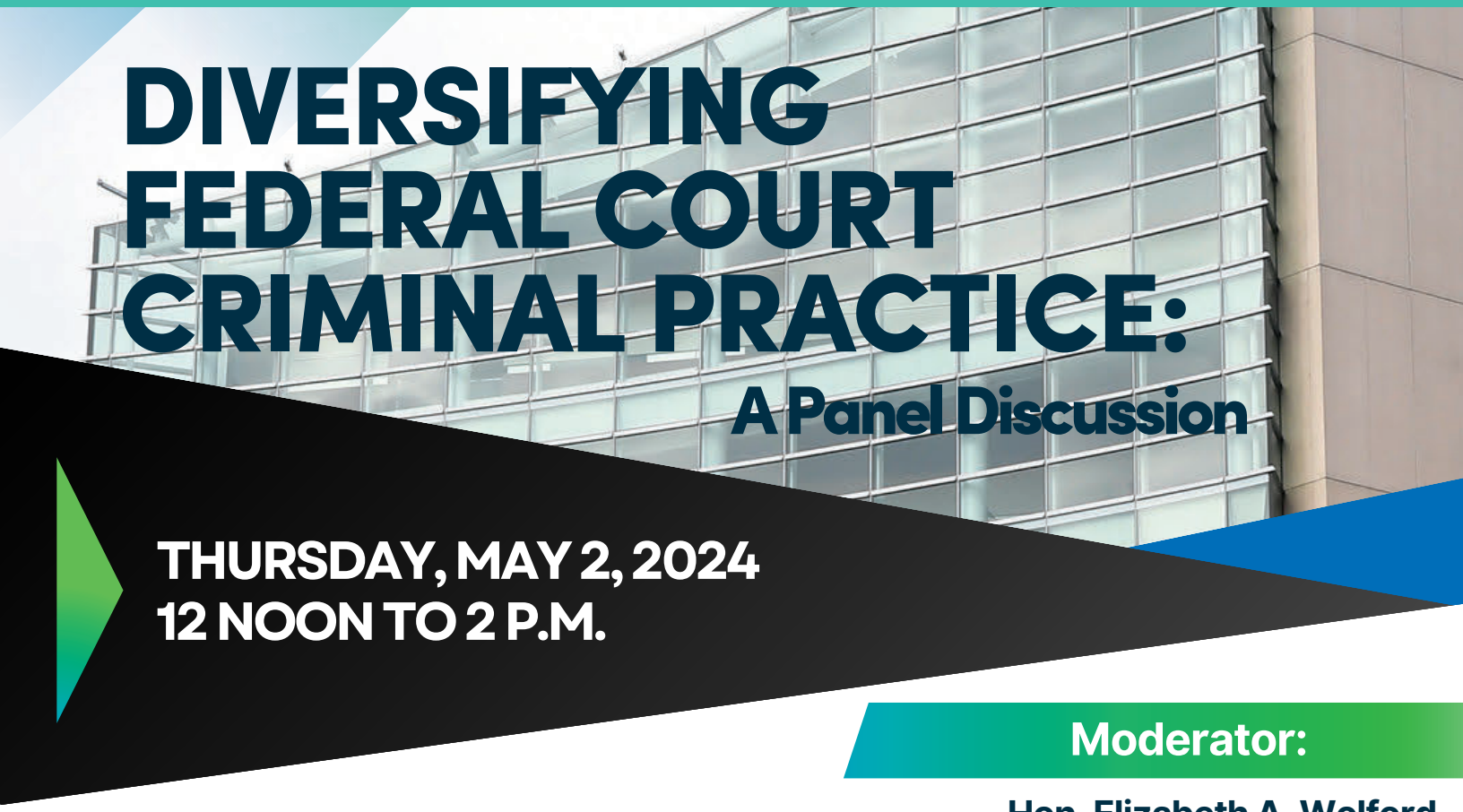
The Criminal Law Committee of the WNY Chapter of WBASNY and the University at Buffalo School of Law present



DIVERSIFYING FEDERAL COURT CRIMINAL PRACTICE:

A Panel Discussion

THURSDAY, MAY 2, 2024
12 NOON TO 2 P.M.

U.S. DISTRICT COURT
JURY ASSEMBLY ROOM

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Moderator:

Hon. Elizabeth A. Wolford
Chief Judge, U.S. District Court, WDNY

Panelists:

Fonda Dawn Kubiak, Esq.
Training Director,
Assistant Federal Public Defender
Federal Public Defender's Office, WDNY

Meghan E. Leydecker, Esq.
Assistant U.S. Attorney
Deputy Chief, Narcotics and Organized Crime Section
U.S. Attorney's Office, WDNY

Cheryl Meyers Buth, Esq.
Meyers Buth Law Group, PLLC

WBASNY
WNY Chapter

University at Buffalo
School of Law

Hon. Elizabeth A. Wolford, Chief United States District Judge

Judge Wolford was appointed United States District Judge for the Western District of New York on December 17, 2013. She was recommended for the position by United States Senator Charles Schumer, and nominated by President Barack Obama. She became Chief Judge of the District Court in July 2021. She is the first woman to serve as either a district judge or chief judge in the Western District of New York.

Before assuming the bench, Judge Wolford practiced for over twenty years with The Wolford Law Firm LLP, a firm founded her father, Michael R. Wolford, Esq., when she was newly graduated from law school. Judge Wolford was an associate with the firm until 2002, when she became a partner. The firm practiced exclusively in the area of criminal and civil litigation, and while working on diverse matters, Judge Wolford primarily focused her practice in the areas of commercial and employment litigation.

Judge Wolford earned her B.A. from Colgate University in 1989, and her J.D. from Notre Dame Law School in 1992. She served as Research and Projects Editor of the *Notre Dame Law Review*.

Judge Wolford is a past president of the Foundation of the Monroe County Bar (2010-2012) and the Greater Rochester Association for Women Attorneys (2003-2004). She is also a former member of the Board of Trustees of the Monroe County Bar Association (2019-2022), and former board member of the Volunteer Legal Services Project now known as Just Cause (2010-2014) and Sojourner House at Pathstone (2005-2010).

Judge Wolford has been recognized by a number of different organizations throughout her career, including the New York State Bar Association that presented her with the Ruth G. Shapiro Award in 2023, the Root/Stimson Award in 2013, and its Outstanding Young Lawyer of the Year Award in 2002. In 2022, she received the Adolph J. Rodenbeck Award from the Monroe County Bar Association, given in recognition of a legal professional who lives and works by Judge Rodenbeck's exemplary example of professionalism and community service. In 2000, she received a Special Service Award from the Court on which she now sits for excellent in the vigorous representation of a *pro bono* client.

Cheryl Meyers Buth, Esq., Meyers Buth Law Group

Cheryl Meyers Buth grew up in Western New York. She earned her undergraduate degree from the State University of Buffalo and her law degree from the University of Toledo College of Law.

After 18 years representing criminal defendants in state and federal courts, in the summer of 2012 she became involved in a case that the Buffalo News called one of the top ten most infamous cases of the past 50 years. The sensational facts divided the community, with most media sources vilifying the defendant. As a member of the defense team Ms. Meyers Buth delivered a closing argument in the case that persuaded the jury to acquit her client of manslaughter and all other felony charges.

In September 2012, Ms. Meyers Buth was chosen as a delegate to the Democratic National Convention in Charlotte, North Carolina. That experience inspired Ms. Meyers Buth to open her own firm along with her law partner Laurie A. Baker, Esq.

In 2013, after making the point at a Women's Bar Association seminar that there were no female legal commentators on local tv newscasts, she accepted an invitation to appear on the NBC affiliate WGRZ Ch. 2 (arranged by co-panelist Aaron Saykin). She has continued to appear regularly since then and has encouraged other women to help expand the public's perception of lawyers beyond traditional stereotypes.

Aside from her federal criminal work, for the past 10 years Ms. Meyers Buth has developed a sports and entertainment practice. In 2015 she was certified by the NBA players' union and has represented players and coaches on a variety of matters. She also currently represents American tenor Jay Dref. Jay has toured for the last two years with world famous soprano, and original Phantom of the Opera lead, Sarah Brightman.

In addition, she regularly defends members of law enforcement agencies in civil rights cases. Her firm has obtained multi-million dollar verdicts for plaintiffs who have suffered catastrophic personal injuries. They have taken on cases that have run the gamut from challenging gender discrimination in college sports to enforcing the State's obligation to maintain public works projects on Native American reservations.

Among her professional honors, Ms. Meyers Buth has been the recipient of the following awards:

- Two-time recipient of the "Criminal Justice Act Award" from the Judges of the United States District Court for the Western District of New York for her work with indigent defendants
- "The M. Dolores Denman Lady Justice Award for Lifetime Achievement" from the Western New York Chapter of the Women's Bar Association of the State of New York;
- "Woman Lawyer of the Year Award" from the Women Lawyers of Western New York;
- Western New York Trial Lawyers Civility Award**;**

- New York State Bar Association Charles F. Crimi Award (honoring the career of a defense lawyer in private practice that embodies the highest ideals of the Criminal Justice Section of the Bar)
- Hon. Judith Kaye Access to Justice Award from the Women's Bar Association of New York State
- She was recently inducted into the American College of Trial Lawyers and has been named by the *Buffalo News* to its Top Ten List of Criminal Lawyers

Fonda Dawn Kubiak, Esq., Training Director, Assistant Federal Public Defender
Federal Public Defender's Office Buffalo, New York

Ms. Kubiak is an **Assistant Federal Public Defender for the Western District of New York**. Since January 2023, she has been the **Training Director** overseeing the office-wide Externship, Pro Bono Scholar, and Volunteer Law Clerk programs, as well as collaborating with the training committee to brainstorm new topics to provide the CJA Panel with training, information, and support to ensure an excellent standard of practice in the district. This includes the development of the bi-annual CJA seminar, and new CJA attorney trainings. In addition, Fonda currently serves as a committee member for the Jury Diversification Project and the Community Outreach Subcommittee working to increase jury diversification in the Courts in our District as well as New York State Courts in the 8th Judicial District and focusing efforts on implanting systemic change.

Fonda has extensive experience in federal and state criminal defense having practiced in Western New York for the past 29 years. She is also an Adjunct Professor at the **University at Buffalo School of Law** teaching Trial Technique, Direct and Cross-Examination of Expert Witnesses in Criminal Cases and coaching the National Trial Team. Fonda has taught widely on various topics of criminal defense.

Prior to becoming an Assistant Federal Public Defender in 2010, Ms. Kubiak managed **The Kubiak Law Firm, PLLC**., where she successfully handled numerous state and federal criminal matters including death penalty cases. Before forming her own firm in 2003, Ms. Kubiak worked for several years at the Buffalo law firm of **Cole, Sorrentino, Hurley, Hewner & Gambino**, **P.C**., where she managed a busy real estate department in addition to her criminal law practice.

Ms. Kubiak graduated *magna cum* laude from Ithaca College in 1991. She received the David W. Sass Scholarship for her distinguished achievement in History. In 1994, Ms. Kubiak earned her Juris Doctorate Degree from the State University of New York at Buffalo Law School. In 1995, she was admitted to practice law in the State of New York and the United States District Court for the Western District of New York. She was admitted to United States Bankruptcy Court in 2007, and the United States Court of Appeals for the Second Circuit in 2012.

Meghan E. Leydecker, Esq., Assistant United States Attorney, Deputy Chief Narcotics & Organized Crime Section

Ms. Leydecker joined the United States Attorney's Office for the Western District of New York in November 2019, after previously serving as an Assistant District Attorney in the Erie County District Attorney's Office. In 2022, she was promoted to the position of Deputy Chief of the Narcotics and Organized Crime Section of the Criminal Division. In this position, Ms. Leydecker oversees a team of Assistant U.S. Attorneys in the Buffalo Office handling the prosecution of international narcotics trafficking, illicit firearms trafficking, violent crimes, gang cases, and opioid overdose cases involving fentanyl and other dangerous drugs.

Ms. Leydecker has prosecuted numerous cases while working with several federal, state, and local law enforcement agencies, including the Federal Bureau of Investigation (FBI), Homeland Security Investigations (HSI), Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), Drug Enforcement Administration (DEA), Buffalo Police Department (BPD), Erie County Sheriff's Office (ECSO), and New York State Police (NYSP).

Prior to joining the USAO, Ms. Leydecker was an Assistant District Attorney with the Erie County District Attorney's Office for over 8 years. As an ADA, Ms. Leydecker handled a wide variety of cases, including special victims, domestic violence, homicide, and non-fatal shooting prosecutions.

Ms. Leydecker received a Bachelor of Arts degree cum laude in Political Science and History with a Minor in English from the University of Miami in Coral Gables, Florida. She received a Juris Doctor Degree from the Boston College Law School in Newton, Massachusetts, and is a member of the New York State Bar and the Bar of the Commonwealth of Massachusetts.

I. Introduction

This primer will introduce state law criminal practitioners to the most important and fundamental aspects of federal criminal practice, including: a basic overview of the operation and structure of the federal criminal court, the basics of bail and bail hearings, plea bargaining and cooperation, sentencing guidelines, and updates, pitfalls and problems of federal criminal practice. During this CLE we will discuss some of the issues facing those attorneys who would like to make the transition from state criminal law practice to federal criminal law practice.

In addition, there is a brief overview of what state defenders need to know about Federal Criminal Law.

II. Pretrial Release in Federal Court

In 2019, New York ended the use of money bail and jail for most cases involving misdemeanors and lower-level felonies. The law, which was implemented in January 2020, sought to make release rather than detention the default in these cases. However, Bail Reform in Federal Court is much different. The question is not, "**How much is my bail?"** Rather, it is, "**Can I be released**?"

In Federal Court, pretrial release is governed by the Bail Reform Act (18 USC §3142). Many times, if a client is released her/she will be placed on pre-trial supervision by the United States Probation Office with specific conditions. Failure to comply with these conditions or to report to the USPO may result in a bail revocation and the client remains locked up for the duration of the case. Rarely does the federal court judge require one to post funds, property or a bail bond. More frequently, a defendant is released on a combination of conditions and required the defendant to It is the rare occasion when one is released on their own recognizance without the need to be on Pretrial Supervision.

Bail Reform Act (18 USC §3142)

The Court has four basic options under the Bail Reform Act. It may:

(1) Order the release of the defendant "on personal recognize or upon executing an unsecured appearance bond";
(2) Order the release of the defendant, subject to one or more other conditions designed to assure the defendant's presence and the safety of others;
(3) Order temporary detention for up to 10 days, excluding weekends and holidays, to allow authorities to take the defendant into their custody in certain other proceedings;
(4) Order permanent detention based on the risk of flight and/or dangerousness.

Prior to arraignment, the Pretrial Services Department of the United States Probation Office will interview the defendant and prepare for the Court a report setting out the USPO's assessment of the defendant's suitability for release and bail and the appropriate conditions. Everyone shall be released on the least restrictive conditions that reasonably assure appearance and safety of the community unless after a detention hearing, Judge finds by a preponderance of the evidence that the defendant presents a serious risk of flight and that no conditions or combination of conditions will reasonably assure the defendant's continued presence, or the Court finds that release on bail would pose a danger to the safety of another person and the community. Government must request the defendant's detention at the initial appearance pursuant to 18 U.S.C. §3142(f).

Presumptions 18 U.S.C. §3142(e): Government can move for detention only when defendant is charged with a drug offense (max of 10 years or more), crime of violence, capital offense, or any felony after committing two prior violent crimes/drug offenses serious risk of flight, or other specified categories. The Government gets a rebuttable presumption of detention for most drug charges, 924(c), some child porn offenses, certain other offenses. Check the statute if there's any question. If a presumption of detention is applicable, the defendant bears a limited burden of production, not a burden of persuasion, to rebut that presumption by coming forward with evidence that contradicts notions of flight risk or dangerousness.

a. Detention Hearings

Because the law generally favors bail release, the government carries a dual burden in seeking pre-trial detention. First, the Government must prove by a preponderance of the evidence that the defendant poses a risk of flight or prove by clear and convincing evidence that the defendant is a danger to the community; then it must show with the same quantum of proof that no condition or combination of conditions will reasonably assure the defendant's presence at trial. If a request for detention is made by the Government, the Court shall order the defendant detained until the hearing is held. 18 U.S.C. §3142(f).

A detention hearing can be adjourned for 3 days at Government's request, or 5 days at defense's request -- for good cause. Most of the Magistrate Judges will agree to hold an immediate detention hearing unless there is a compelling reason why the Government needs more time.

Practical Tips:

i. Find out Government and the Probation Department position on detention prior to the initial appearance before the Magistrate Judge.

ii. If you're going to have a hearing, decide whether you want to run an immediate hearing or ask for an adjournment. Typically, you only get one bite at the apple, and asking for reconsideration after a defendant has been detained requires a showing of a change in circumstances which did not exist at the time of the hearing. An immediate detention hearing is not always a good idea. If you have a case that could go either way and don't know much about the case or your client, it's better to take a day or two and find out more about family / job / bail resources / criminal history / facts of the case / etc. Downside is that your client will have to sit in jail and wait until there's a hearing. If client is getting detained, or definitely getting out, an immediate hearing makes sense -- however-- it can be difficult to predict this with any certainty when a case is brand new.

iii. **Factors to be considered at a detention hearing - 18 U.S.C. §3142(g):**

1. Nature of offense, including whether the offense is violent or involves a narcotic drug;
2. Weight of the evidence;
3. Employment (where, full-time / part-time, for how long, available if released?)
4. Criminal History (how old? any bench warrants? problems on parole or probation before? focus Judge on convictions not charges)
5. Medical issues (will it be difficult to deal with in jail? continuous treatment?)
6. Family (living with family? supporting them? try to have the family in court)
7. Mental Health / Substance Abuse (are they in treatment? can they go into treatment?)
8. Ties to the community – means both the community of arrest and the community where the defendant normally resides.
9. Probation/Parole status.

If there is a problem with facts or law alleged in case -- argue that. If a conviction would result in a short sentence (difficult to know when case is brand new). Magistrate Judges may not know where a case would likely end up under the sentencing guidelines. Maximum sentence may be 20 years, but if it's really a 0-6 sentence, argue that. If Judge is on the fence, can you pitch for curfew, EMS, home incarceration? If there's an immigration detainer (or a state detainer), and client is released, he will go into immigration (or state) custody and will have to apply for bail in that jurisdiction to be released from federal custody. **Always be aware of primary custody issues and issues under the Interstate Agreement on Detainers**.

III. Interstate Agreement on Detainers and Primary State/Federal Custody Issues

Once filed, detainers can disadvantage defendants in several ways, including making them ineligible for more lenient treatment by prison authorities. The Interstate Agreement on Detainers' (IAD) assists prisoners in resolving detainers against them by requiring that the government bring to trial within 180 days those who deliver to the prosecution and the curt a written request for speedy disposition of charges accompanied by detainers.

a. Prisoners serving a sentence, who have pending charges in another state or in federal court, can insist transferring to the custody of that other state or federal authority to deal with those other charges.

b. This doesn't apply to people with charges that are pending simultaneously in both state and federal courts (this is what we usually what we see). Those people are in the primary custody of whoever took them into custody first on their most recent arrest. This can be very complicated. I recommend contacting the BOP at 1-972-352-4441, when you have complicated joint custody issues. **Making mistakes on this can cost people years in additional time -- and it requires coordination with client's state defense attorney**. As a rule of thumb, the BOP will construe any ambiguity to give your client as much time as possible. The only scenario that should work out is (1) client is in primary federal custody, (2) federal sentence is first, (3) state sentence is second and state judge says it's concurrent with federal sentence. Otherwise, the time will not count toward both sentences.

c. Note that if your client is detained on state charges, then the feds pick up the case and the state charges are dismissed with no conviction, the BOP should count that time toward the federal sentence.

d. The Magistrate Judges will often ask whether your client wants to go into state or federal custody -- even when they are not a prisoner serving a sentence under the interstate agreement on detainers. This decision won't change the client's "primary custody" -- which is the only custody that matters in sentencing. BOP and NYS DOCS will calculate time served when a client has been back and forth between state and federal custody -- generally time will count only for one or the other, not both.

e. BOP generally doesn't care that the Magistrate Judge said your client was in "primary federal custody" or "primary state custody." BOP will figure it out for themselves.

f. Joint custody issues are very complicated and confusing -- this is something I recommend talking over with other attorneys when it comes up in a case.

g. **The most important thing is to be aware of state / federal custody issues when they arise so you can discuss it with your client and make an informed decision about what to do.**

IV. Preliminary Hearings

A Preliminary Hearing would be the equivalent to a Felony Hearing in State Court.

i. If your client is charged by complaint (this is where agent tells Judge what they think happened, signs an Affidavit attached to a Criminal Complaint, and Judge finds there's probable cause to arrest your client) -- you're entitled to a preliminary hearing within 14 days of initial appearance (if in custody) or 21 days of initial appearance (if out of custody). At this hearing, the Judge will hear testimony and determine whether there is probable cause that your client committed a crime.

ii. If case is indicted, the Grand Jury has found probable cause to charge your client, and you are no longer entitled to a preliminary hearing.

iii. **BE AWARE** - most AUSA's will find time to indict your client before a preliminary hearing takes place. If you set it down for a preliminary hearing and tell the AUSA that you won't waive it, they will most likely get an indictment before that date, and it may adversely affect your pretrial plea negotiations to the detriment of the client.

Note, **Judge Schroder will not issue Rule 48b dates**, he will set preliminary hearings within 14 days of arrest not initial appearance, so you may have to discuss the implication of this with the AUSA handling the case to determine if running a preliminary hearing will impact any potential plea disposition.

iv. If you have a preliminary hearing, the Judge will need to find only probable cause (which he already found when he signed the complaint). The only real difference is that you will have a limited opportunity to cross-examine the Government's witness.

v. Everyone's practice is different -- If I have a client who is agreeable, and there are no obvious issues with the facts alleged in the complaint, I will generally waive the preliminary hearing at the initial appearance unless there is a real lack in probable cause set forth in the Affidavit attached to the criminal complaint.

V. Speedy Trial

The Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy trial. The right to a speedy trial recognizes that the defendant, as well as the public, is the loser when a criminal trial is not prosecuted expeditiously. Speedy Trial issues in federal court are very complicated and difficulty to calculate.

a. In theory, the Government has:

30 days from initial appearance on a complaint to get an indictment, and

70 days from arraignment on an indictment to take case to trial.

