

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

In the matter of:

PLAN FOR APPOINTMENT OF COUNSEL AND OTHER
SERVICES PURSUANT TO THE CRIMINAL JUSTICE
ACT OF 1964, AS AMENDED, 2004

Misc. No. 426 **FILED**

UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

MAY 10 2004

Robert M. Mach
CLERK

ORDER ADOPTING CJA PLAN

Pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, as amended, (“the Act”), and the *Guidelines for the Administration of the Criminal Justice Act and Related statutes* Volume VII, *Guide to Judiciary Policies and Procedures*, (“CJA Guidelines”)¹, the judges of the United States District Court for the District of New Mexico adopt this Plan for furnishing representation to persons financially unable to obtain adequate representation.

CONTENTS

1.	POLICY.	Page 3
	(a) <i>Objective.</i>	
	(b) <i>Compliance With Relevant Authority.</i>	
	(c) <i>Representation Defined.</i>	
2.	PERSONS ENTITLED TO REPRESENTATION.	Page 4
	(a) <i>Representation Required.</i>	
	(b) <i>Representation Optional.</i>	
	(c) <i>Representation Prohibited.</i>	
	(d) <i>Ancillary Representation.</i>	
3.	FURNISHING COUNSEL.	Page 7
	(a) <i>Court's Discretion.</i>	
	(b) <i>Apportionment of Cases.</i>	
	(c) <i>Management of Records.</i>	
	(d) <i>Time of Appointment.</i>	
	(e) <i>Determination of Eligibility.</i>	
	(f) <i>Disclosure of Change in Eligibility.</i>	

¹The CJA Guidelines are available in the Tenth Circuit Library in the U.S. Courthouse.

CONTENTS, Continued

- (g) *Number of Counsel.*
 - (1) *Separate counsel.*
 - (2) *Multiple counsel.*
- (h) *Preferences.*
 - (1) *Language.*
 - (2) *Location.*
- (i) *Appointment of Non-member Attorneys.*
- 4. FEDERAL PUBLIC DEFENDER. Page 9
 - (a) *Establishment of the Federal Public Defender Organization.*
 - (b) *Responsibilities of Federal Public Defender Organization.*
 - (1) *Reporting.*
 - (2) *Availability.*
 - (c) *Assignment of Cases Within the Office.*
- 5. THE CJA PANEL Page 10
 - (a) *Establishment of CJA Panel.*
 - (b) *CJA Panel Committee.*
 - (c) *Size of CJA Panel.*
 - (d) *Classifications.*
 - (1) *General felony panel.*
 - (2) *Complex Case Panel.*
 - (3) *Auxiliary Panel.*
 - (e) *Qualifications For CJA Panel Members.*
 - (1) *Mandatory Qualifications.*
 - (2) *General Felony Panel Qualifications.*
 - (f) *Equal Opportunity.*
 - (g) *Term of Appointment.*
 - (h) *Mandatory Continuing Legal Education.*
 - (1) *Four Hours Required.*
 - (2) *Certification.*
 - (3) *Dual Credit.*
 - (4) *Eligible Programs.*
 - (i) *Mentor Program.*
 - (1) *Service as Mentor.*
 - (2) *Substance of Mentoring.*
 - (3) *Reimbursement.*
 - (j) *Disciplinary Provisions.*
 - (1) *Suspension.*
 - (2) *Limited Practice.*
 - (3) *Complaint Procedure.*
- 6. CAPITAL CASES. Page 17
 - (a) *Authority.*

- (b) *Capital Case Defined.*
- (c) *Free Access to Accused.*
- (d) *Initial Appointment.*
- (e) *Timing of Appointment of Trial Counsel.*
- (f) *Capital Case Appointment Committee.*
- (g) *Appointment Process.*
- (h) *Recommendations Considered.*
- (i) *Appointment of Two or More Attorneys.*
- (j) *Qualifications of Counsel.*
 - (1) *Lead Trial Counsel.*
 - (2) *Second Chair.*
 - (3) *Local Experience.*
 - (4) *Appointment of Additional or Substitute Trial Counsel.*
 - (5) *Appellate Counsel.*
 - (6) *Post-Conviction Counsel.*
- (k) *Waiver of Appointment Guidelines.*
- (l) *Compensation in Capital Cases.*

7. DUTIES OF APPOINTED COUNSEL.

Page 24

- (a) *Standards.*
- (b) *Professional Conduct.*
- (c) *No Receipt of Other Payment.*
- (d) *Continuing Representation.*

8. COMPENSATION.

Page 25

- (a) *Claim for Compensation.*
- (b) *Policy of the Court Regarding Compensation.*
- (c) *Ex Parte Applications.*

1. POLICY.

(a) *Objective.* The objective of this plan is equality before the law for all persons in federal criminal proceedings. This plan is to be interpreted and administered so that those accused of crime or otherwise eligible for services will not be deprived of any element of representation necessary to an adequate defense for lack of financial resources.

