

AMENDED PLAN TO IMPLEMENT THE CRIMINAL JUSTICE ACT OF 1964

Effective Date January 29, 2002
As Amended _____

I. AUTHORITY

The United States Court of Appeals for the Second Circuit, in accordance with the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, 21 U.S.C. § 848(q), the guidelines for the Administration of the Criminal Justice Act, Vol. VII, Guide to Judiciary Policies and Procedures, and the Federal Rules of Appellate Procedure, hereby adopts this Plan for furnishing representation in the Court of Appeals for eligible persons financially unable to obtain adequate representation in accordance with the Act.

II. STATEMENT OF POLICY

The Plan shall be administered so that those accused of criminal conduct and who are financially unable to pay for legal representation will be provided with legal representation before this Court.

The Judicial Council, in promulgating the amended Plan set forth below, recognizes that while the Criminal Justice Act provides for limited compensation, attorneys chosen pursuant to the Plan to represent indigents are rendering a public and social service of the greatest importance. The Bar has traditionally represented with high dedication persons unable to pay any compensation for such representation. Services performed for eligible persons qualifying under the Plan will continue to be rendered by members of the Bar, essentially in their capacity as officers of the Courts and in keeping with the high traditions of the legal profession and its vital role in society. We also recognize that despite the nominal compensation provided by the Act, such services will be performed with devotion and vigor so that the lofty ideal - equality before the law for all persons - will be achieved. With this recognition of the importance of representation for indigents, we are confident that all segments of the Bar will accept as part of their professional obligations the need to render the most competent services in each and every phase of criminal and habeas corpus proceedings and that the organized Bar will be encouraged into increased activity with respect to the administration of criminal justice.

III. DEFINITIONS

- A. **CJA** - the Criminal Justice Act, 18 USC § 3006A.
- B. **CJA client** - a person for whom counsel has been appointed under the CJA.
- C. **CJA attorney** - an attorney who is appointed to represent an eligible person under the CJA.
- D. **CJA Panel member** - an attorney appointed to the CJA Panel of the Second Circuit Court of Appeals.
- E. **CJA applicant** - a person applying for representation under the CJA.
- F. **The or This Court** - the United States Court of Appeals for the Second Circuit.
- G. **The CJA Committee** - the Court's CJA and Pro Bono Committee.

IV. DETERMINATION OF NEED FOR APPOINTED COUNSEL

A. **Notice to Defendant**

Whenever *in forma pauperis* status is ordered by the District Court of this Court in either a criminal appeal in which a defendant appears *pro se* or in a § 2255 habeas appeal in which the petitioner appears *pro se*, the Clerk of the Court shall forthwith notify the defendant or petitioner that he or she has the right to be represented and that counsel may be appointed for the defendant or petitioner. The foregoing notice shall also be given in all such appeals taken by the United States.

B. **Request for Attorney on Appeal**

In cases where a request for the appointment of an attorney under the Act is made for the first time on appeal, the Chief Judge or the Chief Judge's designee, before making the appointment, shall inquire into and make a finding as to whether the CJA applicant is financially able to employ counsel. In making the determination, such forms as may be prepared and furnished by the Administrative Office of the United States Courts shall be utilized for the purpose of eliciting permanent information.

In cases where the CJA applicant is found by the district court to be financially unable to employ counsel, the Court of Appeals may accept this finding and appoint or continue an attorney without further proof. But see Fed. R. App. P. 24(a).

C. Partial Payment

If a CJA applicant's net financial resources are insufficient to pay fully for retained counsel, counsel may be appointed under the Act, and the CJA applicant may be directed to make partial payment of attorney's fees to the Clerk of Court under the guidelines as established by the Judicial Conference.

D. Re-examination of Financial Status

The Court may at any time after appointment of counsel, re-examine the financial status of a CJA client. If the Court finds that a CJA client is financially able to obtain counsel or make partial payment for the CJA client's representation, the appointment should be terminated or partial payment required to be made. If a CJA attorney learns any information indicating that a CJA client or someone on the CJA client's behalf can make payment in whole or in part for legal services, it shall be the CJA attorney's duty to report such information promptly to the Court so that appropriate action may be taken.

