

Decision and Order

107 F.T.C.

IN THE MATTER OF

DECORATING PRODUCTS DEALERS ASSOCIATION OF
GREATER NEW YORK, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT*Docket 9192. Complaint,* April 29, 1985—Decision, June 11, 1986*

This consent order requires, among other things, a Bayside, N.Y. local affiliate of a wallcovering industry trade association to cease any conduct having the effect of fixing prices, terms or conditions of sale of wallcoverings. Further, respondent is prohibited from: (1) coercing any seller or supplier of wallcovering to use or not use any prices, terms or conditions of sale, distribution methods or policy of choosing customers, and (2) assisting any affiliate or member who use any of the prohibited practices.

*Appearances*For the Commission: *Kevin T. Cronin.*For the respondent: *James H. Sneed, Washington, D.C.*

DECISION AND ORDER

AS TO

DECORATING PRODUCTS DEALERS ASSOCIATION OF
GREATER NEW YORK, INC.

The Commission having heretofore issued its complaint charging respondent Decorating Products Dealers Association of Greater New York, Inc. ("DPDA-NY"), a corporation, named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

* Complaint previously published at 107 F.T.C. 498 (1986).

The Secretary of the Commission having thereafter withdrawn this matter as to this respondent from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent DPDA-NY is a corporation organized, existing and doing business under and by virtue of the laws of the state of New York, with its office and principal place of business located at 42-40 Bell Boulevard, Bayside, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That for purposes of this order the following definitions shall apply:

A. *DPDA-NY* means the Decorating Products Dealers Association of Greater New York, Inc., its officers, directors, committees, representatives, agents, employees, successors and assigns.

B. *Wallcoverings* means flexible materials used to cover residential and commercial walls, such as simple wallpapers, vinyls, fabrics and foils.

II.

It is further ordered, That DPDA-NY, individually or in concert with any other person, directly or indirectly, or through any corporate or other device, shall cease and desist from:

A. Conduct having the purpose or effect of:

1. fixing, maintaining, or stabilizing prices, terms or conditions of sale of wallcoverings;

2. coercing any seller of wallcoverings to adopt, abandon, or refrain from adopting or abandoning any practice or policy concerning prices, terms or conditions of sale, or distribution methods or choice of customers.

B. Expressly or impliedly advocating, suggesting, advising, or recommending that any of DPDA-NY's members refuse to deal with any seller of wallcoverings on account of, or that any of DPDA-NY's members engage in any other act to affect, or to attempt to affect, the prices, terms or conditions of sale, or distribution methods or choice of customers of any seller of wallcoverings.

C. Publishing or circulating the results of any survey of, or otherwise identifying, prices, terms or conditions of sale, or distribution methods or choice of customers of any seller of wallcoverings in order to coerce, compel or induce any seller of wallcoverings to adopt or abandon or to refrain from adopting or abandoning any practice or policy concerning prices, terms or conditions of sale, or distribution methods or choice of customers.

D. Aiding or assisting any affiliates of the National Decorating Products Association or NDPA members in engaging in any of the acts prohibited by this Part II.

III.

It is further ordered, That this order shall not be construed to prevent DPDA-NY from providing information or its members' views to other sellers of wallcoverings, *provided, however,* that the information or views are not presented in a manner constituting an actual or threatened refusal to deal.

IV.

It is further ordered, That DPDA-NY shall:

A. Within 30 days following service of this order, mail a copy of this order to each of its members.

B. Within 60 days following service of this order, publish this order in an issue of *Decorating Logic* in the same type size normally used for articles in *Decorating Logic*.

C. For a period of three years provide each new DPDA-NY member with a copy of this order at the time the new member is accepted into membership.

D. Terminate for a period of one year the membership of any DPDA-NY member within 60 days after learning or having reason to believe that said member has engaged, after the date this order becomes final, in any act or practice that, if engaged in by DPDA-NY, would be prohibited by Part II of this order.

V.

It is further ordered, That DPDA-NY shall:

A. Within 60 days following service of this order, file a written report with the Commission, setting forth in detail the manner and form in which it has complied with this order. Thereafter, additional reports shall be filed at such other times as the Commission may, by written notice to DPDA-NY, require.

B. For a period of 3 years following service of this order, maintain in its files copies of all correspondence received from, or sent to, sellers of wallcoverings, associations of sellers of wallcoverings, or NDPA affiliates or members, and make such copies available for inspection by representatives of the Federal Trade Commission upon written request.

C. Notify the Commission at least 30 days prior to any proposed change in DPDA-NY's organization or operations, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or association, or any other change that may affect compliance obligations arising out of this order.

Chairman Oliver did not participate.

Complaint

107 F.T.C.

IN THE MATTER OF

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9171. Complaint, Dec. 16, 1983—Final Order, June 23, 1986*

This final order prohibits, among other things, a Washington, D.C. lawyers association from: (1) refusing to provide legal services in connection with any effort to fix or raise fees; (2) interfering with the operation of the D.C. Superior Court, any other court, or any government agency in connection with any effort to fix prices; (3) coercing any person not to provide legal services in an effort to fix prices; and (4) encouraging the association, any member, or any other person from engaging in any action prohibited by the order.

Appearances

For the Commission: *Karen G. Bokat, Jonathan J. Groner, Mary Anne M. Fox and M. Suzanne Miller.*

For the respondents: *Willis B. Snell, Michael L. Denger and Willard K. Tom, Sutherland, Asbill & Brennan, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondents Superior Court Trial Lawyers Association, Ralph Perrotta, Karen Dixkoskoff, Reginald Addison and Joanne Slight have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows: [2]

1. Respondent Superior Court Trial Lawyers Association ("SCTLA") is an unincorporated association organized, existing and doing business in the District of Columbia. SCTLA's mailing address is 500 Indiana Avenue, N.W., Room 1220, Washington, D.C.

2. Respondent SCTLA's members are attorneys who in general own or operate private law practices in the District of Columbia for a profit. Respondent SCTLA's members generally specialize in the representation of criminal defendants for a fee. When respondent SCTLA's members represent indigent criminal defendants in the Su-

perior Court of the District of Columbia, their fees are paid by the District of Columbia under the Criminal Justice Act ("CJA") program.

3. Respondents Ralph J. Perrotta, Karen E. Dixkoskoff, Reginald Addison, and Joanne D. Slight (hereinafter sometimes referred to as "the attorney respondents") own or operate private law practices in the District of Columbia for a profit. At all times relevant herein, Ralph J. Perrotta was respondent SCTLAs president, Karen E. Dixkoskoff was its vice-president, Reginald Addison was its secretary, and Joanne D. Slight was the chair person of its "Strike Committee."

4. Respondent SCTLAs is now, and at all times relevant herein has been, an association organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, whose business is in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44. Respondents Ralph J. Perrotta, Karen E. Dixkoskoff, Reginald Addison, and [3] Joanne D. Slight at all times relevant herein have owned or operated private law practices in or affecting commerce in the District of Columbia, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

5. Except to the extent that competition has been restrained as herein alleged, members of respondent SCTLAs and the attorney respondents have been and are now in competition among themselves and with other attorneys in deciding independently whether and to what extent they will seek CJA program cases at fees offered by the District of Columbia, as opposed to other legal work, and in obtaining appointments to represent indigent criminal defendants in the Superior Court of the District of Columbia.

6. In August 1983, members of respondent SCTLAs and the attorney respondents entered into an agreement among themselves and with other lawyers to restrain trade by refusing to compete for or accept new appointments under the CJA program beginning on September 6, 1983, unless and until the District of Columbia increased the fees offered under the CJA program. Virtually all of the attorneys who regularly compete for or accept new appointments under the CJA program joined in this agreement to restrain trade. A substantial number of these attorneys signed a petition stating: "We the undersigned private criminal lawyers in D.C. Superior Court agree that unless we are granted a substantial increase in our hourly rate, we will cease accepting new appointments under the Criminal Justice Act." [4]

7. In furtherance of their agreement, beginning on September 6, 1983, members of respondent SCTLAs, the attorney respondents, and other attorneys took the following actions, among others: (1) they

refused to compete or make themselves available for appointments to represent indigent defendants in Superior Court; and (2) they attempted to use harassment or other means to induce other attorneys to refrain from seeking or accepting appointments to represent indigent defendants in Superior Court.

