at the sole discretion of counsel, where it would not diminish the quality of representation or adversely impact the attorney-client relationship.]

§ 230.63 Reimbursable Out-of-Pocket Expenses

§ 230.63.10 Overview

Out-of-pocket expenses reasonably incurred may be claimed on the voucher, and must be itemized and reasonably documented. Expenses for investigations or other services under 18 U.S.C. § 3006A(e) are not considered out-of-pocket expenses.

§ 230.63.20 Reimbursement for Transcripts

(a) Generally, court reporters or reporting services which furnish court authorized transcripts in CJA cases claim and receive compensation for their services through the eVoucher system on Form CJA 24 (Authorization and Voucher for Payment of Transcript). **See:** Guide, Vol. 7A, § 320.30. While this is the preferred method for payment of transcripts, if appointed counsel has elected to pay for the court-authorized transcripts "out-of-pocket," the cost may be claimed as a reimbursable expense, as provided for in 18 U.S.C. § 3006A(d)(1), in eVoucher. However, unlike most reimbursable expenses, which should be claimed on the Form CJA 20 (Appointment of and Authority to Pay Court Appointed Counsel), reimbursement to the attorney who has paid for the transcript as an "out-of-pocket" expense should be claimed on a Form CJA 24.

(b) The cost of transcribing depositions in criminal cases is the responsibility of the Department of Justice under Rule 17(b) of Fed. R. Crim. P.

Exception: When the witness is a defense expert, the expert is paid out of CJA funds (B-139703, 53 Comp. Gen. 638 (1974)).

§ 230.63.30 Computer-Assisted Legal Research

(a) The cost of use, by appointed counsel, of computer-assisted legal research services, may be allowed as a reimbursable out-of-pocket expense, provided that the amount claimed is reasonable.

(b) Whenever appointed counsel incurs charges for computer-assisted legal research, counsel should attach to the compensation voucher a copy of the bill and receipt for the use of the legal research services or an explanation of the precise basis of the charge (e.g., indicating the extent to which it was derived by proration of monthly charges, or by charges identifiable to the specific research).

(c) If the amount claimed is more than $500 or if it includes costs for downloading or printing, counsel should include a brief statement of justification.

§ 230.63.40 Travel Expenses

(a) Travel by privately owned automobile should be claimed at the mileage rate currently prescribed for federal judiciary employees who use a private automobile for conduct of official business. Parking fees, ferry fares, and bridge, road, and tunnel tolls may also be claimed. Transportation other than by privately owned automobile should be claimed on an actual expense basis.

(b) Per diem in lieu of subsistence is not allowable, since the CJA provides for reimbursement of expenses actually incurred. Therefore, counsel's expenses for meals and lodging incurred in the representation of the defendant would constitute reimbursable "out-of-pocket" expenses.

(c) In determining whether actual expenses incurred are "reasonable," counsel should be guided by travel and subsistence expense levels set by the Judiciary Staff Travel Regulations.

(d) Federal law authorizes attorneys, experts, and other persons traveling primarily in connection with carrying out responsibilities under the CJA to use government travel rates from common carriers and lodging providers. (**See:** 18 U.S.C. 3006A note; Federal Courts Administration Act of 1992, Pub. L. No. 102-572, title VII, § 702, 106 Stat. 4515 (Oct. 29, 1992).)

(1) Government rates may provide substantial cost reductions or increased flexibility over ordinary commercial rates. To obtain such rates, prior approval must be obtained from the appointing authority.

(2) Government contract airfares must be booked through the carrier or the judiciary's contract travel agent using the court's centrally billed account.

§ 230.63.50 Interim Reimbursement for Expenses

(a) Where it is considered necessary and appropriate in a specific case, the presiding judge or U.S. magistrate judge may, in consultation with the AO's Defender Services Office, arrange for interim reimbursement to counsel of extraordinary and substantial expenses incurred in providing representation in a case.

(b) Interim reimbursement should be authorized when counsel's reasonably incurred out-of-pocket expenses for duplication of discovery materials made available by the prosecution exceed $500.

§ 230.63.60 Reimbursement for Expenses Incurred Defending Malpractice Allegations

(a) Courts are authorized to reimburse panel attorneys for expenses reasonably incurred in defending actions alleging malpractice in furnishing representational services under the CJA. **See:** 18 U.S.C. § 3006A(d)(1), as amended by the Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, which covers expenses incurred on or after its effective date of Nov. 13, 2000.

(b) The total reimbursement must not exceed the deductible amount of counsel's professional liability insurance policy or $5,000, whichever is less. Expenses qualifying for reimbursement may include, but are not limited to:

- the costs of transcripts;
- witness fees and costs; and
- attorney fees.

(c) In determining reasonable attorney fees for this purpose, CJA rates are inapplicable.

(d) Compensation for representing oneself in defending the action alleging malpractice, or, if represented by counsel, for time spent assisting that counsel in defending the action, is not reimbursable.

(e) No reimbursement will be made if a judgment of malpractice is rendered against the attorney; in view of this prohibition, no reimbursement should be provided until the malpractice claim is resolved.

(f) Reimbursement should be claimed under the expense categories on a Form CJA 20 (or, where the appointment was in a capital matter, Form CJA 30), and supporting documentation should be attached.

§ 230.63.70 Other Reimbursable Expenses

Other reimbursable expenses include:

- telephone toll calls;
- case-related videoconferencing not covered by general office overhead;
- photographs or video duplication; and
- copying or laser printing (except commercial brief printing — **see:** § 230.66.40).

§ 230.66 Non-Reimbursable Expenses

§ 230.66.10 General Office Overhead

(a) General office overhead includes general office expenses that would normally be reflected in the fee charged to the client. The statutory fee is intended to include compensation for these general office expenses.

(b) Except in extraordinary circumstances (**see:** Guide, Vol. 7A, § 320.70.30), whether work is performed by counsel or other personnel, the following expenses associated with CJA representation are not reimbursable:

- personnel;
- rent;
- telephone, cell phone, or internet service; and
- secretarial.

§ 230.66.20 Items and Services of Personal Nature

(a) The cost of items of a personal nature purchased for or on behalf of the person represented are not reimbursable under the CJA. Such items include:

- purchasing new clothing or having clothing cleaned;
- getting a haircut;
- furnishing cigarettes, candy, or meals, etc.

(b) The cost of services of a personal nature and expenses incidental thereto which cannot be considered legal representation are not compensable under the CJA. Such services include:

- assisting the defendant in the disposition of the defendant's personal property, unless obtaining access to the property could reasonably contribute to a representational purpose;
- arranging for the placement of minor children of the defendant;
- assisting the defendant in executing the conditions of probation;
- providing legal assistance in matters unrelated to the litigation of the case, although incidental to the defendant's arrest, etc.

§ 230.66.30 Filing and Other Fees

Attorneys are not required to pay filing, *pro hac vice*, or PACER fees in connection with a CJA case, as such payment and reimbursement thereof is tantamount to the government billing itself to accomplish a transfer of appropriated funds into the General Fund of the Treasury. Panel attorneys and service providers should obtain a fee-exempt PACER account for use in connection with CJA appointments. More

information may be obtained from the PACER Service Center (pacer@psc.uscourts.gov or 800-676-6856).

§ 230.66.40 Printing and Copying of Briefs

(a) The expense of specialized typesetting, layout, or binding of appellate or other legal briefs (including Supreme Court booklets) exceeding requirements for individuals represented under the CJA, regardless of the printing method utilized, is not reimbursable.

(b) The reasonable cost of laser printing, photocopying, or similar duplication expenses is reimbursable.

§ 230.66.50 Service of Process

(a) Witness fees, travel costs, and expenses for service of subpoenas on fact witnesses, are not payable out of the CJA appropriation but are governed by Fed. R. Crim. P. Rule 17 and 28 U.S.C. § 1825.

(b) While not separately compensable, service of process incidental to a witness interview or other representational purpose is permissible.

(c) If the U.S. Marshals Service is unavailable to serve a fact witness in time for a court proceeding, the circumstances should be documented, and prior approval obtained from the presiding judge or CJA supervisory attorney before incurring expenses for service of process. However, the judge or CJA supervisory attorney may waive prior approval if he or she determines that timely service of necessary process could not await preauthorization.

§ 230.66.60 Taxes

Taxes paid on attorney compensation received under CJA, whether based on income, sales or gross receipts, are not reimbursable expenses.

§ 230.70 Writ of Certiorari

Counsel's time and expenses involved in the preparation of a petition for a writ of certiorari are considered as applicable to the case before the U.S. court of appeals and should be included on the voucher for services performed in that court.

§ 230.73 Interim Payments to Counsel

§ 230.73.10 Non-Death Penalty Cases

(a) Where it is considered necessary and appropriate in a specific case, the presiding trial judge may arrange for periodic or interim payments to counsel.

(b) Appx. 2C (Procedures for Interim Payments to Counsel in Non-Death Penalty Cases) contains instructions on the procedures for effecting interim payments to counsel, and a sample memorandum order on this subject that provides for two alternative payment methods.

(c) The payment options provided in Appx. 2C are designed to strike a balance between the interest in relieving court-appointed attorneys of financial hardships in extended or complex cases, and the practical application of the statutorily imposed responsibility of the chief judge of the circuit to provide a meaningful review of claims for excess compensation.

(d) Other interim payment arrangements which effectuate this balance may be devised in consultation with the AO's Defender Services Office.

§ 230.73.20 Death Penalty Cases

Presiding judicial officers are urged to permit interim payments in death penalty cases. Since the Anti-Drug Abuse Act of 1988 effectively repealed the CJA hourly rates and case maximums with respect to death penalty cases, a separate set of procedures and a separate memorandum order should be used in those cases. These procedures and a sample memorandum order are provided in Appx. 2D (Procedures for Interim Payments to Counsel in Death Penalty Cases).

§ 230.76 Record Keeping

Appointed counsel must maintain contemporaneous time and attendance records for all work performed, including work performed by associates, partners, and support staff, as well as expense records. Such records are subject to audit and must be retained for three years after approval of the final voucher for an appointment.

§ 230.80 Annual Report of Attorney Compensation Exceeding 1,000 Hours

Not later than three months after the end of each fiscal year, the AO's Defender Services Office will prepare reports listing all attorneys who have claimed compensation of more than 1,000 hours of services in the preceding fiscal year. The chief judge of each court of appeals and each district court will receive a copy of the report regarding attorneys within that district or circuit.

Guide to Judiciary Policy

Vol. 7: Defender Services
Pt. A: Guidelines for Administering the CJA and Related Statutes
Ch. 2: Appointment and Payment of Counsel

Appx. 2A: Model Plan for Implementation and Administration of the Criminal Justice Act

For use by a district with a federal public or community defender organization.[1]

Note: Brackets denote optional language based on the configuration of defense services in the district.

Defender Services Committee Comment: This "Model Plan" is intended to provide guidance in the implementation and administration of the Criminal Justice Act, as required under 18 U.S.C. § 3006A(b). This reflects the policies of the Judicial Conference of the United States provided in *Guide to Judiciary Policy*, Vol. 7A, and the *Outline of the Defender Services Program Strategic Plan*.

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[1] As of January 2016, there are federal defender organizations in 91 of the 94 judicial districts. Unless otherwise specified, in districts without a federal defender organization, "local CJA resource counsel" should be substituted for "[federal public defender/community defender]."

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United States District Court
For the _____ District of _____
Criminal Justice Act Plan

I. Authority

Under the Criminal Justice Act (CJA) of 1964, as amended, 18 U.S.C. § 3006A, and *Guide to Judiciary Policy (Guide)*, Volume 7A, the judges of the United States District Court for the District of _____ adopt this Plan, as approved by the circuit, for furnishing representation in federal court for any person financially unable to obtain adequate representation consistent with the CJA.

II. Statement of Policy

A. Objectives

The objectives of this Plan are:

1. to attain the goal of equal justice under the law for all persons;

2. to provide all eligible persons with timely appointed counsel services that are consistent with the best practices of the legal profession, are cost-effective, and protect the independence of the defense function so that the rights of individual defendants are safeguarded and enforced; and

3. to particularize the requirements of the CJA, the USA Patriot Improvement and Reauthorization Act of 2005 (recodified at 18 U.S.C. § 3599), and *Guide,* Vol. 7A, in a way that meets the needs of this district.

This Plan must therefore be administered so that those accused of a crime, or otherwise eligible for services under the CJA, will not be deprived of the right to counsel, or any element of representation necessary to an effective defense, due to lack of financial resources.

B. Compliance

1. The court, its clerk, the [federal public/community] defender organization, attorneys provided by a bar association or legal aid agency, and private attorneys appointed under the CJA must comply with Guide, Vol. 7A, approved by the Judicial Conference of the United States or its Committee on Defender Services, and with this Plan.

2. The court will ensure that a current copy of the CJA Plan is made available on the court's website and provided to CJA counsel upon the attorney's designation as a member of the CJA panel of private attorneys (CJA Panel).

III. Definitions

A. Representation

"Representation" includes counsel and investigative, expert, and other services.

B. Appointed Attorney

"Appointed attorney" is an attorney designated to represent a financially eligible person under the CJA and this Plan. Such attorneys include private attorneys, the [federal public/community] defender and staff attorneys of the [federal public/community] defender organization, and attorneys provided by a bar association or legal aid agency.

C. CJA Administrator

"CJA Administrator" is a person designated by the [federal public defender/community defender/court] to administer the CJA Panel.

IV. Determination of Eligibility for CJA Representation

A. Subject Matter Eligibility

1. Mandatory

Representation **must** be provided for any financially eligible person who:

a. is charged with a felony or with a Class A misdemeanor;

b. is a juvenile alleged to have committed an act of juvenile delinquency as defined in 18 U.S.C. § 5031;

c. is charged with a violation of probation, or faces a change of a term or condition of probation (unless the modification sought is favorable to the probationer and the government has not objected to the proposed change);

d. is under arrest, when such representation is required by law;

e. is entitled to appointment of counsel in parole proceedings;

f. is charged with a violation of supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release;

g. is subject to a mental condition hearing under 18 U.S.C. chapter 313;

h. is in custody as a material witness;

i. is seeking to set aside or vacate a death sentence under 28 U.S.C. § 2254 or § 2255;

j. is entitled to appointment of counsel in verification of consent proceedings in connection with a transfer of an offender to or from the United States for the execution of a penal sentence under 18 U.S.C. § 4109;

k. is entitled to appointment of counsel under the Sixth Amendment to the Constitution; or

l. faces loss of liberty in a case and federal law requires the appointment of counsel.

2. Discretionary

Whenever a district judge or magistrate judge determines that the interests of justice so require, representation **may** be provided for any financially eligible person who:

a. is charged with a petty offense (Class B or C misdemeanor, or an infraction) for which a sentence to confinement is authorized;

b. is seeking relief under 28 U.S.C. §§ 2241, 2254, or 2255 other than to set aside or vacate a death sentence;

c. is charged with civil or criminal contempt and faces loss of liberty;

d. has been called as a witness before a grand jury, a court, the Congress, or a federal agency or commission which has the power to compel testimony, and there is reason to believe, either prior to or during testimony, that the witness could be subject to a criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty;

e. has been advised by the United States attorney or a law enforcement officer that they are the target of a grand jury investigation;

f. is proposed by the United States attorney for processing under a pretrial diversion program; or

g. is held for international extradition under 18 U.S.C. chapter 209.

3. Ancillary Matters

Representation may also be provided for financially eligible persons in ancillary matters appropriate to the criminal proceedings under 18 U.S.C. § 3006A(c). In determining whether representation in an ancillary matter

is appropriate to the criminal proceedings, the court should consider whether such representation is reasonably necessary:

a. to protect a constitutional right;

b. to contribute in some significant way to the defense of the principal criminal charge;

c. to aid in preparation for the trial or disposition of the principal criminal charge;

d. to enforce the terms of a plea agreement in the principal criminal charge;

e. to preserve the claim of the CJA client to an interest in real or personal property subject to civil forfeiture proceeding under 18 U.S.C. § 983,19 U.S.C. § 1602, 21 U.S.C. § 881, or similar statutes, which property, if recovered by the client, may be considered for reimbursement under 18. U.S.C. § 3006A(f); or

f. effectuate the return of real or personal property belonging to the CJA client, which may be subject to a motion for return of property under Fed. R. Crim. P. 41(g), which property, if recovered by the client, may be considered for reimbursement under 18 U.S.C. § 3006A(f).

B. Financial Eligibility

1. Presentation of Accused for Financial Eligibility Determination

a. Duties of Law Enforcement

(i) Upon arrest, and where the defendant has not retained or waived counsel, federal law enforcement officials must promptly notify, telephonically or electronically, the appropriate court personnel, who in turn will notify the [federal public defender/ community defender] of the arrest of an individual in connection with a federal criminal charge.

(ii) Employees of law enforcement agencies should not participate in the completion of the financial affidavit or seek to obtain information concerning financial eligibility from a person requesting the appointment of counsel.

b. Duties of United States Attorney's Office

(i) Upon the return or unsealing of an indictment or the filing of a criminal information, and where the defendant has not retained or waived counsel, the United States attorney or

their delegate will promptly notify, telephonically or electronically, appropriate court personnel, who in turn will notify the [federal public defender/community defender].

(ii) Upon issuance of a target letter, and where the individual has not retained or waived counsel, the United States attorney or their delegate must promptly notify, telephonically or electronically, the appropriate court personnel, who in turn will notify the [federal public defender/community defender], unless the United States Attorney's Office is aware of an actual or potential conflict with the target and the [federal public defender/community defender], in which case they must promptly notify the court.

(iii) Employees of the United States Attorney's Office should not participate in the completion of the financial affidavit or seek to obtain information concerning financial eligibility from a person requesting the appointment of counsel.

c. Duties of [Federal Public Defender/Community Defender] Office

(i) In cases in which the [federal public defender/community defender] may be appointed, the office will:

- immediately investigate and determine whether an actual or potential conflict exists; and
- in the event of an actual or potential conflict, promptly notify the [court/CJA administrator] to facilitate the timely appointment of other counsel.

(ii) When practicable, the [federal public defender/community defender] will discuss with the person who indicates that he or she is not financially able to secure representation the right to appointed counsel and, if appointment of counsel seems likely, assist in the completion of a financial affidavit (Form CJA 23) and arrange to have the person promptly presented before a magistrate judge or district judge of this court for determination of financial eligibility and appointment of counsel.

d. Duties of Pretrial Services Office

(i) When practicable, the pretrial services officer will not conduct the pretrial service interview of a financially eligible defendant until counsel has been appointed, unless the right to counsel is waived or the defendant otherwise consents to a pretrial service interview without counsel.

(ii) When counsel has been appointed, the pretrial services officer will provide counsel notice and a reasonable opportunity to attend any interview of the defendant by the pretrial services officer prior to the initial pretrial release or detention hearing.

Defender Services Committee Comment: The Judicial Conference recognizes the importance of the advice of counsel for persons subject to proceedings under the Bail Reform Act, 18 U.S.C. § 3142 et seq., prior to their being interviewed by a pretrial services or probation officer. Therefore, the Conference encourages districts to take the steps necessary to permit the furnishing of appointed counsel at this stage of the proceedings to financially eligible defendants, having due regard for the importance of affording the pretrial services officer adequate time to interview the defendant and verify information prior to the bail hearing. JCUS-MAR 88, p. 18–19.

2. Factual Determination of Financial Eligibility

a. In every case where appointment of counsel is authorized under 18 U.S.C. § 3006A(a) and related statutes, the court must advise the person that he or she has a right to be represented by counsel throughout the case and that, if so desired, counsel will be appointed to represent the person if he or she is financially unable to obtain counsel.

b. The determination of eligibility for representation under the CJA is a judicial function to be performed by the court after making appropriate inquiries concerning the person's financial eligibility. Other employees of the court may be designated to obtain or verify the facts relevant to the financial eligibility determination.

c. In determining whether a person is "financially unable to obtain counsel," consideration should be given to the cost of providing the person and his or her dependents with the necessities of life, the cost of securing pretrial release, asset encumbrance, and the likely cost of retained counsel.

d. The initial determination of eligibility must be made without regard to the financial ability of the person's family to retain counsel unless their family indicates willingness and ability to do so promptly.

e. Any doubts about a person's eligibility should be resolved in the person's favor; erroneous determinations of eligibility may be corrected at a later time.

f. Relevant information bearing on the person's financial eligibility should be reflected on a financial eligibility affidavit (Form CJA 23).

g. If at any time after the appointment of counsel a judge finds that a person provided representation is financially able to obtain counsel or make partial payment for the representation, the judge may terminate the appointment of counsel or direct that any funds available to the defendant be paid as provided in 18 U.S.C. § 3006A(f).

h. If at any stage of the proceedings a judge finds that a person is no longer financially able to pay retained counsel, counsel may be appointed consistent with the general provisions of this Plan.

V. Timely Appointment of Counsel

A. Timing of Appointment

Counsel must be provided to eligible persons as soon as feasible in the following circumstances, whichever occurs earliest:

1. after they are taken into custody;

2. when they appear before a magistrate or district court judge;

3. when they are formally charged or notified of charges if formal charges are sealed; or

4. when a magistrate or district court judge otherwise considers appointment of counsel appropriate under the CJA and related statutes.

B. Court's Responsibility

The court, in cooperation with the [federal public defender/community defender] and the United States attorney, will make such arrangements with federal, state, and local investigative and police agencies as will ensure timely appointment of counsel.

C. Pretrial Service Interview

When practicable, unless the right to counsel is waived or the defendant otherwise consents to a pretrial service interview without counsel, financially eligible defendants will be provided appointed counsel prior to being interviewed by a pretrial services officer.

Defender Services Committee Comment: Some courts make use of an "on call" or "duty day" attorney for this purpose. A CJA panel attorney or attorneys may be appointed to be on call to advise persons who are in custody, or who otherwise may be entitled to counsel under the CJA, during the pretrial service interview process.

D. Retroactive Appointment of Counsel

Appointment of counsel may be made retroactive to include representation provided prior to appointment.

VI. Provision of Representational Services

A. [Federal Public Defender/Community Defender] and Private Counsel

This Plan provides for representational services by the [federal public defender/community defender] organization and for the appointment and compensation of private counsel from a CJA Panel list maintained by the [federal public defender/community defender/court] in cases authorized under the CJA and related statutes.

B. Administration

Administration of the CJA Panel, as provided in this Plan, is delegated and assigned to the [federal public defender/community defender/court].

C. Apportionment of Cases

Where practical and cost effective, private attorneys from the CJA Panel will be appointed in a substantial proportion of the cases in which the accused is determined to be financially eligible for representation under the CJA. "Substantial" will usually be defined as a minimum of twenty-five percent (25%) of the annual CJA appointments.

D. Number of Counsel

More than one attorney may be appointed in any case determined by the court to be extremely difficult.

E. Capital Cases

Procedures for appointment of counsel in cases where the defendant is charged with a crime that may be punishable by death, or is seeking to vacate or set aside a death sentence in proceedings under 28 U.S.C. §§ 2254 or 2255, are in section XIV of this Plan.

VII. [Federal Public Defender/Community Defender] Organization

A. Establishment

The [federal public/community/defender organization] [insert name of organization] is established in this district under the CJA and is responsible for rendering defense services on appointment throughout this district.

B. Standards

The [federal public defender/community defender] organization must provide high quality representation consistent with the best practices of the legal profession and commensurate with those services rendered when counsel is privately retained. **See:** *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) ("'Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.'" (quoting ABA Standards for Criminal Justice section 4-3.9 (2d ed. 1980))).

C. Workload

The [federal public defender/community defender] organization will continually monitor the workloads of its staff to ensure high quality representation for all clients.

D. Professional Conduct

The [federal public defender/community defender] organization must conform to the highest standards of professional conduct, including but not limited to the [American Bar Association's Model Rules of Professional Conduct/American Bar Association's Model Code of Professional Conduct/Code of Conduct for Federal Public Defender Employees/Model Code of Conduct for Federal Community Defender Employees/other standards for professional conduct adopted by the court].

E. Private Practice of Law

Neither the [federal public defender/community defender] nor any defender employee may engage in the private practice of law except as authorized by the [federal public defender/community defender] Code of Conduct.

F. Supervision of Defender Organization

The [federal public defender/community defender] will be responsible for the supervision and management of the [federal public defender/community defender] organization. Therefore, the [federal public defender/community defender] will be appointed in all cases assigned to that organization for

subsequent assignment to staff attorneys at the discretion of the [federal public defender/community defender].

G. Training

The [federal public defender/community defender] will assess the training needs of [federal public defender/community defender] staff and. in coordination with the CJA Panel Attorney District Representative,[2] the training needs of the local panel attorneys, and provide training opportunities and other educational resources.

VIII. CJA Panel of Private Attorneys

A. Establishment of the CJA Panel Committee and/or CJA Supervisory Attorney

1. A CJA Panel Committee ("CJA Committee") will be established by the [court/federal public defender/community defender] in consultation with the [court/federal public defender/community defender]. The CJA Committee will consist of one district court judge, one magistrate judge, the [federal public defender/community defender], the CJA Panel Attorney District Representative (PADR), a criminal defense attorney who practices regularly in the district who may be a CJA panel member, and an ex officio staff member employed by the [federal public defender/community defender/clerk] who will act as administrative coordinator.

Defender Services Committee Comment: The composition of the CJA Panel Committee can be adjusted to reflect the degree of judicial, federal defender, or panel attorney involvement that is desired by each district court. The committee must incorporate judicial input into panel administration. **See:** JCUS-SEP 2018, p. 39. The court should make a diligent effort to ensure that the composition of the CJA Panel Committee reflects the racial, ethnic, gender, and geographic diversity of the district.

[AND/OR 1. Every district should designate a CJA supervisory or administrative attorney or a defender office to manage the selection, appointment, retention, and removal of panel attorneys from the district's CJA panel. **See:** JCUS-SEP 2018, p. 39.] The [federal public defender/community defender] or their representative, and the district's PADR are permanent members of the CJA Committee.

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[2] The CJA Panel Attorney District Representative (PADR) is a member of the district's CJA Panel who is selected by the local [federal public defender/community defender], with acquiescence from the chief judge, to serve as the representative of the district's CJA Panel for the national Defender Services CJA PADR program and local CJA committees.

Membership on the CJA Committee will otherwise be for a term of three years and may be extended for an additional three years. Members' terms will be staggered to ensure continuity on the CJA Committee.

3. The CJA Committee will meet at least twice a year and at any time the court asks the Committee to consider an issue.

B. Duties of the CJA Committee and/or CJA Supervisory Attorney

1. Membership

Examine the qualifications of applicants for membership on the CJA Panel and recommend to the chief judge the approval of those attorneys who are deemed qualified and the rejection of the applications of those attorneys deemed unqualified.

2. Recruitment

Engage in recruitment efforts to establish a diverse panel and ensure that all qualified attorneys are encouraged to participate in the furnishing of representation in CJA cases.

3. Annual Report

Review the operation and administration of the CJA Panel over the preceding year, and recommend any necessary or appropriate changes to the chief judge concerning:

a. the size of the CJA Panel;

b. the recruitment of qualified and diverse attorneys as required in this plan; and

c. recurring issues or difficulties encountered by panel members or their CJA clients.

Defender Services Committee Comment: Recruitment efforts to establish a diverse CJA Panel could include the following:

- notifying bar associations comprised of racially and ethnically diverse populations of the availability of panel membership;
- advertising in legal journals directed towards women, people with disabilities, and people of color to encourage panel membership;
- informal person-to-person recruiting of women, people of color, and the disabled community by CJA panel committee members and panel administrators; and
- contacting current or former members of the panel, or other prominent local attorneys who have disabilities or are minorities or women for recommendations of potential panel members.

4. Removal

Recommend to the chief judge the removal of any CJA panel member who:

a. fails to satisfactorily fulfill the requirements of CJA panel membership during their term of service, including the failure to provide high quality representation to CJA clients, or

b. has engaged in other conduct such that his or her continued service on the CJA Panel is inappropriate.

See also: Section IX.C.7.

5. Training

Assist the [federal public defender/community defender] office in providing training for the CJA Panel on substantive and procedural legal matters affecting representation of CJA clients.

6. Voucher Review

Review and make recommendations on the processing and payment of CJA vouchers in those cases where the court, for reasons other than mathematical errors, is considering authorizing payment for less than the amount of compensation claimed by CJA counsel. The judge will, at the time the voucher is submitted to the CJA Committee, provide a statement describing questions or concerns they have with the voucher. Counsel will be notified of the potential voucher reduction and given the opportunity to provide information or documentation relevant to the voucher and concerns raised by the judge. The CJA Committee will issue a written recommendation to the judge.

See also: Section XII.B.6.

7. Mentoring

Appoint experienced CJA panel members to serve on a subcommittee to create and administer a mentoring program designed to identify and help prepare viable candidates to qualify for consideration for appointment to the CJA Panel. Experienced members of the criminal defense bar who have practiced extensively in the federal courts will be selected to serve as mentors. The subcommittee will review the mentee applications, make recommendations concerning their participation in the mentoring program, identify appropriate cases for the mentoring program, evaluate the success of the mentoring program, and provide guidance to the mentors.

Defender Services Committee Comment: Mentoring programs may include compensation for mentees (1) under the CJA at the prevailing hourly rate when appointed as second counsel in cases determined by the court to be extremely difficult; (2) under the CJA at a reduced associate rate with prior authorization by the court; or (3) using the court's Bar and Bench funds at a rate determined by the court for non-representational services, such as consulting with appointed counsel or attending training sessions. Questions about mentoring programs should be directed to the AO's Defender Services Office, Legal and Policy Division Duty Attorney as 202-502-3030.

IX. Establishment of a CJA Panel

A. Approval of CJA Panel

1. The existing, previously established panel of attorneys who are eligible and willing to be appointed to provide representation under the CJA is recognized.

2. The chair of the CJA Committee and/or CJA Supervisory Attorney will approve attorneys for membership on the CJA Panel after receiving recommendations from the CJA Committee.

B. Size of CJA Panel

1. The size of the CJA Panel will be determined by the CJA Committee and/or CJA Supervisory Attorney based on the caseload and activity of the panel members, subject to review by the court.

2. The CJA Panel must be large enough to provide a sufficient number of experienced attorneys to handle the CJA caseload, yet small enough so that CJA panel members will receive an adequate number of appointments to maintain their proficiency in federal criminal defense work enabling them to provide high quality representation consistent with the best practices of the legal profession and commensurate with those services rendered when counsel is privately retained.

C. Qualifications and Membership on the CJA Panel

1. Application

   Application forms for membership on the CJA Panel are available from the [federal public defender/community defender/court].

2. Equal Opportunity

   All qualified attorneys are encouraged to participate in the furnishing of representation in CJA cases.

3. Eligibility

   a. Applicants for the CJA Panel must be members in good standing of the federal bar of this district and the _____ Circuit Court of Appeals.

   b. Applicants must maintain a primary, satellite, or shared office in this district.

   c. Applicants must possess strong litigation skills and demonstrate proficiency with the federal sentencing guidelines, federal sentencing procedures, the Bail Reform Act, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence.

   d. Applicants must have significant experience representing persons charged with serious criminal offenses and demonstrate a commitment to the defense of people who lack the financial means to hire an attorney.

   e. Attorneys who do not possess the experience above but believe they have equivalent other experience are encouraged to apply and provide in writing the details of that experience for the CJA Committee and/or CJA Supervisory Attorney's consideration.

Defender Services Committee Comment: These general eligibility requirements may be supplemented or replaced by more detailed and specific standards, depending on the needs of the district. Specific eligibility requirements might include at least two (2) years in a public defender or prosecutor's office, either state or federal; OR at least three (3) years in private practice during which time the attorney was involved in at least 20 criminal cases in either state or federal court, five (5) of which were state or federal felony trials; OR an applicant should have tried at least two (2) federal felony cases from initial appearance or arraignment through sentencing and have other significant litigation experience as determined by the CJA Committee and/or CJA Supervisory Attorney. A specific training eligibility requirement may be imposed prior to appointment to the panel. **See:** Guide, Vol. 7A, § 210.10.15(c)(2).

4. Appointment to CJA Panel

   After considering the recommendations of the CJA Committee and/or CJA Supervisory Attorney, the chief judge will appoint or reappoint

attorneys to the CJA Panel. Due to the highly complex and demanding nature of capital and habeas corpus cases, special procedures will be followed for the eligibility and appointment of counsel in such cases. **See:** Section XIV of this Plan.

