

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The Secretary of the Commission having thereafter withdrawn this matter as to this respondent from adjudication in accordance with Section 3.25(c) of its Rules; and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. Bokart, Jonathan J. Groner, Mary Anne M. Fox and M. Suzanne Miller.*

For the respondents: *Willis B. Snell, Michael L. Denger and Williard 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.

to the trial judge and the attorney, but it is the disbursement agency which should have final authority.

The \$300 limit on compensation for experts, investigators, and other outside services should be mitigated by provisions for excess compensation to experts in appropriate cases.¹⁰⁸ [38]

33. The Austern-Rezneck Report was only one of a series of studies to reach the conclusion that the pre-boycott CJA fees were far too low. The CJA fee structure, however, remained at the \$30/\$20 level between 1975 and 1983 despite the prevalence of run-away inflation and the resulting erosion of even these minimal payments.¹⁰⁹ Further compounding the problem of the adequacy of CJA compensation during this period, was the imposition of additional procedural obligations on lawyers at the very time when the courts (and bar associations) indicated a willingness to consider claims of malpractice, ethical malfeasance, and possible violation of Sixth Amendment rights grounded on counsel's inadequate trial preparation in indigency cases.¹¹⁰ This development alone meant that wary CJA lawyers had to spend more time representing each client than was required when the CJA rates were first set. Another trend that became apparent after the Austern-Rezneck Report was the influx of highly motivated young attorneys who had benefited from participation in clinical criminal programs and who came into CJA practice determined to provide quality representation.¹¹¹ Although the combination of the increasingly stringent standards for rendering effective assistance to indigents, and the work of these new CJA practitioners generally improved the overall [39] quality of representation after 1975,¹¹² criminal justice experts (including current and former District officials directly involved with the criminal justice system) reached the conclusion that the adverse effects of the low rate schedule observed earlier in the Austern-Rezneck Report had persisted into 1983. The consensus of this expert opinion may be summarized as follows—

First, because of the low rate of compensation, CJA regulars were compelled to maintain inordinately large caseloads. The size of a CJA lawyer's caseload, in turn, impacted on the ability to provide quality representation since an excessive caseload inevitably meant limited preparation and investigation time, the two essentials of effective advocacy.¹¹³ This conflict between manageable caseload and compensation was more often than not resolved by the CJA lawyer accepting

¹⁰⁸ RX 55J, K.

¹⁰⁹ RX's 38Z-47, 39E, 54I.

¹¹⁰ Hazard 1138-1142.

¹¹¹ Carter 229, Perrotta 775, 776, Hazard 1162, 1163.

¹¹² JX 3, pp. 155-157; CX 38H, I; Perrotta 742, 775, 776, Pickering 1085, Branton 1399.

¹¹³ JX 5, pp. 65, 66; RX 25Z-21-Z-23; Hazard 1144-1146.

far too many appointments in order to make a bare living.¹¹⁴

Second, while CJA practice initially attracted able young attorneys, the low rates eventually drove experienced and capable CJA attorneys into more lucrative fields.¹¹⁵ This loss of attorneys with two or three years experience was described by [40] Professor Hazard, an expert on the problem of maintaining professionalism in the criminal justice system, as the most pernicious effect of a low rate.¹¹⁶ The tendency of low D.C. CJA rates to drive out of the criminal justice system the most experienced attorneys was also noted by Larry Polansky, Executive Officer of the D.C. Courts. Mr. Polansky observed that because of low D.C. CJA rates there was a changing cadre of CJA lawyers with many "blooded professionals" leaving when they "find that they just can't keep up with the pace necessary to make what is a minimal living out of CJA work".¹¹⁷ Francis Carter, Director of PDS, agreed with this assessment. He testified that low D.C. CJA compensation discouraged the more ambitious and aggressive attorneys to the point where there was a regular pattern of attorneys staying in CJA practice for a short time and then leaving for financial reasons to seek other avenues of practice.¹¹⁸ Professor Hazard concluded that the loss of experienced CJA lawyers was especially significant since it meant that there was a shortage of skilled practitioners to handle the low visibility but serious felonies that were not especially attractive to the pro bono departments of major uptown law firms.¹¹⁹ [41]

Third, low CJA rates meant that indigency practice in the District was conducted under primitive conditions. CJA lawyers were attempting to meet the constitutional requirement of "Assistance" without offices, without secretarial assistance, without paralegals, and basically without any of the standard accouterments of a modern legal practice. Typically, they worked out of their homes and did their own typing.¹²⁰ According to Professor Lefstein, a former Director of PDS and an expert in the field of indigency representation, the lack of ordinary support services, which is the hallmark of CJA practice, is not a question of personal deprivation or diminished life style—it impacts directly on the ability of lawyers to represent their clients effectively.¹²¹

¹¹⁴ JX 8, p. 79, JX 9, pp. 31, 32, JX 12, p. 55; RX 90B, C, E, F; Branton 1410, 1411, Lefstein 1445. CJA lawyers estimate that they must close about 100 cases in order to gross the CJA average of \$20,000 per annum. JX 12, p. 42; RX 90E, F.

