

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

June 22, 2015

Elisabeth A. Shumaker
Clerk of Court

In re:

Adoption of Revised Criminal
Justice Act Plan

No. 95-01
General Order Docket

ORDER

Before **BRISCOE**, Chief Circuit Judge, **KELLY**, **LUCERO**, **HARTZ**, **TYMKOVICH**, **GORSUCH**, **HOLMES**, **MATHESON**, **BACHARACH**, **PHILLIPS**, **McHUGH**, and **MORITZ**, Circuit Judges.

On July 8, 2015, a revised and amended 10th Circuit Criminal Justice Act Plan will take effect. This General Order makes formal the court's adoption of the new Plan and outlines some of the major changes to the court's policies and procedures in this area. A complete copy of the new Plan is attached to this order.

Of particular note, the Plan sets forth a new procedural requirement related to the appointment of CJA counsel. Beginning with the effective date of the Plan, counsel will be required to file *either* a motion to continue the CJA appointment, or a motion to withdraw, within 14 days of case opening. A motion must be filed in every appeal involving a Criminal Justice Act appointment, including government appeals. *See* Criminal Justice Act Plan, Section II. In adopting this policy, we emphasize that trial counsel must still continue to represent the defendant until relieved of that duty by this

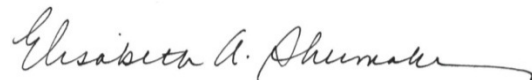
court. In addition, all counsel must follow all applicable rules in filing the required motion. *See* 10th Cir. R. 46.3 and 46.4.

While this procedural requirement will take effect immediately upon adoption of the new Plan, the court will also incorporate the change into the 10th Circuit local rules taking effect on January 1, 2016. The court anticipates the formal proposed rule change will be posted for public comment in late August of 2015.

In addition, the new CJA Plan makes changes to the procedures through which counsel will be appointed to the 10th Circuit Appellate Panel. The new Plan institutes staggered terms for panel members and initiates a required reapplication and appointment process. *See* Criminal Justice Act Plan, Section III(C) and (D). The Plan also adjusts the composition of the 10th Circuit Standing Committee, and requires the appointment of two members who are not members of the court's Appellate Panel. Finally, under the new Plan, Standing Committee members may not accept new CJA appointments during their term.

The clerk is directed to incorporate the new CJA Plan as Addendum I to the rules of this court, and shall post information about the Plan and these new procedures on the court's website forthwith.

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker".

ELISABETH A. SHUMAKER, Clerk

ADDENDUM I

CRIMINAL JUSTICE ACT PLAN UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PREAMBLE

Pursuant to the Criminal Justice Act of 1964 (hereinafter, "Act"), codified as 18 U.S.C. § 3006A(b), the Court adopts the following Criminal Justice Act Plan (hereinafter, "Plan") for furnishing representation in criminal cases on appeal. This Plan supersedes all previous Plans adopted by the Circuit, and will take effect on July 8, 2015.

I. Establishment of the Appellate Panel

The Court has established a Panel of private attorneys (hereinafter, "Panel") who are capable and willing to accept appointments under the Act. These attorneys, along with the Office of the Federal Public Defender for the Districts of Colorado and Wyoming, shall constitute the core group from which appointments shall be made. The Court shall approve private attorneys for membership on the Panel after receiving recommendations from the Court's Standing Committee on the Criminal Justice Act.

II. Appointment of Counsel in the Tenth Circuit

When requested, counsel will be appointed for every person who is entitled to representation under the Act. Absent a change in financial conditions, any determination that a person is eligible for Criminal Justice Act counsel made in the district court shall continue on appeal. The Court of Appeals may appoint the Office of the Federal Public Defender for the Districts of Colorado and Wyoming, another Federal Public Defender office within the Circuit, an attorney from the Court's Criminal Justice Act Panel, or counsel from the trial court.

While the Court recognizes there may be benefits to maintaining continuity of counsel, it also recognizes that trial counsel may not have the requisite skills, or the desire, to represent an individual on appeal. Because each proceeding is unique in this regard, all counsel continuing in appeals from the trial court will be required, through procedures established by the court, to file either a motion for continued appointment or a motion to withdraw. As appropriate, and in the discretion of the Court, new counsel may be appointed from the Panel or the Office of the Federal Public Defender. The Court may also, however, authorize continued appointment of a trial attorney who is not a member of the Court's panel.

