

Policy Governing Appointment of CJA Counsel in Capital Cases
(as updated 9/10/12)

1. Section 6.01(A)(1) of the Guide to Judiciary Policies and Procedures states:

Federal Death Penalty Cases. As required by 18 U.S.C. § 3005, at the outset of every capital case, courts should appoint two counsel, at least one of whom is experienced in and knowledgeable about the defense of death penalty cases. Pursuant to 18 U.S.C. § 3599(a)(l), if necessary for adequate representation, more than two attorneys may be appointed to represent a defendant in such a case. While courts should not appoint more than two lawyers unless exceptional circumstances and good cause are shown, appointed counsel may, with prior court authorization, use the services of attorneys who work in association with them, provided that the employment of such additional counsel (at a reduced hourly rate) diminishes the total cost of representation or is required to meet time limits.

2. To implement these requirements, the S.D.N.Y. has established a list of attorneys eligible for appointment in capital cases (the "Capital Panel"). This list contains the names of lawyers who have agreed to represent defendants in death eligible cases and who the Panel Review Committee and the Court have determined are best able to represent defendants in these cases. However, only some of the lawyers on this list are qualified to be the second lawyer required by the statute, namely a lawyer "learned in the law applicable to capital cases." 18 U.S.C. § 3005.
3. In those cases where the Magistrate Judge or the District Court assigns counsel for the first time in a death-eligible case, the lead attorney should be chosen from the Capital Panel. There is no Capital Panel duty roster; a Court needing to assign Capital Panel counsel should notify the CJA Clerks, who will call the next available attorney(s) from the Capital Panel based on alphabetical order and number of previous assignments.
4. Prior to assigning the second attorney -- namely, an attorney "learned in the law applicable to capital cases," -- 18 U.S.C. § 3005 instructs that "the court shall consider the recommendation of the Federal Public Defender Organization . . ." In this district, the person to contact is David Patton, (212) 417- 8738.
5. In instances where the original indictment did not charge a capital offense and is subsequently superseded with an indictment that charges a capital offense, a lawyer learned in the law applicable to capital cases should be assigned after consultation with David Patton. If the lawyer who was originally appointed is not a member of the Capital Panel, the Court should substitute a member of the Capital Panel for the originally appointed lawyer unless the Court finds for good cause that the original lawyer should be continued. In that event, the defendant should be advised that he has the right to be represented, in the lead counsel position, by a lawyer from the Capital Panel, but the defendant can continue to be represented by his original non-Capital Panel attorney if the

defendant is satisfied with that attorney's representation and understands that the Court is prepared to substitute an attorney from the Capital Panel if the defendant requests.

6. In instances where the U.S. Attorney's Office has advised that a superseding indictment charging a death-eligible offense is a possibility, Learned Counsel should ordinarily be promptly assigned, although ordinarily there will be no need to substitute a lawyer from the Capital Panel in place of the originally appointed counsel (or for the defendant to waive such substitution upon the Court's finding of good cause) until the actual return of a death-eligible charge. Only in highly unusual circumstances should the District Court exercise its discretion not to appoint Learned Counsel.
7. Our CJA lawyers who are not on the Capital Panel list have been advised that if they are assigned to a capital prosecution, they are to respectfully refuse the assignment and request that a Capital Panel attorney be assigned instead.