V. CJA ATTORNEY ADVISORY GROUP

A. Authority and Composition

A CJA Attorney Advisory Group will be appointed by the Court to assist the Court and the CJA Committee in reviewing applications for membership on the CJA Panel and to otherwise promote the furnishing of representation pursuant to this Plan. The CJA Attorney Advisory Group shall consist of the head of the Federal Defenders Appeals Unit of the Legal Aid Society and 12 other attorneys selected by the Court for terms not to exceed three years who will collectively represent all of the districts in the Circuit. The members of the CJA Attorney Advisory Group must be admitted to practice in this Court and may not be members of the CJA Panel. Appointments to the Panel shall be made so that the terms of approximately one-third of the Panel members expire at the conclusion of each Term of Court.

B. Meetings, Terms and Duties

The Attorney Advisory Group shall review applications filed by attorneys seeking to fill vacancies on the CJA Panel. The Advisory Group shall consider the qualifications and experience of the applicants and recommend to the CJA Committee those applicants it deems qualified to fill the vacancies.

C. Death Penalty Cases

A CJA Death Penalty Attorney Advisory Group will be appointed by the Court to assist the Court and the CJA Committee in reviewing applications for membership on the Death Penalty CJA Panel.

VI. CJA PANEL

A. Maintaining the CJA Panel List

The Clerk of Court, under the direction and supervision of the Chief Judge or the Chief Judge's designee, shall maintain the list of the CJA Panel members that will supplement the services of the Legal Aid Society and the Federal Public Defender Offices within this Circuit. The list of CJA Panel members shall include the name of each attorney and the current business address and telephone number of the attorney. Attorneys accepted for service on the CJA Panel must notify the Clerk of Court, in writing, within 48 hours of any changes in business address, business telephone number, e-mail address, or employment.

B. Appointments

Appointments to the CJA Panel shall be made by the Court upon appropriate recommendation from the CJA Committee after consultation with the Attorney Advisory Group.

C. Applications

1. Submission Requirements

All private attorneys seeking to be included on the CJA Panel must submit to the Clerk of Court an application and a resume. Applications for membership shall be submitted on the Court's form for Application for Appointment to the CJA Panel, available in the Clerk's Office. The Attorney Advisory Group will review these materials. Applicants must be members in good standing of the Bar of this Court, must maintain an office within the Circuit, and must have demonstrated experience in and knowledge of Title 18 and the habeas corpus provisions of Title 28 of the United States Code, the Federal Rules of Appellate Procedure, the Federal Rules of Criminal Procedures, the Federal Rules of Evidence, the Local Rules and the United States Sentencing Guidelines.

The Court will set and publicize an annual application period for appointment to the CJA Panel.

2. Term of Appointment

CJA Panel members shall serve for a term not to exceed three years but may be removed by the Court prior to the expiration of their term. See Section D, Removal; See also Section VII, Release of Appointed Counsel. Upon expiration of the term of a CJA Panel member, the CJA Panel member must reapply for membership if he or she wishes to continue as a member of the CJA Panel. Application for renewal shall be made on the Court's form for Application for Renewal of Membership on the CJA Panel, available in the Clerk's Office. Panel members will be selected on the basis of demonstrated qualification, skill and dedication. Because of the limited size of the CJA Panel, the Court will not be able to appoint every qualified applicant to the Panel, but the Court will make an effort to rotate membership on the CJA Panel in order to ensure that new applicants are given an opportunity to serve.

D. Removal

1. Court's Discretion

A CJA Panel member may be removed from the CJA Panel whenever the Court, in its discretion, determines that the member has failed to fulfill satisfactorily the obligations of Panel membership, including the duty to afford competent counsel, or has engaged in other conduct that renders inappropriate his or her continued service on the CJA Panel.

2. Refusal of Assignments

The Court may remove a CJA Panel member for refusing three times to accept an appointment during the membership term.

3. Automatic Removal or Suspension

A CJA Panel member will be suspended automatically if the member is disbarred or suspended by any state or federal bar or arrested for, charged with, or convicted of a crime. A CJA Panel member is obligated to notify the Clerk of Court, in writing, within 24 hours of any such suspension, disbarment, arrest, filing of criminal charges or conviction (See also Local Rule 46(f)-(h)).

Disbarment or suspension by any state or federal bar or conviction of a crime are grounds for automatic removal from the CJA Panel.

4. Complaints

All complaints concerning the conduct of a CJA Panel member shall be forwarded to the Clerk of Court. If the CJA Committee determines that a complaint alleges facts that, if true, would warrant consideration of removal of the CJA Panel member, or that other facts exist potentially warranting removal of a Panel member, the Committee may direct the Attorney Advisory Group to review the complaint, or brief, make such inquiry as it deems appropriate, and issue a report of its findings and recommendations to the Court. The Court has the authority at any time to remove an attorney from the CJA Panel or to take such other action as it deems appropriate.