¹¹⁵ JX 2, p. 79, JX 7, pp. 26, 27; RX's 39F, 40A, 42I, 46I, 54J, 72A, B; Branton 1386, 1408, 1409, Lefstein 1440-1442.

¹¹⁶ Hazard 1150-1152.

¹¹⁷ RX 91C.

¹¹⁸ Carter 228, 229.

¹¹⁹ Hazard 1138-1144, 1150-1152.

¹²⁰ JX 8, p. 19, JX 10, p. 81; Isbell 1336, Lefstein 1439, 1440, 1447.

¹²¹ Lefstein 1439, 1440. See also RX 39C. For evidence of the impact of CJA practice on the ability (and incentive) to keep current with legal developments, see JX 8, p. 83.

H. *The Pre-Boycott Campaign To Get Higher Fees*

34. Prior to the boycott, the CJA lawyers conducted a vigorous campaign to obtain higher fees. Although they received backing from every segment of the community concerned with the criminal justice system, the CJA lawyers were unable to convert this support into effective political action. (Findings 35 to 54.)

35. Interest in the problem of the CJA rates increased markedly after March, 1982, when the report of the Horsky Committee was published. This committee of 42 lawyers had been [42] formed by the D.C. Bar to assess the 1970 reorganization establishing Superior Court as the District's local court of criminal jurisdiction.¹²² The Horsky Committee Report noted that the conditions described in the Austern-Rezneck Report had been aggravated by inflation, and recommended that all necessary steps should be "taken by the Superior Court, the Mayor, and the D.C. Council to raise promptly the levels of compensation for attorneys appointed under the Criminal Justice Act to at least the levels proposed by the Austern-Rezneck Committee."¹²³ Following publication of the report of the Horsky Committee, the D.C. Bar passed a resolution urging a CJA increase. This support of the uptown bar for the cause of the CJA lawyers has continued unflinching to the present.¹²⁴

36. On June 16, 1982, Bill No. 4-486 was introduced in the D.C. Council to "amend the D.C. Criminal Justice Act to provide a fair compensation level for attorneys appointed under that Act." The bill provided a \$50 per hour rate of compensation, with no distinction drawn between in-court and out-of-court time. Bill No. 4-486 also proposed to increase maximum per case compensation to \$1,700 for felonies, \$900 for misdemeanors, and [43] \$1,700 for post-trial matters.¹²⁵ Referred to the D.C. Council's Judiciary Committee for consideration, Bill No. 4-486 died at the end of 1982 before any hearings could be held because there was no prospect for passage in view of the lack of money to fund an increase in CJA compensation levels.¹²⁶

37. In September, 1982, shortly after they were elected officers of SCTL, Perrotta and Koskoff first became deeply involved in the effort to obtain legislation increasing compensation levels under the D.C. CJA.¹²⁷ Their first initiative was to discuss the adequacy of exist-

¹²² RX 56D-U; Pickering 1058-1061.

¹²³ RX 56T, U.

¹²⁴ JX 13, pp. 27, 28; RX's 57, 59B, 71A-J, 143A, B; Perrotta 690-692, Koskoff 800, Pickering 1066, 1067, Isbell 1311, 1312, 1350-1352.

¹²⁵ RX 60A, B.

¹²⁶ JX 7, p. 28; RX 61; Perrotta 686-689, Koskoff 804, Pickering 1066, 1067, Isbell 1312, 1313.

¹²⁷ Even before Perrotta and Koskoff took over the leadership of SCTL, CJA lawyers had lobbied for an increase. The response from the Mayor and Councilmembers before September, 1982, was almost unanimous support but no concrete results were achieved because of lack of funds. JX 2, pp. 53, 54, JX 7, pp. 23-25; Perrotta 679

ing compensation levels with the Chief Judge of the Superior Court at one of the regular monthly meetings that the Chief Judge held with CJA lawyers. At the September meeting, which was also attended by Larry Polansky, the Court's administrative officer, the Chief Judge took the position that he could do nothing to support legislation increasing CJA rates because the court might have to rule on the legality of any bill passed by the D.C. Council. The Chief Judge and Mr. Polansky stated that they privately believed that CJA lawyers deserved an increase in compensation levels but [44] that the CJA lawyers would have to generate the political support for it.¹²⁸

38. In November, 1982, Perrotta and Koskoff met with Herbert Reid, Counsel to the Mayor, to discuss legislation increasing D.C. CJA compensation levels.¹²⁹ Mr. Reid stated that in his view the D.C. CJA compensation levels were inadequate, and while he expressed his sympathy with the need for the legislation, he indicated that the Mayor could do nothing. According to Mr. Reid, since the CJA funds were included in the Superior Court's budget, Perrotta and Koskoff must first attempt to get the Chief Judge to urge a statutory change allowing for an increase. Mr. Reid said that in fact the Chief Judge had never done so, and that it was politically unrealistic to expect the Mayor to support such legislation when no one in authority was pressing for it. At the conclusion of the meeting, Koskoff and Perrotta asked to meet personally with the Mayor, but were told that because there was nothing to talk about, a meeting at that time would be pointless.

