

**APPENDIX A**

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FILED

MODEL PLAN FOR THE PROVISION OF APPOINTED COUNSEL FOR URBAN COURTS IN NEVADA

JUN 24 2008

May 22, 2008

Committee Note: The Model Plan has been recommended for Washoe Clark County as of its writing due to continuing discussion by rural courts of ADKT 411. The Committee does not recommend that a dual system of representation should be permitted in Nevada for Urban and Rural Courts but recognizes that some practical differences in implementation will be required in carrying out the intent of the order in ADKT 411.

BY DEPUTY CLERK

I. STATEMENT OF POLICY

A. Objectives

1. The objective of this Plan is to attain the ideal of equality before the law for all persons. Therefore, this Plan shall be administered so that those accused of crime, or otherwise eligible for services of appointed counsel, will not be deprived, because they are financially unable to pay for adequate representation, of any element of representation necessary to an adequate defense.
2. The further objective of this Plan is to implement the requirements set forth in the Order entered by the Supreme Court of Nevada on January 4, 2008 in ADKT 411: "In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases."

II. DEFINITIONS

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

B. "Appointed attorney" includes private attorneys, both contracted and hourly, Public Defenders and staff attorneys of the Public Defender offices.

III. PROVISION OF REPRESENTATION

A. Mandatory: Representation Shall be provided for any financially eligible person who:

1. is charged with a felony;
2. is charged with a misdemeanor in which the prosecution is seeking jail time (incarceration);

3. is alleged to have violated probation or other supervision and jail time a sentence of confinement may be imposed;
4. is a juvenile alleged to have committed an act of juvenile delinquency;
5. is subject to commitment pursuant to NRS 433A.310;
6. is seeking relief from a death sentence pursuant to NRS 34.724(1);
7. is in custody as a material witness;
8. is entitled to appointment of counsel under the Sixth Amendment to the U.S. Constitution or any provision of the Nevada Constitution, or when due process requires the appointment of counsel, or the judge is likely to impose jail time;
9. faces loss of liberty in a case and Nevada law requires the appointment of counsel;
10. faces loss of liberty for criminal contempt;
11. has received notice that a grand jury is considering charges against him/her and requests appointment of counsel.

B. Discretionary: Whenever a court determines that the interests of justice so require, representation may be provided for any financially eligible person who:

1. is charged with a misdemeanor, infraction or code violation for which a sentence of confinement is authorized;
2. is seeking post-conviction relief, other than from a death sentence, pursuant to NRS 34.724(1).
3. is charged with civil contempt who faces loss of liberty;
4. has been called as a witness before a grand jury, a court, or any agency 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 criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty;
5. faces any other case in which the interest of justice requires appointment of counsel
6. is party to a dependency case in which termination of rights is a possibility

### C. When Counsel Shall be Provided

Counsel shall be provided to eligible persons within 72 hours or as soon as feasible after their first appearance before a judge, when they are formally charged or notified of charges if formal charges are sealed, or when a Justice of the Peace, Municipal Judge or District Judge otherwise considers appointment of counsel appropriate.

D. Number and Qualifications of Counsel in Capital Cases

1. Number: Two lawyers must be appointed as soon as possible in all open murder cases which are reasonably believed to result in a capital charge.
2. Qualifications: Appointment of attorneys to represent defendants charged in capital cases shall comport with SCR 250 and ADKT 411.

E. Eligibility for Representation

1. Financial Eligibility: A person shall be deemed "indigent" who is unable, without substantial hardship to himself or his dependents, to obtain competent, qualified legal counsel on his or her own. "Substantial hardship" is presumptively determined to include all defendants who receive public assistance, such as Food Stamps, Temporary Assistance for Needy Families, Medicaid, Disability Insurance, reside in public housing, or earn less than 200 percent of the Federal Poverty Guideline. A defendant is presumed to have a substantial hardship if he or she is currently serving a sentence in a correctional institution or housed in a mental health facility or is a minor. Defendants not falling below the presumptive threshold will be subjected to a more rigorous screening process to determine if their particular circumstances, including seriousness of charges being faced, monthly expenses, and local private counsel rates, would result in a substantial hardship were they to seek to retain private counsel.
2. Screening for Eligibility: [The Pretrial Services Agency, Court Administrator or other administrative agency] shall conduct any screening for financial eligibility and provide a recommendation to the court with regard to eligibility of the defendant for the services of appointed counsel based upon the provisions set forth in subsection (1) above. Appointed Counsel may assist in providing information during the screening but shall not be asked to make a recommendation with regard to eligibility.
3. Partial Eligibility: If a court determines that a defendant is able to afford counsel but cannot be effectively represented due to inability to pay for appropriate services such as investigators, experts or other services, the court shall order reasonably necessary services be provided at no cost to the defendant, subject to the procedures

established in each jurisdiction for the approval and payment of fees and expenses.

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

5. Appointment of Counsel in Juvenile Matters: In Juvenile Delinquency matters filed with the court, the juvenile should be presumed to be indigent. The court may order the parents of the juvenile to reimburse the county for the reasonable attorney fees, whether Public Defender, contract, or appointed counsel (NRS 62E.300) based on ability to pay.

#### IV. APPOINTMENT OF THE PUBLIC DEFENDER

##### A. Determination of Conflict of Interest

The Public Defender shall, as soon as practicable, upon appointment, conduct a conflict check to determine whether any conflict of interest exists which would prevent representation of the defendant. If such a conflict is determined by the Public Defender to exist, such fact shall be brought to the attention of the court as soon as possible. In no instance, shall the Public Defender be appointed to represent co-defendants in a case.

##### B. Assignment of Attorneys

The determination of which attorney within the office of the Public Defender shall be assigned to any case rests solely within the discretion of the Public Defender.

##### C. Complaints by Clients

The Public Defender shall maintain a system for receipt and review of written complaints made by clients.

#### V. APPOINTMENT OF PRIVATE ATTORNEYS

##### A. Contract and Hourly Attorneys

###### 1. Contract Attorneys:

#### a. Compensation of Contract Attorneys

If a contract is employed for appointment of counsel, compensation may be based either on an hourly basis, a flat fee basis, or a combination of both. If the contract is based on a flat fee basis, the contract should consider the following factors:

1. The average overhead for criminal defense practitioners in the locality;
2. The number of assignments expected under the contract;
3. The hourly rate paid for all appointed counsel; and
4. The ability of the appointed attorney to comply with the Performance Standards for Appointed Counsel as adopted and amended by the Nevada Supreme Court.

#### 2. Categories of Assigned Counsel

Qualified Appointed counsel will be selected for appointments in the following areas:

[The [court/contract administrator/Appointed Counsel Administrator] may choose to create lists in specialty areas, e.g. Juvenile, Appellate, Misdemeanor, Life sentence/death-attorneys may be appointed to multiple lists]

#### 3. Assignment of Cases

Assignment of counsel to a courtroom or to a case may not be performed by the judiciary. The assignment shall be made in the following fashion:

a. Non-hourly Representations: In courts using contract attorneys who are

not paid hourly, in all cases which cannot be handled by the Public Defender or the Special Public Defender, an attorney will be assigned by

[e.g. the Appointed Counsel Administrator, the Contract Attorneys Administrator] except in cases carrying a penalty of life or when the [court/Appointed Counsel Administrator]

determines the complexity of the cases or the severity of the penalty are

such as to necessitate the appointment of an hourly attorney.

b. Hourly Representations: In all cases that have a possible penalty of life-time imprisonment or death, that cannot be handled by the Public Defender or Special Public Defender, counsel shall be selected from a list of qualified attorneys maintained by [e.g. Appointed Counsel Administrator]. Hourly compensation should be provided for work

directly related to the filing of any notice that a sentence of life imprisonment will be sought under NRS 207.010(b) (Habitual Offender statute).