Time can be excluded from the Speedy Trial Clock "in the interests of justice," for pending motions (filed by either side, or any co-defendant in your case), competency evaluations, continuity of counsel, various other reasons in 18 U.S.S. §3161.

b. In practice:

i. If 30 days runs on a complaint and it is dismissed without prejudice, the case can still be indicted at any time within the statute of limitations. Many times, there have been years that have passed from the time that a criminal complaint has been dismissed pursuant to Rule 48b and then an Indictment returned.

ii. JJM and MJR will set a Rule 48b dismissal date and exclude time "in the interests of justice" through that date if you agree. This is the date before which the case should be indicted or resolved by plea. MJR will generally grant extensions of Rule 48b dates if you demonstrate that you are doing something with the case, explain why you need more time, and neither side objects. JJM generally will not grant extensions. Clients don't like to see their "dismissal date" continually extended while they are sitting in jail. I tell clients that this date is essentially a deadline that the Judge is giving us to figure out what we are doing with a case -- trial / plea / motions / etc.

iii. HKS will not set a 48b date, and except in **EXTREMELY** rare circumstances (i.e. competency evals), he will not exclude time on a complaint. In his courtroom, complaints last 30 days, no more. For this reason, most of his complaint cases are indicted shortly after the initial appearance.

iv. Note, generally if time is excluded for one co-defendant, it's excluded for all.

v. Any motions will stop the speedy trial clock.

VI. Grand Jury in Federal Court

There are many major differences between federal and state grand jury protection. *First*, a defendant has no right to testify. *Second*, a witness has no Sixth Amendment right to counsel inside the grand jury. The witness may only confer with counsel outside the jury room after questions are posed. *Third*, hearsay is permissible and regularly offered to the grand jurors. *Fourth*, a subsequent conviction renders almost all grand jury violations harmless. Rule 6 of the Federal Rules of Criminal Procedure governs grand jury proceedings.

A. Immunity Differences

There are significant differences between state and federal immunity. Be sure to consult the United States Attorney's manual and that statutes when you have an issue pertaining to immunity and the grand jury. Witnesses compelled by subpoena to appear before a grand jury are entitled to receive immunity in exchange for their testimony. The grant of immunity impairs the witness's right to invoke the Fifth Amendment protection against self-incrimination as a legal basis for refusing to testify. Per 18 U.S.C. § 6002, if a witness who has been granted immunity nevertheless refuses to offer testimony, he or she may be held in contempt of the court that issued the subpoena. In addition, grand jury witnesses may be prosecuted for perjury or making false statements in their testimony. In *Kastigar v. United States*, 406 U.S. 441 (1972), the Supreme Court confronted the issue of which type of immunity, use or transactional, is constitutionally required in order to compel testimony. The Court ruled that the grant of use and derivative use immunity is sufficient. Despite the ruling in *Kastigar*, the type of immunity required to compel testimony depends on the law of the applicable jurisdiction. New York does more than the United States Constitution requires and mandates that transactional immunity be accorded to compelled witnesses.

B. Superseding Indictments

Many times in complex, long-investigated, criminal cases, prosecutors frequently file indictments with plans to return to the grand jury to add counts that could have been filed in the first place, or to repair flaws, or to add counts because cooperators previously on the fence (or in the woodwork) will come forward. And prosecutors often do this with impunity—telling the court at arraignment that there is a "continuing investigation." Clearly, the prosecutor may properly add new counts. However, the prosecutor will also, oftentimes, merely shore up already indicted counts; accomplish delays if not ready for trial; or serve subpoenas that may intimidate defense witnesses afraid to testify after being "reminded" that the prosecution can charge them with obstruction or perjury if their testimony at trial differs. Moreover, a "first

draft" indictment allows a prosecutor to draw out the defense in motion practice, in order to revise the indictment to address the legal or factual flaws the defense identifies. All a win/win for the prosecution.

C. Federal Prosecution of State Criminal Conduct

A federal prosecution following a state prosecution for the same offense is not precluded by the Double Jeopardy Clause of the Fifth Amendment to the United States 'Constitution. The federal system can make an offense a federal crime so long as there is a federal nexus – i.e., interstate commerce (guns, computers, drugs etc.) – or if the offense occurs on federal property or on an Indian reservation. Since the 1970's, Congress has vastly increased the federal government's jurisdiction over crime. What used to be considered street crime that was traditionally prosecuted in State Court is increasingly coming under the federal umbrella. Thus, there are many areas where state and federal criminal law now overlap.

- Drug possession, distribution, and manufacture
- Firearms possession and use
- Burglary or Robbery where firearms or drugs taken

(Commerce Clause)

- Child Pornography
- Fish and Game Violations
- Environmental Crimes
- Fraud
- Gambling Violations
- Securities Violations

Any time you are dealing with a crime falling into any of these categories you must determine whether the feds have an interest in prosecuting your client – and you must take action to minimize the damage. Don't ever assume that the feds won't find out about your client. Federal and state law enforcement work together – often on the same task forces. Federal prosecutors, like state prosecutors specialize and they are in touch with each other. They read the papers. It is no secret that federal prosecutors, are driven by numbers. They justify their

existence by numbers of successful prosecutions and the easiest way to get your numbers up is to shoot ducks in a barrel. That is why there are a disproportionate number of federal firearms prosecutions in New York– Every time a state probation search turns up a gun the feds have another statistic. No muss, no fuss. The other thing federal prosecutors rely on is people ratting eachother out. The system is set up to reinforce this.

VIII. Federal Court Judges

In Federal Court there are Circuit Court Judges, District Court Judges, and Magistrate Judges. Circuit and District Court Judges are nominated by the President, confirmed by the Senate, and sit on the bench for a life term. Magistrate Judges are hired by the District Court Judges and serve for 8-year terms. Magistrate Judges are empowered to conduct initial appearances and arraignments, appoint counsel, conduct detention hearings, release defendants, preside over preliminary hearings, conduct suppression hearings and issue reports and recommendations, accept guilty pleas, and impose punishment on misdemeanor convictions. It is very important to know each Judge's propensities. Especially in regards to arriving on time in their courtroom. If you are not familiar with the Judge you will be appearing before, make sure you consult with an attorney who has experience appearing before that particular Judge so that you know what to expect.

IX. Discovery and Motion Practice in Federal Court

A. Discovery – Rule 16

The way discovery is handled in federal criminal cases is vastly different than in state court criminal cases. Federal Rule of Criminal Procedure Rule 16(a) requires the government to disclose various information and items of evidence "**upon request of a defendant**." Rule 16 was intended to provide the defendant with liberal discovery, although not discovery of the entirety of the government's case. . Rule 16 is main criminal discovery tool. Rule 16 is mandatory direction to government to inspect and copy.

i. Other than Brady material, no constitutional right to discovery. *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S. Ct. 837, 845 (1977). See also *United States v. Ruiz*, 536 U.S. 622, 629 (2002), citing *Weatherford*.

ii. Limited discovery can be expanded by effective motion drafting.

1. Tie motions to facts of case. See *United States v. Breit*, 767 F.2d 1084, 1091 (4th Cir. 1985).

2. Avoid "form" discovery motions.

3. Be specific. For an excellent discussion of general versus specific requests, see *Chaney v. Brown*, 730 F.2d 1334 (10th Cir. 1984), cert. denied, 105 S. Ct. 601 (1985). See also *United States v. Mack*, 892 F.2d 134 (1st Cir. 1989) (blanket request phrased in language of rule too broad to show request for field test results and later lab tests relied on by government at trial).

4. Support with law. Sources: Cases; Federal Rules of Criminal Procedure, commentary and annotations; ABA Standards and Model Rules.

5. File early--supplement later if necessary.

6. Cover all aspects of case.

iii. Don't be lulled into inaction by a reassuring prosecutor.

B. Motion Practice - Rule 12

Rule 12 of the FED.R.CRIM.P. contains the majority of the motion practice. It discusses motions that must be made before trial and those that may be made before trial. The rule requires the government to file a notice of intent to use any evidence that may be subject to suppression. This is similar to a CPL § 710.30 notice. Magistrate Judges issue a scheduling order which requires the government and the defendant to provide and file certain materials by a given date. Generally, the order requires the government to provide voluntary discovery, acknowledge its *Brady* requirement and file its notice of intent.

The standard order imposes specific requirements on defense counsel. For example, defendant need not move for disclosure of evidence already required under the order. More importantly, the order sets out the requirements for any motions to suppress. In order to claim the protection of the Fourth Amendment, a defendant must demonstrate he personally has an expectation of privacy in the place searched, and his expectation is reasonable; i.e., one which has source outside of the Fourth Amendment, either by reference to concepts of real or personal property or to understandings that are recognized and permitted by society. *Minnesota v. Carter*, 525 U.S. 83, 88 (1998).

A refusal to conduct a pretrial suppression hearing will be upheld where the defendant fails to establish standing. An attorney's affidavit is rarely sufficient. The better practice is to include an affidavit by the defendant. *United States v. Watson*, 404 F.3d 163 (2d Cir. 2005). Such statements and/or affidavits or testimony offered to establish standing are not admissible against the defendant at trial on the issue of guilt. *Simmons v. United States*, 390 U.S. 377, 389-94 (1968).

What can a state practitioner do? Do not ask for a "Huntley hearing" or for the review of the grand jury minutes. These will aggravate the magistrate judge. Do follow the rules and the scheduling order when filing motions.

X. Plea Agreements: Applicable Federal Rules, Sentencing Guidelines & DOJ Policies

A. Introduction

Most criminal cases in federal court are resolved not by trials, but by plea bargains. In order to negotiate a successful plea agreement, defense counsel must understand what kind of agreements can be made and the effect of each kind on the client s sentencing exposure. Although plea agreements are generally referred to and treated as contracts, they are like contracts in a heavily regulated industry. Rights and responsibilities under these contracts are controlled by layers of statutes, rules, guidelines, Department of Justice (DOJ) policies, and case law. Regardless of the type of plea agreement, counsel must understand the impact of all these layers of regulation in order to know what the provisions of the agreement will mean to the client. The Department of Justice Manual the blue loose leaf standard reference manual for all U.S. Attorney s offices, cited herein as the DOJ Manual requires that plea agreements for all felonies and misdemeanors negotiated down from felonies be in writing and filed with the court. (DOJ Manual 9-27.450) Some U.S. Attorney s offices have standard plea agreement forms, others give individual assistants more leeway in what can or must be in plea agreements. Some agreements cover the basics in a couple of pages, others extend to ten or twenty pages. For some time the trend seemed to be toward longer and more complex agreement forms. Any new provision that a prosecutor came up with was simply tacked on to the previously standard form.

Despite the DOJ manual, plea bargaining is not dictated according to a national policy. Rather, it is within the discretion of the United States Attorney for each district. Guilty pleas may be entered with or without a written plea agreement. The majority of guilty pleas in this district are accompanied by a written plea agreement that is prepared and approved by the United States Attorney.

B. General Law of Plea Agreements

A defendant who is considering a plea is usually primarily concerned about what he or she will plead guilty to and what penalties will be assessed. Although the shape of the plea is controlled by many fact-specific factors related to the crime and the defendant, there are some general principles of law and policy that impact on (1) the prosecutor s initial charging decision, (2) the amount of prosecutorial discretion available for bargaining, (3) the involvement of the court in the bargaining process, and (4) the defendant s ability to enforce the plea bargain once it is entered into.

Plea bargains are controlled or influenced by various sources of law. Federal court practitioners are familiar with Rule 11 of the Federal Rules of Criminal Procedure (FRCrP), which, together with case its law interpretations, sets out much of the basic law on plea bargaining. Certain portions of the Federal Sentencing Guidelines (USSG or Guidelines) in particular §1B1.2-4 on Relevant Conduct and §6B1 on Plea Agreements also have a strong effect on plea bargains. Probably the least familiar source of information is the Department of Justice (DOJ) Manual. Most of the DOJ policies are contained in Title 9, Chapter 27 of the DOJ Manual at 9-27.001 et seq.2. Most of the provisions of the various DOJ Bluesheets and other memoranda should be available in local court libraries and in local federal defender offices.

Federal Rules of Criminal Procedure – Rule 11

Rule 11, FRCrP, sets out the basic ground rules for all plea bargaining in federal court. Much of the case law regarding how the plea hearing is handled and the effects of various pleas is based on interpretation of Rule 11. It should be the first source consulted on any plea question. The following are some notable provisions of the rules. Citations to the rules in this section are to the FRCrP unless otherwise stated. Rule 11(a) describes the kinds of pleas allowed under the FRCrP as not guilty, guilty, and nolo contendere. In addition, a defendant may enter a conditional plea under Rule 11(a)(2) with the consent of the court and the

government in order to preserve an issue for appeal. If the defendant prevails, he may withdraw the plea upon remand.

Advice to the defendant:

Rule 11 spells out in some detail the proceedings that must occur for a guilty plea to be valid. Below is a checklist that can be used to determine whether all the bases were covered in a particular case. Note, however, that Rule 11(h) specifically provides that variance from the described procedure is harmless error if it does not affect substantial rights.

If it is a Plea before Magistrate Judge:

- D must waive right to proceed in front of district judge

If it is a Plea before District Court

- Rule 7(b) (waiver of indictment) if pleading to an Information
- Ct must advise D of nature of the charges
- Ct must advise D about GJ (16-23 jurors, 12 must agree)

RULE 11(b)(1) (rights that you must discuss with defendant)

- D must be placed under oath
- D must be personally addressed in open court
- Gov can use statements in perjury or false statement charges
- D can plead NG or persist in that plea
- Right to jury trial
- Burden of proof (not in rule 11)
- Unanimous verdict (not in rule 11)
- Right to counsel at trial and every other stage
- Court will appoint counsel if needed
- Right to confront & cross-examine adverse witnesses
- Right to remain silent
- Right to testify
- Right to subpoena witnesses
- Plea of guilty or nolo waives trial, no trial will occur
- Nature of charge

- Maximum possible penalty: imprisonment, fine, S/R
- Mandatory minimum
- Any applicable forfeiture
- Court may order restitution
- Court must impose special assessment
- Court required to apply guidelines
- Court may depart from guidelines
- Terms of any waiver of appeal or collateral attack

Rule 11(b)(2) (voluntary plea)

- Ct must address D personally in open court
- Ct must determine if plea is voluntary
- Not the result of force or threats
- Not the result of promises other than in agreement

Rule 11(b)(3) (factual basis)

- Ct must determine there is a factual basis for the plea

Rule 11(c) (plea agreement)

- Ct may not participate in plea negotiations
- Parties must disclose plea in open court unless court permits otherwise

(3)(B) If recommendation, must advise that D cannot withdraw

Rule 11(g) (recording)

- Proceedings must be recorded by suitable method

Rule 11(a)(3) (nolo contendere plea) –

JUDGES IN WDNY ARE NOT AMENABLE TO TAKING THESE PLEAS

- Ct considered parties views & pub. interest in effective admin of justice

In general, Rule 11(c)(1) forbids the court to participate in any [plea bargaining] discussion. For example, a meeting of the judge, prosecutor, defendant, and defense counsel in chambers, off the record, during which the judge said he followed the prosecutor s recommendation 90% of the time, required reversal under Rule 11(c)(1). *U.S. v. Daigle*, 63 F.3d 346 (5th Cir. 1995). Similarly, where defendant got cold feet at the change of plea hearing and the judge told him (1) that if he was tried on all three counts he would have to get 15 years, (2) that if he pled guilty he would get 10 years, and (3) that he should talk to his lawyer to see if that is what he really wanted to do, the court crossed the line into the realm of forbidden participation in plea bargaining. *U.S. v. Casallas*, 59 F.3d 1173 (11th Cir. 1995).

C. The Plea Agreement

The standard agreement generally includes the maximum penalties, what charge or charges the defendant will be admitting, the elements of the offense, a factual basis to support the plea, the anticipated Sentencing Guideline range, the government's agreement to seek a 2+1 level reduction for acceptance of responsibility, the parties' ability to seek a sentence less than or higher than the anticipated Guideline range, forfeiture of contraband such as the illegal gun or ammunition or the digital media that contained the illegal images, and a waiver of the right to appeal or bring a habeas corpus petition challenging any sentence that is within or less than the Guideline range in the agreement. There may be an additional section for a recommended government application for a reduced sentence for Substantial Assistance. *See infra.* **Please note that all plea agreements are electronically filed on the Docket and are publicly assessable including the cooperation section of the plea agreement if it is not otherwise sealed or redacted which most of the District Court Judges will do.**

The defendant may decide that there is nothing to be gained by entering into such an agreement. There are increasing instances of defendants pleading guilty to the Indictment without benefit of a plea agreement. Those pleas usually permit the defendant to challenge the applicability of the Guidelines calculations and other sentencing issues. This is often referred to as pleading "open" to the Indictment. The Government will be required to file what is commonly referred to as a "Pimentel Letter" setting forth the government' calculation of maximum sentence and sentencing guideline range. (*United States v. Pimentel*, 932 F.2D 1029, 1034 (2d Cir. 1991). **HOWEVER**, a defendant cannot challenge on appeal any adverse suppression rulings unless he is convicted after trial or enters into a Conditional plea agreement with the government which allows him to pursue that claim on appeal. Also, a defendant cannot obtain a reduction for Substantial Assistance unless that section is included in the plea agreement. No plea agreement means no Substantial Assistance.

D. Cooperation – Substantial Assistance 5K1.1 and Rule 35 Motions

1. Introduction

One way for federal defendants to increase the likelihood that they will receive lower sentences or to have previously-imposed sentences reduced is by "cooperating" with the government. When a defendant "cooperates," it means that he or she helps the government investigate or prosecute someone else. There are two ways that "cooperating" can result in a lower sentence. If a defendant cooperates before sentencing, the prosecutor can file a motion pursuant to § 5K1.1 of the United States Sentencing Guidelines (also known as a "5K" motion). If a defendant cooperates after sentencing, the prosecutor can file a Rule 35 motion.

"Cooperating" does not guarantee that a prosecutor will file a § 5K1.1 or Rule 35 motion. Before a prosecutor will file a motion, the cooperation must amount to "substantial assistance." Frequently, a defendant will decide to cooperate with the government in hopes of receiving a benefit. The benefit usually sought is reduced sentence. Sometimes a friend or family-member of a defendant volunteers to cooperate with the prosecutor to benefit a particular defendant. This is called "third-party cooperation." Some prosecutor's offices have a policy not to allow third-party cooperation; others permit it.

Cooperation is usually a three part process.

1. Initial Meeting or Proffer
2. Substantial Assistance
   a) Proactive
   b) Historical
3. Sentencing Benefits
   a) Less than the Guidelines USSG §5K1.1
   b) Less than the Mandatory Minimum - 18 U.S.C. §3553(e)

Whether a defendant has provided Substantial Assistance is solely determined by the federal prosecutor. Also, the recommended number of levels to be reduced is solely within the discretion of the prosecutor. Lastly, whether the Court decides to grant such a motion/request

and how many levels to reduce is the sentencing judge's decision. The judge's determination is not appealable. So long as the judge exercised his discretion, he cannot abuse it.

2. §5K1.1 Motions

A "motion" is a request to a court to do something. A "5K" motion is motion filed by a prosecutor under the authority granted by § 5K1.1 of the United States Sentencing Guidelines ("guidelines"). It asks a sentencing court to "depart downward" under the guidelines based on "substantial assistance" provided by the defendant. As part of the sentencing process, a court must consider the range of sentences recommended by the guidelines. When a court "departs downward," it means that the guidelines will recommend a shorter range of sentences. A government § 5K1.1 motion will normally result in a shorter sentence. Keep in mind that what is "substantial" in one prosecutor's office may not be "substantial" in another office. All prosecutors consider testifying against another person to be "substantial." Some prosecutors do not consider simply providing information to be "substantial," unless it leads to something specific, such as an arrest, indictment, or conviction.

3. Rule 35 motions

A Rule 35 motion is a motion filed by a prosecutor under the authority granted by Rule 35(b) of the Federal Rules of Criminal Procedure. It asks a court to reduce a previously-imposed sentence based on "substantial assistance" by a defendant provided after sentencing. Only the prosecutor in a defendant's federal case may file a § 5K1.1 or Rule 35 motion.

4. Sentence below the Mandatory Minimum

Please Note that a § 5K1.1 or Rule 35 motion does authorize a court to sentence below a mandatory minimum. Some offenses require a court to impose a sentence that is a least a certain number of years. For example, if a five-year mandatory minimum applies, a court must impose a sentence that is at least five years. A substantial assistance departure motion can give a court the power to impose a sentence as low as probation – **but only if the prosecutor gives the court that power under the authority granted it by § 3553(e) of Title 18 of the United States Code. Make sure that when the prosecution files a §5K1.1 or Rule 35 motion, that they move under 3553(e) as well.**

Although prosecutors filing § 5K1.1 and Rule 35 motions normally recommend specific sentences, once a prosecutor files such a motion, the court is free to impose whatever sentence it believes is appropriate. If a mandatory minimum is involved, a court may not impose a sentence below the mandatory minimum unless the prosecutor's motion gives the court such power.

5. The Risks of Cooperating

There are several – although an experienced defense attorney can help minimize them. The most serious risk is to the safety of the defendant and the defendant's family. Other inmates, co-defendants, or the people against whom the defendant is cooperating sometimes learn of the cooperation or suspect it. When this happens, they sometimes threaten to harm the defendant or his family. The risk is greater for inmates in higher-security institutions (which house more violent offenders). Although threats are not uncommon, it is my understanding that few cooperators or their families are actually harmed as a result of cooperation. There are several things a defense attorney can do to minimize this risk. For example, if the defendant is incarcerated, defense counsel can make sure that visits by government agents are not seen by other inmates.

The second risk is that a defendant could be prosecuted for additional crimes that he reveals as part of cooperation. A "proffer agreement" with the government can protect a defendant from this risk.

XI. Federal Sentencing

A. Introduction

Federal sentencing involves the consideration of the Sentencing Guidelines and the application of minimum mandatory sentences as well as any enhanced sentencing provisions. The federal sentencing process typically begins well before the formal imposition of a sentence. It involves a lengthy adversarial process that revolves around the presentence report (PSR), which includes a proposed application of the sentencing guidelines. At the sentencing hearing, the court must resolve any objections to the PSR and also engage in the "Booker three-step process" in accordance with 18 U.S.C. § 3553. In *United States v. Booker*, 543 U.S. 220 (2005) the Supreme Court determined that the Sentencing Guidelines were no longer mandatory but are advisory.

The Sentencing Guidelines are based on a matrix. The United States Sentencing Guideline Table is attached. It should be consulted at the very beginning of a federal criminal case to try to adequately determine the defendant's sentencing exposure. All federal crimes are assessed an offense level. That offense level begins at one and progresses to forty-three. The more severe the crime, the greater the offense level. The individual's criminal history is determined by the number of points received for prior sentences. The sentencing table is constructed so that the intersection of the offense level and criminal history results in a guideline range. This guideline range is in months and provides the sentencing judge with an

option from which he may select a term of imprisonment and impose same on the defendant. Though no longer mandated by law, the guideline range is a factor that must be considered by the district court judge when determining a reasonable sentence. 18 U.S.C. §3553(a).