5. Terms of CJA Panel Members

To establish staggered CJA membership terms, the current CJA Panel will be divided into three groups, equal in number. Initially, members will be assigned to one of the three groups on a random basis. Members of the first group will continue to serve on the CJA Panel for a term of one year, members of the second group will continue to serve on the CJA Panel for a term of two years, and members of the third group will continue to serve on the CJA Panel for a term of three years. Thereafter, attorneys admitted to membership on the CJA Panel will each serve for a term of three years, subject to the reappointment procedures in this plan.

6. Reappointment of CJA Panel Members

a. The [federal public defender/community defender/court] will notify CJA panel members, prior to the expiration of their current term, of the need to apply for reappointment to the CJA Panel.

b. A member of the CJA Panel who wishes to be considered for reappointment must apply for appointment to an additional term at least three months prior to the expiration of his or her current term.

c. The CJA Committee and/or CJA Supervisory Attorney will solicit input concerning the quality of representation provided by lawyers seeking reappointment.

d. The CJA Committee and/or CJA Supervisory Attorney also will consider how many cases the CJA panel member has accepted and declined during the review period, whether the member has participated in training opportunities, whether the member has been the subject of any complaints, and whether the member continues to meet the prerequisites and obligations of CJA panel members as provided in this Plan.

7. Removal from the CJA Panel

a. Mandatory removal

Any member of the CJA Panel who is suspended or disbarred from the practice of law by the state court before whom such member is admitted, or who is suspended or disbarred from this court or any federal court, will be removed from the CJA Panel immediately.

b. Automatic disciplinary review

The CJA Committee and/or CJA Supervisory Attorney will conduct an automatic disciplinary review of any CJA panel member against whom any licensing authority, grievance committee, or administrative body has taken action, or when a finding of probable cause, contempt, sanction, or reprimand has been issued against the panel member by any state or federal court.

c. Complaints

(i) Initiation

A complaint against a panel member may be initiated by the CJA Committee and/or CJA Supervisory Attorney, a judge, another panel member, a defendant, or a member of the [federal public defender/community defender] office. A complaint need not follow any particular form, but it must be in writing and state the alleged deficiency with specificity. Any complaint should be directed to the CJA Committee and/or CJA Supervisory Attorney, which will determine whether further investigation is necessary.

(ii) Notice

When conducting an investigation, the CJA Committee and/or CJA Supervisory Attorney will notify the panel member of the specific allegations.

(iii) Response

A panel member subject to investigation may respond in writing and appear, if so directed, before the CJA Committee and/or CJA Supervisory Attorney or its subcommittee.

(iv) Protective action

Prior to disposition of any complaint, the CJA Committee and/or CJA Supervisory Attorney may recommend temporary suspension or removal of the panel member from any pending case, or from the panel, and may take any other protective action that is in the best interest of the client or the administration of this Plan.

(v) Review and recommendation

After investigation, the CJA Committee and/or CJA Supervisory Attorney may recommend dismissing the complaint, or recommend appropriate remedial action, including removing the attorney from the panel, limiting the attorney's participation to particular types or categories of

cases, directing the attorney to complete specific CLE requirements before receiving further panel appointments, limiting the attorney's participation to handling cases that are directly supervised or overseen by another panel member or other experienced practitioner, or any other appropriate remedial action.

(vi) Final disposition by the court

The CJA Committee and/or CJA Supervisory Attorney will forward its recommendation to the chief judge for consideration and final disposition.

(vii) Confidentiality

Unless otherwise directed by the court, any information acquired concerning any possible disciplinary action, including any complaint and any related proceeding, will be confidential.

(viii) None of these procedures create a property interest in being on or remaining on the CJA Panel.

d. Notification

The [federal public defender/community defender] will be immediately notified when any member of the CJA Panel is removed or suspended.

X. CJA Panel Attorney Appointment in Non-Capital Cases

A. Appointment List

The [federal public defender/community defender/court] will maintain a current list of all attorneys included on the CJA Panel, with current office addresses, email addresses, and telephone numbers, as well as a statement of qualifications and experience.

B. Appointment Procedures

1. The [federal public defender/community defender/court] is responsible for overseeing the appointment of cases to panel attorneys. The [federal public defender/community defender/court] will maintain a record of panel attorney appointments and, when appropriate, data reflecting the apportionment of appointments between attorneys from the [federal public defender/community defender] office and panel attorneys.

2. Appointment of cases to CJA panel members will ordinarily be made on a rotational basis. In a complex or otherwise difficult case, the [federal

public defender/community defender/court] may appoint counsel outside of the normal rotation to ensure the defendant has sufficiently experienced counsel.

3. Under special circumstances the court may appoint a member of the bar of the court who is not a member of the CJA Panel. Such special circumstances may include cases in which the court determines that the appointment of a particular attorney is in the interests of justice, judicial economy, or continuity of representation, or for any other compelling reason. It is not anticipated that special circumstances will arise often, and the procedures provided in the Plan are presumed to be sufficient in the vast majority of cases in which counsel are to be appointed. Appointments made under this section will be reported to the CJA Committee.

4. Unless otherwise impracticable, CJA panel attorney(s) must be available to represent defendant(s) at the same stage of the proceedings as is the [federal public defender/community defender].

XI. Duties of CJA Panel Members

A. Standards and Professional Conduct

1. CJA panel members must provide high quality representation consistent with the best practices of the legal profession and commensurate with those services rendered when counsel is privately retained. **See:** *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) ("'Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.'" (quoting ABA Standards for Criminal Justice section 4-3.9 (2d ed. 1980))).

2. Attorneys appointed under the CJA must conform to the highest standards of professional conduct, including but not limited to the [American Bar Association's Model Rules of Professional Conduct/ American Bar Association's Model Code of Professional Conduct/ other standards for professional conduct adopted by the court].

3. CJA panel members must notify within 30 days the chair of the CJA Committee and/or CJA Supervisory Attorney when any licensing authority, grievance committee, or administrative body has taken action against them, or when a finding of contempt, sanction, or reprimand has been issued against the panel member by any state of federal court.

B. Training and Continuing Legal Education

1. Attorneys on the CJA Panel are expected to remain current with developments in federal criminal defense law, practice, and procedure,

including the Recommendation for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases.

2. Attorneys on the CJA Panel are expected to attend trainings sponsored by the [federal public defender/community defender].

3. Attorneys on the CJA Panel will be guided in their practice by the Federal Adaptation of the National Legal Aid and Defender Association Performance Guidelines for Criminal Defense Representations.

4. CJA panel members must attend ____ continuing legal education hours relevant to federal criminal practice annually.

5 Failure to comply with these training and legal education requirements may be grounds for removal from the CJA Panel.

C. Facilities and Technology Requirements

1. CJA panel attorneys must have facilities, resources, and technological capability to effectively and efficiently manage assigned cases.

2. CJA panel attorneys must comply with the requirements of electronic filing and eVoucher.

3. CJA panel attorneys must know and abide by procedures related to requests for investigative, expert, and other services.

D. Continuing Representation

Once counsel is appointed under the CJA, counsel will continue the representation until the matter, including appeals (unless provided otherwise by the ____Circuit's CJA plan) or review by certiorari, is closed; or until substitute counsel has filed a notice of appearance; or until an order is entered allowing or requiring the person represented to proceed pro se; or until the appointment is terminated by court order.

Defender Services Committee Comment: While the Defender Services Committee recognizes there may be benefits to maintaining continuity of counsel, it also recognizes that trial counsel may not have the requisite skills to proceed as appellate counsel. There should be significant deference to the position of trial counsel regarding whether, in each matter, continuity is in the best interests of the client and consistent with counsel's professional skills and obligations. (*Good Practices for Panel Attorney Programs in the U.S. Court of Appeals,* Vera Institute of Justice, January 2006.)

E. Miscellaneous

1. Case budgeting

In non-capital representations of unusual complexity that are likely to become extraordinary in terms of cost, the court may require development of a case budget consistent with *Guide*, Vol. 7A, §§ 230.26.10–20.

2. No receipt of other payment

Appointed counsel may not require, request, or accept any payment or promise of payment or any other valuable consideration for representation under the CJA, unless such payment is approved by order of the court.

3. Redetermination of need

If at any time after appointment, counsel has reason to believe that a party is financially able to obtain counsel, or make partial payment for counsel, and the source of counsel's information is not protected as a privileged communication, counsel will advise the court.

XII. Compensation of CJA Panel Attorneys

A. Policy of the Court Regarding Compensation

1. Providing fair compensation to appointed counsel is a critical component of the administration of justice. CJA panel attorneys must be compensated for time expended in court and time reasonably expended out of court, and reimbursed for expenses reasonably incurred.

2. Voucher cuts should be limited to:

a. Mathematical errors;

b. Instances in which work billed was not compensable;

c. Instances in which work was not undertaken or completed; and

d. Instances in which the hours billed are clearly in excess of what was reasonably required to complete the task.

See: JCUS-SEP 2018, p. 42.

B. Payment Procedures

1. Claims for compensation must be submitted on the appropriate CJA form through the court's eVoucher system.

2. Claims for compensation should be submitted no later than 45 days after final disposition of the case, unless good cause is shown.

3. The [federal public defender/community defender/court] or their designee will review the claim for mathematical and technical accuracy and for conformity with Guide, Vol. 7A and, if correct, will forward the claim for consideration and action by the presiding judge.

4. Absent extraordinary circumstances, the court should act on CJA compensation claims within 30 days of submission, and vouchers should not be delayed or reduced for the purpose of diminishing Defender Services program costs in response to adverse financial circumstances.

5. Except in cases involving mathematical corrections, no claim for compensation submitted for services provided under the CJA will be reduced without affording counsel notice and the opportunity to be heard.

6. The court, when contemplating reduction of a CJA voucher for other than mathematical reasons, may refer the voucher to the CJA Committee and/or CJA Supervisory Attorney for review and recommendation before final action on the claim is taken. **See:** Section VIII of this Plan.

7. Notwithstanding the procedure described above, the court may, in the first instance, contact appointed counsel to inquire regarding questions or concerns with a claim for compensation. In the event that the matter is resolved to the satisfaction of the court and CJA panel member, the claim for compensation need not be referred to the CJA Committee and/or CJA Supervisory Attorney for review and recommendation.

C. Independent Review Process

1. The [district/division] must create an independent review process for panel attorneys who wish to challenge any reductions to vouchers that have been made by the presiding judge.

2. Any challenged reduction should be subject to review consistent with this independent review process.

3. All processes implemented by a district or division must be consistent with the statutory requirements for fixing compensation and reimbursement to be paid under 18 U.S.C. § 3006A(d).

XIII. Investigative, Expert, and Other Services

A. Financial Eligibility

Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request such services in an *ex parte* application to the court as provided in 18 U.S.C. § 3006A(e)(1), regardless of whether counsel is appointed under the CJA. Upon finding that the services are necessary, and that the person is financially unable to obtain them, the court must authorize counsel to obtain the services.

Defender Services Committee Comment: A court may choose to have applications for investigative, expert, and other services considered by a non-presiding judge to help ensure appointed counsel's ability to obtain the necessary resources in a manner that does not unreasonably compromise or interfere with the exercise of sound independent professional judgment.

B. Applications

Requests for authorization of funds for investigative, expert, and other services must be submitted in an *ex parte* application to the court (using the court's eVoucher system) and must not be disclosed except with the consent of the person represented or as required by law or Judicial Conference policy.

C. Compliance

Counsel must comply with Judicial Conference policies in *Guide*, Vol. 7A, Ch. 3.

XIV. Appointment of Counsel and Case Management in CJA Capital Cases

A. Applicable Legal Authority

The appointment and compensation of counsel in capital cases and the authorization and payment of persons providing investigative, expert, and other services are governed by 18 U.S.C. §§ 3005, 3006A, and 3599, and *Guide*, Vol. 7A, Ch. 6 [**and insert local rule if any**].

B. General Applicability and Appointment of Counsel Requirements

1. Unless otherwise specified, the provisions of this section apply to all capital proceedings in the federal courts, whether those matters originated in a district court (federal capital trials) or in a state court (habeas proceedings under 28 U.S.C. § 2254). Such matters include those in which the death penalty may be or is being sought by the prosecution, motions for a new trial, direct appeal, applications for a writ of certiorari to the Supreme Court of the United States, all post-conviction proceedings under 28 U.S.C. §§ 2254 or 2255 seeking to vacate or set aside a death sentence, applications for stays of execution, competency proceedings, proceedings for executive or other clemency, and other appropriate motions and proceedings.

2. Any person charged with a crime that may be punishable by death who is or becomes financially unable to obtain representation is entitled to the assistance of appointed counsel throughout every stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction processes, together with applications for stays of execution and other appropriate motions and procedures, competency proceedings, and

proceedings for executive or other clemency as may be available to the defendant. **See:** 18 U.S.C. § 3599(e).

3. Qualified counsel must be appointed in capital cases at the earliest possible opportunity.

4. Given the complex and demanding nature of capital cases, where appropriate, the court will utilize the expert services available through the Administrative Office of the U.S. Courts (AO), Defender Services Death Penalty Resource Counsel projects ("Resource Counsel projects"), which include: (1) Federal Death Penalty Resource Counsel and Capital Resource Counsel Projects (for federal capital trials), (2) Federal Capital Appellate Resource Counsel Project, (3) Federal Capital Habeas § 2255 Project, and (4) National and Regional Habeas Assistance and Training Counsel Projects (§ 2254). These counsel are death penalty experts who may be relied upon by the court for assistance with selection and appointment of counsel, case budgeting, and legal, practical, and other matters arising in federal capital cases.

5. The [federal public defender/community defender] should promptly notify and consult with the appropriate Resource Counsel projects about potential and actual federal capital trial, appellate, and habeas corpus cases, and consider their recommendations for appointment of counsel.

6. In appointing counsel in capital cases, judges should consider and give due weight to the recommendations made by federal defenders and resource counsel and articulate reasons for not doing so.

7. The presiding judge may appoint an attorney furnished by a state or local public defender organization or legal aid agency or other private, non-profit organization to represent a person charged with a capital crime or seeking federal death penalty habeas corpus relief provided that the attorney is fully qualified. Such appointments may be in place of, or in addition to, the appointment of a federal defender organization or a CJA panel attorney or an attorney appointed pro hac vice. **See:** 18 U.S.C. § 3006A(a)(3).

8. All attorneys appointed in federal capital cases must be well qualified, by virtue of their training, commitment, and distinguished prior capital defense experience at the relevant stage of the proceeding, to serve as counsel in this highly specialized and demanding litigation.

9. All attorneys appointed in federal capital cases must have sufficient time and resources to devote to the representation, taking into account their current caseloads and the extraordinary demands of federal capital cases.

10. All attorneys appointed in federal capital cases should comply with the American Bar Association's 2003 Guidelines for the Appointment and

Performance of Defense Counsel in Death Penalty Cases (Guidelines 1.1 and 10.2 et seq.), and the 2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases.

11. All attorneys appointed in federal capital cases should consult regularly with the appropriate Resource Counsel projects.

12. There should be no formal or informal non-statutory budgetary caps on capital cases, whether in a capital trial, direct appeal, or habeas matter.

13. All capital cases should be budgeted with the assistance of case-budgeting attorneys and/or resource counsel where appropriate.

14. Questions about the appointment and compensation of counsel and the authorization and payment of investigative, expert, and other service providers in federal capital cases should be directed to the AO's Defender Services Office, Legal and Policy Division Duty Attorney at 202-502-3030 or by email at ods_lpb@ao.uscourts.gov.

C. Appointment of Trial Counsel in Federal Death-Eligible Cases[3]

1. General Requirements

a. Appointment of qualified capital trial counsel must occur no later than when a defendant is charged with a federal criminal offense where the penalty of death is possible. **See:** 18 U.S.C. § 3005.

b. To protect the rights of an individual who, although uncharged, is the subject of an investigation in a federal death-eligible case, the court may appoint capitally qualified counsel upon request, consistent with Sections C.1, 2, and 3 of these provisions.

c. At the outset of every capital case, the court must appoint two attorneys, at least one of whom meets the qualifications for "learned counsel" as described below. If necessary for adequate representation, more than two attorneys may be appointed to represent a defendant in a capital case. **See:** 18 U.S.C. § 3005.

d. When appointing counsel, the judge must consider the recommendation of the [federal public defender/community defender], who will consult with Federal Death Penalty Resource

[3] The Judicial Conference adopted detailed recommendations on the appointment and compensation of counsel in federal death penalty cases in 1998 (JCUS-SEP 98, p. 22). In September 2010, the Defender Services Committee endorsed revised commentary to the Judicial Conference's 1998 recommendations. *CJA Guidelines*, Vol. 7A, Appx. 6A (Recommendations and Commentary Concerning the Cost and Quality of Defense Representation (Updated Spencer Report, September 2010)) ("Appx. 6A") is available on the judiciary's website.

Counsel to recommend qualified counsel. [In those districts without a federal defender organization, the judge must, as required by 18 U.S.C. § 3005, consider the recommendation of the AO's Defender Services Office.] **See:** 18 U.S.C. § 3005.

e. In appointing counsel, judges should give due weight to the recommendations made by federal defenders and resource counsel and articulate reasons for not doing so.

f. To effectuate the intent of 18 U.S.C. § 3005 that the [federal public defender/community defender]'s recommendation be provided to the court, the judge should ensure the [federal public/ community) defender has been notified of the need to appoint capitally qualified counsel.

g. Reliance on a list for appointment of capital counsel is not recommended because selection of trial counsel should account for the particular needs of the case and the defendant, and be based on individualized recommendations from the [federal public defender/community defender] in conjunction with the Federal Death Penalty Resource Counsel and Capital Resource Counsel projects.

h. Out-of-district counsel, including federal defender organization staff, who possess the requisite expertise may be considered for appointment in capital trials to achieve high quality representation together with cost and other efficiencies.

i. In evaluating the qualifications of proposed trial counsel, consideration should be given to their commitment to the defense of capital cases, their current caseload including other capital cases, and their willingness to effectively represent the interests of the client.

2. Qualifications of Learned Counsel

a. Learned counsel must either be a member of this district's bar or be eligible for admission pro hac vice based on his or her qualifications. Appointment of counsel from outside the jurisdiction is common in federal capital cases to achieve cost and other efficiencies together with high quality representation.

b. Learned counsel must meet the minimum experience standards in 18 U.S.C. §§ 3005 and 3599.

c. Learned counsel should have distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in state death penalty trials, appeals, or post-conviction review that, in combination with co-counsel, will assure high quality representation.

d. "Distinguished prior experience" contemplates excellence, not simply prior experience. Counsel with distinguished prior experience should be appointed even if meeting this standard requires appointing counsel from outside the district where the matter arises.

e. The suitability of learned counsel should be assessed with respect to the particular demands of the case, the stage of the litigation, and the defendant.

f. Learned counsel must be willing and able to adjust other caseload demands to accommodate the extraordinary time required by the capital representation.

g. Learned counsel should satisfy the qualification standards endorsed by bar associations and other legal organizations regarding the quality of representation in capital cases.

3. Qualifications of Second and Additional Counsel

a. Second and additional counsel may, but are not required to, satisfy the qualifications for learned counsel, as provided above.

b. Second and additional counsel must be well qualified, by virtue of their distinguished prior criminal defense experience, training and commitment, to serve as counsel in this highly specialized and demanding litigation.

c. Second and additional counsel must be willing and able to adjust other caseload demands to accommodate the extraordinary time required by the capital representation.

d. The suitability of second and additional counsel should be assessed with respect to the demands of the individual case, the stage of the litigation, and the defendant.

D. Appointment and Qualifications of Direct Appeal Counsel in Federal Death Penalty Cases

1. When appointing appellate counsel, the judge must consider the recommendation of the [federal public defender/community defender], who will consult with Federal Capital Appellate Resource Counsel to recommend qualified counsel.

2. In appointing appellate counsel, judges should give due weight to the recommendations made by federal defenders and resource counsel and articulate reasons for not doing so.

3. Counsel appointed to represent a death-sentenced federal appellant should include at least one attorney who did not represent the appellant at trial.

4. Each trial counsel who withdraws should be replaced with similarly qualified counsel to represent the defendant on appeal.

5. Out-of-district counsel, including federal defender organization staff, who possess the requisite expertise may be considered for appointment in capital appeals to achieve high quality representation together with cost and other efficiencies.

6. Appellate counsel, between them, should have distinguished prior experience in federal criminal appeals and capital appeals.

7. At least one of the attorneys appointed as appellate counsel must have the requisite background, knowledge, and experience required by 18 U.S.C.§ 3599(c) or (d).

8. In evaluating the qualifications of proposed appellate counsel, consideration should be given to the qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases.

9. In evaluating the qualifications of proposed appellate counsel, consideration should be given to their commitment to the defense of capital cases, their current caseload including other capital cases, and their willingness to effectively represent the interests of the client.

E. Appointment and Qualifications of Post-Conviction Counsel in Federal Death Penalty Cases (28 U.S.C. § 2255)

1. A financially eligible person seeking to vacate or set aside a death sentence in proceedings under 28 U.S.C. § 2255 is entitled to appointment of fully qualified counsel. **See:** 18 U.S.C. § 3599(a)(2).

2. Due to the complex, demanding, and protracted nature of death penalty proceedings, the court should consider appointing at least two attorneys.

3. In light of the accelerated timeline applicable to capital § 2255 proceedings, prompt appointment of counsel is essential. Wherever possible, appointment should take place prior to the denial of certiorari on direct appeal by the United States Supreme Court.

4. When appointing counsel in a capital § 2255 matter, the court should consider the recommendation of the [federal public/ community] defender, who will consult with the Federal Capital Habeas § 2255 Project.

5. In appointing post-conviction counsel, judges should give due weight to the recommendations made by federal defenders and resource counsel and articulate reasons for not doing so.

6. Out-of-district counsel, including federal defender organization staff, who possess the requisite expertise may be considered for appointment in capital § 2255 cases to achieve high quality representation together with cost and other efficiencies.

7. Local or circuit restrictions prohibiting capital habeas units (CHUs) from engaging in cross-district or cross-circuit representation should not be imposed without good cause. Every district should have access to a CHU.

6. Counsel in § 2255 cases should have distinguished prior experience in the area of federal post-conviction proceedings and in capital post-conviction proceedings.

7. When possible, post-conviction counsel should have distinguished prior experience in capital § 2255 representations.

8. In evaluating the qualifications of proposed post-conviction counsel, consideration should be given to the qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases.

9. In evaluating the qualifications of proposed post-conviction § 2255 counsel, consideration should be given to their commitment to the defense of capital cases, their current caseload including other capital cases, and their willingness to effectively represent the interests of the client.

F. Appointment and Qualifications of Counsel in Federal Capital Habeas Corpus Proceedings (28 U.S.C. § 2254)

1. A financially eligible person seeking to vacate or set aside a death sentence in proceedings under 28 U.S.C. § 2254 is entitled to the appointment of qualified counsel. **See:** 18 U.S.C. § 3599(a)(2).

2. Due to the complex, demanding, and protracted nature of death penalty proceedings, the court should consider appointing at least two attorneys.

3. When appointing counsel in a capital § 2254 matter, the appointing authority should consider the recommendation of the [federal public defender/community defender] who will consult with the National or Regional Habeas Assistance and Training Counsel projects.

[To be used in districts where the FDO has a Capital Habeas Unit (CHU) that specializes in the representation of death-sentenced individuals in post-conviction proceedings, ADD: The defender's recommendation may

be to appoint this district's CHU, a CHU from another district, or other counsel who qualify for appointment under 18 U.S.C. § 3599 and this Plan, or any combination of the foregoing appropriate under the circumstances.]

4. In appointing counsel in a capital § 2254 matter, judges should give due weight to the recommendations made by federal defenders and resource counsel and articulate reasons for not doing so.

5. Local or circuit restrictions prohibiting Capital Habeas Units (CHUs) from engaging in cross-district or cross-circuit representation should not be imposed without good cause. Every district should have access to a CHU.

6. Out-of-district counsel, including federal defender organization staff, who possess the requisite expertise may be considered for appointment in capital § 2254 cases to achieve cost and other efficiencies together with high quality representation.

7. For federal counsel to avail themselves of the full statute of limitations period to prepare a petition, the court should appoint counsel and provide appropriate litigation resources at the earliest possible time permissible by law.

8. Unless precluded by a conflict of interest, or replaced by similarly qualified counsel upon motion by the attorney or motion by the defendant, capital § 2254 counsel must represent the defendant throughout every subsequent stage of available judicial proceedings and all available post-conviction processes, together with applications for stays of execution and other appropriate motions and procedures, and must also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant. **See:** 18 U.S.C. § 3599(e).

9. Counsel in capital § 2254 cases should have distinguished prior experience in the area of federal post-conviction proceedings and in capital post-conviction proceedings.

10. When possible, capital § 2254 counsel should have distinguished prior experience in capital § 2254 representations.

11. In evaluating the qualifications of proposed capital § 2254 counsel, consideration should be given to the qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases.

12. In evaluating the qualifications of proposed capital § 2254 counsel, consideration should be given to proposed counsel's commitment to the defense of capital cases, their current caseload including other capital

cases, and their willingness to represent effectively the interests of the client.

XV. Effective Date

This Plan will become effective when approved by the Judicial Council of the ____ Circuit.

ENTER FOR THE COURT ON (month) (day), (year).

_____
CHIEF JUDGE, DISTRICT COURT

APPROVED BY THE JUDICIAL COUNCIL OF THE ___CIRCUIT ON (month) (day), (year).

_____
CHIEF JUDGE, COURT OF APPEALS

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Appx. 2C: Procedures for Interim Payments to Counsel in Non-Death Penalty Cases

1. The district court issues a Memorandum Order to counsel, outlining payment procedures and specifically addressing payment for actual expenses, travel, and compensation of counsel. **See:** Sample Memorandum Order, below.

2. If excess compensation is anticipated, written approval of the procedure must be obtained from the chief judge of the circuit or his or her delegate prior to issuance of the order.

3. Once it is issued, a copy of the Memorandum Order should be furnished to the CJA claims coordinator.

4. Form CJA 20 should be submitted with full documentation of all expenses claimed on the voucher.

5. Assign a number to each voucher processed for payment.

6. Item 19 of Form CJA 20 must be completed to indicate the time period covered by the voucher and whether it is for the final payment or for an interim payment.

7. If the court has selected OPTION A of the Sample Memorandum Order, the final voucher should:

   (a) set forth in detail the time and expenses claimed for the entire case;

   (b) reflect all compensation and reimbursement previously received;

   (c) show the net amount remaining to be paid; and

   (d) be approved by the chief judge of the circuit or his or her delegate if the total claim for the case is in excess of the statutory limits.

8. If the court has selected OPTION B of the Sample Memorandum Order and established intervals for the submission of cumulative vouchers for the balance of amounts withheld from the interim vouchers, each cumulative voucher should:

(a) be labeled “Cumulative Voucher”;

(b) set forth in detail the time and expenses claimed for the pre-established time interval;

(c) reflect all compensation and reimbursement previously received during the pre-established time interval;

(d) show the net amount remaining to be paid; and

(e) be approved by the chief judge of the circuit or his or her delegate.

Sample Memorandum Order
(To Be Used in Non-Death Penalty Cases)

Memorandum to All Counsel Appointed Under the Criminal Justice Act (CJA) in the Case of _____

Number _____

RE: Interim Payments for Representation of Counsel

Because of the expected length of the trial in this case, and the anticipated hardship on counsel in undertaking representation full-time for such a period without compensation, under *Guide to Judiciary Policy* (Guide), Volume 7, Part A, § 230.73.10, the following procedures for interim payments will apply during the course of your representation in this case:

1. Submission of Vouchers

Counsel should submit to the court clerk, twice each month, an interim Form CJA 20, Appointment of and Authority to Pay Court Appointed Counsel. Compensation earned and reimbursable expenses incurred from the first to the fifteenth days of each month should be claimed on an interim voucher submitted no later than the twentieth day of each month, or the first business day thereafter. Compensation earned and reimbursable expenses incurred from the sixteenth to the last day of each month should be claimed on an interim voucher submitted no later than the fifth day of the following month, or the first business day thereafter. The first interim voucher submitted should reflect all compensation claimed and reimbursable expenses incurred from the date of appointment to _____ and should be submitted no later than _____; thereafter, the vouchers should be submitted twice each month according to the schedule outlined above. Counsel should complete Item 19 on the form for each interim voucher. Each interim voucher should be assigned a number when processed for payment. Interim vouchers should be submitted in accordance with this schedule even though little or no compensation or expenses are claimed for the respective period. All interim vouchers should be supported by detailed and itemized time and expense statements. Guide, Volume 7A, § 230 outlines the procedures and rules for claims by CJA attorneys and should be followed on each voucher.

I will review the interim vouchers when submitted, particularly with regard to the amount of time claimed, and will authorize compensation to be paid for 80 percent of the approved number of hours. This compensation will be determined by multiplying 80 percent of the approved number of hours by the applicable rate. I will also authorize for payment all reimbursable expenses reasonably incurred.

[Select Option A or B]

OPTION A

At the conclusion of the representation, each counsel should submit a final voucher seeking payment of the 20 percent balance withheld from the earlier interim vouchers, as well as payment for representation provided during the final interim period. The final voucher should set forth in detail the time and expenses claimed for the entire case, including all appropriate documentation. Counsel should reflect all compensation and reimbursement previously received on the appropriate line of the final voucher, as well as the net amount remaining to be paid at the conclusion of the case. After reviewing the final voucher, I will submit it to the chief judge of the circuit or his or her delegate for review and approval.

OPTION B

Every _____ months, counting from the submission date for the first interim voucher, until the conclusion of the representation, counsel should submit a cumulative interim voucher seeking payment of the outstanding 20 percent balance withheld from all earlier interim compensation paid out during the preceding _____-month interval, as well as payment for representation provided during the last interim period of the interval. The cumulative interim voucher should be labeled as such and should set forth in detail the time and expenses claimed for the entire interval, including all appropriate documentation. Counsel should reflect all compensation and reimbursement previously received on the appropriate line of the cumulative interim voucher, as well as the net amount remaining to be paid at the end of the interval. After reviewing the cumulative interim voucher, I will submit it to the chief judge of the circuit or his or her delegate, for review and approval. At the conclusion of the representation, each counsel should submit a final cumulative voucher seeking payment of the 20 percent balance withheld from the interim vouchers processed during the final interval, as well as payment for representation provided during the last interim period of the interval.

2. Reimbursable Expenses

Counsel may be reimbursed for out-of-pocket expenses reasonably incurred incident to the representation. While the statute and applicable rules and regulations do not place a monetary limit on the amount of expenses that can be incurred, counsel should incur no single expense item in excess of $ _____ without prior approval of the court. Such approval may be sought by filing an *ex parte* application with the clerk stating the nature of the expense, the estimated dollar cost and the reason the expense is necessary to the representation. An application seeking such approval may be filed *in camera*, if necessary. Upon finding that the expense is reasonable, I will authorize counsel to incur it. Recurring expenses, such as telephone toll calls, photocopying and photographs, which aggregate more than $ _____ on one or more interim vouchers are not considered single expenses requiring court approval.

With respect to travel outside of the city/county of _____ for the purpose of consulting with the client or the client's former counsel, interviewing witnesses, etc., the $ _____ rule should be applied in the following manner. Travel expenses, such as air fare, mileage, parking fees, meals and lodging, can be claimed as itemized expenses. Therefore, if the reimbursement for expenses relating to a single trip will aggregate an amount in excess of $ _____, the travel should receive prior approval of the court.

The following additional guidelines may be helpful to counsel:

(a) Case related travel by privately owned automobile should be claimed at the rate of ___ cents per mile, plus parking fees, ferry fares, and bridge, road and tunnel tolls. Transportation other than by privately owned automobile should be claimed on an actual expense basis. Air travel in "first class" is prohibited. Counsel and persons providing services under the CJA are encouraged to contact the clerk for air travel authorization at government rates.

(b) Actual expenses incurred for meals and lodging while traveling outside of the city/county of _____ in the course of this representation must conform to the prevailing limitations placed upon travel and subsistence expenses for federal judiciary employees in accordance with existing government travel regulations. For specific details concerning high cost areas, counsel should consult the clerk.

