

United States District Court
For the District of Minnesota
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 Minnesota adopt this Plan, as approved by the circuit, for furnishing representation in federal court for any person financially unable to obtain adequate representation.

II. Statement of Policy

A. Objectives of the CJA Plan

1. to meet 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, cost-effective, and protect the independence of the defense function so that the rights of individual defendants are safeguarded and enforced; and
3. to satisfy 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 Defender for the District of Minnesota (“Federal Defender”), and private attorneys appointed under the CJA must comply with *Guide*, Vol. 7A, approved by the Judicial Conference of the United States, and with this Plan.

2. The court will ensure that a current copy of the 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"). In addition, a copy of the Plan will be made available on the website of the Federal Defender.

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 and attorneys from the Office of the Federal Defender.

C. CJA Panel Administrator

"CJA Panel Administrator" is the person designated by the Federal Defender to assist with the administration of the CJA Panel.

IV. Determination of Eligibility for CJA Representation

A. Subject-Matter Eligibility

1. Mandatory Appointment of Counsel

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 agreed to by 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, unless such a modification is agreed to by the person on supervision;
- g. is subject to a hearing regarding his or her mental condition 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 otherwise 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 Appointment of Counsel

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 that 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 or 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 he or she is the target of a grand-jury or other criminal investigation;
- f. is proposed by the United States attorney for participation in a pretrial diversion program;
- g. is held for international extradition under 18 U.S.C. chapter 209; or
- h. is seeking modification of a condition of supervised release or probation, or a reduction in the term of supervision.

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. Conducting the Financial-Eligibility Determination

a. Duties of Law Enforcement

(i) Upon arrest, federal law enforcement officials must promptly notify the appropriate court personnel, who in turn will notify the Federal 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 where the defendant

has not retained counsel, the United States Attorney must notify appropriate court personnel, who will in turn notify the Federal Defender.

(ii) Upon issuance of a target letter, and where the individual has not retained counsel, the United States Attorney's Office must promptly notify the Federal Defender. If the United States Attorney's Office is aware of an actual or potential conflict of interest between the target and the Federal Defender, they must advise the Federal Defender's Office of that conflict so that appropriate counsel can be appointed.

(iii) If a subpoenaed witness who is not represented and who may be financially eligible has Fifth Amendment concerns that give rise to eligibility for the appointment of counsel, the United States Attorney's Office must notify the Federal Defender promptly.

(iv) 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 Defender

(i) In cases in which the Federal Defender may be appointed, the office will immediately investigate to determine whether an actual or potential conflict of interest exists. In the event of an actual or potential conflict, the Federal Defender will promptly facilitate the timely appointment of CJA Panel counsel.

(ii) When practicable, the Federal Defender will discuss with the person who indicates that he or she is not financially able to secure representation the right to appointed counsel. If appointment of counsel seems likely, the Federal Defender's Office may either gather and evaluate the needed financial information itself, and then submit a Motion for Appointment of Counsel to the

magistrate judge on criminal duty, or arrange to have the person promptly presented before a magistrate judge for determination of financial eligibility and appointment of counsel.

d. Duties of Pretrial Services Office

(i) Prior to conducting any interview, Pretrial Services must advise any defendant of his or her right to have counsel present during the interview. If the defendant chooses to have counsel present for the interview, Pretrial Services will communicate that request to the Federal Defender as soon as possible and will not interview the defendant until counsel is provided.

(ii) When counsel has been previously appointed or retained on the current criminal matter, 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.

(iii) When the person preparing for initial appearance is a juvenile, the pretrial services officer must contact the Federal Defender prior to conducting an interview and arrange for counsel to be present during the interview.

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 or a representative of the Federal Defender must advise the person that he or she has a right to be represented by counsel throughout the case and that, if 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 primarily a judicial function to be performed by the court after making appropriate inquiries concerning the person's financial eligibility. Pretrial Services Offices are also designated to obtain or verify

information relevant to the financial-eligibility determination. In some instances, such as with a person subject to a grand-jury subpoena or a target letter, the Federal Defender may screen the person for financial eligibility and communicate the Federal Defender's conclusion about whether appointment is appropriate to the court.