How the Sentencing Guidelines Work

The sentencing guidelines take into account both the seriousness of the offense and the offender's criminal history. The United States Sentencing Commission Guideline manual is broken up in to chapters and each much be worked through in sequential order. The Chapters are as follows:

CHAPTER ONE - Introduction, Authority, and General Application Principles

CHAPTER TWO - Offense Conduct

CHAPTER THREE - Adjustments

CHAPTER FOUR - Criminal History and Criminal Livelihood

CHAPTER FIVE - Determining the Sentence

- **Sentencing Table (attached at end of document)**

CHAPTER SIX - Sentencing Procedures, Plea Agreements and Crime Victims' Rights

CHAPTER SEVEN - Violations of Probation and Supervised Release

CHAPTER EIGHT - Sentencing of Organizations

Offense Seriousness

The sentencing guidelines provide 43 levels of offense seriousness — the more serious the crime, the higher the offense level.

Base Offense Level

Each type of crime is assigned a base offense level, which is the starting point for determining the seriousness of a particular offense. More serious types of crime have higher base offense levels (for example, a trespass has a base offense level of 4, while kidnapping has a base offense level of 32).

Specific Offense Characteristics

In addition to base offense levels, each offense type typically carries with it a number of specific offense characteristics. These are factors that vary from offense to offense, but that can increase or decrease the base offense level and, ultimately, the sentence an offender receives. Some examples:

One of the specific base offense characteristics for fraud (which has a base offense level of 7 if the statutory maximum is 20 years or more) increases the offense level based on the amount of loss involved in the offense. If a fraud involved a $6,000 loss, there is to be a 2-level increase to the base offense level, bringing the level up to 9. If a fraud involved a $50,000 loss, there is to be a 6-level increase, bringing the total to 13.

One of the specific offense characteristics for robbery (which has a base offense level of 20) involves the use of a firearm. If a firearm was brandished during the robbery, there is to be a 5-level increase, bringing the level to 25; if a firearm was discharged during the robbery, there is to be a 7-level increase, bringing the level to 27.

Adjustments

Adjustments are factors that can apply to any offense. Like specific offense characteristics, they increase or decrease the offense level. Categories of adjustments include: victim-related adjustments, the offender's role in the offense, and obstruction of justice. Examples of adjustments are as follows:

- If the offender was a minimal participant in the offense, the offense level is decreased by 4 levels.
- If the offender knew that the victim was unusually vulnerable due to age or physical or mental condition, the offense level is increased by 2 levels.
- If the offender obstructed justice, the offense level is increased by 2 levels.

Multiple Count Adjustments

When there are multiple counts of conviction, the sentencing guidelines provide instructions on how to achieve a "combined offense level." These rules provide incremental punishment for significant additional criminal conduct. The most serious offense is used as a starting point. The other counts determine whether and how much to increase the offense level.

Acceptance of Responsibility Adjustments

The final step in determining an offender's offense level involves the offender's acceptance of responsibility. The judge may decrease the offense level by two levels if, in the judge's opinion, the offender accepted responsibility for his offense.

In deciding whether to grant this reduction, judges can consider such factors as:

- whether the offender truthfully admitted his or her role in the crime,
- whether the offender made restitution before there was a guilty verdict, and
- whether the offender pled guilty.

Offenders who qualify for the 2-level reduction and whose offense levels are greater than 15 may, upon motion of the government, be granted an additional 1-level reduction if, in a timely manner, they declare their intention to plead guilty.

Criminal History

The guidelines assign each offender to one of six criminal history categories based upon the extent of an offender's past misconduct. Criminal History Category I is the least serious category and includes many first-time offenders. Criminal History Category VI is the most serious category and includes offenders with serious criminal records.

Sentences Outside of the Guideline Range

After applying the guidelines in Chapters Two, Three, and Four of the Guidelines Manual, sentencing courts calculate a guideline range pursuant to Part A of Chapter Five.1 Sentencing courts then may consider any information concerning the background, character, and conduct of a defendant when deciding what sentence to impose,2 whether that sentence be within or outside of the guideline range. Sentences imposed outside of the guideline range rely on departures or variances, which differ both substantively and procedurally.

Departures are sentences outside of the guideline range authorized by specific policy statements in the Guidelines Manual. As Congress acknowledged in the Sentencing Reform Act, and as the Guidelines Manual states, "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision." Departures therefore were incorporated in the guidelines framework to allow for "flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices."

Variances are sentences outside of the guideline range that are not imposed within the guidelines framework. Courts are able to impose sentences that vary from the guidelines because of the guidelines' advisory nature following *United States v. Booker*. While the guidelines remain "the starting point and initial benchmark" in sentencing, a court may determine that a sentence outside of the guidelines framework is warranted based upon the statutory sentencing factors found at 18 U.S.C. § 3553(a).

Because departures are part of the guidelines framework, while variances are not, sentencing courts typically calculate any departures prior to considering whether to vary.

Although departures and variances have the same ultimate result (a sentence above or below the applicable guideline range), they are treated differently procedurally, including with respect to notice and appellate review.

XIII. Concurrent and Consecutive Sentencing between Federal and State Court

Make sure that you consult §5G2.3 of the Sentencing Guidelines prior to sentencing to address any undischarged terms of imprisonment and when asking for concurrent sentences.

§5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment

(a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows:

(1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

(c) If subsection (a) does not apply, and a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.

(d) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

A fact based decision determined by who is the primary custodian of the defendant. Is it the state or federal government? It may be difficult to determine as the United States Marshals Service contracts with many local jails to house defendants. Also, a state detained defendant may be temporarily lodged in a federal facility. Best way is to create a timeline.

XIV. Supervised Release and Violations

Imposition of a Term of Supervised Release at Sentencing

Supervised release is the reformed successor to federal parole. Federal Supervised Release differs from probation because probation is an alternative to imprisonment while supervised release is imposed as an addition to imprisonment. Section 5D1.1 of the sentencing guidelines specifies when supervised release is required. Supervised release must be imposed when it is required by statute. Supervised release must also be imposed any time a defendant is sentenced to a term of incarceration of more than one year, although the sentencing court may choose to depart from that requirement and impose no release term under certain circumstance. The term of supervised release begins on the day the person is released from imprisonment. By statute a term of supervised release runs concurrently with any other federal, state or local term of supervised release, probation or parole. However, the revocation of one term does not terminate another. There are a number of mandatory conditions of supervised release.

Violations of Supervised Release

United States Probation officers are duty bound to report to the court on the conduct and conditions of those under supervision. 18 U.S.C. § When a defendant is alleged to have violated the terms of probation or supervised release, a probation office will file a "violence petition" with the court. Chapter seven of the United States Guidelines manual addresses violations of probation and supervised release. The first thing you will need to determine is the classification of the violation.

§7B1.1. Classification of Violations (Policy Statement)

(a) There are three grades of probation and supervised release violations:

(1) **Grade A Violations** -- conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C.§ 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years;

(2) **Grade B Violations** -- conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year;

(3) **Grade C Violations** -- conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of supervision.

Next, you will need to determine the applicable guideline range for the violation. Below is the revocation table.

§7B1.4. Term of Imprisonment (Policy Statement)

(a) The range of imprisonment applicable upon revocation is set forth in the following table:

Revocation Table

(in months of imprisonment)

Criminal History Category*

Violation	I	II	III	IV	V	VI
Grade C	3 – 9	4 – 10	5 – 11	6 – 12	7 -13	8 -14
Grade B	4 - 10	6 - 12	8 - 14	12 – 18	18 - 24	21 - 27
Grade A	(1) Except as provided in subdivision (2) below:					
	12 – 18	15 – 21	18 – 24	24 – 30	30 – 37	33 - 41

(2) Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony:

Violation	I	II	III	IV	V	VI
	24 – 30	27 – 33	30 – 37	37 – 46	46 – 57	51 - 63

***The criminal history category is the category applicable at the time the defendant originally was sentenced to a term of supervision.**

Finally, you need to determine that statutory maximum sentence that can be imposed which depends on the Grade felony the underlying conviction. When faced with a violation, district courts have broad discretion to revoke the defendant's probation or supervised release and to impose a sentence up to the statutory maximum. The statutory maximum terms of imprisonment are set forth in 18 U.S.C. §3583.

XV. Conclusion

The practice of criminal law is similar in federal and state court. There are specific instances where the federal practice is unique. We are willing to assist you, so please feel free to contact our office by telephone or email to discuss your matter.

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0–6	0–6	0–6	0–6	0–6	0–6
	2	0–6	0–6	0–6	0–6	0–6	1–7
	3	0–6	0–6	0–6	0–6	2–8	3–9
	4	0–6	0–6	0–6	2–8	4–10	6–12
	5	0–6	0–6	1–7	4–10	6–12	9–15
	6	0–6	1–7	2–8	6–12	9–15	12–18
	7	0–6	2–8	4–10	8–14	12–18	15–21
	8	0–6	4–10	6–12	10–16	15–21	18–24
Zone B	9	4–10	6–12	8–14	12–18	18–24	21–27
	10	6–12	8–14	10–16	15–21	21–27	24–30
	11	8–14	10–16	12–18	18–24	24–30	27–33
Zone C	12	10–16	12–18	15–21	21–27	27–33	30–37
	13	12–18	15–21	18–24	24–30	30–37	33–41
Zone D	14	15–21	18–24	21–27	27–33	33–41	37–46
	15	18–24	21–27	24–30	30–37	37–46	41–51
	16	21–27	24–30	27–33	33–41	41–51	46–57
	17	24–30	27–33	30–37	37–46	46–57	51–63
	18	27–33	30–37	33–41	41–51	51–63	57–71
	19	30–37	33–41	37–46	46–57	57–71	63–78
	20	33–41	37–46	41–51	51–63	63–78	70–87
	21	37–46	41–51	46–57	57–71	70–87	77–96
	22	41–51	46–57	51–63	63–78	77–96	84–105
	23	46–57	51–63	57–71	70–87	84–105	92–115
	24	51–63	57–71	63–78	77–96	92–115	100–125
	25	57–71	63–78	70–87	84–105	100–125	110–137
	26	63–78	70–87	78–97	92–115	110–137	120–150
	27	70–87	78–97	87–108	100–125	120–150	130–162
	28	78–97	87–108	97–121	110–137	130–162	140–175
	29	87–108	97–121	108–135	121–151	140–175	151–188
	30	97–121	108–135	121–151	135–168	151–188	168–210
	31	108–135	121–151	135–168	151–188	168–210	188–235
	32	121–151	135–168	151–188	168–210	188–235	210–262
	33	135–168	151–188	168–210	188–235	210–262	235–293
	34	151–188	168–210	188–235	210–262	235–293	262–327
	35	168–210	188–235	210–262	235–293	262–327	292–365
	36	188–235	210–262	235–293	262–327	292–365	324–405
	37	210–262	235–293	262–327	292–365	324–405	360–life
	38	235–293	262–327	292–365	324–405	360–life	360–life
	39	262–327	292–365	324–405	360–life	360–life	360–life
	40	292–365	324–405	360–life	360–life	360–life	360–life
	41	324–405	360–life	360–life	360–life	360–life	360–life
	42	360–life	360–life	360–life	360–life	360–life	360–life
	43	life	life	life	life	life	life

WOMEN'S BAR ASSOCIATION
of the STATE of NEW YORK
WESTERN NEW YORK CHAPTER

DIVERSIFYING FEDERAL CRIMINAL COURT PRACTICE

University at Buffalo
School of Law

MAY 2, 2024

UNITED STATES DISTRICT COURT JURY ASSEMBLY ROOM

1

MODERATOR:
Hon. Elizabeth A. Wolford
Chief United States District Judge
United States District Court for the
Western District of New York

2

BIOGRAPHY & BACKGROUND

- Judge Wolford was appointed United States District Judge for the Western District of New York on December 17, 2013. She was recommended for the position by United States Senator Charles Schumer, and nominated by President Barack Obama. She became Chief Judge of the District Court in July 2021. She is the first woman to serve as either a district judge or chief judge in the Western District of New York.
- Before assuming the bench, Judge Wolford practiced for over twenty years with The Wolford Law Firm LLP, a firm founded her father, Michael R. Wolford, Esq., when she was newly graduated from law school. Judge Wolford was an associate with the firm until 2002, when she became a partner. The firm practiced exclusively in the area of criminal and civil litigation, and while working on diverse matters, Judge Wolford primarily focused her practice in the areas of commercial and employment litigation.
- Judge Wolford earned her B.A. from Colgate University in 1989, and her J.D. from Notre Dame Law School in 1992. She served as Research and Projects Editor of the Notre Dame Law Review.
- Judge Wolford is a past president of the Foundation of the Monroe County Bar (2010-2012) and the Greater Rochester Association for Women Attorneys (2003-2004). She is also a former member of the Board of Trustees of the Monroe County Bar Association (2019-2022), and former board member of the Volunteer Legal Services Project now known as Just Cause (2010-2014) and Sojourner House at Pathstone (2005-2010).
- Judge Wolford has been recognized by a number of different organizations throughout her career, including the New York State Bar Association that presented her with the Ruth G. Shapiro Award in 2023, the Root/Stimson Award in 2013, and its Outstanding Young Lawyer of the Year Award in 2002. In 2022, she received the Adolph J. Rodenbeck Award from the Monroe County Bar Association, given in recognition of a legal professional who lives and works by Judge Rodenbeck's exemplary example of professionalism and community service. In 2000, she received a Special Service Award from the Court on which she now sits for excellent in the vigorous representation of a pro bono client.

3

Women belong in all places where decisions are being made. It shouldn't be that women are the exception.

—Ruth Bader Ginsburg

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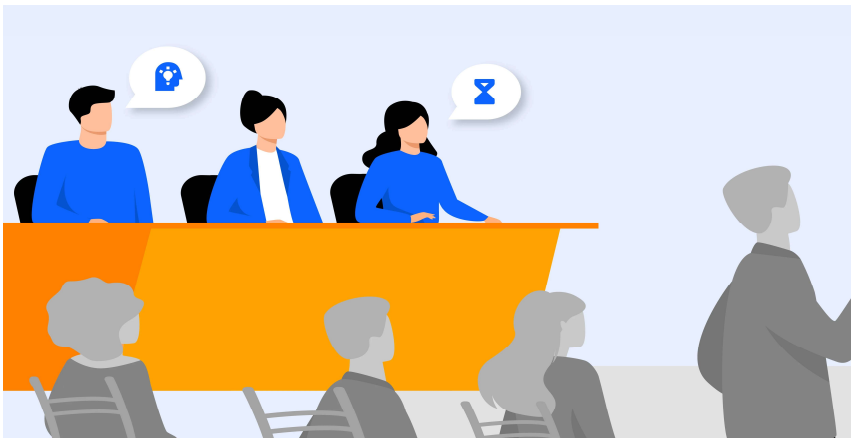

THE PANELLISTS

FONDA DAWN KUBIAK, MEGHAN LEYDECKER & CHERYL MEYERS BUTH

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FONDA DAWN KUBIAK
TRAINING DIRECTOR/ ASSISTANT FEDERAL PUBLIC DEFENDER

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BIOGRAPHY & BACKGROUND

- Ms. Kubiak is an Assistant Federal Public Defender for the Western District of New York. Since January 2023, she has been the Training Director overseeing the office-wide Externship, Pro Bono Scholar, and Volunteer Law Clerk programs, as well as collaborating with the training committee to brainstorm new topics to provide the CJA Panel with training, information, and support to ensure an excellent standard of practice in the district. This includes the development of the bi-annual CJA seminar, and new CJA attorney trainings. In addition, Fonda currently serves as a committee member for the Jury Diversification Project and the Community Outreach Subcommittee working to increase jury diversification in the Courts in our District as well as New York State Courts in the 8th Judicial District and focusing efforts on implanting systemic change.
- Fonda has extensive experience in federal and state criminal defense having practiced in Western New York for the past 29 years. She is also an Adjunct Professor at the University at Buffalo School of Law teaching Trial Techniques, Direct and Cross-Examination of Expert Witnesses in Criminal Cases and coaching the National Trial Team. Fonda has taught widely on various topics of criminal defense.
- Prior to becoming an Assistant Federal Public Defender in 2010, Ms. Kubiak managed The Kubiak Law Firm, PLLC., where she successfully handled numerous state and federal criminal matters including death penalty cases. Before forming her own firm in 2003, Ms. Kubiak worked for several years at the Buffalo law firm of Cole, Sorrentino, Hurley, Hewner & Gambino, P.C., where she managed a busy real estate department in addition to her criminal law practice.
- Ms. Kubiak graduated magna cum laude from Ithaca College in 1991. She received the David W. Sass Scholarship for her distinguished achievement in History. In 1994, Ms. Kubiak earned her Juris Doctorate Degree from the State University of New York at Buffalo Law School. In 1995, she was admitted to practice law in the State of New York and the United States District Court for the Western District of New York. She was admitted to United States Bankruptcy Court in 2007, and the United States Court of Appeals for the Second Circuit in 2012.

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United States Attorney's Office
Western District of New York

MEGHAN E. LEYDECKER

ASSISTANT UNITED STATES ATTORNEY

DEPUTY CHIEF NARCOTICS
&
ORGANIZED CRIME SECTION

8

BIOGRAPHY & BACKGROUND

- Ms. Leydecker joined the United States Attorney's Office for the Western District of New York in November 2019, after previously serving as an Assistant District Attorney in the Erie County District Attorney's Office. In 2022, she was promoted to the position of Deputy Chief of the Narcotics and Organized Crime Section of the Criminal Division. In this position, Ms. Leydecker oversees a team of Assistant U.S. Attorneys in the Buffalo Office handling the prosecution of international narcotics trafficking, illicit firearms trafficking, violent crimes, gang cases, and opioid overdose cases involving fentanyl and other dangerous drugs.
- Ms. Leydecker has prosecuted numerous cases while working with several federal, state, and local law enforcement agencies, including the Federal Bureau of Investigation (FBI), Homeland Security Investigations (HSI), Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), Drug Enforcement Administration (DEA), Buffalo Police Department (BPD), Erie County Sheriff's Office (ECSO), and New York State Police (NYSP).
- Prior to joining the USAO, Ms. Leydecker was an Assistant District Attorney with the Erie County District Attorney's Office for over 8 years. As an ADA, Ms. Leydecker handled a wide variety of cases, including special victims, domestic violence, homicide, and non-fatal shooting prosecutions.
- Ms. Leydecker received a Bachelor of Arts degree cum laude in Political Science and History with a Minor in English from the University of Miami in Coral Gables, Florida. She received a Juris Doctor Degree from the Boston College Law School in Newton, Massachusetts, and is a member of the New York State Bar and the Bar of the Commonwealth of Massachusetts.

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CHERYL MEYERS BUTH ESQ.

MB MEYERS BUTH LAW GROUP PLLC

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Cheryl Meyers Buth grew up in Western New York. She earned her undergraduate degree from the State University of Buffalo and her law degree from the University of Toledo College of Law.
After 18 years representing criminal defendants in state and federal courts, in the summer of 2012 she became involved in a case that the Buffalo News called one of the top ten most infamous cases of the past 50 years. The sensational facts divided the community, with most media sources vilifying the defendant. As a member of the defense team Ms. Meyers Buth delivered a closing argument in the case that persuaded the jury to acquit her client of manslaughter and all other felony charges.
In September 2012, Ms. Meyers Buth was chosen as a delegate to the Democratic National Convention in Charlotte, North Carolina. That experience inspired Ms. Meyers Buth to open her own firm along with her law partner Laurie A. Baker, Esq.
In 2013, after making the point at a Women's Bar Association seminar that there were no female legal commentators on local tv newscasts, she accepted an invitation to appear on the NBC affiliate WGRZ Ch. 2 (arranged by co-panelist Aaron Saykin). She has continued to appear regularly since then and has encouraged other women to help expand the public's perception of lawyers beyond traditional stereotypes.
Aside from her federal criminal work, for the past 10 years Ms. Meyers Buth has developed a sports and entertainment practice. In 2015 she was certified by the NBA players' union and has represented players and coaches on a variety of matters. She also currently represents American tenor Jay Dref. Jay has toured for the last two years with world famous soprano, and original Phantom of the Opera lead, Sarah Brightman.
In addition, she regularly defends members of law enforcement agencies in civil rights cases. Her firm has obtained multi-million dollar verdicts for plaintiffs who have suffered catastrophic personal injuries. They have taken on cases that have run the gamut from challenging gender discrimination in college sports to enforcing the State's obligation to maintain public works projects on Native American reservations.
Among her professional honors, Ms. Meyers Buth has been the recipient of numerous awards.

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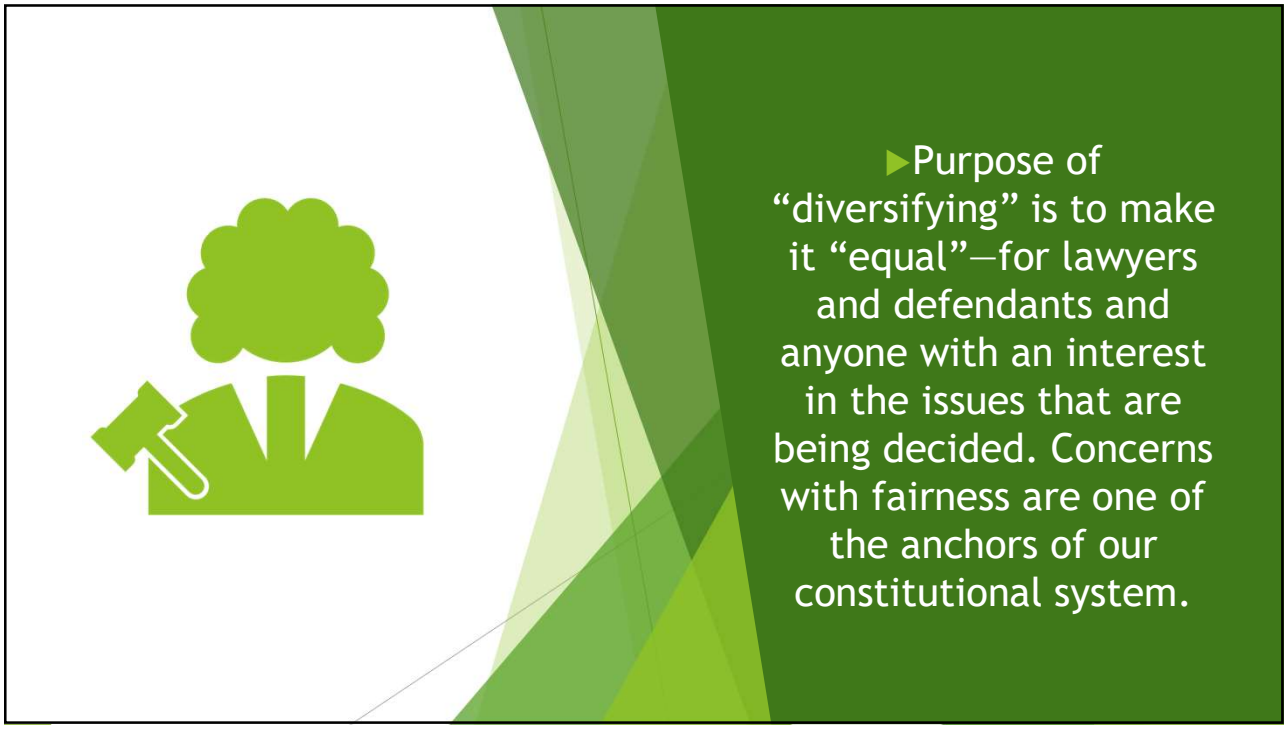
Purpose of "diversifying" is to make it "equal"—for lawyers and defendants and anyone with an interest in the issues that are being decided. Concerns with fairness are one of the anchors of our constitutional system.