#### B. Selection of Panel of Attorneys

1. Appointed Counsel Selection Committee: The [Court Administrator, Assigned Counsel Administrator, or other] shall establish a committee to review the qualifications of applicants for contract or hourly appointments, to review the list of attorneys from which appointments are made in hourly cases, to determine which attorneys shall be selected for appointments in the district and to [other duties].

2. Composition of Selection Committee: The committee shall be made up of [number] members. The committee will be composed of members from a variety of stakeholders concerned with the integrity of indigent criminal defense. No member of the committee should have a pecuniary interest in the outcome of the attorney selection process or be in any way legally or financially related to any attorney whose qualifications will be evaluated. Organizations may designate representatives from bar associations and groups, e.g. State Bar of Nevada, Nevada Attorneys for Criminal Justice, [Clark/Washoe] Bar Associations, National Bar Association, Asian Bar Association [other Associations]. Additionally, a designee of the Public Defender, Special Public Defender and the Federal Public Defender shall be members of the committee. Additionally, the committee will be free from any judicial or prosecutorial involvement.

3. Qualifications of Appointed Counsel: The Selection Committee shall determine the minimum qualifications for all Appointed Counsel and shall determine any additional qualifications required for cases of exceptional difficulty such as death penalty and sexual assault cases. Inquiries on the application should reflect those minimum qualifications.

4. Review of Applications and Continuing Eligibility: The Selection Committee shall meet at least once a year and shall solicit input from judges, and others familiar with the practice of criminal defense, shall review any complaints from clients and the history of participation in training of each applicant and each contract or hourly attorney receiving appointments to determine eligibility and continuing participation.

5. **Responsibility Cannot be Delegated:** While appointed counsel may receive assistance from associate attorneys, participants in a mentorship program, or other attorneys deemed qualified by the Selection Committee, in carrying out his/her responsibilities, appointed counsel cannot delegate responsibilities for representation to another attorney. All substantive court appearances must be made by an attorney who has been determined to be qualified by the Selection Committee.

6. **Complaints by Clients:** Complaints from clients, judges or the public about representation by appointed counsel shall be transmitted to [Appointed Counsel Administrator, Court Administrator, other] for consideration by the Selection Committee in evaluation of appointed counsel.

C. Payment of Fees and Expenses of Private Attorneys

[insert details of process of review of fees and expert/investigator expenses]

VI. MENTORSHIP AND TRAINING

A. Mentoring Programs: If the Selection Committee determines that the ends of justice will be served by selection of attorneys who do not possess the requisite experience as determined by the committee, a mentoring program should be established to insure that the inexperienced attorney will be provided supervision and mentoring from an experienced criminal defense attorney. In no instance shall an attorney who has not tried at least one felony trial be permitted to try a felony case without an experienced criminal defense attorney sitting as "second chair."  
[insert details here of a mentoring program]

B. Annual Training: An intensive training program shall be conducted once each year for all private attorneys who receive appointments to criminal cases. The program shall include training in bail and release, motions practice, search and seizure, evidentiary issues and trial practice, appeals and post-conviction practice. All contract and hourly appointed attorneys shall attend. Attorneys who are new members of the contract or hourly lists are required to attend in order to receive any further appointments.

C. Periodic Training: Periodic training events will be conducted throughout the year on issues of interest to appointed counsel.



D. Creation and Coordination of Training: a  
 be responsible for coordinating, scheduling and creating the training  
 events described above.

#### VII. DUTIES OF APPOINTED COUNSEL

A. Standards: The services to be rendered a person represented by  
 appointed counsel shall be commensurate with those rendered if counsel  
 were privately employed by the person. Representation shall be provided  
 in compliance with the Performance Standards for Representation of  
 Indigent Defendants adopted by the Supreme Court.

B. Professional Conduct: Attorneys appointed under this Plan shall  
 conform to the  
 highest standards of professional conduct, including but not limited to the  
 provisions of the Nevada Rules of Professional Conduct.

C. 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 appointment, unless  
 such payment is approved by order of the court.

D. Continuing Representation: Once counsel is appointed, counsel shall  
 continue representation until substitute counsel has filed a notice of  
 appearance; until an order has been entered allowing or requiring the  
 person represented to proceed *pro se*; or until the appointment is  
 terminated by court order. If appointed counsel is relieved, such counsel  
 must assist successor counsel in securing the file and other necessary  
 information to insure that all deadlines are met, including those applicable  
 to post-conviction matters.

#### VIII. APPOINTED COUNSEL ADMINISTRATOR

A. Selection

B. Duties



## JUDICIAL COUNCIL OF THE NINTH CIRCUIT

### MODEL PLAN FOR IMPLEMENTATION AND ADMINISTRATION OF THE CRIMINAL JUSTICE ACT

The Judicial Council of the Ninth Circuit has adopted this model plan in response to the 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act (Cardone Report). The Ad Hoc Committee was chaired by U.S. District Judge Kathleen Cardone and composed of federal judges, defenders, a panel attorney, an attorney from private practice, a law professor, and an assistant circuit executive to conduct a comprehensive review of the CJA's operation and administration. Its report includes a list of recommendations for improving administration of the system of public defense in federal courts, many of which are reflected herein.

The Circuit Model Plan is intended to provide guidance in the implementation and administration of the CJA, as required under 18 U.S.C. § 3006A(b), and reflects the policies of the Judicial Council and the Judicial Conference of the United States. It is substantially the same as the AO Model Plan but with enhanced panel management provisions that the Judicial Council encourages districts to adopt.

Ninth Circuit policy requires districts to review their plans every five years and to amend as needed to ensure compliance with the CJA and any revised Judicial Conference or Judicial Council policies. In developing a plan, districts should use the Circuit Model Plan as a template and are encouraged to enlist the Circuit CJA Unit to assist with plan review and revisions.

District CJA plans must be sent to the Circuit Executive for the Ninth Circuit for review and approval by the Judicial Council.

## OVERVIEW OF ENHANCED PANEL MANAGEMENT PROVISIONS

### Emphasis on an Independent Defense Function

To promote and protect the independence of the defense function, in keeping with the findings and recommendations of the Cardone Report, the Circuit Model Plan adds or expands upon the provisions of the AO Model Plan, as detailed below.

### Recruitment and Mentoring

Many districts are challenged in various ways when it comes to recruiting new CJA attorneys. To promote diversity and develop talent over the long term, districts should develop both a recruitment plan for generating interest in the CJA Panel, and a mentoring program that includes attorney compensation. Some districts are wary of compensating participants because of the prohibition against using CJA funds for “training,” but several options are available, as explained in Section VII.B. The Circuit CJA Unit is available to assist districts in developing these programs. (See Cardone Report Interim Recommendations 18 and 19.)

### Training and Technological Proficiency

With the prevalence and volume of electronic discovery in criminal cases, it is imperative that CJA Attorneys maintain technological proficiency and awareness of the resources available to them. It is no longer possible for attorneys to single-handedly review every document produced by the government, and it can be ineffective for attorneys not to use technology and service providers to assist in document review. The Model Plan addresses this in Section VIII.C.3 and recommends that districts develop specific technology standards for panel members. To keep pace with rapidly changing technology, such standards should be contained in a plan appendix rather than the plan itself. (See Interim Recommendation 21.)