- 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, the encumbrance or seizure of any assets, and the likely cost of retained counsel given the nature of the charges.
- d. The initial determination of eligibility must be made without regard to the financial ability of the person's family to retain counsel.
- 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 can be reflected on a financial eligibility affidavit (Form CJA 23), provided in the bond report prepared by Pretrial Services, collected by the Federal Defender during screening, or gathered during questioning of the defendant at the initial appearance.
- 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 in accordance with the general provisions set forth in 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 he or she is taken into custody;
2. when he or she appears before a magistrate judge or district judge;
3. when he or she is formally charged or notified of charges if formal charges are sealed; or
4. when a magistrate judge or district judge otherwise considers appointment of counsel appropriate under the CJA and related statutes.

B. 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 Defender and Private Counsel

This Plan provides for representational services by the Federal Defender and for the appointment and compensation of private counsel from a CJA Panel list maintained by the Federal Defender.

B. Administration

Administration of the CJA Panel, as set forth in this Plan, is hereby delegated and assigned to the Federal Defender.

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 uniquely complex or extremely difficult. In addition, a second attorney may be appointed through the court's Second Chair Program.

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 set forth in section XIII of this Plan.

VII. Federal Defender

A. Establishment

The Office of the Federal Defender for the District of Minnesota is established in this district under the CJA and is responsible for rendering defense services on appointment throughout this district.

B. Standards

The Federal Defender 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.

C. Workload

The Federal Defender will continually monitor the workload of his or her staff to ensure high-quality representation for all clients.

D. Professional Conduct

The Federal Defender's Office must conform to the highest standards of professional conduct, including but not limited to the Minnesota Rules of Professional Conduct; American Bar Association's Model

Rules and Model Code of Professional Conduct; and the Code of Conduct for Federal Public Defender Employees.

E. Private Practice of Law

Neither the Federal Defender nor any Federal Defender employee may engage in the private practice of law except as authorized by the Code of Conduct.

F. Supervision of Federal Defender Organization

The Federal Defender will be responsible for the supervision and management of the Federal Defender's Office. Accordingly, the Federal Defender will be appointed in all cases assigned to that organization for subsequent assignment to staff attorneys at the discretion of the Federal Defender.

G. Training

The Federal Defender will assess the training needs of Federal Defender employees and provide training opportunities and resources. In addition, in coordination with the CJA Panel Attorney District Representative, the Federal Defender will assess the training needs of the district's Panel attorneys and provide training opportunities and other educational resources on an ongoing basis.

VIII. CJA Panel of Private Attorneys: Establishment and Oversight

A. Duties Regarding the Panel

1. The Federal Defender

The Federal Defender will be responsible for the daily oversight of the Panel, as set forth in this Plan. The Federal Defender will be assisted in the administration of the Panel by the CJA Panel Administrator, a staff person chosen and supervised by the Federal Defender.

2. The PADR

The CJA Panel Attorney District Representative ("PADR") is a member of the district's CJA Panel selected by the Federal

Defender with agreement from the Chief Judge. The PADR will serve for a term of three years, renewable at the discretion of the Federal Defender. The PADR will assist the Federal Defender with periodic revisions to the makeup of the Panel, will serve as the district's representative at national programs put on by Defender Services, and will assist with other Panel work as deemed appropriate by the Federal Defender.

3. The CJA Panel Committee

A CJA Panel Committee will be established by the Federal Defender in consultation with the court. The Federal Defender and the PADR will select four Panel members who reflect the racial, ethnic, gender, age, and geographic diversity of the district. These four individuals and the PADR will comprise the CJA Panel Committee. Duties of the Committee include assisting with the revision of the Panel, participating in disciplinary proceedings related to Panel members, and engaging in the voucher-cut review process, as provided in paragraph XI.C of this Plan.

B. 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 hereby recognized.
2. The District Court will periodically approve changes to the makeup of the CJA Panel, including the addition or removal of attorneys, after receiving recommendations from the Federal Defender and the CJA Panel Committee.
3. The Federal Defender will undertake a full revision of the Panel at least every three years.

C. Size of CJA Panel

1. The size of the CJA Panel will be determined by the Federal Defender with consultation from the CJA Panel Committee 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 receive an adequate number of appointments to maintain a high level of proficiency in federal criminal defense work, enabling them to provide quality representation consistent with the best practices of the legal profession and commensurate with the services of privately retained counsel. In addition, the CJA Panel should include attorneys with a variety of practice experiences and areas of expertise, in light of the increasingly complex nature of federal criminal cases.

D. Qualifications and Membership on the CJA Panel

1. Application

Application forms for membership on the CJA Panel are available from the Federal Defender. All applicants seeking to join the Panel must submit the appropriate forms and supporting documentation by the deadlines established by the Federal Defender.