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Diversity & Inclusion: An Imperative for the Federal Criminal Court System

By most measures, the legal profession remains one of the least diverse professions in the nation. That fact alone is startling. More fundamentally, it is difficult to conceive how lawyers can ensure equal access to justice if we cannot provide equal access to the profession itself.

Recognizing that we must tirelessly and relentlessly work to ensure that our entire federal legal community—fully reflects and includes the rich diversity of our nation.

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JUSTICE BE A LADY

SO HOW DO WE BALANCE THE SCALES

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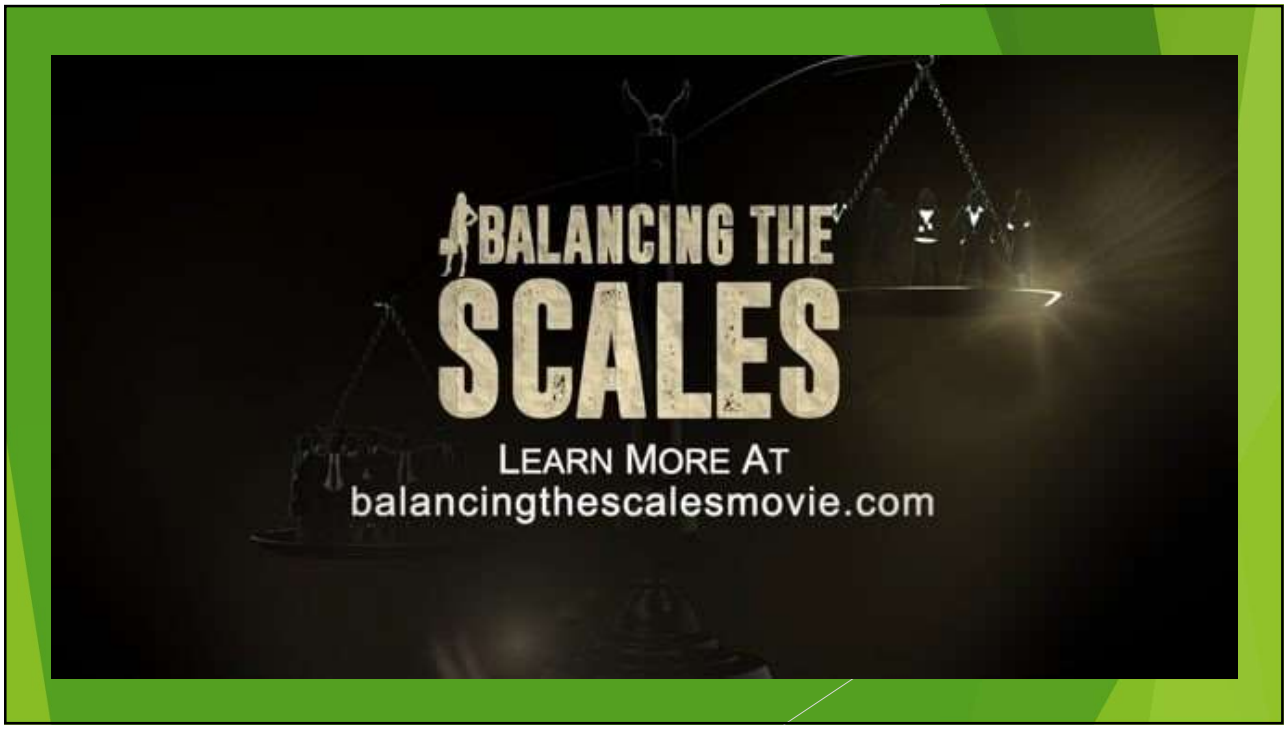

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VIEW FROM THE BENCH
CHIEF JUDGE WOLFORD

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QUESTIONS FOR MEGHAN

- What are some of the differences you have experienced between state and federal criminal practice?
- Why is professional diversity important for a federal prosecutor's office?
- What are some challenges as a woman in federal criminal practice, and what continues to draw you to this career?

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Federal vs. State Courts Key Difference

FEDERAL COURT

- Federal Court requires sophisticated experience and knowledge for all phases of representation
- Judges cannot be involved in plea negotiations
- Judge's do not give sentencing commitments other than 11C1C pleas
- Sentences are generally more severe than for similar State charges
- Examples: child pornography and drug cases
- White Collar cases are usually determined by amount of loss and damage to victim
- Written Submissions

STATE COURT

- Judges more involved in Plea Negotiations
- State Court Judge's Give Sentencing Commitments
- State Courts tend to individualize sentencing
- Alternatives to Incarceration
- Treatment Courts

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LENGTH OF PROSECUTIONS

WHAT DOES SPEEDY TRIAL REALLY MEAN?

FEDERAL COURT

Speedy Trial Act - 18 U.S.S. §3161

- a. In theory, the Government has:
- 30 days from initial appearance on a complaint to get an indictment, and
- 70 days from arraignment on an indictment to take case to trial.
- Time can be excluded from the Speedy Trial Clock "in the interests of justice," for pending motions (filed by either side, or any co-defendant in your case), competency evaluations, continuity of counsel, various other reasons in 18 U.S.S. §3161.
- b. In practice: Cases can be very lengthy 4-5 years if complex or multiple defendants.
- Plea rate is approximately 93%.

STATE COURT

Speedy Trial – N.Y. Crim. Pro. Law 30.30

- 6 months for Felonies, 90 days for misdemeanors
- OCA mandates cases be resolved in 6 months – "Standards & Goals"
- Plea rate is approximately 90%

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Court Structure

- **The Federal Court System**
  - Interstate Commerce Nexus
  - Guns
  - Drug Trafficking
  - Child Exploitation
  - Child Pornography
  - Cybercrimes
  - Fraud
  - Hate crimes
  - IRS (tax) violations and mail fraud
  - immigration crimes
  - Kidnapping
  - White Collar
  - Habeas corpus issues
- **The State Court System**
  - Murder
  - Rape
  - Robbery
  - Burglary
  - Arson
  - Assault
  - Selling or possessing controlled substances
  - Hate Crimes
  - DUI/DWI
  - Burglary
  - Theft
  - Fraud
  - Embezzlement

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ASSIGNMENT OF ATTORNEYS

- FEDERAL COURT
- Criminal Justice Act (CJA) appointment
- Assignment made by Court thru CJA Panel Administrator at FPD or direct appointment by the Court
- Close oversight by the Court
- Rate is $172/hr (non-capital case) or $220/hr (capital case)

- STATE COURT
- Buffalo City Court _ PD Office (Legal Aid) unless conflict then Assigned Counsel
- Felonies:
- Legal Aid if C,D,E non-violent
- Assigned Counsel if A, B, C or Violent felonies or if there is a conflict
- Less Court oversight
- Rate is $158/hr
- Resources available immediately upon assignment

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Discovery

Federal	State
• Rule 16 Voluntary Discovery	• Jan. 1, 2020 Discovery Reform
• *Brady v. Maryland*, 373 U.S. 83 (1963)	• N.Y. Crim. Proc. Law § 245 Automatic Discovery
• Can be very complex and voluminous	• Prosecution: Within fifteen calendar days after arraignment
• Bills of particulars seldom guaranteed	• Defense (reciprocal discovery): Within thirty days after being served with the prosecution's certificate of compliance
• Greater use of protective orders	

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GRAND JURY

- A defendant has no right to testify.
- A witness has no Sixth Amendment right to counsel inside the grand jury. The witness may only confer with counsel outside the jury room after questions are posed.
- Hearsay is permissible and regularly offered to the grand jurors. Rather than hearing from the actual witnesses, a grand jury may hear a federal investigator on what each witness has told them during the course of their investigation.
- A subsequent conviction renders almost all grand jury violations harmless. Rule 6 of the Federal Rules of Criminal Procedure governs grand jury proceedings.
- There are significant differences between state and federal immunity.
- Superseding Indictiments are common n complex, long-investigated, criminal cases.
- Lack of judicial oversight with the sufficiency of the evidence presented before the grand jury in federal court.
- Grand Jury minutes not readily discoverable.

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Rules of Evidence

Federal

- Enumerated Federal Rules of Evidence
- Can be complicated
- Hearsay explained
- No corroboration needed for co-conspirator testimony (accomplice)

State

- Common Law Rules of Evidence
- N.Y. Crim. Proc. Law Art. 60
- Corroboration of accomplice testimony necessary

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Sentencing

Federal

- Complex sentencing process
- Federal Sentencing Guidelines
  - Not mandatory but still advisory
- Pre-Sentence Report ("PSR") made available well in advance of sentencing
  - Objections to PSR
- Sentencing Memorandum
- Mandatory Minimums
  - Mitigated by Safety Valve and similar provisions
- Cooperation motions filed by the government seeking a lower sentence
- Each crime has a separate Guideline calculation

State

- Judges have wide latitude of sentencing options
- PSR made available immediately before sentencing
- Some mandatory minimum sentences but may be mitigated in limited circumstances

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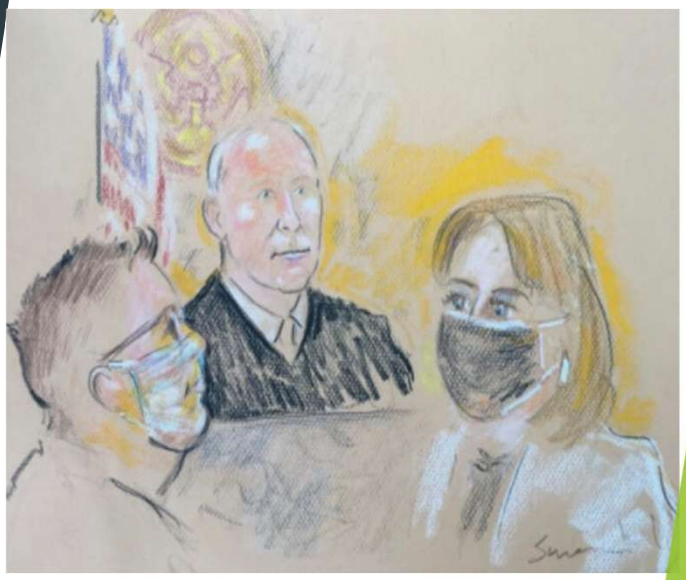
QUESTIONS FOR FONDA

- Why does professional diversity In Federal Criminal Courts matter?
- Why are there virtually no women or minorities on the CJA Panel?
- How do we address the pipeline problem?
- What is most challenging thing about your criminal defense experience?
- What advice would you give to a current or future attorneys about how to overcome this challenge?



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QUESTIONS FOR CHERYL

- Why should women be interested in federal court practice?
- Why apply to the CJA Panel?
- How to apply?
- What are the reasons women decide not to apply?
- Why should we care?

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How does CJA work?

- **The Criminal Justice Act Panel is a group of qualified and court-approved attorneys who are eligible for appointment by the Court to represent individuals in criminal cases who are unable for financial reasons to retain counsel. The appointments are made by the Court on a rotating basis among members of the panel.**
- **The maximum hourly rate for assigned attorneys shall not exceed $172 per hour.**
- **Maximum Amounts of Case Compensation:**
- **For representation of a defendant before a Magistrate and/or District Court Judge, the**
- **maximum compensation to be paid to an attorney shall not exceed $13,400 for each attorney in a case in which one or more felonies are charged, and $3,800 for each attorney**
- **in a case in which only misdemeanors are charged. Representation of a defendant on a new trial shall be considered as a separate case, and fees shall be paid on the same basis as in the original trial.**
- **For representation in connection with any of the following matters, the maximum compensation shall not exceed $2,900 for each attorney in a proceeding before this court:**
- **a. Probation violation;**
- **b. Supervised release hearing;**
- **c. Parole proceedings;**
- **d. Witness/material witness in custody;**
- **e. International extradition**

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HOW TO OBTAIN PAYMENT IN EXCESS OF LIMITS

- **THE CAPS ARE REGULARLY EXCEEDED AND APPROVED BY THE SECOND CIRCUIT**
- Payment in excess of the maximum limits may be made in cases involving extended or complex representation whenever the district judge before whom representation was rendered, or if the magistrate judge (if the representation was furnished exclusively before the magistrate judge) certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the Chief Judge of the Second Circuit or such active Circuit Judge to whom the Chief Judge has delegated such approval authority.

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ISSUES IDENTIFIED BY LOCAL PRACTIONERS AS TO WHY THEY ARE APPREHENSIVE ABOUT PRACTICING IN FEDERAL CRIMINAL COURT

INTIMIDATION	LACK OF ADEQUATE TRAINING	LACK OF RESOURCES SUCH AS THOSE AVAILABLE THROUGH ASSIGNED COUNSEL	LACK OF A STRUCTURED MENTORSHIP PROGRAM
LACK OF CONFIDENCE	LACK OF TRUST & RESPECT FROM CLIENTS	LACK OF SUPPORT	IMPLICIT BIAS
CLIENTS DO NOT HOLD ATTORNEYS IN HIGH REGARD	COMPLEXITIES IN NAVIGATING VOLUMINOUS ELECTRONIC DISCOVERY AND WRITTEN SUBMISSIONS	COMPLEXITIES OF THE CASES AND EVER-CHANGING LANDSCAPE OF FEDERAL CRIMINAL PRACTICE	CHALLENGING NEGOTIATIONS FOR JUST RESOLUTIONS

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> “The lack of diversity in the legal profession not only has a negative impact on the profession, but more importantly, it also affects those people whose lives attorneys hold in their hands”

http://campbelllawobserver.com/diversity-lacking-in-the-legal-profession/

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United States District Court
Western District *of* New York

CRIMINAL JUSTICE ACT POLICIES AND PROCEDURES

September 2022

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I. INTRODUCTION

I. INTRODUCTION

The Western District of New York has developed the following District Court specific policy and procedures manual which expands upon the Guidelines and also highlights the policy particularly relevant to our district.

These policies should be read in conjunction with the Guidelines for Administering the CJA and Related Statutes, Volume 7, Part A, Guide to Judiciary Policy ("CJA Guidelines") as well as the Second Circuit Policy and Procedure Manual. The Second Circuit Manual can be found here https://www.ca2.uscourts.gov/clerk/attorneys/cja_manual.html

The Judicial Council of the Second Circuit ("the Judicial Council") has approved case management and budgeting policies and procedures applicable to representations for counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A ("CJA"), and to death-eligible and capital habeas representations for counsel appointed under 18 U.S.C. § 3005 or § 3599(a).

Additional CJA procedural guidance is available on the Western District of New York website at https://www.nywd.uscourts.gov/criminal-justice-act-cja

II. CJA PLANS

As required by the CJA and the CJA Guidelines, each court develops a plan for furnishing representation in federal court for any person financially unable to obtain adequate representation. The objective of the plan is to attain equal justice under the law for all persons.

The Western District *of* New York's Model CJA Plan, is available on https://www.nywd.uscourts.gov/criminal-justice-act-cja,

III. CASE BUDGETING

The development of a case budget in all capital and eligible complex or high-cost non-capital CJA appointments supports the availability of appropriate funding for quality client representations while providing necessary oversight and opportunities for efficiencies. A case budget with supporting documentation also provides the reviewing court sufficient information for reasonableness determinations and other statutorily required approvals.

To facilitate review and approval of a budget by the Chief Circuit Judge or delegee, case budgets should be developed with the assistance of the circuit Case Budgeting Attorney ("CBA"). Specialized forms utilizing Excel spreadsheets will be used to prepare the budget. All questions concerning case-budgeting should be directed to Alan M. Nelson, Second Circuit Case Budgeting Attorney, at 212-857-8726 or 646-300-5260.

When submitting an interim, final or supplemental voucher, counsel must include in the eVoucher documents tab, a completed CJA 26 form describing the present posture of the case and a copy of the approved budget. The CJA 26 only applies to non-capital budgeted appointments.

A. CAPITAL CASES

All CJA costs in death-eligible prosecutions or capital habeas proceedings, must be budgeted by the circuit CBA. Within 30 days of appointment, CJA counsel must contact the circuit CBA for budgeting assistance.

A capital budget authorized by a court also must be submitted to the Chief Circuit Judge or delegee for secondary approval.

B. NON-CAPITAL HIGH-COST CASES

In CJA Guideline § 230.26.10, the Judicial Conference of the United States ("JCUS") encourages the use of case budgeting in any representation anticipated to exceed either 300 attorney hours or total costs (combined attorney and service provider fees) in excess of 300 times the prevailing CJA attorney non-capital hourly rate, rounded up to the nearest thousand (e.g., if the prevailing panel rate is $158/hour, the total costs benchmark would be $48,000: $158/hour x 300 hours = $47,400, rounded up to $48,000).

The Judicial Council also encourages budgeting in complex or high-cost non-capital cases that meet these thresholds. For CJA representations that exceed or are likely to exceed $100,000 in total costs, the Judicial Council requires budgeting by the circuit CBA.

C. NOTICE OF POTENTIAL HIGH-COST CASE

While there are no specific criteria or elements of a case which in itself will make a case achieve mega status, there are several indicators which, if present, could indicate that a case will become a mega-case. Indicators of a potential high-cost case are listed in Appendix 7.

D. BUDGETING IN STAGES

To make the budget submission and review process more manageable and effective, budgeting ordinarily will be accomplished in stages and, if appropriate, in discrete time periods within stages, such as six-month intervals.

For example, depending on the circumstances, an attorney might submit a budget for the entire representation (through trial/potential sentencing), the entire

pretrial stage, or, if the pretrial stage is expected to be lengthy, for a shorter interval such as through discovery review, the filing of pretrial motions, or trial preparation. Similarly, the first stage of a death-eligible federal prosecution may extend to a decision by the Department of Justice whether to authorize the prosecution to seek the death penalty. Depending on the timing of DOJ's decision-making process, the attorney could submit a budget for the entire stage or for a given period of time within the stage.

For capital habeas proceedings, budgets may be composed of numerous stages, depending on a number of factors particular to a case or district. Such stages ordinarily include record review, petition preparation, responsive briefing, and evidentiary hearing.

In death-eligible prosecutions, it is often critical to assemble a team and begin working on mitigation and fact investigation right away. Therefore, shortly after appointment, the assigned CBA will provide counsel with a proposed "seed money" budget/preliminary order, for the court's consideration. Courts should authorize the preliminary order to allow counsel to become familiar with the case, develop strategy, gather a team, and develop a more detailed budget. This preliminary order/budget should provide sufficient funding for the first 90 days of representation and include authorization for counsel to enlist an investigator, paralegal, and mitigation specialist.

E. VOUCHER REVIEW IN BUDGETED CASES

Although case budgeting generally expedites voucher review, courts are still required to assess whether claimed amounts were reasonably incurred in light of their representational purpose. See CJA Guideline § 230.33.10 (Standard for Voucher Review) and JCUS-SEP 2018, p. 42.

F. BUDGET SUPPLEMENTS

Counsel are responsible for tracking attorney hours and all CJA-funded service provider hours and should routinely run a Defendant Detail Budget Report in eVoucher to ensure the defense team remains within authorized funding levels. Counsel, investigators, experts, and other service providers must not exceed the budget authorized by a court without first seeking prior approval. Supplemental budget requests should be made before funding is exhausted and far enough in advance to give the court sufficient time to review and rule on the request.

Nunc pro tunc requests will be considered only upon a showing of good cause, such as when a task not previously contemplated required immediate action. A general assertion of "competing professional demands" does not establish good cause; a detailed explanation of those demands is required.

IV. COUNSEL APPOINTMENT AND COMPENSATION

A. GEOGRAPHIC PROXIMITY

Without compromising the quality of representation, courts should try to appoint CJA attorneys who are located reasonably near to where the case will be heard to avoid unnecessary travel time and facilitate access to the client.

In cases where more than one attorney is appointed, preferably counsel nearest the client would conduct most of the client visits unless the counsel farthest from the client possesses a certain expertise or working relationship with the client that warrants otherwise. Counsel and other team members not in close geographic proximity to the client should coordinate client visits with court hearings or other case-related activities whenever feasible and, if applicable, arrange to meet with other CJA clients on the same trip.

B. HOURLY RATES FOR APPOINTED COUNSEL

1. Death-Eligible Prosecutions

At the outset of any proceeding in which a financially eligible defendant is or may be charged with a crime punishable by death, a court must appoint two attorneys, at least one of whom is learned in the law applicable to capital cases. 18 U.S.C. § 3005. Courts must consider and give due weight to the recommendation of the federal defender organization before appointing counsel. The maximum hourly rate in death-eligible prosecutions is set forth in CJA Guideline § 630.10.10(A) and Appendix 1. In orders appointing counsel, courts should identify the applicable hourly rate for all counsel and provide for the rate to adjust automatically in accordance with periodic rate increases.

If the prosecution files notice that it will not seek the death penalty, the court should consider whether reducing the number of counsel is appropriate, as

provided in CJA Guideline § 630.30.20. The factors to consider in determining whether circumstances justify the continuation of more than one attorney include: the need to avoid disruption of the proceedings, whether the decision not to seek the death penalty occurred late in the litigation, whether the case is unusually complex, and whether the defense has reasonably allocated trial duties among counsel well into the case such that it would negatively impact the representation to dismiss one attorney.

Following notice that the prosecution will not seek the death penalty, the court should also consider reducing the hourly rate for counsel (and any service providers authorized at a higher capital rate), in light of the factors listed in CJA Guideline § 630.30.30. Such factors include the extent to which the representation precludes counsel from taking other work, the commitment of time and resources counsel has made and will continue to make in the case, and the need to compensate appointed counsel fairly. Any rate reduction must apply prospectively only.

If a court reduces the number of counsel, it should set a timeline and authorize a sufficient number of hours to allow for an orderly transition of the defense team. This includes allowing departing counsel and any mitigation investigator or specialist time to draft transmittal memoranda and meet with remaining counsel and the client.

2. Capital Habeas Corpus Proceedings

Under 18 U.S.C. § 3599(a)(2), a financially eligible petitioner seeking to vacate or set aside a death sentence in any proceeding under 28 U.S.C. § 2254 or § 2255 is entitled to the appointment of one or more attorneys.

3. Non-Capital Representations

The current maximum hourly rate for CJA attorneys in non-capital cases is set forth in Appendix 1. In most circumstances, only one CJA-compensated attorney is necessary for each client representation. However, a second attorney may be appointed in any case determined by the court to be extremely difficult or when such appointment would be in the interest of justice to ensure high quality representation. See CJA Guideline § 230.53.20.

Co-counsel who are members of the court's CJA panel should be compensated at the non-capital CJA hourly rate.

C. ATTORNEY COMPENSATION MAXIMUMS

The CJA contains waivable attorney case compensation maximum amounts for various types of non-capital representations; capital representations have no attorney case compensation maximum. Appendix 4 lists the most common non-capital representation maximums. A complete list is set forth in CJA Guideline § 230.23.20. Expenses and service provider fees do not apply toward a compensation maximum.