39. Perrotta and Koskoff met again with the Chief Judge of Superior Court in early December, 1982.¹³⁰ During this and subsequent monthly meetings, the subject of legislation to increase D.C. CJA compensation levels was discussed. The Chief Judge repeatedly took the position that the court could not [45] publicly support such legislation since it might be called upon later to rule on its legality.

40. In January, 1983, Perrotta and Koskoff met with Wiley Branton, then Dean of the Howard Law School.¹³¹ Dean Branton was sought out because of the traditional leadership role of Howard Law School and its dean in the forefront of civil rights causes and civil liberties issues. Dean Branton also had a direct involvement in CJA problems: he had taken indigency appointments at the request of Superior Court judges, and he had assisted CJA attorneys and Howard law students in handling their cases as part of the school's criminal justice clinic. At this meeting, the SCTL leaders asked Dean Branton for advice on how they should go about securing passage of

¹²⁸ Perrotta 679-681, Koskoff 794, 795.

¹²⁹ JX 13, pp. 28, 37; Perrotta 682, 683, Koskoff 796-799, 810.

¹³⁰ Koskoff 798, 799.

¹³¹ Perrotta 689, 690, Koskoff 801-803, Branton 1379-1391.

legislation raising the level of CJA compensation. Dean Branton believed that the prospects of passage for such legislation were poor since there was no compelling political reason for generating the funds necessary for the increase. According to Dean Branton, the basic problem facing the CJA attorneys was the absence of an organized constituency to lobby effectively for the legislation. He noted that the indigent accused obviously had no political power; moreover, criminal defense bar was not held in high esteem by the Mayor, the D.C. Council, the leadership of the community, or the general public. Furthermore, an increase in compensation paid to criminal defense lawyers would not be considered high priority legislation so long as all the cases were being handled and the [46] system was running smoothly. Dean Branton advised the CJA attorneys that since the prospects for passage were dim "they were going to have to do something dramatic to attract attention in order to get any relief."¹³² The thrust of his message was that because helping indigent criminal defendants is a politically unpopular cause and the city was not having any problems in getting its cases processed, it was going to be necessary for CJA attorneys to "raise hell."¹³³ During the course of the meeting, it was mentioned that some CJA attorneys were becoming discouraged and were thinking about a strike to draw attention to their plight. Dean Branton replied, "it may well have to come to that."¹³⁴

41. The CJA lawyers, however, gave no serious consideration to a boycott in early 1983 because the legislative process leading to a possible increase was starting anew.¹³⁵ On March 17, 1983, D.C. Council Chairman David A. Clarke introduced Bill No. 5-128, providing for a per hour compensation rate of \$35 for in-court and out-of-court time.¹³⁶

42. The SCTLTA leadership rallied an impressive body of support behind the bill, and when a hearing was held on June 6, 1983, before the Council's Judiciary Committee chaired by [47] Councilmember Wilhelmina Rolark, no witness opposed a CJA rate increase on the merits.¹³⁷ The executive branch of the D.C. government, however, again questioned the District's ability to absorb the additional costs of such an increase.¹³⁸

43. Despite the strong showing made at the June 6 hearing, it soon

¹³² Branton 1390.

¹³³ Branton 1390.

¹³⁴ Branton 1391.

¹³⁵ Koskoff 803.

¹³⁶ CX's 34A, B, 36A-Y.

¹³⁷ Perrotta 697, Koskoff 808, Isbell 1314, 1315, 1326, 1327. Supporters included the D.C. Bar (RX 71A-J), Earl Silbert, the former U.S. Attorney for the District of Columbia (RX 72A-E), the American Civil Liberties Union (RX 73A, B), PDS and the Executive Office of the D.C. Courts (RX's 24A-G, 91A-N).

