

JUDICIAL COUNCIL OF THE FIFTH CIRCUIT

PLAN FOR REPRESENTATION ON APPEAL
UNDER THE CRIMINAL JUSTICE ACT

Section 1. Purpose of the Plan

The Criminal Justice Act of 1964, 18 U.S.C. § 3006A, provides for representation of parties financially unable to pay for legal services. The Judicial Council of the Fifth Circuit hereby adopts this Plan to implement the Act's provisions in cases before the court. The plans adopted by the district courts within the Fifth Circuit apply on appeal to the extent they are consistent with this Plan.

Section 2. Definitions

- A. "The Act" – the Criminal Justice Act of 1964, as amended.
- B. "Death penalty proceedings" – federal capital prosecutions under Title 18 or 21 of the United States Code, direct appeals in cases in which a death sentence was imposed, and collateral proceedings under 28 U.S.C. §§ 2254 and 2255 challenging a capital conviction and/or death sentence.
- C. "This Plan" or "the Plan" – Plan adopted by the Court of Appeals for the Fifth Circuit for representation under the Criminal Justice Act.
- D. "Representation" – includes counsel, investigators, experts, and other services necessary for adequate legal representation under the Plan.

Section 3. Applicability

- A. Mandatory Appointment

Any financially eligible person is entitled to appellate representation by appointed counsel if the district court appointed counsel pursuant to 18 U.S.C. § 3006A(a)(1) or (2), or if the district court appointed counsel for a financially eligible person seeking to set aside or vacate a death sentence under 28 U.S.C. § 2254 or 2255. The court of appeals shall appoint counsel for any financially eligible person in an appeal from any proceeding listed in section 3006A(a)(1)(a)-(j) who was not represented by appointed counsel in the district court and who requests appointment of counsel on appeal.

B. Optional Appointment

If the court of appeals determines that the interest of justice requires, the court may appoint counsel on appeal for a financially eligible person who has been convicted of a Class B or C misdemeanor or of an infraction for which a sentence to confinement has been imposed, or who is seeking relief from a sentence other than a death sentence under 28 U.S.C. § 2241, 2254, or 2255.

Section 4. Eligibility for Representation

The court of appeals determines a person's eligibility for appellate representation under the Act based on his or her overall financial inability to hire an attorney, in keeping with Congress' intent in passing the Act. A person for whom counsel is appointed may have to pay a portion of the fees to the clerk of the court of appeals if the court determines he or she has sufficient resources to make a partial payment. The clerk will administer the funds according to the guidelines established by the Judicial Conference.

Section 5. Appointment of Counsel

A. Attorneys Eligible for Appointment

The court of appeals will select counsel for appointment under this Plan from:

- panels of attorneys designated or approved by the district courts of the Fifth Circuit;
- a Federal Public Defender Organization;
- a Community Defender Organization approved by a district court plan and authorized to provide representation under the Act; or
- any other organized program the court of appeals has approved that provides attorneys to represent financially eligible persons on appeal.

Any judge of the court of appeals may appoint competent counsel not included in the above categories if the interest of justice requires.

In keeping with § (a)(3) of the Act and the directives of the Judicial Conference, at least 25% of all appointments must be to members of the private bar.

B. Continuation of District Court Appointment

Counsel appointed under the Act by the district court shall continue to provide representation on appeal unless relieved by court order. The court of appeals or the district court

may relieve counsel of this obligation only by written order. The order must also appoint a substitute counsel, unless the party waives counsel and asks to proceed pro se. The court of appeals may make any appointment retroactive so that counsel's prior representation is included. Counsel shall be eligible to be compensated for such prior representation. If counsel appointed by the district court remains as counsel on appeal, the court of appeals will send a form continuing his or her representation.

If appointed counsel wishes to be relieved from further representation by the court of appeals, he or she must file with the clerk of the court of appeals four copies of a motion stating the reasons. Counsel must continue to represent the party on appeal until relieved by court order.

If a party represented by appointed counsel wishes the court of appeals to relieve counsel and appoint new counsel, he or she must file with the clerk a legible motion asking for that relief. The clerk will submit the motion to the court of appeals for ruling.

Counsel may be relieved upon a showing that there is a conflict of interest or other most pressing circumstances or that the interests of justice otherwise require relief of counsel.

