

**United States District Court
For the Western District of New York
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 Western District of New York adopt this Plan, as approved by the circuit, for furnishing representation in federal court for any person financially unable to obtain adequate representation in accordance 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](#)), *Guide*, Vol. 7A, and the Second Circuit CJA Policy and Procedure Manual (“Second Circuit Manual”) 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 defender organization, 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, with the Second Circuit Manual, 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 Defender, and staff attorneys of the federal public defender organization.

C. CJA Administrator

"CJA Administrator" is a person designated by the Federal Public Defender 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 expressly waived by the probationer;
- 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 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 charged with civil or criminal contempt and faces loss of liberty;
- l. 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;
- m. has been advised by the United States attorney or a law enforcement officer that he or she is the target of a grand jury investigation;
- n. is proposed by the United States Attorney for processing under a pretrial diversion program; or
- o. is held for international extradition under [18 U.S.C. Chapter 209](#);
- p. is entitled to appointment of counsel under the Sixth Amendment to the Constitution; or
- q. 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; or
- b. is seeking relief under 28 U.S.C. §§ 2241, 2254 or 2255 other than to set aside or vacate a death sentence.

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. 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\(g\)](#).

B. Financial Eligibility

1. Presentation of Accused for Financial Eligibility Determination
 - a. Duties of Law Enforcement

- (i) Upon arrest, where the defendant has not retained counsel, federal law enforcement officials must promptly notify, telephonically or electronically, the appropriate court personnel, who in turn will notify the Federal Public Defender of the arrest of an individual in connection with a federal criminal charge.
- (ii) Employees of law enforcement agencies shall 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 or criminal complaint, where the defendant has not retained, the United States Attorney or its delegate will promptly notify, telephonically or electronically, appropriate court personnel, who in turn will notify the federal public defender. The government shall promptly supply the court a conflict list, identifying all attorneys who have a conflict with the defendant(s) and are therefore disqualified for assignment.
- (ii) Upon issuance of a target letter, and where the individual has not retained or waived counsel, the United States Attorney or its delegate must promptly notify, telephonically or electronically, the appropriate court personnel, who in turn will notify the Federal Public Defender, unless the United States Attorney's Office is aware of an actual or potential conflict with the target and the Federal Public Defender, in which case they must promptly notify the court.
- (iii) Employees of the United States Attorney's Office shall 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's Office

- (i) When practicable, the Federal Public 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 and consistent with the agreement between the federal public defender and the United States Probation Office, the pretrial services officer should not conduct the pretrial service interview of a financially eligible defendant until counsel has been appointed, unless 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.ⁱ

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 in accordance with the general provisions set forth in this Plan.
- i. In making a factual determination of financial eligibility, pro bono service is not to be considered by a judge.

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 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 and consistent with the agreement between the Federal Public Defender and the United States Probation Office, unless 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.

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 and Private Counsel

This Plan provides for representational services by the Federal Public Defender's Office and for the appointment and compensation of private counsel from a CJA Panel list maintained by the Federal Public Defender in cases authorized under the CJA and related statutes.

B. Administration

Administration of the CJA Panel, as set forth in this Plan, is hereby delegated and assigned to the federal public 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 appropriate.

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. §§ 2241, 2254 or 2255, are set forth in [section XV of this Plan](#).

VII. Federal Public Defender's Office

A. Establishment

The Federal Public Defender's Office for the Western District of New York 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's Office 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's office will continually monitor the workloads of its staff to ensure high quality representation for all clients.

D. Professional Conduct

The Federal Public Defender's Office must conform to the highest standards of professional conduct.

E. Private Practice of Law

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

F. Supervision of Defender Organization

The Federal Public Defender will be responsible for the supervision and management of the Federal Public Defender's Office.

G. Training

The Federal Public Defender will assess the training needs of Federal Public Defender staff and, in coordination with the CJA Panel Attorney District Representative,¹ 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

1. A CJA Panel Committee ("Panel Committee") will be established by the court, in consultation with the Federal Public Defender. The Panel Committee will consist of two judges (one from Rochester and one from Buffalo), four criminal defense attorneys who practice regularly in the district (two from Rochester and two from Buffalo), and the Federal Public Defender who serves as an ex officio member of the Panel Committee, and will also act as administrative coordinator. The district's CJA representative (PADR) shall be an ex officio member of the Panel Committee, unless he or she is one of the four private criminal defense attorney members.ⁱⁱ
2. The Federal Public Defender or its representative shall serve as an ex officio member of the Panel Committee.
3. The Panel Committee will meet at least once a year and at any time the court asks the Committee to consider an issue. Meetings can be conducted in person, by videoconference, or by telephone conference.

¹ 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, 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.