### Substitution of Counsel for Appeal

The decision to continue representation should be left to the defendant after consulting with trial counsel about potential issues for appeal and the appellate qualifications of counsel. Districts should carefully consider this when developing and reviewing their plans. As addressed in Section X.E, districts can also consider designating a specialized panel for appeals, developing training standards for attorneys new to appeals, or devising an appellate mentoring program.

### CJA Supervisory Attorney

A CJA Supervisory Attorney can assist judges with the important administrative functions of panel management and voucher review, bringing consistency and expertise to the process. (See Sections VII.A.2 and XI.C.) The Judicial Council recommends that each district designate or have access to a CJA Supervisory Attorney, who may be located in a clerk’s office or local defender organization and may be shared among districts, to manage the selection,

appointment, training, retention, and removal of panel attorneys, and to conduct an initial review of vouchers and issue a payment recommendation to the presiding judge or his or her designee. (See Interim Recommendation 19.)

### **Delegating Voucher Review and Funding Authorizations**

As set forth in Sections XI.C and XI.F and supported by the May 4, 2018, Memorandum from Sheryl Walter, AO General Counsel, to Chief Ninth Circuit Judge Sidney R. Thomas, districts may delegate to nonjudicial officers (e.g., CJA administrators) the review and approval of voucher payments and funding requests for investigative, expert, or other services, so long as CJA attorneys are able to seek review of reductions or funding denials to a judge and the presiding judge retains ultimate review and approval authority.

### **Voucher Peer Review Committee**

The Judicial Council recommends, based on the recommendations of the Cardone Report, that districts designate a peer review committee comprised of federal defender organization members or experienced CJA attorneys to assist judges or their designees in reviewing vouchers for reasonableness. An option for creating a committee is included in Section VII.B.5. (See Cardone Report, pp. 121-123.)

### **Voucher Reductions**

Judicial Council policy, as reflected in Section XI, limits voucher reductions to mathematical errors; instances in which work billed was not compensable, undertaken, or completed; and instances in which the hours billed clearly exceed what was reasonably required to complete the task. Claims for compensation may not be reduced without affording counsel notice and an opportunity to be heard. (See Interim Recommendation 8.) Districts must have an independent review process for panel attorneys to challenge voucher reductions that includes review by the Chief District Judge or his or her designee. If the Chief District Judge is the presiding judge who reduced the voucher, counsel may seek review by the Chief Circuit Judge or his or her designee. (See Interim Recommendation 16 and Section XI.E.)

**UNITED STATES DISTRICT COURT  
FOR THE \_\_\_\_\_ DISTRICT OF \_\_\_\_\_  
CRIMINAL JUSTICE ACT PLAN**

**I. AUTHORITY**

The judges of the United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_ adopt this Plan, as approved by the Ninth Circuit, for furnishing representation in federal court for any person financially unable to obtain adequate representation as required by the Criminal Justice Act (CJA) of 1964, as amended, 18 U.S.C. § 3006A, and the Guidelines for Administering the CJA and Related Statutes, Volume 7A, Guide to Judiciary Policy (CJA Guidelines).

**II. STATEMENT OF POLICY**

**A. Objectives**

The objectives of this Plan are to attain the goal of equal justice under the law by providing all eligible persons with timely appointed counsel services that are consistent with the best practices of the legal profession, to ensure that services are cost-effective without compromising the quality of representation, to promote the independence of the defense function so that the rights of individual defendants are safeguarded and enforced, and to particularize the requirements of the CJA, the USA Patriot Improvement and Reauthorization Act of 2005 (recodified at 18 U.S.C. § 3599), CJA Guidelines, Ninth Circuit CJA Policies and Procedures, and Local Rules of the District of \_\_\_\_\_ in a way that meets the needs of this district.

This Plan must 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. Representational Services**

This Plan provides for representational services by the [insert name of Defender Organization] and for the appointment and compensation of private attorneys from an approved panel list ("CJA Panel") and other private attorneys in limited circumstances, in cases authorized under the CJA and related statutes.

**C. Panel Administration**

Administration of the CJA Panel, as set forth in this Plan, is hereby delegated and assigned to the [Defender Organization/Court].

**D. Compliance**

The Court, its clerk, the [Defender Organization], attorneys provided by a bar association or legal aid agency, private attorneys appointed under the CJA, federal law enforcement officers, the United States Attorney's Office, and the Pretrial Services Office must comply with the CJA Guidelines, approved by the Judicial Conference or its Committee on Defender Services, the Ninth Circuit's CJA Policies and Procedures, and with this Plan. The Court will ensure that a current copy of the CJA Plan is made available on the [Court's/Defender Organization's] website, and provided to counsel upon the attorney's designation as a member of the CJA Panel.

**III. DEFINITIONS**

- A. "Appointed Attorney"** is an attorney designated to represent a financially eligible person under the CJA and this Plan. Such attorneys include private attorneys, the Defender Organization and its staff attorneys, and attorneys provided by a bar association or legal aid agency.
- B. "CJA Administrator"** is a person employed by the [Defender Organization/Court] to perform tasks related to the administration of the CJA Panel.
- C. ["CJA Supervising Attorney"/ "CJA Resource Counsel"]** is an attorney employed by the [Defender Organization/Court] who [oversees the CJA Department and administration of panel management or voucher review.]

**Comment:** District plans should define roles of persons involved with CJA administration to whom a Court has delegated any level of voucher review or panel management responsibilities, including a CJA Supervising Attorney, CJA Resource Counsel, or CJA Administrator. For ease, the term "CJA Department" is used in this model plan to refer collectively to all such persons. The term "CJA Supervisory Attorney" is used throughout this model plan to refer to either a "CJA Supervising Attorney" or "CJA Resource Counsel," according to the title used by the district. A CJA Supervisory Attorney can be employed by the Defender Organization, the Court, or a combination of the two.

- D. "Panel Attorney District Representative" (PADR)** is a member of the district's CJA Panel who is selected by the Defender Organization, with approval from the Chief District Judge, to serve as a representative of the district's CJA Panel for the Defender Services CJA PADR program and local CJA committees.
- E. "Representation"** includes counsel, service providers (such as paralegals, investigators, or experts), litigation support vendors, and expenses.

#### IV. ELIGIBILITY FOR CJA REPRESENTATION

##### A. Subject-Matter Eligibility

1. Mandatory. Representation must be provided for any financially eligible person who:
  - a. is charged with a felony or with a Class A misdemeanor;
  - b. is a juvenile alleged to have committed an act of juvenile delinquency as defined in 18 U.S.C. § 5031;
  - c. is charged with a violation of probation, or faces a change of a term or condition of probation (unless the modification sought is favorable to the probationer and the government has not objected to the proposed change);
  - d. is under arrest, when appointed representation is required by law;
  - e. is entitled to appointed counsel in parole proceedings;
  - f. is charged with a violation of supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release;
  - g. is subject to a mental condition hearing under 18 U.S.C. chapter 313;
  - h. is in custody as a material witness;
  - i. is seeking to set aside or vacate a death sentence or when an evidentiary hearing is warranted in a non-capital proceeding under 28 U.S.C. § 2254 or § 2255;
  - j. is entitled to appointment of counsel in verification of consent proceedings in connection with a transfer of an offender to or from the United States for the execution of a penal sentence under 18 U.S.C. § 4109;
  - k. is entitled to appointment of counsel under the Sixth Amendment to the Constitution; or
  - l. faces loss of liberty in a case, and federal law requires the appointment of counsel.
  