(c) Telephone toll calls, photocopying, and photographs can all be reimbursable expenses if reasonably incurred. However, general office overhead, such as rent, secretarial help, and telephone service, is not a reimbursable expense, nor are items of a personal nature. In addition, expenses for service of subpoenas on fact witnesses are not reimbursable, but rather are governed by Fed. R.Crim. P. 17 and 28 U.S.C.§ 1825.

3. Further Guidance

Answers to questions concerning appointment under the Criminal Justice Act can generally be found in (1) 18 U.S.C.§ 3006A; (2) the Plan of the United States District Court for _____, available through the clerk, and (3) Guide, Vol. 7A (Guidelines for Administering the CJA and Related Statutes), published by the Administrative Office of the U.S. Courts and also available through the clerk. Should these references fail to provide the desired clarification or direction, counsel should address their inquiries directly to me or my staff.

_____

United States District Judge Date

Approved:

_____

Chief Judge of the United States Court of Appeals for the _____ Circuit Date

Guide to Judiciary Policy

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Ch. 2: Appointment and Payment of Counsel

Appx. 2D: Procedures for Interim Payments to Counsel in Death Penalty Cases

1. The district court issues a Memorandum Order to counsel, outlining payment procedures and specifically addressing payment for actual expenses, travel, and compensation of counsel. **See:** Sample Memorandum Order.

2. A copy of the Memorandum Order should be furnished to the CJA claims coordinator.

3. Form CJA 30 should be submitted with full documentation of all expenses claimed on the voucher.

4. Assign a number to each voucher processed for payment.

5. Item 18 of Form CJA 30 must be completed to indicate the time period covered by the voucher and whether it is for the final payment or for an interim payment.

6. The final voucher should:

   (a) set forth in detail the time and expenses claimed for the final interim period;

   (b) set forth in detail the time and expenses claimed for the entire case; and

   (c) reflect all compensation and reimbursement previously received.

Sample Memorandum Order
(To Be Used Only In Death Penalty Cases)

Memorandum to All Counsel Appointed Under the Criminal Justice Act (CJA), 18 U.S.C. § 3006A, and 18 U.S.C. § 3599, in the Case of_____

Number _____

RE: Interim Payments for Representation of Counsel

Because of the expected length of the trial in this case and the anticipated hardship on counsel in undertaking representation full-time for such a period without compensation, under *Guide to Judiciary Policy* (Guide), Volume 7, Part A, § 230.73.20, the following procedures for interim payments apply during the course of your representation in this case:

1. Submission of Vouchers

Counsel should submit to the court clerk, twice each month, an interim Form CJA 30, Death Penalty Proceedings: Appointment of and Authority to Pay Court Appointed Counsel. Compensation earned and reimbursable expenses incurred from the first to the fifteenth days of each month should be claimed on an interim voucher submitted no later than the twentieth day of each month, or the first business day thereafter. Compensation earned and reimbursable expenses incurred from the sixteenth to the last day of each month should be claimed on an interim voucher submitted no later than the fifth day of the following month, or the first business day thereafter. The first interim voucher submitted should reflect all compensation claimed and reimbursable expenses incurred from the date of appointment to _____ and should be submitted no later than _____; thereafter, the vouchers should be submitted twice each month according to the schedule outlined above. Each voucher will be numbered when processed for payment. Counsel should complete Item 18 on the form for each interim voucher. Interim vouchers should be submitted in accordance with this schedule even though little or no compensation or expenses are claimed for the respective period. All interim vouchers must be supported by detailed and itemized time and expense statements. *Guide*, Volume 7A, Chapter 6 and Chapter 2, § 230 outline the procedures and rules for claims by CJA attorneys and should be followed on each voucher.

I will review the interim vouchers when submitted, particularly with regard to the amount of time claimed, and will authorize compensation to be paid for the approved number of hours. I will also authorize for payment all reimbursable expenses reasonably incurred.

At the conclusion of the representation, each counsel should submit a final voucher seeking payment for representation provided during the final interim period. The final voucher should also set forth in detail the time and expenses claimed for the entire

case, including all documentation. Counsel should reflect all compensation and reimbursement previously received on the appropriate line of the final voucher.

2. Reimbursable Expenses

Counsel may be reimbursed for out-of-pocket expenses reasonably incurred incident to the representation. While the statute and applicable rules and regulations do not place a monetary limit on the amount of expenses that can be incurred, counsel should incur no single expense item in excess of $_____ without prior approval of the court. Such approval may be sought by filing an *ex parte* application with the clerk stating the nature of the expense, the estimated dollar cost, and the reason the expense is necessary to the representation. An application seeking such approval may be filed *in camera*, if necessary. Upon finding that the expense is reasonable, I will authorize counsel to incur it. Recurring expenses, such as telephone toll calls, photocopying and photographs, which aggregate more than $ _____ on one or more interim vouchers are not considered single expenses requiring court approval.

With respect to travel outside of the city/county of _____ for the purpose of consulting with the client or his or her former counsel, interviewing witnesses, etc., the $ _____ rule should be applied in the following manner. Travel expenses, such as air fare, mileage, parking fees, meals, and lodging, can be claimed as itemized expenses. Therefore, if the reimbursement for expenses relating to a single trip will aggregate an amount in excess of $ _____, the travel should receive prior approval of the court.

The following additional guidelines may be helpful to counsel:

(a) Case related travel by privately owned automobile should be claimed at the rate of ___ cents per mile, plus parking fees, ferry fares, and bridge, road, and tunnel tolls. Transportation other than by privately owned automobile should be claimed on an actual expense basis. Air travel in "first class" is prohibited. Counsel and persons providing services under the CJA are encouraged to contact the clerk for air travel authorization at government rates.

(b) Actual expenses incurred for meals and lodging while traveling outside of the city/county of _____ in the course of this representation must conform to the prevailing limitations placed upon travel and subsistence expenses for federal judiciary employees in accordance with existing government travel regulations. For specific details concerning high cost areas, counsel should consult the clerk.

(c) Telephone toll calls, telegrams, photocopying, and photographs can all be reimbursable expenses if reasonably incurred. However, general office overhead, such as rent, secretarial help, and telephone service, is not a reimbursable expense, nor are items of a personal nature. In addition,

expenses for service of subpoenas on fact witnesses are not reimbursable, but rather are governed by Fed.R.Crim.P. 17 and 28 U.S.C. § 1825.

3. Further Guidance

Answers to questions concerning appointment under the CJA can generally be found in (1) 18 U.S.C. § 3006A; (2) the Plan of the United States District Court for _____, available through the clerk; and (3) Guide, Vol. 7A (Guidelines for Administering the CJA and Related Statutes), published by the Administrative Office of the U.S. Courts, also available through the clerk. Should these references fail to provide the desired clarification or direction, counsel should address their inquiries directly to me or my staff.

_____

United States District Judge Date

Guide to Judiciary Policy

Vol. 7: Defender Services
Pt. A: Guidelines for Administering the CJA and Related Statutes

Ch. 3: Authorization and Payment for Investigative, Expert, or Other Services

§ 310 In General
- § 310.10 Availability
- § 310.20 Limitations
- § 310.30 *Ex Parte* Applications
- § 310.40 Claims for Services Other than Counsel
- § 310.50 Forms for the Authorization and Payment for Services Other than Counsel
- § 310.60 Interim Payments
- § 310.65 Proration of Claims
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§ 320 Authorization of Investigative, Expert, and Other Services
- § 320.10 Investigators
- § 320.15 Interpreters
- § 320.20 Psychiatrists, Psychologists
- § 320.30 Transcripts
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- § 320.50 Guardian Ad Litem
- § 320.60 Commercial Computer-Assisted Legal Research Services
- § 320.70 Other Services and Computer Hardware and Software
- § 320.80 Reimbursement of Expenses
- § 320.90 Record Keeping

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§ 310 In General

§ 310.10 Availability

§ 310.10.10 Overview

(a) Investigative, expert, or other services necessary to adequate representation, as authorized by subsection (e) of the Criminal Justice Act (CJA) (18 U.S.C. § 3006A), are available to persons who are eligible under the CJA, including persons who have retained counsel but who are found by the court to be financially unable to obtain the necessary services.

(b) In this connection, a person with retained counsel is financially unable to obtain the necessary services even if the person's resources are in excess of the amount needed to provide the person and the person's dependents with the necessities of life, provide defendant's release on bond, and pay a reasonable fee to the person's retained counsel, but are insufficient to pay for the necessary services.

§ 310.10.20 Retained Counsel and Fee Arrangements

(a) In responding to requests for services under 18 U.S.C. § 3006A(e) by a person represented by retained counsel, the court should inquire into the fee arrangement between the retained attorney and the client.

(b) If the court finds the fee arrangement unreasonable in relation to fees customarily paid to qualified practitioners in the community for services in criminal matters of similar duration and complexity, or that it was made with a gross disregard of the defendant's trial expenses, the court may order the retained attorney to pay out of such fees all or such part of the costs and expenses as the court may direct.

(c) The procedure outlined in Guide, Vol. 7A, § 210.40.40 applies to such persons who are financially able to pay some, but unable to pay all, the costs of necessary services.

§ 310.10.30 Pro Se Representation

(a) Persons who are eligible for representation under the CJA, but who have elected to proceed pro se, may, upon request, be authorized to obtain investigative, expert, and other services in accordance with 18 U.S.C. § 3006A(e).

(b) The court should authorize subsection (e) services for pro se litigants and review and approve resulting claims in the same manner as is its practice with respect to requests made by CJA panel attorneys. However, in matters for which appointment of counsel is discretionary under 18 U.S.C. § 3006A(a)(2), the court should make a threshold determination that the case is one in which the interests of justice would have required the furnishing of representation.

(c) Although a federal defender organization may be requested to provide administrative assistance to pro se litigants who wish to arrange for subsection (e) services, the investigative, paralegal or other services or resources of the organization should ordinarily be employed only when the organization is appointed as counsel of record, responsible for the conduct of the litigation.

§ 310.20 Limitations

§ 310.20.05 Engaging Relatives for Compensable Services

(a) Prior to engaging any relative (as the term is defined in 5 U.S.C. § 3110) to perform CJA compensable services, other than as associate counsel in the same law firm (**see:** Guide, Vol. 7A, § 230.53.10), counsel should first provide notification of the relationship and potential services to the presiding judicial authority.

(b) The court may, in the interest of justice, and upon finding that timely procurement of necessary services could not await prior notification, approve payment for such services up to the dollar threshold for obtaining services without prior authorization under 18 U.S.C. § 3006A(e)(2) and the CJA Guidelines (Guide, Vol. 7A, § 310.20.30).

§ 310.20.10 With Prior Authorization

(a) With prior authorization, compensation for investigative, expert, and other services is limited to the amounts in the following table for CJA-compensable work performed on or after the effective date. For guidelines applicable to capital cases, **see:** Guide, Vol. 7A, § 660.10.40 and § 660.20.

§ 310.20.10(a) Waivable Case Compensation Maximums for Investigative, Expert, and Other Services

If services were performed between...	The compensation maximum is...
01/01/2024 to present	$3,000
01/01/2023 to 12/31/2023	$2,800
01/01/2021 to 12/31/2022	$2,700
02/15/2019 to 12/31/2020	$2,600
01/01/16 to 02/14/2019	$2,500
05/27/10 to 12/31/15	$2,400
12/8/04 to 5/26/10	$1,600
11/14/86 to 12/7/04	$1,000

(b) The waivable case compensation maximum amounts apply per organization or individual, exclusive of reimbursement for expenses reasonably incurred, and per individual authorization to perform said

service, except with regard to capital cases. **See:** Guide, Vol. 7A, § 660.20.

(c) A separate authorization should be obtained for each type of service for each person served, and for each defendant served, and for each case.

(d) While the service provider may be compensated separately for each person served, care should be taken to ensure that duplicate charges are not being made for the same services.

(e) If, under 18 U.S.C. § 3006A(e), such services are rendered by members of an organization such as a corporation, unincorporated association, or partnership (other than those created under 18 U.S.C. § 3006A(g)), in their capacities as members of that organization, compensation is deemed to have been earned by the organization and is paid to it only once, per CJA client served, in an amount not to exceed the statutory maximum, exclusive of reimbursement for expenses reasonably incurred.

§ 310.20.20 Waiving the Case Compensation Maximums

(a) Payment in excess of the case compensation limit for services authorized prior to the performance thereof may be made when certified by the court or U.S. magistrate judge and approved by the chief judge of the circuit (or an active or senior circuit judge to whom excess compensation approval authority has been delegated) as being necessary to provide fair compensation for services of an unusual character or duration.

(b) If it can be anticipated that the compensation will exceed the statutory maximum, advance approval should be obtained from the court and the chief judge of the circuit (or the active or senior circuit judge to whom excess compensation approval authority has been delegated). **See:** Appx. 3A (Sample Request for Advance Authorization for Investigative, Expert, or Other Services).

§ 310.20.30 Without Prior Authorization

(a) 18 U.S.C. § 3006A(e)(2)(A) authorizes the obtaining of investigative, expert, and other services, without prior authorization but subject to subsequent review, providing the cost of the services obtained does not exceed the amounts listed in the following table, plus expenses reasonably incurred. For information regarding obtaining investigative, expert, and other services in capital cases, **see:** Guide, Vol. 7A, § 660.

§ 310.20.30(a) Limitations on Services Without Prior Authorization	
If services were performed between...	**The compensation maximum is...**
01/01/2024 to present	$1,000
02/15/2019 to 12/31/2023	$900
05/27/10 to 02/14/2019	$800
12/8/04 to 05/26/10	$500
11/14/86 to 12/7/04	$300

(b) The limitation noted above in § 310.20.30(a) may be waived, however, if the presiding judge or U.S. magistrate judge (if the services were rendered in a case disposed of entirely before the U.S. magistrate judge), in the interest of justice, finds that timely procurement of necessary services could not await prior authorization. **See:** 18 U.S.C. § 3006A(e)(2)(B).

§ 310.20.40 Periodic Increases to the Waivable Case Compensation Maximums

The Federal Judiciary Administrative Improvements Act of 2010, Pub. L. No. 111-174, enacted on May 27, 2010, amended the CJA to increase the waivable case compensation amounts listed in § 310.20.10 and § 310.20.30 simultaneously with any subsequent, cumulative adjustments under 5 U.S.C. § 5303 in the rates of pay under the General Schedule (currently calculated based on the determination of the annual Employment Cost Index adjustment), rounded to the nearest hundred dollars. The Administrative Office of the U.S. Courts (AO) will provide notice when new threshold amounts are effective under this provision.

§ 310.30 *Ex Parte* Applications

(a) *Ex parte* applications for services other than counsel under 18 U.S.C. § 3006A(e) must be heard *in camera* and must not be revealed without the consent of the defendant. The application must be placed under seal until the final disposition of the case in the trial court, subject to further order of the court. Maintaining the confidentiality of the application prevents the possibility that an open hearing may cause defendants to reveal their defense.

(b) Appointed counsel may not be required to submit evidence of a prior attempt to enter into a stipulation with the U.S. attorney as a prerequisite to obtaining services under 18 U.S.C. § 3006A(e). The court may encourage counsel to enter into stipulations, in the interest of expedition and economy, without, however, disclosing the contents or otherwise compromising the secret nature of the *ex parte* application.

(c) The use of eVoucher to request and authorize services other than counsel supports confidentiality and enhances efficiency. Such records should be made available to successor counsel for representational purposes upon request. However, further disclosure remains subject to the court's control over CJA information as provided in Guide, Vol. 7A, Ch. 5 (Disclosure of Information on CJA-Related Activities).

§ 310.40 Claims for Services Other than Counsel

All claims for services other than counsel, under 18 U.S.C. § 3006A(e), must be submitted using the eVoucher system and should include the following:

(a) a statement as to the type of, dates of, and time expended for, the services provided;

(b) an explanation of the fee arrangement (e.g., hourly rate, etc.);

(c) an itemized statement of all expenses for which reimbursement is claimed; and

(d) supporting documentation, where practicable, for all expenses of lodgings and subsistence, and for any expenses in excess of $50.

§ 310.50 Forms for the Authorization and Payment for Services Other than Counsel

Requests for authorization and payment for services other than counsel should be submitted using the judiciary's eVoucher system. Legacy forms, together with instructions, can be found on the judiciary's public website.

§ 310.60 Interim Payments

§ 310.60.10 Non-Death Penalty Cases

(a) Where it is considered necessary and appropriate in a specific case, the presiding trial judge may arrange for periodic or interim payments to an individual whose services are obtained under 18 U.S.C. § 3006A(e). For instructions on the procedures for effecting interim payments to persons other than counsel, as well as a sample memorandum order on this subject which provides for two alternative payment methods, **see:** Appx. 3B (Procedures for Interim Payments to Service Providers in Non-Death Penalty Cases).

(b) The payment options provided in Appx. 3B are designed to strike a balance between the interest in relieving subsection (e) service providers of financial hardships in extended and complex cases, and the practical

application of the statutorily imposed responsibility of the chief judge of the circuit to provide a meaningful review of claims for excess compensation. Other interim payment arrangements which effectuate this balance may be devised in consultation with the AO's Defender Services Office.

§ 310.60.20 Death Penalty Cases

Presiding judicial officers are urged to permit interim payment in death penalty cases. Because the CJA compensation maximums for investigative, expert, and other services set out in § 310.20.10(a) do not apply in capital cases, different procedures and memorandum orders must be used in those cases. **See:** Guide, Vol. 7A, § 660.20. These procedures and sample memorandum orders are also set forth in Appx. 3C (Procedures for Interim Payments to Service Providers in Capital Proceedings).

§ 310.65 Proration of Claims

§ 310.65.10 In General

(a) If services were provided for more than one CJA representation, the time spent in common, including travel time, must be represented on the voucher forms by:

- prorating the service time among the representations on separate vouchers; or
- billing the entire service time on a voucher pertaining to one of the representations

The supporting materials to the vouchers must explain the method of billing and, when applicable, cross-reference the other CJA representations (**see:** § 310.65.20).

(b) When a service provider incurs travel or other expenses applicable to more than one CJA representation, the entire amount of the expenses must be billed on one voucher.

Time or expenses "spent in common" includes work performed simultaneously or within the same unit of time, or expenses incurred, for more than one representation (e.g., travel for more than one client). Double billing of time or expenses is prohibited (e.g., billing the same travel time or expenses applicable to more than one representation on more than one voucher).

(c) A "CJA representation" is one in which the attorney is:

- a federal public or community defender providing representation under the CJA or related statutes, or

- a CJA panel attorney or other attorney or entity authorized to obtain services for a particular representation under the CJA or related statutes.

Reference to a "voucher" in this section includes invoices submitted to a federal public or community defender organization for work performed for that entity.

For information regarding the overlap of billing time periods in the interpreter context specifically, **see:** § 320.15.30.

§ 310.65.20 Cross-Referencing Vouchers

(a) Whenever a service provider submits a voucher, as provided by this section, that includes time spent in common, if the time is prorated then each CJA representation must be cross-referenced on the supporting documentation to each voucher. If the time is billed to one representation, the other representations must be cross-referenced on the supporting documentation to that voucher. However, to ensure that an appointed attorney does not receive inappropriate information as to another attorney's use of the service provider, the CJA representations that are cross-referenced should not be identified by name and case number if the work was performed for an attorney other than the one who will be certifying the voucher, although the number of other representations should be listed.

(b) After the attorney certifies the service provider's voucher, the service provider, upon the request of the court's designated CJA voucher review personnel, must provide the name, case number, and any other identifying information for such representations.

§ 310.65.30 Prorating Time Limitation

Proration of time among CJA representations must not result in a service provider billing a larger amount than would have been billed if all the time was assigned to one voucher.

§ 310.65.40 Application of the Case Compensation Maximum

Where compensation is claimed on a voucher for time spent in common on more than one CJA representation, the compensation will be applied to the pre-authorized and case compensation maximum amounts for the representation on that voucher.

§ 310.65.50 Time Spent in Common with Non-CJA Representations

(a) If the service provider is billing under the CJA for time or expenses, including travel, that were spent in common for a purpose other than a

CJA representation, the service provider must report such information so that the court can determine whether, in fairness to the provider, the time or expenses should be apportioned and the provider compensated for the time or expenses reasonably attributable to the CJA.

Note: There is no apportionment between a contract court interpreter's work for a court unit and the CJA, **see:** § 320.15.30.

(b) The service provider should explain the rationale for billing under the CJA, and the court may conduct a further inquiry.

(c) In determining whether time or expenses spent in common for a purpose other than a CJA representation should be apportioned, the court should consider:

- the time or expenses reasonably expended in the performance of the service provider's duties under the CJA in relation to the time and expenses expended furthering other purposes;
- the significance to the representation of the duties performed or expenses incurred; and
- the likelihood that the service provider would have performed the services or incurred the expenses under the CJA in the absence of the other purposes.

§ 310.70 Review of Vouchers

Absent extraordinary circumstances, reviewers should act upon claims for compensation for investigative, expert, or other services within 30 days of submission.

§ 320 Authorization of Investigative, Expert, and Other Services

§ 320.10 Investigators

When necessary to an adequate representation as described above, the court may authorize, under 18 U.S.C. § 3006A(e), the services of an investigator.

§ 320.15 Interpreters

§ 320.15.10 Terms of Compensation

(a) Interpreting services provided under the CJA may be compensated:

- according to the terms and conditions set forth in the court interpreter services contract;
- on an hourly rate basis; or

- on another appropriate basis.

(b) Interpreters should be compensated consistently throughout the district or, if applicable, in individual court locations.

§ 320.15.20 Reviewing the Rate of Compensation

(a) In determining the reasonableness of rates paid to interpreters under the CJA, courts should utilize either:

(1) the half- and full-day rates established by the Director for contract court interpreters performing in-court services; or

(2) an hourly rate. The half- and full-day rates (prorated hourly) or the hourly overtime rate should be used as a guidepost for the reasonableness of the hourly rate.

(b) Justification should be submitted to the presiding judicial officer if compensation is sought for an interpreter by a method different from or in an amount in excess of presumptive or maximum rates adopted by a court.

(c) Appointed counsel may negotiate rates with the interpreter consistent with the guidance contained in this section.

§ 320.15.30 Overlap of Billing Time Periods

(a) Contract court interpreters must not bill or receive funds from any other federal court unit, federal public defender, community defender organization, or other attorneys or entities obtaining interpreting services under the CJA or related statutes for any services rendered during the same half- or full-day for which the contract court interpreter is being compensated pursuant to the court interpreter services contract. **See:** Guide, Vol. 5, § 220.30.20. Thus, an interpreter retained by the court under the court contract for a one-half or full-day period may not bill the CJA for any work performed during that same half-day or full-day period even if the court no longer requires the interpreter's services.

(b) An interpreter billing on a half- or full-day rate basis, hourly basis, or other unit of time under the CJA must not charge any other federal court unit, federal public defender, community defender, CJA panel attorney, or other person or entity otherwise authorized by the court to obtain the services of an interpreter under the CJA or related statutes for any services rendered within the same time period.

(c) When an interpreter is invoicing under the CJA on a half-day rate basis and works one half-day for a court unit and another half-day for a CJA

representation, or is invoicing two separate half-days for different CJA representations, then the first half-day should be billed at the half-day rate and the second at the difference between the half-day and full-day rates, unless otherwise negotiated.

(d) It is permissible to prorate compensation among more than one CJA representation (but expenses must be invoiced to one CJA representation) or to apportion compensation, including expenses, between a CJA representation and a non-CJA purpose (not including a federal court unit). **See:** § 310.65.

§ 320.20 Psychiatrists, Psychologists

§ 320.20.10 Type of Examinations

Chapter 313 of Title 18, as amended by the Insanity Defense Reform Act of 1984 (Chapter IV of the Comprehensive Crime Control Act of 1984), provides for **court-directed** psychiatric or psychological examination of individuals in connection with the various proceedings to determine mental condition authorized under that chapter. The functions of these separate proceedings are to determine:

(a) the mental competency of a defendant to stand trial (18 U.S.C. § 4241);

(b) insanity at the time of the offense (18 U.S.C. § 4242);

(c) the mental condition of an acquitted person hospitalized following a finding of not guilty only by reason of insanity (18 U.S.C. § 4243);

(d) the present mental condition of a convicted defendant (18 U.S.C. § 4244);

(e) the present mental condition of an imprisoned person who objects to transfer to a treatment facility (18 U.S.C. § 4245); and

(f) the present mental condition of a hospitalized person due for release (18 U.S.C. § 4246).

In addition, mental condition examinations may be conducted for purposes other than those specified in 18 U.S.C. chapter 313, e.g., to aid the defendant in preparing a defense.

§ 320.20.20 Source of Payment

(a) CJA funds are used to pay for psychiatric and related services obtained in accordance with 18 U.S.C. § 3006A(e) upon a determination that the services are "necessary for an adequate defense." These are "defense" services, where the defendant selects the expert and controls the disclosure of the expert's report.

(b) It is important to note that psychiatrists and related experts may be used in many circumstances in which payment is made from a source **other** than the CJA appropriation. In these situations, the court or the government selects the expert and persons other than the defendant also have access to the expert's report. The Department of Justice (DOJ) generally pays for these "non-defense" services. The chart in § 320.20.60 summarizes payment responsibility for the various circumstances in which psychiatric and related services are utilized.

(c) Court-ordered presentence examinations and reports under 18 U.S.C. § 3552(c) are not paid by the CJA appropriation. However, funding for these examinations is available from the AO. Courts should contact the AO's Probation and Pretrial Services Office at 202-502-1600 for guidance.

§ 320.20.30 Limitation of Amount

The limitations contained in § 310.20 apply to compensation claims submitted by "defense" psychiatrists and related experts, to be paid out of the CJA appropriation. For information regarding "dual purpose" examinations, **see:** § 320.20.50.

§ 320.20.40 Procedures for Payment

(a) CJA Appropriation – Defense Services

(1) eVoucher should be used for all payments for "defense" services in non-capital cases. **See also:** Form CJA 21 (Authorization and Voucher for Expert and Other Services).

(2) eVoucher should be used for all payments for "defense" services in death penalty cases. **See also:** Form CJA 31 (Death Penalty Proceedings: Ex Parte Request for Authorization and Voucher for Expert and Other Services).

(3) eVoucher submissions of form CJA 21 or CJA 31 should clearly describe the purpose of the expert's service.

(4) If separate vouchers are submitted for examination and testimony, they should be cross-referenced by voucher number.

(b) DOJ

Compensation claims for psychiatric and related services to be paid for by the DOJ should be referred to the U.S. attorney or assistant U.S. attorney.

§ 320.20.50 Dual Purpose Examinations

(a) On occasion, a psychiatrist or related expert will be asked to examine an individual for both a "defense" purpose and a "non-defense" purpose. In these cases, the defense has waived the confidentiality of the "defense" portion of the examination. In such dual purpose examinations, for the convenience of the expert providing the service, the entire compensation claim may be submitted through eVoucher using Form CJA 21, or, in a death penalty proceeding, Form CJA 31. The CJA will pay the expert the total amount approved and obtain reimbursement to the CJA appropriation from the DOJ for one-half of the cost. As a result of the AO's need to seek reimbursement from the DOJ, claims submitted for dual purpose examinations must be accompanied by separate court orders that indicate:

- who requested the examination;
- the specific purpose(s) of the examination;
- to whom the examination is directed; and
- to whom copies of the report are to be given.

(b) The limitation in § 320.20.30 applies to 50 percent of the claim for a dual purpose examination in which a portion of the examination is for "defense" purposes.

(c) In some "dual purpose" examinations both portions of the examination are chargeable to the same payment source. For instance, if the examination included evaluation of competency to stand trial under 18 U.S.C. § 4241 and evaluation of sanity at the time of the offense under 18 U.S.C. § 4242, the DOJ would be responsible for both portions of the examination and the entire compensation claim should be submitted to the U.S. attorney or assistant U.S. attorney.

§ 320.20.60 Summary Chart: Responsibility for Payment of Psychiatric and Related Expert Services		
Type of Service	**CJA**	**DOJ**
(a) To determine mental competency to stand trial, under 18 U.S.C. § 4241		
(1) Examination costs		Yes, regardless of which party requests, including examination on court's own motion
(2) Testimony costs for examiner if called at hearing		Yes, regardless of which party calls

§ 320.20.60 Summary Chart: Responsibility for Payment of Psychiatric and Related Expert Services		
Type of Service	**CJA**	**DOJ**
(3) Testimony costs for examiner if called at trial	If witness appears on behalf of defense	If witness appears on behalf of government
(b) To determine existence of insanity at time of offense, under 18 U.S.C. § 4242		
(1) Examination costs		Yes
(2) Testimony costs for examiner if called at trial		Yes, regardless of which party calls
(c) To determine existence of insanity at time of offense, under CJA subsection (e)		
(1) Examination costs	Yes	
(2) Testimony costs for examiner if called at trial	Yes	
(d) To determine mental condition of hospitalized person found not guilty only by reason of insanity, under 18 U.S.C. § 4243		
(1) Examination costs		Yes
(2) Testimony costs for examiner if called at hearing		Yes, regardless of which party calls
(e) To determine mental condition of convicted person suffering from mental disease or defect, under 18 U.S.C. § 4244		
(1) Examination costs		Yes
(2) Testimony costs for examiner if called at hearing		Yes, regardless of which party calls
(f) To determine mental condition of imprisoned person, under 18 U.S.C. § 4245		
(1) Examination costs		Yes, including costs of additional examiner selected by imprisoned person in accordance with 18 U.S.C. § 4247(b)

§ 320.20.60 Summary Chart: Responsibility for Payment of Psychiatric and Related Expert Services		
Type of Service	**CJA**	**DOJ**
(2) Testimony costs for examiner if called at hearing		Yes, regardless of which party calls, including additional examiner selected by imprisoned person in accordance with 18 U.S.C. § 4247(b)
(g) To determine mental condition of hospitalized person due for release, under 18 U.S.C. § 4246		
(1) Examination costs		Yes, including costs of additional examiner selected by hospitalized person in accordance with 18 U.S.C. § 4247(b)
(2) Testimony costs for examiner if called at hearing		Yes, regardless of which party calls, including additional examiner selected by hospitalized person in accordance with 18 U.S.C. § 4247(b)
(h) Examination of a person in custody as a material witness		Yes, under all circumstances
(i) Examination and testimony costs for expert witnesses not appointed under 18 U.S.C. §§ 4241, 4242, 4243, 4244, 4245, 4246	If requested by the defense	If requested by the government, or if appointed as an independent expert on court's own motion under Fed. R. Evid. 706

§ 320.30 Transcripts

§ 320.30.10 Authorization and Payment

(a) For panel attorneys, the preferred method for payment of transcripts authorized by the court is for the court reporter or reporting service to claim compensation directly through eVoucher's Authorization and Voucher for Payment of Transcript (Form CJA 24). Alternatively, the panel attorney may pay for transcripts and obtain reimbursement as an "out-of-pocket expense" in the eVoucher system using Form CJA 24. **See:** Guide, Vol. 7A, § 230.63.20 and § 320.30.40. Regardless of which method is used, the limitations set forth in § 310.20 and the $7,500 limitation set forth in Guide, Vol. 7A, Ch. 6 are inapplicable with regard to the cost of transcripts.

(b) In a direct appeal in a case in which counsel is assigned under the CJA, neither the CJA nor 28 U.S.C. § 753(f) requires the signing of a pauper's oath or certification by the court that the appeal is not frivolous in order to obtain a transcript.

(c) For procedures regarding federal defender organization transcript payments, **see:** Guide, Vol. 7A, § 430.10.

§ 320.30.20 Accelerated Transcript Costs

Routine apportionment of **accelerated** transcript costs among parties in CJA cases is prohibited. The following resolution was adopted by the Judicial Conference in March 1980, and modified in September 1986:

> That the furnishing of accelerated transcript services in criminal proceedings should be discouraged; however, recognizing that there are some circumstances in which such transcript services are necessary and required by either the prosecution or the defense, or both, accelerated transcript services may be provided.
>
> That in those cases where accelerated transcript services are provided, the party from whom the request or order emanates shall pay for the original, and if the requesting or ordering party is other than defense counsel appointed under the Criminal Justice Act, the CJA counsel shall be entitled to a copy at the copy rate.
>
> That the present practice, in some districts, of routinely apportioning the total cost of accelerated transcript services equally among the parties should be abandoned.

See: JCUS-SEP 1986, p. 90.

