# KLINGER, ROBINSON & FORD, L.L.P.

ATTORNEYS AT LAW

401 OLD MARION ROAD NE

Mailing Address: P. O. Box 10020

CEDAR RAPIDS, IOWA 52410-0020

PHILLIP D. KLINGER
JEFFREY P. TAYLOR
JONATHAN B. HAMMOND
STEPHEN A. SWIFT

ROBERT E. FORD, Retired
GARY L. ROBINSON (1947-1998)

TELEPHONE
(319) 395-7400
CABLE: TESHUB
FACSIMILE
(319) 395-9041

Writer's E-mail: sswift@krflawfirm.com


April 29, 2016

*Via Email ONLY:* CJAstudy@ao.uscourts.gov and autumn_dickman@ao.uscourts.gov

The Honorable Kathleen Cardone, Chair
Ad Hoc Committee to Review the CJA Program
Thurgood Marshall Federal Judiciary Building
One Columbus Circle
Washington, DC 20544

RE: CJA PANEL HEARING MAY 17, 2016 – MINNEAPOLIS, MN

Dear Judge Cardone and Honorable Committee Members:

Thank you for giving me the opportunity to appear and present testimony at the Committee's public hearing regarding the structure and function of the Criminal Justice Act.

I am a partner at the law firm Klinger, Robinson & Ford, L.L.P. I have been practicing law in the Cedar Rapids, Iowa area since 1975. I have been the panel representative for the Northern District of Iowa for the last 8 years and was the Defender Services Advisory Group representative for the Eighth and Tenth Circuits for 4 years until my second term ended earlier this year. A significant portion of my practice is dedicated to representation of criminal defendants in federal court, both through the Criminal Justice Act Panel and as privately retained counsel. Our firm consists of 4 partners and would be considered a mid-size firm in the Cedar Rapids area. One of my partners is also on the CJA Panel. I have tried numerous

cases in both the Northern and Southern Districts of Iowa and have been involved in more than 40 appeals to the Eighth Circuit, with approximately 10 occasions where some relief has been granted to my clients.

Over the course of my practice in federal court (predominantly over the last 25 years of my practice) I have seen several changes in the CJA Panel rate. Early on, this rate was abysmally low and did not reflect a true commitment to guaranteeing the right of individuals to have effective assistance of counsel. If my practice had been solely or predominantly based on CJA Panel cases, I would have been in dire financial straits. With the substantial increase over the years, from the $40/$60 in and out of court rate to the current $129 per hour rate, I have been able to dedicate more of my efforts to this area of practice. However, even with the current rate I am not "getting rich," nor are my partners, off this practice. My share of the office overhead is approximately $125,000 per year. If I were to devote 100% of my time to CJA Panel work, and was able to bill 40 hours a week for 50 weeks a year I would generate $258,000 of revenue. Thus, I would have earned approximately $133,000 per year. This for an attorney who has practiced for 40 years and has reached a level of some expertise. This also assumes that I am able to bill that many hours; many hours actually spent working do not end up getting billed. This also assumes that all of the time actually billed is compensated, which is not the experience that I have had. It is not unusual for arbitrary cuts to be made, especially on the excess statutory scheduled fee cases.

The point of this is not to say that I, nor any attorney, should be guaranteed an income through the CJA. I have no complaint about my financial life and have been able to put my two children through college and provide for my family. It does reflect, however, the economic realities of the CJA system, and most importantly, the future of the CJA system. Recent law school graduates carry onerous debts and will have a need to generate significant revenue to pay the incurred indebtedness and provide for their family's financial security and wellbeing.[1] Without the opportunity to make a living wage, individuals will not tend to gravitate toward this practice of law. This is likely to lead to a future shortfall in the CJA Panel membership. Currently, I believe we have two attorneys on the Panel who are under the age of 40, one or two between ages 40 – 50, and the rest are above age 50. This out of an active Panel exceeds over 20 members. Several of those members are very close to retirement age.

---

1 The ABA required disclosure indicates for the Class of 2015, the average law school student loan debt was $86,373.00. See http://law.uiowa.edu/aba-required-disclosures-and-other-disclosures. For a law school student starting in 2014, a resident of Iowa who is a full time JD student would incur $12,888.50 per semester in tuition and fee costs. The figure for a non resident student at the University of Iowa is $24,954.00 per semester. See https://www.maui.uiowa.edu/maui/pub/tuition/rates.page .

Most of the attorneys I know also have spent numerous hours in volunteering their efforts. I myself have been a long term contributor to the Iowa Legal Aid system, and have accepted numerous cases over the years representing individuals in civil matters on a pro bono basis. I have received awards for volunteer of the year. Along with the family law volunteer work, I am also a practicing mediator. As part of the mediator panel listing I am committed to providing volunteer or pro bono services to those who are financially unable to afford the minimal costs involved in family law mediation. I have participated in numerous community events in which I volunteered my efforts. I do not consider my experiences to be unusual compared to the typical attorney.