2. Discretionary. Whenever a district judge or magistrate judge determines that the interests of justice so require, representation may be provided for any financially eligible person who:
  - a. is charged with a petty offense (Class B or C misdemeanor, or an infraction) for which a sentence to confinement is authorized;

- b. is seeking relief under 28 U.S.C. §§ 2241, 2254, or 2255 other than to set aside or vacate a death sentence, unless an evidentiary hearing is warranted (see above IV(A)(1)(i));
  - c. is charged with civil or criminal contempt and faces loss of liberty;
  - d. has been called as a witness before a grand jury, a court, the Congress, or a federal agency or commission which has the power to compel testimony, and there is reason to believe, either prior to or during testimony, that the witness could be subject to a criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty;
  - e. has been advised by the United States attorney or a law enforcement officer that they are the target of a grand jury investigation;
  - f. is proposed by the United States attorney for processing under a pretrial diversion program; or
  - g. is held for international extradition under 18 U.S.C. chapter 209.
3. Ancillary Matters. The Court has the discretion to appoint counsel 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 to:
- a. protect a constitutional right;
  - b. contribute in some significant way to the defense of the principal criminal charge;
  - c. aid in preparation for the trial or disposition of the principal criminal charge;
  - d. enforce the terms of a plea agreement in the principal criminal charge;
  - e. preserve the claim of the CIA 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 CIA client, which may be subject to a motion for return of property under Fed. R. Crim. P. 41(g), which property, if recovered by the client, may be considered for reimbursement under 18 U.S.C. § 3006A(f).



## B. Financial Eligibility

### 1. Presentation of Accused for Financial Eligibility Determination

- a. Duties of Federal Law Enforcement Officers
  - (1) For the purpose of ensuring that eligible persons have access to counsel as soon as practicable, federal law enforcement officials must promptly notify, telephonically or electronically, the appropriate court personnel of an arrest, unless the person has retained counsel. Court personnel will in turn notify the Defender Organization of the arrest.
  - (2) Employees of law enforcement agencies may 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
  - (1) Upon the return or unsealing of an indictment, the filing of a criminal complaint or information, and where the defendant has not retained counsel, the United States Attorney's Office will promptly notify, telephonically or electronically, appropriate court personnel, who in turn will notify the Defender Organization.
  - (2) Upon issuance of a target letter, and where the individual has not retained counsel, the United States Attorney's Office must promptly notify, telephonically or electronically, the appropriate court personnel, who in turn will notify the Defender Organization, unless the United States Attorney's Office is aware of an actual or potential conflict with the target and the Defender Organization, in which case they must promptly notify the Court.
  - (3) Employees of the United States Attorney's Office may 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 Defender Organization
  - (1) In cases in which the Defender Organization may be appointed, the office will immediately investigate and determine whether an actual or potential conflict exists and, if so, must promptly notify the [Court/CIA Administrator] to facilitate the timely appointment of other counsel.

(2) Whenever practicable, the Defender Organization will discuss with the person the right to appointed counsel, assist with completion of a financial affidavit (Form CJA 23), and arrange to have the matter promptly presented before a judicial officer of this Court to determine financial eligibility and counsel appointment.

d. Duties of Pretrial Services Office

(1) 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.

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

2. Eligibility Determination

a. In every case where 18 U.S.C. § 3006A(a) and related statutes authorize appointment of counsel, 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, the Court will appoint counsel to represent the person if he or she is financially unable to obtain counsel.

b. The completed financial eligibility affidavit (Form CJA 23) should reflect relevant information bearing on the person's financial eligibility for appointed counsel.

c. Determining eligibility for representation under the CJA is a judicial function performed by the Court after making appropriate inquiries concerning the person's financial eligibility. Other employees of the Court or the Defender Organization may be designated to obtain or verify the facts relevant to the financial eligibility determination if the Defender Organization is not available.

3. Standards

a. In determining whether a person is "financially unable to obtain counsel," the Court should consider the cost of providing the person and the person's dependents with life's necessities, the cost of securing pretrial release, asset encumbrance, and the

likely cost to retain counsel.

- b. The initial eligibility determination must be made without regard to the financial ability of the person's family to retain counsel unless the person's family indicates a willingness and ability to do so promptly.
- c. Any doubts about a person's eligibility should be resolved in the person's favor; erroneous determinations of eligibility may be corrected later.
- d. If at any time after appointment appointed counsel has reason to believe that a person is financially able to retain private counsel or make partial payment for the appointed representation, and the source of counsel's information is not protected as a privileged communication, counsel will advise the Court.
- e. If at any time after the appointment of counsel a judge finds that a person provided representation is financially able to retain private counsel or make partial payment for the appointed representation, the judge may terminate the counsel appointment or direct the defendant to pay available funds as provided in 18 U.S.C. § 3006A(f).
- f. If at any stage of the proceedings a judge finds that a person is no longer financially able to pay retained counsel, counsel will be appointed in accordance with the general provisions set forth in this Plan.
- g. If at any stage of the proceedings a judge finds that a pro se or privately represented person is not financially able to pay other representation costs, including investigative, expert, or other services, funding may be authorized for those costs in accordance with the general provisions set forth in this Plan.

#### **V. TIMELY APPOINTMENT OF COUNSEL**

- A. Eligible persons must receive appointed counsel as soon as feasible. This means as soon as possible after receiving a target letter, after being taken into custody, upon appearing before a judicial officer, when formally charged, when notified of charges if formal charges are sealed, or when a judicial officer otherwise determines appointed counsel is appropriate under the CJA or this Plan, whichever occurs earliest.
- B. When practicable, unless the right to counsel is waived or the defendant otherwise consents to a pretrial services interview without counsel, financially eligible persons will be provided appointed counsel prior to being interviewed by a pretrial services officer. [OPTION: The [Defender Organization/Court] will

establish a schedule of “on call” or “duty day” attorneys, who can be employees of the Defender Organization or CJA Attorneys, to advise persons who are in custody, or who otherwise may be entitled to counsel under the CJA, during the pretrial services interview process.]

**Comment:** District plans should consider including a deadline by which notice of appearance by retained counsel should be filed to ensure the defendant has representation and does not require appointed counsel.

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

**VI. [INSERT NAME OF DEFENDER ORGANIZATION]**

**A. Establishment**

The [insert name of Defender Organization] is established in this district under the CJA and is responsible for rendering defense services on appointment throughout this district.

**B. Staff Supervision and Case Workload**

The [Federal Public Defender/Community Defender] is responsible for supervising and managing the defender organization. Accordingly, the [Federal Public Defender/Community Defender] will be appointed in all cases assigned to that organization for subsequent assignment to staff attorneys at the [Federal Public Defender’s/Community Defender’s] discretion. The [Federal Public Defender/Community Defender] will continually monitor staff workloads to ensure high-quality representation for all clients.

**C. Standards and Professional Conduct**

The Defender Organization must provide high-quality representation consistent with the best practices of the legal profession. The Defender Organization must conform to the highest standards of professional conduct, including but not limited to the [American Bar Association’s Model Rules of Professional Conduct/Code of Conduct for Federal Public Defender Employees/Model Code of Conduct for Federal Community Defender Employees/other standards for professional conduct adopted by the Court].

**D. Private Practice of Law**

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

### E. Panel Attorney Training

In coordination with the PADR and the CJA Panel Committee, the Defender Organization will assess the training needs of the CJA Panel and provide regularly scheduled training opportunities and other educational resources that includes updates regarding substantive law, sharing best practices in federal criminal defense, and presentations on courtroom and office technology.