B. Duties of the Panel Committee

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.ⁱⁱⁱ

3. 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 the member's 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

4. Training

Assist the Federal Public Defender in providing training for the CJA Panel on substantive and procedural legal matters affecting representation of CJA clients.

5. 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. Review of CJA vouchers referred to the Panel Committee shall occur pursuant to the following procedure:

- a. the referring judge shall request voucher review by the Panel Committee in writing—either by letter or memorandum—with notice to the attorney whose voucher is under review,

- b. the Panel Committee shall notify the attorney whose voucher is under review of his or her opportunity to submit a written response to the court's referring letter or memorandum,
- c. the Panel Committee may, but is not required to allow the attorney an opportunity for a personal interview to discuss the voucher and issues raised in the court's referring letter or memorandum,
- d. the Panel Committee may conduct such additional investigation as it deems appropriate, and may seek input from third-parties, if it deems appropriate,
- e. the Panel Committee shall issue a written report and recommendation to the referring judge, with a copy to the attorney whose voucher is under review, pursuant to such schedule as is set by the referring judge, and
- f. none of the writings or submissions relating to such voucher review, including the court's referring letter or memorandum, shall be filed on the ECF System, but shall be maintained by the court and by the Panel Committee in hard copy, for a period of at least three years following final approval or disapproval of the CJA voucher under review.

See also Section XIII.B.6

IX. Establishment of a CJA Panel

A. Reapplication to the CJA Panel

- 1. With the adoption of this revised Criminal Justice Act Plan for the Western District of New York, any attorney wishing to be appointed to the Probationary, Trial or Emeritus Panels, including all attorneys currently serving on such panels, must submit an application for appointment to the appropriate panel. For one year after the adoption of this revised Plan, the court may make assignments to any attorney on the previous Trial Panel.
- 2. The Panel Committee will approve attorneys for membership on the CJA Trial and Probationary Panels, consistent with the eligibility criteria stated in subsection C below.

B. Size of CJA Panel

1. The size of the CJA Trial Panel will be determined by the Panel Committee on an annual basis, 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's website, and the WDNY website. Applications are collected annually until September 30, and are thereafter reviewed by the Panel Committee.

2. Equal Opportunity

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

3. Eligibility

- a. All applicants must demonstrate a commitment to provide high quality representation to those individuals eligible for their services, commensurate with those services rendered when counsel is privately retained. *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.").
- b. Each applicant must certify that he or she has read and can demonstrate knowledge of the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, the Federal and Second Circuit Rules of Appellate Procedure, the United States Sentencing Guidelines, the Bail Reform Act of 1984, the Local Rules of Criminal Procedure and standing Orders, the Guidelines for the Administration of the Criminal Justice Act, the Rules of Civility, and this CJA Plan.

- c. 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.
- d. Each applicant should have also tried at least two felony cases to verdict in either state or federal court. Alternatively, an applicant must have appeared as defense counsel of record in at least two federal felony cases from initial appearance or arraignment through sentencing and have other significant trial experience as determined by the Panel Committee.
- e. Unless specifically permitted by the Court, applicants shall have their principal place of business within the Western District of New York.^{iv}

4. Appointment to CJA Trial Panel

After considering the recommendations of the Panel Committee, the chief judge will appoint attorneys to the CJA Trial 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 XV of this Plan](#).

5. Probationary Panel

In the Panel Committee's discretion, it may be recommended to the Chief Judge that applicants with limited trial or federal criminal practice experience be accepted to the Trial Panel and placed on probation through completion of the first three cases assigned to them. During their first year, the Probationary Panel member shall attend all training programs presented by the Federal Public Defender's Office, except for good cause shown, and shall participate in the mentoring program outlined in section XIV of this Plan. Probationary Panel members will be eligible for the regular assignment of cases unless the judge requesting the assignment indicates that the matter would not be appropriate for assignment to a Probationary Panel member. The Committee shall be notified by the Panel member upon completion of his/her third probationary assignment. After consultation with the assigned mentor, the Committee will review and recommend to the court either elevation to non-probationary status, a continuation of probation for a specific length of time, or removal from the Panel.

6. Emeritus Panel

The Committee will also recommend to the Court a list of highly experienced attorneys who are willing to serve as CJA counsel on cases deemed appropriate to supplement the depth of the Panel. The Emeritus Panel will be comprised of attorneys who are not part of the regular rotation of CJA appointments, but who are willing to serve the court on cases requiring specific experience and expertise. Emeritus attorneys must be admitted to practice before the Court, and be in good standing. Emeritus attorneys must demonstrate proficiency equivalent to the annual training requirements of the regular CJA panel attorneys.

