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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON**

IN RE:

Amended Criminal Justice Act Plan

GENERAL ORDER

The Court hereby adopts the attached Amended Criminal Justice Act Plan for the United States District Court Western District of Washington, as approved by the Judicial Council for the Ninth Circuit on June, 28, 2005.

The Amended Criminal Justice Act Plan shall take effect immediately and supersede the plan heretofore in effect.

Dated this 25<sup>th</sup> day of July, 2005.

  
HONORABLE ROBERT S. LASNIK  
CHIEF UNITED STATES DISTRICT JUDGE

**OFFICE OF THE CIRCUIT EXECUTIVE**  
**UNITED STATES COURTS FOR THE NINTH CIRCUIT**

95 SEVENTH STREET  
POST OFFICE BOX 193939  
SAN FRANCISCO, CA 94119-3939

GREGORY B. WALTERS, CIRCUIT EXECUTIVE  
PHONE: (415) 556-9585  
FAX: (415) 556-6179

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**TO:** Chief Judge Robert S. Lasnik, Western District of Washington  
Clerk Bruce Rifkin, Western District of Washington

**FROM:** Dr. Robert E. Rucker, Assistant Circuit Executive, Court Management  
& Research

**DATE:** June 30, 2005

**RE:** Amended CJA Plan

I am writing to inform you that on Tuesday, June 28, 2005, the Judicial Council for the Ninth Circuit voted to approve the Western District of Washington's amended "Criminal Justice Act Plan." If you have not done so, please send a copy of your district's plan to Theodore J. Lidz, Defender Services Division, at the Administrative Office.

If you have any questions or comments, please let me know.

cc: Theodore J. Lidz, Defender Services Division, AO

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
OFFICE OF THE CLERK

BRUCE RIFKIN  
CLERK

UNITED STATES COURTHOUSE  
700 STEWART ST., LOBBY LEVEL  
SEATTLE, WASHINGTON 98101

April 6, 2005

Dr. Gregory Walters  
Circuit Executive  
P.O. Box 193939  
San Francisco, CA 94119-3939

Re: Amended Criminal Justice Act Plan

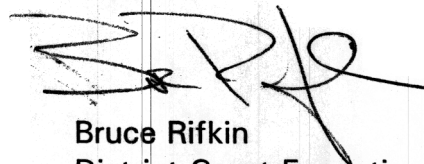
Dear Dr. Walters,

Enclosed is a copy of the amended Criminal Justice Act Plan adopted by the United States District Court for the Western District of Washington.

The amended plan is hereby submitted for approval by the Judicial Council of the Ninth Circuit.

If you should have any questions, can be reached at (206) 370-8484.

Sincerely,



Bruce Rifkin  
District Court Executive

cc: Janna Kropelnicki, CJA Administrator

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
CRIMINAL JUSTICE ACT PLAN

AUTHORITY

Pursuant to the Criminal Justice Act of 1964 (18 U.S.C. § 3006A) [hereinafter referred to as CJA], and the *Guidelines for the Administration of the Criminal Justice Act, Volume VII, Guide to Judiciary Policies and Procedures* (CJA Guidelines), the judges of the United States District Court for the Western District of Washington adopt the following amended Plan for furnishing representation in federal courts to any person financially unable to obtain adequate representation.

II STATEMENT OF POLICY

A. Objectives

1. The objective of this Plan is to attain the goal of equal justice under the law for all persons. This Plan, therefore, shall be administered so that those accused of crime, or otherwise eligible for service pursuant to the CJA, will not be deprived of the right to counsel, or any element of representation necessary to an effective defense.

2. The further objective of this Plan is to particularize the requirements of the CJA, the Anti Drug Abuse Act of 1988 (codified in part at 21 U.S.C. § 848(q)) and the CJA Guidelines in a way that meets the needs of this district.

B. Compliance

1. The Court, its Clerk, the Federal Public Defender's office and private attorneys appointed under the CJA shall comply with the CJA Guidelines approved by the Judicial Conference of the United States and/or its Committee on Defender Services and with this Plan.

2. Each private attorney shall be provided by the Federal Public Defender with a current copy of this Plan upon the attorney's first appointment under the CJA or designation as a member of the Panel of Private Attorneys under the Criminal Justice Act (CJA Panel). The Federal Public Defender shall maintain a current copy of the CJA Guidelines for the use of members of the CJA Panel and shall make its availability known to such attorneys.

III DETERMINATION OF ELIGIBILITY FOR REPRESENTATION.

A. The determination of eligibility for representation under the CJA is a judicial

function to be performed by a judge after making appropriate inquiries concerning the person's financial condition.

B. In every case in which appointment of counsel pursuant to 18 U.S.C. § 3006A(a) is appropriate, it is the duty of the judge to advise the party of his or her right to counsel. The judge shall appoint counsel promptly if it is found that the party is financially unable to obtain an attorney, unless the party waives his or her right to be represented by counsel.