8. In engaging in the acts and practices described in Paragraphs 6 and 7, respondent SCTLTA has acted as a combination of at least some of its members, or in conspiracy with some of them or others, to increase the fees offered by the District of Columbia under the CJA program and to boycott the CJA program administered by the District of Columbia.

9. Respondents' acts and practices, described above, have had the following effects, among others:

a. Competition for CJA appointments among respondent SCTLTA's members, and between respondent SCTLTA's members and other attorneys, has been restrained;

b. The administration of criminal justice in the District of Columbia has been disrupted, imposing increased costs on the Superior Court; and

c. The District of Columbia's decision with respect to the fee levels to offer attorneys under the CJA program was made under the duress occasioned by the disruption of its criminal justice system, and that decision was to offer increased fees, resulting in substantially higher costs. [5]

10. Respondents' acts and practices, described above, constitute a conspiracy to fix prices and to conduct a boycott, and they are unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The violations, or the effects thereof, are continuing and will continue in the absence of the relief requested.

DISSENTING STATEMENT BY COMMISSIONER MICHAEL PERTSCHUK*

I have voted against issuing a complaint in this matter because it represents a poor exercise of prosecutorial discretion. I do not doubt there is reason to believe a legal violation has occurred. However, as the Chairman is fond of pointing out, we are responsible for allocating our scarce resources so as to focus on cases which "harm consumers." The Commission under this administration has failed to bring any cases involving predatory pricing, the Robinson-Patman Act, resale price maintenance, vertical mergers, or conglomerate mergers. Now, it issues a complaint against an effort by a group of local lawyers, paid

* Michael Pertschuk, Commissioner 1977-1984.

by the District of Columbia to serve indigent clients, to raise reimbursement rates in a situation where it is generally agreed the rates were too low to insure adequate representation.

In addition to the local and limited nature of the lawyer's effort, and the fact that, from a practical perspective, they were underpaid, other factors mitigate against formal enforcement action. The theoretical "victim," the District of Columbia, never asked for our intervention nor asserted its own antitrust prohibitions. The dispute between the lawyers and the District is now over, legal services are again being provided. The system is working better than before. Finally, should liability be found and an order ultimately issued, there will be inevitable problems in enforcing it given that the "respondent" here is a loose-knit collection of individuals.

All this is not to say that conspiracies by lawyers or other professionals to raise fees are not antitrust violations, or that I would not enthusiastically support a case challenging such a conspiracy in a different set of circumstances in the future. In *this* case at *this* time, we should spend our time on more harmful conduct.

December 16, 1983

INITIAL DECISION BY

MORTON NEEDELMAN, ADMINISTRATIVE LAW JUDGE

OCTOBER 18, 1984

I.

STATEMENT OF THE CASE

Most of the criminal defendants brought before the District of Columbia's Superior Court¹ are indigents represented by private lawyers appointed by the commissioners and judges of the Superior Court under the District's Criminal Justice Act ("CJA"). The fees paid to these "CJA lawyers"² had been set in 1970 at \$20 for out-of-court time

¹ Since 1970, Superior Court has been the principal trial forum for criminal offenses involving violations of the D.C. Code. Criminal cases in Superior Court are heard in two divisions—Criminal Division for adults, Family Division for juveniles under age 18. The United States District Court for the District of Columbia has concurrent jurisdiction with Superior Court for any violation of the D.C. Code which is also a federal offense. In actual practice, fully 95 percent of all criminal cases brought in the District are heard in Superior Court. See Carter 124-126, 220, 221.

² The CJA lawyers are sometimes referred to as "Fifth Streeters" (for where Judiciary Square, Superior Court, and the offices of some CJA old-timers are located) as a way of distinguishing them from Washington's "uptown lawyers" who practice in the federal court system, before federal departments and administrative agencies, and on the civil side of Superior Court. While the offices of the uptown bar are usually located on the streets leading off Connecticut Avenue, the geographical separation between the two bars is gradually diminishing as a result of the gentrification of the area between 15th and 5th Streets. Notwithstanding the blurring of territorial lines, the separation of Washington lawyers between Fifth Streeters and the uptown bar is well-recognized and embraces

(footnote cont'd)

and \$30 for in-court time. This case centers around a 1983 boycott organized by the Superior [2] Court Trial Lawyers Association ("SCTLA"), a confederation of CJA lawyers, to obtain higher fees.

The Commission's complaint, which was filed on December 16, 1983, charges that the members of SCTLA and three named officers of the association (respondents Perrotta, Koskoff³ and Addison), as well as respondent Joanne D. Slight as head of a so-called "Strike Committee", entered into an agreement among themselves and with other CJA lawyers to restrain trade by refusing to compete for or to accept new appointments unless fees were raised. In support of this charge, the complaint cites the following petition attributed to SCTLA:

We, the undersigned criminal lawyers in the District of Columbia Superior Court, agree that unless we are granted substantial increases in our hourly rate, we will cease accepting new appointments under the Criminal Justice Act.

The subsequent refusal by the members of SCTLA and the named individual respondents to take additional appointments, as well as the alleged harassment aimed at inducing other attorneys to refuse appointments, is variously characterized in the complaint as an illegal agreement, a combination, and a conspiracy to fix prices and to conduct a boycott. According to the complaint, but for the boycott, the CJA lawyers would have competed among themselves in deciding independently whether to accept CJA cases at fees offered by the District. The effects of the boycott are said to include a restraint on competition for CJA appointments, [3] the disruption of the District's criminal justice system, and the imposition by duress of additional costs on the District.

Respondents' answer, dated January 6, 1984, acknowledges that respondents Slight and Addison signed the aforementioned petition but otherwise denies all material allegations in the complaint. The answer also states that SCTLA is not a legally accountable or even an identifiable organization for purposes of a Federal Trade Commission proceeding. The answer asserts as affirmative defenses that respondents' activity represented the exercise of the right to petition guaranteed by the First Amendment, and was undertaken in furtherance of the Sixth Amendment rights of indigent criminal defendants.

In the prehearing stage both sides were allowed discovery including

every aspect of their respective practices: kinds of clients, types of cases, prestige, income, amenities, and the forums where they generally appear. The CJA bar must also be distinguished from the handful of District lawyers who represent the big-time criminal defendants—those in control of prostitution, gambling, and drugs and who can well afford to pay generously for skilled counsel. See Perrotta 647-649. See also JX 2, p. 51, JX 4, p. 21, JX 6, p. 71, JX 11, p. 133; RX's 647-649.

³ By my order dated August 15, 1984, the pertinent part of the caption of the case was changed to "Karen E. Koskoff" from the original "Karen E. Dixkoskoff" to reflect a legal name change.

depositions of all prospective witnesses and several key participants in the boycott who were not subsequently called as witnesses. Complaint counsel's case-in-chief was heard during the week of May 7, 1984. The defense case was presented between May 13, 1984, and May 25, 1984. Rebuttal exhibits were offered by complaint counsel on June 8, 1984, and the record was closed for the receipt of evidence on July 20, 1984. During the hearings, counsel for both sides were given full opportunity to be heard and to cross-examine the witnesses. The parties filed their main briefs and proposed findings on August 14, 1984. Reply briefs were filed on September 4, 1984.

After reviewing all the evidence as well as proposed findings and briefs submitted by the parties, and based on the [4] entire record, including my observation of the demeanor of witnesses, I make the following findings of fact:⁴ [7]

⁴ Proposed findings not adopted in the form or substance proposed are rejected, as either not supported by the entire record or as involving immaterial or irrelevant matters.