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 Panel Committee will conduct an automatic disciplinary review of any CJA panel member against whom any licensing authority, grievance committee, or administrative body has issued public discipline, or when a court has issued a sanction against such attorney or held such attorney in contempt.

c. Complaints

(i) Initiation

A complaint against a panel member may be initiated by the Panel Committee, a judge, another panel member, a defendant, or a member of the federal defender's 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 Panel Committee, which will determine whether further investigation is necessary. If the complaint was initiated by a judge, and the Panel Committee believes that no further investigation is necessary, the Panel Committee will report to the judge who initiated the complaint, and explain its recommendation.

(ii) Notice

When conducting an investigation, the Panel Committee will notify the panel member of the specific allegations.

(iii) Response

A panel member subject to investigation shall be given the opportunity to respond in writing and appear, if so directed, before the Panel Committee or its subcommittee.

(iv) Protective action

Prior to disposition of any complaint, the Panel Committee 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 Panel Committee 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 Panel Committee 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 will be immediately notified when any member of the CJA Panel is removed or suspended.

X. Mentoring Program

- A. If requested by the Panel Committee, a Trial or Emeritus Panel member shall serve as a mentor to Probationary Panel members. Attorneys of the Federal Public Defender's Office will also serve as mentors. A mentor will make himself/herself available to answer questions of and provide advice to a probationary Panel member regarding cases currently assigned to the probationer. The mentor may also allow the Probationary Panel member to observe and to participate in, if appropriate, all aspects of a federal

criminal case, including client conferences, decisions concerning defense strategy, motion and trial preparation, and court appearances, including hearings and trials.

- B. Trial and Emeritus Panel members will be expected to agree to reasonable mentoring requests and endeavor to involve the Probationary Panel member as closely as possible in the substance of the representation. The Panel Committee shall establish standards for the administration of this program.

XI. CJA Panel Attorney Appointment in Non-Capital Cases

A. Appointment List

1. The federal defender will maintain a current list of all attorneys included on the CJA Trial and Probationary Panels, with current office addresses, email addresses, and telephone numbers. Prior to the beginning of each calendar year, the Panel Committee shall determine the size of the appointment list for the coming year. The Panel Committee shall endeavor to ensure that each year's appointment list includes a mixture of more experienced and less experienced attorneys. The Panel Committee will also ensure that membership on the annual appointment list shall be distributed among panel members as equally as possible.
2. All Probationary Panel members shall be included on each year's appointment list.

B. Appointment Procedures

1. The Federal Public Defender is responsible for overseeing the appointment of cases to panel attorneys. The Federal Public Defender will maintain a record of panel attorney appointments and, when appropriate, data reflecting the apportionment of appointments between attorneys from the federal public defender office and panel attorneys.
2. Appointment of cases to CJA panel members will ordinarily be made from the annual appointment list on a rotational basis. In a complex or otherwise difficult case, the Federal Public Defender or the court may appoint any attorney from the Trial Panel or the Emeritus Panel outside of the normal rotation to ensure that the defendant has sufficiently experienced counsel.
3. Under special circumstances the court may appoint a member of the bar, who is not on the Trial Panel or the Emeritus Panel, or who

is not on the annual appointment list. 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 set forth 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 Panel Committee.

XII. 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.
3. CJA panel members must notify within 30 days the chair of the Panel Committee 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, 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.
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 at least 6 continuing legal education hours relevant to federal criminal practice annually. This requirement can be met by attending one of the full-day federal practice programs offered by the Federal Public Defender. If the CJA panel member chooses to satisfy the continuing legal education requirement by attending a different program, the panel member must submit a letter to the Panel Committee setting forth details about the program and provide a copy of the program agenda.
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 Second 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. If trial counsel believes that continuity of counsel is not in the best interest of the client for purposes of appeal, CJA counsel shall timely seek substitution of counsel.^v

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 or

CJA counsel may seek permission of the court for the development of a case budget consistent with [Guide, Vol. 7A, Ch. 2, §§ 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.

XIII. Compensation of CJA Panel Attorneys

A. Policy of the Court Regarding Compensation

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.

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 Clerk of the Court or his/her designee will review the claim for mathematical and technical accuracy and for conformity with Guide, Vol. 7A, as well as the Second Circuit Manual, 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. The court shall not seek to reduce or justify a voucher reduction based on a view that there exists a pro bono component to CJA representation of criminal defendants.
6. The court, when contemplating reduction of a CJA voucher for other than mathematical reasons, may refer the voucher to the Panel Committee 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 Panel Committee for review and recommendation.

XIV. 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.^{vi}

B. Applications

1. 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.
2. CJA counsel may seek and/or the 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.

C. Compliance

Counsel must comply with Judicial Conference policies set forth in [Guide, Vol. 7A, Ch. 3](#), and the Second Circuit Manual.

XV. 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 set forth in 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 United States 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 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. 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 public defender organization or a CJA panel attorney or an attorney appointed pro hac vice. See [18 U.S.C. § 3006A\(a\)\(3\)](#).
7. 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.
8. 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.
9. 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](#).