C. Eligible Person Not Represented in District Court

The clerk of the court of appeals will notify a person who was not represented by counsel in the district court of the right to have an attorney appointed if the person is financially unable to hire one.

D. Determination of Financial Eligibility

The court of appeals may accept without further inquiry the district court's finding that the person is financially eligible for appointment of counsel. If a party moves for appointment of counsel under the Act for the first time on appeal, the clerk will direct the party to execute an affidavit demonstrating his or her financial inability to hire an attorney. After receiving the affidavit, the clerk will serve a copy on opposing counsel, who will have 15 days after receipt to furnish proof the affidavit is false. The court of appeals may grant a reasonable extension of time, if requested, for furnishing this proof. The clerk will then submit the papers and evidence to the court for appropriate action.

If the court of appeals finds, at any time, that a party who had retained counsel has become financially unable to pay the attorney, it may appoint counsel and authorize payment pursuant to §§ (b), (c), and (d) of the Act.

E. Cases with Multiple Parties

The court of appeals shall appoint separate counsel for persons having interests that cannot properly be represented by the same counsel, or when other good cause is shown.

F. Appointment of Multiple Counsel

In an extremely difficult case where the court of appeals finds it in the interest of justice, it may appoint an additional attorney for a party. Each attorney is eligible to receive the maximum compensation allowed under the Act. The court of appeals must include in its order of appointment the specific finding that the appointment of an additional attorney is necessary.

Section 6. Duties of Appointed Counsel

In cases proceeding under the Act, appointed counsel must file CJA Form 24 with the district court to obtain the reporter's transcript of testimony at government expense.

If asked by his or her client in writing, appointed counsel must provide a copy of any motions or briefs filed on the client's behalf in the appeal. Counsel must also forward the client a copy of the court of appeals' decision when issued. The clerk will provide counsel an extra copy of the decision for that purpose.

Appointed counsel must appear for oral argument unless the court of appeals directs otherwise. An associate attorney, not appointed under the Act, may not present oral argument except in the most pressing and unusual circumstances.

Promptly after the court of appeals' decision issues, appointed counsel must advise the client in writing of the right to seek further review by filing a petition for writ of certiorari with the United States Supreme Court. If the client asks in writing that counsel file a petition, counsel must do so in a timely manner. If counsel believes filing a petition would be futile, he or she may move the court of appeals to be relieved of the obligation. The court of appeals also may act sua sponte to relieve counsel of any further representation.

Appointed counsel must inform the client of the right to appeal to the court of appeals and to seek certiorari review in the Supreme Court without prepayment of fees and costs, giving security, or filing the affidavit of financial inability specified by 28 U.S.C. § 1915(a).

Appointed counsel has a duty under Anders v. California, 386 U.S. 738 (1967), to advise the court of appeals if he or she concludes the appeal has no arguable merit, and to request to withdraw.

No one appointed under the Act may accept any payment from or on behalf of the person represented in the court of appeals without prior authorization by a judge of the court of appeals. All authorized payments are subject to the directions contained in the court of appeals' order and the provisions of § (f) of the Act.

Section 7. Payment of Claims for Compensation and Expenses

A. General Guidelines

In all appeals under the Act, the court of appeals may authorize compensation for services and reimbursement for expenses reasonably incurred on appeal, within the limitations of the Act, by any person appointed under the Plan. The court of appeals is cognizant that the hourly rates of compensation in the Act are intended as maximum, not standard, rates. Total compensation for representation on appeal may exceed the amount fixed in the statute or by the Judicial Conference only in cases involving extended or complex representation. In such cases, the court of appeals must certify that the excess payment was necessary to provide fair compensation, and the chief judge must approve the excess payment.

B. Compensation Limits

1. Non-Death Penalty Cases

The Act sets the following limits for total compensation for services rendered, excluding approved expenses, for each attorney:

- Direct appeal in a felony or misdemeanor case or a habeas corpus appeal – \$5,000
- Appeal from a proceeding before the U. S. Parole Commission under 18 U.S.C. § 4106A – \$5,000

Appointed counsel may claim compensation for services furnished by a partner or an associate within the maximum compensation allowed by the Act, as long as appointed counsel takes the lead in preparation of the brief and presentation of oral argument, if allowed. Only appointed counsel may claim compensation for in-court services and associated travel expenses.