The following abbreviations are used throughout in citing to the record:

CX - (Complaint counsel's exhibits)
 RX - (Respondents' exhibits)
 JX - (Joint exhibits)

Testimony is cited by the name of the witness, followed by transcript page as in Isbell 1357. Complaint counsel's Exhibit 1 and respondents' Exhibit 1 are the indices required by Section 3.46(b) of the Commission's Rules.

The appearances of the witnesses were as follows:

<u>Name</u>	<u>Called By</u>	<u>Tr. Pages</u>
Francis D. Carter (Director, Public Defender Service)	Complaint counsel ("c.c.")	67-290
Herbert C. Robinson (Chief of Staff, Criminal Justice Act Office, Public Defender Service)	c.c.	311-384
Lillian A. McEwen (CJA Lawyer)	c.c.	407-517
Hugh O'Neill (CJA Lawyer)	c.c.	525-574
Ralph J. Perrotta (CJA Lawyer, former SCTLTA President and now Chairman of SCTLTA Board of Directors)	Respondents ("resp.")	634-784
Karen E. Koskoff (CJA Lawyer, former SCTLTA Vice-President, and now SCTLTA President) [5]	resp.	784-866
Reginald G. Addison (CJA Lawyer, former SCTLTA Secretary and now SCTLTA Vice-President)	resp.	872-911
Nelson J. Kline (Former CJA Lawyer and Media Representative for the "Strike Committee")	resp.	916-948
Joanne D. Slaight (Former CJA Lawyer and Chairperson of the "Strike Committee")	resp.	949-975
Robert H. Salisbury (Professor of Political Science, Washington University, St. Louis, Missouri)	resp.	979-1047
John H. Pickering (Former President, D.C. Bar (Unified))	resp.	1051-1109

Initial Decision

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II.

FINDINGS OF FACT

A. SCTLA

1. Respondent Superior Court Trial Lawyers Association ("SCTLA"), a loosely-organized unincorporated association, served as the rallying point for the 1983 campaign waged by the CJA lawyers to increase their fees. (Findings 2 to 4.)

2. SCTLA has been in existence for at least 10 years.⁵ It is located in Room 1220, Superior Court Building, 500 Indiana Avenue, N.W., Washington, D.C.⁶ At one point, SCTLA had some of the formal trappings of a professional organization—*i.e.*, a certificate of incorporation as a District of Columbia non-profit corporation, by-laws, and a Blue Cross/Blue Shield insurance policy.⁷ The certificate of incorporation was revoked on September 14, 1981; in early 1983 it was decertified for health insurance purposes because it did not meet Blue

Edward P. Colbert (Uptown Lawyer)	resp.	1109-1124
Geoffrey C. Hazard, Jr. (Professor of Law, Yale Law School, and Director, American Law Institute)	resp.	1128-1173
James F. Rill (Uptown Lawyer)	resp.	1177-1190
Edward J. Lopata (Uptown Lawyer)	resp.	1191-1206
Sterling Tucker (Former Chairman, D.C. City Council)	resp.	1236-1283
James R. Loftis, III (Uptown Lawyer)	resp.	1283-1295
David B. Isbell (President, D.C. Bar (Unified)) [6]	resp.	1302-1369
Wiley A. Branton (Former Dean, Howard University Law School)	resp.	1370-1413
Norman Lefstein (Professor of Law, University of North Carolina Law School)	resp.	1418-1540

Deposition testimony appears in the following joint exhibits:

- JX's 2-4 - J. Gerard Lewis (CJA lawyer and SCTLA Treasurer)
- JX 5 - Cheryl B. Stein (CJA lawyer and member of the "Strike Committee")
- JX 6 - David B. Hirsch (CJA lawyer and member of the "Strike Committee")
- JX 7 - Robert J. Pleshew (CJA lawyer and former member of SCTLA Board of Directors)
- JX 8 - Roger L. Pickens (CJA lawyer and member of the "Strike Committee")
- JX 9 - Yvonne T. Foster (CJA lawyer and former SCTLA Secretary)
- JX 10 - Joanne D. Slaight (*See above*)
- JX 11 - Ralph J. Perrotta (*See above*)
- JX 12 - Reginald G. Addison (*See above*)
- JX 13 - Karen E. Koskoff (*See above*)

Deposition testimony is cited by reference to the joint exhibits listed above, followed by page number.

⁵ JX 11, p. 23; CX 2A.

⁶ CX 6A.

⁷ JX 2, pp. 21, 24, 25, JX 11, p. 17, JX 13, pp. 20, 21, 124; CX 2B, C.

Cross/Blue Shield criteria for an employer/employee group; and if SCTLA now has by-laws no one seems to know where they are or what they say.⁸ [8]

3. Because lawyers are constantly entering and leaving CJA practice, the membership of SCTLA is difficult to pin down. There is no reliable membership list.⁹ Technically, membership in the organization and the right to vote in SCTLA elections is open to any lawyer who takes CJA cases and pays the \$30 annual dues.¹⁰ But income from CJA practice being what it is, there is a minimum level of compliance with the dues requirement, and SCTLA officers (CJA practitioners themselves who appreciate the financial condition of their colleagues) have never vigorously enforced the dues requirement or strictly limited voting in SCTLA elections to dues-paying members.¹¹ As a result, any CJA lawyer (broadly identified as someone who takes CJA cases) can participate in SCTLA meetings, vote in SCTLA elections, and even hold office in the organization.¹²

4. Despite its diminished status as a formal association, SCTLA nevertheless functions as a viable entity around which the CJA lawyers are organized. SCTLA holds informal meetings from [9] time to time in the Lawyers' Lounge of the courthouse.¹³ It has a board of directors and it elects officers.¹⁴ It maintains a bank account.¹⁵ At one time, it organized a Political Action Committee (PAC), which collected funds and made contributions to political candidates supportive of SCTLA's demand for a rate increase.¹⁶ SCTLA officers initiated, and the SCTLA treasury paid, the expenses associated with a pre-boycott lobbying campaign aimed at increasing CJA rates.¹⁷ SCTLA officers orchestrated the boycott and SCTLA paid boycott-related expenses.¹⁸ In general, SCTLA holds itself out as the representative of CJA lawyers, and in that capacity its leaders are perceived as authorized to speak for CJA lawyers on the question of rates and other matters affecting CJA practice.¹⁹ [10]

⁸ JX 2, p. 23, JX 3, p. 212, JX 6, p. 65, JX 11, p. 17; CX 2D.

⁹ JX 2, pp. 14-17, JX 9, pp. 16, 17; CX 1634A-I, which purports to be an SCTLA membership application list, contains the names of individuals who are not in CJA practice. JX 7, p. 52, JX 9, p. 54.

¹⁰ JX 2, p. 20, JX 7, pp. 14, 47, 50, JX 9, p. 17, JX 13, pp. 176, 190.

¹¹ JX 2, pp. 15, 16, JX 3, p. 208, JX 6, pp. 8, 9, JX 9, pp. 11, 12, 17, JX 11, p. 21.

¹² JX 2, p. 8, JX 5, p. 19, JX 6, pp. 8, 11, JX 7, pp. 7-13, JX 12, pp. 28, 46-48; Addison 892.

¹³ Meetings (including election meetings) are held on the spur-of-the-moment or whenever someone posts a notice on the blackboard in the Lawyers' Lounge of Superior Court announcing that one is necessary. JX 2 p. 58, JX 6, pp. 55, 56, JX 7, p. 9, JX 13, p. 37.

¹⁴ JX 2, p. 8, JX 3, pp. 138, 139, JX 7, pp. 12-14, 17, JX 9, pp. 8, 10, 11, 13, 43-45, JX 11, p. 20, JX 12, p. 22, JX 13, p. 21.

¹⁵ JX 2, pp. 8, 19, 59, 60, JX 3, p. 200; CX 56.

¹⁶ JX 10, p. 14, JX 11, pp. 23, 24; Perrotta 679.

