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## Chapter 2, § 210: Representation under the CJA

*Guide to Judiciary Policy, Vol 7 Defender Services, Part A Guidelines for Administering the CJA and Related Statutes, Chapter 2: Appointment and Payment of Counsel*

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## **§ 210 Representation under the CJA**

### **§ 210.10 District Plans**

#### **§ 210.10.10 Overview**

(a) Each district court, with the approval of the judicial council of the circuit, is required to have a plan for furnishing representation for any person financially unable to obtain adequate representation. **See:** [18 U.S.C. § 3006A\(a\)](#)

(b) "Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation." **See:** [18 U.S.C. § 3006A\(a\)](#)

(c) The Criminal Justice Act (CJA), [18 U.S.C. § 3006A\(a\)](#) , mandates that each district plan provide for representation in the circumstances set forth in [§ 210.20](#) and specify how such representation will be delivered as provided in [§ 210.10.20](#).


(d) A Model Plan for Implementation and Administration of the Criminal Justice Act (Model Plan) is included as [Appx 2A](#).

(e) Each district court should review, and amend as appropriate, the CJA Plan every five years to ensure compliance with the CJA Guidelines and other relevant Judicial Conference policies.

#### **§ 210.10.20 Attorneys Who May Be Appointed Under the CJA**

(a) Each district plan must include a provision for private attorneys. "Private attorneys shall be appointed in a substantial proportion of the cases." **See:** [18 U.S.C. § 3006A\(a\)\(3\)](#) .

(b) The district plan may include, in addition to a provision for private attorneys, either of the following or both:

- attorneys furnished by a bar association or a legal aid agency; or
- attorneys furnished by a defender organization established according to the provisions of [18 U.S.C. § 3006A\(g\)](#) .

**See:** [18 U.S.C. § 3006A\(a\)\(3\)](#) .


### **§ 210.10.30 Counsel's Obligation to Advise the Court of Client's Ability to Pay**



Each plan should contain a provision to the effect:



If, at any time after appointment, counsel obtains information that a client is financially able to make payment, in whole or in part, for legal or other services in connection with the client's representation, and the source of the attorney's information is not protected as a privileged communication, counsel will advise the court.

### **§ 210.20 Proceedings Covered by and Compensable under the CJA**

#### **§ 210.20.10 Mandatory Appointments**

The CJA, [18 U.S.C. § 3006A\(a\)\(1\)](#) , requires that representation must be provided for any financially eligible person who is:

- charged with a felony or with a Class A misdemeanor;
- a juvenile alleged to have committed an act of juvenile delinquency as defined in [18 U.S.C. § 5031](#)  (**see:** [18 U.S.C. § 5034](#)  (on appointment of counsel); [Guide, Vol 7A, § 320.50](#) (on appointment of a guardian ad litem));
- charged with a violation of probation;
- under arrest, when such representation is required by law;
- entitled to appointment of counsel in parole proceedings;

**[Note:** The reference to representation at parole proceedings was deleted from the [CJA](#)  according to the November 1, 1987 repeal of [18 U.S.C. chapter 313](#) . However, the savings provisions of the Sentencing Reform Act of 1984, as amended by the United States Parole Commission Extension Act of 2013 (Pub. L.

No. 113-47 (October 31, 2013)), state that existing law pertaining to parole will remain effective for 31 years after November 1, 1987, with regard to persons specified in the savings provisions, and certain laws relating to parole will remain effective until the expiration of the sentence received by other persons specified in the savings provisions. This includes laws governing the right to counsel in parole proceedings.]

(f) 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 (e.g., *Guide to Judiciary Policy*, Vol 8G (Criminal Monetary Penalties (Monograph 114)), Ch 6);

(g) subject to a mental condition hearing under [18 U.S.C. § 311](#) (see: [Guide, Vol 7A, § 220.30\(f\)](#) and [§ 230.23.20\(i\)\(5\)](#));

(h) in custody as a material witness;

(i) entitled to appointment of counsel under the sixth amendment to the Constitution, or faces loss of liberty in a case and federal law requires the appointment of counsel;

**[Note:** This provision obviates the need for future amendments to the CJA each time the right to counsel may be extended to new situations by judicial decision or federal statutes.]

(j) seeking to set aside or vacate a death sentence in proceedings under [28 U.S.C. § 2254](#) or [§ 2255](#); or

(k) is entitled to appointment of counsel in connection with prisoner transfer proceedings under [18 U.S.C. § 4109](#).

For applicable case compensation limits, see: [§ 230.23.20](#).

