

Building a Criminal Practice:

A Panel Discussion

Dionne Scherff

Joseph Hollander & Craft

dscherff@josephhollander.com

Robert Moody

Martin Pringle

rjmoody@martinpringle.com

Laura Shaneyfelt

Kansas Federal Public Defender

laura_shaneyfelt@fd.org

Getting off the Ground: Establishing a Criminal Practice

- Mentors
- Solo/small practice organizations
 - KBA ([Conference scheduled for 5/26/17-5/27/17](#))
 - ABA ([Solo and Small Firm Interest Group](#))
- Outsource
 - Accounting
 - Billing
 - Research
 - Supplies and upkeep
 - Technology
- Electronic resources



Recommended Reading:

Carolyn Elefant, *Solo By Choice: How To Be The Lawyer You Always Wanted To Be.*

K. William Gibson, *Flying Solo: A Survival Guide to the Solo and Small Firm Lawyer*

Jay Foonberg, *How to Start and Build a Law Practice*

- From within an established firm.

Getting Clients to the Office

- Connections are critical.
 - Professional organizations
 - Community organizations
 - One-on-one meetings with local attorneys who practice in compatible areas
 - Family law
 - Professional licensing
 - Administrative forfeitures
 - Firms with no criminal defense attorneys
 - Immigration law
 - Look for connections beyond your community
- Reputation is everything. Keep your word. Always.
 - With clients and family.
 - With opposing counsel.
 - With the Court and court staff.
 - See also Rules 3.3 Candor to the Tribunal; Rule 3.4 Fairness to Opposing Party and Counsel; Rule 4.1 Truthfulness in Statements to Other
- Presence on social media
 - Provides visibility and availability.
 - Engage with substantive blogs/posts and items of interest
 - We should always assume that our posts are being read by
 - current clients
 - Stan Hazlett
 - future clients
 - the AUSA
 - the judge
 - your mother
 - Be savvy about ethical issues and advertising rules. For instance, know what counts as “an advertisement or communication” that

A checklist of possible marketing ideas can be found at [50 Simple Ways You Can Market Your Practice](#). Not all apply to a criminal defense practice, but there are some innovative ideas for criminal practitioners.

must be “kept for two years after its last dissemination along with a record of when and where it was used.” Rule 7.2. And employ appropriate caveats when bragging about those big wins.

Getting Paid and Keeping the Fee

1.5 Client-Lawyer Relationship: Fees

(a) 1.5 Client-Lawyer Relationship: Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the

▪ Fee agreements are not required by the Disciplinary Rules in criminal cases, but are highly recommended. A written agreement sets accurate expectations, memorializes agreements, and provides proof of the parties' intentions.

○ Flat Fee Contract

○ Hourly Fee Contract

▪ Letter Agreements with expert witnesses are also highly recommended. Use an agreement with service providers that sets out who is responsible for payment; scope of agreement, confidentiality requirements, and budget limits. In appointed cases, add in sections about the overlay of reasonableness; ultimate decision-making power of the Court; and current budget limit.

○ Here is a sample letter agreement for use in CJA cases.

▪ Trust Accounts and Operating Accounts

○ Kansas Bar Foundation: [Money of Others: Accounting for Lawyer Trust Accounts](#)

- LEXIS/NEXIS, [A Lawyer's 7-Point Plan for Trust Account Management](#)

- Form 8300 and Cash Payments in Excess of \$10,000

<https://www.irs.gov/businesses/small-businesses-self-employed/form-8300-and-reporting-cash-payments-of-over-10000>

- Consider ways to make managing those quarterly taxes a little less terrifying.

<https://www.eftps.gov/eftps/>

- Track your time—even if using a flat fee

- Will assist with any claim of unreasonableness of fee or unearned fee.
- Will establish effective representation.
- Will help you know where your time goes and predict the time it takes to perform certain tasks.
- Contemporaneous time-keeping will increase your bill. You lose about 25% of your time when you attempt to recreate time sheets.

- ABA, [3 musts for ethical bills that get paid faster](#)

- In appointed cases

- Follow the rules about exceeding statutory caps—for attorneys and service providers.

- [District of Kansas CJA Handbook](#)

- [Guide to Judiciary Policy, Vol. 7A: CJA and Related Statutes](#)

- Submit vouchers promptly

- Charge what a case is worth so that you have sufficient time to prepare the cases you accept.

1.15 Client-Lawyer Relationship: Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state of Kansas. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

"Quantity defeats quality."

~Richard Ney

Getting Clients to Stay and to Refer Friends, Family, Cellies

- Communications
 - Always return calls or emails
 - Visit your client in jail, even when you have nothing to say.
 - Schedule visits with families. They are excellent referral sources.
 - Return phone calls or emails promptly—before the end of the day, if at all possible.