¹⁷ JX 2, pp. 25-27, JX 11, pp. 97, 98; Perrotta 679, 693, 694, 698, 699.

¹⁸ See Findings 46-49, 55, 58, 63, 65, 66.

¹⁹ JX 2, pp. 46-53, JX 7, pp. 16, 20, JX 11, pp. 60, 98, JX 12, pp. 21, 24, 26; CX's 6A-14, 36C, 38F, 84A; RX's 63B, 142B-D; Perrotta 678-680, Koskoff 849, 850, Pickering 1090, 1091. See also Findings 37-40, 42-45, 50, 55, 58, 63, 65, 66.

B. *Individual Respondents*

5. Respondent Ralph J. Perrotta graduated from the Harvard Law School in 1960, and was admitted to practice in the District of Columbia the same year. Between 1960 and 1979, Perrotta pursued a varied career with emphasis on public interest work: he drafted Medicaid and child abuse legislation; he established antipoverty, head start, legal services, and neighborhood health programs; and he worked with organizations concerned with the problems of urban ethnic groups. Perrotta also taught courses on urban affairs at the Rhode Island School of Design and Cornell University. In 1976, he ran unsuccessfully for the Democratic nomination for United States Senator from Rhode Island. Perrotta entered CJA practice in 1979 when he found that public interest funding was drying up and that career opportunities in this area were no longer readily available.²⁰ At present, about 90 percent of Perrotta's practice consists of CJA cases.²¹ He conducts his practice from his home and he has no employees.²² In the fall of 1982, Perrotta was elected President of SCTLTA and in October, 1983, he was elected Chairman of the Board of SCTLTA.²³

6. Respondent Karen E. Koskoff graduated from Antioch Law School in 1979 and was admitted to practice in the District of [11] Columbia in 1980. She is a sole practitioner who has accepted CJA cases since early 1981. Her interest in criminal and poverty law traces back to her high school days when she served as a part-time staff member in a drug treatment program. In college she assisted released prisoners in finding jobs. Koskoff has worked as an investigator for the public defender service in Montpelier, Vermont, and as a social worker in a work release program for prisoners in Madison County, Alabama. While attending Antioch Law School, she participated in the school's Prisoners' Rights Clinic, Adult Misdemeanor Clinic, and Juvenile Clinic. In her third year at Antioch, Koskoff was certified to handle misdemeanor cases in Superior Court in the District. After graduation from law school, she was employed as a staff attorney with the Public Defender Service in Pittsburgh, Pennsylvania and worked briefly with a Washington, D.C. law firm. Koskoff began taking CJA assignments in 1981.²⁴ At present, approximately 99 percent of her practice consists of CJA cases.²⁵ She conducts her practice from her

²⁰ Perrotta 635-641.

²¹ Perrotta 647.

²² JX 11, p. 9; Perrotta 646, 647.

²³ JX 11, p. 19; Perrotta 663, 762, 763.

²⁴ Koskoff 785-792.

²⁵ JX 13, p. 47; Koskoff 792, 793.

home and has no employees.²⁶ In late 1982, Koskoff was elected Vice-President of SCTLTA and in October, 1983, she was elected President of SCTLTA.²⁷ [12]

7. Respondent Reginald G. Addison graduated from George Washington University Law School in 1981 and was admitted to practice in the District of Columbia the same year. He grew up in Southeast Washington, "had a couple of brushes with the law"²⁸ as a juvenile, and went into CJA practice determined to help those from a similar background.²⁹ He is a sole practitioner who has accepted CJA cases since February, 1982. Approximately 90 percent of Addison's current practice consists of CJA cases. He maintains an answering service in a part-time office that also serves as his mailing address. He has no employees.³⁰ In the summer of 1983, Addison was elected Secretary of SCTLTA and in October, 1983, he was elected Vice-President of SCTLTA.³¹

8. Respondent Joanne D. Slaight graduated from Catholic University Law School in 1980 and was admitted to practice in the District of Columbia the same year. Before entering law school, she was employed in public interest work in California and New York.³² She began taking CJA assignments in 1981, and at the time of the boycott, approximately 95 percent of Slaight's practice consisted of CJA cases. Until December, 1983, she maintained an office in the District of Columbia. She had no [13] employees.³³ She has never been elected as an officer or director of SCTLTA and did not pay dues to SCTLTA in 1983.³⁴ In August, 1983, Slaight was designated as Chairperson of a "Strike Committee", which later evolved into the "SCTLTA Strike Committee."³⁵ In December, 1983, she stopped handling CJA cases in the District of Columbia and now lives in Staten Island, New York. Slaight is presently employed by The New York Public Interest Research Group, Inc.³⁶

C. The Criminal Indigency Problem In The District Of Columbia

9. The Sixth Amendment of the Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been

²⁶ Koskoff 793.

²⁷ JX 13, p. 19; Koskoff 785, 793, 794.

²⁸ Addison 874.

²⁹ Addison 873-875.

³⁰ JX 12, pp. 7, 9, 10; Addison 873-875.

³¹ JX 9, p. 13, JX 12, p. 20.

³² Slaight 950.

³³ JX 10, p. 7; Slaight 951, 952, 954.

³⁴ JX 10, p. 12; Slaight 973.

³⁵ JX 10, pp. 32, 33; Slaight 973. See also Findings 47, 58.

³⁶ Slaight 950.

committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

10. The Supreme Court has held that the Sixth Amendment right of the accused to be represented by counsel is essential because lawyers are the means through which all other rights are [14] secured.³⁷ In *Powell v. Alabama*, the Court said that the right of fair trial itself would be meaningless without counsel.

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.³⁸

11. The Court has also held that the Sixth Amendment guarantees more than just the right to retain a lawyer or to have one appointed. By its terms, the accused has a right to "the Assistance of Counsel for his defense," and "Assistance" in the context of our adversary system means that the criminal defendant should have by his side a vigorous and effective advocate who at [15] every turn requires "the prosecution's case to survive the crucible of meaningful adversarial testing."³⁹

12. The constitutional guarantee of effective counsel applies to all criminal defendants, rich and poor alike. In *Gideon v. Wainwright*, the Court said:

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.⁴⁰

13. Following *Gideon*, the right of the indigent accused to counsel

³⁷ *United States v. Cronin*, 52 U.S.L.W. 4560 (May 14, 1984); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Powell v. Alabama*, 287 U.S. 45 (1932).

³⁸ 287 U.S. 45 at 68-69 (1932).

³⁹ *United States v. Cronin*, 52 U.S.L.W. 4560 at 4562 (May 14, 1984). See also *Strickland v. Washington*, 52 U.S.L.W. 4565 (May 14, 1984).

⁴⁰ 372 U.S. 335 at 344 (1963).

has been extended to misdemeanor cases in which the accused may suffer a loss of liberty, and to the crucial preliminary proceedings in a criminal proceeding that can determine the outcome of the trial.⁴¹

14. Notwithstanding the "noble ideal" of the Sixth Amendment celebrated in cases both before and after *Gideon*, the real world differences between the quality of "Assistance" [16] available to the affluent as compared to the needy⁴² persists for several reasons. To begin with, there is the sheer dimensions of the criminal indigency problem facing an urban jurisdiction like the District. About 85 percent of the persons charged with criminal offenses in the District are eligible for court-appointed counsel.⁴³ This translates into approximately 25,000 indigency cases closed in 1982 by court-appointed counsel,⁴⁴ and the addition of new "papered"⁴⁵ indigency cases at the rate of 50 to 80 a day.⁴⁶ Further compounding the District's problem is a line of legal authority creating a substantive right to quality representation for the indigent accused at the very time when criminal law itself has been imbued with a host of complex procedural problems requiring an increasingly high level of legal skill.⁴⁷ [17]

D. *The District's Answer To The Criminal Indigency Problem*

15. The District's answer to its criminal indigency problem is a mixed system consisting of both private lawyers compensated under the Criminal Justice Act (CJA lawyers) and government lawyers employed by the District's Public Defender Service (PDS). (Findings 16 to 19.)