¹³⁸ CX 36F; RX's 86E, 87E, G.

became apparent to the CJA lawyers and their supporters that the hearing had been an empty gesture and that there was little prospect that anything further would happen on the bill.¹³⁹ In late June, Kemi Morton of Councilmember Rolark's staff told Koskoff that passage of the bill was unlikely because there was no source of funding.¹⁴⁰ Thereafter, Koskoff spoke with Councilmember Rolark and was informed that although the Council was sympathetic, no money was available to fund Bill No. 5-128.¹⁴¹ Similarly, Betsy Reveal, the city's Budget Director, told the SCTL A leaders that the entire D.C. government supported their demand for higher fees, but that no money could be found.¹⁴² [48]

44. These discouraging reports notwithstanding, Perrotta and Koskoff (and later respondent Addison) continued their lobbying effort throughout the summer of 1983. As part of this effort, Addison and Koskoff met with Timothy Leeth, a member of the staff of the Subcommittee on the District of Columbia of the Senate Committee on Appropriations, to discuss the subject of possible federal funding to increase the level of compensation.¹⁴³ Mr. Leeth informed Addison and Koskoff that Congress was sensitive to the District's Home Rule status and therefore would not support an increase in rates under the D.C. CJA until the District itself had acted, either through a request from the Chief Judge of Superior Court or through a bill enacted by the D.C. Council.

45. In early August, 1983, Koskoff and Addison buttonholed the Mayor in a corridor of the District Building.¹⁴⁴ They asked again about the prospects for passage of Bill No. 5-128, and were told by the Mayor that he was sympathetic, but the money was not available to fund an increase, and that he did not know where the money would come from. Referring to a riot in city jail which inspired Congress to appoint seven new judges, improve the cell block, and carpet the courthouse, the Mayor spoke wryly of \$28 [49] million falling "from the sky. . . . [but] there is no money for you."¹⁴⁵ The Mayor agreed to another meeting on August 29, 1983.

46. After the conversation with the Mayor, Addison and Koskoff informed the other CJA lawyers at an SCTL A meeting in the Lawyers' Lounge on August 7 or 8 that while they were repeatedly told by D.C. officials that they supported Bill No. 5-128, and that these officials recognized the need to increase the CJA compensation levels, these same officials insisted that no money could be found to fund the

¹³⁹ JX 12, p. 34, JX 13, p. 54; Perrotta 697, 698, Addison 881, 882, Isbell 1317, 1318, 1328.

¹⁴⁰ Koskoff 809.

¹⁴¹ JX 13, p. 62; Perrotta 697, 698.

¹⁴² JX 11, p. 94.

¹⁴³ JX 13, pp. 150, 151; Koskoff 811-814.

¹⁴⁴ JX 12, p. 37, JX 13, pp. 62-65; Koskoff 810, 811, Addison 884.

¹⁴⁵ JX 13, p. 64.

legislation.¹⁴⁶ On the basis of this report, the CJA lawyers voted to form a "Strike Committee" for the purpose of developing an action plan that went beyond the lobbying campaign. Perrotta named SCTLA member David Hirsch as temporary head of this Strike Committee.

47. Following the SCTLA meeting of August 7 or 8, the Strike Committee met in the office of CJA lawyer Roger Pickens.¹⁴⁷ The consensus at this meeting was that the previous lobbying efforts had been futile, that the only viable way of getting an increase in fees was to stop signing up to take new CJA appointments, and that the boycott should aim for a \$45 out-of-court and \$55 in-court rate schedule.¹⁴⁸ Slaughter was [50] designated as Chairperson of the Strike Committee and various other "strike" assignments were handed out.¹⁴⁹

48. On August 11, 1983, a group of about 100 CJA lawyers met at an SCTLA meeting in the Lawyers' Lounge.¹⁵⁰ Addison and Koskoff again emphasized that the Mayor and Councilmember Rolark were sympathetic, but that both had insisted that there was no money available to fund Bill No. 5-128. They also reported that the Chief Judge had again refused to support a bill increasing rates. At this point, Slaughter reviewed the substance of the discussion that had taken place at the Strike Committee meeting in Roger Pickens' office. Edward Shannon, a CJA regular, called for an immediate strike. This motion was voted down. Roger Pickens then moved to strike on September 6 if the statutory rates were not raised by then. Pickens' proposal carried by a voice vote, indicating solid agreement by the CJA lawyers not to call in for new cases if the pending legislation had not moved forward by the strike date.

49. Immediately following the August 11 SCTLA meeting, a petition was drafted by Strike Committee member David Hirsch and [51] edited by Perrotta.¹⁵¹ The petition, which was placed on the blackboard of the Lawyers' Lounge in Superior Court, stated:

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

¹⁴⁶ JX 5, pp. 13-16; Addison 882-884.

¹⁴⁷ JX 6, pp. 21-24. The Strike Committee members were Joanne Slaughter, Cheryl Stein, Abe Blitzer, Jeffrey Stulman, Ron Goodbread, Davies Couch, David Hirsch, and Roger Pickens. JX 5, p. 16, JX 10, pp. 20-23.

¹⁴⁸ JX 10, pp. 20-23.