Chelsea Davis, et. al., *'A Little Communication Would Have Been Nice, Since This Is My Life: Defendant Views on the Attorney-Client Relationship*, 40 *Champion* 28, 35 (July 2016).

- Set realistic expectations.
 - Avoid predictions.
 - Early in the representation, put the worst possible outcome in writing for the client.
 - With the client's permission, talk with family members about upcoming decisions and risks/benefits.
 - Clients don't like surprises.
- Be ahead of the curve on legal issues and trends.
 - [Kansas Federal Defender blog](#)
 - [Kansas Federal Defender Issues Pending](#)
 - [National Federal Defender website](#)
 - [SCOTUSBlog](#)
 - [Sentencing Law and Policy](#)
- Continue representation beyond the verdict and sentence.
 - Answer questions
 - Provide resources to help with expectations for prison
 - For example, [PTS Prison Orientation sessions](#) May 4, 2017; August 10, 2017; November 2, 2017

Criminal Defense Practice Tips from the Disciplinary Office:

- Prepare an introductory letter at the outset of the representation.
 - What discovery will you be able to have?
 - How often will we be in touch?
 - What is the general timeline for this type of case and what could change that timeline?
- The introductory letter has two purposes:
 - Set expectations and provides information.
 - Cuts short any frivolous disciplinary complaint.
- Thoroughly discuss client requests such as filing of pretrial motions with the client, even if it is not the client's decision.
- Communicate. Communicate. Communicate. And document

- Help with logistics
- Correspond with the client



Alan Ellis, Federal Prison Guidebook: Sentencing and Post-Conviction Remedies

- Make the file available to successor counsel
- Be an excellent writer
 - Bryan Garner seminars
 - On-line resources
 - Build a library of writing books by such authors as Bryan Garner, Ross Guberman, and Matthew Butterick (ask Paige for additional recommendations)
- Look the part (we hate this one, but it's true) and act the part
 - Clients watch you...and want you to pay attention to them.
 - Other defendants watch you...and may be looking for counsel.
 - Other attorneys watch you...and may need to refer a co-defendant to someone.
- Likewise....take care to make your pleadings look professional
 - Appearance matters
 - Consider spacing, font, caption style
 - Comply with all rules about formatting
- Be consistent so that your office's work product has a recognizable "look."

AUTHORITY TO REPRESENT AND EMPLOYMENT CONTRACT

Joseph, Hollander & Craft, LLC, (referred to as "Counsel"), is authorized to represent _____, "Client", in the following case(s):

Counsel agrees to provide legal services to Client through disposition of the above case(s). "Disposition" may include, but is not limited to, pre-charge services, trial, plea, sentencing, order, judgment, case dismissal, withdrawal, or some other resolution of the case(s) that are listed above. This fee does not include retrial, removal of the current case to another prosecuting court, any appeal, violation of probation, civil forfeiture, or sealing of records unless expressly stated otherwise.

This is an **hourly fee** contract. Counsel will bill Client in six-minute increments (0.1 hour increments) at Counsel's hourly rate. In consideration for such representation, Client agrees to pay Counsel a retainer fee and costs as follows:

Costs shall include, but not be limited to, the following: investigative, paralegal and research fees; discovery information received from the State/Federal/City Attorney's Office regarding the above cases(s); taking/transcribing depositions where permitted; transcript cost(s); filing fees; reports; records; expenses for investigators; serving subpoenas; witness/mileage fees; polygraph examinations; any expert witness fees; travel expenses; and miscellaneous out-of-pocket expenses. Client will pay for these costs and Client expressly authorizes Counsel to contract for and expend money for these services, determined to be necessary by Counsel, and agrees to reimburse Counsel for all such related expenses.

Client and all persons paying the above fee or any portion thereof, do hereby acknowledge that all such fees were derived from legal sources only and are not the result of any activity which may result in forfeiture of the fee. Services to be provided hereunder do not include any matters concerning any civil forfeiture or expungement proceeding unless otherwise set forth herein.

It is understood that in the event the payment schedule agreed upon is not honored, Client consents to Counsel stopping all legal work until such time as Client once again becomes current in these financial obligations. At the option of Counsel, all future payments shall become due in full if the payment schedule is not honored. Failure to adhere to the agreed upon financial obligation for legal representation may result in Joseph, Hollander & Craft, LLC withdrawing from Client's case(s).

Should Client desire to terminate legal services under this contract for any reason, such intention must be delivered to Counsel in writing. It is further understood by Client that this contract may be produced in court for purposes of withdrawal. Client agrees to pay a reasonable

fee at the agreed upon hourly rate to Counsel for the work performed up to, and including, the date of withdrawal.