VII. APPOINTMENT OF COUNSEL

A. General

In all cases on appeal in which the appointment of an attorney by the Court of Appeals under the Act is required, the Court shall appoint a CJA Panel member to represent a CJA client. The appointment of counsel shall be made within a reasonable time after the appeal is docketed.

The selection of counsel shall be the sole and exclusive responsibility of the Court, and no CJA applicant or CJA client will be permitted to select his or her own attorney from the Panel or otherwise; and no attorney or CJA Panel member shall have the right to be selected to represent a CJA applicant or CJA client.

B. Non-Panel Member Appointments

When the Court determines that the appointment of an attorney who is not a member of the CJA Panel is appropriate in the interest of justice, judicial economy, or some other compelling circumstance warranting such appointment, the attorney may be admitted to the CJA Panel *pro hac vice* and appointed to represent the CJA client.

C. Retained Counsel

Retained counsel, whether or not a member of the Panel, may seek to be appointed under the Act. Such application must be supported by financial documentation as specified in Section IV herein.

D. Multiple CJA Clients

In appeals involving more than one CJA client, separate counsel may be appointed to represent each client. Where circumstances warrant, one attorney may be appointed to represent multiple CJA clients.

E. Substitution of Counsel

The Court may, at any point in the appellate proceedings, substitute one appointed counsel for another. Total compensation to all counsel is subject to the maximum permitted by the Act. Appointed counsel replaced by such substitution shall, absent the Court's approval of interim payment, await the final disposition of the appeal before submitting a claim for compensation. See Section X (B), *infra*.

VIII. RELEASE OF APPOINTED COUNSEL

A. Appointed CJA Attorneys

Counsel appointed under the Act to represent a CJA client in the district court shall continue such representation on appeal unless or until relieved by order of the Court of Appeals.

B. Relief of Trial Counsel

If CJA counsel who acted in the district court wishes to be relieved from representing a CJA client on appeal, he or she shall file with the Clerk of the Court of Appeals, and serve upon a CJA client and all other counsel in the case, a motion seeking to be relieved and stating the grounds in support of the motion. Counsel seeking to be relieved nevertheless shall continue to represent the CJA client on appeal unless or until relieved by the Court of Appeals (See Local Rule 4(b)). The district court may also relieve counsel appointed under the Act provided the district court substitutes counsel as provided in the Act. Once the notice of appeal is filed however, only the Court of Appeals may assign or relieve counsel on appeal.

C. CJA Client Seeking to Relieve Counsel

A CJA client seeking to have a CJA attorney relieved and/or the appointment of a substitute CJA attorney must file a typed or legibly handwritten motion, including a sworn affidavit (under penalties of perjury), setting forth compelling reasons for the substitution and giving a detailed account of the facts justifying the request. Such motion shall not be granted absent compelling circumstances.

IX. DUTIES OF APPOINTED COUNSEL

A. General

CJA Panel members must be reasonably available, see also § VI (D) (2) *supra*, to accept assignments. Upon assignment to represent a CJA client, a CJA attorney

shall provide representation in accordance with the Canons of Professional Responsibility and the provisions of this Plan.

B. Advice of Rights and Filing of Transcript

In all cases where trial counsel has acted in the district court under the CJA, such trial counsel shall advise the CJA client of the right to appeal to the United States Court of Appeals and of the obligation to file a timely notice of appeal, and shall file such notice of appeal if requested to do so, unless the CJA client states that the notice of appeal should not be filed. Where appropriate, trial counsel shall also file with the district court the CJA Form 24 for the furnishing of the reporter's transcript at the expense of the United States.

C. Writ of Certiorari

In the event of a decision adverse to the CJA client in this Court, the CJA attorney shall promptly transmit to the CJA client a copy of the Court's decision, advise the CJA client in writing of the right to file a petition for writ of certiorari with the United States Supreme Court, inform the CJA client of the CJA attorney's opinion as to the merit and likelihood of success in obtaining such a writ, and if requested to do so, petition the Supreme Court for certiorari. Despite a CJA client's directive to file a writ, if a CJA attorney has reasonable grounds to believe that a petition for certiorari would have no likelihood of success, the CJA attorney may file with this Court a motion to be relieved and serve a copy on the CJA client and other counsel within ten days of the filing of an adverse decision of this Court. If the Court relieves the CJA attorney, he or she shall, within 48 hours after such motion is granted, so advise the CJA client in writing and inform the CJA client concerning the procedures for filing a petition for a writ of certiorari *pro se*.