Trial counsel is always required to continue to represent the defendant until relieved of that duty by the Court, consistent with 10th Cir. R. 46.3 and 46.4.

III. Composition of the Panel

A. Application for Membership

Applications for membership on the Panel shall be available in the Office of the Clerk of Court and on the Circuit's website at <http://www.ca10.uscourts.gov/cja/panel>. Completed applications must be submitted to the Clerk of Court for transmittal to the Court's Standing Committee on the Criminal Justice Act.

B. Eligibility and Qualifications

CJA Panel members will be selected on the basis of demonstrated commitment, qualification and skill in federal criminal appellate practice.

To be eligible for service on the Panel, lawyers must be or become, and remain, members in good standing of the Tenth Circuit's bar. Panel attorneys must certify they have a working knowledge of this Plan, the Tenth Circuit Rules, Federal Rules of Appellate Procedure, Federal Rules of Evidence, Federal Rules of Criminal Procedure, United States Sentencing Guidelines, and relevant provisions of the United States Code. Panel members must also certify their willingness to accept at least one appellate appointment each year. Finally, they must also show they have an established law practice in the Tenth Circuit.

C. Size of the Panel

The Panel will not have a size limitation. It shall be large enough to provide an adequate number of experienced attorneys who possess the necessary skills to effectively litigate federal criminal appeals. To that end, membership shall be reserved for attorneys who meet the Court's criteria. The Panel will also be small enough that each attorney receives a sufficient number of appointments to maintain proficiency in litigating federal criminal appeals. To the extent possible, the Panel will include qualified attorneys from every judicial district within the Tenth Circuit.

Not every qualified applicant will be selected for Panel membership. To ensure that qualified applicants are given the opportunity to serve, Panel membership will be for three-year terms. Reapplication is required at the conclusion of the first three-year term. Attorneys may be reappointed to serve a second three year term, but at the conclusion of that six year period they must wait a minimum of one year before reapplying for Panel membership.

D. *Membership Terms*

Panel members shall be appointed for a three-year term, but may be removed by the Court prior to the expiration of their term.

1. *Renewal of Membership Term* – A Panel member will be given written notice in advance of the expiration of Panel membership. To be considered for renewal, the Panel member must submit application for renewal prior to the expiration of the current term. Renewal applications shall be made available in the Office of the Clerk of Court and on the Circuit's website at www.ca10.uscourts.gov. Completed applications must be submitted to the Clerk of Court for transmittal to the Court's Standing Committee on the Criminal Justice Act. Renewal shall not be automatic, but may be granted at the Court's discretion, taking into account the provisions of this Plan. Panel members may serve two consecutive terms. If any Panel member chooses to reapply after the expiration of a second consecutive term, the Panel member must wait a minimum of one year before reapplying.

2. *Removal from the Panel* – Membership on the Panel is not a property right. A Panel member may be removed whenever the Court, in its discretion, determines that the member has failed to fulfill the obligations of Panel membership, including the duty to provide competent and effective representation, or has engaged in other conduct that renders inappropriate his or her continued service on the Panel. Removal may also result if a Panel member refuses three times to accept an appointment during the membership term.

The Standing Committee shall make all removal recommendations to the Court in writing. If the Court decides to accept the recommendation, counsel will be given notice of the proposed basis for removal and will be provided an opportunity to respond in writing. The Court of Appeals will make all final decisions regarding removal. An attorney who is removed will receive a written explanation of removal from the Court.

Attorneys who are removed from the Panel may file a renewal application no earlier than one year from the date of removal. In the application, counsel must note the earlier removal and explain why re-appointment to the Panel should be granted.

E. *Maintaining the Panel List*

The Clerk of Court shall maintain the list of Panel members, including their current name, business address, business email, and business telephone number. Panel attorneys must promptly notify the Clerk of Court of any changes in business address, business telephone number, or e-mail address. The Panel roster shall be public information.

IV. **Standing Committee on the Criminal Justice Act**

A. *Membership and Structure*

The Chief Judge, or the Chief Judge's delegate, shall appoint the Standing Committee. The Federal Public Defender for the Districts of Colorado and Wyoming shall be a permanent member of the Standing Committee. The remaining membership shall consist of two lawyers from Oklahoma, and one lawyer from the remaining states in the Circuit. At least one of these positions must be filled with one of the other Federal Public Defenders from the Circuit. Two of the other positions must be filled with attorneys who are not current members of the Panel. In addition, those members of the Standing Committee who remain on the Panel may not accept new appointments from the court during their tenure as Committee members. All members of the Standing Committee shall serve staggered three-year terms, and may serve two consecutive terms.