16. At the center of the District's mixed system is the Public Defender Service (PDS), which not only constitutes one of the two operating arms of the mixed system, but also contains within its table of organization the Criminal Justice Act Office (CJA Office of PDS), the administrative office with responsibility for the other component of the mixed system—the private practitioners (CJA lawyers) compensated under the District's Criminal Justice Act (D.C. CJA).⁴⁸

17. The PDS component of the mixed system was established by

⁴¹ *United States v. Gouveia*, 52 U.S.L.W. 4659 (May 29, 1984); *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

⁴² See, e.g., *Strickland v. Washington*, 52 U.S.L.W. 4565 at 4576 (dissenting opinion of Mr. Justice Marshall) (May 14, 1984) ("It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure that he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case".).

⁴³ Carter 88, 126, 127, Robinson 326.

⁴⁴ RX 14S; Carter 154.

⁴⁵ A "papered" case is one in which formal charges are filed by the United States Attorney who prosecutes all criminal offenses in the District. If a case is "no papered" (i.e., no charge is filed) the accused is released. The decision to "no paper" a case is usually, but not always, made early in the day before court-appointed counsel has been assigned. Carter 76, 128.

⁴⁶ CX 233E; RX 158E.

⁴⁷ Hazard 1139-1142.

⁴⁸ Carter 67-69, Robinson 312-314.

Congress in 1970 as the successor to the Legal Aid Agency. PDS lawyers are full-time employees of the District of Columbia.⁴⁹ By statute, PDS may represent only criminal defendants charged with an offense punishable by imprisonment for six months or more, and it may represent no more than 60 percent of the indigents in this overall category.⁵⁰ In fiscal 1982, PDS was authorized 110 employees. Of its total complement of 56 [18] attorneys, three supervisors and 38 attorneys are assigned to indigency cases in the Criminal Division of Superior Court.⁵¹

18. The CJA lawyers component of the mixed system is open to every member in good standing of the D.C. bar having a local address and a local telephone number. To become eligible to receive appointments under the D.C. CJA, all that a private attorney has to do is register with PDS' CJA Office.⁵² Although there are more than 1,200 private attorneys on the master list of attorneys registered with the CJA Office, most appointments go to the approximately 100 lawyers⁵³ (the CJA "regulars") who derive almost all of their income from representing indigents,⁵⁴ and make themselves available to take appointments on a regular basis.

19. The two branches of the District's mixed system differ sharply in the role each performs in the criminal justice system. Criminal offenses under the D.C. Code are classified as [19] misdemeanors, felony I's, and felony II's.⁵⁵ Most of the cases requiring court-appointed lawyers (20,000 of the 25,000 indigency cases closed in fiscal 1982) are misdemeanors,⁵⁶ and clearly it is the CJA lawyers who have assumed the responsibility of moving this large volume of lesser crimes—19,475 misdemeanors in fiscal 1982⁵⁷—through the criminal justice system. About 80 percent of the cases handled by CJA lawyers are misdemeanors. The CJA lawyers also handled some 4,000 felonies in fiscal 1982 but these were mainly felony II's.⁵⁸ In all, the CJA lawyers are responsible for fully 85 percent of all the indigency cases.⁵⁹ PDS,

⁴⁹ Carter 69.

⁵⁰ D.C. Code § 1-2702(a)(1); Carter 158.

⁵¹ Carter 138, 139.

⁵² Robinson 354.

⁵³ Estimates of the size of the corps of CJA regulars vary widely in the record (ranging from 50 to 200), and the approximation indicated in the text merely reflects the figure mentioned most often. See, e.g., JX 2, p. 84, JX 3, p. 155, JX 12, p. 112, JX 13, pp. 47, 48; CX's 38G, 76D, 80A; Robinson 323-326, 379.

⁵⁴ Because of the nature of CJA practice—its long hours away from the office (assuming the CJA lawyer has an office), the deadlines of Superior Court, and the problem of meeting deadlines in other courts—CJA regulars ordinarily do not take civil cases, nor do they usually appear on the criminal side of U.S. District Court. JX 2, pp. 80-82.

⁵⁵ Felony I's are the more serious crimes—homicide, rape, and armed robbery—carrying a maximum sentence of fifteen years. Felony II's are crimes such as burglary and larceny subject to a maximum prison term of fifteen years. Misdemeanors are punishable by imprisonment for no more than one year. Carter 78.

⁵⁶ RX 14S; Carter 154, 155.

⁵⁷ RX 14S; Carter 153, 154.

⁵⁸ RX 14S; Carter 154, 156-158, Perrotta 642, 643.

⁵⁹ RX 14S.

in contrast, appears in only about 8 to 10 percent of the criminal indigency cases.⁶⁰ This relatively small percentage, however, represents most of the more complex felony I's, including two-thirds of all murder cases.⁶¹ In short, the CJA lawyers handle most of the volume; PDS, on the other hand, operates on the basis of a limited caseload heavily [20] skewed toward the more difficult felony I cases.⁶² The District is unique among major urban jurisdictions in its reliance on assigned private lawyers to handle such a large percentage of its huge indigency caseload.⁶³ In 1982, payments made to CJA lawyers by the District amounted to \$4,579,572. The PDS appropriation was \$3,306,000.⁶⁴

20. In addition to the CJA lawyers and the PDS components of the District's mixed system, indigent criminal defendants are also represented from time to time by private attorneys who take assignments on an uncompensated pro bono basis. Less than one-half of one percent of the eligible indigent defendants are represented by these pro bono attorneys.⁶⁵ Third-year law students from Howard, Georgetown, American, Antioch, Catholic, and George Washington University Law Schools who are participating in clinical programs are permitted by Superior Court rules to handle misdemeanor cases under the guidance of a supervising attorney. These uncompensated students handle approximately three to five percent of indigent criminal cases.⁶⁶[21]

21. The record shows that there are alternatives to the District's mixed system, but no single solution has been a panacea, and the effectiveness of any system is largely a function of the level of public funds made available for indigency representation.⁶⁷ Voluntary pro bono, which obviously requires no public funding, may be feasible in a jurisdiction having a relatively small number of indigency cases, but there is no evidence that any voluntary system has operated effectively in the context of the massive criminal indigency problem associated with an urban inner city.⁶⁸ Another possible option (also requiring no public funds) is the use of compulsory pro bono—that is, a rule imposed by court, unified bar, or legislature, requiring all lawyers to serve an uncompensated turn as assigned counsel. Such a system has been criticized on several grounds: the lack of experience in criminal law of most of the prospective “draftees”; an unfair shift of what

⁶⁰ RX's 5I, 16C; Carter 149, 156. PDS caseloads are far below the statutory limit of 60 percent (see Finding 17) of the kinds of cases it is permitted to take. RX 4E; Carter 81.

⁶¹ RX's 4G, 5I; Carter 82.

⁶² Carter 81. More than 65 percent of the PDS cases are felonies (Carter 81), and of the PDS felony caseload, 75 to 80 percent are felony I's. RX 14R.

⁶³ CX 38K; Hazard 1172.

⁶⁴ RX's 4Z-8, 22M.

⁶⁵ Robinson 327.

⁶⁶ RX 11B, C; Carter 80, 81, 136, 137, 267, 268.

⁶⁷ Hazard 1165-1170.