### **§ 210.20.20 Discretionary Appointments**

(a) Whenever the U.S. magistrate judge or the court determines that the interests of justice so require, representation **may** be provided for any financially eligible person who is:

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

(2) seeking relief under [28 U.S.C. §§ 2241, 2254, or 2255](#) (but see: [Guide, Vol 7A, § 210.20.10\(j\)](#) on the mandatory appointment of counsel in death penalty habeas corpus cases and [§ 220.45](#) on the requirement for appointment of counsel for an evidentiary hearing).

(b) Counsel may be appointed under the CJA for a person charged with civil or criminal contempt who faces loss of liberty.

(c) Upon application of a witness before a grand jury, a court, the Congress, or a federal agency or commission which has the power to compel testimony, counsel may be appointed where 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.

(d) Counsel may be appointed for financially eligible persons proposed by the U.S. attorney for processing under a "pretrial diversion" program.

(e) Counsel may be appointed for persons held for international extradition under [18 U.S.C. chapter 209](#).

For applicable case compensation limits, **see:** [§ 230.23.20](#).

### § 210.20.30 Ancillary Matters

(a) Representation may be furnished for financially eligible persons in "ancillary matters appropriate to the proceedings" under [18 U.S.C. § 3006A\(c\)](#).

(b) In determining whether a matter is ancillary to the proceedings, the court should consider whether the matter, or the issues of law or fact in the matter, arose from, or are the same as or closely related to, the facts and circumstances surrounding the principal criminal charge.

(c) In determining whether representation in an ancillary matter is appropriate to the proceedings, the court should consider whether such representation is reasonably necessary to accomplish, among other things, one of the following objectives:

(1) to protect a Constitutional right;

(2) to contribute in some significant way to the defense of the principal criminal charge

(3) to aid in preparation for the trial or disposition of the principal criminal charge;

(4) to enforce the terms of a plea agreement in the principal criminal charge;

(5) to **preserve** the claim of the CJA client to an interest in real or personal property subject to a civil forfeiture proceeding under [21 U.S.C. § 881](#), [19 U.S.C. § 1602](#) or similar statutes, which property, if recovered by the CJA client, may be considered for reimbursement under [18 U.S.C. § 3006A\(f\)](#) and [Guide, Vol 7A, § 210.40.30](#); or

(6) 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\(g\)](#), which property, if recovered by the CJA client, may be considered for reimbursement under [18 U.S.C. § 3006A\(f\)](#) and [Guide, Vol 7A, § 210.40.30](#).

(d) The scope of representation in the ancillary matter should extend only to the part of the ancillary matter that relates to the principal criminal charge and to the **correlative objective sought** to be achieved in providing the representation (e.g., a CJA defendant in a criminal stock fraud case should be represented by CJA counsel at the defendant's deposition in a parallel civil fraud action for the limited purpose of advising

the defendant concerning the defendant's Fifth Amendment rights).

(e) Representation in an ancillary matter is compensable as part of the representation in the principal matter for which counsel has been appointed and is not considered a separate appointment for which a separate compensation maximum would be applicable under [§ 230.23.10\(g\)](#).

(f) A private panel attorney appointed under the CJA may obtain, through an *ex parte* application to the court, a preliminary determination that the representation to be provided in an ancillary matter is appropriate to the principal criminal proceeding and compensable under [18 U.S.C. § 3006A\(c\)](#) and this guideline. However, failure to obtain such a preliminary determination does not bar the court from approving compensation for representation in an ancillary matter provided that the services and compensation related thereto are justified in a memorandum submitted by the attorney to the court at the conclusion of the principal criminal matter and the presiding judicial officer finds that such representation was appropriate.

### **§ 210.20.40 Civil Forfeiture Proceedings**

(a) Under [18 U.S.C. § 983\(b\)\(1\)](#), if a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the person is represented by counsel appointed under [18 U.S.C. § 3006A](#) in connection with a related criminal case, the court may authorize counsel to represent that person with respect to the claim.

(b) In determining whether to authorize counsel to represent a person in a judicial civil forfeiture proceeding under a civil forfeiture statute, the court must take into account such factors as:

- the person's standing to contest the forfeiture; and
- whether the claim appears to be made in good faith.

### **§ 210.20.50 Proceedings Not Covered by or Compensable under the CJA**

Cases or proceedings which are not covered by or compensable under the CJA include the following:

(a) Petty offenses (Class B or C misdemeanors or infractions), except where confinement is authorized by statute and the court or U.S. magistrate judge determines that appointment of counsel is required in the interest of justice. **See:** [§ 210.20.20\(a\)\(1\)](#).


(b) Corporate defendant cases.


(c) Prisoners bringing civil rights actions under [42 U.S.C. § 1983](#). Care should be taken to ensure that a prisoner is not denied the appointment of counsel due to the mislabeling of the prisoner's action as "civil rights" when the proceedings could also be considered as seeking relief under [28 U.S.C. § 2254](#).