- C. Representation shall be provided for any financially eligible person who:
1. is charged with a felony or Class A misdemeanor;
  2. is a juvenile alleged to have committed an act of juvenile delinquency as defined in 18 U.S.C. § 5031;
  3. is under arrest, when such representation is required by law;
  4. is charged with a violation of probation, parole or supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of probation, parole or supervised release;
  5. is subject to a mental condition hearing under Chapter 313 of Title 18;
  6. is in custody as a material witness;
  7. is charged with a capital offense or is seeking to set aside or vacate a death sentence under sections 2254 or 2255 of Title 28, United States Code. All appointments under this section shall be made pursuant to Appendix C of this Plan or Local Rule CR104(d);
  8. is entitled to appointment of counsel in verification of consent proceedings pursuant to a transfer of an offender to or from the United States for the execution of a penal sentence under 18 U.S.C. § 4109;
  9. has been called as a witness before a Grand Jury or a court that has the power to compel testimony and there is reason to believe the witness risks self-incrimination, loss of liberty or contempt of court;
  10. is the subject of federal law enforcement interest and faces the risk of federal charges;
  1. is entitled to appointment of counsel under the Sixth Amendment to the Constitution;

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

D. Whenever a judge<sup>1</sup> determines that the interests of justice so require, representation may be provided for a financially eligible person who:

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

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

3. is proposed by the United States Attorney for processing under a pretrial diversion program;

4. is under federal supervision or in the custody of the Federal Bureau of Prisons, or is otherwise in contact with federal law enforcement officials, whenever the interests of justice require and the court determines that assignment of counsel would be of assistance to the court;

5. is financially eligible and whose case is of a type described in Volume VII, Chapter II, Part A, Section 2.01 F(5)(6) of the *Guidelines for the Administration of the Criminal Justice Act.*

#### IV. PROVISIONS FOR FURNISHING COUNSEL

A. This Plan provides for the furnishing of legal services by the Federal Public Defender's office and for the continued appointment and compensation of private counsel in a substantial proportion of cases.

B. When appointing counsel under this Plan, the court should be mindful of directives from the Judicial Conference during times of financial constraint. When practicable, private attorney appointments should be made in at least 25% of the cases.

C. The court, in cooperation with the Federal Public Defender, will make such arrangements with federal, state, and local investigative and police agencies as will adequately assure that at the earliest practicable stage, persons arrested under circumstances where representation is required by federal law, may promptly have counsel furnished to them.

D. Prior to a defendant's first scheduled court appearance, if it becomes known

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<sup>1</sup> Use of the term judge in this Plan includes both district judges and magistrate judges.

that the defendant desires representation of an attorney, but claims to be unable to afford such services, the Federal Public Defender shall be notified. If feasible, in order to conserve the time of the court, a staff attorney of the Federal Public Defender or a panel attorney shall then advise the defendant of his/her right to representation by counsel and to appointment thereof if he/she is unable financially to retain an attorney. If in the judgment of the panel or staff attorney of the Federal Public Defender, based upon inquiry of the defendant, a judge is likely to appoint counsel, with or without requiring payments by the defendant toward the cost of such representation, said attorney shall commence representation.

E. In the interests of justice, the Federal Public Defender is authorized under this Plan, subject to the approval or ratification of the court, to initially represent all persons arrested in the district before the first appearance and at bail hearings or arraignments where, in the judgment of the Federal Public Defender, the defendant is eligible or likely to be determined eligible for assigned counsel by the court and the defendant will likely be assigned to the Federal Public Defender or a panel attorney for representation.

F. The judge before whom a case is pending may, in the interest of justice, substitute one appointed counsel for another at any stage of the proceedings.

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

H. If at any stage of the proceedings, a judge finds that the party is financially unable to continue to pay retained counsel, the judge may make an original appointment of counsel in accordance with the general procedure set forth in this Plan.

I. 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 a privileged communication, counsel shall advise the court.

## V. ESTABLISHMENT OF THE FEDERAL PUBLIC DEFENDER ORGANIZATION

A. The court finds that the use of a Federal Public Defender organization in this district, as defined in 18 U.S.C. § 3006A(g)(2)(A), is appropriate and should continue. The Federal Public Defender shall submit to the Director of the Administrative Office of the United States Courts, at the time and in the form prescribed, reports of the office's activities and the financial position and proposed budget of the office.

B. The Federal Public Defender shall be responsible for the supervision and management of the Federal Public Defender Organization. Accordingly, the Federal Public Defender shall be appointed in all cases assigned to that organization for subsequent assignment to staff

attorneys at the discretion of the Federal Public Defender.

C. In accordance with and subject to the provisions of this Plan and further orders of the court, authority to administer the Criminal Justice Act is assigned and delegated to the Federal Public Defender.

D. It shall be the responsibility of the Federal Public Defender, subject to the approval of the court, to notify panel attorneys of an appointment and of the first appearance date.

E. Neither the Federal Public Defender, nor any staff attorney appointed as an Assistant Federal Public Defender, may engage in the private practice of law.

## VI. CRIMINAL JUSTICE ACT PANEL

### A. Formation of a Standing Committee to Oversee the Criminal Justice Act Panel

1. The judges of the United States District Court for the Western District of Washington hereby create a standing committee to oversee the CJA Panel. This committee shall consist of five attorneys, each a voting member, who possess sufficient experience and interest in the federal criminal justice system to administer the CJA Panel. Four members of the standing committee shall be selected by a majority vote of the active judges of the court. At least one such attorney shall be from the area served by the United States District Court in Tacoma. Members of the committee shall serve without compensation.

2. The Federal Public Defender or his or her representative will be a permanent member of the committee.

3. The court may set terms for service on the committee or rotate members at its discretion or upon recommendation of the Federal Public Defender.