¹⁴⁹ JX 10, pp. 32, 33. The Strike Committee designated Perrotta, Koskoff, and Addison as the "Negotiating Team". JX 5, pp. 23, 24. Assignments to other CJA lawyers included responsibility for contacting "all groups of lawyers who may support us or be used as strikebreakers," (CX 14), letting all CJA lawyers know about the boycott (JX 5, p. 26, JX 10, pp. 31, 32), soliciting the support of courthouse personnel (JX 5, p. 25, JX 8, p. 29, JX 10, pp. 34, 35) and working with the media. JX 5, p. 18, JX 10, pp. 31, 32.

¹⁵⁰ JX 8, pp. 24-27, 48, JX 10, pp. 18, 19, JX 11, pp. 28-33, 119, 120, JX 13, pp. 48-50, 78, 79.

¹⁵¹ JX 6, pp. 35-38, JX 11, pp. 63-65.

Act.¹⁵²

The petition was signed by a number of CJA attorneys including Addison and Slaughter, but not by Koskoff or Perrotta.¹⁵³

50. Although the CJA lawyers had already voted in favor of boycotting Superior Court, the lobbying effort of the SCTLTA leadership continued throughout the late summer.¹⁵⁴ On August 29, 1983, Perrotta, Addison, and Koskoff, accompanied by Jacob Stein, former President of the D.C. Bar, met again with the Mayor at the District Building to review the prospects for passage of the legislation increasing CJA fees.¹⁵⁵ During the meeting, the Mayor said repeatedly that he supported Bill No. 5-128, that he knew CJA attorneys needed an increase, that it was long overdue, and that CJA attorneys did useful work at [52] extraordinarily low rates. He stated, however, that he did not know where he would find the money to fund the increase. He promised to make a concerted effort to do so, but indicated that it would be impossible to meet the September 6 deadline.

The August 29 meeting with the Mayor was very friendly. No threats were made on either side. The Mayor knew about the August 11 vote to stop calling in for new appointments after September 6 if the legislation did not pass by then. He made no effort to dissuade respondents from the boycott. During the meeting there was a lot of smiling back and forth, and the Mayor said, "You do what you have to do, and I will do what I have to do."¹⁵⁶ This was said in the context of his explanation that the normal legislative process takes several months, but if an emergency existed the legislative process could be expedited and a bill passed within a week or two. The Mayor explained that if there were an actual crisis at the courthouse, this would constitute an emergency to which he could respond.¹⁵⁷

51. The record does not lend itself to a definitive finding on whether the pre-boycott 1982-1983 campaign of the CJA lawyers constituted exhaustion of the political process to the point that a continued lobbying would have been fruitless. To illustrate, there is testimony suggesting that an alternative political strategy, one presenting a unified CJA and PDS demand for increased overall indigency funds, may have been [53] productive.¹⁵⁸ The fact that the PDS budget is handled separately from the CJA budget (the CJA budget is buried within the

¹⁵² CX 4B-D.

¹⁵³ JX 2, pp. 115, 116, JX 6, pp. 37, 38, JX 11, pp. 63, 64, JX 13, p. 131; Koskoff 814. Apparently, Perrotta and Koskoff abstained from signing the petition and voting in favor of the strike to avoid the charge that SCTLTA officers had led an unwilling membership into a boycott. See JX 12, p. 36.

¹⁵⁴ JX 12, pp. 35-37, JX 13, p. 63; Addison 883.

¹⁵⁵ JX 5, p. 48, JX 11, pp. 41, 49, 121, JX 12, pp. 38, 72, JX 13, pp. 63-68; Perrotta 700-702, 721, Koskoff 815-817.

¹⁵⁶ JX 11, p. 49, JX 12, pp. 37, 38, 126, 127, JX 13, p. 65; Perrotta 701, Koskoff 816, 817.

¹⁵⁷ JX 11, p. 49, JX 12, pp. 38, 127.

¹⁵⁸ Carter 288-290. But for opinions respecting the dim prospects in 1983 for success from further political lobbying by SCTLTA see Tucker 1265, 1266, 1270, 1271, Isbell 1328, 1330, Branton 1384, 1385, 1396.

Superior Court's appropriation; PDS is funded as a separate executive-level agency of the District's government) seems to be a lame excuse for the failure to make even an attempt at such a unified approach.¹⁵⁹ On the other hand, the record indicates that not only do PDS lawyers and CJA lawyers consider themselves rivals for whatever limited indigency funds are available, but that the day-to-day relationship between the two is strained to the point that effective political cooperation was unlikely.¹⁶⁰ In addition, it should be noted that the track record up to 1983 of unsuccessful attempts by even the most [54] prestigious, and presumably influential groups, to obtain increased compensation under the federal CJA, could not have inspired the CJA lawyers with confidence during the summer of 1983 that any modification in lobbying strategy would have produced markedly different results at the local level.¹⁶¹

¹⁵⁹ See Perrotta 695, 696.