(b) *Compliance With Relevant Authority.* The court, its clerk, the Federal Public Defender, and an attorney appointed under this plan must comply with relevant statutory authority and the *CJA Guidelines*. In the event of any conflict between this plan and any

federal statute, or any rule or guideline issued by the Administrative Office of the U.S. Courts, the statute, rule, or guideline controls.

(c) *Representation Defined.* Representation includes counsel, investigative, expert and other services.

2. PERSONS ENTITLED TO REPRESENTATION.

(a) *Representation Required.* Representation must be provided to a financially eligible person unable to obtain adequate representation who is:

- (1) charged with a felony or with a Class A misdemeanor;
- (2) a juvenile alleged to have committed an act of juvenile delinquency as defined in 18 U.S.C. § 5031 (*See*, 18 U.S.C. § 5034 regarding appointment of counsel; for appointment of a *guardian ad litem*, *see*, ¶ 3.14 of the *CJA Guidelines*);
- (3) charged with a violation of probation or faces modification 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 ;
- (4) under arrest, when representation is required by law;
- (5) entitled to appointment of counsel in parole proceedings;
- (6) 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;
- (7) subject to a mental condition hearing under 18 U.S.C. 4241-4247;

- (8) in custody as a material witness;
- (9) seeking to set aside or vacate a death sentence under 28 U.S.C. §§ 2254 or 2255.
- (10) entitled to the appointment of counsel in international transfer proceedings under 18 U.S.C. §4109;
- (11) entitled to appointment of counsel under the Sixth Amendment to the Constitution; or
- (12) facing loss of liberty in a case and federal law requires the appointment of counsel.

(b) *Representation optional.* When a judge determines that the interests of justice require, representation may be provided to a financially eligible person who:

- (1) is charged with a petty offense (Class B or C misdemeanor, or an infraction) for which a sentence of confinement is authorized;
- (2) is seeking relief under 28 U.S.C. §§ 2241, 2254, or 2255 in a case other than a capital case; or
- (3) is contesting the forfeiture of property in a civil judicial civil forfeiture proceeding, who is represented by appointed counsel in a related criminal case, and who satisfies the requirements of 18 U.S.C. § 983(b);
- (4) needs standby counsel pursuant to § 2.17 of the *CJA Guidelines*;
- (5) is charged with civil or criminal contempt and faces loss of liberty;
- (6) is a witness before a grand jury, a court, Congress, or federal agency or commission which has the power to compel testimony if there is reason to believe,

either prior to or during testimony, that the witness could be subject to criminal prosecution, civil or criminal contempt proceeding, or face loss of liberty;

(7) is proposed for admission to a pretrial diversion program;

(8) is held for international extradition under 18 U.S.C. §§ 3181 - 3196.

(c) *Representation Prohibited.* Counsel must not be provided in the following cases:

(1) Petty offenses (Class B or C misdemeanors or infractions), unless confinement is authorized and the judge determines that appointment of counsel is required in the interest of justice;

(2) Corporate defendant cases;

(3) Prisoners bringing civil rights actions under 42 U.S.C. § 1983. The Court should ensure that a prisoner is not denied counsel due to mislabeling of a case as "civil rights" when the action also could be a case under 28 U.S.C. §§ 2241, 2254, or 2255;

(4) Civil actions to protect federal jurors' employment. Counsel may be appointed under 28 U.S.C. § 1875 in such a case;

(5) Deportation or removal immigration proceedings.

(d) *Ancillary Representation.*

(1) Representation may be furnished for a financially eligible person in "ancillary matters appropriate to the proceedings" under 18 U.S.C. § 3006A(c) and § 2.01

(F)(5) of the *CJA Guidelines*.

3. FURNISHING COUNSEL.

(a) *Court's Discretion.* The Court, in its discretion, will determine whether a person entitled to representation will be represented by the Federal Public Defender or by a CJA panel attorney.