§ 320.30.30 Commercial Duplication in Multi-Defendant Cases

(a) In multi-defendant cases involving CJA defendants, no more than one transcript should be purchased from the court reporter on behalf of CJA defendants. The appointed counsel or the clerk of court should share an electronic copy with each of the CJA defendants for whom a transcript has been approved. If the transcript was provided in printed format, counsel should arrange for duplication at commercially competitive rates. The cost of such duplication will be charged to the CJA appropriation. This policy would not preclude the furnishing of duplication services by the court reporter at the commercially competitive rate.

(b) In individual cases involving requests for **accelerated** transcripts, the court may grant an exception to the policy set forth in (a) of this subsection based upon a finding that application of the policy will unreasonably

impede the delivery of accelerated transcripts to persons proceeding under the CJA. Such finding should be reflected on the transcript voucher.

§ 320.30.40 Standards for Transcripts of Other than Federal Court Proceedings

In negotiating agreements and contracts for providing transcripts of other than federal court proceedings, including, for example, transcription or translation of wiretap recordings, it is recommended that the standards for the size and format of a page be the same as those used for transcripts of federal court proceedings.

§ 320.40 Fact Witnesses and Depositions

§ 320.40.10 Fees and Expenses of Fact Witnesses

(a) Generally speaking, fees and expenses of fact witnesses for defendants proceeding under the CJA are paid by the DOJ. **See:** Fed. R. Crim. P., Rule 17(b); 28 U.S.C. § 1825.

(b) Section 1825 of 28 U.S.C. specifically provides for the payment of witness fees by the DOJ in all federal criminal proceedings, and in proceedings for a writ of habeas corpus or in proceedings under section 2255 of that title upon certification of a federal public defender or assistant federal public defender, or clerk of court upon the affidavit of other counsel appointed under the CJA.

(c) If advance witness travel funds are required, the court should issue the subpoena order, so stating, to authorize the travel advance by the marshal. These expenses will not be paid from CJA funds.

§ 320.40.20 Depositions

Depositions are covered by Fed. R. Crim. P., Rule 15, rather than 18 U.S.C. § 3503 (repealed).

(a) Expenses incurred in the taking of fact witness depositions (notarial fees, interpreters, transcripts, etc.) are paid by the DOJ, regardless of which party requested the deposition.

(b) The costs of attendance of fact witnesses for either party at the deposition are paid by the DOJ under Rule 17 (b).

(c) The costs of attendance of expert witnesses for the defense at the deposition are paid under the CJA.

(d) Reasonable travel and subsistence expenses incident to attendance of counsel and the defendant at the deposition are paid by the DOJ (1) if the

government is the requesting party, or (2) if the defendant is the requesting party and is unable to bear the deposition expenses, based on resources that would be used to determine financial eligibility for appointed counsel. However, it should be noted that the presence of the defendant is not essential to defense depositions since the confrontation clause only requires the defendant's presence if the depositions are intended to be used against the defendant.

§ 320.40.30 Travel Expenses, Subsistence, and Fees of Counsel in Habeas Corpus Cases

In habeas corpus and 28 U.S.C. § 2255 cases, the court may order the state or the government to pay the "expenses of travel and subsistence and fees of counsel" to attend the taking of a deposition at the request of the state or government. **See:** Rules Governing §§ 2254 and 2255 Cases in U.S. District Courts, Rule 6.

§ 320.50 Guardian Ad Litem

§ 320.50.10 Proceedings Involving Juveniles

(a) A guardian ad litem appointed under 18 U.S.C. § 5034 is not eligible for compensation under the CJA or any other appropriated source. Any person who is appointed as both counsel and guardian ad litem in one case under § 5034 should prorate time spent fulfilling the duties of these two offices. Only time spent as counsel on a case is compensable and should be reflected on the CJA claim.

(b) A guardian ad litem appointed for a child victim or witness under 18 U.S.C. § 3509(h) must be compensated through decentralized court funds using BOC 2559, not the CJA or the attorney admission fund.

§ 320.50.20 Prisoner Transfer Proceedings

A guardian ad litem appointed in proceedings to verify consent of a minor or incompetent prisoner to transfer from the United States to a foreign country is eligible for compensation under the CJA under 18 U.S.C. § 4109(b). **See:** Guide, Vol. 7A , § 230.23.20(d) on compensation limits and Guide, Vol. 7B (International Prisoner Transfer Proceedings).

§ 320.60 Commercial Computer-Assisted Legal Research Services

(a) The court may authorize counsel to obtain computer-assisted legal research services, where the research is performed by employees of a commercial legal research firm or organization rather than by appointed counsel, provided that the total amount charged for computer-assisted legal research services is reasonable. Requests by counsel for authority to obtain such computer-assisted legal research services should include: a

brief explanation of the need for the research services; and an estimate of the charges.

(b) Claims for compensation for such services should be submitted through eVoucher using Form CJA 21 (Authorization and Voucher for Expert and Other Services), or, in a death penalty proceeding, Form CJA 31 (Death Penalty Proceeding: Ex Parte Request for Authorization and Voucher for Expert and Other Services). For information concerning reimbursement for the cost of direct use, by appointed counsel, of computer-assisted legal research services, **see:** Guide, Vol. 7A, § 230.63.30.

§ 320.70 Other Services and Computer Hardware and Software

§ 320.70.10 Other Services

In addition to investigators, psychiatrists, psychologists, and reporters, services other than counsel may include, but are not necessarily limited to:

- interpreters;
- computer systems and automation litigation support personnel and experts;
- paralegals and legal assistants, including law students;
- neurologists and other medical experts; and
- laboratory experts in such areas as ballistics, fingerprinting, and handwriting.

§ 320.70.20 Notarial and Stenographic Expenses

The use of CJA funds is authorized to pay expenses of eligible defendants for stenographic and notarial expenses required to perpetuate and authenticate testimony of expert witnesses for such defendants.

§ 320.70.30 Extraordinary Office Expenses

(a) CJA attorneys are expected to use their own office resources, including secretarial help, for work on CJA cases. **See:** Guide, Vol. 7A, § 230.66.10.

(b) However, unusual or extraordinary expenses of these types may be considered "other services necessary for an adequate defense" and may be paid from CJA funds under 18 U.S.C. § 3006A(e).

(c) In determining whether the expense is unusual or extraordinary, consideration should be given to whether the circumstances from which the need arose would normally result in an additional charge to a fee-paying client over and above that charged for overhead expenses. **See:** Decision of the Comptroller General, B-139703, Feb. 28, 1974, 53 Comp. Gen. 638.

§ 320.70.40 Computer Hardware, Software, or Litigation Support Services

(a) Overview

(1) Providing an adequate defense may require CJA panel attorneys to utilize computer hardware, software, or litigation support services not typically available in a law office. In such cases, following the standards in § 320.70.30, counsel may apply to the court for authorization of CJA funds for the acquisition of such property or services.

(2) Before seeking court approval for any computer hardware or software with a cost exceeding the limitations in § 310.20.30(a), or for the utilization of computer systems, litigation support products, services, personnel, or experts with an expected combined cost exceeding $10,000, appointed counsel must consult the National Litigation Support Team in the AO's Defender Services Office (phone number: 510-637-3500) for guidance. Counsel must inform the court in writing of the Defender Services Office's advice and recommendation regarding counsel's proposed expenditure. **See also:** Appx. 3D (Sample Order Authorizing the Acquisition of Computer [Hardware and/or Software] under the CJA).

(b) Acquisition of Computer Hardware and/or Software

(1) The request for acquisition of the computer hardware and/or software, or for the procurement of litigation support services should be submitted through eVoucher using Form CJA 21 (Authorization and Voucher for Expert and Other Services), or, in a death penalty proceeding, Form CJA 31 (Death Penalty Proceedings: Ex Parte Request for Authorization and Voucher for Expert and Other Services).

(2) Property purchased with CJA funds is the property of the United States and remains so after the case is completed.

(3) When property is purchased, counsel must provide the Defender Services Office with a copy of the following documents to ensure the property is properly accounted for: a copy of the court's order approving the request; a copy of the completed Form CJA 21 (or Form CJA 31); the purchase order from the vendor and any receiving documents, such as a copy of the packing slip or the company's invoice.

(4) Because computer hardware or storage devices being used by counsel may contain confidential or privileged information, all case-

related materials must be removed before the hardware is returned as described below. Unless otherwise required by the court or by law, counsel should retain copies, electronic or otherwise, of the case-related materials for the client's file.

Note: When large amounts of electronic information are placed on drives or storage devices purchased with CJA funds, counsel may apply to the court to retain the drive or an alternative drive as the most cost-effective and efficient method for preserving the data.

(5) Upon the completion of the case, counsel must contact the National Litigation Support Team in the Office of Defender Services at (510) 637-3500 for instructions on returning any software, and directions for deleting case-related material from any hardware and returning it to the National Litigation Support Team for the permanent removal of case-related material. If appointed counsel has acquired software, then counsel should provide all accounting information for the software, including any serial numbers, activation codes, or other identifying information, and remove the software from his or her machines. If appointed counsel acquired computer hardware, it must be returned in good condition.

§ 320.70.50 Paralegals, Legal Assistants, and Other Non-Secretarial Support

(a) For services of paralegals, legal assistants, and other non-secretarial professional support personnel employed by appointed counsel, the court will determine a reasonable hourly compensation rate that may not exceed the lesser of the rate paid to counsel under the CJA or the rate typically charged by counsel to a fee-paying client for such services.

(b) Authorizing compensation at such rates should result in greater efficiency and lower costs for the CJA program than would occur if counsel performed and charged for these services.

§ 320.80 Reimbursement of Expenses

§ 320.80.10 Determination of Reasonableness

In determining the reasonableness of expenses of persons furnishing investigative, expert, or other services, claimants and the court should be guided by the provisions of these Guidelines regarding reimbursement of expenses of counsel. **See:** Guide, Vol. 7A, § 230.63 and § 230.66. Gross receipts or other taxes levied on fees for expert services rendered under the CJA are not reimbursable expenses.

§ 320.80.20 Government Travel Rates

(a) Federal law authorizes experts and other service providers traveling primarily in connection with carrying out responsibilities under the CJA the use of government travel rates from common carriers and lodging providers. **See:** 18 U.S.C. § 3006A note.

(b) Government rates may provide substantial cost reductions or increased flexibility over ordinary commercial rates. To obtain such rates, service providers must obtain prior approval from the appointing authority. Government contract airfares must be booked through the carrier or a judiciary contract travel management center using the court's centrally billed account.

§ 320.90 Record Keeping

(a) Investigative, expert, and other service providers must maintain contemporaneous time and attendance records for all work billed by them, as well as expense records.

(b) Such records are subject to audit and must be retained for three years after approval of the appointed counsel's or the service provider's final voucher, whichever is later, for a representation.

Guide to Judiciary Policy

Vol. 7: Defender Services
Pt. A: Guidelines for Administering the CJA and Related Statutes
Ch. 3: Authorization and Payment for Investigative, Expert, or Other Services

Appx. 3A: Sample Request for Advance Authorization for Investigative, Expert or Other Services

TO: Chief Judge (or Delegate) _____
United States Court of Appeals for the _____ Circuit

DATE: _____

FROM: _____

SUBJECT: Advance Authorization for Investigative, Expert, or Other Services

It is requested that advance authorization be granted to obtain services in an amount in excess of the maximum allowed under the provisions of subsection (e)(3) of the Criminal Justice Act, 18 U.S.C. § 3006A, [**or, for capital cases commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996, under 18 U.S.C. § 3599(g),**] as follows:

Case Name & Designation

Name of Expert or Investigator or Service Provider

Address _____

Type of Service _____

Reasons for Application

_____

_____

Estimated Compensation (Non-Capital Case) $_____

Estimated Compensation and Expenses (Capital Case) $ _____

Estimated Compensation and Expenses of All Investigative, Expert, and Other Services (Capital Case) $ _____

I certify that the estimated compensation in excess of the maximum set forth in 18 U.S.C. § 3006A(e)(3) [or, if applicable, the estimated compensation and expenses in excess of the maximum set forth in 18 U.S.C. § 3599(g),] appears necessary to provide fair compensation for services of an unusual character or duration and therefore recommend approval of this advance authorization in the amount of

$_____

_____ _____
United States District Judge Date
or United States Magistrate Judge

Advance authorization is hereby approved in the amount of

$_____.

_____ _____
Chief Judge, United States Court of Appeals Date
(or Delegate)

Guide to Judiciary Policy

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Ch. 3: Authorization and Payment for Investigative, Expert, or Other Services

Appx. 3B: Procedures for Interim Payments to Service Providers in Non-Death Penalty Cases

1. The district court issues a Memorandum Order to persons providing services under 18 U.S.C. § 3006A(e), outlining payment procedures and specifically addressing payment for actual expenses, travel, and compensation of persons providing investigative, expert, and other services under subsection (e). **See:** Sample Memorandum Order, below.

2. If excess compensation is anticipated, written approval of the procedure must be obtained from the chief judge of the circuit or his or her delegate prior to issuance of the order.

3. Once it is issued, a copy of the Memorandum Order should be furnished to the CJA claims coordinator.

4. Form CJA 21 should be submitted with full documentation of all expenses claimed on the voucher.

5. Assign a number to each voucher processed for payment.

6. Item 17 of the Form CJA 21 must be completed to indicate the time period covered by the voucher and whether it is for the final payment or for an interim payment.

7. If the court has selected OPTION A of the Sample Memorandum Order, the final voucher should:

   (a) set forth in detail the time and expenses claimed for the entire case;

   (b) reflect all compensation and reimbursement previously received;

   (c) show the net amount remaining to be paid; and

   (d) be approved by the chief judge of the circuit or his or her delegate if the total claim for the case is in excess of the statutory limits.

8. If the court has selected OPTION B of the Sample Memorandum Order and established intervals for the submission of cumulative vouchers for the balance of amounts withheld from the interim vouchers, each cumulative voucher should:

   (a) be labeled "Cumulative Voucher";

   (b) set forth in detail the time and expenses claimed for the pre-established time interval;

   (c) reflect all compensation and reimbursement previously received during the pre-established time interval;

   (d) show the net amount remaining to be paid; and

   (e) be approved by the chief judge of the circuit or his or her delegate.

Sample Memorandum Order
(To Be Used in Non-Death Penalty Cases)

Memorandum to All Service Providers Under Subsection (e) of the Criminal Justice Act (CJA), 18 U.S.C. § 3006A, in the Case of

Number: _____

RE: Interim Payments for Services Other Than Counsel

Because of the expected length of the trial in this case, and the anticipated hardship on persons providing services pursuant to subsection (e) of the CJA for such a period without compensation, in accordance with *Guide to Judiciary Policy (Guide)*, Vol 7A, § 310.60, the following procedures for interim payments apply during the period of time in which you provide services in connection with this case:

1. Submission of Vouchers

Persons providing services under subsection (e) shall submit to the court clerk, twice each month, an interim Form CJA 21, Authorization and Voucher for Expert and Other Services. Compensation earned and reimbursable expenses incurred from the first to the fifteenth days of each month shall be claimed on an interim voucher submitted no later than the twentieth day of each month, or the first business day thereafter. Compensation earned and reimbursable expenses incurred from the sixteenth to the last day of each month shall be claimed on an interim voucher submitted no later than the fifth day of the following month, or the first business day thereafter. The first interim voucher submitted must reflect all compensation claimed and reimbursable expenses incurred from the date on which your services were first retained to _____, and shall be submitted no later than _____; thereafter, the vouchers shall be submitted twice each month according to the schedule outlined above. Claimants must complete Item 17 of each interim voucher submitted. Each voucher will be assigned a number when processed for payment. Interim vouchers shall be submitted in accordance with this schedule even though little or no compensation or expenses are claimed for the respective period. All interim vouchers must be supported by detailed and itemized time and expense statements. Guide, Volume 7A, Chapter 3 outlines the procedures and rules for claims by persons providing services pursuant to subsection (e) and should be followed regarding each voucher.

I will review the interim vouchers when submitted, particularly with regard to the amount of time claimed, and will authorize compensation to be paid for 80 percent of the approved number of hours. This compensation will be determined by multiplying 80 percent of the approved number of hours by the applicable rate. I will also authorize for payment all reimbursable expenses reasonably incurred.

[Select Option A or B]

OPTION A

At the conclusion of the period during which you provide services in this case, you shall submit a final voucher seeking payment of the 20 percent balance withheld from the earlier interim vouchers, as well as payment for services rendered during the final interim period. The final voucher must set forth in detail the time and expenses claimed for the entire case, including all appropriate documentation. A statement should be attached to the voucher that reflects all compensation and reimbursement previously received, as well as the net amount remaining to be paid at the conclusion of the case. After reviewing the final voucher, I will submit it to the chief judge of the circuit, or his or her delegate, for review and approval.

OPTION B

Every _____ months, counting from the submission date for the first interim voucher, until the conclusion of the services, claimants shall submit a cumulative interim voucher seeking payment of the outstanding 20 percent balance withheld from all earlier interim compensation paid out during the preceding _____-month interval, as well as payment for services rendered during the last interim period of the interval. The cumulative interim voucher shall be labeled as such and must set forth in detail the time and expenses claimed for the entire interval, including all appropriate documentation. A statement must be attached to the cumulative interim voucher, which reflects all compensation and reimbursement previously received, as well as the net amount remaining to be paid at the end of the interval. After reviewing the cumulative interim voucher, I will submit it to the chief judge of the circuit, or his or her delegate, for review and approval. At the conclusion of the period during which you provide services in this case, you shall submit a final cumulative voucher seeking payment of the 20 percent balance withheld from the interim vouchers processed during the final interval, as well as payment for services rendered during the last interim period of the interval.

2. Reimbursable Expenses

Persons providing services under subsection (e) may be reimbursed for out-of-pocket expenses reasonably incurred incident to the rendering of services.

The following additional guidelines may be helpful:

(a) Case related travel by privately owned automobile should be claimed at the rate of ___ cents per mile, plus parking fees, ferry fares, and bridge, road, and tunnel tolls. Transportation other than by privately owned automobile should be claimed on an actual expense basis. Air travel in "first class" is prohibited. For service providers requiring air travel, counsel

are encouraged to contact the clerk for air travel authorization at government rates.

(b) Actual expenses incurred for meals and lodging while traveling outside of the city/county of _____ in the course of this representation must conform to the prevailing limitations placed upon travel and subsistence expenses for federal judiciary employees in accordance with existing government travel regulations. For specific details concerning high cost areas, counsel should consult the clerk.

(c) Telephone toll calls, telegrams, photocopying, and photographs can all be reimbursable expenses if reasonably incurred. However, general office overhead, such as rent, secretarial help, and telephone service, is not a reimbursable expense, nor are items of a personal nature. In addition, expenses for service of subpoenas on fact witnesses are not reimbursable, but rather are governed by Fed.R.Crim.P. 17 and 28 U.S.C. § 1825.

3. Further Guidance

Answers to questions concerning services provided under the CJA can generally be found in (1) 18 U.S.C. § 3006A; (2) the Plan of the United States District Court for _____, available through the clerk; and (3) Guide, Vol. 7A (Guidelines for Administering the CJA and Related Statutes), published by the Administrative Office of the U.S. Courts, also available through the clerk. Should these references fail to provide the desired clarification or direction, counsel should address their inquiries directly to me or my staff.

_____

United States District Judge Date

Approved:

_____

Chief Judge of the United States Court of Appeals for the _____ Circuit Date

Guide to Judiciary Policy

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Ch. 3: Authorization and Payment for Investigative, Expert, or Other Services

Appx. 3C: Procedures for Interim Payments to Service Providers in Capital Proceedings

1. The district court issues a Memorandum Order to persons providing investigative, expert, and other services under 18 U.S.C. § 3006A(e), and 18 U.S.C. § 3599(f) and (g)(2), outlining payment procedures and specifically addressing payment for actual expenses, travel, and compensation. **See:** Sample Memorandum Order, below.

2. If excess payment (i.e., more than $7,500 for all such services in a case) is anticipated, written approval of the procedure must be obtained from the chief judge of the circuit or his or her delegate prior to issuance of the Memorandum Order. If excess payment was not anticipated, but becomes apparent during the provision of services, approval must be obtained at that point.

3. Once it is issued, a copy of the Memorandum Order should be furnished to the CJA claims coordinator.

4. Form CJA 31 should be submitted for each service provider with full documentation of all expenses claimed on the voucher.

5. Assign a number to each voucher processed for payment.

6. Item 17 of the Form CJA 31 must be completed to indicate the time period covered by the voucher and whether it is for the final payment or for an interim payment.

7. If the court has selected OPTION A of the Sample Memorandum Order, the final voucher should:

   (a) set forth in detail the time and expenses claimed for the entire case;

   (b) reflect all compensation and reimbursement previously received;

   (c) show the net amount remaining to be paid; and

(d) be approved by the chief judge of the circuit or his or her delegate if the total claim for the case is in excess of the statutory limits.

8. If the court has selected OPTION B of the Sample Memorandum Order and established intervals for the submission of cumulative vouchers for the balance of amounts withheld from the interim vouchers, each cumulative voucher should:

(a) be labeled “Cumulative Voucher”;

(b) set forth in detail the time and expenses claimed for the pre-established time interval;

(c) reflect all compensation and reimbursement previously received during the pre-established time interval;

(d) show the net amount remaining to be paid; and

(e) be approved by the chief judge of the circuit or his or her delegate.

Sample Memorandum Order
(To Be Used in Capital Proceedings)

Memorandum to All Service Providers Under Subsection (e) of the Criminal Justice Act (CJA), 18 U.S.C. § 3006A, and 18 U.S.C. § 3599(f) and (g)(2), in the Case of

Name: _____

Number: _____

RE: Interim Payments for Services Other Than Counsel

Because of the expected length of the proceedings in this [federal capital prosecution] [federal capital habeas corpus case], and the anticipated hardship on persons providing services under 18 U.S.C. § 3006A(e), and 18 U.S.C. § 3599(f) and (g)(2), for such a period without payment, in accordance with *Guide to Judiciary Policy* (Guide), Volume 7A, § 660.40, the following procedures for interim payments apply during the period of time in which you provide services in connection with this case:

1. Submission of Vouchers

Persons providing services under 18 U.S.C. § 3006A(e), and 18 U.S.C. § 3599 (f) and (g)(2), shall submit to the court clerk, twice each month, an interim Form CJA 31, Death Penalty Proceedings: *Ex Parte* Request for Authorization and Voucher for Expert and Other Services. Compensation earned and reimbursable expenses incurred from the first to the fifteenth days of each month shall be claimed on an interim voucher submitted no later than the twentieth day of each month, or the first business day thereafter. Compensation earned and reimbursable expenses incurred from the sixteenth to the last day of each month shall be claimed on an interim voucher submitted no later than the fifth day of the following month, or the first business day thereafter. The first interim voucher submitted must reflect all compensation claimed and reimbursable expenses incurred from the date on which your services were first retained to _____ and shall be submitted no later than _____; thereafter, the vouchers shall be submitted twice each month according to the schedule outlined above. Claimants must complete Item 17 of each interim voucher submitted. Each interim voucher will be assigned a number when processed for payment. Interim vouchers shall be submitted in accordance with this schedule even though little or no compensation or expenses are claimed for the respective period. All interim vouchers must be supported by detailed and itemized time and expense statements. *Guide*, Volume 7A, Chapter 6 and Chapter 3, outlines the procedures and rules for claims by persons providing services under 18 U.S.C. § 3006A(e), and 18 U.S.C. § 3599(f) and (g)(2), and should be followed regarding each voucher.

I will review the interim vouchers when submitted, particularly with regard to the amount of time claimed, and will authorize compensation to be paid for 80 percent of the

approved number of hours. This compensation will be determined by multiplying 80 percent of the approved number of hours by the applicable rate. I will also authorize for payment all reimbursable expenses reasonably incurred.

[Select Option A or B]

OPTION A

At the conclusion of the period during which you provide services in this case, you shall submit a final voucher seeking payment of the 20 percent balance withheld from the earlier interim vouchers, as well as payment for services rendered during the final interim period. The final voucher must set forth in detail the time and expenses claimed for the entire case, including all appropriate documentation. A statement should be attached to the voucher that reflects all compensation and reimbursement previously received, as well as the net amount remaining to be paid at the conclusion of the case. After reviewing the final voucher, I will submit it to the chief judge of the circuit, or his or her delegate, for review and approval. I will certify that the total payment amount is necessary to provide fair compensation for services of an unusual character or duration. If the total payment for a service provider does not exceed $7,500, and if it is anticipated that the combined payments for all providers of investigative, expert, and other services will not exceed $7,500, then I will approve the final voucher.

OPTION B

Every _____ months, counting from the submission date for the first interim voucher, until the conclusion of the services, claimants shall submit a cumulative interim voucher seeking payment of the outstanding 20 percent balance withheld from all earlier interim compensation paid out during the preceding _____-month interval, as well as payment for services rendered during the last interim period of the interval. The cumulative interim voucher shall be labeled as such and must set forth in detail the time and expenses claimed for the entire interval, including all appropriate documentation. A statement must be attached to the cumulative interim voucher, which reflects all compensation and reimbursement previously received, as well as the net amount remaining to be paid at the end of the interval. At the conclusion of the period during which you provide services in this case, you shall submit a final cumulative voucher seeking payment of the 20 percent balance withheld from the interim vouchers processed during the final interval, as well as payment for services rendered during the last interim period of the interval. After reviewing the cumulative interim voucher, I will submit it to the chief judge of the circuit, or his or her delegate, for review and approval. I will certify that the total payment amount is necessary to provide fair compensation for services of an unusual character or duration. If the total payment for a service provider does not exceed $7,500, and if it is anticipated that the combined payments for all providers of investigative, expert, and other services will not exceed $7,500, then I will approve the final cumulative voucher seeking payment of the 20 percent balance

withheld from the interim vouchers processed during the final interval, as well as payment for services rendered during the last interim period of the interval.

2. Reimbursable Expenses

Persons providing services under 18 U.S.C. § 3006A(e), and 18 U.S.C. § 3599(f) and (g)(2), may be reimbursed for out-of-pocket expenses reasonably incurred incident to the rendering of services.

The following additional guidelines may be helpful:

(a) Case related travel by privately owned automobile should be claimed at the rate of ___ cents per mile, plus parking fees, ferry fares, and bridge, road, and tunnel tolls. Transportation other than by privately owned automobile should be claimed on an actual expense basis. Air travel in "first class" is prohibited. For service providers requiring air travel, counsel are encouraged to contact the clerk for air travel authorization at government rates.

(b) Actual expenses incurred for meals and lodging while traveling outside of the city/county of _____ in the course of this representation must conform to the prevailing limitations placed upon travel and subsistence expenses for federal judiciary employees in accordance with existing government travel regulations. For specific details concerning high cost areas, counsel should consult the clerk.

(c) Telephone toll calls, telegrams, photocopying, and photographs can all be reimbursable expenses if reasonably incurred. However, general office overhead, such as rent, secretarial help, and telephone service, is not a reimbursable expense, nor are items of a personal nature. In addition, expenses for service of subpoenas on fact witnesses are not reimbursable but rather are governed by Fed.R.Crim.P. 17 and 28 U.S.C. § 1825.

3. Further Guidance

Answers to questions concerning services provided pursuant to 18 U.S.C. § 3006A(e) and 18 U.S.C. § 3599, can generally be found in (1) these statutes; (2) the Plan of the United States District Court for _____, available through the clerk; and (3) Guide, Volume 7A (Guidelines for Administering CJA and Related Statutes), published by the Administrative Office of the U.S. Courts, also available through the clerk. Should these references fail to provide the desired clarification or direction, counsel should address their inquiries directly to me or my staff.

_____

United States District Judge Date

Approved:

_____

Chief Judge of the United States Court of Appeals for the _____Circuit Date

Guide to Judiciary Policy

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Appx. 3D: Sample Order Authorizing the Acquisition of Computer [Hardware and/or Software] Under the CJA

(**Note:** Footnotes explain options or provide suggestions to the presiding judicial officer.)

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

United States of America

v.

No. _____

Defendant #1
Defendant #2
Defendant #3
Defendant #4

ORDER AUTHORIZING ACQUISITION
OF [HARDWARE AND/OR SOFTWARE]
UNDER THE CRIMINAL JUSTICE ACT

The above-named defendants,[1] having been found to be eligible for services under the Criminal Justice Act (CJA), 18 U.S.C. § 3006A, have submitted an *ex parte*[2] application

[1] In most cases, counsel for one defendant is likely to make application on behalf of all co-defendants. Courts should encourage cooperation among defendants in multi-defendant cases and urge them to agree on needs before application is made.

[2] *Guide to Judiciary Policy*, Volume 7A, § 310.30 anticipates an *ex parte* application for "services other than counsel" and instructs that applications "must be heard *in camera*" and are not to be revealed without the consent of the defendant.

for the approval of CJA funds to purchase computer [hardware and/or software[3]], litigation support products and/or obtain litigation support services, personnel or experts as authorized by subsection (e) of the CJA [18 U.S.C. § 3006A(e)].

The Court finds, after inquiry and counsel's consultation with the Defender Services Office of the Administrative Office of the United States Courts (AO),[4] that the item(s) and service(s) listed below is [are] necessary for an adequate defense and constitute unusual or extraordinary expenses.[5]

The Court, therefore, approves the acquisition of the following:
[1.]
[2.]
[3.]
[4.]
in the amounts listed for each item and a total expenditure not to exceed [the sum of all items approved[6]].

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[3] Hardware includes computers, laptops, CD drives, printers, scanners, memory boards or related tangible items. Software includes operating and application programs.

[4] When computer hardware or software costs exceed the limitations in *Guide to Judiciary Policy*, Volume 7A, § 310.20.30(a) or when the combined cost of computer system fees, litigation support products, services, personnel, or experts is expected to exceed $10,000, applicants must consult with the National Litigation Support Administrator and the National Litigation Support Team in the AO's Defender Services Office (510-637-3500) **before** submitting an application for funds to the Court. The Defender Services Office will provide technical advice to counsel to ensure the items requested are necessary, appropriate, and compatible with systems currently being used by counsel. Counsel is required to include, in writing, the advice and recommendation of the Defender Services Office in the application to the Court. **See:** *Guide*, Volume 7A, § 320.70. The presiding judicial officer or the clerk also may wish to seek advice from the Defender Services Office.

[5] Under *Guide*, Volume 7A, § 320.70, approval for "unusual or extraordinary expenses" is authorized when "the circumstances from which the need arose would normally result in an additional charge to a fee-paying client over and above that charged for overhead expenses." The Court has discretion to determine when that condition is met. Circumstances of extraordinary expense may include but are not limited to: massive documentary discovery; voluminous electronically stored information (ESI); numerous hours of wiretap tapes; complex financial transactions; and national security concerns requiring disclosure, but no copying, of discovery. In all cases, the decision to approve expenses for hardware or software is a matter for the presiding judge (and if above the case compensation maximum, for the chief judge of the court of appeals, or designee of the chief judge).

[6] The Court may wish to authorize acquisition of each specific item and a total cost ceiling but allow the designated purchaser some leeway to negotiate prices for individual items.

It is further ordered that counsel must acquire the approved items in conformance with *Guide to Judiciary Policy*, Volume 7A, § 320.70. Both the acquisition of the computer software and/or hardware and the procurement of litigation support services, should be submitted on Form CJA 21 (Authorization and Voucher for Expert and Other Services) or, in a death penalty proceeding, Form CJA 31 (Death Penalty Proceedings: Ex Parte Request for Authorization and Voucher for Expert and Other Services). Upon actual purchase, counsel shall provide the AO's Defender Services Office with a copy of the court's order approving the request, a copy of the completed Form CJA 21 (or Form CJA 31), the purchase order from the vendor and any receiving documents. These documents should be sent to: National Litigation Support Team, Federal Public Defender Organization, 555 12th Street, Suite 650, Oakland, CA 94607-3627.

Because this [hardware and/or software] is [are] for the use of counsel appointed under the CJA and is being purchased with United States government funds, it is further ordered that the approved items are and will remain the property of the United States. The item[s] is [are] to be used only in the course of the representation of the above-named defendant[s]. Counsel must use due diligence and care to maintain the property in good condition.