In preparing my comments I reached out to the CJA Panel for the Northern District of Iowa and sought to obtain their thoughts and comments. The following are representative quotes:

> "My main gripe concerns over-cap bills. The reviewing judge at the Circuit level seems to have his own cap of 1.5 times the official case max. So even if you did a 3-week trial in a multi defendant case with lots of pretrial issues and a contested sentencing, the unofficial cap would be $15,000. This is B.S.
>
> Also, we don't get any prior notice of intent to cut, nor a chance to justify. We don't know what the trial level judge says or sends to the Circuit reviewer. (Remember when Melloy used to send us copies of his letters?)"

> "One thing that I would add or seek to have addressed is the seeming insensitivity by the court to the conflicting demands and obligations facing private lawyers. We all strive to give equal attention to our CJA clients – many of whom are detained – but at least in the Northern District there is little appreciation for the abbreviated schedules, multiple deadlines, and sometimes oppressive logistical problems created by the discovery policies of the prosecution. I understand the need to appoint and secure counsel without unnecessary delay, and to expeditiously process cases, but I sometimes sense that the court underestimates the ability of CJA lawyers to just drop what they're doing and be in court in a few hours to assume responsibility for a new, extremely serious and challenging case. Of course, these cases – in the Northern District – get put at the head of the line in the CJA lawyers practice.

> I find little comfort in hearing about the huge (though apparently shrinking) number of criminal cases "processed" in the Iowa federal courts, especially knowing the toll this takes on the federal defenders and CJA lawyers shouldering the professional and emotional burdens that result."

> "You should talk to them about the advantages to having counsel that represented the defendant in state court staying with a case into federal court instead of taking the next name on the appointment list. Also, you should talk to them about the need for CJA panel attorneys getting enough appointments to stay competent, especially given the reduction in the number of overall cases."

These comments reflect both institutional and individual problems that the CJA Panel attorney faces. The subject of fees, the demands for availability of service (which carries with it opportunity costs and scheduling issues), the need to maintain a quality Panel are all reflected in these and other comments that the undersigned has received. There is a continuing need for Panel membership to have adequate cases to maintain their level of expertise, to justify the commitment for the educational and updated training, along with that not to be a basis for overwhelming case load that would crush the other portion of a private practitioner's practice. There further is a need for the CJA attorney to see more transparency in the bill review and payment process and to have a sense of fairness in the fee approval and not be subject to potentially arbitrary or institutionally derived fee cutting.

There is not an attorney on the CJA Panel who is not a believer in the need to fulfill the Sixth Amendment right of individuals who face the power of the federal government. As the substantial increase in federal prosecutions occurred over the years, there has been a need, and has developed a more qualified and deeper bench of counsel to represent the accused. All of us are committed to the system and do so because of our belief in fulfilling the rights of all individuals to receive due process and to have vigorous, able counsel on their behalf.

You have received a number of well thought out and written letters and testimony before. I do not desire to repeat all of those, but would endorse the great majority and bulk of those statements. The question becomes, what to do? The system today is, I believe, vastly better

than what existed before establishment of the CJA. The hybrid system, involving federal defenders and the private panel attorneys, appears to work quite well. The Federal Defenders Office can provide full time, solely focused criminal defense attorneys. They are available on short term basis to make initial appearances, and to frequently represent on an ongoing basis indigent defendants. They also, in many districts, provide training and guidance to the membership of the Panel. The Panel attorney, committed and very skilled, provides an additional source of representation needed because of the many multiple defendant and conflicted cases that preclude sole reliance on the Federal Public Defenders Office model. Panel membership is more and more nationally becoming a privilege position and not just an assignment or duty that is infrequently handed out to individuals who have no ongoing experience with federal criminal defense law. This hybrid system advances the cause of the individual defendant in providing for more than adequate counsel. Setting the threshold at merely the basic adequate level should not be the goal. Membership on both the Federal Defenders Office and the Panel position should be as equally capable as the highly skilled levels of the U.S. Attorney's Office. Especially so, in light of the fact that the resources dedicated on the defense side are almost inherently less than what is available to the prosecution side. The prosecution side has investigating agents, has long lead times in planning out when to charge individuals, has numerous professionals and experts at their hand. These resources are not automatically available to the defendant.

I believe there is a need to address the issue of fee cutting, and perhaps the overall system of fee approval. 18 U.S.C. §3006A(d)(3) provides for Circuit Court approval of vouchers that exceed the maximum assigned for different case levels. Why is this so? This system creates a burden for two judges, the District Court and Circuit Court, to review the voucher. What is gained by this second review? Is this an effective use of judicial time? I have heard stories of judges having to spend late hours in the day to go through a stack of bills and review them for their reasonableness. Why should this be the responsibility of potentially two different levels? Does this result in the best review of the vouchers, or does it prompt broad base, arbitrary cuts? Would it be a better system to grant more power and authority to the district court to determine the appropriate fee? This would potentially generate a more responsive process. If the District Court constantly cuts an attorney, or the entire panel, perhaps the attorney or the panel will have more of an idea or opportunity to discuss the fee cut and more of an opportunity to persuade the court that cuts are not warranted. There is much more possibility of interaction and discussion with the District Court than with the Circuit Court judges. For attorneys in the Cedar Rapids area we do not have the opportunity to meet and discuss fee cutting with the judges of the Eighth Circuit. The only communication I have ever had with the judges of the Eighth Circuit Court has been in the context of the following:

1. During oral argument;

2. During planning meetings for the Eighth Circuit biennial meeting;

3. During time at an Eighth Circuit biennial meeting when I had requested the meeting between the judges and panel representatives of the Eighth Circuit. Chief Judge Riley agreed to a half hour conference that was attended by several other appellate and district court judges of the Eighth Circuit. I was able to present comments to the Eighth Circuit which were acknowledged by several members as helpful and insightful. We also heard comments from the Eighth Circuit, and frankly, some of those comments were not encouraging for the Panel.

If the district court had more authority, counsel would have a much more transparent view of payment process and much more of an opportunity to plead their case to the local district court judge. It would not be perfect; different judges will have a range of opinions on what sort of fee is reasonable and what should or should not be approved, but the respective district court judge will also face the consequences of their decisions. If a judge becomes known as a routine fee cutter, they may end up with a reduced panel of attorneys. As compensation drops, so likely will be the individuals who are the most skilled representatives, as they are the ones who will most likely have other options available to them. In the long run, that will cost the district courts in poorer trials and more 18 U.S.C. §2255 petitions. In addition, defendants will receive distinctly lesser quality of representation, and every district court judge should not want that result. There is more of a check and balance in play if the district court has authority over fee compensation.

Consideration was given to "outsourcing" the fee approval, along with the appointment of counsel function. Although that removes the inherent threat to counsel (the "go along to get along" possibilities) it is not a perfect system. The State of Iowa's court appointed representation system is not highly viewed by any counsel that I have spoken with. Most attorneys on the federal panel do not take state court appointments due to both the meager rates and also due to the administrative agencies arbitrary fee cutting. Furthermore, taking away involvement on both the appointment or compensation matters takes away too much power from the district court. The district court should want to have a say in who is on the Panel and it would appear to be appropriate for them to have a say on both who is on the Panel and how they are adequately compensated for their services. On the other hand, approval of vouchers could be a time consuming function and burden on the court.

Over the course of the practice, there have been changes implemented by the U.S. Attorney's Office. For a long time the U.S. Attorney's Office in the Northern District of Iowa had a very restrictive policy on discovery. After lengthy philosophical discussions with the court and the U.S. Attorney's Office, and along with changes in leadership in the U.S. Attorney's Office, there has developed more flexibility in the discovery process. Instead of having to go to the U.S. Attorney's Office, review and dictate discovery, wait for that discovery to be transcribed, frequently having to select which portions to dictate and transcribe, and the delays involved in that process, have now been replaced with a discovery process that allows for sharing of the reports. Even in that circumstance, there are still restrictions on the local counsel's ability to share that with their clients. All in all, however, the process has been extremely expedited, and costs of review of discovery have been substantially reduced. This is now, however, being counterbalanced by the fact that many new cases are involving hundreds of pages, if not thousands upon thousands of pages, of discovery. In my communications with the national panel representatives and through my communication with the DSAG members, I have learned of how large scale some of these prosecutions are in other districts. I am frankly thankful that I don't have to try to sort through millions of pages of discovery to try to find the important parts that might assist my client in defending prosecution by the federal government. There is no doubt, however, that costs are generally reduced. This is not in all cases; I have had cases where I have had to review over 500 hours of video recordings. There is no short and easy way to do any of that. We are now entering a new area of increased security in the exchange of electronic discovery. There will be continuing need to have a dialog between the government, defense counsel, and the court to efficiently and effectively exchange discovery.

I would be remiss if I did not address the assistance provided by the Defender Services Office in Washington, D.C. Staff there has been both vigorous in making certain that the quality of representation is high, and has provided substantial assistance through their training programs to both the Federal Defenders Office and the Panel membership. I have attended a number of seminars that they have provided (at no registration cost) and I have always found their programs to be outstanding and well worth the time and personal cost to attend those conferences or seminars.

No system will be perfect. Any system, including any systematic changes that may be made, will still need to be implemented by human beings. We are all subject to being fallible and all of us have our petty quirks and failings. There is, however, room for continuing improvement in the Criminal Justice Act system. Ultimately, each individual accused by the federal

government of a crime, and who is financially unable to afford to hire counsel (most clients) are in need of more than adequate counsel to represent them. I believe you can review and make some suggestions, including potential congressional statutory changes that will improve the system by making it more transparent, and by establishing potentially more local control over the process and removing one layer between the provider of services and the reviewer of the provider of those services.

I thank you for the opportunity to provide these comments. I look forward to meeting in person and providing any elaboration or additional detail or insight that I might have on these matters.

Yours truly,

KLINGER, ROBINSON & FORD, L.L.P.

Stephen A. Swift

SAS:grl