If an adverse party petitions for a writ of certiorari to review a judgment of this Court, the CJA attorney shall take all necessary steps to oppose the petition.

D. Furnishing Documents

A CJA attorney must furnish the client with copies of all papers filed in the matter with the Court that relate to the CJA client's appeal, including all opinions and orders of the Court.

E. Oral Argument

The CJA attorney shall appear for oral argument unless excused by the Court. Presentation of oral argument by an associate attorney not appointed under the Act will be allowed only with permission of the Court.

F. No Delegation of Authority

CJA counsel shall not delegate any non-ministerial tasks in connection with representation of a CJA client to any person other than a partner, associate, paralegal, student or regular employee of the law firm or clinical program of which the Panel member is a partner, associate or affiliate without the written consent of the CJA client and the Court.

G. Representation Upon Remand

The CJA attorney must continue to represent a CJA client in the district court upon remand unless relieved. The fact that a CJA attorney limits his or her practice to appellate work, or that proceedings in the district court on remand will be distant from the CJA attorney's office, will ordinarily be adequate grounds justifying the relief of the CJA attorney upon remand.

H. Anders

If a CJA attorney seeks to be relieved on the grounds that there is no nonfrivolous issue to be raised on the appeal, the CJA attorney must follow the procedures of **Anders v California, 386 U.S. 738 (1967)**.

I. No Other Reimbursement

No CJA attorney shall accept a payment from or on behalf of the CJA client in this Court without prior authorization by a United States Circuit Judge on the form provided for such purpose. All such authorized payments shall be received subject to the terms contained in such order and pursuant to the provisions of subsection (f) of the Act.

X. PAYMENT OF CLAIMS FOR COMPENSATION AND EXPENSES

A. What to Submit

No CJA attorney shall be compensated for the representation of a CJA client in this Court except upon the submission of the attorney's voucher in accordance with the rules, regulations and forms promulgated by the Administrative Office of the United States Courts. Unless another means for compensation was specifically approved, such voucher must be accompanied by a written statement specifying the time expended, services rendered, and exact expenses for which reimbursement is sought while the case was pending in this Court.

B. Time to Submit

Unless a judge of the court so orders, a claim for attorney's fees, expenses, and services must be submitted no later than 45 days after a mandate has issued. If the appeal is from an interlocutory order or results in remand to the district court, the claim shall be timely if submitted within 45 days of the termination of the case in the district court or in the Court of Appeals. In the event of termination of the representation prior to the issuance of the mandate or the termination of the case, a motion for interim payment shall be timely if submitted within 45 days of the termination of the representation. See Section VII (E), *supra*.

C. Maximum Hourly Rates

The maximum hourly rates currently shall be \$90.00 for in-court work and out-of-court work.

D. Maximum Compensation

For representation of a party on a direct appeal from a judgment of conviction in a felony, misdemeanor or habeas corpus case, **the total compensation allowed, excluding approved expenses, shall not exceed \$3,700, except on appeals taken from the Eastern District and Southern District of New York for which the maximum compensation shall not exceed \$4,625** except as described in Section E below. Different limits apply to death penalty federal habeas corpus petitions and federal capital prosecutions.

E. Excess Payments

Payments for representation on appeal in excess of the above limitations may be made for extended or complex representation whenever a judge of the Court certifies that the amount of such excess payment is necessary to provide fair compensation and such excess payment is also approved by the Chief Judge of the Second Circuit or the Chief Judge's designee.

F. Interim Payment

A judge of this Court may authorize interim payment where the judge determines it is appropriate upon the filing of a motion by a CJA attorney. The Chief Judge or the designee of the Chief Judge may arrange for interim payments.

G. Payment

The Clerk of Court shall forthwith forward all approved statements to the Administrative Office of the United States Courts for payment.

XI. CJA COMPENSATION GUIDELINES

A. Writ of Certiorari

Where time and expense for preparation of a Petition for a Writ of Certiorari to the United States Supreme Court has been claimed, a copy of the Petition must accompany the voucher. Vouchers for the CJA attorney's time and expenses involved in the preparation of a Petition are subject to separate compensation limits in the same amounts as listed in Section X (D) *supra*.