(d) Administrative proceedings before the U.S. Citizenship and Immigration Services (USCIS), removal or deportation proceedings before the Immigration Court, review of the Immigration Court's decision by the


Board of Immigration Appeals, and judicial review by the federal courts of appeals of petitions for review from these administrative decisions. **But see:** [§ 210.20.30](#) (ancillary matters) and [§ 210.20.20\(a\)\(2\)](#) (habeas corpus cases).



### **§ 210.20.60 Civil Actions to Protect Federal Jurors' Employment**

(a) Although not an appointment under the authority of the CJA, Congress has annually included statutory language in the appropriation for the federal judiciary's Defender Services account to authorize "the compensation of attorneys appointed to represent jurors in civil actions for the protection of their employment, as authorized by [28 U.S.C. § 1875\(d\)](#) .

(b) In these cases, the court appoints counsel under the standard set forth in [28 U.S.C. § 1875\(d\)\(1\)](#) , which does not require a finding of financial eligibility.

(c) The court will appoint a private attorney, who may be a member of the CJA panel and should have employment law experience. A federal defender should not be appointed.

(d) The court should use [Form CJA 20 \(Appointment of and Authority to Pay Court-Appointed Counsel\)](#) for the appointment and pay counsel "to the extent provided by [the CJA]," [28 U.S.C. § 1875\(d\)\(1\)](#) , and the CJA Guidelines.

(e) The court may, as authorized by [28 U.S.C. § 1875\(d\)\(2\)](#) , order a defendant employer to pay the fees and expenses of counsel appointed under [28 U.S.C. § 1875\(d\)\(1\)](#) ; in such event, the court should follow the reimbursement procedures in [Guide, Vol 7A, § 230.40](#).

### **§ 210.30 Composition and Management of the Panel of Private Attorneys (CJA Panel)**

#### **§ 210.30.10 Overview**

(a) The CJA Panel must be designated or approved by the court. **See:** [18 U.S.C. § 3006A\(b\)](#). 

(b) The membership of the panel should be large enough to provide a sufficient number of experienced attorneys to handle the CJA caseload, yet small enough so that panel members receive an adequate number of appointments to maintain their proficiency in criminal defense work and thereby provide a high quality of representation.

(c) Members should serve at the pleasure of the court.

(d) The Model Plan for Implementation and Administration of the Criminal Justice Act is included as [Appx. 2A](#).

#### **§ 210.30.20 Selection of Panel Members**

In part, [18 U.S.C. § 3006A\(b\)](#)  provides that:



Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan.

### **§ 210.30.30 *Pro Hac Vice* Appointments**

- (a) If the district judge presiding over the case, or the chief judge if a district judge has not yet been assigned to the case, determines that the appointment of an attorney, who is not a member of the CJA panel, is in the interest of justice, judicial economy or continuity of representation, or there is some other compelling circumstance warranting the attorney's appointment, the attorney may be admitted to the CJA panel *pro hac vice* and appointed to represent the CJA defendant.
- (b) Consideration for preserving the integrity of the panel selection process suggests that *pro hac vice* appointments should be made only in exceptional circumstances.
- (c) The attorney, who may or may not maintain an office in the district, should possess such qualities as would qualify the attorney for admission to the district's CJA panel in the ordinary course of panel selection.

### **§ 210.30.40 Centralization of Panel Administration and Management**

Administration and management of the CJA Panel should be centralized in one organizational element (such as the clerk's office or, where appropriate, the federal defender organization) to ensure that counsel is appointed as expeditiously as possible, appointments are equitably distributed, and information on availability of counsel is maintained.

### **§ 210.30.50 Distribution of Appointments**

- (a) Appointments should be made in a manner which results in both a balanced distribution of appointments and compensation among members of the CJA Panel, and quality representation for each CJA defendant.
- (b) These objectives can be accomplished by making appointments on a rotational basis, subject to the court's discretion to make exceptions due to the nature and complexity of the case, an attorney's experience, and geographical considerations.

## **§ 210.40 Determining Financial Eligibility for Representation Under the CJA**

### **§ 210.40.10 Timely Appointment of Counsel**

A person financially eligible for representation should be provided with counsel as soon as feasible after being taken into custody, when first appearing before the court or U.S. magistrate judge, when formally charged, or when otherwise entitled to counsel under the CJA, whichever occurs earliest.