4. The standing committee shall meet formally at least four times per year. In addition to reviewing Panel membership, the committee shall identify and define any operating difficulties encountered in the administration of the Panel and make recommendations to the court for appropriate changes.

5. The standing committee shall act consistent with the requirements of Appendix A to this Plan in making recommendations concerning selection to the Panel and recommendations concerning disputes involving claims for compensation or other services provided under this Plan.

6. The standing committee shall also coordinate with the Federal Public Defender's office in providing training for the CJA Panel. Such training shall include correspondence with Panel attorneys on substantive and procedural changes in the law, local rules,



and other matters affecting the Panel attorneys, and shall also include regularly scheduled seminars for Panel attorneys as well as the private bar.

7. The standing committee will be permitted to use the staff of the Federal Public Defender for clerical and record-keeping matters. However, the standing committee is not authorized to make requests for services which would incur financial obligations without prior approval of the court.

**B. Formation of the CJA Panel**

1. The Panel shall consist of attorneys recommended by the standing committee and approved by a majority of the active judges of the district, pursuant to the procedures outlined in Appendix A. A majority of the active judges of the district may remove a member of the Panel at any time.

2. CJA Panel attorneys must be admitted to practice and in good standing in the State of Washington, the United States District Court for the Western District of Washington and the Ninth Circuit Court of Appeals. In addition to bar membership, the Panel attorneys should have prior federal and/or state criminal trial experience, significant involvement in serious or complex criminal cases, knowledge of the Sentencing Guidelines and the Bail Reform Act, knowledge of other relevant areas of federal criminal practice, and/or clinical experience or participation in trial advocacy programs.

3. Each Panel attorney must carry professional malpractice insurance with minimum limits of \$200,000.00 for each occurrence.

**C. Obligations of Panel Members**

1. In addition to meeting the training and qualification requirements established by the standing committee, Panel members are expected to:

a. have an office procedure in place that facilitates the prompt receipt of information concerning appointment in a CJA case;

b. be qualified and willing to represent an assigned client through the appellate process and ancillary matters appropriate to the proceedings (subsection (c) of the CJA) unless or until relieved by order of the court;

c. promptly notify the standing committee, in writing, in the event any action is taken by any court or bar affecting the standing of the attorney to practice before such court or bar;

d. participate actively in the representation of eligible individuals;

e. comply with the requirements of electronic filing and have sufficient knowledge and technological capabilities to effectively and efficiently manage complex cases.

f. conform to the highest standards of professional conduct.

2. 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.

## VII. ASSIGNMENT OF CASES TO THE CJA PANEL

A. The Federal Public Defender shall be responsible for overseeing the assignment of cases to Panel attorneys.

B. Attorneys will be assigned to one of two primary panels, one providing service for the United States District Court in Tacoma and the second providing service for the United States District Court in Seattle. In the event that the Federal Public Defender is unable to locate counsel from the list maintained in that city, assignment will be made to the next available Panel attorney on the list maintained in the other city.

C. In addition to the two primary panels, the Federal Public Defender shall maintain a list of attorneys who will provide representation for individuals who appear before judges in outlying courts located within the district. Attorneys assigned to this list shall be selected by the standing committee in accordance with the procedures and requirements of this Plan. Consistent with the terms and requirements of Appendix B and Appendix C, the Federal Public Defender shall also maintain lists of attorneys for assignment to appeals or in capital cases.

D. The Federal Public Defender may create an emeritus panel for each of the above lists. Attorneys will be eligible for inclusion on the emeritus panels when they have served with distinction on the active panels or have otherwise demonstrated excellence in the practice of federal criminal defense and wish to be active in CJA matters but are no longer able or willing to take a significant number of assignments.

E. Location of attorneys for individual cases shall be handled by the Federal Public Defender. To facilitate this process, the appropriate court agency shall notify the Federal Public Defender of the need for counsel as rapidly as possible.

F. In the normal course, the Federal Public Defender shall locate counsel by calling from the appropriate list of attorneys in rotational order. The Federal Public Defender may go out of rotation at the direction of the court, or for a case which requires particular expertise, is of particular complexity or severity, or involves a client with unusual needs.

G. Attorneys on the emeritus panels may be called for cases which require

particular expertise, are of particular complexity or severity or involve clients with unusual needs. They may also inform the Federal Defender from time to time of their desire to take a case and be considered for the next available assignment.

H. In the interests of justice, where continuity of representation is a factor or other special circumstances exist, the court may assign an attorney who is not on the panel. Consideration for preserving the integrity of the panel selection process suggests that such appointments should be made only in exceptional circumstances. Further, the attorney, who may or may not maintain an office in the district, should possess such qualities as would qualify him or her for admission to the district's CJA panel in the ordinary course of panel selection.

I. The Federal Public Defender shall maintain master lists of CJA appointments, which will include the date of each appointment, the case name and the date of each refusal ("pass") by a Panel attorney.

J. If a Panel member has repeatedly passed assignments, the Federal Public Defender may refer the name of the attorney to the standing committee. The standing committee shall then consider the information provided by the Federal Public Defender and make such further inquiry as it deems appropriate.

K. The Federal Public Defender shall maintain a record of assignments to the Federal Public Defender's office and to the CJA Panel, as well as current statistical data reflecting the respective percentages of cases assigned to the Federal Public Defender and to private counsel.