## VII. CJA PANEL COMMITTEE

### A. Establishment

1. A CJA Panel Committee [or CJA Panel Committees in [list geographic divisions]] will be established by the [Court/Defender Organization] in consultation with the [Court/Defender Organization] to assist the Court in the selection, oversight, and management of CJA Panel members. The CJA Panel Committee may establish subcommittees that include non-members to address specific CJA-related issues such as recruiting panel members, training, mentoring, reviewing complaints, and reviewing voucher reductions.
2. At a minimum, the CJA Panel Committee[s] must consist of:
  - a. the [Federal Public Defender/Community Defender] or delegate, who will be a permanent member of the CJA Panel Committee;
  - b. the district's current PADR or delegate, who will be a permanent member of the CJA Panel Committee;
  - c. the district's [CJA Supervisory Attorney], who will be a permanent member; [This must be included if the district has a CJA Supervisory Attorney].
  - d. two or more criminal defense attorneys, at least one of whom is a CJA Panel member; and
  - e. an ex officio staff member employed by the [Defender Organization/Court Clerk] who will act as administrative coordinator.

**Comment:** In furtherance of Interim Recommendation 15 of the Cardone Report, every district must form a committee, or designate a CJA supervisory or administrative attorney or a defender office, to manage the selection, appointment, retention, training, and removal of panel attorneys. The process must incorporate judicial input into panel administration. The composition of the CJA Panel Committee can be adjusted to reflect the degree of judicial, federal defender, or panel attorney involvement desired by each district court, including the use of state court practitioners or judicial officers. However, the Cardone Report suggests that CJA panels function more effectively when management, retention, and removal of panel attorneys is left in the hands of defense practitioners. Report at 74-79.

3. Except for the Defender Organization, PADR, [CJA Supervisory Attorney] and ex officio administrator, members will serve for [three] years and may be extended for one additional [three-year] term. Terms will be staggered to ensure continuity on the CJA Panel Committee and rotation of members. Vacancies will be filled upon recommendation of the remaining committee members and approval by the Chief District Judge.
4. The CJA Panel Committee will ensure the creation of a diverse workforce. [See Interim Recommendation 18.]
5. The CJA Panel Committee will meet at least once a year and at any time the Court or a committee member asks the committee to consider an issue.

**B. Duties**

1. CJA Panel Membership. The CJA Panel Committee will examine applications for appointment or reappointment to the CJA Panel and recommend to the Chief District Judge approval of those attorneys deemed qualified to serve on the CJA panel [or any specialized panel]. The committee will also recommend removal of any CJA Panel attorney who fails to satisfy the requirements of panel membership, including failing to provide high quality representation, or engages in conduct that would render continued panel service inappropriate.
2. Recruitment. The CJA Panel Committee will strive to create and maintain a diverse CJA Panel of the highest caliber federal criminal defense practitioners. In conjunction with a mentoring program, the Committee will devise a recruitment strategy that identifies and trains a diverse set of viable panel applicants.

**Comment:** The Ninth Circuit's CJA Unit is available to assist districts in designing a recruitment strategy that includes outreach to bar associations, law schools, state court indigent defense services, legal aid organizations, and undergraduate institutions to educate attorneys and students about CJA work and any available mentoring program, as well as use of social and electronic media and other advertising.

3. Mentoring. The CJA Panel Committee [in collaboration with the Defender Organization] must appoint experienced CJA Panel members to serve on a subcommittee that will create and administer a mentoring program to help prepare viable panel candidates by pairing experienced practitioners with attorneys new to federal criminal practice. Mentoring program participants will be compensated.

Comment: The Judicial Council of the Ninth Circuit encourages courts to develop a mentoring program that, along with a robust recruitment program, will encourage talented attorneys to become qualified for membership on the CJA Panel. The Ninth Circuit's CJA Unit is available to assist districts in designing a mentoring program that includes an application process, goals or benchmarks for participants, guidance for mentors, program completion requirements, and compensation. Compensation is critical in encouraging program participation. Participants may be compensated in several ways: (1) under the CJA at the prevailing hourly rate when appointed as second counsel in cases determined by the Court to be extremely difficult or when necessary in the interests of justice; (2) under the CJA at a reduced associate rate; or (3) using the Court's Attorney Admission Fund at a rate determined by the Court for non-representational services, such as consulting with appointed counsel or attending training sessions.

4. Training. The CJA Panel Committee will assist the Defender Organization in devising and presenting training programs for the CJA Panel.
5. Voucher Review. The CJA Panel Committee will [be available to/appoint experienced federal criminal defense practitioners to serve on a peer review subcommittee to] provide a reasonableness recommendation to the Court for any CJA payment voucher that the Court is considering reducing. [See Interim Recommendation 16.]

Comment: Input from a peer review subcommittee can be a valuable tool to assist judges in assessing the reasonableness of billed time or funding requests for experts and other service providers. The Cardone Report encourages using a committee of defense-attorney peers to assist with voucher review to promote the independence of the defense function by obtaining input from other defense practitioners about the reasonableness of counsel's efforts. Report at 121-123 and Interim Recommendation 16. Such review will also alert the committee about areas where substantive training or an eVoucher refresher may be needed. An example of one district's peer/fee review committee's procedures is available in Appendix 8 of the Ninth Circuit CJA Policies and Procedures.

6. Annual Report. Annually, the committee will review panel operation and administration for the preceding year and provide a report to the Chief District Judge describing efforts to recruit qualified and diverse panel members, any proposed changes to panel size, any recurring issues or difficulties panel attorneys or their clients encounter, and any other operating difficulties, along with recommendations for appropriate changes.

## VIII. CJA PANEL MEMBERSHIP

### A. Establishment

The existing, previously established panel[s] of attorneys who are eligible and willing to be appointed to provide representation under the CJA [is/are] hereby recognized. The Court will approve additional attorneys for membership on the CJA Panel after receiving recommendations from the CJA Panel Committee. Nothing in this Plan creates a property interest in being or remaining on the CJA Panel.

**Comment:** Courts and CJA committees should consider establishing specialized panels to address a district's particularized needs. These could include a Misdemeanor Panel, a Complex Felony Panel, a Material Witness Panel, an Appellate Panel, or an Emeritus Panel (for experienced attorneys who prefer a reduced caseload). When creating a specialized panel, the CJA Panel Committee should establish standards for membership, such as Spanish language skills, technological expertise, or years of experience. Courts may also create panels dedicated to serving separate geographic divisions.

### B. Size

The CJA Panel size will be determined by the CJA Panel Committee, subject to the Court's review, based on panel member caseloads and activity. The CJA Panel must be large enough to provide a sufficient number of experienced attorneys to handle the CJA caseload, yet small enough so panel members will each receive an adequate number of appointments to maintain their federal criminal defense work proficiency, enabling them to provide high quality representation consistent with the best practices of the legal profession.