Payment in excess of the maximum limits may be made in cases involving extended or complex representation whenever the district judge before whom representation was rendered, or if the magistrate judge (if the representation was furnished exclusively before the magistrate judge) certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the Chief Judge of the Second Circuit or such active Circuit Judge to whom the Chief Judge has delegated such approval authority.

Counsel claiming payment in excess of the statutory maximum shall submit a Form CJA 26 under the documents tab in eVoucher.

When an attorney withdraws and new counsel is substituted, the case compensation maximum does not reset. Rather, the combined fees for all successive attorneys appointed to a single representation (i.e., for a particular client in a particular case) count against the compensation maximum. See CJA Guideline § 230.56. Absent concerns over the performance or billing of prior counsel, the substituted attorney is allowed to submit a final voucher before the representation concludes, preferably within 45 days of withdrawing.

D. CJA APPOINTMENT OF RETAINED COUNSEL

Courts have discretion under the CJA, 18 U.S.C. § 3006A(c), to authorize appointment of and payment to an attorney initially retained by an individual who later becomes financially unable to pay for representation. In deciding whether to authorize the appointment, the court will consider whether counsel is a CJA attorney or otherwise regularly practices in federal court.

Regarding payment, the court may inquire into the fees already paid to the retained attorney. Such inquiry may include requiring counsel to provide *in camera* copies of the retainer agreement, billing statements, and a statement of funds received from or on behalf of the client.

The court may find it appropriate to allow the retained attorney to begin billing under the CJA upon appointment. Or the court may find it appropriate to appoint the retained attorney *nunc pro tunc* to the start of counsel's representation. In the latter scenario, the court may then order that any funds paid to retained counsel be attributed to work already performed and costs incurred (at the applicable CJA hourly rate), as well as new work performed and costs incurred, until the funds are deemed exhausted. Once exhausted, counsel and service providers would begin billing under the CJA. The court may consider other equitable arrangements as well.

E. ASSOCIATES

1. Distinction Between Associate Counsel and Co-Counsel

"Associate," for the purpose of CJA compensation, is an attorney authorized to assist appointed counsel on a case but not as counsel of record. An associate under the CJA is either a member of appointed counsel's firm or an independent contract attorney authorized to practice law in the relevant jurisdiction. As discussed further below, an associate is considered an extension of, not a substitute for, the appointed CJA panel attorney. "Co-counsel" (see Section IV.B.3), on the other hand, serves as additional counsel of record and has the same duties and responsibilities as first appointed counsel unless appointed for a limited purpose.

Appointed counsel is responsible for attending pre-trial and probation interviews, negotiating potential pleas, discussing significant decisions with the client, and participating in substantive hearings, and may not unreasonably delegate responsibilities to associate counsel or duplicate work. Associates generally perform discrete tasks such as research, motion writing, summarizing discovery, reviewing discovery with the client, etc.

Associates and appointed counsel may be compensated for reasonable time conferring with each other regarding the case and specific assignments, but both should not bill time for participating in meetings with others absent a demonstrated need relevant to the associate's assigned tasks. Such need should be described in detail in the corresponding voucher. Where an associate appears in court with appointed counsel, prior approval must be sought to allow the court to consider the reasonable necessity of the associate attorney's participation.

2. Prior Authorization for Associates

As provided in CJA Guidelines § 230.53.20(b) (non-capital) and § 620.10 (capital), CJA attorneys may utilize the services of attorneys who are members of

appointed counsel's firm. However, prior approval is required where the billing of the associate will exceed 10 hours. This email request should be made directly to the CJA staff at the Buffalo Clerk's Office. Any questions, call 716-557-1732.

In all cases, prior authorization is required to enlist independent contract attorneys who are not members of appointed counsel's firm. The authorization request should provide justification for the associate appointment and detail the proposed scope of work.

In determining whether to permit appointed counsel to utilize an associate, the court will consider that associate involvement in a case provides a valuable opportunity to develop future CJA panel members.

3. Hourly Rate

The WDNY hourly rate for associates is $50/hour. For those associates who are members of the court's CJA panel, a court may authorize up to the maximum non-capital CJA hourly rate.

4. Billing

The services of associate counsel may not be billed on CJA 21 or 31 (service provider payment voucher). Rather, an associate's billable time must be submitted on CJA 20 or 30 (attorney payment voucher) and counts toward the attorney compensation maximum.

F. DIVISION OF LABOR

Whenever appropriate and without compromising the quality of work, services should be performed by the least expensive, competent provider capable of performing the work. Accordingly, CJA-appointed attorneys should enlist associates, paralegals, investigators, and other lower-cost service providers where the appointed attorney's expertise is not required, such as for legal research or preliminary discovery review.

Counsel should develop a plan to divide responsibilities among defense team members so that each member is performing duties effectively and efficiently, thereby avoiding unnecessary duplication of effort. While meetings are needed to effectively divide responsibilities among team members and to coordinate efforts, counsel should assess the need for a meeting in advance and consider whether its purpose could be served using a video or phone conference instead of meeting in person. Similarly, where team members belong to the same firm, non-substantive internal firm communications (e.g., to schedule internal deadlines or discuss division of labor logistics) should be billed with restraint.

Typically, it is presumed that initial fact-gathering interviews of potential witnesses may be conducted by an investigator or mitigation specialist alone and that, after key witnesses are identified, only one attorney need accompany the investigator or mitigation specialist to subsequent interviews. If the circumstances of a particular case warrant otherwise, counsel should provide justification in the payment voucher or authorization request.

Support staff—including law clerks, paralegals, associates, and investigators—will not be compensated for attendance at court hearings without prior court approval.

G. COMPENSABLE SERVICES

The Western District of New York CJA Compensability Handbook provides extensive guidance and detailed examples on what is presumptively compensable within the Second Circuit throughout the many stages of CJA representation. The Handbook was created to assist both panel attorneys and approving authorities in understanding and applying the CJA Guidelines and to provide a framework for analyzing challenging compensability questions. Administrative tasks that are typically not separately reimbursable or compensable may be claimed when they are extraordinary or unusual in terms of volume, extent, or difficulty. See CJA Guideline § 320.70.30. Counsel are encouraged to consult the court CJA staff regarding such circumstances.

Areas of note include:

1. Office Overhead

Under CJA Guidelines § 230.66.10 and § 320.80.10, the authorized hourly rate for panel attorneys and service providers includes compensation for general office overhead, including clerical assistance. Consequently, routine administrative tasks are not separately compensable, even if performed by an attorney.

Non-compensable administrative tasks include: (1) entering calls, meetings, due dates, or court appearances into a calendar; (2) rote or routine scheduling-related communications, including with the court; (3) leaving non-substantive voicemail messages; (4) filing or lodging electronic documents in CM/ECF, unless the filing is particularly voluminous or atypical such that filing takes an unusual or extraordinary amount of time; (5) emailing courtesy copies or proposed orders; (6) copying, scanning, or printing; (7) office filing; and (8) preparing documents for mailing.

2. Budgeting and Voucher Preparation

Time spent creating and entering billable time and expenses into a payment voucher is a non-compensable administrative expense. However, time spent requesting funding for experts, investigators, and other service providers, as well as reviewing service provider payment vouchers to certify that billed time and expenses were rendered, is compensable.

In addition, time spent preparing a budget or an advance request to exceed the case compensation maximum is compensable because it requires counsel to plan for litigation by preliminarily reviewing records, sorting through discovery, initiating contact with experts and other service providers, and assessing overall case needs. However, time spent justifying a bill or seeking authorization to exceed the compensation maximum *after* the work has been substantially completed is not compensable.

3. Travel Arrangements

Time spent making travel arrangements for counsel or a service provider, whether undertaken by an attorney, paralegal, or other staff member, is a non-compensable administrative task. However, time spent preparing a request for travel authorization from the court is compensable.

4. Attorney Travel

Under CJA Guideline § 230.60, appointed counsel must be compensated for reasonably necessary travel. Please see the WDNY CJA Compensability Handbook for details.

In determining whether actual expenses incurred are "reasonable," counsel should be guided by travel and subsistence expense levels set by the Judiciary Staff Travel Regulations.

Advance travel approval is ordinarily required in two circumstances: (1) out-of-district travel and (2) overnight travel. Counsel should consult with the court's CJA staff regarding the preparation of a travel authorization form. When feasible, attorneys are expected to perform case-related work while traveling, which should be billed to a substantive billing category not as travel time.

Federal law authorizes attorneys, experts, and other persons traveling primarily in connection with carrying out responsibilities under the CJA to use government travel rates from common carriers and lodging providers. Government rates may provide substantial cost reductions or increased flexibility over ordinary commercial rates. To obtain such rates, prior approval must be obtained. See CJA Guideline § 230.63.40(d). Counsel should contact local CJA staff for details on how to obtain government rates.

5. Notices of Electronic Filing

Accessing, downloading, opening, renaming, saving, printing, or forwarding a Notice of Electronic Filing ("NEF") is a non-compensable administrative task. However, reasonable time spent reviewing a text-only NEF or an Electronic Court Filing ("ECF") document linked to an NEF is compensable.

Counsel are expected to exercise professional judgment in billing time for reviewing NEFs and ECF documents that require no substantive response, especially in multi-defendant cases where notices or filed documents may be unrelated or irrelevant to their client or representation.

6. Discovery Organization and Review

In any case with complex discovery, an efficient and cost-effective method to process, distribute, organize, and review discovery must be developed early in

the representation. Counsel should confer with the National Litigation Support Team ("NLST") in the Defender Services Office, and the circuit CBA, on ways to effectively manage discovery, which may include use of a Coordinating Discovery Attorney, case management software, web-based discovery review platform, or litigation support specialist.

In multi-defendant cases, counsel must make every reasonable effort to collaborate and share discovery organization resources to the extent possible without creating a conflict. Prior authorization for computer hardware, software, or litigation services is required. If combined costs are expected to exceed $10,000, counsel must confer with NLST as provided in CJA Guideline § 320.70.40(a)(2).

V. INVESTIGATIVE, EXPERT, AND OTHER SERVICE PROVIDERS

A. AUTHORIZATION FOR SERVICES

1. Presiding Judge or Delegee

Under 18 U.S.C. § 3006A(e)(2) and CJA Guideline § 310.20.30, prior authorization from the presiding judge or delegee must be obtained for any service provider compensation in excess of $900 per representation, *not* per service provider. CJA representations routinely require the use of investigators, paralegals, and interpreters. Counsel must submit authorization requests via eVoucher and not directly to chambers.

If prior authorization was neither sought nor authorized, claims for service provider compensation exceeding $900 will be approved only if the court finds, in the interest of justice, that timely procurement of necessary services could not await prior authorization. Every effort should be made to avoid *nunc pro tunc* applications and to seek any required authorization before work by experts, investigators, or other providers is performed.

When seeking authorization, counsel must indicate the necessity of the service, the provider's name and hourly rate, and the estimated number of hours to complete the work. The court will rule on service provider requests as expeditiously as possible, to minimize litigation delay and associated costs.

If counsel obtains prior approval for expert, investigative, or other services and it later becomes apparent that the cost will exceed the initial approved amount, requests for additional compensation should be requested by counsel and authorized by the court *before* any further services are undertaken. Again, *nunc pro tunc* requests will be approved only if the court finds, in the interest of justice, that timely procurement of the additional services could not await prior authorization.

V. INVESTIGATIVE, EXPERT, AND OTHER SERVICE PROVIDERS

Once funding for investigators, experts or other specialized services has been approved, counsel is responsible for communicating the specific terms of the authorization with the service provider, initiating a CJA 21 (non-capital) or 31 (capital) in eVoucher to facilitate timely billing, and ensuring the provider's services do not exceed the authorized amount. To monitor available service provider funding, counsel should routinely run a Defendant Detail Budget Report in eVoucher.

2. Chief Circuit Judge or Delegee

a. Non-capital Cases

Under 18 U.S.C. § 3006A(e)(3) and CJA Guideline § 310.20.10, compensation for services in non-capital cases may not exceed $2,800 without approval of the Chief Circuit Judge or delegee and certification by the presiding judge or delegee that the fees are necessary to provide fair compensation for services of an unusual character or duration. The non-capital compensation services maximum is exclusive of reasonably incurred expenses. As provided in CJA Guideline § 310.20.20(b) and required by Second Circuit policy, approval for excess compensation must be obtained from the circuit.

b. Capital Cases

Under 18 U.S.C. § 3599(g)(2) and CJA Guideline § 660.20.20, for capital cases commenced on or after April 24, 1996, the combined fees and expenses for investigative, expert, and other services are limited to $7,500 absent approval of the Chief Circuit Judge or delegee and certification by the presiding judge or delegee that the fees are necessary to provide fair compensation for services of an unusual charter or duration. This $7,500 limit is per case and applies to the total payments for all services and expenses, not to each service provider type individually. As provided in CJA Guideline § 660.20.20(d) and required by Second Circuit policy, approval for excess compensation must be obtained from the circuit.

V. INVESTIGATIVE, EXPERT, AND OTHER SERVICE PROVIDERS

B. ENGAGING RELATIVES

Counsel must provide notification of the relationship and potential services to the court *prior* to engaging any relative to perform CJA compensable services, other than an associate counsel in the same law firm.

C. GEOGRAPHIC PROXIMITY

To minimize travel costs, counsel must make a reasonable effort to retain qualified experts, investigators, or other service providers from the locale where the proposed services are to be performed, if such providers are available.

D. SERVICE PROVIDER HOURLY RATES

The current hourly rate ranges for investigators, experts, and other service providers are listed in Appendix 2. The high end of a listed range is not the presumptive rate. Rather, rates vary based on locality, education, specialization, certification, licensing, and experience.

The WDNY has adopted our own service provider rate schedule based on local needs. Court-specific rates may not exceed the high end of a range listed in Appendix 2 without approval of the presiding judge.

In any individual case, the presiding judge or delegee may, for good cause, approve a rate in excess of the maximum. Factors that may be considered in determining the existence of good cause include the uniqueness of the service or the service provider; the education, training, or specialization of the service provider; the lack of availability of this or similar service providers; complexity of the case; and any time limitations on the case that may affect how quickly the service needs to be completed. The circuit CBA is available to assist CJA counsel in negotiating rates with providers.

V. INVESTIGATIVE, EXPERT, AND OTHER SERVICE PROVIDERS

E. SERVICE PROVIDER TRAVEL

Service providers may be compensated for reasonable travel time and expenses. In determining whether actual expenses incurred are "reasonable," service providers should be guided by travel and subsistence expense levels set by the Judiciary Staff Travel Regulations. Federal law authorizes experts and other service providers traveling primarily in connection with carrying out responsibilities under the CJA to use government travel rates from common carriers and lodging providers. Counsel and service providers should coordinate with the CJA staff regarding the process for obtaining these rates.

Advance approval by the court is ordinarily required in two circumstances: (1) out-of-district travel, and (2) overnight travel. Counsel should consult with our CJA staff regarding travel authorization procedures for service providers.

Counsel are expected to negotiate lower travel rates for high-cost service providers, preferably at 50 percent of the provider's services rate. Time spent performing case-related work while traveling is not "travel time" and should be compensated at the full hourly rate. Case-related work is work relevant to the responsibilities or duties assigned to the expert or service provider by appointed counsel.

V. INVESTIGATIVE, EXPERT, AND OTHER SERVICE PROVIDERS

F. INTERPRETERS AND TRANSLATORS

As provided in CJA Guideline § 320.15.20, in determining the reasonableness of rates paid to interpreters under the CJA, our court utilizes the half-day and full-day rates established for contract court interpreters performing in-court services. Please contact Maria Gomolka at 716-551-1739 for interpreter authorization guidance as this has recently changed.

Every effort should be made to avoid less than 24 hours' notice of a canceled interpreter appointment. Should that occur, the interpreter may bill CJA for any actual out-of-pocket expenses and for the time required to get to and from the appointment.

The translation of written documents typically should be billed by the English word at the rate set forth in Appendix 2. Please contact Maria Gomolka at 716-551-1739 for guidance. Prior authorization is required by our court for providing a translation in written form verses the spoken word.

G. TRANSCRIPTS

As provided in CJA Guideline § 320.30.30(a), in multi-defendant cases, only one transcript should be purchased from the court reporter on behalf of CJA-represented defendants. The appointed counsel should share an electronic copy with each of the CJA defendants for whom a transcript has been approved. If the transcript was provided in printed format, counsel or the court reporter should arrange for duplication at a commercially competitive rate (typically ten cents per page) rather than the usual first or additional copy transcript rates.

V. INVESTIGATIVE, EXPERT, AND OTHER SERVICE PROVIDERS

H. PAYMENT OF SERVICE PROVIDER FEES

Given the critical importance of maintaining the availability of high-quality service providers willing to assist with CJA appointed matters, counsel should make every effort to process and submit service provider vouchers in a timely manner.

Service provider fees and expenses must be submitted using eVoucher's CJA 21 or 31, and payments should be made directly to the service provider. Absent extraordinary circumstances, counsel should not pay experts, investigators, or other service providers out of pocket and then seek reimbursement on a CJA 20 or 30. Any exceptions to this general requirement should be discussed in advance with local CJA administrative staff.

I. SERVICES FOR DEFENDANTS WITH RETAINED COUNSEL

A defendant with retained counsel may at any point during the representation seek a determination by the court of financial eligibility for reasonably necessary investigative, expert, or other services under 18 U.S.C. § 3006A(e)(2). Such application shall include a Financial Affidavit (CJA 23).

J. ENGAGEMENT LETTERS

Counsel appointed under the CJA and retained counsel authorized to enlist CJA-funded service providers should use written engagement letters for experts or other specialized services setting forth the details of their engagement, including the hourly rate, the maximum number of authorized hours or compensation amount, and the requirements of billing in tenths of an hour and contemporaneous record-keeping. A sample engagement letter is set forth in Appendix 3.

VI. AUTHORIZATION AND BILLING PROCEDURES

A. TIMESHEETS AND RECORDKEEPING

1. Billing Entries

Actual time must be billed in tenths of an hour. Discrete tasks must be billed separately and to the correct voucher category except that those tasks taking less than 0.1 hours each must be aggregated into one block of time to ensure that billable time does not exceed actual hours worked. These requirements also apply to service providers.

Information must be provided in detail sufficient to permit meaningful review, without violating the canons of ethics or disclosing client confidences, so that reviewers may determine that the amount sought in the voucher provides fair compensation for the services rendered. In particular:

- Identify the number of pages, amount of data, or length of audio or video records being reviewed, and the nature of the material reviewed (e.g., "transcripts," "302s," "surveillance video")
- Describe witness interviews with sufficient information to distinguish between individuals (*e.g.*, "Witness 1" or "W1" or "Witness A.K.")
- Identify the person(s) involved in telephone conversations or conferences and general topic of discussion (using descriptors or initials where confidentiality is needed)
- Describe generally any issue being researched
- When preparing or reviewing a court filing, identify the document by name or ECF number

Appendix 5 contains further guidance regarding specificity for time sheets, and detailed billing tip sheets are available at www.nywd.uscourts.gov/cja. In addition, counsel should consult with the CJA staff or local billing guides regarding the level of specificity required in supporting documentation.

2. Excess Hours in One Day

Unless in trial, 10 or more hours billed in a single day by an attorney or service provider across all cases is unusual, and the necessity for such time should be explained in the voucher (e.g., trial preparation, impending deadline, etc.). Otherwise, the voucher may be returned for additional information.

3. Expenses

Courts will ensure that panel attorneys and service providers abide by the expense policies set forth in Appendix 6 and in the CJA Compensability Handbook.

4. Billing Records

Appointed counsel must maintain contemporaneous time and attendance records for all work performed, including work performed by associates, partners, contract lawyers, and support staff, as well as expense records. In the absence of a court-specific policy defining "contemporaneous time and attendance records," information entered into eVoucher payment vouchers satisfies counsel's recordkeeping requirement, provided the information is entered as soon as feasible after performing the work described or based upon contemporaneous notes. Under CJA Guideline § 230.76, written records may be subject to audit and must be retained for at least three years after approval of the final voucher for any appointment.

Counsel should advise all investigators, experts, and other service providers that they must maintain contemporaneous time and attendance records for all work billed by them, as well as expense records. Providers who are authorized to enter time into eVoucher satisfy this requirement if billing information is entered as soon as feasible after performing the work described or based upon contemporaneous notes. Under CJA Guideline § 320.90, billing records are subject to audit and must be maintained for at least three years after approval of the service provider's or appointed counsel's final voucher, whichever is later.

B. DEADLINE FOR VOUCHER SUBMISSION

Under Guideline § 230.13, final vouchers should be submitted no later than 45 days after the representation concludes, absent good cause. Counsel should make every effort to submit all outstanding vouchers in a case at the same time and are responsible for advising service providers of this voucher submission requirement.

Counsel must create CJA 21 and 31 payment vouchers for service providers and should inform all providers of the date the representation concludes. If service providers are allowed to enter their own services into eVoucher, counsel should review and certify CJA 21 or 31 payment vouchers submitted for approval in a timely fashion.

Persistent submission of late vouchers may be addressed as a performance issue.

C. VOUCHER REVIEW

Providing fair compensation to appointed counsel is a critical component of the administration of justice. CJA panel attorneys must be compensated for time expended in court and time reasonably expended out of court and must be reimbursed for expenses reasonably incurred.

Vouchers are reviewed for technical compliance with the CJA Guidelines, Second Circuit policies, and any policies adopted by the WDNY.

The reasonableness of a claim is determined by the judge presiding over the matter or delegee and, if the voucher exceeds the case compensation maximum, the Chief Judge of the 2nd Circuit or delegee. In determining reasonableness, the court should consider whether the work was clearly in excess of what was reasonably necessary.

the court should consider whether the work was clearly in excess of what was reasonably necessary.

To aid with reasonableness review, a voucher may be referred to our local CJA panel review committee for input. The presiding judge or delegee also may seek input from the Circuit CJA Unit.

As provided by CJA Guidelines § 230.13 and § 310.70, absent extraordinary circumstances, courts should act upon payment vouchers within 30 days of submission.

D. VOUCHER REDUCTION PROCEDURES

Vouchers for attorney fees reasonably expended may not be reduced to lessen Defender Services program costs in response to adverse federal budgetary circumstances. Nor may a voucher be arbitrarily reduced to the statutory maximum.

As provided in CJA Guideline § 230.33.10, reductions to payment vouchers should be limited to mathematical errors; instances in which work billed was not compensable, undertaken, or completed; and instances in which the hours billed clearly exceed what was reasonably required to complete the task.

Prior to the reduction of any voucher, other than for technical errors or non-compliance with billing guidelines, the CJA attorney must receive notice and a brief statement of the reason for the proposed reduction. Counsel will then be allowed a reasonable opportunity to address the matter to the court or reviewing official.