B. Compensation of Associate Attorneys

Compensation may be provided under the CJA for services furnished by a partner, associate or affiliate of the appointed CJA attorney, but the total compensation provided for the representation of the CJA client shall be within the limits described in Section X (D) *supra*. Such services shall not be compensated unless the participation of such partner, associate or affiliate has been approved in advance by a judge of this court.

C. Excess Voucher

A CJA attorney submitting a voucher in excess of the maximum allowable compensation is required to submit along with a CJA voucher a memorandum detailing how time was spent and why excess payment is warranted.

D. Maximum Compensation

The maximum allowable compensation rates are detailed in Section X of this Plan.

A judge of the court who heard the case shall forward a CJA attorney's application for excess compensation to the Chief Judge or Chief Judge's designee, with a recommendation for approval or denial. Excess compensation will not be paid unless it is approved by the Chief Judge or the Chief Judge's designee.

E. Reimbursement of Expense

1. Travel and Transportation

Reimbursement for travel and transportation expenses shall be consistent with section 2.26 of chapter II, volume VII of the Guide to Judiciary Policies and Procedures. See also chapter VI, volume I, part C of the Guide to Judiciary Policies and Procedures (employee travel regulations). Reimbursement shall be limited to the most economical means of travel and transportation reasonably available. Reimbursement may be claimed only for expenses actually incurred. In all cases, a copy of the ticket used or the bill or receipt must be attached to the voucher for compensation. Travel time to and from court (or the place where the service is rendered) may not be claimed if the round trip is less than one hour.

a. Commercial Carrier

Reimbursement for transportation by commercial carrier will be limited to economy class accommodations unless unavailable in an emergency. If compensation is claimed at a rate exceeding the economy rates, a detailed explanation in writing must be provided.

b. Automobile Transportation

If travel is by automobile, the total mileage shall not exceed the fare authorized for travel by economy air travel, except in an emergency, or for other unusual circumstances. Travel reimbursement for a privately owned automobile shall not exceed the current government authorized rate for official travel per mile on a straight mileage basis, plus parking fees, ferry, bridge, road, tolls and tunnel fares.

c. Meals and Lodging

CJA attorneys will be reimbursed for reasonable actual expenses incurred for meals and lodging within allowable limits. CJA attorneys will not be given a fixed per diem sum. Counsel should be guided by prevailing limitations for travel and subsistence expenses of federal employees. The Clerk of Court can advise attorneys of these limitations. A copy of the hotel or motel bill must be attached to the voucher. Attorneys traveling to attend oral argument will be reimbursed for no more than one and one half days of lodging and meals, absent an order of the Court in compelling circumstances.

d. Photocopying

Actual costs for reasonable printing services for appendices will be paid if a copy of the bill is submitted. For in-house printing or copying, a maximum of \$0.20 per page will be paid. The maximum per page limit is subject to periodic change by directive of the Judicial Conference of the United States. Actual costs for printing of briefs and brief covers will be paid for reasonable printing services if a copy of the bill is submitted. The costs of other forms of reproduction will not be reimbursable including typeset printing.

e. Courier Service

For delivery of items that could be mailed, expenses will be reimbursed only if a satisfactory explanation is given why normal mail service was not utilized. In non-emergency cases, routine documents such as briefs and motions should be prepared early enough to permit use of the regular mail.

f. Miscellaneous

CJA Panel members will be permitted to incur only the most reasonable rates for postage, telephone calls, and brief supplies. Supporting documentation is required for single item expenses of \$50 or more.

XII. FORMS

The forms prepared and furnished by the Administrative Office shall be used, where applicable, in all proceedings under this Plan.

XIII. RULES AND REPORTS

The Court shall submit a report on the appointment of counsel under the Act to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference may specify. This Plan shall be subject to such rules and regulations of the Judicial Conference of the United States governing the operation of such plans under the Act as may be issued from time to time.

XIV. OPERATION OF THE PLAN

This Plan incorporates the Guidelines for the Administration of the Criminal Justice Act of 1964 (18 U.S.C. § 3006A) by reference.

XV. NO RIGHTS CREATED

This Plan is intended only as a description of the procedures this Court will follow; it does not create any rights as against any individual or institution.

XVI. AMENDMENTS

Amendments to this Plan may be made from time to time by the Court, subject to the approval of the Judicial Council of the Second Circuit.