Unless otherwise ordered by the Court, within 30 days after final judgment is entered as to a defendant, appointed counsel for that defendant is directed to contact the National Litigation Support Team in the AO's Defender Services Office at 510-637-3500 for instructions on returning any software, and directions for deleting case-related material from any hardware and returning it to the National Litigation Support Team for the permanent removal of case-related material. If appointed counsel has acquired software, then counsel should provide all accounting information for the software, including any serial numbers, activation codes, or other identifying information, and remove the software from his or her machines. If appointed counsel acquired computer hardware, it must be returned in good condition. Counsel should retain copies, electronic or otherwise, of the deleted information for the client's file.[7]

[7] While it is preferable that counsel retain copies of the deleted information in the client files, there may be some cases where it is impossible or prohibited by law. For example, the retention of discovery that implicates a national security concern may be barred by federal law.

Guide to Judiciary Policy

Vol. 7: Defender Services
Pt. A: Guidelines for Administering the CJA and Related Statutes

Ch. 4: Defender Organizations

§ 410 Overview
§ 410.10 Statutory Authority
§ 410.20 Judicial Conference Policy

§ 420 Types of Defender Organizations
§ 420.10 Federal Public Defender Organizations
§ 420.20 Community Defender Organizations

§ 430 Transcripts, Investigative, Expert, and Other Services
§ 430.10 Payment of Transcripts
§ 430.20 Payment of Investigative, Expert, and Other Services

§ 440 Assignment of Cases

§ 450 Apportionment of Cases Between Defender Organizations and the Panel

§ 460 Participation as *Amicus Curiae*

Appendices

Appx. 4A Community Defender Organization: Grant and Conditions
Appx. 4B Model Code of Conduct for Federal Community Defender Employees

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§ 410 Overview

§ 410.10 Statutory Authority

(a) Subsection (g) of the Criminal Justice Act (CJA) (18 U.S.C. § 3006A(g)), as amended, is intended to provide an option for the establishment of a public defender organization or community defender organization. A district, or part of a district in which at least 200 persons annually require the appointment of counsel, may establish a defender organization. Two adjacent districts or parts of districts may aggregate the number of persons required to be represented to establish eligibility.

(b) If an eligible court desires to provide for representation by a public defender organization or a community defender organization as provided

under 18 U.S.C. § 3006A(g), then 18 U.S.C. § 3006A(a) of the CJA applies. The CJA directs each district court to place in operation its own plan for furnishing representation under the terms of the CJA, after the approval of the plan by the judicial council of the circuit court of appeals and under rules and regulations established by the Judicial Conference of the United States.

(c) It is intended that all provisions of the CJA be administered efficiently and economically. 18 U.S.C. § 3006A(g) is intended to provide an option in the plan for the establishment of a public defender organization or community defender organization. Only one such organization should be approved for any district or part of a district in the absence of a clearly demonstrated showing of the need and feasibility of more than one such organization. It is the sense of the Judicial Conference that competitive organizations in the area should be avoided. The statute prohibits the authorization of more than one federal public defender organization within a single judicial district.

§ 410.20 Judicial Conference Policy

§ 410.20.10 Recommended Amendments to the Criminal Justice Act

The Judicial Conference has recommended that the CJA be amended to:

(a) Eliminate the requirement that a district receive at least 200 CJA appointments annually in order to qualify for the establishment of a federal public defender organization or a community defender organization; and

(b) Require that a federal public defender organization or community defender organization be established in all judicial districts, or combination of districts, where:

- such an organization would be cost effective;
- more than a specified number of appointments is made each year; or
- the interests of effective representation otherwise require establishment of such an office.

See: JCUS-MAR 1993, p. 23; JCUS-SEP 1995, p. 25.

§ 410.20.20 Establishment of Federal Defender Organizations

(a) A federal public or community defender organization should be established in every district that has 200 or more appointments each year.

(b) If a district does not have a sufficient number of cases, then a defender organization adjacent to the district should be considered for co-designation to provide representation in that district.

See: JCUS-SEP 2018, p. 39.

§ 420 Types of Defender Organizations

§ 420.10 Federal Public Defender Organizations

§ 420.10.10 Appointment of the Federal Public Defender

The federal public defender is appointed by the circuit court of appeals for a term of four years, unless sooner removed. Upon the expiration of the term a federal public defender may, by a majority vote of the judges of the court of appeals, continue to perform the duties of the office until a successor is appointed, or until one year after the expiration of such defender's term, whichever is earlier.

§ 420.10.20 Appointment of Federal Public Defender Organization Staff

(a) The federal public defender organization consists of one or more full-time salaried attorneys. The federal public defender may appoint:

- full-time attorneys in such number as may be approved by the court of appeals of the circuit; and
- other personnel as approved by the Director of the Administrative Office of the United States Courts (AO).

(b) The federal public defender and staff are subject to the provisions of 5 U.S.C. § 2104 and § 2105.

§ 420.10.25 Setting the Number of Assistant Federal Public Defenders in a District

Circuit court judges should give due weight to Defender Services Office recommendations and Judicial Conference-approved Judicial Resources Committee staffing formulas when approving the number of assistant federal defenders in a district.
See: JCUS-MAR 2019, pp. 19-20.

§ 420.10.30 Compensation of Federal Public Defender and Staff

(a) The circuit court of appeals determines the compensation of the federal public defender, which may not exceed the compensation received by the U.S. attorney for the same district. In determining the rate of compensation of the federal public defender, the court of appeals will take into account the:

- size of the office;
- number of employees required; and
- responsibilities of the public defender and staff as compared with the same requirements and responsibilities of the U.S. attorney and staff.

(b) The federal public defender determines the compensation of assistant defenders and other personnel, which may not exceed the compensation paid to attorneys and other personnel of similar qualifications, experience, and responsibilities in the office of U.S. attorney for the same district.

§ 420.10.40 Appointment of a Committee to Assess the Qualifications of Federal Public Defender Candidates and of the Federal Public Defender for Reappointment

(a) In view of the intent of Congress to insulate the federal public defender from the involvement of the district court before which the defender principally practices, the recruitment and screening of candidates for the office of federal public defender and the evaluation of federal public defender performance prior to reappointment should be a function of the court of appeals rather than the district court.

(b) In carrying out this responsibility, the chief judge of the court of appeals should appoint a committee to assess the performance and potential for future performance of the federal public defender candidates or incumbent federal public defender. The committee should consist of persons knowledgeable in federal criminal defense issues, but should not include probation, pretrial services, law enforcement, or prosecutorial personnel.

§ 420.10.50 Committee Selection of the Federal Public Defender

(a) In recruiting and selecting candidates for the office of federal public defender, the committee should seek attorneys with the following qualifications:

(1) a member in good standing in the bar of the state in which the candidate is admitted to practice;

(2) a minimum of five years criminal practice experience, preferably with significant federal criminal trial experience, which demonstrates an ability to provide zealous representation of consistently high quality to criminal defendants;

(3) the ability to effectively administer the office;

(4) a reputation for integrity; and

(5) a commitment to the representation of those unable to afford counsel.

(b) The committee should solicit the views of those in a position to evaluate the performance of the candidates, including, but not limited to judges and U.S. magistrate judges of courts in which the candidate has practiced.

(c) A national vacancy notification effort consistent with equal employment opportunity standards should be undertaken in connection with the recruitment of candidates for vacant federal public defender positions. The AO Defender Services Office should be contacted for advice and financial support in this regard.

(d) The committee should screen applications and submit the names of three to five candidates ranked in order of preference to the district court for comment and recommendation. Pursuant to the provision of the CJA requiring the court of appeals to consider the recommendation of the district court or courts to be served, the recommendations of the district court must be included in the committee's report to the court of appeals, along with the committee's response to the district court's comments and recommendations, where appropriate.

(e) When a candidate is selected, the AO Defender Services Office should be notified promptly of the nominee so that it may initiate any background investigation requested by the court of appeals.

§ 420.10.60 Reappointment of the Federal Public Defender

(a) The committee should assess the following before deciding whether the reappointment of an incumbent federal public defender is warranted:

- quality of representation;
- level of commitment and service to clients; and
- administrative efficiency of the federal defender office.

In this process, it should solicit the views of those in a position to evaluate the performance of the federal public defender and the quality of the services provided by the federal public defender organization, including, but not limited to, judges and U.S. magistrate judges of courts served by the organization.

(b) The federal public defender should be given an opportunity to respond to adverse comments, including adverse comments that would not influence the decision to reappoint, so that the defender may benefit from constructive criticism. The committee will not disclose the identity of any

person who requests confidentiality, but will provide the defender with a general description of the source and nature of the comments.

(c) The committee's report and assessment, including any recommendations from the district court to be served, should be considered by the court of appeals in determining whether to appoint or reappoint a particular individual as the federal public defender.

§ 420.20 Community Defender Organizations

(a) A community defender organization must be a nonprofit defense counsel service. The organization's stated purposes must include implementation of the aims and purposes of the CJA. Its bylaws must demonstrate that it is an organization with a professional and fiscal responsibility capable of providing adequate representation under the CJA. The bylaws must be provided in the plan for the district authorizing a community defender organization. It may operate either on the fee system or through grants to be approved by the Judicial Conference.

(b) If a community defender organization that has been approved under the plan for the district court applies for any grant, it must do so on a form prepared by the Director of the AO (Director) for the use of the Judicial Conference in considering applications for such grants. The receipt and use of grant funds are subject to the conditions in Appx. 4A (Community Defender Organization: Grant and Conditions). Community defender organizations must agree to and accept these conditions before grant payments are issued.

(c) A Model Code of Conduct for Federal Community Defender Employees is provided in Appx. 4B. Unless a variance from one or more of the Model Code's provisions is sought from, and approved by, the AO Defender Services Office, the community defender organization's board of directors must adopt the Model Code of Conduct as provided in Appx. 4B and make it applicable to all of the community defender organization's employees. **See:** Clause 22 of Appx. 4A (Community Defender Organization: Grant and Conditions).

(d) The Director has delegated authority to the Chief of the AO Defender Services Office to:

(1) sign and manage Director-approved Grant and Conditions agreements with community defender organizations;

(2) establish, manage, and modify disbursement schedules within the current grant ceilings as needed for representations and other expenses under the Criminal Justice Act; and

(3) modify current grant ceilings, by written amendment and subject to the availability of funds, up to the annual amount approved by the Judicial Conference's Committee on Defender Services, to include any additional authorities delegated by the Committee to the AO Defender Services Office.

(e) The Director retains authority to approve all other substantive modifications, exceptions, or waivers to the terms of community defender office Grant and Conditions agreements.

§ 430 Transcripts, Investigative, Expert, and Other Services

§ 430.10 Payment of Transcripts

(a) All defender organizations have general authorization to procure transcripts, provided that total expenditures for transcripts do not exceed the funding available in the budget object code (BOC) for transcripts.

(b) The limitations in Guide, Vol. 7A, § 310.20 are inapplicable to the cost of transcripts and do not apply to federal public or community defender organizations.

(c) The general authorization provided above includes supplemental funds provided for the transcripts or funds transferred to the transcripts BOC from other BOCs.

(d) Once the federal public or community defender has obligated all funds in the transcripts BOC, it will be necessary to transfer funds from other BOCs, or to seek supplemental funds to cover additional expenditures.

§ 430.20 Payment of Investigative, Expert, and Other Services

(a) All defender organizations have general authorization to procure investigative, expert and other services as contemplated under 18 U.S.C. § 3006A(e), as amended, provided that total expenditures for the BOCs that comprise investigative, expert and other services do not exceed the funding available in those BOCs.

(b) The limitations in Guide, Vol. 7A, § 310.20 do not apply to federal public or community defender organizations.

(c) The general authorization provided above includes supplemental funds provided in the investigative, expert and other services BOCs, or funds transferred to those BOCs.

(d) Once the federal public or community defender has obligated all funds in any of the investigative, expert and other services BOCs, it will be necessary to transfer funds from other BOCs or to seek supplemental funds to cover additional expenditures.

§ 440 Assignment of Cases

To ensure the effective supervision and management of the organization, federal public defenders and community defenders should be responsible for the assignment of cases within their own offices. Accordingly, appointments by the court or U.S. magistrate judge should be made in the name of the organization (i.e., the federal public defender or community defender), rather than in the name of an individual staff attorney within the organization.

§ 450 Apportionment of Cases Between Defender Organizations and the Panel

(a) Recognizing that federal defender organizations consistently furnish high-quality representation to CJA defendants and provide a cost-effective alternative to representation by CJA panel attorneys, the Judicial Conference has recommended that courts take steps to increase the number of cases assigned to federal defender organizations. JCUS-MAR 1993, pp. 13-14.

(b) In districts currently served by a defender organization these steps should include:

(1) approval of additional assistant federal defender staff in appropriate circumstances; and

(2) review and adjustment of district appointment procedures.

§ 460 Participation as *Amicus Curiae*

Under governing court rules, federal public defenders and community defenders may participate as *amicus curiae*:

(a) in federal court at the invitation of the court;

(b) in death penalty habeas corpus cases; or

(c) on behalf of a client as an ancillary matter appropriate to the proceedings.

JUDICIAL CONFERENCE
OF THE UNITED STATES OF AMERICA
AND
COMMUNITY DEFENDER ORGANIZATION
FOR THE _____ DISTRICT OF _____

FISCAL YEAR 2020
GRANT AND CONDITIONS

The Community Defender Organization (CDO), _____ (hereinafter Grantee), operating as a non-profit corporation, has been authorized by the Criminal Justice Act Plan of the _____ District of _____ to provide representation and related defense services to eligible persons pursuant to paragraph (g)(2)(B) of the Criminal Justice Act, as amended, 18 U.S.C. § 3006A (hereinafter CJA); and

Grantee has submitted the appropriate documentation to the Judicial Conference of the United States (hereinafter Conference) via the Administrative Office of the United States Courts (AOUSC) (hereinafter Grantor); and

Grantor provides a grant to grantee, subject to the availability of appropriated funds for fiscal year (FY) 2020, commencing on October 1, 2019, and terminating on September 30, 2020. The FY 2020 budget will be emailed to the Executive Director and Administrative Officer by Grantor on October 1, 2019. In the event that Congress fails to enact an annual appropriations act covering expenditures for the judiciary by that date, Grantor will provide Grantee a specific amount to continue operations until enactment of the judiciary's annual appropriations act. Grantor will amend this amount in writing as necessary to continue Grantee operations within the approved 2020 budget until sufficient budgetary resources are enacted and made available to Grantor to provide the amount provided in the final budget.

Pursuant to its authority under subsections (g)(2)(B) and (h) of the CJA, and in consideration of this grant, the Conference requires that each expenditure of funds from this grant comply with the terms and conditions contained in this agreement. Grantor may grant exceptions or waivers to any provision in this agreement, as appropriate and consistent with the CJA and other federal laws.

Grantee, by signature of its authorized representative, at the end hereof, signifies its acceptance of the terms and conditions set forth below, as well as its agreement to comply with the provisions of the CJA, the Guidelines for the Administration of the Criminal Justice Act and Related Statutes (CJA Guidelines), Volume 7, *Guide to Judiciary Policy*, any other relevant policies or directives issued by the Conference or by its appropriate committees (e.g., the

Conference's Defender Services Committee (DSC)), and the CJA plans of the judicial district(s) and circuit in which Grantee will operate.

Any question with respect to the interpretation of terms, conditions, or provisions of this grant will be resolved by Grantor.

A signed copy of this agreement shall be returned to Grantor together with a list of the names, addresses, email addresses, and telephone numbers of all current board members.

l. USE OF GRANT FUNDS: Once awarded to Grantee, grant funds will be distributed generally pursuant to a schedule promulgated by Grantor. Grant funds are only available for expenditures and obligations incurred during FY 2019, and, except as provided in Clause 4, only in accordance with and in such amounts as are provided in designated budget categories as authorized by the Conference. Grantee will use such funds solely for the purpose of providing representation and other appropriate services in accordance with the CJA, the CJA Guidelines, and the CJA plans of the appropriate district and circuit courts.

2. BANK ACCOUNTS FOR GRANT FUNDS: Grantee will maintain grant funds in federally insured interest or credit bearing accounts in accordance with provisions of 31 CFR 202 and will ensure that amounts in excess of federal insurance limits are collateralized before depositing the funds. Grant funds, grant-related income, and any non-grant funds will be maintained separately and will not be commingled with one another. Credits or interest earned on the grant funds account may be used to offset account maintenance fees. Any excess interest on grant funds must be returned to Grantor within 60 days of the grant's expiration. Grantee shall submit to Grantor via AOUSC, Finance and Accounting Division, ATTN: Mail Stop FAD CR, the actual or estimated amount of grant-related interest. The amount of excess interest returned as an estimate will be adjusted, if necessary, following completion of the annual grantor audit specified in clause 8.

3. GRANT-RELATED INCOME: Grant-related income means any gross income earned by Grantee that is directly generated by a supported activity or earned as a result of the award. Grant-related income includes, but is not limited to, income from recovery of fees for services performed, the sale of commodities or items fabricated under the award, or interest earned on grant-related income. Interest earned on advances of grant funds from Grantor is not grant-related income and is addressed in clause 2.

Grant-related income shall be retained by Grantee and shall be used in accordance with the CJA and the terms and conditions of this agreement. Grant-related income shall not be commingled with any grant or non-grant funds maintained by Grantee. Grantee shall report the amount of grant-related income retained by Grantee on or about July 1, each year.

4. REALLOCATING FUNDS: Subject to such limitations as the DSC may establish, Grantee may reallocate grant funds between budget categories (i.e., for purposes not specifically identified in the funding justification), provided that the aggregate of the amounts transferred within the fiscal year does not exceed 15 percent of the organization's total fiscal year grant

amount approved by the DSC. Grantor may authorize reallocation between budget categories in any amount.

5. ACCOUNTING OF UNOBLIGATED BALANCES: Grantee shall perform a review of obligations of grant funds, at the close of the fiscal year, and will make records of this review available during the annual audit pursuant to clause 8. Within 60 days of the end of the fiscal year, Grantee shall submit to Grantor the actual or estimated amount of all unobligated grant funds awarded under this document, excluding any grant-related income, remaining at the end of the fiscal year, unless otherwise authorized by Grantor. The grant amount reflected in clause 3 of this agreement will be reduced by the final, prior-year unobligated balance set forth by the final audit report required under clause 8. Grantee shall include a statement identifying which portion of the unobligated balance represents grant funds and excess grant interest pursuant to clause 2.

6. ANNUAL REPORTS: In compliance with subsection (g)(2)(B) of the CJA, Grantee must submit an Annual Report of Operations setting forth its activities and financial position each fiscal year. Instructions for completing and submitting the Annual Report of Operations will be provided to Grantee by Grantor at least thirty (30) days prior to the submission date.

Other reports must be submitted to Grantor each month, including, but not limited to, the electronic status of funds report (ESFR), the monthly staffing and workload report (MWSR), the monthly caseload report (JS-50), the Timekeeper report, the dData disposition report, and the salary report.

7. GRANT RECORDS AND REPORTS: Grantee shall keep financial records in accordance with the federal fiscal year unless a waiver is granted by Grantor. Such records shall be maintained and submitted in such manner and form as required by Grantor. Such records shall disclose the amount of grant funds, grant interest, and grant-related income received during the fiscal year, as well as the amount of grant funds expended or obligated by budget category and the total amount of grant funds expended during the fiscal year.

The record-keeping procedures utilized by Grantee shall provide for the accurate and timely recordation and determination of all income and funds received, all expenditures and obligations, and the balance of unexpended and unobligated grant funds, grant interest, and grant-related income. In addition, Grantee shall maintain the records in such a manner as to permit the determination of the propriety of all expenditures and obligations of grant funds and the charges to specific budget categories.

Grantee shall maintain records concerning expenditures and obligations of all funds subject to audit (as specified in clause 8) in such a manner as to allow the auditor access to said records without compromising client files and other attorney-client privileged material. Grantee is obligated to maintain the confidentiality of information protected by the attorney-client privilege or any ethical, constitutional, statutory, or other mandate.

Grantor may inspect and audit the financial records, bank statements, and other records related to the expenditure of grant funds, at any reasonable time upon request. If, because of inadequate records, documentation, or explanation, the propriety of an expenditure cannot readily be determined, questionable costs and expenditures may be disallowed.

Grantee shall maintain and submit such statistical records and reports as may be required by Grantor. Grantee must keep financial and statistical records and reports for a period of at least seven years after the expiration of the fiscal year for which the grant was awarded unless otherwise authorized by Grantor. If audit issues remain unresolved, records must be retained until all such issues have been resolved.

8. AUDITS: Within 120 days of the end of the fiscal year, an auditor (hereafter, "Auditor") contracted and paid for by Grantor will perform an audit of Grantee's financial activities occurring during the grant period. Such audit will express an opinion on whether Grantee's financial statements, and notes to the financial statements, present fairly the financial position of Grantee. The financial statements shall include a statement of assets, liabilities and net assets; a statement of revenue, expenses, and other changes in net assets; and a statement of cash flows.

Grantee shall compile and prepare the required statements and reports and make all statements, reports, financial records/books and supporting documents available to the Auditor (as specified in clause 7). Incidents of identified fraud, waste or abuse must be disclosed to Grantor and reports of those incidents will be made available to the Auditor.

The Auditor will perform the audit in accordance with the Government Auditing Standards promulgated by the U.S. Government Accountability Office. In accordance with those standards, the Auditor also will report on Grantee's internal controls over its financial activities and Grantee's compliance with the terms and conditions of the grant and other rules and regulations pertinent to the grant. Audits performed by independent certified public accounting firms under contract with Grantor are performed in accordance with the American Institute of Certified Public Accountants Code of Conduct and integrity and confidentiality standards. Audit reports issued by Grantor or its contract audit CPA firms, are intended solely for the information and use by Grantor and Grantee, unless otherwise specified by those parties.

Grantee may contract with local accountants for any accounting and financial services necessary for the operation of its office, including, but not limited to, the preparation of all required federal and state tax returns; payroll, disbursing, and record-keeping services; and any additional annual reports required by the board of directors that do not duplicate the audit conducted under this section. Notwithstanding the foregoing, Grantee may use grant funds to contract with an expert for the purpose of responding to a finding of the Auditor in the annual audit when authorized in advance to do so by Grantor.

9. GRANTEE STATUS: Neither Grantee nor any of its employees are officers, employees, or agents of the United States. The United States shall in no way be obligated under leases, contracts, or other agreements entered into by Grantee.

10. PROPERTY AND SERVICES: Title to all property, including, but not limited to, real property, equipment, and supplies purchased with grant funds or grant-related income shall vest in Grantee subject to the condition that Grantee shall use the property for the purposes authorized by the CJA and the terms and conditions of this agreement. Grantee may not encumber any title to property without the approval of Grantor. Grantee shall maintain insurance, in reasonable amounts, to cover the costs of replacing or repairing property acquired with grant funds due to damage, loss or theft.

For equipment and real property interests, when property is no longer needed, Grantee shall request disposition instructions from Grantor except under the following conditions:

Grantee may sell, assign, transfer, dispose of, or encumber any property of the United States, having an acquisition cost of less than $1,000, without the prior approval of Grantor.

Grantee shall maintain an inventory of all property reflecting the date and cost of purchase of such property; the date of receipt by transfer, if applicable; and the date and manner of disposition of excess or surplus property. This inventory shall be available to Grantor upon request.

Grantee shall (1) provide Grantor with at least 15 working days advance notification of its intention to enter into or renew a lease for office space and (2) obtain Grantor approval prior to initiating lease negotiations. Advance notification shall include the total number of square feet, cost per square foot, the duration of the lease, and certification that at least two other competitive proposals were considered.

All procurement transactions, whether negotiated or competitively bid and without regard to dollar value, of all property and all services (other than services under subsection (e) of the CJA) shall be conducted in a manner promoting maximum open competition. Grantee must maintain and adhere to policies promoting full and open competition in all acquisitions made with grant funds. No employer, officer, or agent shall participate in the selection, award, or administration of a contract supported by federal funds if a real or apparent conflict of interest would be involved. Grantee is the responsible procuring authority. By offering this grant, Grantor does not become a responsible party to any contract, lease, or licensing agreement entered into by Grantee; therefore, any party entering into a contract, lease, or licensing agreement with Grantee does so without recourse to Grantor regarding settlement and satisfaction of contractual and administrative issues arising out of procurements entered into in support of an award or other agreement.

Unless otherwise authorized by Grantor, no equipment, furniture, furnishings, or other property, and no services (except for services as contemplated under subsection (e) of the CJA, leasing of office space, and procurement of liability insurance) shall be obtained with such funds at a total cost of more than $100,000 without advance approval of Grantor. In addition, hardware and software purchases must be made consistent with the specifications listed on the National Hardware and Software Lists and the national defender information technology architecture and infrastructure guidelines.

11. DISSOLUTION OF GRANTEE ORGANIZATION OR TERMINATION OF GRANT FUNDS: Grantee may dissolve on its own accord in accordance with the laws of the state in which it is organized. Grantee shall provide Grantor, chief judge of the district court, and chief judge of the court of appeals 90 days advance notice of its intent to dissolve. Additionally, the Conference in its discretion may determine to terminate or not renew the grant. The Conference, or its authorized representative, shall give written notice to Grantee of an intent to terminate the grant at least 60 days prior to taking action. Such notice shall indicate the intended action and the reason therefor and shall give Grantee the opportunity to respond in writing and to be heard within 30 days of that notice. In either event, unless otherwise authorized by Grantor, Grantee shall properly inventory and make available for reclamation, all property in the care and custody of Grantee purchased with grant funds or related income. Within 75 days of dissolution, the Auditor, selected by Grantor, will perform a final financial audit of the grant. The audit will be of the same scope as discussed in clause 8. Upon receipt of the report of this audit, Grantee shall remit to the AOUSC, Finance and Accounting Division, ATTN: Mail Stop FAD-CR, all remaining unobligated or unexpended grant funds, grant interest, and grant-related income. The United States shall not be responsible for any obligations or debts incurred by Grantee and Grantee shall hold the United States harmless for such obligations or debts.

12. MULTI-SERVICE DEFENDER ORGANIZATIONS: Consistent with clause 2 of this agreement, if Grantee is part of a larger defender organization which is not exclusively providing services under the CJA, grant funds received from the Conference pursuant to the CJA, grant interest, and grant related income may not be commingled with those of the general organization. Also, expenses, inventory, payroll, and other records pertaining to CJA funds and operations of Grantee must be maintained separately by Grantee unless otherwise approved by Grantor.

13. TRAVEL, MEALS, AND LODGING: Grantee's reimbursement policies regarding expenses for official travel, meals, and lodging shall be in writing. Grantee shall furnish Grantor a current copy of the written policies and all changes thereto. Unless approved by Grantor, Grantee's reimbursement policies for official travel, lodging, and meals shall not exceed the maximum allowances to be paid for per diem, actual expenses, and travel prescribed for federal judiciary employees. Grantee shall maintain records of travel and reimbursement in a form acceptable to Grantor.

Grantee must follow the policies and procedures outlined in the archived *Federal Defenders Operations Manual*, Chapter 8, available at https://dweb.fd.org/DSO/Operations-Manual (and attached), specifically applicable to CDOs, regarding travel inside and outside the district(s) served by Grantee.

14. PERSONNEL: Personnel policies and other terms and conditions of employment shall be in writing. Grantor shall be furnished a current copy of such policies, and subsequently, any changes to those policies. Grantee shall maintain leave records in a form acceptable to Grantor.

Grantee shall follow the policies and procedures contained in the Defender Organization Classification System (DOCS). No personnel vacancy shall be filled without prior notice to

Grantor. Such notice shall include all relevant data concerning the employee candidate, including his or her name, position, starting salary (including grade and step for graded employees or AD level for assistant defenders), education, experience and compensation history, and any annual leave credit for prior experience. Information regarding attorneys must indicate the month and year they received their law degree, the month and year they first became a member of a bar, and their prior relevant work experience.

Grantee shall conform employee benefit policies on leave, holidays, hours worked, and payment of bar dues to those applicable to federal public defender organizations, unless a request for a variance is submitted to and approved by the DSC. Grantee shall provide Grantor with notice at least 90 business days in advance of any proposed changes to the above referenced policies or any other policies that may impact the organization's current or future costs. Grantee's expenditures for employee benefits shall not exceed 36.53 percent of its expenditures of salaries for the fiscal year.[1] If, at any point during the fiscal year, it appears Grantee's expenditures for employee benefits will exceed the percentage authorized Grantee, Grantee shall submit a written justification to the DSC's Budget Subcommittee requesting approval to exceed the authorized benefit-to-salary ratio.

15. INVESTIGATIVE, EXPERT, OR OTHER SERVICES: Pursuant to subsection (e) of the CJA, and to the extent that they are necessary for adequate representation of a person who is financially eligible under the CJA, Grantee may engage and compensate investigators, experts, or others from grant funds made available for that purpose.

16. BUSINESS, ENTERTAINMENT, OR PERSONAL EXPENSES: Grantee may not expend grant funds for business or personal entertainment; professional or association dues, memberships, or fees; or items of property or services of a personal nature.

17. TRAINING: Funds for training of employees are provided in the "other services" budget category of the grant. Grantees shall submit annual reports of training activities including travel and other expenses associated therewith.

18. EMPLOYMENT: Grantee shall not discriminate against any employee, or applicant for employment, on the basis of race, color, national origin, religion, sex, age,[2] or disability. Grantee shall not hire, promote, or advance within the organization any individual who is a relative[3] of: (1) the federal defender, (2) any superior of the federal defender, or (3) any member of the board of directors. No employee of Grantee shall hire, promote, advance, or advocate the hiring, promotion, or advancement of his or her relative by Grantee.

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[1] The limit on benefits is calculated by adding three percentage points to the national average federal public defender organization benefit-to-salary ratio, based on the most recently completed fiscal year.

[2] Judicial Conference policy with respect to age discrimination is that the complainant must have been at least 40 years of age at the time of the alleged discrimination.

[3] For purposes of this clause, the term "relative" is defined in 5 U.S.C. § 3110(a)(3).

Grantee agrees to place in effect a program for providing equal employment to all persons regardless of their race, color, national origin, religion, sex, age, or disability. This program shall encompass all facets of personnel management including recruitment, hiring, promotion, and advancement. The program shall also provide for a system, whereby all applicants for employment, and all employees, may seek timely redress of discrimination complaints. A copy of Grantee's program will be filed with Grantor.

Upon request, Grantee shall submit to Grantor statistical and other reports relating to its equal employment opportunity practices. Grantee also agrees to notify Grantor of any equal employment opportunity-related grievance or suit filed against the organization or any of its employees and of the outcome of all such grievances or suits, and upon request, shall provide Grantor with any additional information regarding any such grievance or suit.

19. OUTSIDE PRACTICE OF LAW: Unless otherwise authorized by Grantor, no employee of Grantee organization (including the executive director) may engage in the practice of law outside the scope of his or her official duties with Grantee. Notwithstanding this prohibition, an employee may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the employee's family.[4]

20. LIABILITY INSURANCE: Grantee shall maintain insurance, in reasonable amounts, to cover the costs of representation and liability for claims alleging malpractice, negligence, unfair personnel practices, and "errors and omissions" of officers, directors, and employees of the organization. Upon receiving or amending coverage, Grantee shall notify Grantor of the amount of coverage per event, the aggregate limit, the amount of deductible, and the cost for each type of insurance obtained, and shall certify that competitive proposals were sought.

Grantee also agrees to notify Grantor of any such claims filed and their disposition, and upon request shall provide Grantor with any additional information regarding any such claim.

21. CODE OF CONDUCT: Grantee must adopt the Model CDO Code of Conduct. Grantee may seek a variance of one or more of the provisions from Grantor.

A copy of Grantee's code of conduct and any subsequent revisions must be filed with Grantor. Grantee must inform Grantor of significant violations of the code of conduct and, upon request, must provide a written report to Grantor.

22. CHANGES OR MODIFICATIONS: Upon their adoption, Grantee shall forward to Grantor any amendment to the articles of incorporation or the by-laws under which Grantee operates; Grantee shall also notify Grantor of any changes in Grantee's board of directors.

23. PAYMENTS FROM OR ON BEHALF OF CLIENTS: Except as authorized pursuant to subsection (f) of the CJA and corresponding provisions in the CJA Guidelines, neither Grantee nor its employees will take, request, demand, accept, receive, or agree to receive anything of

[4] For purposes of this clause, the term "family" includes all relatives listed in 5 U.S.C. § 3110(a)(3).

value from or on behalf of a person who is to be, is being, or has been furnished representation by Grantee. Grantee will take appropriate measures to enforce this clause and advise Grantor of any violation.

24. NON-ASSIGNABILITY: No obligations or responsibilities of Grantee, and no grant funds or benefits accruing under the grant, may be transferred, assigned, sub-contracted, or otherwise conveyed without the express written approval of Grantor, except as specifically authorized in the Grant and Conditions.