⁶⁸ See Isbell 1357.

should be a matter of societal concern to one group of professionals; the appearance of imbalance in the criminal justice system and the likelihood of inadequate representation that arises when the defense but not the prosecutor is expected to work for nothing; and the strong feeling among members of the bar that a lawyer's duty to perform public service should be left to the individual's discretion and he should be free to exercise that discretion by choosing the [22] kind of pro bono work he favors.⁶⁹ As it happens, the District's most recent experience with compulsory pro bono confirms the inherent limitations of the compulsory system. In 1974, when the CJA regulars briefly refused to take additional cases in protest over a fiscal lapse which had dried up all CJA funds, the Chief Judge of the Superior Court directed PDS to draw up a list of all active attorneys so that they might be summoned to serve. Only 43 percent of the attorneys summoned actually reported, thereby demonstrating strenuous bar resistance to the notion of forced contribution of services and a general lack of enthusiasm for criminal practice. As a result of this incident, the Chief Judge has indicated an unwillingness to impose similar [23] drafts.⁷⁰ In any event, there are legal impediments to compulsory pro bono, and from a political standpoint, uptown bar opposition in the District would be so strenuous as to make the likelihood of its adoption remote in the extreme.⁷¹

As for universal PDS—that is, a system in which the public defender represents all indigents—there is little evidence that it would be a practical solution to the District's indigency problem. Technically, no jurisdiction can ever have a universal PDS if for no other reason than the existence of conflicts in multiple-defendant cases that require the appointment of separate counsel. Even more important is the fact that budgetary constraints on effective indigency representation do not disappear under universal PDS. On the contrary, they are compounded since by definition universal PDS means an increased government payroll with concomitant government salaries and gov-

⁶⁹ RX's 2Z-19, Z-20, Z-32, 25Z-5; Hazard 1157, 1158, Isbell 1363-66, Lefstein 1480-1484. See also RX's 25Z-4, 26Z-1, 28Q, for the view that compulsory pro bono simply perpetuates the perception that representation of indigents is a form of bargain-basement law and *Ferri v. Ackerman*, 444 U.S. 193, 199 (1979) in which the Supreme Court observed:

The Criminal Justice Act of 1964 [which first gave D.C. lawyers compensation for representing indigents] was enacted to provide compensation for attorneys appointed to represent indigent defendants in federal criminal trials. In response to evidence that unpaid appointed counsel were sometimes less diligent or less thorough than retained counsel, Congress concluded that reasonable compensation would improve the quality of the representation of indigents.

⁷⁰ RX 55M-"O"; Carter 216-218, Isbell 1361-1366. See also H. Rep. No. 93-1172, 93rd Cong. 2d. Sess. p. 2 (1974). This reluctance exists notwithstanding the favorable impression made by the drafted lawyers in 1974. The judges found that although the draftees initially had difficulty finding their way around the criminal court system, the quality of their representation was high. This was attributed to the draftees sense of professional pride. RX 55Z-4. See also RX 2Z-9 for similar experience in the Northern District of Illinois, but note "that only on rare occasions do assigned counsel in the Northern District of Illinois elect, in fact, to contest the guilt of their clients and virtually never pursue a case through the appellate process." *Ibid.*

⁷¹ Carter 218, Pickering 1078, 1098, 1100-1102, Isbell 1362-1365, Lefstein 1483, 1484.

ernment fringe benefits. When a near universal public defender system has been tried in large urban settings, experience has demonstrated that more often than not caseloads [24] have increased faster than the level of funding, thereby creating staff shortages and making quality representation exceedingly difficult.⁷²

Still another possible choice is a contract system in which the city asks private attorneys to bid for indigency work. Although the contract system has been tried in a few small jurisdictions, its possible extension to a large metropolitan area has been sharply questioned on the grounds that the quality of legal service may be compromised if a contractual promise to deliver is made at firm prices regardless of caseload or amount of time required for specific cases.⁷³

E. The Operation Of The District's CJA Program

22. Appointments under the District's mixed system are made Monday through Friday by one of three commissioners and on Saturdays by a Superior Court judge. The process begins when the CJA Office of PDS receives from the U.S. Marshall's Office a "lock-up list" showing the identity of persons arrested and the offenses charged.⁷⁴ After interviewing all persons on the lock-up list to determine their eligibility for court-appointed [25] counsel, PDS presents the list (with the designation "CJA" for an indigent) to the commissioner or judge assigned to make the appointments. Typically, about 85 percent of the persons arrested on the lock-up list have the designation "CJA" next to their names.⁷⁵ In addition to the lock-up list, the CJA Office furnishes the commissioner or judge with an "attorneys available list". The attorneys available list shows the names of CJA lawyers who have telephoned the CJA Office of PDS between 7:45 a.m. and 8:15 a.m. to establish their availability for that day. The names of CJA lawyers are entered on the attorneys available list in the order of their telephone calls to the CJA Office.⁷⁶

23. Using the lock-up and attorneys available list, the commissioner (or on Saturdays and holidays a Superior Court judge) usually makes appointments to CJA attorneys by using a simple match-up—the first person appearing at the beginning of the lock-up list is matched with

⁷² CX 38L; RX's 25J, 26Z-33; Carter 280, 281, Koskoff 791, Hazard 1166, 1167, Lefstein 1469, 1170. See also RX 26Z-14-Z-22 for a description of the San Francisco public defender office where in shoddy, cramped, roach-infested offices, young attorneys lacking training, supervision, and support staff, attempt to practice criminal law.

⁷³ RX 26Z-42; Lefstein 1467, 1468.

⁷⁴ Three lock up lists are received by PDS' CJA Office each day: an early list of persons arrested during the preceding night, a mid-day list of persons arrested that morning, and a late list of persons arrested in the late morning and early afternoon. Carter 74, Robinson 328, 329.

⁷⁵ Carter 88, 89, 127, Robinson 326.

⁷⁶ Carter 70-72, Robinson 313, 314. Heading the attorney available list are the names of the one or two PDS lawyers who are designated to take indigency assignments for a particular day (see, e.g., CX's 165-216D). The PDS lawyers receive what is perceived to be the more complex cases, usually limited to no more than two or three to each designated PDS lawyer on the available list. Carter 88, 89, 96, 176.

the first attorney appearing on [26] the available list, and so on down the two lists.⁷⁷ This rotation, however, may be broken for several reasons. First, at the start of a CJA career, a new attorney, irrespective of position on the available list, will generally receive only misdemeanors.⁷⁸ Second, if a particularly complex case comes up, the rotation will be broken as the commissioner or judge searches for a more experienced CJA lawyer on the available list.⁷⁹ Third, the rotation may be broken if a CJA attorney had made a request that he or she receive only a particular type of [27] case (e.g., only felonies or only misdemeanors),⁸⁰ and some CJA attorneys never receive a serious case whether they want one or not.⁸¹

24. In general, the most important consideration in making indigency appointments to CJA lawyers is availability.⁸² A lawyer must be assigned to every case, and even an inexperienced CJA lawyer may be assigned to a serious felony II if a more seasoned lawyer is not available.⁸³ Because the District has no shortage of indigent accused, in no time at all (at least in the [28] pre-boycott era) the eager newcomer can obtain a full caseload—many misdemeanors, a few felony II's, and even an occasional felony I.⁸⁴ As one veteran CJA lawyer described the operation of the CJA system—

... there was a sense that any lawyer who walked in off the street, if he was a member of the bar, not only qualified to take cases but was entitled to have cases. It was almost a sense that the CJA program was not only a program of representation for indigents

⁷⁷ JX 5, p. 55, JX 10, pp. 76, 77; Robinson 350-352. Because of the sharp rise in the number of lawyers calling in after the post-boycott fee increase, an alphabetical list has been substituted for the one based on order of call-in. Robinson 357, 358.

⁷⁸ JX 2, p. 63, JX 5, pp. 54, 55, JX 11, p. 82; Perrotta 642, Slight 953.