### C. Qualifications and Membership

1. Equal Opportunity. All qualified attorneys are encouraged to apply for CJA Panel membership.
2. Application. Application forms for CJA Panel membership are available from the [Defender Organization/Court]. Applications may be submitted to the CJA Panel Committee at any time.
3. Eligibility. CJA Panel applicants must:
  - a. be members in good standing of the [state bar of this district], federal bar of this district, and the Ninth Circuit Court of Appeals;
  - b. except for appellate or capital habeas panel members, maintain a primary, satellite, or shared office in the [District/Division of the District];



- c. possess strong litigation and writing skills;
- d. demonstrate proficiency with the Bail Reform Act, Recommendations for Electronically Stored Information Discovery Production in Federal Criminal Cases (ESI Protocol), Federal Rules of Evidence, Federal Rules of Criminal Procedure, Federal Rules of Appellate Procedure, United States Sentencing Guidelines, federal sentencing procedures, and this District's Local Rules;
- e. have the training and ability to manage and effectively utilize electronic case presentation equipment and software in the courtroom and manage electronic discovery;
- f. 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.
  - (1) At a minimum, counsel must have [list requirements-see Comment below].
  - (2) Attorneys who do not possess the experience set forth above but believe they have equivalent other experience, or who have completed a mentoring program, are encouraged to apply and set forth in writing the details of that experience for the committee's consideration.

**Comment:** Specific eligibility requirements should be tailored to the needs of the district and the qualities of the pool of potential new applicants, with the goal of promoting diversity and attracting attorneys with the potential of providing excellent representation to CJA clients. The requirements can vary from district to district, but when developing standards, the CJA Panel Committee should consider years of experience in a state or federal public defender office, as a contract public defender, or in a prosecutor's office; the number of state or federal felony cases handled from initial appearance to trial, sentencing, or appeal; formal training or CLE work the attorney has attended; and participation in the district's mentoring program.

#### **D. Reappointment**

1. Once appointed, CJA Panel members will serve a term of three years. CJA Panel members may serve an unlimited number of terms and may serve on specialized panels as deemed appropriate by the CJA Panel Committee.
2. The [Defender Organization/Court] will notify CJA panel members, within [insert number of months] prior to the expiration of their current term, of the need to apply for reappointment to the CJA Panel, and will set forth the procedures and deadlines for re-applying.

3. In considering the re-appointment of CJA Panel members, the CJA Panel Committee may:
  - a. solicit input from the legal community and the Court concerning the quality of representation provided by attorneys seeking reappointment;
  - b. request a personal interview with the CJA Panel member; and
  - c. consider the number of cases the CJA Panel member accepted and declined during the review period, the member's participation in training opportunities, whether the member continues to meet this Plan's technology and facilities requirements, whether the member has been the subject of any complaints, and whether the member continues to meet the prerequisites and obligations of CJA panel members or applicants as set forth in this Plan.

#### **E. Removal**

1. Mandatory Removal. Members of the CJA Panel who are suspended or disbarred from the practice of law by their state courts, or who are suspended or disbarred from any federal court, will be removed from the CJA Panel immediately and ordered to withdraw from current CJA representations. The Defender Organization will be immediately notified when any member of the CJA Panel is removed.
2. Automatic Disciplinary Review. The CJA Panel Committee will conduct an automatic disciplinary review of any CJA panel member against whom any licensing authority, grievance committee, or administrative body has acted, or when a finding of probable cause, contempt, sanction, or reprimand has been made against the panel member by any state or federal court.

#### **F. Complaints**

1. Initiation. A complaint about an attorney's performance may be initiated by any concerned individual and should be directed to the CJA Panel Committee, which will determine whether further investigation is necessary. Complaints must be in writing and state the alleged deficiency with specificity.
2. Notice. Upon receiving a written complaint, the CJA Panel Committee will notify the panel member and the Chief District Judge of the specific allegations and will advise the panel member whether it has commenced an investigation or dismissed the complaint.

3. Response. A panel member under review may be asked to respond in writing and appear before the CJA Panel Committee, or may request to do so.
4. Protective Action. Prior to deciding the matter, the CJA Panel Committee may recommend the CJA Panel member's suspension or removal from any pending case, or from the CJA Panel, and may take any other protective action that is in the best interest of the attorney's clients or the administration of this Plan.
5. Investigation. Any investigation undertaken by the CJA Panel Committee will be concluded within [insert time frame] of receiving the initial complaint. Should the investigation need to continue beyond this prescribed period, the CJA Panel Committee must notify both the attorney and the Chief District Judge in writing.
6. Review and Recommendation. After investigation and review, the CJA Panel Committee may recommend closing the matter with no further action or may recommend appropriate remedial action, including:
  - a. removing the attorney from the panel permanently or temporarily;
  - b. limiting the attorney's participation to certain categories of cases;
  - c. directing the attorney to complete specific training requirements before receiving further panel appointments;
  - d. limiting the attorney's participation to handling cases that are directly supervised or overseen by another panel member or other experienced practitioner or assigning a mentor;
  - e. directing the attorney to attend counseling for substance abuse issues; or
  - f. any other appropriate remedial action.
7. Oversight of Remedial Action. Should the CJA Panel Committee recommend any remedial action on the part of the attorney, the CJA Panel Committee will establish, in its recommendation to the Chief District Judge, a plan for overseeing completion of conditions for full panel reinstatement.
8. Final Disposition by the Court. The CJA Panel Committee will forward its recommendation to the Chief District Judge for consideration and final disposition. The Chief District Judge will communicate a final disposition in writing to the attorney and the CJA Panel Committee.

9. Confidentiality. Information acquired concerning complaints and potential disciplinary action will remain confidential unless otherwise directed by the Court or required by applicable ethical standards.

**Comment:** Districts may create a set of retention policies for records of attorney complaints. The Guide to Judiciary Policy, Vol. 10, Chapter 6 may be useful in developing such a policy.

## IX. CJA PANEL MEMBER DUTIES

### A. Standards and Professional Conduct

1. CJA panel members must provide high quality representation consistent with the legal profession's best practices. CJA Panel attorneys will be guided in their practice by the Federal Adaptation of the National Legal Aid and Defender Association *Performance Guidelines for Criminal Defense Representations* and the ABA's *Criminal Justice Standards for the Defense Function*.
2. Attorneys appointed under the CJA must conform to the highest standards of professional conduct, including but not limited to the [American Bar Association's Model Rules of Professional Conduct/other standards for professional conduct adopted by the Court].
3. CJA Panel members must immediately notify the [Federal Public Defender/Community Defender/Chief District Judge], in writing, if they are disbarred, suspended, sanctioned, or reprimanded by any licensing authority, grievance committee, or administrative body. CJA Panel members must also notify the [Federal Public Defender/Community Defender/Court], in writing, within 30 days, if they are sanctioned or found in contempt by any state or federal court judge.

### B. Training and Continuing Legal Education

1. CJA Panel attorneys are expected to remain current with developments in federal criminal defense law, practice, and procedure, including electronic discovery techniques.
2. CJA panel members must annually attend [insert number] hours of Continuing Legal Education relevant to federal criminal practice, including trainings sponsored by the Defender Organization.
3. 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 the facilities, resources, and technological capability to effectively and efficiently manage assigned cases, including the availability of office space to meet with clients and the technological resources to receive, review, organize, and otherwise manage electronic discovery and records.
2. CJA panel attorneys must know and comply with the requirements of electronic filing and eVoucher, including how to submit requests for investigative, expert, and other services.

**Comment:** The Cardone Report examined a myriad of challenges defense attorneys face in the age of digital technology. Report at 227-232 and Interim Recommendation 21. Maintaining competence with technology is an important aspect of practicing in federal court, and courts should consider adopting minimum technology requirements. These could include proficiency in using e-mail, word processing, spreadsheets, and keyword searching tools; hardware such as a multimedia player, scanner, and DVD/CD player with read/write capability; and applications to open ZIP files and to create searchable PDF documents. In addition, districts should ensure CJA counsel understand when and how to utilize the resources of the National Litigation Support Team, funded by Defender Services to provide e-discovery assistance to panel attorneys.