### § 210.40.20 Fact-Finding

- (a) The determination of eligibility for representation under the CJA is a judicial function to be performed by the court or U.S. magistrate judge after making appropriate inquiries concerning the person's financial condition.
- (b) Unless it will result in undue delay, fact-finding concerning the person's eligibility for appointment of counsel should be completed prior to the person's first appearance in court.
- (c) Other officers or employees of the court (e.g., clerk, deputy clerk, or pretrial services officer) may be designated by the court to obtain or verify the facts upon which such determination is to be made.
- (d) Relevant information bearing on the person's financial eligibility should be reflected on [Form CJA 23 \(Financial Affidavit\)](#) and the form must be completed and executed before a judicial officer or employee.
- (e) Employees of law enforcement agencies or U.S. attorney offices should not participate in the completion of the [Form CJA 23 \(Financial Affidavit\)](#) or seek to obtain information from a person requesting the appointment of counsel concerning the person's eligibility.
- (f) The person seeking appointment of counsel has the responsibility of providing the court with sufficient and accurate information upon which the court can make an eligibility determination. (Regarding counsel's obligation to advise the court about the client's ability to pay, **see**: [§ 210.10.30](#).)
- (g) The prosecution and other interested entities may present to the court information concerning the person's eligibility, but the judicial inquiry into financial eligibility must not be utilized as a forum to discover whether the person has assets subject to forfeiture, or the ability to pay a fine, make restitution, or compensate another person under the Victim/Witness Protection Act or other purposes not related to the appointment of counsel. Such determinations, if appropriate, must be made at other stages of the proceedings in which the person seeking counsel is a party.

### § 210.40.30 Standards for Eligibility

- (a) A person is "financially unable to obtain counsel" within the meaning of [18 U.S.C. § 3006A\(b\)](#) if the person's net financial resources and income are insufficient to obtain qualified counsel. In determining whether such insufficiency exists, consideration should be given to:
- (1) the cost of providing the person and his dependents with the necessities of life, and
  - (2) the cost of the defendant's bail bond if financial conditions are imposed, or the amount of the case deposit defendant is required to make to secure release on bond.
- (b) Any doubts as to a person's eligibility should be resolved in the person's favor; erroneous determinations of eligibility may be corrected at a later time.
- (c) At the time of determining eligibility, the court or U.S. magistrate judge should inform the person of the



penalties for making a false statement, and of the obligation to inform the court and the appointed attorney of any change in financial status.

(d) Prior to sentencing, the court should consider pertinent information contained in the presentence report, the court's intention with respect to fines and restitution, and all other available data bearing on the person's financial condition, in order to make a final determination concerning whether the person then has funds available to pay for some or all of the costs of representation. At the time of sentencing, in appropriate circumstances, it should order the person to reimburse the CJA appropriation for such costs.

**See:** § 230.40.

(e) Future earnings should not be considered or subject to a reimbursement order; however, other income or after-acquired assets which will be received within 180 days after the date of the court's reimbursement order may be available as a source of reimbursement.

### § 210.40.40 Partial Eligibility

If a person's net financial resources and income anticipated prior to trial are in excess of the amount needed to provide the person and that person's dependents with the necessities of life and to provide the defendant's release on bond, but are insufficient to pay fully for retained counsel, the judicial officer should find the person eligible for the appointment of counsel under the CJA and should direct the person to pay the available excess funds to the clerk of the court at the time of such appointment or from time to time thereafter.

(a) Such funds must be held subject to the provisions of [18 U.S.C. § 3006A\(f\)](#).

(b) The judicial officer may increase or decrease the amount of such payments, and impose such other conditions from time to time as may be appropriate.

(c) With respect to the disposition of such funds, **see:** § 230.40.

### § 210.40.50 Family Resources

The initial determination of eligibility should be made without regard to the financial ability of the person's family unless the family indicates willingness and financial ability to retain counsel promptly. At or following the appointment of counsel, the judicial officer may inquire into the financial situation of the person's spouse (or parents, if the person is a juvenile) and if such spouse or parents indicate their willingness to pay all or part of the costs of counsel, the judicial officer may direct deposit or reimbursement.

### § 210.50 Criminal Justice Act (CJA) Forms

The Judicial Conference of the United States, at its meeting in January 1965, approved the recommendation of its Committee to Implement the Criminal Justice Act of 1964 (subsequently renamed the Committee on Defender Services), that every district incorporate in its plan a requirement that the standard forms, approved by the Conference, be used. **See:** [JCUS-JAN 65](#), p.6. Copies of the pertinent

forms may be found on the [public judiciary website](#).

## Chapter Appendices

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Appx 2C: Procedures for Interim Payments to Counsel In Non-Death Penalty Cases ([pdf](#))([word](#))

Appx 2D: Procedures for Interim Payments to Counsel in Death Penalty Cases ([pdf](#))([word](#))

*Last substantive revision ([Transmittal 07-010](#)) October 3, 2016*

*Last revised (minor technical changes) September 11, 2017*

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- [§ 220 Appointment of Counsel](#)
- [§ 230 Compensation and Expenses of Appointed Counsel](#)

## Appendices

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- [Appx 2C: Procedures for Interim Payments to Counsel In Non-Death Penalty Cases](#)  
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