25. FAILURE TO COMPLY WITH TERMS AND CONDITIONS: In the event Grantee fails to comply substantially with any of the terms or conditions of the grant award set forth herein, or it is unable to deliver the representation and other services which are the subject of this agreement, Grantor may temporarily reduce or suspend, payments under this grant award as it deems appropriate. At the time of a reduction or suspension of payments under this clause, Grantor will provide Grantee with a written explanation for its actions. Grantee may seek reinstatement of payments by submitting a written response, which may include a request to be heard within ten days of receipt of Grantor's explanation. If the request for reinstatement is not granted based on the written submission, Grantor will provide a conference with Grantor, or authorized representative, on this request for reinstatement within five business days of receipt of the request. Grantor reserves the right to pursue all remedies, including, but not limited to, recovery of monetary damages and accrued interest, for Grantee's failure to comply with any of the terms and conditions of the grant award or to deliver the representation and other services which are the subject of the agreement.

26. SYSTEM FOR AWARD MANAGEMENT (SAM) REGISTRATION REQUIRED: Grantee must have an active registration in SAM and ensure that all information in that registration is accurate and updated. If Grantee's SAM registration is not active or accurate, Grantor will be unable to disburse grant funds timely in accordance with this agreement.

_____ _____

DATE **AUTHORIZED REPRESENTATIVE OF** _____

_____

_____ _____

DATE **CHIEF, AO'S DEFENDER SERVICES OFFICE**

Guide to Judiciary Policy

Vol. 7: Defender Services
Pt. A: Guidelines for Administering the CJA and Related Statutes

Appx. 4B: Model Code of Conduct for Federal Community Defender Employees

Note: *This Model Code of Conduct for Federal Community Defender Employees must be adopted by a community defender organization's board of directors and made applicable to all the community defender organization's employees.*

I. Overview

I.A. Scope

I.A.1 This code of conduct applies to all employees of the community defender organization named [Name of CDO] (hereafter, "[Name Abbreviation]").

I.A.2 This code of conduct does not apply to private counsel appointed under the Criminal Justice Act or to attorneys provided by a bar association.

I.A.3 Nothing contained in these canons is intended to limit or modify the primary responsibility of community defenders, as appointed counsel, to render effective legal representation to clients as required by the Constitution and laws of the United States and by applicable rules governing professional conduct, including the code of professional responsibility applicable in the jurisdiction in which the community defender practices. If there is any conflict between this code and the code of professional responsibility applicable to the defender employee or any state law, the code of professional responsibility or the applicable state law should take precedence.

I.B. History

This Code of Conduct is based on the Model Code of Conduct for Community Defender Employees which was approved in September 2010 by the Judicial Conference of the United States. This Code of Conduct was adopted [Date] by the [Name Abbreviation] board of directors, and it became effective [Date].

I.C. Definitions

I.C.1 Defender Employees

As used in this code, "defender employees" means the chief community defender, assistant community defenders, and all other employees of the community defender organization.

I.C.2 Community Defenders

“Community defenders" means only the chief community defender and assistant community defenders.

I.C.3 Chief Community Defender

“Chief community defender” means the head of the community defender organization – the executive director or chief federal defender.

I.C.4 Grant and Conditions

“Grant and conditions” refers to the agreement between [Name Abbreviation] and the Judicial Conference of the United States. In consideration of a sustaining grant from the Conference, the agreement requires that terms of the grant and conditions be followed.

I.D Further Guidance

I.D.1 Defender employees (other than the chief community defender) should consult with the chief community defender, and the chief community defender may consult with the board of directors and others, as appropriate, for guidance on questions concerning this code and its applicability.

Note: The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions concerning the application and interpretation of various judiciary codes of conduct, including the Code of Conduct for United States Judges and the Code of Conduct for Federal Public Defender Employees but does not issue opinions regarding the CDO Code of Conduct. Its opinions may be useful in guiding defender employees and the [Name Abbreviation]’s board of directors. The Committee on Codes of Conduct’s published advisory opinions may be found in the *Guide to Judiciary Policy*, Vol. 2B, Ch 2.

I.D.2 In assessing the propriety of one's proposed conduct, a defender employee should take care to consider all relevant canons in this code, any applicable statutes and regulations, and applicable codes of professional responsibility.

I.D.3 Should a question remain after this consultation, the affected defender employee may request guidance from the [Name Abbreviation] board of directors, bar counsel, or other appropriate person.

II. Text of the Code

CANON 1 A Defender Employee Should Uphold the Integrity and Independence of the Office

CANON 2 A Defender Employee Should Avoid Impropriety and the Appearance of Impropriety in All Activities

CANON 3 A Defender Employee Should Adhere to Appropriate Standards in Performing the Duties of the Office

CANON 4 A Defender Employee May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice

CANON 5 A Defender Employee Should Regulate Extra-official Activities to Minimize the Risk of Conflict with Official Duties

CANON 6 A Defender Employee Should Avoid Impropriety and the Appearance of Impropriety in Compensation Received for All Extra-official Activities

CANON 7 A Defender Employee Should Refrain from Inappropriate Political Activity

Canon 1: A Defender Employee Should Uphold the Integrity and Independence of the Office

An independent and honorable defender system is indispensable to justice in our society. A defender employee should personally observe high standards of conduct so that the integrity and independence of the office are preserved and so that the defender office reflects a devotion to serving the community defender's clients and the principle of equal justice under law. Defender employees should require adherence to such standards by personnel subject to their direction and control. The provisions of this code should be construed and applied to further these objectives. The standards of this

code shall not affect or preclude other more stringent standards required by law, by applicable codes of professional responsibility, or by court order.

Canon 2: A Defender Employee Should Avoid Impropriety and the Appearance of Impropriety in All Activities

A defender employee should not engage in any activities that would put into question the propriety of the defender employee's conduct in carrying out the duties of the office. A defender employee should not use position or office for private gain.

Canon 3: A Defender Employee Should Adhere to Appropriate Standards in Performing the Duties of the Office

In performing the duties prescribed by law, by resolution of the Judicial Conference of the United States, by court order, or by the chief community defender or the [Name Abbreviation] board of directors, the following standards apply:

(A) A defender employee should respect and comply with the law and these canons. A defender employee should report to the appropriate supervising authority any attempt to induce the defender employee to violate these canons.

[***Optional Language:***

***Note*:** A number of criminal statutes of general applicability govern defender employees' performance of official duties. These include:

- 18 U.S.C. § 201 (bribery of public officials and witnesses);
- 18 U.S.C. § 211 (acceptance or solicitation to obtain appointive public office);
- 18 U.S.C. § 285 (taking or using papers relating to government claims);
- 18 U.S.C. § 287 (false, fictitious, or fraudulent claims against the government);
- 18 U.S.C. § 508 (counterfeiting or forging transportation requests);
- 18 U.S.C. § 641 (embezzlement or conversion of government money, property, or records);
- 18 U.S.C. § 798 (disclosure of classified information);
- 18 U.S.C. § 1001 (fraud or false statements in a government matter);

- 18 U.S.C. § 2071 (concealing, removing, or mutilating a public record);
- 31 U.S.C. § 3729 (false claims against the government).

This is not a comprehensive listing but sets forth some of the more significant provisions with which defender employees should be familiar.]

(B) A defender employee should be faithful to professional standards and maintain competence in the defender employee's profession.

(C) A defender employee should be patient, dignified, respectful, and courteous to all persons with whom the defender employee deals in an official capacity, and should require similar conduct of personnel subject to the defender employee's direction and control. A defender employee should diligently discharge the responsibilities of the office in a nondiscriminatory fashion.

(D) A defender employee should not solicit or accept a payment of money or anything of value from a client, except that a defender employee may accept an appropriate memento or token that is neither money nor of commercial value. A defender employee should never disclose any confidential communications from a client, or any other confidential information received in the course of official duties, except as authorized by law. A former defender employee should observe the same restrictions on disclosure of confidential information that apply to a current defender employee.

(E) A defender employee should not engage in nepotism prohibited by the Grant and Conditions.

(F) Conflicts of Interest.

(1) In providing legal representation to clients, a community defender should observe applicable rules of professional conduct governing the disclosure and avoidance of conflicts of interest.

(2) In the performance of administrative duties, a defender employee should avoid conflicts of interest. A conflict of interest arises when a defender employee knows that he or she (or the spouse, minor child residing in the defender employee's household, or other close relative of the defender employee) might be so personally or financially affected by a matter that a reasonable person with knowledge of the relevant facts would question the defender employee's ability properly to perform administrative duties.

(3) When a defender employee knows that a conflict of interest may be presented in the performance of duties, the defender employee should promptly inform the chief community defender. The chief community defender, after determining that a conflict or the appearance of a conflict of interest exists, should take appropriate steps to restrict the defender employee's performance of duties in such a matter so as to avoid a conflict or the appearance of a conflict of interest. If the conflict involves a conflict between or among clients, the chief community defender should consider withdrawal from one or more representations, or other appropriate remedial actions, as necessary to comply with applicable rules of professional conduct. A defender employee should observe any restrictions imposed by the chief community defender in this regard.

Canon 4: A Defender Employee May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice

A defender employee, subject to the proper performance of official duties, may engage in the law-related activities enumerated below.

(A) A defender employee may speak, write, lecture, teach, and participate in other activities concerning defender services, the legal system, and the administration of justice.

(B) A defender employee may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A defender employee may assist such an organization in raising funds and may participate in the management and investment of such funds. A defender employee may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal profession, and the administration of justice. A defender employee may solicit funds for law-related activities, subject to the following limitations:

(1) A defender employee should not use or permit the use of the prestige of the office in the solicitation of funds.

(2) A defender employee should not solicit subordinates to contribute funds to any such activity but may provide information to them about a general fund-raising campaign.

(3) A defender employee should not solicit or accept funds from lawyers, clients, or other persons likely to have official business with the community defender office, except as an incident to a general fund-raising activity.

(C) A defender employee may promote the development of professional organizations and foster the interchange of information and experience with others in the profession. A defender employee may make himself or herself available to the public at large for speaking engagements and public appearances designed to enhance the public's knowledge of the operation of defender services and the criminal justice system.

Canon 5: A Defender Employee Should Regulate Extra-official Activities to Minimize the Risk of Conflict with Official Duties

(A) Avocational Activities

A defender employee may write, lecture, teach, and speak on subjects unrelated to the profession, and may engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of the office, interfere with the performance of official duties, or adversely reflect on the community defender's role as an advocate. A defender employee may solicit funds for avocational activities, subject to the limitations set forth in canon 4B.

(B) Civic and Charitable Activities

A defender employee may participate in civic and charitable activities that do not detract from the dignity of the office, interfere with the performance of official duties, or adversely reflect on the community defender's role as an advocate. A defender employee may serve as an officer, director, trustee or advisor of an educational, religious, charitable, fraternal, or civic organization, and may solicit funds for any such organization subject to the limitations set forth in canon 4B.

(C) Financial Activities

(1) A defender employee should refrain from financial and business dealings that tend to detract from the dignity of the office or interfere with the performance of official duties.

(2) A defender employee should not solicit or accept a gift from anyone seeking official action from or doing business with the community

defender office, or from anyone whose interests may be substantially affected by the performance or nonperformance of official duties; except that a defender employee may accept a gift as permitted for Federal Public Defender employees by the Ethics Reform Act of 1989 (Pub.L. No. 101-194, § 303, 5 U.S.C. 7351 and 7353) and the Judicial Conference regulations on gifts. *Guide to Judiciary Policy*, Vol. 2C, §§ 620.10 to 620.45. A defender employee should endeavor to prevent a member of a defender employee's family residing in the household from soliciting or accepting any such gift except to the extent that a defender employee would be permitted to do so.

(3) A defender employee who exercises any supervisory, financial, or procurement authority should report to the chief community defender the value of any gifts of more than *de minimis* value received from any source other than a relative of the reporting individual. The chief community defender must provide an annual report to the board of directors on all such gifts received by covered defender employees.

[**Note:** *For reporting requirements for federal public defender employees, see 5 U.S.C. App. §§ 101 to 111 (Ethics Reform Act financial disclosure provisions).]*

(D) Practice of Law

A defender employee should not engage in the private practice of law. Notwithstanding this prohibition, a defender employee may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the defender employee's family, so long as such work does not present an appearance of impropriety and does not interfere with the defender employee's primary responsibility to the defender office.

Note: *See Grant and Conditions*, *Outside Practice of Law (prohibiting community defender employees from engaging in the practice of law outside the scope of his/her official duties with the grantee and defining "family" as all relatives listed in 5 U.S.C. § 3110(a)(3)).*

Canon 6: A Defender Employee Should Avoid Impropriety and the Appearance of Impropriety in Compensation Received for All Extra-official Activities

A defender employee may receive compensation and reimbursement of expenses for outside activities provided that receipt of such compensation or reimbursement is not prohibited or restricted by the chief community defender, [Name Abbreviation] board of directors, this code, the grant and conditions, or applicable law, and provided that the source or amount of such payments does not influence or give the appearance of influencing the defender employee in the performance of official duties or otherwise give the appearance of impropriety. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by a defender employee and, where appropriate to the occasion, by the defender employee's spouse or relative. Any payment in excess of such an amount is compensation. Any defender employee who exercises any supervisory, financial, or procurement authority should make and file reports of compensation and reimbursement for outside activities to the extent prescribed by the chief community defender, [Name Abbreviation] board of directors, grant and conditions, applicable law, or the Judicial Conference of the United States.

Notwithstanding the above, a defender employee (other than a defender employee serving without compensation) should not receive any salary, or any supplementation of salary, as compensation for official services from any source other than the United States through a grant to the community defender organization.

Canon 7: A Defender Employee Should Refrain from Inappropriate Political Activity

A defender employee should not engage in any political activity while on duty or in the defender employee's workplace and may not utilize any federal resources in any such activity. A defender employee may engage in political activity not otherwise prohibited, provided that such activity does not conflict with any other provision of this code, detract from the dignity of the office, or interfere with the proper performance of official duties. A defender employee who participates in political activity should not use his or her position or title in connection with such activity.

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§ 530 Disclosure of Information on Payments to Service Providers

§ 540 History of the Disclosure Policy

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§ 510 General Principles

§ 510.10 Overview

This chapter sets forth the policy on the public disclosure of information pertaining to activities under the Criminal Justice Act (CJA) (18 U.S.C. § 3006A) and related statutes. Because of amendments to the CJA and related statutes, different procedures may apply depending on the type and date of the information.

§ 510.20 Freedom of Information Act Inapplicable

Neither the Freedom of Information Act (5 U.S.C. § 552) nor the Privacy Act (5 U.S.C. § 552a) applies to the judiciary, and neither is applicable to requests for release to the public of records and information pertaining to activities under the CJA and related statutes.

§ 510.30 Limitations on Disclosure

Generally, such information which is not otherwise routinely available to the public should be made available unless it:

(a) is judicially placed under seal;

(b) could reasonably be expected to unduly intrude upon the privacy of attorneys or defendants;

(c) could reasonably be expected to compromise defense strategies, investigative procedures, attorney work product, the attorney-client relationship or privileged information provided by the defendant or other sources; or

(d) otherwise adversely affect the defendant's right to the effective assistance of counsel, a fair trial, or an impartial adjudication.

§ 510.40 CJA Information Placed Under Seal

Upon request, or upon the court's own motion, documents pertaining to activities under the CJA and related statutes maintained in the clerk's open files, which are generally available to the public, may be judicially placed under seal or otherwise safeguarded until after all judicial proceedings, including appeals, in the case are completed and for such time thereafter as the court deems appropriate. Interested parties should be notified of any modification of such order.

§ 510.50 Information in the Custody of the Administrative Office

Requests for release of information pertaining to activities under the CJA and related statutes in the custody of the Administrative Office (AO) will be disposed of in accordance with internal directives of that office.

§ 520 Disclosure of Information on Payments to Attorneys

§ 520.10 Timing

(a) The statutory basis for disclosing payments to counsel in noncapital appointments expired on Jan. 25, 2000. **See:** § 540. While disclosure provisions continue by Judicial Conference policy, courts should consider factors listed in § 510.30 and § 520.50, depending on the stage of the case, to ensure that such disclosures will not impact the right to counsel in CJA panel appointments. Disclosure may be postponed until after all proceedings have concluded. **See:** § 510.40.

(b) For capital cases, disclosure must be **after** the disposition of the petition for habeas corpus.

§ 520.20 Documents

(a) To satisfy the requirements of the CJA, courts may release summary payment amounts from the eVoucher system, redacted or unredacted, depending on the stage of the particular case and the policy considerations involved.

(b) Documentation submitted in support of, or attached to, payment may not be disclosed at any time.

§ 520.30 Notice

(a) Before approving payments, courts are required to provide reasonable notice of disclosure to counsel to allow the counsel to request the redaction of specific information based on the considerations set forth in 18 U.S.C. § 3006A(d)(4)(D) and Guide, Vol. 7A, § 520.50.

(b) To comply with this notice requirement, it is recommended that, contemporaneously with the issuance to counsel of the forms CJA 20 or CJA 30, courts give appointed counsel a copy of Form CJA 19 (Notice to Court Appointed Counsel of Public Disclosure of Attorney Fee Information).

(c) Upon receipt of a request for disclosure of CJA payment information, courts may contact counsel about the propriety of safeguarding the information under § 510.40.

§ 520.40 Attorney Payments Approved Before or During Trial

(a) After redacting any detailed information provided to justify the expenses, the court will make available to the public a copy of the voucher showing only the amounts approved for payment.

(b) On the completion of trial, an unredacted copy of summary payment amounts from the eVoucher system may be released, depending on whether an appeal is being pursued and whether the court determines that one or more of the interests listed in Guide, Vol. 7A, § 520.50 require the redaction of information.

§ 520.50 Attorney Payments Approved After Trial Where Appellate Review is Not Being Pursued or Has Concluded

The court will make an unredacted copy of the payment voucher available to the public **unless** it determines that one or more of the interests set forth in 18 U.S.C. § 3006A(d)(4)(D) and listed below justify limiting disclosure to the amounts approved for payment.

(a) the protection of any person's Fifth Amendment right against self-incrimination;

(b) the protection of the defendant's Sixth Amendment right to effective assistance of counsel;

(c) the defendant's attorney-client privilege;

(d) the work product privilege of the defendant's counsel;

(e) the safety of any person; or

(f) any other interest that justice may require (with the exception that for death penalty cases where the underlying alleged criminal conduct took place on or after April 19, 1995, the amount of the fees shall not be considered a reason to limit disclosure).

§ 520.60 Attorney Payments Approved After Trial Where Appellate Review is Being Pursued

The court will make available to the public only the amounts approved for payment **unless** it finds that **none** of the interests listed above in § 520.50 will be compromised.

§ 520.70 Attorney Payments Approved After the Appeal is Completed

The court will make an unredacted copy of the payment voucher available to the public **unless** it determines that one or more of the interests listed above in § 520.50 justify limiting disclosure to only the amounts approved for payment.

§ 530 Disclosure of Information on Payments to Service Providers

(a) The CJA and related statutes expressly provide for disclosure to the public of the amounts paid for representation with respect to cases commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996. The timing of the disclosure must be consistent with the principles set forth in § 510.

(b) For capital cases, disclosure must be **after** the disposition of the petition for habeas corpus.

§ 540 History of the Disclosure Policy

(a) The Fiscal Year 1998 Judiciary Appropriations Act amended 18 U.S.C. § 3006A(d)(4) to require amounts paid to attorneys under the CJA be made publicly available pursuant to a specific process. The amendment applied to cases filed on or after January 25, 1998 and included a two-year sunset provision. Public Law No. 105-119, Nov. 26, 1997. To conform to the amendment, the Judicial Conference approved in March 1999 revisions to paragraph 5.01B of the Guidelines for the Administration of the Criminal Justice Act and Related Statutes, Volume VII, *Guide to Judiciary Policies and Procedures* (Legacy *Guide*). **See:** JCUS-MAR 1999, pp. 15-16.

Note: These amendments are now incorporated into Guide, Vol. 7A, § 520 and § 530.

(b) In March 2000, the Judicial Conference agreed to retain the revised guideline after the scheduled sunset, with the following minor revisions: (a) to show that for cases filed on or after January 25, 2000, the guideline will no longer be statutorily based; and (b) to reflect a further amendment to 18 U.S.C. § 3006A(d)(4), enacted as part of the Fiscal Year 2000 Judiciary Appropriations Act (Public Law No. 106-113, 113 Stat. 1501), which states that in death penalty cases where the underlying alleged criminal conduct took place on or after April 19, 1995, the amount of the fees shall not be considered a reason justifying limited disclosure of payments to attorneys. JCUS-MAR 2000, pp. 16-17.

(c) For Payments to **Providers of Services other than Counsel** in Cases Commenced **on or after** April 24, 1996, **and** for Payments to **Attorneys** in Cases Commenced **on or after** April 24, 1996 **but before** January 25, 1998:

(1) The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, amended the CJA (18 U.S.C. § 3006A), and the Anti-Drug Abuse Act of 1988 (ADAA) (codified in part at 21 U.S.C. § 848(q), recodified in 2005 as 18 U.S.C. § 3599), expressly to provide for disclosure to the public of the amounts paid for representation with respect to cases commenced, and appellate proceedings in which an appeal is perfected, **on or after** April 24, 1996.

(2) With respect to noncapital cases, the CJA, as amended, 18 U.S.C. § 3006A(d)(4) and (e)(4), provided that the amounts paid under those subsections in any case "shall be made available to the public."

(3) With respect to capital cases, the ADAA, as amended, 21 U.S.C. § 848(q)(10)(C) (now 18 U.S.C. § 3599(g)(3)), provided that the amounts paid under that paragraph in any case "shall be disclosed to the public, after the disposition of the petition."

(4) Judicial Conference policy required that the timing of disclosure be consistent with the principles stated in Guide, Vol. 7A, § 510.

(d) For All Payments in Cases Commenced **Before** April 24, 1996:

The general principles regarding the release of information stated in § 510 governed.

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Last revised (Transmittal 07-014) January 5, 2022
Last revised (minor technical changes) January 2, 2024

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Appendix

Appx. 6A Recommendations Concerning the Cost and Quality of Defense Representation (Updated Spencer Report, September 2010)

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§ 610 Overview

§ 610.10 Statutory Authority and Applicability

(a) The appointment and compensation of counsel and the approval and payment of persons providing investigative, expert, and other services in federal capital cases is governed by 21 U.S.C. § 848(q), which was amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and recodified as 18 U.S.C. § 3599.

(b) The pertinent provisions of the AEDPA are applicable to capital cases commenced, and appellate proceedings in which an appeal is perfected, on or after the date of enactment of the AEDPA (April 24, 1996).

(c) This chapter retains guidelines applicable to cases that pre-date the AEDPA, and adds, where appropriate, guidelines for cases subject to the AEDPA.

(d) Unless otherwise specified, provisions in this chapter apply to all capital cases.

§ 610.20 Judicial Conference Recommendations

Detailed recommendations on the appointment and compensation of counsel in federal death penalty cases were adopted by the Judicial Conference, upon recommendation of the Defender Services Committee, on September 15, 1998 (JCUS-SEP 1998, pp. 67-74). The recommendations were contained in the May 1998 report entitled *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (Spencer Report). The Defender Services Committee approved the initial Spencer report, including the commentary that accompanied the recommendations. In September 2010, following a comprehensive update of the report's contents, the Defender Services Committee endorsed revised commentary to the 1998 recommendations. The recommendations and the accompanying revised commentary are provided in Appx. 6A (Recommendations Concerning the Cost and Quality of Defense Representation (Updated Spencer Report, September 2010)) of Part A of this volume. The updated 2010 report, which includes additional information, is available on the judiciary's public website.

§ 610.30 Contact Information

Questions about the appointment and compensation of counsel and the approval and payment of investigative, expert, and other service providers in federal capital cases should be directed to the Administrative Office of the U.S. Courts' (AO) Defender Services Office, Legal and Policy Division Duty Day Attorney, at 202-502-3030 or via email at DSO_LPD@ao.uscourts.gov.

§ 620 Appointment of Counsel in Capital Cases

§ 620.10 Number of Counsel

§ 620.10.10 Federal Death Penalty Cases

(a) As required by 18 U.S.C. § 3005, at the outset of every capital case, courts should appoint two attorneys, at least one of whom is experienced in and knowledgeable about the defense of death penalty cases.

(b) Under 18 U.S.C. § 3599(a)(1), if necessary for adequate representation, more than two attorneys may be appointed to represent a defendant in a capital case.

(c) While courts should not appoint more than two attorneys unless exceptional circumstances and good cause are shown, appointed counsel may, with prior court authorization, use the services of attorneys who work in association with them, provided that the employment of such additional counsel (at a reduced hourly rate) diminishes the total cost of representation or is required to meet time limits.

§ 620.10.20 Habeas Corpus Proceedings

(a) Under 18 U.S.C. § 3599(a)(2), a financially eligible person seeking to vacate or set aside a death sentence in proceedings under 28 U.S.C. § 2254 or § 2255 is **entitled** to appointment of one or more qualified attorneys.

(b) Due to the complex, demanding, and protracted nature of death penalty proceedings, judicial officers should consider appointing at least two attorneys.

§ 620.15 Notification of Relationship

Prior to appointment, counsel should notify the presiding judicial authority if counsel is aware that he or she is related (as the term is defined in 5 U.S.C. § 3110) to any attorney on the same representation, or any attorney being considered for appointment. If appointment of related counsel is made prior to notification, counsel should provide notification as soon as practicable.

§ 620.20 Appointment of State Public Defenders or Legal Aid Attorneys

(a) The judicial officer may appoint an attorney, if qualified under Guide, Vol. 7A, § 620.60, who is furnished by a state or local public defender organization or by a legal aid agency or other private, non-profit organization to represent a person charged with a capital crime or seeking federal death penalty habeas corpus relief.

(b) Such appointments may be in place of, or in addition to, the appointment of a federal defender organization or a CJA panel attorney or an attorney appointed *pro hac vice* according to Guide, Vol. 7A, § 210.30.

(c) Such appointments should be made when the court determines that they will provide the most effective representation. In making this determination, the court should take into consideration whether the attorney represented the person during prior state court proceedings.

§ 620.30 Procedures for Appointment of Counsel in Federal Death Penalty Cases

(a) Recommendations for Appointment of Qualified Counsel

(1) In appointing counsel in federal death penalty cases, 18 U.S.C. § 3005 requires the court to consider the recommendation of the federal defender, or, if no such organization exists in the district, of the AO's Defender Services Office. Judges should consider and give due weight to the recommendations made by federal

defenders and resource counsel and articulate reasons for not doing so. **See:** JCUS-MAR 2019, pp. 18-20.

(2) In fulfilling this responsibility, the federal defender organization or AO's Defender Services Office should consult with counsel (if counsel has already been appointed or retained) and the court regarding the facts and circumstances of the case to determine the qualifications which may be required to provide effective representation.

(b) Evaluating the Qualifications of Counsel Considered for Appointment

(1) Courts should ensure that all attorneys appointed in federal death penalty cases are well qualified, by virtue of their prior defense experience, training, and commitment, to serve as counsel in this highly specialized and demanding litigation.

(2) Ordinarily, "learned counsel" (**see:** 18 U.S.C. § 3005) should have distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in state death penalty trials, appeals, or post-conviction review that, in combination with co-counsel, will assure high-quality representation.

(3) In evaluating the qualifications of counsel considered for appointment, the federal defender organization or AO's Defender Services Office should consider the:

(A) minimum experience standards in 18 U.S.C. § 3599(b)–(d), 18 U.S.C. § 3005, and other applicable laws or rules;

(B) qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases;

(C) recommendations of other federal public and community defender organizations, and local and national criminal defense organizations;

(D) proposed counsel's commitment to the defense of capital cases; and

(E) availability and willingness of proposed counsel to accept the appointment and to represent effectively the interests of the client.

§ 620.40 Federal Death Penalty Cases: Special Considerations in the Appointment of Counsel on Appeal

(a) In appointing counsel in capital cases, judges should consider and give due weight to the recommendations by federal defenders and resource counsel and articulate reasons for not doing so. **See:** JCUS-MAR 2019, pp. 18-20.

(b) Ordinarily, the attorneys appointed to represent a death-sentenced federal appellant should include at least one attorney who did not represent the appellant at trial. In appointing counsel, the court should, among other relevant factors, consider the:

(1) attorney's experience in federal criminal appeals and capital appeals;

(2) general qualifications identified in § 620.30; and

(3) attorney's willingness, unless relieved, to serve as counsel in any post-conviction proceedings that may follow the appeal.

§ 620.50 Federal Death Penalty Cases: Special Considerations in the Appointment of Counsel in Post-Conviction Proceedings

(a) In appointing counsel in capital cases, judges should consider and give due weight to the recommendations by federal defenders and resource counsel and articulate reasons for not doing so. **See:** JCUS-MAR 2019, pp. 18-20.

(b) In appointing post-conviction counsel in a case where the defendant is sentenced to death, courts should consider the attorney's experience in federal post-conviction proceedings and in capital post-conviction proceedings, as well as the general qualifications identified in § 620.30 and § 620.60.20.

§ 620.60 Attorney Qualification Requirements Under 18 U.S.C. § 3599 in Federal Death Penalty Cases and Habeas Corpus Proceedings

§ 620.60.10 Appointment of Counsel Before Judgment

Under 18 U.S.C. § 3599(b), at least one of the attorneys appointed must have been admitted to practice in the court in which the case will be prosecuted for not less than five years, and must have had not less than three years' experience in the actual trial of felony prosecutions in that court. Under 18 U.S.C. § 3005, at least one of the attorneys appointed must be knowledgeable in the law applicable to capital cases.

§ 620.60.20 Appointment of Counsel After Judgment

Under 18 U.S.C. § 3599(c), at least one of the attorneys appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years' experience in the handling of appeals in felony cases in the court.

§ 620.60.30 Attorney Qualification Waiver

Under 18 U.S.C. § 3599(d), the presiding judicial officer, for good cause, may appoint an attorney who may not qualify under 18 U.S.C. § 3599(b) or (c), but who has the background, knowledge, and experience necessary to represent the defendant properly in a capital case, giving due consideration to the seriousness of the possible penalty and the unique and complex nature of the litigation.

§ 620.70 Continuity of Representation

(a) In the interest of justice and judicial and fiscal economy, unless precluded by a conflict of interest, presiding judicial officers are urged to continue the appointment of state post-conviction counsel, if qualified under Guide, Vol. 7A, § 620.60, when the case enters the federal system.

(b) Under 18 U.S.C. § 3599(e), unless replaced by an attorney similarly qualified under Guide, Vol. 7A, § 620.60 by counsel's own motion or upon motion of the defendant, counsel "shall represent the defendant throughout every subsequent stage of available judicial proceedings," including:

- pretrial proceedings;
- trial;
- sentencing;
- motion for a new trial;
- appeals;
- applications for writ of certiorari to the Supreme Court of the United States;
- all post-conviction processes;
- applications for stays of execution and other appropriate motions and procedures;
- competency proceedings; and
- proceedings for executive or other clemency.

§ 630 Compensation of Appointed Counsel in Capital Cases

§ 630.10 Hourly Rates and Inapplicability of Compensation Maximums

§ 630.10.10 Hourly Rates

Under 21 U.S.C. § 848(q)(10)(A), recodified in 18 U.S.C. § 3599(g)(1), the presiding judicial officer will set the hourly compensation at a rate not to exceed the following amounts, for appointed counsel in federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal was perfected, on or after April 24,1996:

§ 630.10.10(a) Capital Hourly Rates	
If services were performed between...	**The hourly rate maximum is...**
01/01/2024 to present	$220
01/01/2023 through 12/31/2023	$210
01/01/2022 through 12/31/2022	$202
01/01/2021 through 12/31/2021	$197
01/01/2020 through 12/31/2020	$195
02/15/2019 through 12/31/2019	$190
03/23/2018 through 02/14/2019	$188
05/05/2017 through 03/22/2018	$185
01/01/2016 through 05/04/2017	$183
01/01/2015 through 12/31/2015	$181
03/01/2014 through 12/31/2014	$180
09/01/2013 through 02/28/2014	$163
01/01/2010 through 08/31/2013	$178
03/11/2009 through 12/31/2009	$175
01/01/2008 through 03/10/2009	$170
05/20/2007 through 12/31/2007	$166
01/01/2006 through 05/19/2007	$163
02/01/2005 through 12/31/2005	$160

(b) Annual Increase in Hourly Rate Maximum

(1) Under 18 U.S.C. § 3599(g)(1), the Judicial Conference is authorized to increase annually the hourly rate maximum by an amount not to exceed the federal pay comparability raises given to federal employees.