## X. COUNSEL APPOINTMENT IN NON-CAPITAL CASES

### A. Apportionment of Cases

CJA Panel attorneys will be appointed in a sufficient number of cases per year so that attorneys remain proficient in criminal defense work. [See Interim Recommendation 19.]

### B. Number of Counsel

More than one attorney may be appointed in any case determined by the Court to be extremely difficult or when necessary in the interests of justice to ensure high quality representation. Co-counsel who are members of the CJA Panel will be compensated at the non-capital CJA hourly rate. If a non-panel attorney is appointed as co-counsel, the Court will determine the hourly rate based on the attorney's experience and qualifications.

### C. Appointment List

The [Defender Organization/Court] will maintain a current list of all CJA Panel attorneys, with current office addresses, email addresses, and telephone numbers, as well as a statement of qualifications and experience.

**D. Appointment Procedure**

The [Defender Organization/Court] is responsible for overseeing the appointment of cases to panel attorneys. The [Defender Organization/Court] will maintain a record of panel attorney appointments and data reflecting the proportion of appointments among the CJA Panel and Defender Organization.

1. Appointment of cases to CJA panel members will ordinarily be made on a rotational basis. However, in a complex or otherwise difficult case, the [Defender Organization/Court] may appoint CJA counsel outside of the normal rotation to ensure the defendant has sufficiently experienced counsel.
2. Under special circumstances, the Court may appoint an attorney who is not a member of the District's CJA Panel. Such special circumstances may include cases in which the Court determines that the appointment of a particular attorney is in the interests of justice, judicial economy, or continuity of representation, or for any other compelling reason. Other circumstances may include large multi-defendant cases for which there is an insufficient number of CJA Panel attorneys in the District. 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 CJA Panel Committee.

**E. Continuing Representation**

1. Once counsel is appointed under the CJA, counsel will continue the representation until:
  - a. the matter is closed, including conclusion of any appellate or certiorari proceedings;
  - b. substitute counsel has filed a notice of appearance;
  - c. an order is entered allowing the client to proceed pro se; or
  - d. the appointment is otherwise terminated by Court order.
2. If trial counsel prefers to withdraw in favor of new counsel on appeal, trial counsel will first file the notice of appeal in the district court to preserve the client's right to appeal and then move to withdraw in the Court of Appeals, asking for appointment of substitute counsel.

**Comment:** While the Ninth Circuit recognizes there may be benefits to maintaining continuity of counsel, it also recognizes that the skills necessary to proceed as appellate counsel may differ from those required for trial counsel. The decision to continue representation should be made by the defendant after consulting with trial counsel about potential issues for appeal and the appellate qualifications of counsel. Accordingly, courts may designate a specialized panel of appellate attorneys available for appointment in the event trial counsel prefers to withdraw.

## **XI. CJA ATTORNEY COMPENSATION AND FUNDING FOR NEEDED SERVICES**

### **A. Court Compensation Policies**

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. In determining the reasonableness of out-of-court time, the court must consider three factors:
  - a. whether the work was performed;
  - b. whether the work performed was a reasonable means of achieving the client's aims in the litigation; and
  - c. whether the time spent to accomplish that work was reasonable.
2. Voucher reductions will be limited to mathematical errors; instances in which work billed was not compensable, undertaken, or completed; and instances in which the hours billed clearly exceed what was reasonably required to complete the task.
3. Vouchers and funding requests for service providers and other litigation costs will not be delayed or reduced to lessen Defender Services program costs in response to adverse financial circumstances.
4. Absent extraordinary circumstances, the Court will act on compensation claims within 30 days of submission.
5. Payment vouchers and amounts paid to counsel or service providers will not be disclosed except as required by law or CJA Guidelines.

### **B. Claim Submission**

1. Claims for compensation must be submitted on the appropriate CJA form through the Court's eVoucher system. Information regarding eVoucher is available [insert source- website, local rule, general order, etc.]

2. Claims for compensation will be submitted no later than [45, 60, or 90] days after final disposition of the case, unless good cause is shown.

**C. [OPTION] Delegated Authority for Claim Approval**

This Court has delegated to [insert person's title] the authority to [insert scope of delegation authority—see comment box below]. The Court retains ultimate review and approval authority.

**Comment:** The Cardone Report provides compelling reasons for courts to adopt alternative methods of conducting reasonableness review of payment vouchers, including delegation of voucher review and approval to a CJA Supervisory Attorney with criminal defense experience. Report at 86-133. Delegation has been successfully implemented in several districts. For example, the Districts of Arizona, California Eastern, and California Southern allow vouchers below a specific dollar amount to be approved by a nonjudicial officer. Similarly, the Districts of Central California and Northern California employ CJA Supervising Attorneys who review and approve payment vouchers and service-provider funding requests on behalf of the Court. The May 4, 2018, Memorandum from Sheryl Walter, AO General Counsel, to Chief Ninth Circuit Judge Sidney R. Thomas, explains that districts may delegate these tasks to nonjudicial officers (e.g., CJA administrators) so long as CJA attorneys are able to seek review of reductions or funding denials to a judge and the presiding judge retains ultimate review and approval authority. Courts may also consider delegating their defender organization to conduct an initial review of vouchers and issue a payment recommendation to the presiding judge. To avoid potential conflicts of interest, defender staff reviewing vouchers should work independently and exclusively on CJA panel matters, separate from the remainder of the defender office, and be required to maintain confidentiality of panel attorney submissions. The Circuit's CJA Unit is available to assist districts in developing delegation standards.

**D. Voucher Review Procedure**

The CJA Department will perform an initial review for accuracy and compensability under the CJA Guidelines and Ninth Circuit CJA Policies and Procedures. In determining whether services provided by counsel are compensable, the guidelines for ancillary appointment of counsel in Section IV.A.3 of this Plan may be considered. After this review, vouchers will be forwarded for consideration and action by the presiding judge or his or her designee, who will review claims for overall reasonableness. A voucher may be referred to the [CJA Panel Committee/CJA Supervisory Attorney] for input regarding reasonableness.

**E. Voucher Reductions and Independent Review Procedures**

1. Reductions. Claims for compensation under the CJA will not be reduced without affording counsel notice and an opportunity to be heard.
  - a. When contemplating a voucher reduction, the [Court/CJA Department] will notify CJA counsel of any proposed reduction



and offer counsel the opportunity to justify the submission.

- b. If counsel indicates that the reduction is not contested, or if no response is received within ten days, the [Court/CJA Department] will process the reduced voucher.
- c. If counsel responds and provides information justifying the claimed time or expense, the voucher will be approved as submitted.

2. Independent Review.

- a. If after reviewing counsel's response the [presiding judge/CJA Department] reduces the voucher, counsel may seek review of the reduction to the Chief District Judge or his or her designee within ten days. If the Chief District Judge is the presiding judge who reduced the voucher, counsel may seek review by the Chief Circuit Judge or his or her designee within thirty days. Deadline extensions may be granted for good cause.
- b. If the reviewing judge or his or her designee finds the request for review to be meritorious, the CJA Department will direct counsel to create a new voucher for the appropriate amount.

**F. Investigative, Expert, and Other Services; Litigation Expenses**

- 1. Financial Eligibility. Counsel for a person financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request CJA funding 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 presiding judge or designee must authorize the funding.
- 2. **[OPTION]** Delegation. This Court has delegated to [insert person's title] the authority to [insert scope of delegation authority—see comment box below].