Counsel has the right to withdraw from representation of Client for good cause in which event Client agrees to pay a reasonable fee to Joseph, Hollander & Craft, LLC at the agreed upon hourly rate for the work performed up to, and including, the date of the withdrawal.

It is further agreed between Counsel and Client that should it become necessary to collect any unpaid balance for fees and costs when due, Client will pay a reasonable attorney's fee for costs of such collection.

Client hereby authorizes Counsel to waive his/her right to a speedy trial if at any time Counsel determines such waiver to be in Client's best interest. Client acknowledges such right to a speedy trial and that this right has been explained to Client.

Client expressly agrees that all counsel with Joseph, Hollander & Craft, LLC may perform legal services on his/her behalf. This includes any pre-trial services as well as hearings in or outside of court or at trial.

It is further agreed that if Client's case(s) is concluded without a trial, that decision will be Client's alone. If a negotiation is offered to Client by the office of the State/Federal/City attorney and Client chooses to accept that negotiation, the entity paying Counsel's fee does not have any veto power over Client not accepting the negotiation. In short, Client is Counsel's client and not the entity paying the fee.

Client acknowledges that Counsel has made no guarantees as to the outcome of such representation in the above case(s). It is expressly understood that employment has not been entered into with the expectation or promise of any particular sentence or disposition or outcome.

Client acknowledges that Counsel may send a portion of the fee to the referring attorney and Client consents to Counsel sending this referral fee.

Client must notify Joseph, Hollander & Craft, LLC in writing of any change in address or phone number(s).

By signing this agreement, Client acknowledges reading the contents of this two-page document and agreeing to all provisions therein.

Date

Client

Joseph, Hollander & Craft, LLC
10990 Quivira, Suite 200
Overland Park, KS 66210
(913) 948-9490

AUTHORITY TO REPRESENT AND EMPLOYMENT CONTRACT

Joseph, Hollander & Craft, LLC, (referred to as "Counsel"), is authorized to represent _____, "Client", in the following case(s):

Counsel agrees to provide legal services to Client through disposition of the above case(s). "Disposition" may include, but is not limited to, pre-charge services, trial, plea, sentencing, order, judgment, case dismissal, withdrawal, or some other resolution of the case(s) that are listed above. This fee does not include retrial, removal of the current case to another prosecuting court, any appeal, violation of probation, civil forfeiture, or sealing of records unless expressly stated otherwise.

This is a **flat fee** contract. That is, representation is not undertaken on an hourly basis. In consideration for such representation, Client agrees to pay Counsel legal fees and costs as follows:

If Client opts to have a trial, but decides fewer than 15 days prior to the trial date to enter a plea or other offered resolution, Counsel reserves the right to retain the trial fee, if one is delineated above, if such fee is reasonable and earned.

Costs shall include, but not be limited to, the following: investigative, paralegal and research fees; discovery information received from the State/Federal/City Attorney's Office regarding the above cases(s); taking/transcribing depositions where permitted; transcript cost(s); filing fees; reports; records; expenses for investigators; serving subpoenas; witness/mileage fees; polygraph examinations; any expert witness fees; travel expenses; and miscellaneous out-of-pocket expenses. Client will pay for these costs and Client expressly authorizes Counsel to contract for and expend money for these services, determined to be necessary by Counsel, and agrees to reimburse Counsel for all such related expenses.

Client and all persons paying the above fee or any portion thereof, do hereby acknowledge that all such fees were derived from legal sources only and are not the result of any activity which may result in forfeiture of the fee. Services to be provided hereunder do not include any matters concerning any civil forfeiture or expungement proceeding unless otherwise set forth herein.

It is understood that in the event the payment schedule agreed upon is not honored, Client consents to Counsel stopping all legal work until such time as Client once again becomes current in these financial obligations. At the option of Counsel, all future payments shall become due in full if the payment schedule is not honored. Failure to adhere to the agreed upon financial obligation for legal representation may result in Joseph, Hollander & Craft, LLC withdrawing from Client's case(s).

Should Client desire to terminate legal services under this contract for any reason, such intention must be delivered to Counsel in writing. It is further understood by Client that this contract may be produced in court for purposes of withdrawal/termination. Client agrees to pay a reasonable fee, as defined below, to Counsel for the work performed up to, and including, the date of termination. Counsel

will return the portion of the retainer to Client, if any, which is unearned and which is not to reimburse Counsel for costs.

Counsel has the right to withdraw from representation of Client for good cause in which event Client agrees to pay a reasonable fee, as defined below, to Joseph, Hollander & Craft, LLC for the work performed up to the date of withdrawal and will return any portion of the retainer to Client, if any, which is unearned and which is not to reimburse Counsel for costs.