⁷⁹ JX 5, pp. 53, 55, JX 10, p. 79, JX 11, p. 109; Carter 78, Robinson 321, 322, 350-352, McEwen 436, 438-440, Slight 953. The complexity of a case is not always apparent to the assignment commissioner since all that he has before him is a charge sheet that makes no distinction between a felony charge, which will plead out quickly, and a misdemeanor having serious implications. JX 13, pp. 44, 45; CX 80C; Addison 905, 906. Moreover, the perception of CJA lawyers is that departures from the usual rotation in the interest of a special appointment to a complex case may be even more haphazard than the rotation itself. Several CJA lawyers testified that an important factor in non-rotational appointments is the personal relationship between a CJA lawyer and the CJA Office. These personal relationships are significant because appointment commissioners often ask the CJA Office to make a recommendation in a complex case. At best, the CJA Office recommendation reflects the limited knowledge that CJA personnel have of actual attorney performance; at worst, recommendations may turn on such bizarre factors as the willingness of a CJA lawyer to turn out for the CJA Office softball team. Furthermore, the very fact that most appointments are made by commissioners rather than judges tends to compound the hit-or-miss nature of the selective appointments. A commissioner, in contrast to a judge, knows little about the actual courtroom capability of CJA lawyers, and with nothing else to go on, an appointment may turn, for example, on how the commissioner reacted to the way a particular CJA lawyer represented a client at a preliminary hearing before the same commissioner. JX 10, pp. 74-77, JX 12, p. 122, JX 13, pp. 41-45; Perrotta 642.

⁸⁰ JX 13, p. 44. On rare occasions the available list is not consulted at all as commissioner, judge, or the head of the CJA Office of PDS asks a lawyer to take a case because of past performance in a similar case, prior representation of the same client, or simply because the CJA lawyer happens to be around the courthouse when a special need arises. Carter 80. In addition, for the few cases originating from grand jury indictments ("grand jury originals"), judges appoint highly regarded attorneys by telephoning them directly or by mailing a notice of appointment. JX 10, p. 79; Perrotta 656, 658, 659.

⁸¹ Perrotta 767, 768.

⁸² JX 12, p. 120.

⁸³ JX 11, pp. 107, 108, JX 12, pp. 120-122.

⁸⁴ JX 5, pp. 54, 55, JX 10, p. 74, JX 11, pp. 43, 82, 123; Perrotta 642, 643.

but a welfare for broken down or has-been lawyers. When I first went in to talk to Herb Robinson [Chief of the CJA Office] and he put me on the rolls and indicated what I needed to do to pick up cases and I got a bunch of cases within 30 days, I thought that was attributable to my sterling qualities which were no doubt immediately apparent to him. But it turned out that everybody in those days who put his name down and got all the cases they wanted and more because there were just so many cases and so few people.⁸⁵

25. On the basis of this record, no definitive finding can be made about the performance of CJA lawyers in handling their caseloads except to observe that collectively they move a large volume of cases through the District's criminal justice system. See Finding 19. As for quality, there is plenty of evidence that within the corps of CJA regulars are dedicated lawyers from public interest backgrounds who consider representation of the [29] poor as the highest calling of the legal profession.⁸⁶ Others are drawn by a combination of factors including the attraction of criminal law litigation and a strong desire to be their own bosses (or an equally strong desire to avoid a large corporate practice).⁸⁷ There are still others who enter CJA practice as a temporary expedient—a way to pay bills until a civil practice develops.⁸⁸ Equally important is the fact that the law schools continue to pour graduates into a job market that is shrinking because of government contraction and deregulation with the result that more than a few young lawyers come to CJA practice because there are no other jobs available.⁸⁹ The mixed motivation of CJA lawyers produces a bar of mixed ability. Many CJA lawyers are credited with doing an excellent job in representing their clients, and the consensus seems to be that the overall quality as well as the number of CJA lawyers had improved markedly even before the boycott.⁹⁰ But the CJA corps still has its fair share of courthouse “hangers-on” who take as many cases as possible (usually misdemeanors) in the expectation that without investigation, preparation, or concern for the particular needs of their clients, their cases will plead out, [30] and hassles with Bar Council over charges of ineffective representation will be avoided as a living is scratched out collecting CJA fees.⁹¹

⁸⁵ Perrotta 673, 674. See also JX 2, p. 78 for an account of a disbarred lawyer who had accumulated a docket of 300 cases.

⁸⁶ JX 3, pp. 205, 206; Branton 1385, 1386.

⁸⁷ Klein 945, 946, Slaight 952, 953.

⁸⁸ Koskoff 860.

⁸⁹ JX 5, p. 97; Carter 113–115, 232, Perrotta 742, Pickering 1081, 1082.

⁹⁰ JX 3, pp. 155, 205; RX 74A; Carter 90, 91, 114, 115, Pickering 1082, 1083, 1085, 1086, Branton 1385, 1386, Lefstein 1506.

⁹¹ Perrotta 652, 653, Pickering 1085, 1086. See also JX 2, pp. 63, 69, 70, JX 11, p. 107. Bar Council, charged with bringing proceedings against members of the D.C. Bar for ethical or competency lapses, is a constant source of apprehension among CJA lawyers. These fears may be largely chimerical since few CJA lawyers have ever been barred from taking cases because of incompetence. See RX 55M.

F. *The CJA Rate Schedule*

26. The origin of pre-boycott CJA fees (\$20 for out-of-court time and \$30 for in-court time) can be traced back to the 1960's when most criminal cases in the District of Columbia were heard in United States District Court. At that time the local District of Columbia court—the Court of General Sessions—only heard minor misdemeanors. Private attorneys appointed to represent indigents in both United States District Court and the Court of General Sessions were not compensated (except for actual out-of-pocket expenses) under the lofty notion that it was part of their professional responsibility to represent indigents. The concept of uncompensated professional responsibility was largely carried forward into the Criminal Justice Act of 1964 (the federal CJA). This was the first federal statute to provide for compensation but it did so at the niggardly rate of \$15 for in-court time and \$10 for out-of-court time.⁹² The federal CJA Act also provided that compensation could not exceed \$500 for felony cases and \$300 for misdemeanor cases except in “extraordinary [31] circumstances”—i.e., when a judge determines that payment in excess of the limits “is necessary to provide fair compensation for protracted representation. . . .”⁹³

In 1970, the federal CJA was amended by increasing the maximum hourly rate for in-court time from \$15 to \$30 and the maximum rate for out-of-court time from \$10 to \$20. The 1970 amendment also increased the maximum compensation per felony case from \$500 to \$1000 and for a misdemeanor case from \$300 to \$400. The amendment contained a provision permitting additional compensation of up to \$1000 for appellate work and up to \$250 for post-trial motions.⁹⁴

By judicial and administrative interpretation (and later by legislative enactment) the federal CJA Act (including the 1970 amendments) was applied to the District's local courts—the Court of General Sessions until 1970 and Superior Court thereafter. But because of the uncertainty respecting the legality of making payments under the federal CJA to an autonomous local court,⁹⁵ in 1974 a District of Columbia Criminal Justice Act (the District CJA) was passed authorizing the Joint Committee On Judicial Administration (consisting of three judges from the District's Superior Court and two judges [32] from the District's Court of Appeals) to promulgate an indigency fee schedule, not to exceed the federal CJA level.⁹⁶

What this all boils down to is that in 1983 (just before the SCTLA

⁹² RX's 7A-D, 8PS, 27H, I.

⁹³ RX 7C.

⁹⁴ 18 U.S.C. 3006A(d)(1)-(3).

⁹⁵ The Administrative Office of the United States Courts and the Chief Justice of the Supreme Court took the position that after 1974 funds appropriated for the Federal CJA could only be applied to federal courts, and not to the District's newly created Superior Court. See H. Rep. No. 93-1172, 93d Cong., 2d Sess. pp. 1, 2 (1974).

⁹⁶ CX 230A-L; Carter 118.

boycott) lawyers compensated under the District's CJA were being paid according to a schedule fixed in the federal CJA over 10 years earlier: \$30 per hour for in-court time; \$20 per hour for out-of-court time; \$1000 per case maximum for felonies; \$400 per case maximum in misdemeanors; and \$1000 per case maximum for appeals.