¹⁶⁰ By the very nature of its dichotomy between high volume and complex cases, the District's mixed system does not lend itself to a relationship of mutual respect and cooperation between PDS and CJA lawyers. Because of its limited caseload (concentrated in felony 1 cases), tradition of excellence, its well-known zeal on behalf of its indigent clients, and its reputation as an office where young lawyers are soon exposed to challenging litigation, PDS is swamped with applications from recent graduates of the most prestigious law schools. The very virtues of PDS, however, tend to install an elitist attitude among its lawyers that is not conducive to a close, mutually supportive relationship with the CJA lawyers who more often than not come from a more humble background. Carter 115, 116, 290, Lefstein 1422. For their part, the CJA lawyers seem to harbor a deep resentment over what is perceived as an unfair allocation of awards and brickbats—PDS is seen as garnering all the glory (and almost 40 percent of indigency funds for handling relatively few cases) while the CJA lawyers are treated contemptuously as "Fifth Streeters" even though they move over 85 percent of the cases through the District's criminal justice system. JX 11, pp. 132, 133; CX 80A-E; Addison 903-910. In addition to a general feeling of resentment, CJA lawyers have some specific grievances. One particular sore point straining the relationship between PDS and CJA lawyers is the dispute over investigators. PDS has a paid staff of investigators who are often by-passed in favor of a spirited group of volunteer college interns assigned to the PDS Office. When PDS investigators are not being used by PDS attorneys, however, the CJA Office of PDS insists that the CJA lawyers use these investigators. CJA lawyers, on the other hand, believe that they have no control over PDS investigators and would prefer to retain private investigators. This preference can easily be overruled since in the first instance CJA vouchers (including vouchers for outside investigators) are processed by personnel in the CJA Office which, of course, is a division within PDS. Perrotta 668-670, Addison 898, 899. Even apart from the question of PDS investigators, other PDS services available to CJA lawyers—library, motions file, appellate brief file, access to PDS duty-day attorney to answer questions about criminal law procedure, and assistance to CJA counsel in formulating alternatives to incarceration—are not highly valued by CJA regulars. O'Neill 533, 534, Perrotta 667, 668.

¹⁶¹ See Perrotta 761-762. An increase in the federal CJA level would have at least authorized the Joint Committee on Judicial Administration to raise the D.C. rates even without new legislation from the D.C. Council. See Finding 26. The most recent effort for an increase in the federal CJA began in 1980 when the Judicial Conference of the United States and the National Association of Former United States Attorneys adopted resolutions supporting an increase in the federal rates. In 1981, the Judicial Conference transmitted a draft bill to Congress. It was introduced in the House but no further action was taken. The American Bar Association in 1982 adopted a resolution favoring an increase. And again in 1983, the Judicial Conference urged the passage of a rate increase. Hearings were finally held on a rate bill in June and July, 1983. While support was almost universal, the Department of Justice opposed the bill on the grounds that the increase should be considered as part of a comprehensive examination of fees, including fees in civil cases. Because of Justice opposition, no further action was taken on the federal bill in 1983. RX's 35A-37R, 40A-T, 42A-49C. On October 15, 1984, however, the following item appeared in the "Lawyers" column (p. B2) of the *Washington Post*:

Members of Congress couldn't have been in more of a hurry to get out of town last week. Before they left, however, they approved a measure of interest to attorneys in federal courts here and around the country: doubling the salary of lawyers who represent indigent defendants in criminal cases before the federal bench.

The measure raises the hourly rate lawyers receive from \$20 for work out of court and \$30 for court appearances to \$40 and \$60 an hour, respectively. That should come as a welcome relief to the attorneys. Many had drifted away from the federal court here after lawyers in D.C. Superior Court negotiated a hefty raise from city officials following a walkout last year.

But the question now is: How will Superior Court attorneys react to the new federal pay? The new federal

(footnote cont'd)

52. Although there is room to speculate on the soundness of the lobbying strategy adopted by the CJA lawyers, there can be no serious question that the pre-boycott efforts of the CJA lawyers [55] had largely failed because indigent criminals and their lawyers are not a politically significant constituency; on the contrary, there is political capital to be made if the rights of the [56] indigent accused are denigrated.¹⁶² This hostility toward criminal defendants generally has a carry-over effect to the funding for the lawyers who represent them.¹⁶³ Moreover, at a time when all programs must contend for scarce public funds (by law, the District must adopt a balanced budget)¹⁶⁴ funding for indigency programs may be resisted on the grounds that more aggressive representation by criminal lawyers, which might be made possible, say, by reducing the caseloads of CJA lawyers, is precisely what the community does not want since it may interfere [57] with the efficient processing of bodies through the criminal justice system.¹⁶⁵