## VIII. INVESTIGATIVE, EXPERT AND OTHER SERVICES

A. Counsel (whether or not appointed under the Act) for a party who is financially unable to obtain investigative, expert or other services necessary for an adequate defense in his or her case, may request such services in an ex parte application before a judge, as provided in 18 U.S.C. § 3006A(e)(1). Upon finding that the services are necessary, and that the person is financially unable to obtain them, the judge shall authorize appointed counsel to obtain the services.

B. Counsel may obtain, subject to later review, investigative, expert, or other services without prior authorization, pursuant to 18 U.S.C. § 3006A(e)(1). Expenditures without prior court authorization are not favored.

C. Counsel shall comply with all provisions regarding financial limitations and requests for services, as set forth in 18 U.S.C. § 3006A(e), and any guidelines or regulations approved by the Judicial Conference of the United States.

D. In the event that a judge indicates an intention not to approve, in whole or in part, compensation for services requested or rendered under this paragraph, counsel may request review and recommendation by the standing committee pursuant to the procedures set forth in Appendix A.

## IX. COMPENSATION

A. Payments of fees and expenses to counsel appointed under this Plan, (other than to the Federal Public Defender's office), and payment for investigative, expert, and other services incurred, shall be made in accordance with any statutory limitations and such rules, regulations and guidelines, as have been or may be prescribed from time to time by the Judicial Conference of the United States, and in accordance with the fiscal policies of the Administrative Office of the United States Courts. No appointed counsel may request or accept any payment or promise of payment for assisting in the representation of a party, unless such payment is approved by order of the court.

B. Claims for compensation of private attorneys providing representation under the CJA shall be submitted on the appropriate CJA form, to the office of the Federal Public Defender. That office shall review the claim form for mathematical accuracy and for conformity with the CJA Guidelines and, if correct, shall forward the claim form for the consideration of the appropriate judge.

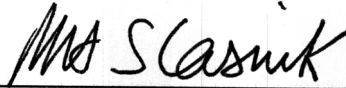
C. Except in cases involving mathematical or technical corrections, no claim for compensation submitted for services provided under the CJA shall be reduced without affording counsel the opportunity to be heard as provided below.

D. In any case where a judge has a question or concern with the amount of compensation claimed, the voucher shall be referred to the standing committee for review and recommendation before final action on the claim is taken. The judge may, at the time the voucher is submitted to the standing committee, provide the committee with a statement describing questions or concerns with the voucher. Counsel shall be given the opportunity to provide information or documentation relevant to the voucher and questions or concerns raised by the judge. The standing committee shall act in accordance with the procedures outlined in Appendix A and issue a written recommendation to the judge.

E. Notwithstanding the procedure described above, a judge, may in the first instance, contact appointed counsel to inquire regarding questions or concerns with a claim for compensation. In the event that the matter is resolved to the satisfaction of the judge and Panel member, the claim for compensation need not be referred to the standing committee for review and recommendation.

X. EFFECTIVE DATE

This Plan as amended this 4<sup>th</sup> day of April, 2005, shall take effect when approved by the Judicial Council of the Ninth Circuit.



ROBERT S. LASNIK  
CHIEF UNITED STATES DISTRICT JUDGE



JOHN C. COUGHENOUR  
UNITED STATES DISTRICT JUDGE



FRANKLIN D. BURGESS  
UNITED STATES DISTRICT JUDGE



MARSHA J. PECHMAN  
UNITED STATES DISTRICT JUDGE



RONALD B. LEIGHTON  
UNITED STATES DISTRICT JUDGE



RICARDO S. MARTINEZ  
UNITED STATES DISTRICT JUDGE



JAMES L. ROBERT  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
CRIMINAL JUSTICE ACT PLAN

APPENDIX A

I. CREATION AND MAINTENANCE OF THE REGULAR CJA PANEL

A. The standing committee shall solicit applications for the CJA Panel from interested members of the bar of the Western District of Washington including attorneys who have in the past participated in providing representation under the CJA. The standing committee shall promote participation on the Panel in a manner which facilitates and encourages diversity and geographic balance.

B. The standing committee shall compile and review all applications, and prepare lists of applicants who possess the qualifications required for inclusion on a panel. A separate list will be maintained for the United States District Court in Tacoma and will include the names of attorneys from those counties listed in Local Rule CR5(e). That list shall be designated the Tacoma

Panel. Another list will be maintained for the United States District Court in Seattle and will include the names of attorneys from the counties served by the District Court in Seattle. That list shall be designated the Seattle Panel. The standing committee shall also compile lists for the appellate panel, capital case panel, and the emeritus panel.

C. The standing committee shall solicit comment from the court concerning the individuals included on the compiled lists. After receiving that comment and such further comment as the committee deems necessary, and after further discussion, the committee shall make recommendations, by majority vote, to the court, concerning which prospective Panel members should be included on the final Panels. Final decisions regarding membership on or removal from the Panel will be made by a majority of the active judges of the district. The Tacoma Panel shall consist of not less than ten members. The Seattle Panel shall consist of not less than fifty members. The emeritus, appellate and capital case panels will have no size restriction.