**Comment:** Courts may delegate review and recommendation of funding applications for investigative, expert, and other services to a CJA Supervisory Attorney, Defender Organization, Magistrate Judge, or any non-presiding judge to help ensure appointed counsel's ability to obtain necessary resources in a manner that does not unreasonably compromise or interfere with the exercise of sound independent professional judgment. Delegation could also include authority to approve applications for investigative, expert, or other services so long as CJA attorneys are able to seek review of any funding denial and the presiding judge retains ultimate review and approval authority.

3. Applications. Requests to authorize funds for investigative, expert, and other services must be submitted using the Court’s [eVoucher system/existing system] and must not be disclosed except with the consent of the person represented or as required by law or CJA Guidelines.

**Comment:** The Judicial Council strongly recommends using eVoucher for all CJA funding requests to streamline voucher processing and data collection.

4. Cost Considerations. Appointed counsel is expected to use lower-cost service providers such as investigators or paralegals to undertake tasks not requiring attorney expertise. In multi-defendant cases with multiple CJA attorneys, counsel must make all reasonable efforts to coordinate with each other to reduce costs, including coordinating and sharing discovery and utilizing shared investigators and other services to the extent possible.
5. Compliance. Counsel must comply with Judicial Conference policies set forth in CJA Guidelines, Ch. 3.

**G. Case Budgeting**

Consistent with CJA Guidelines, Ch. 2 §§ 230.26.10–20, CJA counsel are encouraged to use case-budgeting techniques in non-capital representations where combined attorney and service provider costs are likely to exceed [insert specific amount determined by the district to be reasonable or “the equivalent of 300 times the prevailing CJA panel attorney non-capital hourly rate” (e.g., if the non-capital hourly rate is \$150 per hour, case budgeting should be considered if the case is likely to exceed 300 times that, or \$45,000)]. The Court or appointed counsel should contact [insert title of contact person—Ninth Circuit Case Managing Attorney or CJA Supervisory Attorney] to discuss whether a case may be appropriate for budgeting and the procedures for submitting a case budget.

**H. 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.

## XII. SPECIAL PROVISIONS FOR CAPITAL CASES

### A. Capital Cases

For purposes of this plan, “capital cases” are those involving the death penalty and include: (1) prosecutions under any provision of federal law carrying a potential penalty of death; (2) direct appeals from cases wherein the death penalty was imposed by a federal court; (3) post-conviction proceedings in which an individual sentenced to death by a federal court is seeking to set aside or vacate the conviction or sentence under 28 U.S.C. § 2255; and (4) habeas corpus proceedings in which an individual sentenced to death by a state court is seeking to set aside or vacate the conviction or sentence under 28 U.S.C. § 2254.

### B. 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; CJA Guidelines, Ch. 6; and [any applicable Local Rule or General Order].

### C. Counsel Qualifications

1. In addition to the requirements for Panel membership set out in Section VIII of this Plan, counsel appointed in capital cases to represent financially-eligible persons will meet the statutory requirements set out in 18 U.S.C. §§ 3005 and 3599(b)-(d) as expanded upon below, as well as any applicable circuit rules.
2. All attorneys appointed in capital cases must (1) be well qualified as demonstrated by their training, commitment to the defense of capital cases, and distinguished prior criminal defense experience at the relevant stage of the proceeding; (2) have sufficient time and resources to devote to the representation, considering their current caseload and the extraordinary demands of a capital case; (3) meet all applicable guidelines adopted by the American Bar Association concerning representation of persons in death penalty cases; and (4) consult regularly with the appropriate Death Penalty Resource Counsel project available through the Defender Services division of the Administrative Office of the United States Courts.
3. In trial-level capital cases requiring the appointment of “learned counsel,” such counsel must meet the minimum standards in 18 U.S.C. §§ 3005 and 3599(b) or (d). Learned counsel should have distinguished prior experience in the trial, appeal, or post-conviction review of federal or state death-penalty cases that, in combination with co-counsel, will

assure high-quality representation. “Distinguished prior experience” contemplates excellence, not simply prior experience.

4. In direct appeals and post-conviction proceedings under 18 U.S.C. §§ 2254 or 2255, appointed counsel must meet the minimum standards required by 18 U.S.C. § 3599(c) or (d) and should have distinguished prior experience in federal criminal appeals, capital appeals, federal post-conviction proceedings, or capital post-conviction proceedings.
5. Out-of-district counsel, including Defender Organization staff, who possess the requisite expertise may be considered for appointment in capital cases to achieve high-quality representation.
6. 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 capital habeas corpus relief may be appointed if the attorney is fully qualified. This appointment 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).)

#### D. Appointment of Counsel

1. Pre-Trial. No later than when a defendant receives a target letter alleging the commission of a capital offense, or is charged with a federal criminal offense where the penalty of death is possible, the Court must appoint two attorneys, at least one of whom meets the qualifications for “learned counsel.” If necessary for adequate representation, more than two attorneys may be appointed. Consistent with Section IV.A.1 of this Plan, the Court may appoint capital qualified counsel for an individual that, although uncharged, is the subject of an investigation in a federal death-eligible case. When appointing counsel, the judge must consider the recommendation of the [Defender Organization/AO Defender Services Office (for those districts without a federal defender organization)], who will consult with Death Penalty Resource Counsel to recommend qualified counsel.
2. Direct Appeals. Counsel representing a death-sentenced federal appellant should include at least one attorney who did not represent the appellant at trial. Each trial counsel who withdraws should be replaced with similarly qualified counsel to represent the defendant on appeal. When appointing counsel, the Court must consider the recommendation of the [Federal Public/Community Defender/AO Defender Services Office (for those districts without a federal defender organization)], who will consult with Federal Capital Appellate Resource Counsel to recommend

qualified counsel.

- 3. Post-Conviction Proceedings. In any post-conviction proceeding under 18 U.S.C. §§ 2255 or 2254, the Court must appoint at least one qualified attorney and may consider appointing at least two given the complex, demanding, and protracted nature of death penalty proceedings. When appointing counsel, the Court should consider the recommendation of the [Defender Organization/AO Defender Services Office (for those districts without a federal defender organization)], who will consult with the appropriate Resource Counsel project to recommend qualified counsel. For § 2255 proceedings, appointment should take place, if possible, prior to denial of certiorari on direct appeal by the United States Supreme Court. For § 2254 proceedings, appointment should take place at the earliest time permissible by law to permit federal counsel to avail themselves of the full statute-of-limitations period to prepare a petition.

**E. Case Budgeting and Resources**

All capital cases, unless staffed only by the Defender Organization’s office, must be budgeted. As early as practicable after appointment, counsel or the Court should refer the case to [a Ninth Circuit CJA Case Managing Attorney/the CJA Supervisory Attorney]. Questions about the appointment and compensation of counsel and the authorization and payment of investigative, expert, and other service providers in capital cases also may be directed to the appropriate Death Penalty Resource Counsel project or the AO Defender Services Office, Legal and Policy Division Duty Attorney at 202-502-3030.

**XIII. EFFECTIVE DATE**

This plan will become effective when approved by the Judicial Council of the Ninth Circuit.

ENTERED FOR THE COURT ON [DATE].

\_\_\_\_\_  
CHIEF JUDGE, \_\_\_\_\_ DISTRICT OF \_\_\_\_\_

APPROVED BY THE JUDICIAL COUNCIL OF THE NINTH CIRCUIT ON [DATE].

\_\_\_\_\_  
CHIEF JUDGE, NINTH CIRCUIT COURT OF APPEALS