(b) *Apportionment of Cases.* A CJA panel attorney will be appointed in at least twenty-five percent of the cases, to the extent practicable. For the sole purpose of allocation of cases between CJA panel attorneys and the Federal Public Defender, a "case" shall be deemed to be each proceeding actually docketed in the United States District Court and each "new trial" as defined in 18 U.S.C. § 3006A(d)(6).

(c) *Management of Records.* The Court Clerk will maintain a current roster of all CJA panel attorneys, with current office addresses and telephone numbers. The Clerk also will maintain a public record of assignments to CJA panel attorneys, and current statistical data reflecting the distribution of cases between CJA Panel attorneys and the Federal Public Defender Organization.

(d) *Time of Appointment.* Counsel must be provided to financially eligible person requiring representation as soon as feasible in the following circumstances, whichever occurs earliest:

- (1) after they are taken into custody;
- (2) when they appear before a District Judge or Magistrate Judge;
- (3) when they are formally charged or notified of sealed charges; or
- (4) when a district judge or magistrate judge otherwise considers appointment of counsel appropriate.

(e) *Determination of Eligibility.* The determination of eligibility for representation under this Plan is a judicial function to be performed by a District Judge or Magistrate Judge after making appropriate inquiries concerning the person's financial condition pursuant to §§ 2.03 - 2.06 of the *CJA Guidelines*. The court may delegate responsibility for collecting financial eligibility information to a court agency.

(f) *Disclosure of Change in Eligibility.* After appointment under this Plan, if 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 must advise the court.

(g) *Number of Counsel.*

(1) *Separate counsel.* Separate counsel must be appointed for persons with interests that cannot properly be represented by the same counsel.

(2) *Multiple counsel.* More than one counsel may be appointed in a noncapital case determined by the court to be extremely difficult.

(h) *Preferences.*

(1) *Language.* The court should appoint counsel with a demonstrated ability to communicate with the client in his or her primary language.

(2) *Location.* The court should appoint counsel who reside in the division in which the case is assigned.

(i) *Appointment of Non-member Attorneys.* When the judge presiding over the case, or the chief judge if a judge has not been assigned to the case, determines that appointment

of an attorney who is not a member of the CJA Panel is in the interest of justice, judicial economy or continuity of representation, or there is some other compelling circumstance warranting his or her appointment, the attorney may be admitted to the CJA Panel *pro hac vice* and appointed to represent the defendant. Consideration for preserving the integrity of the panel selection process suggests that such appointments should be made only in exceptional circumstances.

4. FEDERAL PUBLIC DEFENDER.

(a) *Establishment of the Federal Public Defender Organization.* The Court has determined that a Federal Public Defender Organization as defined in 18 U.S.C. § 3006(g)(2)(A) facilitates representation under the Act, and that the District of New Mexico is a district in which at least 200 persons annually require the appointment of counsel pursuant to 18 U.S.C. § 3006A(g)(1). On February 11, 1971, the Judicial Council of the Tenth Circuit approved the establishment of a Federal Public Defender's office with headquarters in Albuquerque, New Mexico. The Federal Public Defender Organization is available for appointment as provided in the Act (18 U.S.C. § 3006A(a)(3)(B)). In recognition of and in order to preserve the independence of the defense function, the Federal Public Defender is appointed by and reports to the Tenth Circuit. Neither the Federal Public Defender nor any staff attorney appointed by the Federal Public Defender may engage in the private practice of law.

(b) *Responsibilities of Federal Public Defender Organization.*

(1) *Reporting.* The Federal Public Defender Organization shall submit to the Director of the Administrative Office of the United States Courts, at the time and in the form prescribed by the Director, reports on the activities, finances, and budget of the office. Copies of annual reports will be furnished to the Chief Judge of the Tenth Circuit and to the Chief Judge of this court.

(2) *Availability.* The Federal Public Defender will make arrangements with federal, state, and local investigative and police agencies to assure that at the earliest practicable stage, persons arrested under circumstances where representation is authorized by federal law promptly may have counsel furnished them by the organization. In communities where a Federal Public Defender attorney is not available, such agencies shall have access to a CJA Panel attorney.

(c) *Assignment of Cases Within the Office.* In order to ensure the effective supervision and management of the Federal Public Defender Organization, the Federal Public Defender will be responsible for the assignment of cases among the staff attorneys in the office. Accordingly, the Court must assign cases in the name of the Federal Public Defender Organization rather than in the name of individual staff attorneys.