27. Actual payments to CJA lawyers are made through a voucher method. Vouchers showing the amount and nature of the time spent on a case are submitted to the presiding judge if the case proceeded to trial or to a judge in chambers if no trial was held.⁹⁷ The presiding judge has the authority to reduce the amount sought and in a small percentage of cases this authority has been exercised.⁹⁸ If the voucher seeks compensation beyond the maximum per case limits of \$1,000 for a felony and \$400 for a misdemeanor on the grounds that it was an extended or complex matter, the CJA lawyer must submit a statement justifying the request for extra compensation. These requests are reviewed by the presiding judge, and a recommendation in support of extra [33] compensation is then forwarded to the Chief Judge for ratification. Approximately five to ten percent of all vouchers submitted involve requests for compensation beyond the maximum limits. Most of these requests are approved.⁹⁹ The average voucher paid to a CJA attorney for trial work in the fiscal year ending September 30, 1983, was \$231.21.¹⁰⁰

28. CJA lawyers do not compete against each other to obtain appointments on the basis of hourly rates or the level of compensation per case. The rates paid per hour to CJA lawyers and the per case ceiling are established by statute, and the same compensation is paid to CJA lawyers irrespective of their level of skill, experience, or the quality of service they render. In short, under the D.C. CJA, there is no head-to-head price competition in the sense that CJA lawyers make price or hourly bids in seeking appointments. Instead, each CJA lawyer accepting an appointment automatically accepts the rate established in the D.C. CJA.¹⁰¹

29. The D.C. CJA contains no limitation on the total compensation a CJA lawyer may earn. However, a rule established by the Joint Committee on Judicial Administration limited the [34] maximum compensation to \$42,000 per annum. Very few CJA lawyers reach the

⁹⁷ If a case is not "papered", no voucher may be submitted even though the CJA lawyer put in time on the case before the U.S. attorney decided to drop charges. JX 2, p. 48; RX 55Z.

⁹⁸ A voucher may be cut, for example, if it reflects accurately that the CJA lawyer spent a significant amount of time at the courthouse waiting for a case to be called. JX 5, p. 70.

⁹⁹ Carter 172, 173. CJA lawyers know from experience, however, that there are certain categories of time spent on a case that should be avoided either in submitting a voucher below the maximum or in asking for an excess. These include hours spent on legal research, waiting in a judge's courtroom, or time spent (particularly in drug cases) in developing sentence alternatives to institutionalization. RX 74B, C. See also JX 5, p. 70, JX 10, pp. 82, 83; Lefstein 1438, 1439.

¹⁰⁰ CX 233L.

¹⁰¹ JX 10, pp. 77, 78; Lefstein 1436.

\$42,000 maximum.¹⁰² After the 1983 boycott, the maximum was raised to \$50,000.¹⁰³

*G. The Impact Of The CJA Fee Level On
The Criminal Justice System*

30. The impact of the pre-boycott fee level in the CJA bar was described as early as 1975 in the authoritative report of the Austern-Rezneck Committee, a joint undertaking of the Judicial Conference of the D.C. Circuit and the D.C. Bar.¹⁰⁴ Sweeping aside the cant surrounding indigency practice, the Austern-Rezneck Report described the huge gap between the facile assumptions behind the District's Criminal Justice Act and the realities of CJA practice.

We are well beyond the point where it can be said that the criminal justice system in the District of Columbia can function without attorneys dedicated primarily to the practice of criminal law. Since close to 90% of all defendants in this city are indigent, criminal practice necessarily means CJA practice. The courts—especially D.C. Superior Court—seem to have recognized this. And, yet, criminal lawyers continue to be treated as appendages to the system. They [35] are desperately needed, but they are inadequately compensated and frequently abused.¹⁰⁵

—It is the community as a whole not a relatively small group of attorneys which should bear the financial burden of providing representation for indigent defendants.

—A majority of the attorneys who practice regularly under the Criminal Justice Acts do this for a living. It is their primary source of income, notwithstanding the hope and expectation of Congress that the system can function with attorneys practicing CJA law as a sideline. There are too many cases, too few attorneys, and criminal practice necessarily demands a constant honing of skills and knowledge.¹⁰⁶

31. The Austern-Rezneck Report found that the existing low rates impacted on all facets of the indigency problem: the ability to attract new talent to represent the poor; the willingness of experienced attorneys to continue in this work; and the quality of representation provided to indigents. Ultimately, the report concluded, the rates reflected on the depth of the District's commitment to protection of the constitutional rights of criminal defendants. [36]

¹⁰² JX 10, p. 81, JX 11, p. 124; CX 38N. It is the perception of CJA lawyers that their colleagues who "max out" (i.e., earn the pre-boycott maximum of \$42,000) tend to concentrate in the easier misdemeanors and plead out most of their case. JX 11, p. 107; Perrotta 652, 653. It is estimated that the average gross earnings of CJA regulars is about \$20,000 per annum. JX 8, p. 77. See also JX 2, p. 86.

¹⁰³ Perrotta 652.

¹⁰⁴ The Austern-Rezneck Committee was assisted by a professional staff funded by a grant from LEAA and had several advisory panels drawn from the staffs of the U.S. Attorney's Office and PDS. RX 55B.

¹⁰⁵ The Austern-Rezneck reference to attorney abuse confirms the perception of some CJA lawyers that they are regarded by those in the criminal justice system (from marshalls to judges) as indistinguishable from their clients to the point that the CJA lawyers themselves are subject to being punished along with the criminals. JX 6, pp. 62, 70, 71; CX 80E. See also Addison 900, 901. A particular sore point with CJA lawyers was a court order providing that they were required to take child neglect cases, the bane of all indigency lawyers since it means that the appointed attorney must look after the child's interests for his or her entire minority. Addison 897, 898.

¹⁰⁶ RX 55Z-7, Z-8.

—The criminal justice system as now constituted may attract new talent, but cannot seem to keep it. Many able attorneys who want to practice criminal law find themselves caught in a dilemma between their sense of commitment and the personal and financial sacrifices involved in fulfilling that commitment. Few enter the practice of criminal law in the hopes of getting rich. But too often, the low rates of CJA compensation drive them out of the criminal law.

—It is axiomatic that lawyers are no different from other people. They cannot be expected to work for little or nothing, just as one would not expect a contractor to build a house without being paid for the cost of labor, materials, and overhead. Yet, criminal lawyers practicing under the Act are frequently asked to provide representation for which they are not paid, or paid very little. One of two things will happen: either the attorney will not do the work that a case requires, at great cost to the defendant, or he will do the work and suffer a financial loss.

—Finally and this is probably the most important point a system which is heavily weighed against the indigent defendant in terms of the compensation that his attorney will receive raises serious questions of equal protection. The indigent's rights under the Constitution are no less than the rights of the well-to-do. And, yet, if his counsel is not adequately paid, the indigent defendant has little reason to expect that his rights will receive the protection they would get if he could afford to retain counsel. Not only must the system protect his interests, it must *appear* to protect them if he is to have any confidence in it.¹⁰⁷

32. The specific recommendations of the Austern-Rezneck Report, including raising fees to \$40 for both in-court and out-of-court time, were as follows: [37]

Appropriations for the D.C. Criminal Justice Act must be increased to ensure that attorneys are adequately compensated and that defendants receive effective representation. The committee strongly supports the efforts of the Joint Committee on Judicial Administration of Superior Court and the D.C. Court of Appeals to obtain increased funding.

The rate of compensation under both the local and Federal Criminal Justice Acts should be raised to not less than \$40 an hour for both in-court and out-of-court time.

Counsel should be compensated for work performed in any assigned CJA case, whether or not charges are filed.

The statutory maximum compensation for misdemeanor and felony cases should be raised to \$800 or \$1600, respectively.

The maximum compensation for representation in post-trial matters should be raised from \$250 to \$800 if the underlying case was a misdemeanor and to \$1600 if the underlying case was a felony.

The \$18,000 annual limit for CJA attorneys practicing in D.C. Superior Court should be abolished.

Claims for excess compensation should be treated like any other vouchers; that is, they should not be subject to approval of the trial judge and review by the chief judge of the court. If the disbursement agency has questions about a claim, these may be addressed

¹⁰⁷ RX 55Z-8, Z-9.