53. The inability of lawyers for the indigent to command political support (on both the national and local levels) may also reflect the spillover effect from the public's image of the criminal lawyer. In general, this image is not favorable. First, there is the public perception of a few "mouthpieces" who are, in effect, house counsel for the organized crime groups which run the nation's gambling, prostitution, and narcotics traffic.¹⁶⁶ Second, many of our larger cities harbor a distinct non-indigent criminal bar of low legal ability and dubious ethical quality which one expert described as follows:

These lawyers haunt the vicinity of the criminal courts seeking out clients who can pay a modest fee. Some have referral arrangements with bondsmen, policemen, or minor court officials. They negotiate guilty pleas and try cases without investigation, preparation, or concern for the particular needs of their clients. Because the prosecution is frequently willing to recommend a light sentence in exchange for a guilty plea in a routine case, the dispositions which these lawyers arrange often appear satisfactory to defendants and other laymen who are ignorant of the fact that the result owes little to the capability of the lawyer. Fed by this ignorance, the reputation of the courthouse

rate is substantially higher than the new local one, which is \$35 an hour for work in or out of court.

Traditionally, the local rate is pegged to what lawyers get in federal court. It remains to be seen whether lawyers will invoke this to get another raise from D.C. officials.

Whether or not the federal CJA would have gone up without the pressure engendered by an increase in District CJA rates is, of course, not developed in this record.

¹⁶² JX 11, p. 134, JX 12, p. 41; RX's 26V, W, 79A, B; Addison 881, Hazard 1153. This lack of political support for indigency programs is by no means unique to the District. The general failure of criminal indigency program to attract support can best be illustrated by the fact that in the allocation of public funds, the indigency programs are usually left out in the cold. Nationally, indigent defense receives about 1.5 percent of state and local government criminal justice funds whereas prosecution services receive 5.9 percent, the judiciary 13.1 percent, corrections 24.7 percent, and police protection 53.2 percent. RX 26S. See also Lefstein 1486.

¹⁶³ Hazard 1153, Lefstein 1486.

¹⁶⁴ Tucker 1247.

¹⁶⁵ JX 11, p. 105, JX 12, p. 54; Perrotta 689, 690, Addison 908-911.

¹⁶⁶ RX 28N.

lawyer grows, and he attracts a substantial portion of the paying criminal business. The insufficiency of his performance thereby comes to taint in [58] large measure the image of all defense counsel.¹⁶⁷

Finally, in the District itself, the CJA bar is not made up entirely of dedicated idealists. See Finding 25.

54. A possible contributing factor in the failure of the pre-boycott efforts of the CJA lawyers, may have been widespread ignorance about the District's mixed system. Even many uptown lawyers were under the mistaken impression that PDS, rather than the CJA lawyers, carried most of the indigency burden.¹⁶⁸

I. *The Boycott*

55. By late August, 1983, based on their perception that the lobbying effort had failed, SCTLTA activities thereafter were directed thereafter at assuring the success of the boycott scheduled to begin on September 6. The leading uptown firms were urged by SCTLTA (in a letter over Perrotta's signature) to "support [SCTLTA's] goals by not making your firm available to accept cases during this period."¹⁶⁹ Later, SCTLTA leaders addressed several lawyers' associations, and their plea that [59] members of these associations not take indigency cases after September 6, was answered affirmatively.¹⁷⁰ Since almost all the CJA lawyers had already indicated their agreement with the boycott, little had to be done in the way of additional persuasion, but all CJA lawyers were contacted to make certain of their support.¹⁷¹ In addition, an effort was made to persuade the few hold-outs among the CJA lawyers to join with their colleagues in the boycott.¹⁷²

56. Beginning on September 6, 1983, the named individual respondents and all but a few CJA regulars stopped calling in to the CJA Office for the purpose of having their names placed on the daily list of attorneys willing to accept CJA appointments.¹⁷³

57. The immediate goal of the boycott was to increase the compensation paid to CJA lawyers.¹⁷⁴ The CJA lawyers also believed that their rate of compensation was directly related to the quality of representa-

¹⁶⁷ RX 28N-"O".

¹⁶⁸ JX 12, p. 33. See also Addison 880 for evidence that members of City Council and the Mayor's office were unaware of either the number of cases CJA lawyers were forced to take in order to survive or the primitive conditions under which they were working.

¹⁶⁹ CX 6A. The 40 firms contacted by the SCTLTA Strike Committee were the same firms PDS approached later for volunteers. See CX7 A-D. The list of firms, consisting of those with the most conspicuous pro bono programs, was originally compiled by the D.C. Bar for the use by PDS, but at the request of SCTLTA it was sent to the Strike Committee. JX 10, pp. 42, 43, JX 11, pp. 70-73, JX 13, p. 142; Perrotta 711, 712, 746-748, Isbell 1345.