2. Eligibility

- a. Applicants for the CJA Panel must be members in good standing of the federal bar of this district and the Eighth Circuit Court of Appeals.
- b. Applicants must possess strong litigation skills and demonstrate proficiency with the federal sentencing guidelines and applicable statutes, federal sentencing procedures, the Bail Reform Act, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence.
- c. Applicants must have significant experience representing persons charged with serious criminal offenses and demonstrate a commitment to indigent defense.
- d. Applicants must demonstrate that they participate in ongoing training opportunities, including those regularly offered to Panel members and applicants by the Federal Defender.

- e. Applicants who do not possess the experience set forth above but believe they have other equivalent experience are encouraged to apply and set forth in writing the details of that experience for the CJA Panel Committee's consideration.

3. Appointment to CJA Panel

The CJA Panel Committee and the Federal Defender will review the applications of attorneys seeking to join the Panel and existing Panel members seeking to remain on the Panel. After considering the recommendations of the Federal Defender and the CJA Panel Committee, the judges of the District Court will appoint or reappoint attorneys to the CJA Panel.

4. Terms of CJA Panel Members

Members of the CJA Panel serve at the discretion of the court. There is no limitation on how long an attorney can remain on the Panel, although even Panel members in good standing may face removal if the Panel has become too large to serve the goals set forth above.

5. Reappointment of CJA Panel Members

- a. The Federal Defender will notify CJA Panel members of the need to apply for reappointment each time the Panel is being revised.
- b. A member of the CJA Panel who wishes to be considered for reappointment must submit the required application and supporting materials on the schedule set forth by the Federal Defender
- c. The Federal Defender may seek input from judges, former clients, and other attorneys concerning the quality of representation provided by an applicant seeking reappointment. The Federal Defender will provide that information to the CJA Panel Committee, in addition to sharing the Federal Defender's own observations about the quality of an applicant's work.

- d. The CJA Panel Committee will also 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 qualifications of CJA Panel members as set forth in this Plan.

6. Removal, Disciplinary Review, and Complaints

a. Mandatory Removal

Any member of the CJA Panel who is suspended or disbarred from the practice of law by a 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. Periodic Removal

During the course of the term, members of the CJA Panel might accept full-time employment that conflicts with their ability to serve on the Panel, retire from the practice of law, become incapacitated, die, or seek to resign from the Panel. In such cases, the Federal Defender may seek to have the court remove such members from the Panel without waiting for the full Panel revision.

- c. The Federal Defender will conduct a disciplinary review of any 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.

d. Complaints

(i) Initiation

A concern or complaint about a Panel member may be initiated by a judge, another Panel member, a criminal

defendant, or a family member of a defendant, or by a member of the Federal Defender's Office.

The Federal Defender will consider the complaint and consult with the Panel member regarding the issues raised. The Federal Defender will also consult with the person who raised the concern. Following this review, the Federal Defender will determine whether further investigation is necessary.

(ii) Notice and Response

If the Federal Defender determines that a formal investigation is appropriate, the Federal Defender will notify the Panel member of the specific allegations. The Panel member will have the opportunity to defend against the allegations in person and in writing.

(iii) Protective Action

While a complaint is being investigated, either formally or informally, the Federal Defender may temporarily remove the Panel member from any pending case and from active participation on the Panel, and may take any other protective action that is in the best interest of the client or the administration of this Plan.

(iv) Dismissal or Remedial Action

After investigation, the Federal Defender may dismiss the complaint or implement appropriate remedial action. Such remedial action may include (1) recommending to the court that the attorney be removed from the Panel; (2) suspending assignments for a set period of time; (3) limiting the attorney's participation to particular types of cases; and (4) directing the attorney to complete specific training requirements before receiving further Panel appointments.

(v) Review of Remedial Action

If a Panel member is subjected to the above-described remedial action (excluding removal from the Panel) and disagrees with that resolution, he or she may bring the issue to the CJA Panel Committee for further review. The decision of the Panel Committee is final as to the action to be taken. However, if the recommended action is for removal from the Panel, the court must make the final decision.