5. THE CJA PANEL

(a) *Establishment of CJA Panel.* A panel of private attorneys who are eligible and willing to be appointed to provide representation under this Plan is established for each division within the district. ("CJA Panel") The court shall approve attorneys for membership on the CJA Panel after receiving recommendations from the CJA Panel

Committee. Membership on the CJA Panel is a privilege not a right and members of the CJA Panel serve at the pleasure of the court.

(b) *CJA Panel Committee.* The CJA Panel Committee will be appointed by the Court and must consist of members of the criminal defense bar who are knowledgeable regarding federal criminal defense practice. The Federal Public Defender and a representative of the New Mexico Criminal Defense Lawyers Association must be included among the members of the CJA Panel Committee. Appointments to the CJA Panel Committee should be made with the goal of achieving roughly equal proportions of lawyers from the Las Cruces and Albuquerque/Santa Fe divisions. Video conferencing should be utilized as needed by the Panel Committee.

(c) *Size of CJA Panel.* The court periodically will fix the size of the CJA panel for each division of the court. The goal of this provision is to provide each member of the CJA Panel with the opportunity for appointment in at least three cases per year.

(d) *Classifications.* The CJA Panel Committee will recommend CJA Panel attorneys to the court in the following categories:

(1) *General felony panel.* Members of the general felony panel shall be selected by the CJA Panel Committee utilizing the guidelines set out in section (e) below.

(2) *Complex Case Panel.* The CJA Panel Committee will identify attorneys with special experience in complex or multi defendant criminal cases. The clerk of the court will appoint counsel from the Complex Case Panel in RICO or CCE cases, or when the case is unusual or complex due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law.

(3) *Auxiliary Panel.* The CJA Panel Committee also will recommend a list of attorneys on an auxiliary panel whose experience level does not meet the qualifications for the general panel. These attorneys, in addition to attorneys on the general felony panel, may be appointed to represent individuals charged in misdemeanor or petty offenses cases or held as material witnesses.

(e) *Qualifications For CJA Panel Members.*

(1) *Mandatory Qualifications.* All CJA Panel members must meet the following criteria:

(A) They must be members in good standing of the State Bar of New Mexico and of the Federal Bar of this district.

(B) They must have experience in, or knowledge of, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, the Federal Sentencing Guidelines, and the local rules of court.

(2) *General Felony Panel Qualifications.* CJA General Felony Panel members should have the following qualifications. At the option of the panel selection committee, significant federal non-trial experience, and/or significant state court trial experience, may be substituted for the following requirements:

(A) At least five years criminal practice in state or federal court, or three years experience as an Assistant United States Attorney or an Assistant Federal Public Defender.

(B) Ten felony trials at least three of which are federal felony jury trials.

For purposes of this requirement, an applicant shall be considered to have

had a jury trial in any case in which a jury was empaneled, or jeopardy otherwise attached. An applicant who has not tried at least three federal criminal jury trials must audit three pretrial proceedings including a motions hearing, three sentencing hearings, and three jury trials in federal criminal cases pursuant to the mentor program established under this plan or its equivalent.

(f) *Equal Opportunity.* All qualified attorneys will be considered for appointment to the CJA Panel regardless of their race, color, religion, sex, age, national origin, or disabling condition.

(g) *Term of Appointment.* CJA Panel attorneys will be appointed for a term of three years. There is no limit on the number of terms an attorney may serve. Initial terms of appointment may be adjusted so that approximately one third of the panel is due for reevaluation and reapplication each year. Members wishing to serve another term must reapply by July 30th of the calendar year their term expires.

(h) *Mandatory Continuing Legal Education.*

(1) *Four Hours Required.* Each CJA Panel member must attend four hours of continuing legal education concerning federal criminal practice per calendar year at his or her own expense. Failure to comply with this requirement is grounds for removal from the CJA panel.

(2) *Certification.* CJA Panel attorneys must certify compliance with this requirement by February 1 of the following calendar year to the CJA Panel Committee on forms made available by the Committee.

(3) *Dual Credit.* These four hours of CLE may be satisfied by programs that also are used to satisfy state bar MCLE requirements.