(2) The Judicial Conference has determined that the hourly rate maximum will be adjusted automatically each year according to any federal pay comparability adjustment, contingent upon the availability of sufficient funds. **See:** JCUS-MAR 2002, pp. 13-14.

(3) Newly established rates will apply with respect to services performed on or after their effective dates.

§ 630.10.20 Inapplicability of Compensation Maximums

There is neither a statutory case compensation maximum for appointed counsel nor provision for review and approval by the chief judge of the circuit of the case compensation amount in capital cases.

§ 630.20 Adequate Compensation of Counsel

In the interest of justice and judicial and fiscal economy, and in furtherance of relevant statutory provisions regarding qualifications of counsel in capital cases (**see:** Guide, Vol. 7A, § 620.60), presiding judicial officers are urged to compensate counsel at a rate and in an amount sufficient to cover appointed counsel's general office overhead and to ensure adequate compensation for representation provided.

§ 630.30 Death Eligible Cases Where Death Penalty Is Not Sought

§ 630.30.10 General Considerations

If, following the appointment of counsel in a case in which a defendant was charged with an offense that may be punishable by death, it is determined that the death penalty will not be sought, the court should consider the questions of the number of counsel and the rate of compensation needed for the duration of the proceeding.

§ 630.30.20 Number of Counsel

(a) The court should, absent extenuating circumstances, make an appropriate reduction in the number of counsel.

(b) In deciding whether there are extenuating circumstances, the court should consider the following factors:

(1) the need to avoid disruption of the proceedings;

(2) whether the decision not to seek the death penalty occurred late in the litigation;

(3) whether the case is unusually complex; and

(4) any other factors that would interfere with the need to ensure effective representation of the defendant.

§ 630.30.30 Compensation Rate

(a) The court should, absent extenuating circumstances, reduce the compensation rate.

(b) In determining whether there are extenuating circumstances, the court should consider the following factors:

(1) the extent to which this representation precludes counsel from taking other work;

(2) the commitment of time and resources counsel has made and will continue to make in the case; and

(3) the need to compensate appointed counsel fairly.

(c) Any reduction in the compensation rate will apply prospectively only.

§ 630.40 Interim Payments to Counsel

It is urged that the court permit interim payment of compensation in capital cases. For information on interim payments to counsel in death penalty cases, **see:** § 230.73.20 and Appx. 2D (Procedures for Interim Payments to Counsel in Death Penalty Cases).

§ 630.50 Timely Review of Vouchers

Absent extraordinary circumstances, judges should act upon panel attorney compensation claims within 30 days of submission.

§ 630.60 Forms

Claims for compensation and reimbursement of expenses for attorneys furnishing services in death penalty proceedings should be submitted through the eVoucher system on Form CJA 30 (Death Penalty Proceedings: Appointment of and Authority to Pay Court Appointed Counsel).

§ 635 Elimination of Non-Statutory Budgetary Caps

There should be no formal or informal non-statutory budgetary caps on capital cases, whether in a capital trial, direct appeal, or habeas matter. **See:** JCUS-MAR 2019, p. 18.

§ 640 Case Budgeting

§ 640.10 Overview

(a) All capital cases should be budgeted with the assistance of case-budgeting attorneys and/or resource counsel where appropriate. **See:** JCUS-MAR 2019, p. 18.

(b) Courts are encouraged to require appointed counsel to submit a proposed initial litigation budget for court approval that will be subject to modification in light of facts and developments that emerge as the case proceeds.

§ 640.20 Purpose and Procedures

(a) The budget should serve purposes comparable to those of private retainer agreements by confirming both the court's and the attorney's expectations regarding fees and expenses.

(b) Case budgets should be submitted *ex parte* and filed and maintained under seal.

(c) Consideration should be given to employing an *ex parte* pretrial conference to facilitate reaching agreement on a litigation budget at the earliest opportunity.

(d) The budget should be incorporated into a sealed initial pretrial order that reflects the understandings of the court and counsel regarding all matters affecting counsel compensation and reimbursement and payments for investigative, expert, and other services.

(e) An approved budget should guide counsel's use of time and resources by indicating the services for which compensation is authorized.

(f) Case budgets should be re-evaluated when justified by changed or unexpected circumstances and should be modified by the court where good cause is shown.

§ 640.30 Matters for Inclusion in the Capital Case Budget

Matters that may affect the compensation and reimbursement of counsel and payments for investigative, expert, and other services (**see:** Guide, Vol. 7A, § 640.20(d)) include, but are not limited to the following:

(a) The hourly rate at which counsel will be compensated (**see:** § 630.10 and § 630.20);

(b) In capital habeas corpus cases:

The best preliminary estimate that can be made of the cost of all services (counsel, expert, investigative, and other) for the entire case (in its discretion, the court may determine that defense counsel should prepare budgets for shorter intervals of time);

(c) In federal death penalty cases:

(1) Prior to prosecution decision to seek death penalty authorization:

The best preliminary estimate that can be made of the cost of all services (counsel, expert, investigative, and other) likely to be needed through the time that the Department of Justice (DOJ) determines whether to authorize the death penalty;

(2) After prosecution decision to seek death penalty authorization:

The best preliminary estimate that can be made of the cost of all services (counsel, expert, investigative, and other) likely to be needed through the guilt and penalty phases of the trial (in its discretion, the court may determine that defense counsel should prepare budgets for shorter intervals of time);

(3) Death penalty not sought:

As soon as practicable after a decision not to seek the death penalty, the number of appointed counsel and hourly rate of compensation should be reviewed according to § 630.30;

(d) Agreement that counsel will advise the court of significant changes (counsel, expert, investigative, and other) to the estimates contained in the order;

(e) Agreement on a date on which a subsequent *ex parte* case budget pretrial conference will be held;

(f) Procedure and schedules for submission, review, and payment of interim compensation vouchers (**see:** § 660.40.10 and § 660.60);

(g) The form in which claims for compensation and reimbursement should be submitted (**see:** § 630.60) and the matters that those submissions should address; and

(h) The authorization and payment for investigative, expert, and other services. **See:** § 660.

§ 640.40 Authorization for Investigative, Expert, and Other Services Prior to Submission of Case Budget

(a) Recognizing that investigative, expert, and other services may be required before there is an opportunity for counsel to prepare a case budget or for the court to approve it, courts should act upon requests for services where prompt authorization is necessary for adequate representation.

(b) Courts, in examining the case budget, may reconsider amounts authorized for services prior to the budget's approval; however, courts may not rescind prior authorization where work has already been performed.

§ 650 Case Management in Federal Capital Habeas Corpus Proceedings

Judges are encouraged to employ the case-management techniques used in complex civil litigation to control costs in federal capital habeas corpus cases.

§ 655 Establishment of Capital Habeas Units and Other Resources

(a) Circuit courts should encourage the establishment of capital habeas units in federal defender organizations where they do not already exist and make resource counsel and other resources, as well as training opportunities, more widely available to attorneys appointed in capital habeas cases. **See:** JCUS-SEP 2018, p. 40.

(b) Every district should have access to a capital habeas unit. **See:** JCUS-MAR 2019, pp.18-20.

(c) Local or circuit restrictions prohibiting capital habeas units from engaging in cross-district or cross-circuit representation should not be imposed without good cause. **See:** JCUS-MAR 2019, pp.18-20.

§ 660 Authorization and Payment for Investigative, Expert, and Other Services in Capital Cases

§ 660.10 In General

§ 660.10.10 Cases Commenced After April 24, 1996 (Post-AEDPA)

(a) With respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996, upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, the court should authorize the defendant's attorneys to obtain such services.

(b) No *ex parte* request for investigative, expert, or other services in such cases may be considered unless a proper showing is made by counsel concerning the need for confidentiality.

§ 660.10.20 Cases Commenced Before April 24, 1996 (Pre-AEDPA)

For capital cases commenced, and appellate proceedings in which an appeal was perfected, before April 24, 1996, according to 21 U.S.C. § 848(q)(9) before that provision's amendment by the AEDPA, upon a finding in *ex parte* proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the presiding judicial officer will authorize the defendant's counsel to obtain such services on behalf of the defendant.

§ 660.10.30 All Capital Cases

Upon a finding that timely procurement of necessary investigative, expert, or other services could not await prior authorization, the presiding judicial officer may authorize such services ***nunc pro tunc*** consistent with § 310.20.30(b).

§ 660.10.40 Applicability of Chapter 3 Guidelines

Except as otherwise specified in § 660, the provisions in Guide, Vol. 7A, Ch. 3, including § 310.20.30, are applicable to the authorization and payment for investigative, expert, and other services in capital cases.

§ 660.20 Limitations On Payment for Investigative, Expert, and Other Services

§ 660.20.10 Inapplicability of Compensation Maximums

For all capital cases, the compensation maximum amounts for investigative, expert, and other services identified in Guide, Vol. 7A, § 310.20.10 are inapplicable.

§ 660.20.15 Engaging Relatives for Compensable Services

(a) Prior to engaging any relative (as the term is defined in 5 U.S.C. § 3110) to perform CJA compensable services, other than as associate counsel in the same law firm (**see:** Guide, Vol. 7A, § 620.10.10(c)), counsel should first provide notification of the relationship and potential services to the presiding judicial authority.

(b) The court may, in the interest of justice, and upon finding that timely procurement of necessary services could not await prior notification, approve payment for such services up to the dollar threshold for obtaining services without prior authorization under 18 U.S.C. § 3006A(e)(2) and the CJA Guidelines (Guide, Vol. 7A, § 310.20.30).

§ 660.20.20 Cases Commenced After April 24, 1996 (Post-AEDPA)

(a) With respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996, under 18 U.S.C. § 3599)(g)(2), the fees and expenses for investigative, expert, and other services are limited to $7,500 in any case unless:

(1) payment in excess of that amount is certified by the court, or U.S. magistrate judge if the services were rendered in connection with a case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration; and

(2) the amount of the excess payment is approved by the chief judge of the circuit (or an active or senior circuit judge to whom the chief judge has delegated this authority).

(b) The $7,500 limit applies to the total payments for investigative, expert, and other services in a case, not to each service individually.

(c) Once payments for investigative, expert, and other services total $7,500, then additional payments must be approved by the chief judge of the circuit (or an active or senior circuit judge to whom the chief judge has

delegated this authority). Accordingly, the court will monitor all payments for investigative, expert, and other services.

(d) If it can be anticipated that the payments for investigative, expert, and other services will exceed the statutory maximum, advance approval should be obtained from the court and the chief judge of the circuit (or an active or senior circuit judge to whom the chief judge has delegated this authority). **See:** Guide, Vol. 7A, Appx. 3A (Sample Request for Advance Authorization for Investigative, Expert, or Other Services).

(e) Rather than submitting multiple requests, where possible, courts should submit the expert, investigative, and other services portion of the approved case budget to the chief judge of the circuit (or designee of the chief judge) for advance approval. **See:** § 640.

§ 660.20.30 Cases Commenced Before April 24, 1996 (Pre-AEDPA)

For capital cases commenced, and appellate proceedings in which an appeal was perfected, before April 24, 1996, according to 21 U.S.C. § 848(q)(10) before that provision's amendment by the AEDPA, the presiding judicial officer will set compensation for investigative, expert, and other services in an amount reasonably necessary to obtain such services, without regard to CJA or AEDPA maximum limitations.

§ 660.30 Consulting Services

(a) Where necessary for adequate representation, 18 U.S.C. § 3006A(e) and 18 U.S.C. § 3599(f) authorize the reasonable employment and compensation of expert attorney consultants to provide "**light consultation**" services to appointed and *pro bono* attorneys in federal capital habeas corpus cases and in federal death penalty cases in such areas as:

- records completion;
- determination of need to exhaust state remedies;
- identification of issues;
- review of draft pleadings and briefs; and
- authorization process to seek the death penalty.

(b) "Light consultation" services are those that a lawyer in private practice would typically seek from another lawyer who specializes in a particular field of law, as opposed to "**heavy consultation**" services, which include, but are not limited to:

- reviewing records;
- researching case-specific legal issues;

- drafting pleadings;
- investigating claims; and
- providing detailed case-specific advice to counsel, if such tasks take a substantial amount of time.

(c) An expert attorney consultant will not be paid an hourly rate exceeding that which an appointed counsel could be authorized to be paid.

(d) Courts may wish to require that an appointed attorney who seeks to have the court authorize the services of an expert attorney consultant confer with the federal defender, or the AO's Defender Services Office if there is no federal defender in the district or if the federal defender has a conflict of interest, regarding who could serve as an expert attorney consultant.

§ 660.40 Interim Payments to Service Providers

§ 660.40.10 In General

It is urged that the court or U.S. magistrate judge permit interim payment of compensation in capital cases.

§ 660.40.20 Cases Commenced After April 24, 1996 (Post-AEDPA)

(a) A special set of procedures for effecting interim payments, including a special memorandum order, must be used in these cases. These procedures and a sample memorandum order are provided in Guide, Vol. 7A, Appx. 3C (Procedures for Interim Payments to Service Providers in Capital Proceedings). For limitations on payment for investigative, expert, and other services with respect to federal death penalty cases and federal capital habeas corpus proceedings, **see:** § 660.20.20.

See also: the case-budgeting techniques recommended in § 640.

(b) Other interim payment arrangements, which effectuate a balance between the interest in relieving service providers of financial hardships and the practical application of the statutorily imposed responsibility of the chief judge of the circuit to provide a meaningful review of claims for excess payment, may be devised in consultation with the AO's Defender Services Office.

§ 660.40.30 Cases Commenced Before April 24, 1996 (Pre-AEDPA)

A separate set of procedures for effecting interim payments, including a separate memorandum order, must be used in those cases. These procedures and sample memorandum order are provided in Guide, Vol. 7A, Appx 3C (Procedures for Interim Payments to Service Providers in Capital Proceedings). For procedures governing

federal death penalty cases and federal capital habeas corpus proceedings, **see:** § 660.20.30.

§ 660.50 Forms

Claims for compensation and reimbursement of expenses for investigative, expert, or other services in death penalty proceedings should be submitted through the eVoucher system on Form CJA 31 (Death Penalty Proceedings: Ex Parte Request for Authorization and Voucher for Expert and Other Services).

§ 660.60 Timely Review of Vouchers

Absent extraordinary circumstances, judges should act upon claims for compensation for investigative, expert, or other services within 30 days of submission.

§ 670 Scheduling of Federal Death Penalty Case Authorization to Control Costs

(a) Within a reasonable period of time after appointment of counsel under 18 U.S.C. § 3005, and only after consultation with counsel for the government and for the defendant (including, as appropriate, in an *ex parte* application or proceeding), the court should establish a schedule for resolution of whether the government will seek the death penalty.

(b) This schedule should include dates for:

(1) the submission by the defendant to the U.S. attorney of any reasons why the government should not seek the death penalty;

(2) the submission by the U.S. attorney to the appropriate officials of the DOJ of a recommendation and any supporting documentation concerning whether the death penalty should be sought; and

(3) filing of a notice under 18 U.S.C. § 3593(a) that the government will seek the death penalty, or notification to the court and the defendant that it will not.

(c) The schedule should be flexible and subject to extension for good cause at the request of either party (again, as appropriate, in an *ex parte* application or proceeding).

(d) The schedule should allow reasonable time for counsel for the parties to discharge their respective duties with respect to the question of whether the death penalty should be sought, with due regard to:

- the factual complexity of the case;

- the status of any continuing investigation of the crimes and related criminal conduct;
- the anticipated or actual progress of discovery;
- the potential for successful plea negotiations; and
- any other relevant factors.

(e) It is also recognized that scheduling extensions may be necessary because the full development of facts related to guilt and aggravating and mitigating factors may continue even after the case is submitted to the DOJ for review.

§ 680 Clemency

§ 680.10 Clemency Representation by Counsel

§ 680.10.10 New Appointments

A new appointment for clemency representation is not necessary since, under 18 U.S.C. § 3599(e), each attorney appointed to represent the defendant for habeas corpus proceedings under 28 U.S.C. § 2254, unless replaced by similarly qualified counsel, "shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant."

§ 680.10.20 Motions to Withdraw

(a) Motions to withdraw from the clemency representation should be brought in the federal district court where the habeas corpus matter was filed.

(b) Upon granting a motion to withdraw, unless the defendant is represented by similarly qualified counsel or representation is waived by the defendant, the court must appoint counsel to represent the defendant for any available clemency proceedings.

§ 680.20 Clemency Vouchers

§ 680.20.10 Issuance of Voucher for Clemency Work

Upon appointment of counsel for habeas corpus proceedings brought under 28 U.S.C. § 2254, the district court should issue appointed counsel two CJA payment vouchers through the eVoucher system (Form CJA 30 (Death Penalty Proceedings: Appointment of and Authority to Pay Court Appointed Counsel)): one designated for the habeas corpus proceeding and one designated for a potential clemency proceeding.

§ 680.20.20 Processing of Clemency Vouchers

All attorney compensation (Form CJA 30 (Death Penalty Proceedings: Appointment of and Authority to Pay Court Appointed Counsel)) and investigative, expert, or other services vouchers (Form CJA 31 (Death Penalty Proceedings: Ex Parte Request for Authorization and Voucher for Expert and Other Services)) pertaining to the clemency representation should be submitted to the district court through the eVoucher system, regardless of whether the habeas corpus case is on appeal at the time.

§ 680.30 Budgeting Clemency Work

(a) Consistent with § 640, courts are encouraged to require counsel appointed in 28 U.S.C. § 2254 proceedings to submit a proposed initial clemency budget for court approval that will be subject to modification in light of facts and developments that emerge as the case proceeds.

(b) The district court, in consultation with counsel, should determine when the clemency budget should be submitted — early in the habeas corpus proceedings, or at the beginning of the clemency work. To allow sufficient time for clemency preparation, budgeting should occur well in advance of final resolution of the case in the courts.

Guide to Judiciary Policy

Vol. 7: Defender Services
Pt. A: Guidelines for Administering the CJA and Related Statutes

Appx. 6A: Recommendations & Commentary Concerning the Cost and Quality of Defense Representation (Updated Spencer Report, September 2010)

Recommendations and Commentary

1. Qualifications for Appointment
   Commentary on Recommendation 1
2. Consultation with Federal Defender Organizations or the Administrative Office
   Commentary on Recommendation 2
3. Appointment of More Than Two Lawyers
   Commentary on Recommendation 3
4. Appointment of the Federal Defender Organization (FDO)
   Commentary on Recommendation 4
5. The Death Penalty Authorization Process
   Commentary on Recommendation 5
6. Federal Death Penalty Resource Counsel
   Commentary on Recommendation 6
7. Experts
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8. Training
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10. Case Management
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11. Availability of Cost Data
    Commentary on Recommendation 11

Note: Detailed recommendations on the appointment and compensation of counsel in federal death penalty cases were adopted by the Judicial Conference, upon recommendation of the Defender Services Committee, on September 15, 1998 (JCUS-SEP 98, pp. 67-74). The recommendations were contained in the May 1998 report entitled *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (Spencer Report). The Defender Services Committee approved the initial Spencer Report, including the commentary that accompanied the recommendations. In September 2010, following a comprehensive

update of the report's contents, the Defender Services Committee endorsed revised commentary to the 1998 recommendations. **The recommendations and the accompanying revised commentary are set forth in this appendix.** The revised commentary has not been approved by the Judicial Conference; it is included in this appendix as it expands upon the recommendations, discusses the role of federal defender organizations in federal death penalty cases, and generally provides practical information that is useful to judges and appointed counsel in the management of a federal death penalty case. The entire updated 2010 report, which includes additional information and is entitled Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases, is available on the judiciary's public website; what follows in this appendix is an excerpt from that report.

VIII. RECOMMENDATIONS AND COMMENTARY[89]

1. Qualifications for Appointment

a. Quality of Counsel. Courts should ensure that all attorneys appointed in federal death penalty cases are well qualified, by virtue of their prior defense experience, training and commitment, to serve as counsel in this highly specialized and demanding type of litigation. High quality legal representation is essential to assure fair and final verdicts, as well as cost-effective case management.

b. Qualifications of Counsel. As required by statute, at the outset of every capital case, courts should appoint two counsel, at least one of whom is experienced in and knowledgeable about the defense of death penalty cases. Ordinarily, "learned counsel" should have distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in *state* death penalty trials, appeals, or post-conviction review that, in combination with co-counsel, will assure high quality representation.

c. Special Considerations in the Appointment of Counsel on Appeal. Ordinarily, the attorneys appointed to represent a death-sentenced federal appellant should include at least one attorney who did not represent the appellant at trial. In appointing appellate counsel, courts should, among other relevant factors, consider:

i. the attorney's experience in federal criminal appeals and capital appeals;

ii. the general qualifications identified in paragraph 1(a), above; and

iii. the attorney's willingness, unless relieved, to serve as counsel in any post-conviction proceedings that may follow the appeal.

d. Special Considerations in the Appointment of Counsel in Post-Conviction Proceedings. In appointing post-conviction counsel in a case where the defendant is sentenced to death, courts should consider the attorney's experience in federal post-conviction proceedings and in capital post-conviction proceedings, as well as the general qualifications set forth in paragraph 1(a).

e. Hourly Rate of Compensation for Counsel. The rate of compensation for counsel in a capital case should be maintained at a level sufficient to assure the appointment of attorneys who are appropriately qualified to undertake such representation.

[89] Section VIII utilizes a numbering system that is different from the rest of this report in order to match the numbered recommendations in the original Spencer Report.

Commentary

As Recommendation 1(a) indicates, the first responsibility of the court in a federal death penalty case is to appoint experienced, well-trained, and dedicated defense counsel who will provide high quality legal representation. Federal law requires the appointment of two counsel to represent a defendant in a federal death penalty case, of whom at least one must be "learned in the law applicable to capital cases." 18 U.S.C. § 3005. Additional requirements relating to counsel's experience are codified at 18 U.S.C. § 3599. Legislatures, courts, bar associations, and other groups that have considered the qualifications necessary for effective representation in death penalty proceedings have consistently demanded a higher degree of training and experience than that required for other representations. As provided in the Defender Services Program Strategic Plan, counsel in federal death penalty cases are expected to comply with Guidelines 1.1 and 10.2 et seq. of the American Bar Association's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003), and the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev 677 (2008).[90]

Heightened standards are required to ensure that representation in federal death penalty cases is both cost-effective and commensurate with the complexity and high stakes of the litigation. Counsel in a federal death penalty case must not only be skilled in defending the charged offense, e.g., a homicide, but also must be thoroughly knowledgeable about a complex body of constitutional law and special procedures that do not apply in other criminal cases. They must be able to direct extensive and sophisticated investigations into guilt/innocence and

[90] Aimed at providing counsel services "consistent with the best practices of the legal profession," the Defender Services Program Strategic Plan was endorsed by the Defender Services Committee of the United States Judicial Conference. See Goal 2 (Quality of Representation), Strategy 16 (Capital Representations).

mitigation of sentence. They must have the counseling skills to advise a client deciding between pleading guilty in return for a life sentence and proceeding to trial where the sentencing options are death or life imprisonment without the possibility of release.[91] They must have communication skills to establish trust with clients, family members, witnesses, and others whose backgrounds may be culturally, racially, ethnically, linguistically, socioeconomically, and otherwise different from counsel's. They must be able to work effectively as part of a defense team and collaboratively with counsel for codefendants. And, for post-conviction cases, counsel also must be familiar with the unique jurisprudence and practices applicable in habeas corpus. Finally, counsel must be able, notwithstanding exceptional knowledge and skill, to commit sufficient time and resources, taking into account the extraordinary demands of a federal death penalty representation.

The standards listed in Recommendations 1(b) – (d) are designed to assist courts in identifying the specific types of expertise and distinguished prior experience which have been deemed most valuable to this demanding work in the experience of the federal courts thus far. They emphasize the importance of bringing to bear both death penalty expertise and experience in the practice of criminal defense in the federal courts. As described further in the commentary to Recommendation 2, the qualifications of counsel must be assessed with respect to the particular demands of the individual case, the stage of the litigation, and the defendant.

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[91] A guilty plea negotiated at any point in the proceedings brings substantial cost savings, and such a disposition is always available if the sides can find agreement, even after the death penalty has been authorized. The Federal Death Penalty Resource Counsel Project recently estimated that plea agreements have been reached in approximately 25 percent of *authorized* federal capital prosecutions since 1988. Appointed counsel's negotiating skills thus are very important.

The governing statute calls for capitally qualified counsel to be appointed "promptly," 18 U.S.C. § 3005. Recommendation 1(b) endorses appointment of specially qualified counsel "at the outset" of a case, which in some cases may mean prior to the formal filing of a charging document. Courts should not wait to see whether the government will seek capital prosecution before appointing appropriately qualified counsel and granting them the resources necessary for a preliminary investigation. The goals of efficiency and quality of representation are achieved by early appointment of learned counsel in cases where capital indictment may be sought. Virtually all aspects of the defense of a federal death penalty case, beginning with decisions made at the earliest stages of the litigation, are affected by the complexities of the penalty phase. Early appointment of "learned counsel" is also necessitated by the formal authorization process adopted by the Department of Justice to guide the Attorney General's decision-making regarding whether to seek imposition of a death sentence once a death-eligible offense has been indicted. Integral to the authorization process are presentations to the local United States Attorney's Office and Justice Department officials of the factors which would militate against a death sentence. See United States Attorney's Manual § 9-10.000. A mitigation investigation therefore must be undertaken at the commencement of the representation. Delay in appointment of learned counsel risks missing this important opportunity to avoid the high cost of a capital prosecution. Since an early decision not to seek death is the least costly way to resolve a potential capital charge, a prompt preliminary mitigation investigation leading to effective advocacy with the local U.S. Attorney and with the Justice Department is critical both to a defendant's interests and to sound fiscal management of public funds. And, since the local prosecutor's recommendation most often prevails with the Attorney General, the opportunity to persuade the U.S. Attorney not to request capital authorization is extremely important.

Recommendation 1(b)'s requirement of "distinguished prior experience" contemplates excellence, not simply prior experience, at the relevant stage of proceedings: trial, appeal, or post-conviction. It is expected that a lawyer appointed as "learned counsel" for trial previously will have tried a capital case through the penalty phase, whether in state or in federal court, and will have done so with distinction. Excellence in general criminal defense will not suffice because the preparation of a death penalty case requires knowledge, skills, and abilities which even the most seasoned lawyers will not possess if they lack capital experience. And not all capital trial experience will qualify as "distinguished." Consultation with federal defender organizations and Resource Counsel, as described in Recommendation 2 (Consultation with Federal Defender Organizations or the Administrative Office), can help ensure that appointed counsel meet this criterion.[92]

Courts should appoint counsel with "distinguished prior experience" in death penalty trials, appeals, or post-conviction representation, even if meeting the standard requires appointing counsel from outside the district in which a matter arises. Appointing such qualified defense counsel generally produces cost efficiencies, including a higher likelihood of a non-trial disposition. The costs of travel and other expenses associated with bringing counsel from

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[92] The term federal defender organization (FDO) is used here to refer to a Federal Public Defender Organization (FPDO) and a Community Defender Organization (CDO), two different organizational models that fulfill the same function of providing counsel for indigent criminal defendants in the federal courts pursuant to the Criminal Justice Act (CJA), 18 U.S.C. § 3006A. A Federal Public Defender Organization is a federal office, headed by a Federal Public Defender who is selected by the Circuit Court of Appeals. The attorneys and other staff are employees of the federal judiciary. A Community Defender Organization is a not-for-profit corporation governed by a board of directors and led by an executive director. Both types of organization are funded and administered by the federal judiciary. Among the 94 judicial districts, 90 are served by an FDO.

The term "Resource Counsel" refers to the death penalty experts who serve in the Federal Death Penalty Resource Counsel Project (trial level), the Federal Capital Appellate Resource Counsel Project (appellate level), and the Federal Capital Habeas Project (post-conviction level). These groups are referred to collectively as "Resource Counsel" or "the Resource Counsel Projects." The work of the three Resource Counsel Projects and the National Mitigation Coordinator is described in the commentary accompanying Recommendation 2 (Consultation with Federal Defender Organizations or the Administrative Office) and Recommendation 6 (Federal Death Penalty Resource Counsel).

another jurisdiction can be minimized with careful planning by counsel and the court. With appropriate forethought, investigations, client counseling, court appearances, and other obligations can be coordinated to maximize the efficient use of counsel's time and ensure cost-effectiveness. In the institutional defender context, when it is helpful and desirable, attorney resources can be shared between defender offices pursuant to an established protocol.

Recommendation 1(c) provides that counsel on appeal should include "at least one attorney who did not represent the appellant at trial." Like capital trial representation, capital appellate representation should be tailored to the individual requirements of the case, stage of proceedings, and client. There should be no presumption of continuity from trial to appeal in federal death penalty cases, and courts frequently relieve and replace both trial counsel. Capital appellate work is a specialty, and a lawyer is rarely a specialist in both trial and appellate representation.[93] Even if trial counsel does possess "distinguished prior experience" in appellate as well as trial representation, there is value in bringing fresh perspective to issues that have been litigated below. In addition, a new lawyer may, if appropriately experienced, be able to provide continued representation following the appeal in any post-conviction proceedings, which a trial lawyer could not, due to a conflict of interest.[94] This would afford continuity of representation at that stage and, presumably, cost savings. To address particular case-specific demands, such as an especially complex trial record or managing the needs of a defendant with significant mental health issues, some courts have found it helpful and cost-efficient to appoint one of the

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[93] See *Good Practices for Panel Attorney Programs in the U.S. Courts of Appeals*, Vera Institute of Justice (2006) (the Defender Services Committee endorsed the report's recommendation that circuits adopt a flexible approach rather than requiring CJA trial counsel to continue representing the defendant through the appeal, and encouraging deference to trial counsel regarding whether continued representation is in the client's best interests and consistent with counsel's professional skills and obligations). http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/Publications/VERASuggestedGoodPractices.aspx.

[94] Where a claim of ineffective assistance of counsel on appeal is possible, continued representation would not be appropriate.

defendant's trial attorneys as third counsel on appeal, to provide limited and/or temporary assistance as required.

Recommendation 1(d) highlights the need for specialized expertise in post-conviction representation. Like trial and appellate counsel, post-conviction lawyers for federal death penalty cases should be selected based on an individualized assessment of the requirements of the case, the stage of the litigation, and the defendant. Habeas corpus practice is a complex subspecialty of capital representation. A lawyer qualified to be learned counsel in a federal capital trial or on appeal will not necessarily have such expertise. Challenges include an accelerated timeline, a tangle of specialized procedural law applicable to capital proceedings pursuant to 28 U.S.C. § 2255, and an obligation that includes a full investigation of both phases of the trial to identify any possible constitutional infirmities. This underscores the importance of appointing counsel with the experience and dedication – as well as the time and resources – to devote to this intensely demanding work. The one-year statute of limitations makes it especially important that counsel be appointed promptly. Federal Capital Habeas Resource Counsel recommend that appointment take place prior to the denial of certiorari by the Supreme Court. As indicated in Recommendation 4 (Appointment of the Federal Defender Organization), a number of federal defender organizations have staff attorneys who specialize in post-conviction capital litigation. Where they possess the requisite expertise, appointment of federal defender organizations should be considered in capital 2255 cases. For capital habeas corpus cases brought pursuant to 28 U.S.C. § 2254, involving state death sentenced prisoners, representation

by an institutional defender organization has been endorsed by the Committee on Defender Services as offering cost and other efficiencies together with high quality representation.[95]

Recommendation 1(e) recognizes that appropriate rates of compensation are essential to maintaining the quality of representation required in a federal capital case. The time demands of these cases are such that a single federal death penalty representation is likely to become, for a substantial period of time, counsel's exclusive or nearly exclusive professional commitment. It is therefore necessary that the hourly rate of compensation be fair in relation to the costs associated with maintaining a criminal practice. The rate ($178 as of January 1, 2010) should be reviewed at least every three years to ensure that it remains sufficient in light of inflation and other factors. (See 18 U.S.C. § 3006A(d)(1) and 18 U.S.C. § 3599(g)(1).)