D. The standing committee shall monitor the operation of the Panel to determine whether it meets the needs of current case load requirements. Applications for inclusion on the Panel shall be collected by the Federal Public Defender and referred to the standing committee for periodic review

E. The standing committee shall periodically submit to the court names of attorneys recommended for inclusion on the Panel, consistent with the procedure outlined in paragraph C of this section.

F Every three years, the committee shall poll attorneys on both the Seattle and Tacoma Panels to determine whether any individuals wish to voluntarily terminate service on the Panel. The vacancies shall be filled in the aforementioned manner

**II. TRAINING REQUIREMENTS**

The standing committee shall, in conjunction with the Federal Public Defender, develop a regular program for providing training for members of the CJA Panels. The standing committee may establish training requirements and monitor compliance of Panel members

**III. VOUCHER REVIEW**

Every Panel attorney has a right to request the standing committee to review and make recommendations when a judge has indicated a concern with a claim for compensation or for services provided pursuant to 18 U.S.C. § 3006A(e). The standing committee shall meet as soon as practical to review the questioned claim and, in no event, not more than fifteen days after receipt of the request. The standing committee shall consider the record and the



comments submitted by the court and counsel in making recommendation. The standing committee shall submit recommendation to the court and counsel within thirty days of the request for review. In making its recommendation the committee shall consider definitions or standards describing "extended or complex" cases as published by the Judicial Conference of United States. In addition, the committee shall consider, among other factors, the following:

1. Whether the case goes to trial or ends with a guilty plea.
2. The number of defendants in the case.
3. Unusual characteristics of the defendant (unable to speak English, mental health issues, particularly uncooperative).
4. Location of the defendant (e.g., amount of travel required for counsel to meet with the defendant) and whether the defendant is in custody.
5. Type and number of crimes charged.
6. Complexity or novelty of legal issues (requiring unusually great amount of legal research).
7. Number of witnesses presented by all parties at the trial or hearing.
8. Amount of pretrial discovery and investigation required, number of documents, open or closed file case.
9. Number of motions in the case; number and length of hearings on motions and other hearings; nature of hearings (evidentiary or mere argument).

Amount of trial preparation required

11. Length of trial.
12. Length and complexity of sentencing hearing and severity of potential sentence.

Following receipt of the standing committee's report and recommendation, the judge may request additional information from counsel. The judge shall take final action on the claim for compensation within fifteen days following receipt of the standing committee's report and recommendation.

IV. **COST CONTAINMENT MEASURES**

standing committee shall explore and develop cost containment measures for representation under the CJA. The standing committee shall specifically explore and discuss the following possibilities:

1. Use of a pool of experts and investigators who have agreed, in nonspecialized cases, to provide their services at a discounted or most reasonable cost.
2. Use of a brief bank developed by the Federal Public Defender and made available to Panel attorneys with a topics index for the brief bank being made available to all Panel lawyers.
3. Use of the internet and web sites to facilitate information sharing and training.
4. Identification of paralegals and document technicians to provide assistance in summarizing transcripts and organizing documents in complex litigation cases in a cost efficient manner.

5. Providing assistance to Panel lawyers in identifying "government rates" for transportation and travel related expenses for attorneys, witnesses and experts through the Panel administration team in the Federal Public Defender's office.
6. Establish a relationship with the United States Attorney's Office to discuss and develop cost efficiencies associated with bail requests, discovery disputes, management of complex cases or other matters that draw on the resources of the CJA.
7. Creation of relationships with the United States Marshal, Pretrial Services and the Probation Office to develop cost containment measures with those agencies.

V. **YEAR-END REPORT**

The standing committee shall prepare a brief year-end report to be provided to the Chief Judge of the Western District of Washington describing the fiscal year operation of the Panels. The Federal Public Defender shall provide relevant statistical information to the standing committee for inclusion in its yearly report of operations. The report of operations shall cover the fiscal year and be submitted not later than December 31st.

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
CRIMINAL JUSTICE ACT PLAN

APPENDIX B

I. ADMINISTRATION OF APPELLATE PANEL

A. The Federal Public Defender shall maintain a list of qualified individuals to handle appointments on appeal. The list shall include individuals with a proven commitment to the defense function, who are learned in the practice of federal criminal and have demonstrated excellence in writing skills

Upon request from the district court or the Court of Appeals, the Federal Public Defender shall select an attorney from the Appellate Panel and assign her or him to a case with due regard to the complexity of the issues on appeal and the equitable distribution of cases to all Panel members. The Federal Public Defender shall facilitate formal appointment and processing selected counsel

B. In selecting individuals for placement on

Appellate Panel, the Federal Public Defender shall take steps to assure appropriate diversity and geographic balance within the Western District of Washington

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
CRIMINAL JUSTICE ACT PLAN

APPENDIX C

PROVISIONS APPLICABLE IN CASES  
INVOLVING THE DEATH PENALTY

I. CAPITAL CASES

The judges of the United States District Court for the Western District of Washington have adopted the following addendum to the Criminal Justice Act Plan for this District which will apply in cases involving the death penalty.

"Cases involving the death penalty" or "capital cases" includes cases pending in this district wherein the government is seeking the death penalty under federal law and cases in this district wherein the penalty of death has been imposed by a federal court upon an individual who is seeking to set aside or vacate his or her conviction or sentence on direct appeal or pursuant to 28 U.S.C. §2255. This shall include prosecutions pursuant to any provision of federal law which authorizes the penalty of death

All such cases shall be referred to in this addendum as "capital cases" regardless of the nature of the proceeding. (See Local Rule CR104(d) for procedures that apply to appointment of counsel in state capital cases involving petitions filed pursuant to 28 U.S.C. § 2254).