(4) *Eligible Programs.* Eligible federal criminal practice programs include, but are not limited to, local seminars offered by the Federal Public Defender for the District of New Mexico, the New Mexico Criminal Defense Lawyer's Association, or the National Association of Criminal Defense Lawyers, or national programs available to CJA lawyers. The four hour requirement can be satisfied by providing or receiving mentoring as described in paragraph (i), below.

(i) *Mentor Program.*

(1) *Service as Mentor.* If requested by the CJA Panel Committee chairperson, a General Felony Panel member may serve as a mentor to an applicant who has not yet tried three federal criminal jury trials. General Felony Panel members are expected to agree to reasonable mentoring requests unless there is a compelling reason that excuses participation at a particular time.

(2) *Substance of Mentoring.* The General Felony Panel member should allow the applicant to audit as many aspects of a federal criminal case as possible, such as client conferences, strategy determination, motion and trial preparation, and court appearances. General Felony Panel members should involve the applicant as closely as possible in the substance of the representation.

(3) *Reimbursement.* Reimbursement for both the General Felony Panel member and the applicant is not available unless the court finds that the case is sufficiently complex to justify the services of more than one attorney.

(j) *Disciplinary Provisions.*

(1) *Suspension.* A CJA Panel attorneys who is suspended or disbarred by the New Mexico Supreme Court or the U.S. District Court for the District of New Mexico must be removed from the CJA panel. A removed attorney may reapply to the CJA Panel only upon readmission to practice before the court that imposed the suspension or disbarment.

(2) *Limited Practice.* A CJA Panel attorney subject to disciplinary action by the New Mexico Supreme Court or the U.S. District Court for the District of New Mexico that permits limited practice during a period of suspension or deferral will be permitted to continue practice as a CJA Panel attorney only within the terms or restrictions imposed by the disciplinary authority and only with advance written approval of the Court.

(3) *Complaint Procedure.*

(A) *Initiation.* A complaint concerning the performance a CJA Panel attorney may be initiated by a judge, a panel attorney, a member of the Federal Public Defender office, a client, or any other concerned person. A complaint is to be directed to the CJA Panel Committee, or a disciplinary subcommittee thereof. The CJA Panel Committee may take notice of deficiencies on its own and may itself be a complainant.

(B) *Form.* A complaint need not follow any particular form, however, a complaint must be in writing and must state the alleged performance deficiency with as much specificity as possible.

(C) *Notice.* A panel attorney against whom a complaint is lodged must be provided with a copy of the complaint by CJA Panel Committee.

(D) *Response.* A panel attorney against whom a complaint is lodged may respond in writing and may appear in person before the CJA Panel Committee.

(E) *Review.* The CJA Panel Committee must review the complaint, the response, and any other relevant materials and make a disposition recommendation to the Court as soon as possible. The CJA Panel Committee's action will be by a majority of the Committee.

(F) *Protective Action.* Prior to disposition of a complaint, the CJA Panel Committee may recommend to the court removal of the attorney from any pending CJA case or other protective action in the best interest of a CJA client.

(G) *Disposition Recommendation by CJA Panel Committee.* The committee's disposition recommendation to the Court may include any one or more of the following:

- (i) Removal of the attorney from the CJA panel.
- (ii) Limiting the attorney's participation to a type or category of cases.
- (iii) Requiring the attorney to complete specific CLE requirements prior to further CJA panel participation.

(iv) Limiting the attorney's participation to handling cases with direct supervision and oversight from a CJA panel member or other experienced practitioner for a specified period of time or until further review.

(v) Recommending that the complaint be dismissed.

(H) *Disposition by the Court.* The CJA Panel Committee will forward its disposition recommendation to the District Court for consideration and final disposition. The District Court may take any action it deems appropriate whether or not recommended by the CJA Panel Committee.

(I) *Confidentiality.* Unless otherwise ordered by the Court, a complaint and any proceedings conducted in connection with a complaint will be confidential.

6. CAPITAL CASES.

(a) *Authority.* Pursuant to 18 U.S.C. § 3005, 21 U.S.C. § 848(q), *CJA Guidelines* §§ 6.01 to 6.03, and *CJA Guidelines* Appendix I, the Court adopts the following provisions for the appointment of counsel in capital cases. In the event of any conflict between these provisions and any federal statute, or any rule or guideline issued by the Administrative Office of the U.S. Courts, the statute, rule, or guideline controls.

(b) *Capital Case Defined.* The term "capital case" includes any case in which the government may seek the death penalty under federal law or any case in which the