If the court of appeals substitutes one attorney for another, the maximum compensation for both attorneys may not exceed the statutory maximum for one defendant. The court of appeals may approve payment in excess of the statutory maximum if the case is complex or involves extended representation. The court of appeals will not approve any payments in such cases until the conclusion of the appeal.

2. Death Penalty Proceedings

In death penalty proceedings, counsel requesting compensation shall file the request with the senior active member of the panel or that judge's designee who is an active member of the panel. The maximum total compensation allowed for death penalty proceedings, including interim payments but excluding approved expenses, is as follows:

- \$50,000 for representing one appellant in a capital murder direct appeal, or
- \$15,000 for representing one petitioner or movant in a death penalty habeas case at the appellate level.

A request for compensation exceeding the above amounts, either in total amount claimed, hourly rate, or both, is presumptively excessive. An attorney filing a presumptively excessive claim must justify the request in writing when submitting the voucher. A judge who receives such a request will forward it along with a brief recommendation to the chief judge, or his or her designee, who will determine how much of the requested fees will be paid.

3. Maximum Hourly Rates

Pursuant to statute, the maximum hourly rates at which counsel may be compensated are set by the Judicial Conference of the United States. For non-death penalty cases, the maximum hourly rate counsel may charge is \$110 for in-court and out-of-court work. For death penalty cases, the maximum hourly rate counsel may charge is \$175. Rates may be changed in the future by the Judicial Conference, and the schedule of applicable rates published by the Judicial Conference is incorporated herein by reference.

4. Vouchers in Excess of \$800

Any claim exceeding \$800 for out-of-court work must include an explanation of how counsel spent the time.

C. Reimbursable Expenses

The court of appeals will reimburse appointed counsel for the following expenses incurred in the course of providing representation under the Act:

1. Travel Expenses

- Air Transportation – the court will arrange air transportation for counsel at government employee rates. The clerk’s office provides the necessary information at the time the case is scheduled for oral argument. Accordingly, counsel does not incur any out-of-pocket expense. If counsel makes travel reservations personally, reimbursement will be only for the amount that could have been obtained at the government employee rate.
- Automobile – the rate per mile cannot exceed the current government authorized rate for official travel. The amount claimed cannot exceed that authorized for air fare at the government employee rate, except in an emergency or other

unusual circumstance. In such a case, counsel must provide an explanation. Parking, ferry, bridge, road, and tunnel fees are reimbursable.

- Local Transportation – counsel must use the most economical means of local transportation possible (e.g., airport shuttle, if available) and may claim actual expenses.
- Meals and Lodging – counsel may claim the actual expenses incurred for meals and lodging. Expenses should be in line with the limits for federal employees, which can be obtained from the clerk. Counsel will be reimbursed for a maximum of one and one-half days for travel for oral argument.

2. Miscellaneous Expenses

- Photocopying – counsel may claim actual expenses not to exceed \$.25 per page and must submit a copy of the bill. If counsel does photocopying in-house, he or she may claim actual expenses not to exceed \$.15 per page.
- Briefs – counsel may claim actual cost for preparing briefs, subject to the photocopying limits above. Reimbursement will be for a maximum of 15 copies, except if the case is heard en banc, where reimbursement will be for 23 copies.
- Courier and Other Special Service – counsel must attach an explanation for using services, except in capital cases. Briefs, motions, and other documents whose filing can be anticipated in advance should be prepared in time to permit the use of less expensive services, and excessive charges for shipping will not be reimbursed.
- Other Expenses – counsel may claim actual expenses for such things as postage, telephone calls, brief supplies, and the like. Counsel should use the least possible cost for such items.

3. Petition for Writ of Certiorari

If appointed counsel files a petition for writ of certiorari on behalf of the client, the time and expense are considered to be applicable to the case in the court of appeals. Counsel must attach a copy of the petition to the voucher.

D. Requesting Compensation

Counsel should file all voucher claims with the clerk not later than 30 days after completing representation. The clerk will refer all claims for compensation as directed by the court.

Section 8. Implementation

The court of appeals, by rule, internal operating procedure, or court policy, may delegate any of the duties set out in this Plan to a single judge, the clerk of court, or a deputy clerk.

This Plan becomes effective on April 1, 2009.