**A. Federal Defender**

1. Federal Defender: In appropriate cases, consistent with the resources available to that office, the Federal Defender for the Western District of Washington [hereinafter Federal Defender] may be appointed as counsel in capital cases.

2. Initial Appearance: Before the formal appointment of counsel occurs in a capital case, an attorney with the Federal Defender may appear and act as counsel for the defendant, subject to subsequent approval by the court or the appointment of additional or other counsel under the provisions of subsection 3(e).

**B. Appointment of Trial Counsel**

1. Appointment of Two or More Attorneys: Due to the complex, demanding and protracted nature of death penalty proceedings, when appointing trial counsel under this section a person shall be entitled to the timely appointment of at least two qualified attorneys, at least one of whom shall be "learned in the law applicable to capital cases." 18 U.S.C. § 3005.

2. Appointment Guidelines: Counsel shall meet, to the extent practical, the qualification and training standards adopted by the American Bar Association, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (Feb. 2003). [Attached as Exhibit "A" In addition, at least one attorney so appointed must have been admitted to practice in the Western District of Washington for not less than five years and must have had not less than three years of experience in the actual trial of felony prosecutions in the Western District of Washington. Second, each attorney must have at least fourteen hours of approved continuing legal education in the defense of capital cases in the preceding two years before the trial. This continuing legal education shall include at least two hours focusing on recent developments in capital litigation and two hours focusing on federal death penalty developments

3. Waiver of Appointment Guidelines: Upon recommendation of the Federal Public Defender, the court for good cause may appoint an attorney whose background, knowledge, or experience would otherwise enable him or her to provide proper representation in a capital case, giving due consideration to the seriousness of the possible penalty and the unique and complex nature of the litigation.

4. Appointment Mechanism: Before the appointment of



counsel is made in a capital case, the presiding judge shall inform the Federal Defender that a capital case is pending and that counsel is needed. The Federal Defender for the Western District of Washington shall provide the appointing judge the names of at least two attorneys for appointment as counsel, who shall meet the guidelines for counsel in capital cases as set forth in subsection 3(b), or the exception thereto, set forth in subsection 3(c). Appointment of counsel shall be made by the court.

5. Timing of Appointment of Trial Counsel: The provisions of this section shall apply at the earliest opportunity. In order to protect the rights of a person who is in the focus of an investigation in a capital case, the Federal Defender and/or the presiding judge may assign interim counsel before the appointment of counsel occurs, either at their own initiative or upon the request of any interested party. The provisions of this section shall take effect no later than whenever a defendant is charged with a federal criminal offense for which the penalty of death is possible, unless the government issues written notice at or before the initial appearance that the government will not seek the death penalty or unless the court orders that death is not an applicable punishment upon conviction. If such written notice by the government that it will not seek death as punishment is later permitted to be withdrawn, the provisions set forth in this section

shall be implemented as soon after the withdrawal of the notice as is practicable. In the event that counsel for the defendant has already been appointed or retained at the time the government either withdraws its notice not to seek the death penalty or files a notice of intention to seek the death penalty, the provisions of this section shall apply to permit the appointment of additional or substitute counsel if necessary to comply with sections 3(a), (b) and (d). If additional or substitute counsel is appointed under this subsection, such appointment shall be made sufficiently in advance of trial to permit newly appointed counsel an adequate opportunity to prepare, provided that, if necessary to comply with the provisions of Title 18 U.S.C. § 3161, a motion to continue the trial is filed by the defendant

**C. Appointment of Appellate Counsel**

In the event the defendant is convicted and sentenced to death, after consultation with trial counsel and the condemned, the Federal Defender shall, where appropriate, provide the presiding judge and/or the Court of Appeals the name of at least two attorneys to perfect a direct appeal. Unless a compelling reason exists to appoint either or both trial attorneys as appellate counsel, the Federal Defender shall recommend at least one counsel to perfect the appeal other than those who represented the defendant at trial. The attorneys recommended for appointment

shall meet the qualifications guidelines for appellate counsel referred to in subsection 3(b) [Appendix A] or the exception thereto in subsection 3(c).

**D. Appointment of Post-Conviction Counsel**

In the event a sentence of death is affirmed on direct appeal, on his own initiative or upon the request of any interested party, and after consultation with 1) the defendant and 2) present and former counsel of record, the Federal Defender shall provide the presiding judge with the names of at least two attorneys to prosecute any post-conviction action. The attorneys appointed shall meet the ABA qualifications guidelines referred to in subsection 3(b) [Exhibit A] as to post-conviction counsel or the exception thereto in subsection 3(c).

**E. Investigative and Other Services**

1. Inapplicability of CJA Limitations: With respect to services rendered in federal capital proceedings, the presiding judge shall set compensation for investigative, expert and other services in an amount reasonably necessary to obtain such services without regard to CJA limitations and in accordance with 21 U.S.C. § 848(q)(10)(B).