Courts should use the eVoucher program to facilitate this process by providing the reason(s) for the reduction either in the Public Notes section of eVoucher, or as an attachment in the Documents section. Attorneys can be

directed to respond in the same manner. Keeping the process within eVoucher will make for a transparent and convenient account of the exchange between the court and counsel. If an email exchange concerning an adjustment occurs, PDFs of the emails should be attached to the voucher and referenced in the eVoucher notes.

APPENDIX 1 – ATTORNEY HOURLY RATES

For services performed on or after January 1, 2022: [1]

CAPITAL DEATH-ELIGIBLE PROSECUTIONS	
Learned Counsel	$210
Co-Counsel	$210
NON-CAPITAL CASES	
Lead Counsel	$164
ASSOCIATES/PARTNERS	
As of 3/1/2007	$50

1 Consult CJA Guidelines § 230.16 and § 630.10.10 for the maximum hourly rates paid to capital and non-capital counsel for services performed prior to January 1, 2023. Please note that eVoucher does not update capital rates automatically when annual increases go into effect. Therefore, when appointing counsel in capital cases, courts should consider expressly authorizing that annual increases be added to the initial appointment rate.

APPENDIX 2 – SERVICE PROVIDER HOURLY RATES

The high end of a listed range is not the presumptive rate. Rather, rates vary based on locality, education, specialization, certification, licensing, and experience. Depending on the circumstances in an individual case, a provider's rate may exceed the high end of a range upon a showing of good cause, as explained in Section V.D of these policies.

The WDNY has adopted our own service provider rate schedule based on local needs. Court-specific rates may not exceed the high end of a range without approval of the presiding judge.

Counsel are expected to negotiate lower travel rates for high-cost service providers, preferably at 50 percent of the provider's services rate. Counsel should consult with local CJA staff regarding applicable travel policies. Time spent performing case-related work while traveling is not "travel time" and should be compensated at the full hourly rate.

Investigators, Mitigation Specialists, and Paralegals			
Court-specific rates vary based on unique locality needs. Thus, the high end of a range is not the presumptive rate. For providers who work in multiple courts, the approved rate will be based on the applicable court's presumptive rate, not prior authorizations in other courts.			
	Standard Rate	Special Skills Rate	
Investigator	$80 - $95	$110	Special skills rate is for case-needed foreign language fluency or other specialization, such as mastery of one or more relevant areas of forensic science (e.g., forensic psychology or digital forensics) or a high level of experience in the type of alleged offense.
Mitigation Specialist	$90 - $100	$125	Special skills rate is for case-needed foreign language fluency or specialized mental health expertise.

APPENDIX 2 – SERVICE PROVIDER HOURLY RATES

	Standard Rate	Special Skills Rate	
Paralegal	$25	$**	Special skills rate is for those with the technology skills necessary to perform complex litigation support or discovery database management (including subjective coding), case-needed foreign language fluency, or capital case expertise.
Associates	$50		
Paralegal (J.D.)	$65 -$75	$75	Special skills rate is for those with the technology skills necessary to perform complex litigation support or discovery database management (including subjective coding), case-needed foreign language fluency, or capital case expertise.

Other Service Provider Categories		
Accident Reconstruction	$150 – $200	
Accountant	$125 – $275	
Accounting Staff (non-CPA)	$65	E.g., reviewing/summarizing/preparing financial records
Attorney Expert – Capital	CJA Hourly Rate	
Attorney Expert – Non-Capital	CJA Hourly Rate	E.g., immigration law expert
Audio, Video, Photo Forensic Analyst	$125 – $200	
Audio, Video, Photo Technician	$25 – $100	E.g., creating video exhibits, taking or enlarging photos, enhancing audio or video recordings, etc.
Ballistics/Firearms Expert	$150 – $300	
Canine Expert	$125 – $200	
Chemist/Toxicologist (B.S. or Ph.D.)	$150 – $275	
Chemist/Toxicologist (M.D.)	$275 – $400	

APPENDIX 2 – SERVICE PROVIDER HOURLY RATES

Computer/Cellphone/Cellular Tower Forensic Analyst	$250 – $300	
Crime Scene/Police Practices/Use-of-Force Expert	$150 – $250	
DNA Expert (B.S. or Ph.D.)	$150 – $250	
Fingerprint Analyst	$150 – $250	
Gang Expert	$150 – $200	
Handwriting Analyst	$100 – $250	
Interpreter/Translator for in-person meetings	CJA Rates	The half day, full day, contract rates negotiated between the court and the interpreters.
Jury Consultant	$150 – $225	
Law Student	$15 -$25	
Legal Analyst/Consultant (Non-Attorney)	$75 – $100	E.g., Sentencing Guidelines consultant.
Medical – Other (M.D. or D.O.)	$200 – $350	
Neurologist or Neuropsychiatrist (M.D.)	$275 – $350	
Neuropsychologist (Ph.D.)	$225 – $350	
Nurse (L.P.N. or R.N.)	$100 – $125	
Nurse (M.S.N. or D.N.P.)	$150 – $300	Including S.A.N.E. certified.
Pathologist/Medical Examiner	$250	
Ph.D – Other	$150 – $300	
Polygraph	$100 – $250	Polygraph testing typically billed at a flat rate between $350 and $1,000.
Psychiatrist (M.D.)	$200 – $350	
Psychologist (Ph.D.)	$150 – $300	
Translation – Foreign Language Document	.165 cents per word	
Transcription – English Audio	$3.65 per page	Contract court reporter rate (without foreign translation) for non-automated transcription services. NOTE: Reimbursement for transcripts of federal court proceedings must be submitted on Form CJA-24 in eVoucher and requested in District Court, whether for use in District Court or the Court of Appeals.
Transcription and Translation Combined – Foreign Audio	$35 – $85	Combined translation and transcription of foreign audio recordings are typically billed by the hour, not per word or page, for non-automated services. Rates vary based on language, interpreter certification, and recording quality.

September, 2022

APPENDIX 3 – SAMPLE ENGAGEMENT LETTER

Sample Engagement Letter: Contents of Financial Arrangements

Case Name: _____

Case Number: _____

The engagement of your services for this case is subject to the following:

1) You will be compensated at a rate of $_____ per hour for services and $_____ per hour for travel time. The maximum payment amount authorized by the court as of this date for your services is $_____, excluding properly documented reimbursable expenses. Do not incur any single expense in excess of $500 without first contacting me so that I may obtain prior court authorization.

2) A CJA 21 (non-capital) or 31 (capital) will be created for you in the court's electronic voucher system which either you or I will complete and submit. Instructions on how to use the eVoucher system will be provided to you.

3) It is my responsibility as counsel to certify to the court that the services were rendered. Payment for your services is subject to approval by the presiding judge or delegee and, in certain circumstances, the Chief Judge of the Second Circuit or delegee. Approved payments are made by the Department of the Treasury out of the federal judiciary's Defender Services account, **not by me or my law firm**.

4) The presiding judge (and the Chief Judge of the Second Circuit or delegee) has discretion to reduce a voucher. Specific reasons include: (a) mathematical errors; (b) instances in which work billed was not compensable under district or circuit court policies or the Guidelines for Administering the CJA and Related Statutes (CJA Guidelines), Guide to Judiciary Policy, Volume 7, Part A; (c) instances in which work billed was not undertaken or completed; and (d) instances in which the hours billed are clearly in excess of what was reasonably required to complete the task. Accordingly, this Engagement Letter is not a guarantee of payment for all services rendered or expenses incurred.

5) **Do not perform services or incur expenses in excess of amounts authorized by the court**. Doing so creates a risk that the court will not authorize payment for the work done or expenses incurred, even if the services performed or expenses incurred are necessary. You must advise me **before** exceeding the court's authorization. If I determine such additional work and/or expenses are necessary for the representation, I will seek approval from the court for additional funds before such work is performed or expenses incurred.

6) Travel expenses will be reimbursed on the basis of actual expenses incurred. Please consult with me regarding the maximum reimbursement amounts for travel expenses. Airline travel must be authorized by the court by my application. If airline travel is authorized, I will provide guidance to you regarding the purchase of a ticket.

7) Record Keeping – Consistent with CJA Guideline § 320.90, you are required to maintain contemporaneous time and attendance records for all work/services billed, as well as expense records. These records should be entered into eVoucher on a CJA 21 or 31 that is submitted for payment. Any separate time and attendance records must be retained for three years after approval of the appointed counsel's or the service provider's final voucher, whichever is later.

8) Unless otherwise authorized by the court, a voucher for services performed and expenses incurred for the representation should be submitted at the conclusion of your services. While the court attempts to process invoices as quickly as possible, there may be delays in payment due to workload and other factors.

9) Scope of Work – You are authorized to do the following work:

_____

_____

_____

_____

_____

_____

_____

_____

Accepted by: _____

Date: _____

APPENDIX 4 – COMPENSATION MAXIMUMS

APPENDIX 4 – COMPENSATION MAXIMUMS

A. ATTORNEY CASE COMPENSATION MAXIMUMS

For representations in which work is performed on or after January 1, 2022:	
Non-capital felony	$12,800 for trial court level $9,100 for appeal
Misdemeanor	$3,600 for trial court level $9,100 for appeal
Non-capital post-conviction proceeding under 28 U.S.C. § 2241, § 2254, or § 2255	$12,800 for trial court level $9,100 for appeal

B. SERVICE PROVIDER NO PRIOR AUTHORIZATION LIMIT

For representations in which services are performed on or after February 15, 2019:	
All cases	$900 (all services)

C. SERVICE PROVIDER CASE COMPENSATION MAXIMUMS

For representations in which services are performed on or after January 1, 2021:	
Non-capital case	$2,800 (per individual authorization, exclusive of expenses reasonably incurred)
Capital case	$7,500 (applicable to total payments for investigative, expert, and other services in a case, including expenses, not to each service individually)

APPENDIX 5 – SPECIFICITY IN TIMESHEETS

APPENDIX 5– SPECIFICITY IN TIMESHEETS

Counsel should strive to provide sufficient information in their billing to demonstrate both reasonableness and compensability and are encouraged to review the WDNY CJA Unit's billing tip sheets at https://www.nywd.uscourts.gov/cja and any local billing guidelines.

PROPER CLASSIFICATION OF SERVICES (NO FULL-DAY BUNDLING):

Do this…

Date	Service	Description	Time
04/05/21	Interviews and Conferences	Met with AUSA (.4); phone call with client (.4); met with client at jail (.8)	1.6
04/05/21	Obtain/Review Rcds	Reviewed 302s re: Count 1 (Bates Nos. 001-225)	3.2
04/05/21	Legal Research	Legal research for motion to suppress	1.5

Not this…

Date	Service	Description	Time
04/05/21	Interviews and Conferences	Met with AUSA (.4); phone call with client (.4); met with client at jail (.8); Reviewed 302s re: Count 1 (Bates Nos. 001-225) (3.2); Legal research for motion to suppress (1.5)	6.3

DETAILED TASK DESCRIPTIONS:

Do this…

Date	Service	Description	Time
04/05/21	Travel Time	Traveled by private car to locate and meet with two possible eyewitnesses (W1 and W2) in Rochester, NY (includes travel to and within Roch. to two separate residences)	1.0
04/05/21	Interviews and Conferences	Interviewed two possible eyewitnesses (W1 and W2) in Roch. NY, at their separate residences	1.6
04/08/21	Obtain/Review Rcds	Reviewed 200 pages of wiretap transcripts (Bates Nos. 220-420)	1.5
04/17/21	Legal Research	Researched whether the search of client's car without a warrant was unlawful; drafted motion to suppress (Doc. 112)	5.2
04/20/21	Obtain/Review Rcds	Reviewed cell site data, take notes, and draft timeline. Approx 150 pages of cell site discovery (no bates numbers).	2.0

APPENDIX 5 – SPECIFICITY IN TIMESHEETS

Not this…

Date	Service	Description	Time
04/05/21	Travel Time	Travel to Rochester, NY	1.0
04/05/21	Interviews and Conferences	Witness interviews	1.6
04/08/21	Obtain/Review Rcds	Reviewed discovery	1.5
04/17/21	Legal Research	Legal research and writing	5.2
04/20/21	Obtain/Review Rcds	Reviewed discovery	2.0

AGGREGATE ECF DOCUMENT REVIEW AND OTHER 0.1 TASKS:

Do this…

Date	Service	Description	Time
04/05/21	Obtain/Review Rcds	Reviewed multiple ECF filings (Doc. 2-9)	0.3
04/06/21	Interviews and Conferences	Review and respond to multiple emails from AUSA re: discovery	0.2

Not This….

Date	Service	Description	Time
04/05/21	Obtain/Review Rcds	ECF document review	0.1
04/05/21	Obtain/Review Rcds	ECF document review	0.1
04/05/21	Obtain/Review Rcds	ECF document review	0.1
04/05/21	Obtain/Review Rcds	ECF document review	0.1
04/05/21	Obtain/Review Rcds	ECF document review	0.1
04/06/21	Interviews and Conferences	Email AUSA re: discovery request	0.1
04/06/21	Interviews and Conferences	Review AUSA email response re: discovery request	0.1
04/06/21	Interviews and Conferences	Email AUSA re: discovery request follow-up	0.1
04/06/21	Interviews and Conferences	Review AUSA email response re: discovery request follow-up	0.1

APPENDIX 6 – EXPENSE POLICIES

APPENDIX 6– EXPENSE POLICIES

- Prior approval of the presiding judicial officer should be sought for any single non-travel, case-related expense in excess of $500.

- The use of couriers, messengers, and other premium delivery services such as Express Mail, Federal Express, and United Parcel Service, is discouraged unless there is a genuine necessity for this service or unless the cost of the premium service does not exceed United States Postal Service express mail rates. Explanations and receipts for all such services are required.

- In-house copying is strongly encouraged and is reimbursable at a rate not to **exceed** fifteen cents ($0.15) per page for black-and-white copies and twenty-five cents ($0.25) per page for color copies. If in-house duplication is neither feasible nor cost effective, counsel or service providers are expected to negotiate the lowest rate possible from an outside vendor.

- Counsel should use the most fiscally responsible method for discovery duplication. In some instances, this will require coordination among co-counsel, a "meet and confer" with the AUSA, and potential use of an outside vendor.

- External hard drives purchased with the intent to stay with a case file (e.g., to store discovery) or for use in another CJA representation may be reimbursed as an out-of-pocket expense.

- General office overhead expenses are not reimbursable, including, but not limited to, flat-fee computerized research plans unless itemized by client (and billed on a proportional basis), land and cellular telephone maintenance fees, books and publications, office supplies and equipment, and all costs related to educational seminars.

APPENDIX 6 – EXPENSE POLICIES

- The cost of computer-assisted legal research (*e.g.*, Westlaw) may be allowed as a reimbursable out-of-pocket expense, provided the research pertains to the case and the amount claimed is reasonable and properly documented. CJA attorneys are expected to utilize the most cost-efficient pricing plan available. As provided by CJA Guideline § 230.63.30, a copy of the bill or receipt is required.

- Reimbursement for transcripts of federal court proceedings must be submitted on a CJA 24 in eVoucher. Except during trial, accelerated transcripts, such as Expedited (7 days), 3-Day, or Daily, are discouraged. Any requests for accelerated transcripts must be justified and pre-approved by the court.

- As provided in CJA Guideline § 320.30.30, only one CJA-appointed attorney should order a transcript of any federal proceeding and should share a copy with appointed counsel for other defendants. If sharing is impracticable, additional copies may be ordered from the court reporter, but fees for a second or successive copy to appointed counsel must be furnished at a commercially competitive duplication (estimated to be ten cents per page) rate rather than the usual first or additional copy transcript rates.

APPENDIX 7 – HIGH-COST CASE INDICATORS

APPENDIX 7– HIGH-COST CASE INDICATORS

- Voluminous or complex discovery (*e.g.*, more than 500 gigabytes of data in the form of documents, audio or video recordings, or forensic images of computers, cell phones, or other devices)
- Use of wiretaps, especially involving foreign languages
- Multiple defendants
- Lengthy trial proceedings
- Complex cases
- Large indictments with multiple counts
- Cases where a defendant has mental health issues
- Lengthy or complicated sentencing exposure
- Terrorism cases
- Securities or other major fraud cases
- RICO cases
- Organized crime, gang, or drug trafficking cases
- Cases where a plea appears out of question because of such factors as immigration status or deportation consequences
- Any case which appears, from an early stage, destined for trial

APPENDIX 8 – RESOURCES

A. SECOND CIRCUIT COURT OF APPEALS, CJA

- CJA Policy and Procedures Manual
  www.ca2.uscourts.gov/cja

- Alan Nelson
  CJA Case Budgeting Attorney
  212-857-8726
  Alan_Nelson@ca2.uscourts.gov

- Richard Alcantara
  Administrative Manager
  212-857-8610
  Richard_Alcantara@ca.uscourts.gov

- Candice Joseph
  Legal Assistant to CBA
  212-857-8728
  Candice_Joseph@ca2.uscourts.gov

B. NATIONAL CJA GUIDELINES

- Guide to Judiciary Policy, Volume 7 (Criminal Justice Act Guidelines) https://www.uscourts.gov/rules-policies/judiciary-policies/criminal-justice-act-cja-guidelines

- AO Defender Services Legal and Policy Division
  202-502-3030
  DSO_LPD@ao.uscourts.gov

C. LITIGATION SUPPORT

- National Litigation Support Team, AO Defender Services Office
  https://www.fd.org/litigation-support
  510-637-3500

- Sean Broderick, National Litigation Support Administrator
  Contact: sean_broderick@fd.org

- Kelly Scribner, Assistant National Litigation Support Administrator Contact: kelly_scribner@fd.org

UNITED STATES DISTRICT COURT
Western District of New York

Revised Plan for Furnishing Representation pursuant to the Criminal Justice Act 18 U.S.C. § 3006A

Adopted by the Judges of the Western District of New York on October 29, 2021

Approved by the Judicial Council of the Second Circuit on _____

United States District Court
For the Western District of New York
Criminal Justice Act Plan

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United States District Court
For the Western District of New York
Criminal Justice Act Plan

I. Authority

Under the Criminal Justice Act (CJA) of 1964, as amended, 18 U.S.C. § 3006A, and *Guide to Judiciary Policy (Guide)*, Volume 7A, the judges of the United States District Court for the Western District of New York adopt this Plan, as approved by the circuit, for furnishing representation in federal court for any person financially unable to obtain adequate representation in accordance with the CJA.

II. Statement of Policy

A. Objectives

The objectives of this Plan are:

1. to attain the goal of equal justice under the law for all persons;

2. to provide all eligible persons with timely appointed counsel services that are consistent with the best practices of the legal profession, are cost-effective, and protect the independence of the defense function so that the rights of individual defendants are safeguarded and enforced; and

3. to particularize the requirements of the CJA, the USA Patriot Improvement and Reauthorization Act of 2005 (recodified at 18 U.S.C. § 3599), *Guide,* Vol. 7A, and the Second Circuit CJA Policy and Procedure Manual ("Second Circuit Manual") in a way that meets the needs of this district.

This Plan must therefore be administered so that those accused of a crime, or otherwise eligible for services under the CJA, will not be deprived of the right to counsel, or any element of representation necessary to an effective defense, due to lack of financial resources.

B. Compliance

1. The court, its clerk, the federal public defender organization, and private attorneys appointed under the CJA must comply with Guide, Vol. 7A, approved by the Judicial Conference of the United States or its Committee on Defender Services, with the Second Circuit Manual, and with this Plan.

2. The court will ensure that a current copy of the CJA Plan is made available on the court's website, and provided to CJA counsel upon

the attorney's designation as a member of the CJA panel of private attorneys (CJA Panel).

III. Definitions

A. Representation

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

B. Appointed Attorney

"Appointed attorney" is an attorney designated to represent a financially eligible person under the CJA and this Plan. Such attorneys include private attorneys, the Federal Public Defender, and staff attorneys of the federal public defender organization.

C. CJA Administrator

"CJA Administrator" is a person designated by the Federal Public Defender to administer the CJA Panel.

IV. Determination of Eligibility for CJA Representation

A. Subject Matter Eligibility

1. Mandatory

Representation **must** be provided for any financially eligible person who:

a. is charged with a felony or with a Class A misdemeanor;

b. is a juvenile alleged to have committed an act of juvenile delinquency as defined in 18 U.S.C. § 5031;

c. is charged with a violation of probation, or faces a change of a term or condition of probation, unless expressly waived by the probationer;

d. is under arrest, when such representation is required by law;

e. is entitled to appointment of counsel in parole proceedings;

f. is charged with a violation of supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release;

g. is subject to a mental condition hearing under 18 U.S.C. chapter 313;

h. is a material witness;

i. is seeking to set aside or vacate a death sentence under 28 U.S.C. § 2254 or § 2255;

j. is entitled to appointment of counsel in verification of consent proceedings in connection with a transfer of an offender to or from the United States for the execution of a penal sentence under 18 U.S.C. § 4109 ;

k. is charged with civil or criminal contempt and faces loss of liberty;

l. has been called as a witness before a grand jury, a court, the Congress, or a federal agency or commission which has the power to compel testimony, and there is reason to believe, either prior to or during testimony, that the witness could be subject to a criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty;

m. has been advised by the United States attorney or a law enforcement officer that he or she is the target of a grand jury investigation;

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

o. is held for international extradition under 18 U.S.C. Chapter 209;

p. is entitled to appointment of counsel under the Sixth Amendment to the Constitution; or

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

2. Discretionary

Whenever a district judge or magistrate judge determines that the interests of justice so require, representation **may** be provided for any financially eligible person who:

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

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

3. Ancillary Matters

Representation may also be provided for financially eligible persons in ancillary matters appropriate to the criminal proceedings under 18 U.S.C. § 3006A(c). In determining whether representation in an ancillary matter is appropriate to the criminal proceedings, the court should consider whether such representation is reasonably necessary:

a. to protect a constitutional right;

b. to contribute in some significant way to the defense of the principal criminal charge;

c. to aid in preparation for the trial or disposition of the principal criminal charge;

d. to enforce the terms of a plea agreement in the principal criminal charge;

e. to preserve the claim of the CJA client to an interest in real or personal property subject to civil forfeiture proceeding under 18 U.S.C. § 983,19 U.S.C. § 1602, 21 U.S.C. § 881, or similar statutes, which property, if recovered by the client, may be considered for reimbursement under 18 U.S.C. § 3006A(f); or

f. to effectuate the return of real or personal property belonging to the CJA client, which may be subject to a motion for return of property under Fed. R. Crim. P. 41(g).

B. Financial Eligibility

1. Presentation of Accused for Financial Eligibility Determination

a. Duties of Law Enforcement

(i) Upon arrest, where the defendant has not retained counsel, federal law enforcement officials must promptly notify, telephonically or electronically, the appropriate court personnel, who in turn will notify the Federal Public Defender of the arrest of an individual in connection with a federal criminal charge.