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

E. Recruiting New Attorneys to the Panel

Including Panel members from diverse backgrounds broadens the perspective attorneys bring to their role as advocates. Therefore, it is important to affirmatively engage in efforts to increase the diversity of the Panel. Efforts should be made to ensure that the Panel reflects the racial, ethnic, gender, age, and geographic diversity of the District of Minnesota. Diversity in practice, experience level, and other areas is also important and should be considered. Direct and indirect methods should be utilized to recruit Panel members who will continue to improve the quality of representation provided pursuant to the Criminal Justice Act.

IX. CJA Panel Attorney Appointment in Non-Capital Cases

A. Appointment List

The Federal Defender and the Clerk of Court will maintain a current list of all attorneys included on the CJA Panel, with current office addresses, email addresses, and telephone numbers.

B. Appointment Procedures

1. The Federal Defender is responsible for overseeing the assignment of cases to Panel attorneys. The Federal Defender will maintain a record of Panel attorney appointments and data

reflecting the apportionment of cases between attorneys from the Federal Defender's Office and Panel attorneys.

2. The Federal Defender will assign cases based upon a variety of factors, including the complexity of the case and the presence of unique issues requiring specialized expertise. The Federal Defender will endeavor to assign cases equally among members of the Panel, though the unique needs of an individual case or client may outweigh that consideration.
3. Under special circumstances the court may appoint, and the Federal Defender may assign, a member of the bar who is not a member of the CJA Panel. Such special circumstances include cases in which the appointment of a particular attorney is in the interests of justice, judicial economy, or continuity of representation, or for any other compelling reason. The attorney should generally possess the qualities required for admission to the Panel, described in paragraph VIII.D above.
4. Unless impracticable, a CJA Panel attorney must be available to represent a defendant at the first hearing after the initial appearance.

X. 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.
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 and Code of Professional Conduct and the Minnesota Rules of Professional Responsibility.
3. CJA Panel members must notify the Federal Defender within 30 days 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 or 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. It is also imperative that Panel members develop and maintain competency in areas involving technology, including electronic discovery and the use of emerging technologies in criminal investigations.
2. Attorneys on the CJA Panel are expected to attend trainings sponsored by the Federal Defender and to review the daily case-law updates provided by the Federal Defender. This requirement includes participating in training focused on developing and improving competence in technology and electronic discovery.
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. Failure to comply with these training and legal-education requirements may be grounds for removal from the CJA Panel.

C. Facilities, Technology Requirements, and Outside Services

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 document 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

1. Termination of Representation

Once counsel is appointed under the CJA, counsel will continue the representation until the matter is resolved; until substitute counsel has filed a notice of appearance; until an order is entered allowing or requiring the person represented to proceed pro se; or until the appointment is terminated by court order.

2. Representation on Appeal

While there are benefits to continuity of representation, it is important to recognize that it might not be in the best interests of the defendant for trial counsel to serve as appellate counsel. Trial counsel may lack the required skills and experience to handle an appeal. Upon request by trial counsel, the Federal Defender will make every effort to assist trial counsel in identifying potential substitute appellate counsel. Ultimately, the Eighth Circuit Court of Appeals will decide whether substitute counsel will be appointed for the appeal. Regardless of whether trial counsel will represent the defendant on appeal, trial counsel *must* timely file the Notice of Appeal if instructed to do so by the defendant.

E. Miscellaneous

1. Case Budgeting

In non-capital cases of unusual complexity that are likely to become extraordinary in terms of cost, the court may require appointed counsel to develop a case budget consistent with *Guide*, Vol. 7A, Ch. 2, §§ 230.26.10–20.

2. No 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 Eligibility

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 must advise the court.

XI. 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 tasks.

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 Panel Administrator will review the claim for mathematical and technical accuracy and, if correct, will forward it to the Federal Defender. The Federal Defender will review the voucher for substance, conformity with *Guide*, Vol. 7A, and completeness. If necessary, the Federal Defender may return the voucher to the Panel attorney for correction, clarification or the inclusion of additional information. Once the Federal Defender's review of the voucher is complete, it be will forwarded to the presiding judge for consideration and action.
4. Absent extraordinary circumstances, the court should act on CJA compensation claims within 30 days of submission. Vouchers should not be delayed or reduced for the purpose of diminishing Defender Services program costs in response to adverse financial circumstances.
5. If considering reduction of a CJA voucher for other than mathematical reasons, the court should refer the voucher back to the Federal Defender for further review.
6. The Federal Defender must then notify counsel that the court is considering a reduction and provide counsel with the opportunity to submit additional information in support of the voucher.
7. After consideration of the additional information provided by counsel, and another review of the voucher, the Federal Defender must make a recommendation to the court regarding the questioned voucher.
8. The decision to pay a voucher in full or reduce it is solely the court's decision. The court is free to accept, reject, or modify any recommendation.