2. With or Without Prior Authorization: Upon a finding in *ex parte* proceedings that investigative, expert or other services are reasonably necessary for the representation of the

defendant in a capital case, the presiding judge shall authorize counsel to obtain such services on behalf of the defendant. Upon a finding that timely procurement of necessary investigative, expert or other services could not practicably await prior authorization, the presiding judge shall authorize such services *nunc pro tunc*.

3. *Ex Parte Applications:* *Ex parte* applications for services other than counsel shall be heard *in camera*, and the confidentiality of all verbal communications, pleadings and court orders shall be preserved unless expressly waived by the person represented. Such application shall be placed under seal and shall be inaccessible to the government subject to further order of the court.

4. *Claims:* Claims for compensation of persons providing investigative, expert, and other services under the Act shall be submitted on the appropriate CJA form to the Federal Defender. That office shall review the claim form for mathematical and technical accuracy and for conformity with the Guidelines for the Administration of the Criminal Justice Act, and if correct, shall forward the claim form for the consideration of the appropriate judge. If incorrect, the Federal Defender shall return any claims for compensation to the person submitting such for correction

F. Payment for Representation by Non-Staff, Private Counsel

Compensation of counsel for capital cases shall be in accordance with the provisions of Title 21 U.S.C. § 848 (g) (10) (A) without regard to CJA hourly rates or compensation limitations contained in 18 U.S.C. §3006A. The court shall give due regard to any Judicial Conference or Ninth Circuit recommendations or policies concerning budgeting and management of costs in capital cases. Counsel shall meet with the court as directed to discuss budgetary issues and to assure compliance with cost related directives

**GUIDELINE 5.1—QUALIFICATIONS OF DEFENSE COUNSEL**

- A. The Responsible Agency should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation.**
- B. In formulating qualification standards, the Responsible Agency should insure:**
- 1. That every attorney representing a capital defendant has:**
    - a. obtained a license or permission to practice in the jurisdiction;**
    - b. demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and**
    - c. satisfied the training requirements set forth in Guideline 8.1.**
  - 2. That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:**
    - a. substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;**

- b. skill in the management and conduct of complex negotiations and litigation;
- c. skill in legal research, analysis, and the drafting of litigation documents;
- d. skill in oral advocacy;
- e. skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
- f. skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
- g. skill in the investigation, preparation, and presentation of mitigating evidence; and
- h. skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

#### *History of Guideline*

This Guideline has been substantially reorganized for this edition. In the original edition, it emphasized quantitative measures of attorney experience—such as years of litigation experience and number of jury trials—as the basis for qualifying counsel to undertake representation in death penalty cases. In this revised edition, the inquiry focuses on counsel's ability to provide high quality legal representation.

#### *Related Standards*

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-2.2 (3d ed. 1992) ("Eligibility to Serve").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.15 (1973) ("Providing Assigned Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 1.2 (1995) ("Education, Training, and Experience of Defense Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDED GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline II-3 (1984) ("Duties").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 2.9 (1989) ("Standards for Performance of Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.1(b) (1989) ("Establishment and General Operation of Assigned Counsel Roster").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.1.1 (1989) ("Qualifications of Attorneys").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 2.15 (1976) ("Establishing the Assigned Counsel Panel").

### *Commentary*

Under Guideline 3.1, it is the duty of the Responsible Agency to provide capital defendants with attorneys who will give them high quality legal representation. This Guideline amplifies that duty. It is designed to be outcome-focused and to leave the Responsible Agency maximum flexibility. The Guideline sets forth the necessary qualifications for all attorneys (Subsection B(1)), and also requires that "the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation." (Subsection B(2)). The qualification standards set by the Responsible Agency must be such as to bring about this result. This functional approach is new to this edition.

As described in the commentary to Guideline 1.1, the abilities that death penalty defense counsel must possess in order to provide high



quality legal representation differ from those required in any other area of law. Accordingly, quantitative measures of experience are not a sufficient basis to determine an attorney's qualifications for the task. An attorney with substantial prior experience in the representation of death penalty cases, but whose past performance does not represent the level of proficiency or commitment necessary for the adequate representation of a client in a capital case, should not be placed on the appointment roster.<sup>109</sup>

There are also attorneys who do not possess substantial prior experience yet who will provide high quality legal representation in death penalty cases.<sup>110</sup> Such attorneys may have specialized training and experience in the field (e.g., as law professors), may previously have been prosecutors, or may have had substantial experience in civil practice.<sup>111</sup> These attorneys should receive appointments if the Responsible Agency is satisfied that the client will be provided with high quality legal representation by the defense team as a whole.

In order to make maximum use of the available resources in the legal community overall, the Responsible Agency needs to devise qualification standards that build upon the contribution that each lawyer can make to the defense team, while ensuring that the team is of such a size and aggregate level of experience as to be able to function effectively.

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109. See Bright, *supra* note 29, at 1871 n.209 ("Standards for the appointment of counsel, which are defined in terms of number of years in practice and number of trials, do very little to improve the quality of representation since many of the worst lawyers are those who have long taken criminal appointments and would meet the qualifications.").

110. Because, as the second sentence of Subsection A emphasizes, the overriding goal is to provide high quality legal representation to the client in the individual case, it may also be appropriate for the appointing authority to certify an attorney for a limited purpose, such as to represent a particular client with whom he or she has a special relationship.