10. All attorneys appointed in federal capital cases should consult regularly with the appropriate Resource Counsel projects.
11. 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 Defender Services Office, Legal and Policy Division Duty Attorney at 202-502-3030 or via email at ods_lpb@ao.uscourts.gov.

C. Appointment of Trial Counsel in Federal Death-Eligible Cases²

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, who will consult with Federal Death Penalty Resource Counsel to recommend qualified counsel. [In those districts without a federal public defender organization, the judge must, as required by 18 U.S.C. § 3005, consider the recommendation

² 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.

of the AO, Defender Services Office.] See [18 U.S.C. § 3005](#).

- e. To effectuate the intent of 18 U.S.C. § 3005 that the Federal Public Defender's recommendation be provided to the court, the judge should ensure the Federal Public Defender has been notified of the need to appoint capital-qualified counsel.
- f. 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 in conjunction with the Federal Death Penalty Resource Counsel and Capital Resource Counsel projects.
- g. Out-of-district counsel, including federal public 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.
- h. 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 set forth 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 set forth 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, who will consult

with Federal Capital Appellate Resource Counsel to recommend qualified counsel.

2. Counsel appointed to represent a death-sentenced federal appellant should include at least one attorney who did not represent the appellant at trial.
3. Each trial counsel who withdraws should be replaced with similarly qualified counsel to represent the defendant on appeal.
4. Out-of-district counsel, including federal public 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.
5. Appellate counsel, between them, should have distinguished prior experience in federal criminal appeals and capital appeals.
6. 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 \(d\)](#).
7. 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.
8. 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 defender, who will consult with the Federal Capital Habeas § 2255 Project.
5. Out-of-district counsel, including federal public 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.
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 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 Federal Public 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.]

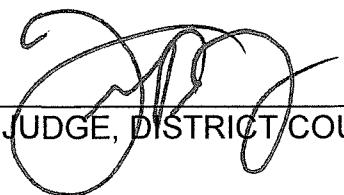
4. Out-of-district counsel, including federal public defender organization staff, who possess the requisite expertise, may be considered for appointment in capital § 2254 cases to achieve cost and other efficiencies, together with high quality representation.
5. In order for federal counsel to avail 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, preferably no later than the conclusion of the state direct appeal.
6. 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\(e\)](#).
7. Counsel in capital § 2254 cases should have distinguished prior experience in the area of federal post-conviction proceedings and in capital post-conviction proceedings.
8. When possible, capital § 2254 counsel should have distinguished prior experience in capital § 2254 representations.
9. 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.
10. 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.

XVI. Effective Date

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

ENTER FOR THE COURT ON March 15, 2018⁹.



CHIEF JUDGE, DISTRICT COURT

APPROVED BY THE JUDICIAL COUNCIL OF THE SECOND CIRCUIT ON
May 23, 2019 ~~2018~~.

CHIEF JUDGE, COURT OF APPEALS

Explanatory Comments from the Defender Services Committee

ⁱ **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. Accordingly, 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. **All comments are included in this draft of the CJA Plan for the benefit of the court, and its consideration of the plan, but will be removed from the text of any plan formally approved by the court.**

ⁱⁱ **Defender Services Committee Comment:** The composition of the CJA Panel Committee can be adjusted to reflect the degree of judicial, federal public defender, or panel attorney involvement that is desired by each district court. 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.

ⁱⁱⁱ **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.

^{iv} **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.

^v **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.](#))

^{vi} **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.

*SECOND JUDICIAL CIRCUIT OF THE UNITED STATES
UNITED STATES COURTHOUSE
40 FOLEY SQUARE-ROOM 2904
NEW YORK, NEW YORK 10007
(212) 857-8700 PHONE
(212) 857-8680 FACSIMILE*

**JUDICIAL COUNCIL
APPROVED**

MAY 24 2019

C/E

ROBERT KATZMANN
CHIEF JUDGE

KAREN GREVE MILTON
CIRCUIT EXECUTIVE

MEMORANDUM

May 23, 2019

To: Second Circuit Judicial Council

From: Karen Greve Milton, Circuit Executive 

Re: **Amendments to CJA Plan – Western District of New York**

The United States District Court for the Western District of New York requests that the Judicial Council approve amendments to the Districts CJA Plan.

Attached is an Executive Summary of Changes and a signed copy of the final CJA plan.

**Kindly return your ballot by email or fax to 212-857-8680, by Thursday, May 30, 2019.
Thank you.**

BALLOT

Judge: _____

_____ Yes, I approve the amendments to CJA Plan - WDNY

_____ No, I do not approve the amendments to CJA Plan - WDNY

_____ I request additional information and/or further discussion