The Chief Judge may also appoint a liaison to the Committee from the Court's legal staff. That person will not be a Committee member, but will be available to both the Court and members for support and consultation. The liaison may sit in on, but shall not participate in, the Committee's deliberations.

B. *Duties of the Committee*

The Standing Committee shall meet in person at least once per year. Additional meetings may be convened by the Chair.

The Committee shall review the qualifications of applicants for membership on the Panel, conduct further inquiries as necessary, and make recommendations to the Court for placement or removal. The Standing Committee shall also review the operation of the Panel on a periodic basis and shall make recommendations to the Court regarding any suggested changes. At the Court's discretion, the Standing Committee may also investigate complaints concerning deficient performance by Panel members and report its findings and recommendations to the Court. The Standing Committee's written recommendations to the Court on any issue shall remain confidential.

V. Change in Financial Conditions Effecting Representation on Appeal

A person previously represented by private counsel in the district court who becomes financially unable to employ counsel on appeal, must first obtain an order in the district court finding that he or she qualifies for court-appointed appellate counsel. Trial counsel is responsible for filing the application for court-appointed counsel in the district court, and must comply with all other provisions of 10th Cir. R, 46.3 and 46.4. This Court may, at any time, review the financial status of the defendant. If the Court finds that the defendant has become financially able to obtain counsel or make partial payments for representation, the Court may deny or terminate an appointment pursuant

to subsection (c) of the Act or require partial payment to be made pursuant to subsection (f) of the Act.

VI. Death Penalty Cases

Pursuant to the Guidelines for Administering the Criminal Justice Act (CJA Guidelines), the Court may, in an appropriate death penalty case, appoint and compensate under the Act an attorney or attorneys from a state or local public defender organization or from a legal aid agency or other non-profit organization.

VII. Petition For Writ of Certiorari

Counsel's appointment does not terminate until, if the person loses the appeal, counsel informs the person of his or her right to petition for certiorari in the United States Supreme Court and the deadline for filing the petition. Additionally, counsel must prepare and file the petition if the person requests it and there are reasonable grounds for counsel properly to do so (see Rule 10 of the Rules of the Supreme Court of the United States).

If counsel determines that there are no reasonable grounds for filing a petition and declines the person's request to file a petition, counsel shall inform the person and, after entry of judgment, shall move to withdraw under 10th Cir. R. 46.4. Upon entry of an order terminating the appointment, counsel shall promptly notify the represented person and advise the person of his or her right to file a pro se petition for certiorari.

VIII. Compensation

A. Claims

All claims for compensation and expenses must be submitted to the clerk in the manner found on the Court's website. See <http://www.ca10.uscourts.gov/cja>. All claims must be supported as required by the CJA Guidelines and the Court's Advice to CJA Counsel letter(s). In each case, the Court will fix the compensation to be paid the attorney as provided in the Act. Counsel appointed in direct criminal appeals and non-death penalty 28 U.S.C. §§ 2254 and 2255 matters should review the Court's general *Advice To Counsel* letter for detailed information and guidelines regarding compensation issues. Counsel appointed in death penalty matters should review the Court's separate *Death Penalty Advice To Counsel* letter. Copies of those letters are available online at <http://www.ca10.uscourts.gov/sites/default/files/adv20-mod.pdf> <http://www.ca10.uscourts.gov/sites/default/files/adv30-mod.pdf>.

Although the Act provides for limited compensation, the Court recognizes that the compensation afforded often does not reflect the true value of the services rendered. Consequently, it is the Court's policy not to cut or reduce claims which are reasonable and necessary. If the Court intends to reduce a claim for compensation, it will provide the attorney prior notice of the proposed reduction with a brief statement of the reason(s) for it, and will provide an opportunity to address the matter. Notice will not be given where the reduction is based on mathematical or technical errors.

B. *Other Payments*

Except as authorized or directed by the Court, no appointed attorney and no person or organization authorized by the Court to furnish representation under the Act may request or accept any payment or promise of payment for representation of a defendant.

IX. Application of Guidelines

Appointment of counsel under the Act will be governed generally by the Guidelines for Administering the CJA and related statutes. See Volume 7, Guide to Judiciary Policy, Appointment and Payment of Counsel, Part A. Online at: <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/CJAGuidelinesForms.aspx>