[95] Report on Death Penalty Representation, prepared by the Committee on Defender Services Subcommittee on Death Penalty Representation, approved by the Judicial Conference (JCUS-SEP 95, pp. 69, 78-81).

2. Consultation with Federal Defender Organizations or the Administrative Office

a. Notification of Statutory Obligation to Consult. The Administrative Office of the U.S. Courts (Administrative Office) and federal defender organizations should take appropriate action to ensure that their availability to provide statutorily mandated consultation regarding the appointment of counsel in every federal death penalty case is well known to the courts. (See 18 U.S.C. § 3005.)

b. Consultation by Courts in Selecting Counsel. In each case involving an offense punishable by death, courts should, as required by 18 U.S.C. § 3005, consider the recommendation of the district's Federal Public Defender (FPD) (unless the defender organization has a conflict) about the lawyers to be appointed. In districts not served by a Federal Public Defender Organization, 18 U.S.C. § 3005 requires consultation with the Administrative Office. Although not required to do so by statute, courts served by a Community Defender Organization (CDO) should seek the advice of that office.

c. Consultation by Federal Defender Organizations and the Administrative Office in Recommending Counsel. In discharging their responsibility to recommend defense counsel, FDOs and the Administrative Office should consult with Federal Death Penalty Resource Counsel in order to identify attorneys who are well qualified, by virtue of their prior defense experience, training and commitment, to serve as lead and second counsel.

Commentary

Courts are required pursuant to 18 U.S.C. § 3005 to consider the recommendation of their federal defender organization or the Administrative Office regarding the appointment of both counsel in each federal death penalty case.[96] Most courts are aware of the statute and policy and do consult about their appointments, though a small number still do not. The Administrative Office should continue to ensure that all courts are aware of the importance and availability of consultation for all federal capital appointments, and should make specific outreach to courts that for any reason have not consulted with federal defenders or Resource Counsel.

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[96] The specific language of the statute requires the court to "consider the recommendation of the *Federal Public Defender* organization, or, if no such organization exists in the district, of the Administrative Office…." 18 U.S.C. § 3005. Emphasis added. There is no indication in the legislative history that this reference was intended to exclude Community Defender Organizations, and the most reasonable interpretation is that this was inadvertent and that Congress's intention was to include all federal defender organizations. As a matter of policy, the Judicial Conference recommends that consultation be made with the district's FDO, regardless of whether it is organized as an FPD or a CDO. See Recommendation 1, Footnote 94.

Recommendation 2(b) emphasizes that consultation should be made for "*each case* involving an offense punishable by death." It is not satisfied where a court selects counsel from a pre-existing list, because recommendations concerning appointment of counsel are best obtained on an individualized, case-by-case basis. The relative infrequency of federal death penalty appointments, and the typically swift response which any court requesting a recommendation can expect, makes lists or "panels" of "capitally-qualified" attorneys both unnecessary and, in some respects, impractical.[97] Currently, within a short time after receipt of a request, the federal defender or Administrative Office (through Resource Counsel, as described below and in Recommendation 6) provides the court with the names of attorneys who not only are qualified to serve as counsel but who also have been contacted and indicated their willingness to serve in the particular case.[98] These individualized recommendations help to ensure that counsel are well-suited to the demands of a particular case and compatible with one another and the defendant. Whether at trial, on appeal, or in post-conviction, the federal defender and Resource Counsel are likely to have access to information that the court lacks. That information includes factors relating to the defendant or to counsel who are candidates for appointment. Consideration of these factors is essential to establishing a defense team that functions effectively. Case-specific consultation is also required by Judicial Conference policy (see Guide, §§ 620.30(a) and (b), explaining the 18 U.S.C. § 3005 consultation requirement and

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[97] The distinction between being qualified to serve and willing to do so is significant. Many defense counsel would not be willing to accept appointment to more than one federal death penalty case at a time. Furthermore, since accepting a federal death penalty appointment requires a substantial time commitment which may ultimately cause the attorney to become entirely unavailable for any other fee-generating work, appointment in such a case is not lightly undertaken.

[98] In some instances, in fact, it is the federal defender or Resource Counsel who first alerts the court to the need for an appointment. For example, prior to an indictment issuing, the U.S. Attorney's Office may inform the defender or Resource Counsel of an imminent capital prosecution in which a defendant will need capitally qualified counsel, or the defender or Resource Counsel may become aware of an investigation and the need for counsel through other means.

suggesting that in developing a recommendation, consideration be given to "the facts and circumstances of the case.")

Recommendation 2(c) recognizes the role of Resource Counsel in the consultation process. When this Recommendation was first made, there was a single Federal Death Penalty Resource Counsel Project charged with responsibility for assisting in federal death penalty proceedings at all stages of litigation: trial, appeal, and post-conviction. Those functions have now been distributed among three projects, each of which addresses a different stage of litigation: the Federal Death Penalty Resource Counsel Project (trial), the Federal Capital Appellate Resource Counsel Project, and the Federal Capital Habeas Project.[99] Referred to collectively here as "Resource Counsel" or "the Resource Counsel Projects," these lawyers are death penalty experts. They are knowledgeable about and maintain effective communication with defense counsel nationwide, and their ability to promptly match attorneys with cases is of great value to the judiciary.

The appropriate Resource Counsel Project should be consulted about appointment of counsel in every trial, appellate, and post-conviction case, whether by the court, the federal defender, or both. In addition, prior to recommending counsel for appointment in a federal capital case, federal defenders should advise potential counsel that any attorney appointed is expected to consult regularly with Resource Counsel.[100] Federal defenders and Resource Counsel should also ensure, prior to making a recommendation to a court, that prospective defense counsel are able to dedicate the time required to the new capital case.

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[99] The National Mitigation Coordinator also provides assistance in federal death penalty cases, as described in Recommendation 6 (Federal Death Penalty Resource Counsel).

[100] See Defender Services Strategic Plan, Goal 2 (Quality of Representation), Strategy 17 (Capital Representations).

Together, Resource Counsel and federal defenders have been instrumental in providing high quality representation to federal defendants from trial through post-conviction proceedings. Recommendation 2(c) recognizes the value of Resource Counsel and urges federal defenders and the Administrative Office to continue to work closely with them.

3. Appointment of More Than Two Lawyers

Number of Counsel. Courts should not appoint more than two lawyers to provide representation to a defendant in a federal death penalty case unless exceptional circumstances and good cause are shown. Appointed counsel may, however, with prior court authorization, use the services of attorneys who work in association with them, provided that the employment of such additional counsel (at a reduced hourly rate) diminishes the total cost of representation or is required to meet time limits.

Commentary

The norm in federal death penalty cases is the appointment of two counsel per defendant. Courts contemplating the appointment of a third counsel for trial, appeal or post-conviction representation might consider contacting the Administrative Office, the federal defender organization or the appropriate Resource Counsel Project (see Recommendation 6) for information and advice about whether circumstances warrant such appointment. Notwithstanding this suggested limit on the number of attorneys charged with responsibility for the defense in its entirety, courts are encouraged to permit appointed counsel to employ additional attorneys to perform more limited services where to do so would be cost-effective or otherwise enhance the effective use of resources. For example, in many federal death penalty cases, the prosecution provides to defense counsel an extensive amount of discovery material which must be reviewed for relevance and organized for use by the defense. Allowing appointed counsel to obtain legal assistance from an associate at his or her firm or from another appropriately qualified lawyer may prove economical because the work is performed at a lower hourly rate, or this assistance may be a necessity in light of the volume and nature of the work or court deadlines. See Guide, §§ 620.10.10 and 230.23.10(f).

4. Appointment of the Federal Defender Organization (FDO)

a. FDO as Lead Counsel. Courts should consider appointing the district's FDO as lead counsel in a federal death penalty case only if the following conditions are present:

> i. the FDO has one or more lawyers with experience in the trial and/or appeal of capital cases who are qualified to serve as "learned counsel"; and
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> ii. the FDO has sufficient resources so that workload can be adjusted without unduly disrupting the operation of the office, and the lawyer(s) assigned to the death penalty case can devote adequate time to its defense, recognizing that the case may require all of their available time; and
>
> iii. the FDO has or is likely to obtain sufficient funds to provide for the expert, investigative and other services reasonably believed to be necessary for the defense of the death penalty case.

b. FDO as Second Counsel. Courts should consider appointing the district's FDO as second counsel in a federal death penalty case only if the following conditions are present:

> i. the FDO has sufficient resources so that workload can be adjusted without unduly disrupting the operation of the office, and the lawyer(s) assigned to the death penalty case can devote adequate time to its defense, recognizing that the case may require all of their available time; and
>
> ii. the FDO has or is likely to obtain sufficient funds to provide for the expert, investigative and other services reasonably believed to be necessary for the defense of the death penalty case.

Commentary

Effective capital representation requires a team of many players, and the institutional strength of a federal defender organization lends itself to good teamwork. On the other hand, a defender organization can meet the demands of a capital case only if the assigned personnel possess the requisite qualifications and have available to them the time and other resources the case requires. Thus, courts are encouraged to appoint an FDO as either lead or second counsel in a capital case, but only after consideration of the factors identified in this Recommendation and consultation with the federal defender.

Recommendations 4(a) and (b) acknowledge that capital cases inevitably and seriously disrupt the normal functioning of an office. To undertake too much death penalty litigation would seriously threaten the effective performance of a defender organization's responsibility to provide representation to a substantial number of financially eligible criminal defendants in its district each year. Therefore, a federal defender organization should not be required to accept more than one federal death penalty trial representation at a time unless the head of the organization believes such an arrangement is appropriate. In addition, the head of an FDO accepting a capital appointment must be prepared to seek additional resources as necessary and to shift responsibilities among staff so that those entrusted with capital cases have sufficient time for that work and other demands upon them are limited.[101] Regardless of what level of capital experience the federal defender has, all FDOs with federal capital cases should maintain close contact and collaborate with the appropriate Resource Counsel Project.[102]

In addition to serving as counsel, many federal defender organizations play a valuable administrative and leadership role with respect to death penalty representation in their districts, for example, by sponsoring training, facilitating relationships with Resource Counsel, and disseminating information to panel attorneys. This important work should continue to be supported and encouraged by the Administrative Office. Also, federal defender organizations should identify and share best practices they have developed in providing capital representation and in supporting the work of other capital lawyers.

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[101] These warnings about avoiding over-commitment should be understood to extend to panel attorneys accepting appointment in capital cases as well. As noted in the commentary accompanying Recommendation 2 (Consultation with Federal Defender Organizations or the Administrative Office), in making recommendations and appointments, courts, federal defenders and Resource Counsel should ensure that prospective defense counsel are sufficiently free of other obligations to dedicate the time required to the new capital case.

[102] See Defender Services Strategic Plan, Goal 2 (Quality of Representation), Strategy 16 (Capital Representations).

Courts are encouraged to consider appointing federal defender organizations with the requisite expertise to represent federal death-sentenced prisoners in appellate and post-conviction proceedings, as well as at trial. There are particular benefits to the appointment of well-resourced offices in capital 2255 proceedings, which require digesting and briefing large amounts of legal and factual material and conducting a thorough investigation within a very compressed timetable. Post-conviction representation makes demands that can be efficiently met by institutional representation.[103] In addition, it has proved much harder to find qualified, available attorneys for 2255 matters than for capital trial cases.

Over the past several years, a number of federal defender organizations have accepted capital appeals and 2255 representations, most of them having acquired the necessary expertise through their representation of state death-sentenced prisoners pursuant to 28 U.S.C. § 2254. The Administrative Office should evaluate the need for counsel in capital 2255 proceedings, continue to support federal defender organizations in meeting the need, and consider whether to establish additional capacity for institutional representation in capital cases in the defender program.

[103] Report on Death Penalty Representation, prepared by the Committee on Defender Services Subcommittee on Death Penalty Representation, approved by the Judicial Conference (JCUS-SEP 95).

5. The Death Penalty Authorization Process

a. Streamlining the Authorization Process. The Department of Justice should consider adopting a "fast track" review of cases involving death-eligible defendants where there is a high probability that the death penalty will not be sought.

b. Court Monitoring of the Authorization Process. Courts should exercise their supervisory powers to ensure that the death penalty authorization process proceeds expeditiously.

Commentary

A decision not to seek the death penalty against a defendant has large and immediate cost-saving consequences. The sooner that decision is made, the larger the savings. Since the death penalty ultimately is sought against only a small number of the defendants charged with death-eligible offenses, the process for identifying those defendants should be expeditious in order to preserve funding and minimize the unnecessary expenditure of resources. The current process, however, is not expeditious; rather, even in cases in which authorization for capital prosecution is viewed as unlikely by both the prosecution and the defense, the process is lengthy and seemingly inefficient, involving multiple levels of review, and results in unnecessary costs being incurred. The process also limits the availability of lawyers qualified to serve as "learned counsel" for other capital appointments. Recommendations 5(a) and (b) call upon the Department of Justice and the judiciary to maximize cost-savings by increasing the efficiency of the authorization process. The Department of Justice can do this by evaluating and streamlining its procedures. Judges can do this by establishing reasonable deadlines and maintaining oversight during the pre-authorization stage of the litigation.[104] Courts should ensure, however, that whatever decision-making timetables are imposed are sufficient to allow for meaningful pre-authorization advocacy by counsel for the defendant. Where authorization to seek the death

[104] Section 670 of the Guide sets forth Judicial Conference policy on "scheduling of federal death penalty case authorization to control costs."

penalty is significantly likely, the prosecution and defense should be given every opportunity to explore the reasons for not authorizing or for negotiating an early disposition of the case.

In addition to acting in their individual capacities to pursue efficiency goals, the Department of Justice and the judiciary should seek opportunities to communicate with one another about the impact of federal death penalty policies on the efficient administration of justice. Given the enormous resource demands and cost implications, it would be wise for the judiciary, the Department of Justice, and the Administrative Office to communicate and work together at the highest levels.

6. Federal Death Penalty Resource Counsel

a. Information from Resource Counsel. In all federal death penalty cases, defense counsel should obtain the services of Federal Death Penalty Resource Counsel in order to obtain the benefit of model pleadings and other information that will save time, conserve resources and enhance representation. The judiciary should allocate resources sufficient to permit the full value of these services to be provided in every case.

b. Technology and Information Sharing. The Administrative Office should explore the use of computer-based technology to facilitate the efficient and cost-effective sharing of information between Resource Counsel and defense counsel in federal death penalty cases.

Commentary

When Recommendation 6 was issued in 1998, there was only one Federal Death Penalty Resource Counsel Project, and it offered support for all cases, whether at trial, on appeal, or in post-conviction. As Recommendation 2 (Consultation with Federal Defender Organizations or the Administrative Office) describes, there is now a separate Resource Counsel Project dedicated to each stage of litigation. The trial-level Federal Death Penalty Resource Counsel Project has been joined by the Federal Capital Appellate Resource Counsel Project and the Federal Capital Habeas Project. There is also a National Mitigation Coordinator who collaborates with Resource Counsel and supports work in all death penalty matters that arise in the federal courts.[105] Recommendation 6 and other references to Resource Counsel in these Recommendations and Commentary apply to each of the Resource Counsel Projects.

The Resource Counsel Projects serve CJA counsel, federal defenders, and the courts by recommending counsel for every case at trial, on appeal, and in post-conviction, and by providing numerous other services, including case consultation, training, and assistance with case budgeting. Trial-level Resource Counsel are assigned to each defense team at the outset of every death-eligible case, and continue to support the efforts of appointed counsel through the

[105] The National Mitigation Coordinator also works with the Habeas Assistance and Training Counsel Project (HAT) in connection with capital post-conviction representation in the federal courts pursuant to 28 U.S.C. §2254.

conclusion of trial. Appellate and post-conviction Resource Counsel assume responsibility at the appropriate procedural junctures, and offer consultation and assistance throughout those stages of the case. The National Mitigation Coordinator provides information, referrals, and case-specific consultation, and is extensively involved in the planning and delivery of training. The four Projects work together on issues of common concern, and support one another in conducting training and disseminating information to counsel. They also provide consultation and advice to the Administrative Office and to courts.

Recommendation 6(a) urges both the judiciary and counsel to maximize the benefits of Resource Counsel's services. Together, the Resource Counsel Projects are essential to the delivery of high quality, cost-effective representation. Their work should continue to be facilitated by the Administrative Office, and counsel in all federal death penalty cases are encouraged to maintain regular contact with Resource Counsel. See Defender Services Strategic Plan, Goal 2 (Quality of Counsel), Strategy 16 (Capital Representations). In addition, federal defender organizations should advise potential appointed counsel that they are expected to consult with Resource Counsel if they accept a capital representation. *Id*., Strategy 17 (Capital Representations). The Department of Justice provides centralized support to prosecutors nationwide at all stages of federal death penalty proceedings. Although the Resource Counsel Projects cannot match that capacity, the judiciary should allocate resources sufficient to permit the full value of their services to be provided in every case.

Recommendation 6(b) recognizes the critical role of technology in sharing information. The website maintained by Resource Counsel (www.capdefnet.org) recently has been upgraded. It is a valuable resource, enhancing quality of representation in a cost-efficient manner, and it is relied upon extensively by appointed counsel nationwide. The Administrative Office should

support the ongoing development of this cost-effective means of assisting appointed counsel in federal death penalty cases. The database of case related information maintained by Resource Counsel is also an essential resource and, similarly, should receive ongoing support as indicated in the Commentary to Recommendation 11 (Availability of Cost Data).

7. Experts

a. Salaried Positions for Penalty Phase Investigators. The federal defender program should consider establishing salaried positions within FDOs for persons trained to gather and analyze information relevant to the penalty phase of a capital case. FDOs should explore the possibility that, in addition to providing services in death penalty cases to which their FDO is appointed, it might be feasible for these investigators to render assistance to panel attorneys and to other FDOs.

b. Negotiating Reduced Rates. Counsel should seek to contain costs by negotiating reduced hourly rates and/or total fees with experts and other service providers.

c. Directory of Experts. A directory of experts willing to provide the assistance most frequently needed in federal death penalty cases, and their hourly rates of billing, should be developed and made available to counsel.

Commentary

Penalty phase investigators or "mitigation specialists" are individuals trained and experienced in the development and presentation of evidence for the penalty phase of a capital case. As indicated in the 2003 ABA Guidelines,[106] this function is an essential component of effective capital defense representation; however, mitigation specialists are in short supply and in many cases they are not available locally. Recommendation 7(a) suggests ameliorating this problem by employing and training persons for this work in federal defender organizations. In 2004 the Defender Services Committee authorized a position for a National Mitigation Coordinator in a federal defender office to assist in expanding the availability and quality of mitigation work in death penalty cases in the federal courts. In addition to leveraging his own significant knowledge and skills through case consultations, the National Mitigation Coordinator has enhanced defense representation and contributed to cost containment efforts by recruiting more mitigation specialists to work on federal capital cases, matching mitigation specialists with

[106] American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003). See also Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 Hofstra L. Rev. 677 (2008) for an elaboration on the mitigation function, including the role of mitigation specialists.

counsel, and providing expanded training opportunities both for defender staff and for private mitigation specialists who are authorized to work on federal cases. This training enhances the skills and availability of such professionals.

In addition, because of the cost containment potential, Recommendation 7(a) suggests that salaried federal defender employees might work not only on cases in which their office is appointed, but also, in appropriate instances, on other cases. Procedures that will facilitate lending such non-attorney staff members between defender offices have been developed by the Administrative Office.

Recommendation 7(b) encourages counsel to negotiate a reduced hourly rate for expert services whenever possible. Private experts must be employed in death penalty cases, but the cost of their services can and should be contained. When asked to provide services for the defense of a CJA-eligible criminal defendant, many experts are willing to accept fees lower than their customary hourly rates for private clients. The types of experts employed in capital cases can be highly specialized, however, and sometimes a particular expert is required and it is not possible to negotiate a reduced rate. It should be noted that the government, too, employs private experts, often at high hourly rates, a factor the courts could consider in assessing the reasonableness of proposed defense expenditures.

With respect to Recommendation 7(c), it should be noted that while maintaining formal lists of experts has proved to be problematic, substantial progress has been made in collecting and sharing appropriate information of this nature with defense counsel and courts, particularly since 2004 when the National Mitigation Coordinator position was established. Resource Counsel, federal defenders, and the National Mitigation Coordinator have knowledge of a wide range of expert service providers throughout the country and they are available to assist in

matching cases with experts and evaluating costs during the case-budgeting process and at any other stage of litigation.

8. Training

Federal Death Penalty Training Programs. The Administrative Office should continue to offer and expand training programs designed specifically for defense counsel in federal death penalty cases.

Commentary

Specialized death penalty training programs are relied upon by even the most highly experienced counsel to update and refine their skills and knowledge. Death penalty law is not only complex but also is rapidly evolving, and counsel are obligated to keep pace with developments throughout the federal courts. Continuing education in the latest forensic science developments is another responsibility of capital lawyers. Resource Counsel, the National Mitigation Coordinator, and federal defenders, with the support of the Administrative Office, have substantially increased training opportunities over the past several years. Counsel appointed in federal capital cases may attend a variety of specialized trial, appellate, and post-conviction programs organized or supported by each of the Resource Counsel Projects. Defender offices sponsor local and regional training as well. Programs focusing on forensic science, mitigation investigation, and victim contact offer further opportunities for skill-building and information sharing. Financial assistance to facilitate attendance at training programs and other logistical support are made available through the Training Branch of the Administrative Office's Office of Defender Services. These opportunities for counsel to benefit from the research and experience of others and share information and ideas are important and cost-effective. Their quality and utility has been universally praised by defense counsel. The Administrative Office should ensure that training opportunities continue to expand to meet the needs of capital defense teams.

9. Case Budgeting

a. Consultation with Prosecution. Upon learning that a defendant is charged with an offense punishable by death, courts should promptly consult with the prosecution to determine the likelihood that the death penalty will be sought in the case and to find out when that decision will be made.

b. Prior to Death Penalty Authorization. Ordinarily, the court should require defense counsel to submit a litigation budget encompassing all services (counsel, expert, investigative and other) likely to be required through the time that the Department of Justice (DOJ) determines whether or not to authorize the death penalty.

c. After Death Penalty Authorization. As soon as practicable after the death penalty has been authorized by DOJ, defense counsel should be required to submit a further budget for services likely to be needed through the trial of the guilt and penalty phases of the case. In its discretion, the court may determine that defense counsel should prepare budgets for shorter intervals of time.

d. Advice from Administrative Office and Resource Counsel. In preparing and reviewing case budgets, defense counsel and the courts should seek advice from the Administrative Office and Federal Death Penalty Resource Counsel, as may be appropriate.

e. Confidentiality of Case Budgets. Case budgets should be submitted ex parte and should be filed and maintained under seal.

f. Modification of Approved Budget. An approved budget should guide counsel's use of time and resources by indicating the services for which compensation is authorized. Case budgets should be re-evaluated when justified by changed or unexpected circumstances, and should be modified by the court where good cause is shown.

g. Payment of Interim Vouchers. Courts should require counsel to submit vouchers on a monthly basis, and should promptly review, certify and process those vouchers for payment.

h. Budgets In Excess of $250,000. If the total amount proposed by defense counsel to be budgeted for a case exceeds $250,000, the court should, prior to approval, submit such budget for review and recommendation to the Administrative Office.

i. Death Penalty Not Authorized. As soon as practicable after DOJ declines to authorize the death penalty, the court should review the number of appointed counsel and the hourly rate of compensation needed for the duration of the proceeding pursuant to the Guide, § 630.30.

j. Judicial Conference Guidelines. The Judicial Conference should promulgate guidelines on case budgeting for use by the courts and counsel.

k. Judicial Training for Death Penalty Cases. The Federal Judicial Center should work in cooperation with the Administrative Office to provide training for judges in the management of federal death penalty cases and, in particular, in the review of case budgets.

Commentary

When Recommendation 9 was issued in 1998, case budgeting was new to the courts. It is now well established, representing the norm in federal death penalty cases. Judicial Conference policy with respect to capital case budgeting is set forth in Section 640 of the Guide, and district and appellate courts in various parts of the country are experimenting with different approaches to case budgeting. Reports on their methods and progress will be forthcoming as those initiatives are evaluated. In the meantime, certain things are clear. Drafting a case budget requires the lawyer to incorporate cost considerations into litigation planning and encourages the use of less expensive means to achieve the desired end. Submission and review of a budget assists the court in monitoring the overall cost of representation in the case, and determining the reasonableness of costs. Both judges and counsel consistently describe the budgeting process as valuable. They also emphasize the importance of a focus on the "big picture" rather than "nickels and dimes," and of an understanding that case budgeting is about ensuring planned, thoughtful, and responsible spending as opposed to simply cutting costs. Resource Counsel are available to assist courts and counsel with drafting and evaluating case budgets.

Because of the unpredictability of pretrial litigation, it is impractical to require counsel to budget for an entire case from start to finish. At a minimum, the budgeting process should occur in two stages, as suggested in Recommendations 9(b) and (c). The first stage begins when the lawyer is sufficiently familiar with the case to be able to present a budget reasonably related to the anticipated factual and legal issues in the case and continues until the Department of Justice makes its decision as to whether it will seek the death penalty. Prior to this first-stage budget, in

some districts the court orders a "starter budget" approving funds for an initial allotment of counsel's time as well as service providers such as an investigator, paralegal, mitigation specialist, and associate counsel. This allows counsel to begin work without delay, and a formal first-stage budget is submitted after counsel has had an opportunity to assess the needs of the case more thoroughly. As indicated in the Commentary to Recommendation 1(b) (Qualifications of Counsel), courts should not defer appointing "learned counsel" and authorizing an appropriate investigation at this stage. As recognized in Section 640.40 of the Guide, it will be necessary for counsel to begin work immediately, so courts should be prepared to authorize funds for this purpose, even if a case budget has not yet been submitted or approved.

If a death penalty notice is filed, a further budget should be prepared. The court may require a single budget from authorization through trial, though it may be more practical to develop a series of budgets covering shorter increments of time. If the prosecution will not seek the death penalty, Recommendation 9(i) calls for the court to review the case in accordance with the Guide, § 630.30, to determine whether the number or compensation of counsel should be reduced.

Consistent with the Criminal Justice Act, 18 U.S.C. § 3006A, Recommendation 9(e) calls for case budgets to be submitted ex parte and maintained under seal. Guide, § 640.20(b). A case budget requires defense counsel to develop an overall litigation plan for the case. Consequently, it contains privileged information and is an extremely sensitive document.

Recommendation 9(g) encourages prompt and efficient consideration and payment of interim vouchers in capital cases. Delay in approving payments to experts or counsel may prevent the defense from moving forward to develop its case, negatively affect the quality of representation, and/or delay expeditious and cost-effective disposition of the matter.

Case budgeting in post-conviction cases should proceed in much the same way as trial case budgeting. Costs can be significant because counsel is obligated to thoroughly and independently investigate both phases of the trial to determine whether there are any potential constitutional infirmities. Guideline 10.7 (Investigation), American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1015 (2003). A capital post-conviction budget should include the costs of counsel, investigators, and experts. The budgeting process should be completed quickly in light of the one-year statute of limitations for filing a motion pursuant to 28 U.S.C. § 2255.

10. Case Management

a. Non-Lawyer Staff. Where it will be cost-effective, courts should consider authorizing payment for services to assist counsel in organizing and analyzing documents and other case materials.

b. Multi-defendant Cases.

i. Early Decision Regarding Severance. Courts should consider making an early decision on severance of non-capital from capital codefendants.

ii. Regularly Scheduled Status Hearings. Status hearings should be held frequently, and a schedule for such hearings should be agreed upon in advance by all parties and the court.

iii. "Coordinating Counsel." In a multi-defendant case (in particular a multi-defendant case in which more than one individual is eligible for the death penalty), and with the consent of co-counsel, courts should consider designating counsel for one defendant as "coordinating counsel."

iv. Shared Resources. Counsel for codefendants should be encouraged to share resources to the extent that doing so does not impinge on confidentiality protections or pose an unnecessary risk of creating a conflict of interest.

v. Voucher Review. In large multi-defendant cases, after approving a case budget, the court should consider assigning a magistrate judge to review individual vouchers. The court should meet with defense counsel at regular intervals to review spending in light of the case budget and to identify and discuss future needs.

Commentary

Recommendation 10(a) recognizes that the large volume of discovery materials and pleadings associated with a federal death penalty case may make it cost-effective for courts to authorize (and appointed counsel to employ) the services of law clerks, paralegals, secretaries, or others to perform organizational work which would otherwise have to be performed by counsel at a higher hourly rate. (See also Commentary accompanying Recommendation 3 (Appointment of More Than Two Lawyers), endorsing the practice of authorizing counsel to obtain the services of additional attorneys under appropriate circumstances.) Judicial Conference policy provides that, in general, appointed counsel may not be reimbursed for expenses deemed part of their office overhead (Guide, § 230.66.10); however, unusual expenses of this nature may be

compensated (Guide, § 320.70.30). The Guidelines suggest that in determining whether an expense is unusual or extraordinary, "consideration should be given to whether the circumstances from which the need arose would normally result in an additional charge to a fee paying client over and above that charged for overhead expenses." (Guide, § 320.70.30).

Recommendations 10(b)(i) – (iv) address some of the particular management burdens associated with multi-defendant federal death penalty cases. Special efforts are required to ensure the orderly administration of justice in these matters, which tend to become costly and cumbersome for courts and counsel. Courts should also consider encouraging prosecutors to provide discovery in a way that will make information much more accessible and therefore less costly for the defense to assimilate. For example, the way in which the government organizes the material it turns over to defense counsel and the way it formats it can have significant cost consequences. Where there is extensive wiretap evidence, the government might be asked to provide defense counsel not just with recordings, but with any transcripts of those recordings. Such time and cost savings possibilities should be urged wherever possible. The court might initiate discussion about how best to contain discovery costs by soliciting a list of ideas from the parties.

Recommendation 10(b)(i) suggests that courts make early decisions concerning severance of non-capital from capital codefendants. In general, capital cases remain pending longer than non-capital cases and involve far greater amounts of pre-trial litigation. Separating the cases of non-capital codefendants, where appropriate, may lead to swifter and less costly dispositions in those cases. The earlier such a decision is implemented, the greater will be the cost savings.

Recommendation 10(b)(ii) suggests that courts schedule frequent status hearings so that discovery and other matters may proceed efficiently and problems may be noted early and swiftly resolved. If the schedule for such status hearings (on a monthly or other basis) is agreed upon in advance, all parties can plan accordingly and valuable time will not be consumed with counsel and judges trying to find a mutually convenient time for their next meeting.

Recommendation 10(b) (iii) suggests that, if all counsel agree, courts consider designating the attorneys for one defendant as "coordinating counsel." Coordinating counsel might be responsible for arranging for the efficient filing and service of motions and responses among the codefendants, scheduling co-counsel meetings and court dates, facilitating discovery, or completing any other tasks deemed appropriate by counsel and the court. In multi-defendant cases where the federal defender organization represents a defendant eligible for the death penalty, courts should (taking into account the views of the federal defender) consider designating the FDO as coordinating counsel because of its institutional capabilities. In the event that a panel attorney is designated as coordinating counsel, the additional time and resources demanded by this role should be compensated.

11. Availability of Cost Data

The Administrative Office should improve its ability to collect and analyze information about case budgets and the cost of capital cases.

Commentary

The cost data for this report were assembled by painstaking manual collection, necessitated by the limitations of the only available information source, the CJA payment system.[107] Given the significance of capital case costs to the federal defender program, the Administrative Office has given priority to developing an electronic CJA voucher processing system that will provide accurate and reliable case data that are accessible for analysis. Enhancing the ability of the Defender Services program to analyze and make use of cost and other quantitative data relating to federal death penalty cases would assist in making resource allocation decisions and in establishing policy. In addition, the judiciary should give further consideration to geographic disparities in defense resources and the relationship between low cost defense representation and sentencing outcome in capital cases. The Administrative Office should work with the Department of Justice to obtain useful data about prosecution costs in federal capital cases.

This report could not have been completed without extensive assistance from the federal capital trial, appellate, and post-conviction Resource Counsel Projects, including access to information from their databases. These data are vitally important to the Defender Services program and their collection and analysis should remain a priority and be supported by the Administrative Office.

[107] The CJA Panel Attorney Payment System is a judiciary-wide application in which all attorney and expert service provider vouchers for representation-related work performed are recorded, processed and paid.