C. Independent Review Process for Voucher Cuts

1. The Judicial Conference adopted a policy, contained in § 230.33.40 of the CJA Guidelines, providing for independent review for panel attorneys who wish to challenge a voucher that has been reduced. This review is intended to provide recourse to an attorney after the presiding judge has authorized payment for less than the amount claimed.

2. In the normal course of voucher processing, after the court completes review of a voucher, the court sends the voucher back to the Federal Defender. If the court does not authorize full payment, the Federal Defender must notify the Panel member within five days. The Panel member may choose to accept the reduction and the Federal Defender will certify the voucher for payment. Alternatively, the Panel member may request an independent review of the voucher and the reduction. This independent review will be performed by the CJA Panel Committee, with input from the Federal Defender.
3. The CJA Panel Committee will consider the court's concerns with the voucher and will also use the CJA Panel Committee's own expertise to review a fellow Panel member's work and the time claimed for that work. After this review process is complete, the CJA Panel Committee must make written recommendations to the court regarding payment of the voucher.
4. The final decision whether to pay a voucher in full or in part rests solely with the Judge.

XII. 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.

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 set forth in *Guide*, Vol. 7A, Ch. 3.

XIII. 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.

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, the court should utilize the expert services available through the Administrative Office of the U.S. Courts (AO), Defender Services Death Penalty Resource Council projects (“Resource Council projects”), which include: (1) Federal Death Penalty Resource Council and Capital Resource Council Projects (for federal capital trials), (2) Federal Capital Appellate Resource Council 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 Defender should promptly notify and consult with the appropriate Resource Council 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. If a judge declines to follow those recommendations, he or she should 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

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 Defender, who will consult with Federal Death Penalty Resource Counsel to recommend qualified counsel.
- e. In appointing counsel in capital cases, judges should consider and give due weight to the recommendations made by federal defenders and resource counsel. If a judge declines to follow those recommendations, he or she should articulate reasons for not doing so.
- f. To effectuate the intent of 18 U.S.C. § 3005 that the Federal Defender’s recommendation be provided to the court, the judge should ensure the Federal 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 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 Defender, who will consult with Federal Capital Appellate Resource Counsel to recommend qualified counsel.

2. In appointing appellate counsel in capital cases, judges should consider and give due weight to the recommendations made by federal defenders and resource counsel. If a judge declines to follow those recommendations, he or she should 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 Supreme Court of the United States.
4. When appointing counsel in a capital § 2255 matter, the court should consider the recommendation of the Federal Defender, who will consult with the Federal Capital Habeas § 2255 Project.
5. In appointing post-conviction counsel in capital cases, judges should consider and give due weight to the recommendations made by federal defenders and resource counsel. If a judge declines to follow those recommendations, he or she should 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.
8. Counsel in § 2255 cases should have distinguished prior experience in the area of federal post-conviction proceedings and in capital post-conviction proceedings.
9. When possible, post-conviction counsel should have distinguished prior experience in capital § 2255 representations.

10. 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.
 11. 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 Defender, who will consult with the National or Regional Habeas Assistance and Training Counsel projects.
 4. In appointing counsel in a capital § 2254 matter, judges should consider and give due weight to the recommendations made by federal defenders and resource counsel. If a judge declines to follow those recommendations, he or she should 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.

XIV. Effective Date

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

John R. Tunheim

John R. Tunheim
CHIEF JUDGE, DISTRICT COURT

1-10-20

DATE

United States Courts
Judicial Council of the Eighth Circuit
Thomas F. Eagleton United States Courthouse
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St. Louis, Missouri 63102-1116

Millie B. Adams
Circuit Executive

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EIGHTH CIRCUIT JUDICIAL COUNCIL

ORDER

I hereby certify that the Eighth Circuit Judicial Council has approved the amended Criminal Justice Act Plan for the District of Minnesota which was adopted by the court on January 10, 2020.



Millie B. Adams
Circuit Executive

St. Louis, Missouri
February 18, 2020

cc: Judicial Council Members
Chief Judge John R. Tunheim
Kate M. Fogarty, Clerk of Court
Katherian D. Roe, Federal Public Defender
Administrative Office

Approval was given by the Defender Services Committee (CJA).

JCO 3101