111. Superior post-conviction death penalty defense representation has often been provided by members of the private bar who did not have prior experience in the field but who did have a commitment to excellence. See, e.g., Kelly Choi, *Against All Odds*, AM. LAW., Dec. 2000, at 98; *Death-Row Rescue*, STAR TRIB., Jan. 5, 2001, at 18A.

**GUIDELINE 8.1—TRAINING**

- A. The Legal Representation Plan should provide funds for the effective training, professional development, and continuing education of all members of the defense team.**
- B. Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the Responsible Agency, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:**
- 1. relevant state, federal, and international law;**
  - 2. pleading and motion practice;**
  - 3. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;**
  - 4. jury selection;**
  - 5. trial preparation and presentation, including the use of experts;**
  - 6. ethical considerations particular to capital defense representation;**
  - 7. preservation of the record and of issues for post-conviction review;**
  - 8. counsel's relationship with the client and his family;**
  - 9. post-conviction litigation in state and federal courts;**
  - 10. the presentation and rebuttal of scientific**

evidence, and developments in mental health fields and other relevant areas of forensic and biological science;

11. the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18.

- C. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the Responsible Agency that focuses on the defense of death penalty cases.
- D. The Legal Representation Plan should insure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.

#### *History of Guideline*

The importance of training was addressed in Guideline 9.1 of the original version of the Guidelines for lawyers seeking to receive appointments in capital cases. Subsections A and D have been added to this revised edition to emphasize that the Legal Representation Plan must provide for specialized training of all members of the defense team involved in the representation of capital defendants. Subsections B and C are based on the original edition of the Guideline. This revised edition of the Guideline has been amended to emphasize that qualified training programs must be "comprehensive" in scope. Thus the eleven areas of training set forth in Subsection B are new and are intended to indicate the broad range of topics that must be covered in order for an initial training program to meet minimum requirements. The requirement of participation in a continuing legal education program every two years is also a minimum; many capital defense counsel have discovered that they must attend training programs more frequently in order to provide effective legal representation.

*Related Standards*

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.5 (3d ed. 1992) ("Training and Professional Development").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION Standard 3-2.6 (3d ed. 1993) ("Training Programs"), in ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.15 (1973) ("Providing Assigned Counsel").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.16 (1973) ("Training and Education of Defenders").

NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, MODEL PUBLIC DEFENDER ACT, Section 10 (1970) ("Office of Defender General").

NAT'L LEGAL AID AND DEFENDER ASS'N, DEFENDER TRAINING AND DEVELOPMENT Standards (1997).

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDED GOVERNMENTAL CONTRACTS FOR DEFENSE SERVICES Guideline III-17 (1984) ("Professional Development").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.7 (1976) ("Training Staff Attorneys in a Defender System").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.8 (1976) ("Training Assigned Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.2 (1989) ("Orientation").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.3.1 (1989) ("Entry-Level Training").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.3.2 (1989) ("In-Service Training").

ABA, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 9 (2002) ("Defense Counsel Is Provided with and Required to Attend Continuing Legal Education").

### *Commentary*

As indicated in the commentary to Guideline 1.1, providing high quality legal representation in capital cases requires unique skills. Accordingly, the standard of practice requires that counsel have received comprehensive specialized training before being considered qualified to undertake representation in a death penalty case.<sup>129</sup> Such training is not to be confined to instruction in the substantive law and procedure applicable to legal representation of capital defendants, but must extend to related substantive areas of mitigation and forensic science. In addition, comprehensive training programs must include practical instruction in advocacy skills, as well as presentations by experienced practitioners.

Once an attorney has been deemed qualified to accept appointments in capital cases, the standard of practice requires counsel to regularly receive formal training in order to keep abreast of the field.<sup>130</sup> Continuing legal education, which is required by many state bars as a matter of course for all attorneys, is critically important to capital

129. See, e.g., New York Capital Defender Office, *Minimum Standards for Lead Counsel and Associate Counsel in Capital Cases*, available at <http://www.nycdo.org/35b/35b-std.html> (requiring that applicants submit "a description of specialized criminal defense training programs regularly attended, such as the NITA, the National Criminal Defense College, or bar association criminal practice programs" and specifying that "[a]n attorney shall not be eligible to be appointed as lead counsel or associate counsel in a capital case unless the Capital Defender Office shall certify that the attorney satisfactorily has completed a basic capital training program prescribed by the Capital Defender Office" or qualifies for an Interim Certification because she is otherwise qualified and is "in active pursuit of such training").

130. As one authority has noted, capital defense counsel must exhibit "constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law." Vick, *supra* note 4, at 358; see also Taylor-Thompson, *supra* note 37, at 1510.

defense attorneys. As the commentary to Guideline 1.1 indicates, they must not only have mastery of current developments in law, forensics, and related areas, but also be able to anticipate future ones.<sup>131</sup>

In recognition of the central role that ongoing training plays in the provision of effective capital defense representation, a number of professional organizations, including the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, the Habeas Assistance Project, the NAACP Legal Defense and Education Fund, Inc., the office of the Kentucky Public Advocate, and the Association of the Bar of the City of New York, have regularly devoted significant efforts to providing educational programs of the quality contemplated by this Guideline.

Many such organizations also provide resources, such as newsletters, that counsel should utilize to learn of new developments and to benefit from the collective wisdom and experience of the capital defense bar.

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131. See *supra* text accompanying note 28.