(ii) Employees of law enforcement agencies shall not participate in the completion of the financial affidavit or seek to obtain information concerning financial eligibility from a person requesting the appointment of counsel.

b. Duties of United States Attorney's Office

(i) Upon the return or unsealing of an indictment or the filing of a criminal information or criminal complaint, where the defendant has not retained, the United States Attorney or its delegate will promptly notify, telephonically or electronically, appropriate court personnel, who in turn will notify the federal public defender. The government shall promptly supply the court a conflict list, identifying all attorneys who have a conflict with the defendant(s) and are therefore disqualified for assignment.

(ii) Upon issuance of a target letter, and where the individual has not retained or waived counsel, the United States Attorney or its delegate must promptly notify, telephonically or electronically, the appropriate court personnel, who in turn will notify the Federal Public Defender, unless the United States Attorney's Office is aware of an actual or potential conflict with the target and the Federal Public Defender, in which case they must promptly notify the court.

(iii) Employees of the United States Attorney's Office shall not participate in the completion of the financial affidavit. Further, the government may not use as part of its direct case, other than a prosecution for

perjury or false statements made on the affidavit, any information provided by a defendant in connection with his or her request for appointment of counsel pursuant to this Plan.

c. Duties of Federal Public Defender's Office

(i) When practicable, the Federal Public Defender will discuss with the person who indicates that he or she is not financially able to secure representation the right to appointed counsel and, if appointment of counsel seems likely, assist in the completion of a financial affidavit (Form CJA 23) and arrange to have the person promptly presented before a magistrate judge or district judge of this court for determination of financial eligibility and appointment of counsel.

d. Duties of Pretrial Services Office

(i) When practicable and consistent with the agreement between the federal public defender and the United States Probation Office, the pretrial services officer should not conduct the pretrial service interview of a financially eligible defendant until counsel has been appointed, unless the defendant otherwise consents to a pretrial service interview without counsel.

(ii) When counsel has been appointed, the pretrial services officer will provide counsel notice and a reasonable opportunity to attend any interview of the defendant by the pretrial services officer prior to the initial pretrial release or detention hearing.[i]

2. Factual Determination of Financial Eligibility

a. In every case where appointment of counsel is authorized under 18 U.S.C. § 3006A(a) and related statutes, the court must advise the person that he or she has a right to be represented by counsel throughout the case and that, if so desired, counsel will be appointed to represent the person if he or she is financially unable to obtain counsel.

b. The determination of eligibility for representation under the CJA is a judicial function to be performed by the court after making appropriate inquiries concerning the person's financial eligibility. Other employees of the court may be

designated to obtain or verify the facts relevant to the financial eligibility determination.

c. In determining whether a person is "financially unable to obtain counsel," consideration should be given to the cost of providing the person and his or her dependents with the necessities of life, the cost of securing pretrial release, asset encumbrance, and the likely cost of retained counsel.

d. The initial determination of eligibility must be made without regard to the financial ability of the person's family to retain counsel unless their family indicates willingness and ability to do so promptly.

e. Any doubts about a person's eligibility should be resolved in the person's favor; erroneous determinations of eligibility may be corrected at a later time.

f. Relevant information bearing on the person's financial eligibility should be reflected on a financial eligibility affidavit (Form CJA 23).

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

h. If at any stage of the proceedings a judge finds that a person is no longer financially able to pay retained counsel, counsel may be appointed in accordance with the general provisions set forth in this Plan.

i. In making a factual determination of financial eligibility, pro bono service is not to be considered by a judge.

V. Timely Appointment of Counsel

A. Timing of Appointment

Counsel must be provided to eligible persons as soon as feasible in the following circumstances, whichever occurs earliest:

1. after they are taken into custody;

2. when they appear before a magistrate or district court judge;

3. when they are formally charged or notified of charges if formal charges are sealed; or

4. when a magistrate or district court judge otherwise considers appointment of counsel appropriate under the CJA and related statutes.

B. Court's Responsibility

The court, in cooperation with the Federal Public Defender and the United States Attorney, will make such arrangements with federal, state, and local investigative and police agencies as will ensure timely appointment of counsel.

C. Pretrial Service Interview

When practicable and consistent with the agreement between the Federal Public Defender and the United States Probation Office, unless the defendant otherwise consents to a pretrial service interview without counsel, financially eligible defendants will be provided appointed counsel prior to being interviewed by a pretrial services officer.

D. Retroactive Appointment of Counsel

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

VI. Provision of Representational Services

A. Federal Public Defender and Private Counsel

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

B. Administration

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

C. Apportionment of Cases

Where practical and cost effective, private attorneys from the CJA Panel will be appointed in a substantial proportion of the cases in which the accused is determined to be financially eligible for representation under the CJA. "Substantial" will usually be defined as a minimum of twenty-five percent (25%) of the annual CJA appointments.

D. Number of Counsel

More than one attorney may be appointed in any case determined by the court to be appropriate.

E. Capital Cases

Procedures for appointment of counsel in cases where the defendant is charged with a crime that may be punishable by death, or is seeking to vacate or set aside a death sentence in proceedings under 28 U.S.C. §§ 2241, 2254 or 2255, are set forth in section XV of this Plan.

VII. Federal Public Defender's Office

A. Establishment

The Federal Public Defender's Office for the Western District of New York is established in this district under the CJA and is responsible for rendering defense services on appointment throughout this district.

B. Standards

The Federal Public Defender's Office must provide high quality representation consistent with the best practices of the legal profession and commensurate with those services rendered when counsel is privately retained. See *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) ("'Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.'" (quoting ABA Standards for Criminal Justice section 4-3.9 (2d ed. 1980))).

C. Workload

The federal public defender's office will continually monitor the workloads of its staff to ensure high quality representation for all clients.

D. Professional Conduct

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

E. Private Practice of Law

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

F. Supervision of Defender Organization

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

G. Training

The Federal Public Defender will assess the training needs of Federal Public Defender staff and, in coordination with the CJA Panel Attorney District Representative,[1] the training needs of the local panel attorneys, and provide training opportunities and other educational resources.

VIII. CJA Panel of Private Attorneys

A. Establishment of the CJA Panel Committee

1. A CJA Panel Committee ("Panel Committee") will be established by the court, in consultation with the Federal Public Defender. The Panel Committee will consist of two judges (one from Rochester and one from Buffalo), up to six criminal defense attorneys who practice regularly in the district (three from Rochester and three from Buffalo), and the Federal Public Defender who serves as an ex officio member of the Panel Committee, and will also act as administrative coordinator. The district's CJA representative (PADR) shall be an ex officio member of the Panel Committee, unless he or she is one of the four private criminal defense attorney members.[ii]

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[1] The CJA Panel Attorney District Representative (PADR) is a member of the district's CJA Panel who is selected by the local Federal Public Defender, with acquiescence from the Chief Judge, to serve as the representative of the district's CJA Panel for the national Defender Services CJA PADR program and local CJA committees.

2. The Federal Public Defender or its representative shall serve as an ex officio member of the Panel Committee.

3. The Panel Committee will meet at least once a year and at any time the court asks the Committee to consider an issue. Meetings can be conducted in person, by videoconference, or by telephone conference.

B. Duties of the Panel Committee

1. Membership

Examine the qualifications of applicants for membership on the CJA Panel and recommend to the Chief Judge the approval of those attorneys who are deemed qualified and the rejection of the applications of those attorneys deemed unqualified.

2. Recruitment

Engage in recruitment efforts to establish a diverse panel and ensure that all qualified attorneys are encouraged to participate in the furnishing of representation in CJA cases.[iii]

3. Removal

Recommend to the Chief Judge the removal of any CJA panel member who:

a. fails to satisfactorily fulfill the requirements of CJA panel membership during the member's term of service, including the failure to provide high quality representation to CJA clients, or

b. has engaged in other conduct such that his or her continued service on the CJA Panel is inappropriate.

See also Section IX.C.7

4. Training

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

5. Voucher Review

Review and make recommendations on the processing and payment of CJA vouchers in those cases where the court, for

reasons other than mathematical errors, is considering authorizing payment for less than the amount of compensation claimed by CJA counsel. Review of CJA vouchers referred to the Panel Committee shall occur pursuant to the following procedure:

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

b. the Panel Committee shall notify the attorney whose voucher is under review of his or her opportunity to submit a written response to the court's referring letter or memorandum,

c. the Panel Committee may, but is not required to allow the attorney an opportunity for a personal interview to discuss the voucher and issues raised in the court's referring letter or memorandum,

d. the Panel Committee may conduct such additional investigation as it deems appropriate, and may seek input from third-parties, if it deems appropriate,

e. the Panel Committee shall issue a written report and recommendation to the referring judge, with a copy to the attorney whose voucher is under review, pursuant to such schedule as is set by the referring judge, and

f. none of the writings or submissions relating to such voucher review, including the court's referring letter or memorandum, shall be filed on the ECF System, but shall be maintained by the court and by the Panel Committee in hard copy, for a period of at least three years following final approval or disapproval of the CJA voucher under review.

See also Section XIII.B.6

IX. Establishment of a CJA Panel

A. Reapplication to the CJA Panel

1. With the adoption of this revised Criminal Justice Act Plan for the Western District of New York, any attorney wishing to be appointed to the Probationary, Trial or Emeritus Panels, including all attorneys currently serving on such panels, must submit an application for appointment to the appropriate panel. For one year after the

adoption of this revised Plan, the court may make assignments to any attorney on the previous Trial Panel.

2. The Panel Committee will approve attorneys for membership on the CJA Trial and Probationary Panels, consistent with the eligibility criteria stated in subsection C below.

B. Size of CJA Panel

1. The size of the CJA Trial Panel will be determined by the Panel Committee on an annual basis, based on the caseload and activity of the panel members, subject to review by the court.

2. The CJA Panel must be large enough to provide a sufficient number of experienced attorneys to handle the CJA caseload, yet small enough so that CJA panel members will receive an adequate number of appointments to maintain their proficiency in federal criminal defense work enabling them to provide high quality representation consistent with the best practices of the legal profession and commensurate with those services rendered when counsel is privately retained.

C. Qualifications and Membership on the CJA Panel

1. Application

Application forms for membership on the CJA Panel are available from the federal public defender's website, and the WDNY website. Applications are collected annually until September 30, and are thereafter reviewed by the Panel Committee.

2. Equal Opportunity

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

3. Eligibility

a. All applicants must demonstrate a commitment to provide high quality representation to those individuals eligible for their services, commensurate with those services rendered when counsel is privately retained. *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) ("Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.").

b. Each applicant must certify that he or she has read and can demonstrate knowledge of the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, the Federal and Second Circuit Rules of Appellate Procedure, the United States Sentencing Guidelines, the Bail Reform Act of 1984, the Local Rules of Criminal Procedure and standing Orders, the Guidelines for the Administration of the Criminal Justice Act, the Rules of Civility, and this CJA Plan.

c. Applicants must have significant experience representing persons charged with serious criminal offenses and demonstrate a commitment to the defense of people who lack the financial means to hire an attorney.

d. Each applicant should have also tried at least two felony cases to verdict in either state or federal court. Alternatively, an applicant must have appeared as defense counsel of record in at least two federal felony cases from initial appearance or arraignment through sentencing and have other significant trial experience as determined by the Panel Committee.

e. Unless specifically permitted by the Court, applicants shall have their principal place of business within the Western District of New York.[iv]

4. Appointment to CJA Trial Panel

After considering the recommendations of the Panel Committee, the chief judge will appoint attorneys to the CJA Trial Panel. Due to the highly complex and demanding nature of capital and habeas corpus cases, special procedures will be followed for the eligibility and appointment of counsel in such cases. See Section XV of this Plan.

5. Probationary Panel

In the Panel Committee's discretion, it may be recommended to the Chief Judge that applicants with limited trial or federal criminal practice experience be accepted to the Trial Panel and placed on probation through completion of the first three cases assigned to them. During their first year, the Probationary Panel member shall attend all training programs presented by the Federal Public Defender's Office, except for good cause shown, and shall participate in the mentoring program outlined in section XIV of this Plan. Probationary Panel members will be eligible for the regular

assignment of cases unless the judge requesting the assignment indicates that the matter would not be appropriate for assignment to a Probationary Panel member. The Committee shall be notified by the Panel member upon completion of his/her third probationary assignment. After consultation with the assigned mentor, the Committee will review and recommend to the court either elevation to non-probationary status, a continuation of probation for a specific length of time, or removal from the Panel.

6. Emeritus Panel

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

7. Removal from the CJA Panel

a. Mandatory removal

Any member of the CJA Panel who is suspended or disbarred from the practice of law by the state court before whom such member is admitted, or who is suspended or disbarred from this court or any federal court, will be removed from the CJA Panel immediately.

b. Automatic disciplinary review

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

c. Complaints

(i) Initiation

A complaint against a panel member may be initiated by the Panel Committee, a judge, another panel

member, a defendant, or a member of the federal defender's office. A complaint need not follow any particular form, but it must be in writing and state the alleged deficiency with specificity. Any complaint should be directed to the Panel Committee, which will determine whether further investigation is necessary. If the complaint was initiated by a judge, and the Panel Committee believes that no further investigation is necessary, the Panel Committee will report to the judge who initiated the complaint, and explain its recommendation.

(ii) Notice

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

(iii) Response

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

(iv) Protective action

Prior to disposition of any complaint, the Panel Committee may recommend temporary suspension or removal of the panel member from any pending case, or from the panel, and may take any other protective action that is in the best interest of the client or the administration of this Plan.

(v) Review and recommendation

After investigation, the Panel Committee may recommend dismissing the complaint, or recommend appropriate remedial action, including removing the attorney from the panel, limiting the attorney's participation to particular types or categories of cases, directing the attorney to complete specific CLE requirements before receiving further panel appointments, limiting the attorney's participation to handling cases that are directly supervised or overseen by another panel member or other

experienced practitioner, or any other appropriate remedial action.

(vi) Final disposition by the court

The Panel Committee will forward its recommendation to the Chief Judge for consideration and final disposition.

(vii) Confidentiality

Unless otherwise directed by the court, any information acquired concerning any possible disciplinary action, including any complaint and any related proceeding, will be confidential.

(viii) None of these procedures create a property interest in being on or remaining on the CJA Panel.

d. Notification

The Federal Public Defender will be immediately notified when any member of the CJA Panel is removed or suspended.

X. Mentoring Program

A. If requested by the Panel Committee, a Trial or Emeritus Panel member shall serve as a mentor to Probationary Panel members. Attorneys of the Federal Public Defender's Office will also serve as mentors. A mentor will make himself/herself available to answer questions of and provide advice to a probationary Panel member regarding cases currently assigned to the probationer. The mentor may also allow the Probationary Panel member to observe and to participate in, if appropriate, all aspects of a federal criminal case, including client conferences, decisions concerning defense strategy, motion and trial preparation, and court appearances, including hearings and trials.

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

XI. CJA Panel Attorney Appointment in Non-Capital Cases

A. Appointment List

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

2. All Probationary Panel members shall be included on each year's appointment list.

B. Appointment Procedures

1. The Federal Public Defender is responsible for overseeing the appointment of cases to panel attorneys. The Federal Public Defender will maintain a record of panel attorney appointments and, when appropriate, data reflecting the apportionment of appointments between attorneys from the federal public defender office and panel attorneys.

2. Appointment of cases to CJA panel members will ordinarily be made from the annual appointment list on a rotational basis. In a complex or otherwise difficult case, the Federal Public Defender or the court may appoint any attorney from the Trial Panel or the Emeritus Panel outside of the normal rotation to ensure that the defendant has sufficiently experienced counsel.

3. Under special circumstances the court may appoint a member of the bar, who is not on the Trial Panel or the Emeritus Panel, or who is not on the annual appointment list. Such special circumstances may include cases in which the court determines that the appointment of a particular attorney is in the interests of justice, judicial economy, or continuity of representation, or for any other compelling reason. It is not anticipated that special circumstances will arise often, and the procedures set forth in the Plan are presumed to be sufficient in the vast majority of cases in which counsel are to be appointed. Appointments made under this section will be reported to the Panel Committee.

XII. Duties of CJA Panel Members

A. Standards and Professional Conduct

1. CJA panel members must provide high quality representation consistent with the best practices of the legal profession and commensurate with those services rendered when counsel is privately retained. See *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) ("'Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.'" (quoting ABA Standards for Criminal Justice section 4-3.9 (2d ed. 1980))).

2. Attorneys appointed under the CJA must conform to the highest standards of professional conduct.

3. CJA panel members must notify within 30 days the chair of the Panel Committee when any licensing authority, grievance committee, or administrative body has taken action against them, or when a finding of contempt, sanction, or reprimand has been issued against the panel member by any state of federal court.

B. Training and Continuing Legal Education

1. Attorneys on the CJA Panel are expected to remain current with developments in federal criminal defense law, practice, and procedure, including the Recommendation for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases.

2. Attorneys on the CJA Panel are expected to attend trainings sponsored by the federal public defender.

3. Attorneys on the CJA Panel will be guided in their practice by the Federal Adaptation of the National Legal Aid and Defender Association Performance Guidelines for Criminal Defense Representations.

4. CJA panel members must attend at least 6 continuing legal education hours relevant to federal criminal practice annually. This requirement can be met by attending one of the full-day federal practice programs offered by the Federal Public Defender. If the CJA panel member chooses to satisfy the continuing legal education requirement by attending a different program, the panel member must submit a letter to the Panel Committee setting forth

details about the program and provide a copy of the program agenda.

5 Failure to comply with these training and legal education requirements may be grounds for removal from the CJA Panel.

C. Facilities and Technology Requirements

1. CJA panel attorneys must have facilities, resources, and technological capability to effectively and efficiently manage assigned cases.

2. CJA panel attorneys must comply with the requirements of electronic filing and eVoucher.

3. CJA panel attorneys must know and abide by procedures related to requests for investigative, expert, and other services.

D. Continuing Representation

Once counsel is appointed under the CJA, counsel will continue the representation until the matter, including appeals (unless provided otherwise by the Second Circuit's CJA plan) or review by certiorari, is closed; or until substitute counsel has filed a notice of appearance; or until an order is entered allowing or requiring the person represented to proceed pro se; or until the appointment is terminated by court order. If trial counsel believes that continuity of counsel is not in the best interest of the client for purposes of appeal, CJA counsel shall timely seek substitution of counsel.[v]

E. Miscellaneous

1. Case budgeting

In non-capital representations of unusual complexity that are likely to become extraordinary in terms of cost, the court may require or CJA counsel may seek permission of the court for the development of a case budget consistent with *Guide*, Vol. 7A, Ch. 2, §§ 230.26.10–20.

2. No receipt of other payment

   Appointed counsel may not require, request, or accept any payment or promise of payment or any other valuable consideration for representation under the CJA, unless such payment is approved by order of the court.

3. Redetermination of need

   If at any time after appointment, counsel has reason to believe that a party is financially able to obtain counsel, or make partial payment for counsel, and the source of counsel's information is not protected as a privileged communication, counsel will advise the court.

XIII. Compensation of CJA Panel Attorneys

A. Policy of the Court Regarding Compensation

Providing fair compensation to appointed counsel is a critical component of the administration of justice. CJA panel attorneys must be compensated for time expended in court and time reasonably expended out of court, and reimbursed for expenses reasonably incurred.

B. Payment Procedures

1. Claims for compensation must be submitted on the appropriate CJA form through the court's eVoucher system.

2. Claims for compensation should be submitted no later than 45 days after final disposition of the case, unless good cause is shown.

3. The Clerk of the Court or his/her designee will review the claim for mathematical and technical accuracy and for conformity with Guide, Vol. 7A, as well as the Second Circuit Manual, and, if correct, will forward the claim for consideration and action by the presiding judge.

4. Absent extraordinary circumstances, the court should act on CJA compensation claims within 30 days of submission, and vouchers should not be delayed or reduced for the purpose of diminishing Defender Services program costs in response to adverse financial circumstances.

5. Except in cases involving mathematical corrections, no claim for compensation submitted for services provided under the CJA will

be reduced without affording counsel notice and the opportunity to be heard. The court shall not seek to reduce or justify a voucher reduction based on a view that there exists a pro bono component to CJA representation of criminal defendants.

6. The court, when contemplating reduction of a CJA voucher for other than mathematical reasons, may refer the voucher to the Panel Committee for review and recommendation before final action on the claim is taken. See Section VIII of this Plan.

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

XIV. Investigative, Expert, and Other Services

A. Financial Eligibility

Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request such services in an *ex parte* application to the court as provided in 18 U.S.C. § 3006A(e)(1), regardless of whether counsel is appointed under the CJA. Upon finding that the services are necessary, and that the person is financially unable to obtain them, the court must authorize counsel to obtain the services.[vi]

B. Applications

1. Requests for authorization of funds for investigative, expert, and other services must be submitted in an *ex parte* application to the court (using the court's eVoucher system) and must not be disclosed except with the consent of the person represented or as required by law or Judicial Conference policy.

2. CJA counsel may seek and/or the court may choose to have applications for investigative, expert, and other services considered by a non-presiding judge to help ensure appointed counsel's ability to obtain the necessary resources in a manner that does not unreasonably compromise or interfere with the exercise of sound independent professional judgment.

C. Compliance

Counsel must comply with Judicial Conference policies set forth in *Guide*, Vol. 7A, Ch. 3, and the Second Circuit Manual.

XV. Appointment of Counsel and Case Management in CJA Capital Cases

A. Applicable Legal Authority

The appointment and compensation of counsel in capital cases and the authorization and payment of persons providing investigative, expert, and other services are governed by 18 U.S.C. §§ 3005, 3006A, and 3599, and *Guide*, Vol. 7A, Ch. 6.

B. General Applicability and Appointment of Counsel Requirements

1. Unless otherwise specified, the provisions set forth in this section apply to all capital proceedings in the federal courts, whether those matters originated in a district court (federal capital trials) or in a state court (habeas proceedings under 28 U.S.C. § 2254). Such matters include those in which the death penalty may be or is being sought by the prosecution, motions for a new trial, direct appeal, applications for a writ of certiorari to the Supreme Court of the United States, all post-conviction proceedings under 28 U.S.C. §§ 2254 or 2255 seeking to vacate or set aside a death sentence, applications for stays of execution, competency proceedings, proceedings for executive or other clemency, and other appropriate motions and proceedings.

2. Any person charged with a crime that may be punishable by death who is or becomes financially unable to obtain representation is entitled to the assistance of appointed counsel throughout every stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction processes, together with applications for stays of execution and other appropriate motions and procedures, competency proceedings, and proceedings for executive or other clemency as may be available to the defendant. See 18 U.S.C. § 3599(e).

3. Qualified counsel must be appointed in capital cases at the earliest possible opportunity.

4. Given the complex and demanding nature of capital cases, where appropriate, the court will utilize the expert services available

through the Administrative Office of the United States Courts (AO), Defender Services Death Penalty Resource Counsel projects ("Resource Counsel projects") which include: (1) Federal Death Penalty Resource Counsel and Capital Resource Counsel Projects (for federal capital trials), (2) Federal Capital Appellate Resource Counsel Project, (3) Federal Capital Habeas § 2255 Project, and (4) National and Regional Habeas Assistance and Training Counsel Projects (§ 2254). These counsel are death penalty experts who may be relied upon by the court for assistance with selection and appointment of counsel, case budgeting, and legal, practical, and other matters arising in federal capital cases.