Though this is not an hourly case, if Counsel is terminated by Client for any reason or if Counsel withdraws from representation of Client for good cause, Counsel will retain a reasonable and earned fee up to, and including, the date of termination/withdrawal and will return any unused portion, if any, which has not been earned and/or which is not to pay costs incurred. A reasonable and earned fee will be calculated at \$250.00 per hour in six-minute increments (0.1 hour increments).

It is further agreed between Counsel and Client that should it become necessary to collect any unpaid balance for fees and costs when due, Client will pay a reasonable attorney's fee for costs of such collection.

Client hereby authorizes Counsel to waive his/her right to a speedy trial if at any time Counsel determines such waiver to be in Client's best interest. Client acknowledges such right to a speedy trial and that this right has been explained to Client.

Client expressly agrees that all counsel with Joseph, Hollander & Craft, LLC may perform legal services on his/her behalf. This includes any pre-trial services as well as hearings in or outside of court or at trial.

It is further agreed that if Client's case(s) is concluded without a trial, that decision will be Client's alone. If a negotiation is offered to Client by the office of the State/Federal/City attorney and Client chooses to accept that negotiation, the entity paying Counsel's fee does not have any veto power over Client not accepting the negotiation. In short, Client is Counsel's client and not the entity paying the fee.

Client acknowledges that Counsel has made no guarantees as to the outcome of such representation in the above case(s). It is expressly understood that employment has not been entered into with the expectation or promise of any particular sentence or disposition or outcome.

Client acknowledges that Counsel may send a portion of the fee to the referring attorney and Client consents to Counsel sending this referral fee.

Client must notify Joseph, Hollander & Craft, LLC in writing of any change in address or phone number(s).

By signing this agreement, Client acknowledges reading the contents of this two-page document and agreeing to all provisions therein.

Date

Client

Joseph, Hollander & Craft, LLC
10990 Quivira, Suite 200
Overland Park, KS 66210
(913) 948-9490

Sample Expert Letter

{Date}

Dear _____:

Thank you for agreeing to provide services to {name of client} in {case number} in the United States District Court for the District of Kansas. Please understand that the engagement of your services is subject to the following:

(1) You will be compensated at a rate of \$ _____ per hour [or specify some other fee arrangement]. The maximum amount currently authorized by the Court for your services is \$ _____. This does not include any reasonable and necessary expenses, up to \$500, that are incurred by you. Do not begin providing services until you have been notified that the Court has authorized funds for your services.

(2) (a) You have been set up as a user in eVoucher for the District of Kansas. As such, you are asked to keep track of your time and expenses, and to submit your CJA 21 through eVoucher. 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 judge, and in certain circumstances, the Chief Judge of the Court of Appeals. Checks are issued by the Department of the Treasury, out of the federal judiciary's Defender Services account.

- Or -

(b) You will submit your invoice to me and I will transfer the information to eVoucher for submission and review. 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 judge, and in certain circumstances, the Chief Judge of the Court of Appeals. Checks are issued by the Department of the Treasury, out of the federal judiciary's Defender Services account.

(3) The presiding judge (and the Chief Judge of the Circuit, if applicable) may reduce a voucher. Specific reasons include: (a) a mathematical error; (b) non-compliance with the CJA Guidelines, or court policies; or (c) a determination that the services claimed are unreasonable either in terms of the work performed or the amount of time and expenses submitted. Accordingly, this engagement letter is not a guarantee of payment for all services rendered or expenses incurred.

(4) **Do not perform services or incur expenses that would result in an invoice in excess of the maximum payment amount authorized by the Court** (as set forth in paragraph (1)). 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. Advise me **before** you exceed the Court's maximum authorized payment amount. If I determine such additional work and/or expenses are necessary for the representation, I will seek approval from the Court for a new maximum authorization level.

(5) Travel expenses (other than mileage) 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, prior to travel.

Sample Expert Letter

If airline travel is authorized, I will provide guidance to you regarding the purchase of the ticket.

- (6) Please maintain contemporaneous time and attendance records for all work and services billed, including work performed by associates, partners, and support staff. Please also keep a copy of your receipts for expenses. These must be retained for three years after approval of your final voucher.
- (7) You may submit a voucher, or invoice, at the end of four months, or when your fees amount to \$4,000 – whichever occurs first. You may, however, wait until the conclusion of your services to submit your voucher or invoice.
- (8) All of the documents, files, photographs, etc., that are provided for your review in this case are confidential and shall not be disclosed to any third party. You shall not use the confidential information for your own benefit, nor publish, copy or otherwise disclose to others. You shall return to me any and all records, notes, and other written, printed or tangible materials in your possession pertaining to the confidential information if I request it in writing.
- (9) If you are provided discovery that was received from the Government, you will also be provided the terms by which the discovery was provided to counsel. You must abide by these same terms and conditions
- (10) The scope of your work is as follows:

Sincerely,

[Signature Block]