5. The Federal Public Defender should promptly notify and consult with the appropriate Resource Counsel projects about potential and actual federal capital trial, appellate, and habeas corpus cases, and consider their recommendations for appointment of counsel.

6. The presiding judge may appoint an attorney furnished by a state or local public defender organization or legal aid agency or other private, non-profit organization to represent a person charged with a capital crime or seeking federal death penalty habeas corpus relief provided that the attorney is fully qualified. Such appointments may be in place of, or in addition to, the appointment of a federal public defender organization or a CJA panel attorney or an attorney appointed pro hac vice. See 18 U.S.C. § 3006A(a)(3).

7. All attorneys appointed in federal capital cases must be well qualified, by virtue of their training, commitment, and distinguished prior capital defense experience at the relevant stage of the proceeding, to serve as counsel in this highly specialized and demanding litigation.

8. All attorneys appointed in federal capital cases must have sufficient time and resources to devote to the representation, taking into account their current caseloads and the extraordinary demands of federal capital cases.

9. All attorneys appointed in federal capital cases should comply with the American Bar Association's 2003 Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Guidelines 1.1 and 10.2 et seq.), and the 2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases.

10. All attorneys appointed in federal capital cases should consult regularly with the appropriate Resource Counsel projects.

11. Questions about the appointment and compensation of counsel and the authorization and payment of investigative, expert, and other service providers in federal capital cases should be directed to the AO Defender Services Office, Legal and Policy Division Duty Attorney at 202-502-3030 or via email at ods_lpb@ao.uscourts.gov.

C. Appointment of Trial Counsel in Federal Death-Eligible Cases[2]

1. General Requirements

a. Appointment of qualified capital trial counsel must occur no later than when a defendant is charged with a federal criminal offense where the penalty of death is possible. See 18 U.S.C. § 3005.

b. To protect the rights of an individual who, although uncharged, is the subject of an investigation in a federal death-eligible case, the court may appoint capitally-qualified counsel upon request, consistent with Sections C.1, 2, and 3 of these provisions.

c. At the outset of every capital case, the court must appoint two attorneys, at least one of whom meets the qualifications for "learned counsel" as described below. If necessary for adequate representation, more than two attorneys may be appointed to represent a defendant in a capital case. See 18 U.S.C. § 3005.

d. When appointing counsel, the judge must consider the recommendation of the Federal Public Defender, who will consult with Federal Death Penalty Resource Counsel to recommend qualified counsel. [In those districts without a federal public defender organization, the judge must, as required by 18 U.S.C. § 3005, consider the recommendation of the AO, Defender Services Office.] See 18 U.S.C. § 3005.

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[2] The Judicial Conference adopted detailed recommendations on the appointment and compensation of counsel in federal death penalty cases in 1998 (JCUS-SEP 98, p. 22). In September 2010, the Defender Services Committee endorsed revised commentary to the Judicial Conference's 1998 recommendations. *CJA Guidelines*, Vol. 7A, Appx. 6A (Recommendations and Commentary Concerning the Cost and Quality of Defense Representation (Updated Spencer Report, September 2010)) ("Appx. 6A") is available on the judiciary's website.

e. To effectuate the intent of 18 U.S.C. § 3005 that the Federal Public Defender's recommendation be provided to the court, the judge should ensure the Federal Public Defender has been notified of the need to appoint capitally-qualified counsel.

f. Reliance on a list for appointment of capital counsel is not recommended because selection of trial counsel should account for the particular needs of the case and the defendant, and be based on individualized recommendations from the Federal Public Defender in conjunction with the Federal Death Penalty Resource Counsel and Capital Resource Counsel projects.

g. Out-of-district counsel, including federal public defender organization staff, who possess the requisite expertise may be considered for appointment in capital trials to achieve high quality representation together with cost and other efficiencies.

h. In evaluating the qualifications of proposed trial counsel, consideration should be given to their commitment to the defense of capital cases, their current caseload including other capital cases, and their willingness to effectively represent the interests of the client.

2. Qualifications of Learned Counsel

a. Learned counsel must either be a member of this district's bar or be eligible for admission pro hac vice based on his or her qualifications. Appointment of counsel from outside the jurisdiction is common in federal capital cases to achieve cost and other efficiencies together with high quality representation.

b. Learned counsel must meet the minimum experience standards set forth in 18 U.S.C. §§ 3005 and 3599.

c. Learned counsel should have distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in state death penalty trials, appeals, or post-conviction review that, in combination with co-counsel, will assure high quality representation.

d. "Distinguished prior experience" contemplates excellence, not simply prior experience. Counsel with distinguished prior experience should be appointed even if meeting this standard requires appointing counsel from outside the district where the matter arises.

e. The suitability of learned counsel should be assessed with respect to the particular demands of the case, the stage of the litigation, and the defendant.

f. Learned counsel must be willing and able to adjust other caseload demands to accommodate the extraordinary time required by the capital representation.

g. Learned counsel should satisfy the qualification standards endorsed by bar associations and other legal organizations regarding the quality of representation in capital cases.

3. Qualifications of Second and Additional Counsel

a. Second and additional counsel may, but are not required to, satisfy the qualifications for learned counsel, as set forth above.

b. Second and additional counsel must be well qualified, by virtue of their distinguished prior criminal defense experience, training and commitment, to serve as counsel in this highly specialized and demanding litigation.

c. Second and additional counsel must be willing and able to adjust other caseload demands to accommodate the extraordinary time required by the capital representation.

d. The suitability of second and additional counsel should be assessed with respect to the demands of the individual case, the stage of the litigation, and the defendant.

D. Appointment and Qualifications of Direct Appeal Counsel in Federal Death Penalty Cases

1. When appointing appellate counsel, the judge must consider the recommendation of the Federal Public Defender, who will consult with Federal Capital Appellate Resource Counsel to recommend qualified counsel.

2. Counsel appointed to represent a death-sentenced federal appellant should include at least one attorney who did not represent the appellant at trial.

3. Each trial counsel who withdraws should be replaced with similarly qualified counsel to represent the defendant on appeal.

4. Out-of-district counsel, including federal public defender organization staff, who possess the requisite expertise, may be considered for appointment in capital appeals to achieve high quality representation, together with cost and other efficiencies.

5. Appellate counsel, between them, should have distinguished prior experience in federal criminal appeals and capital appeals.

6. At least one of the attorneys appointed as appellate counsel must have the requisite background, knowledge, and experience required by 18 U.S.C.§ 3599(c) or (d).

7. In evaluating the qualifications of proposed appellate counsel, consideration should be given to the qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases.

8. In evaluating the qualifications of proposed appellate counsel, consideration should be given to their commitment to the defense of capital cases, their current caseload including other capital cases, and their willingness to effectively represent the interests of the client.

E. Appointment and Qualifications of Post-Conviction Counsel in Federal Death Penalty Cases (28 U.S.C. § 2255)

1. A financially eligible person seeking to vacate or set aside a death sentence in proceedings under 28 U.S.C. § 2255 is entitled to appointment of fully qualified counsel. See 18 U.S.C. § 3599(a)(2).

2. Due to the complex, demanding, and protracted nature of death penalty proceedings, the court should consider appointing at least two attorneys.

3. In light of the accelerated timeline applicable to capital § 2255 proceedings, prompt appointment of counsel is essential. Wherever possible, appointment should take place prior to the denial of certiorari on direct appeal by the United States Supreme Court.

4. When appointing counsel in a capital § 2255 matter, the court should consider the recommendation of the federal public defender, who will consult with the Federal Capital Habeas § 2255 Project.

5. Out-of-district counsel, including federal public defender organization staff, who possess the requisite expertise may be considered for appointment in capital § 2255 cases to achieve high quality representation together with cost and other efficiencies.

6. Counsel in § 2255 cases should have distinguished prior experience in the area of federal post-conviction proceedings and in capital post-conviction proceedings.

7. When possible, post-conviction counsel should have distinguished prior experience in capital § 2255 representations.

8. In evaluating the qualifications of proposed post-conviction counsel, consideration should be given to the qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases.

9. In evaluating the qualifications of proposed post-conviction § 2255 counsel, consideration should be given to their commitment to the defense of capital cases, their current caseload including other capital cases, and their willingness to effectively represent the interests of the client.

F. Appointment and Qualifications of Counsel in Federal Capital Habeas Corpus Proceedings (28 U.S.C. § 2254)

1. A financially eligible person seeking to vacate or set aside a death sentence in proceedings under 28 U.S.C. § 2254 is entitled to the appointment of qualified counsel. See 18 U.S.C. § 3599(a)(2).

2. Due to the complex, demanding, and protracted nature of death penalty proceedings, the court should consider appointing at least two attorneys.

3. When appointing counsel in a capital § 2254 matter, the appointing authority should consider the recommendation of the Federal Public Defender who will consult with the National or Regional Habeas Assistance and Training Counsel projects.

   [To be used in districts where the FDO has a Capital Habeas Unit (CHU) that specializes in the representation of death-sentenced individuals in post-conviction proceedings, ADD: The Federal

Public Defender's recommendation may be to appoint this district's CHU, a CHU from another district, or other counsel who qualify for appointment under 18 U.S.C. § 3599 and this Plan, or any combination of the foregoing appropriate under the circumstances.]

4. Out-of-district counsel, including federal public defender organization staff, who possess the requisite expertise, may be considered for appointment in capital § 2254 cases to achieve cost and other efficiencies, together with high quality representation.

5. In order for federal counsel to avail themselves of the full statute of limitations period to prepare a petition, the court should appoint counsel and provide appropriate litigation resources at the earliest possible time permissible by law, preferably no later than the conclusion of the state direct appeal.

6. Unless precluded by a conflict of interest, or replaced by similarly qualified counsel upon motion by the attorney or motion by the defendant, capital § 2254 counsel must represent the defendant throughout every subsequent stage of available judicial proceedings and all available post-conviction processes, together with applications for stays of execution and other appropriate motions and procedures, and must also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant. See 18 U.S.C. § 3599(e).

7. Counsel in capital § 2254 cases should have distinguished prior experience in the area of federal post-conviction proceedings and in capital post-conviction proceedings.

8. When possible, capital § 2254 counsel should have distinguished prior experience in capital § 2254 representations.

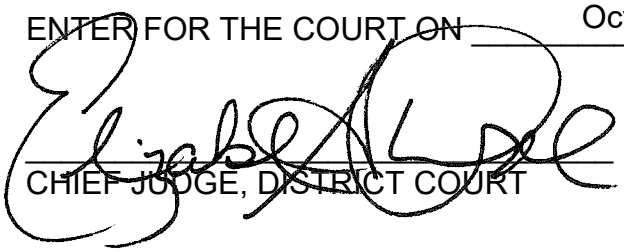
9. In evaluating the qualifications of proposed capital § 2254 counsel, consideration should be given to the qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases.

10. In evaluating the qualifications of proposed capital § 2254 counsel, consideration should be given to proposed counsel's commitment to the defense of capital cases, their current caseload including other capital cases, and their willingness to represent effectively the interests of the client.

XVI. Effective Date

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

ENTER FOR THE COURT ON October 29, 2021.



CHIEF JUDGE, DISTRICT COURT

APPROVED BY THE JUDICIAL COUNCIL OF THE SECOND CIRCUIT ON _____, 2021.

_____
CHIEF JUDGE, COURT OF APPEALS

Explanatory Comments from the Defender Services Committee

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[i] **Defender Services Committee Comment:** The Judicial Conference recognizes the importance of the advice of counsel for persons subject to proceedings under the Bail Reform Act, 18 U.S.C. § 3142 et seq., prior to their being interviewed by a pretrial services or probation officer. Accordingly, the Conference encourages districts to take the steps necessary to permit the furnishing of appointed counsel at this stage of the proceedings to financially eligible defendants, having due regard for the importance of affording the pretrial services officer adequate time to interview the defendant and verify information prior to the bail hearing. JCUS-MAR 88, p. 18–19. **All comments are included in this draft of the CJA Plan for the benefit of the court, and its consideration of the plan, but will be removed from the text of any plan formally approved by the court.**

[ii] **Defender Services Committee Comment:** The composition of the CJA Panel Committee can be adjusted to reflect the degree of judicial, federal public defender, or panel attorney involvement that is desired by each district court. The court should make a diligent effort to ensure that the composition of the CJA Panel Committee reflects the racial, ethnic, gender, and geographic diversity of the district.

[iii] **Defender Services Committee Comment:** Recruitment efforts to establish a diverse CJA Panel could include the following:

- notifying bar associations comprised of racially and ethnically diverse populations of the availability of panel membership;
- advertising in legal journals directed towards women, people with disabilities, and people of color to encourage panel membership;
- informal person-to-person recruiting of women, people of color, and the disabled community by CJA Panel Committee members and panel administrators; and
- contacting current or former members of the panel, or other prominent local attorneys who have disabilities or are minorities or women for recommendations of potential panel members.

[iv] **Defender Services Committee Comment:** These general eligibility requirements may be supplemented or replaced by more detailed and specific standards, depending on the needs of the district. Specific eligibility requirements might include at least two (2) years in a public defender or prosecutor's office, either state or federal; OR at least three (3) years in private practice during which time the attorney was involved in at least 20 criminal cases in either state or federal court, five (5) of which were state or federal felony trials; OR an applicant should have tried at least two (2) federal felony cases from

initial appearance or arraignment through sentencing and have other significant litigation experience as determined by the CJA Committee.

[v] **Defender Services Committee Comment:** While the Defender Services Committee recognizes there may be benefits to maintaining continuity of counsel, it also recognizes that trial counsel may not have the requisite skills to proceed as appellate counsel. There should be significant deference to the position of trial counsel regarding whether, in each matter, continuity is in the best interests of the client and consistent with counsel's professional skills and obligations. (*Good Practices for Panel Attorney Programs in the U.S. Court of Appeals,* Vera Institute of Justice, January 2006.)

[vi] **Defender Services Committee Comment:** A court may choose to have applications for investigative, expert, and other services considered by a non-presiding judge to help ensure appointed counsel's ability to obtain the necessary resources in a manner that does not unreasonably compromise or interfere with the exercise of sound independent professional judgment.

JUDICIAL COUNCIL
APPROVED

NOV 03 2021

C/E

From:	CA02db CourtBallots
To:	CA02db ChiefAdministrative; Debra Livingston; Elizabeth Wolford; Geoffrey Crawford; Glenn Suddaby; Jose Cabranes; Joseph Bianco; Laura Swain; Margo Brodie; Raymond Lohier; Richard Sullivan; Rosemary Pooler; Stefan Underhill; Susan Carney
Cc:	Meika Brown; Janice Kish; Michael Jordan
Bcc:	Aisha Parks
Subject:	Proposed Changes to Local CJA Plan - WDNY - ACTION REQUESTED
Date:	Tuesday, November 02, 2021 9:09:00 AM
Attachments:	Signed and Dated 10-31-21 Revised CJA Plan - TOC - Final.pdf image001.png

Dear Judicial Council:

The Western District of New York seeks Judicial Council approval for two changes to its local CJA Plan, as described by Chief Judge Wolford below:

1. Section IV(B)(1)(b)(iii) has been amended to bring the plan into compliance with existing Second Circuit precedent, see United States v. Harris, 707 F.2d 653, 662 (2d Cir. 1983) (appointments of counsel applications under the CJA are not ex parte); and
2. Section VIII(A)(1) has been amended to expand the CJA Panel Committee from four to six lawyers.

The full CJA Plan with changes is attached.

Please reply with your vote by November 9.
Thank you

Office of the Circuit Executive
Thurgood Marshall U.S. Courthouse
40 Foley Square, Room 2904
New York, NY 10007
(212)-857-8700

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

APPLICATION FOR MEMBERSHIP ON CJA ATTORNEY PANEL

1. Name: _____
LAST FIRST MIDDLE

2. Business: _____ _____
FIRST NAME BUSINESS TELEPHONE EXTENSION

_____ _____ _____
STREET ADDRESS SUITE BUSINESS FAX

_____ _____ _____ _____
CITY STATE ZIP CODE BUSINESS E-MAIL ADDRESS

3. Application for:
- ☐ Buffalo Division District Court Trial Panel
- ☐ Rochester Division District Court Trial Panel
- ☐ Buffalo Division District Court Emeritus Panel
- ☐ Rochester Division District Court Emeritus Panel

4. State Bar Memberships

_____ _____ _____
STATE BAR ID NUMBER DATE OF ADMISSION

_____ _____ _____
STATE BAR ID NUMBER DATE OF ADMISSION

_____ _____ _____
STATE BAR ID NUMBER DATE OF ADMISSION

Date Admitted to the Bar of this Court: _____
DATE OF ADMISSION

Date Admitted to the Bar of the Court of Appeals for the Second Circuit: _____
DATE OF ADM ISSION

List all courts in which you are presently admitted to practice, including the dates of admission.

_____ _____
COURT DATE OF ADMISSION

_____ _____
COURT DATE OF ADMISSION

5. Colleges and Universities Attended:

_____ _____ _____
NAME DATES (MM /YY - M M /YY) DEGREE

_____ _____ _____
NAME DATES (MM /YY - M M /YY) DEGREE

_____ _____ _____
NAME DATES (MM /YY - M M /YY) DEGREE

Law School:

_____ _____ _____
NAME DATES (MM /YY - M M /YY) DEGREE

6. Professional Work History

(a) _____
POSITION

_____
NAME OF FIRM

_____ _____
STREET ADDRESS SUITE START DATE

_____ _____ _____ _____
CITY STATE ZIP CODE END DATE

_____
REASON FOR LEAVING EMPLOYM ENT

(b) _____
POSITION

_____
NAME OF FIRM

_____ _____
STREET ADDRESS SUITE START DATE

_____ _____ _____ _____
CITY STATE ZIP CODE END DATE

_____
REASON FOR LEAVING EMPLOYM ENT

(c) _____
POSITION

_____
NAME OF FIRM

_____ _____
STREET ADDRESS SUITE START DATE

_____ _____ _____ _____
CITY STATE ZIP CODE END DATE

_____
REASON FOR LEAVING EMPLOYM ENT

7. What is the general nature of your practice?

DESCRIBE YOUR TYPICAL CLIENTS AND MENTION ANY LEGAL SPECIALTIES YOU POSSESS.

8. List in reverse chronological order, the 3 most recent felony criminal trials in which you participated. You **must** provide the following information for each case: year, court, case number, judge with current chambers telephone number, prosecutor with current telephone number and defendant's name. Please indicate whether each trial was a jury or bench trial, the length of trial, and whether the trial went to verdict. State what your role was in each trial (lead counsel, second seat) and give the names of other lawyers who participated in the defense of your client. In multiple defendant cases, please include name and current telephone number(s) of co-counsel.

Case # 1

Date of trial and name of deft: _____

Court and Judge: _____

Case name and dkt no.: _____

Prosecutor: _____

Co-Counsel, if any: _____

Your role: _____

Charges, including grade of each: _____

Jury or bench trial: _____

Duration of trial and outcome: _____

Case # 2

Date of trial and name of deft: _____

Court and Judge: _____

Case name and dkt no.: _____

Prosecutor: _____

Co-Counsel, if any: _____

Your role: _____

Charges, including grade of each: _____

Jury or bench trial: _____

Duration of trial and outcome: _____

Case # 3

Date of trial and name of deft: _____

Court and Judge: _____

Case name and dkt no.: _____

Prosecutor: _____

Co-Counsel, if any: _____

Your role: _____

Charges, including grade of each: _____

Jury or bench trial: _____

Duration of trial and outcome: _____

9. Summarize your experience with the federal sentencing guidelines.

INCLUDE SEMINARS, LECTURES, REFERENCE WORKS YOU SUBSCRIBE TO AND SENTENCING MATTERS YOU HAVE HANDLED. PROVIDE THE TYPE OF INFORM ATION REQUESTED IN QUESTION 8 ABOVE.

10. List all continuing legal education classes that you attended within the last two years that relate to federal criminal practice.

11. Please provide the names, addresses and telephone numbers of two (2) professional references who can certify your professional competence and ethical character.

(a) _____
NAME

_____ _____
BUSINESS ADDRESS BUSINESS TELEPHONE NUMBER

_____ _____ _____ _____
CITY STATE ZIP CODE OTHER NUMBER (HOME, CELLULAR, ETC.)

(b) _____
NAME

_____ _____
BUSINESS ADDRESS BUSINESS TELEPHONE NUMBER

_____ _____ _____ _____
CITY STATE ZIP CODE OTHER NUMBER (HOME, CELLULAR, ETC.)

12. Use the provided attachment pages to explain any "YES" answers to the following questions:

(a) Ha ve you ever been convicted of, or pleaded guilty to, the commission of any felony or misdemeanor or violation of law or ordinance (except minor traffic violations)? If so, state the date, name and nature of the offense, locality and disposition.

○ Yes ○ No

(b) Are you now, or within the last twelve (12) months have you been, the subject to any complaint, information, indictment, accusation, or other charging document, which charges you with the commission of any felony or misdemeanor or violation of any law or ordinance (except minor traffic violations)? If so, state the date, name and nature of the offense, locality and disposition.

○ Yes ○ No

(c) As the holder of any public office or of any license granted by the United States, by any state or local government (including the New York State Bar), have you ever been discharged, disbarred, suspended, or otherwise disqualified, disciplined, or advised that renewal of such license would not be permitted? Have you ever been disciplined by any such body? Unless your answer to both of the above questions is an unqualified "no", state the complete facts and disposition and identify the authority in possession of the records thereof

○ Yes ○ No

(d) Have you ever been cited for contempt of any court or body having the power of contempt? If so, provide complete details.

○ Yes ○ No

13. Foreign Language Ability:

I hereby certify that the answers given by me to the foregoing questions and statements made are true and correct, without mental reservations of any kind whatsoever. I certify I have read and am familiar with the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, the Federal and Second Circuit Rules of Appellate Procedure, the United States Sentencing Guidelines, the Bail Reform Act of 1984, the Local Rules of Criminal Procedure and standing Orders, the Guidelines for the Administration of the Criminal Justice Act, the Rules of Civility, and this CJA Plan, I will comply with all orders, rules and regulations administered by the Court. I also authorize my former employers to give any information they may have regarding me. I hereby release them and their companies from all liability for any damage whatsoever for issuing same. If, upon investigation, anything contained in this application is found to be untrue, I understand that I will be subject to dismissal at any time during the period of my appointment.

DATE

SIGNATURE OF APPLICANT

Submit completed application to:

Donna M. Daly
CJA Panel Administrator
Federal Public Defender's Office
300 Pearl Street, Suite 200
Buffalo, New York 14202

ATTACHMENT PAGE

THE FOLLOWING PAGES MAY BE USED TO PROVIDE OR COMPLETE INFORM ATION REQUESTED BY APPLICATION QUESTIONS.

Question number:

Question number:

ATTACHMENT PAGE

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Question number:

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