¹⁷⁰ JX 10, p. 49. See also JX 5, pp. 34, 35.

¹⁷¹ CX's 8A-10J.

¹⁷² O'Neill 543, 544.

¹⁷³ JX 13, pp. 71, 111. At most, 13 of the CJA regulars continued to take assignments. CX's 216D, 217E, 218E, 221E, 228E; Robinson 362-367, 380.

¹⁷⁴ JX 5, p. 30, JX 7, p. 34, JX 8, pp. 35, 36, JX 10, p. 108, JX 11, p. 32, JX 13, pp. 90, 91; CX 4B.

tion provided to indigents since it almost compelled them to carry an excessive caseload and allowed [60] for none of the essential support services identified with a professional practice.¹⁷⁵

58. In addition to the refusal by the CJA lawyers to take on new cases, SCTLTA staged a series of events—rallies, picket lines, handouts of “press kits”, newspaper and T.V. interviews—all designed to educate the general public about the plight of the CJA lawyers in the expectation that this would result in additional pressure on the District government to increase fees.¹⁷⁶ These efforts were initiated by the Strike Committee, which had been formed after the August 7 or 8 SCTLTA meeting in Roger Pickens’ office, and which by August 26 was clearly identified as the “SCTLTA Strike Committee”.¹⁷⁷ While the hoopla organized by SCTLTA did attract media attention and editorial support,¹⁷⁸ there is no credible evidence that the District’s eventual capitulation to the demands of the CJA lawyers was made in response to public pressure, or, for that matter, that this publicity campaign actually engendered any significant measure of public pressure.¹⁷⁹

[61]

59. If respondents tend to overemphasize the so-called “educational” aspects of the boycott, complaint counsel are inclined to do the same with their charge of physical harassment. A few minor incidents of doubtful propriety aside,¹⁸⁰ the CJA boycott was a peaceful effort.¹⁸¹

60. The expectation of the CJA lawyers was that their boycott would have a severe impact on the District’s criminal justice system.¹⁸² This expectation was fully realized for essentially three reasons.

First, the incidence of crime in the District does not subside because of the sudden nonavailability of lawyers.¹⁸³

Second, the criminal law requirements that a lawyer be assigned to each case almost immediately upon arrest of the accused and that the assigned lawyer’s investigation and preparation proceed apace to meet certain early deadlines—arraignment or presentment date, preliminary hearing, status hearing—are not changed either by the sudden nonavailability [62] of enough lawyers or the imposition of

¹⁷⁵ JX 8, p. 80, JX 9, p. 31, JX 10, pp. 18, 19, 25, 100–102, JX 12, p. 118; CX’s 8D-K, 38I; Slaight 958–960.

¹⁷⁶ JX 1, ¶ 50, JX 5, pp. 46, 47, JX 8, pp. 41, 84, 85, JX 10, pp. 48, 49, 55, 56, JX 12, pp. 62, 90; CX 6C-J; RX 106A-D; Koskoff 818–822, Addison 885, 886, Kline 923–927, Slaight 960–962.

¹⁷⁷ JX 10, pp. 32, 33, 122; CX’s 8A, 14.

¹⁷⁸ RX’s 110A–139.

¹⁷⁹ See Slaight 943.

¹⁸⁰ See JX 5, pp. 70, 71, JX 8, pp. 63, 64, JX 10, pp. 57, 58; McEwen 454, 455 for use of a “scab” poster with names of non-boycotting CJA lawyers and Robinson 342, McEwen 449–453, 458, 492, O’Neill 550–553 for some rude treatment of the non-boycotters.

¹⁸¹ JX 3, p. 180, JX 5, p. 26, JX 9, p. 39, JX 12, pp. 107, 108; O’Neill 542–544.

¹⁸² JX 5, pp. 75, 76; CX 234; See also Perrotta 740.

¹⁸³ During the period from September 6 to September 20, there was a daily average of 63 defendants on the weekday lock-up list and 43 on the Saturday list. CX’s 216A–228E.

massive caseloads on those who are available.¹⁸⁴

Third, there was no one to replace the CJA regulars, and makeshift measures were totally inadequate.¹⁸⁵ A few days after the September 6 deadline, PDS was swamped with cases.¹⁸⁶ The handful of CJA regulars who continued to take cases were soon overloaded.¹⁸⁷ The overall response of the uptown lawyers to the PDS call for help was feeble,¹⁸⁸ reflecting their universal distaste for criminal law, their special aversion for compelled indigency representation, the near epidemic siege of self-doubt about their ability to handle cases in this field, and their [63] underlying support for the demands of the CJA lawyers.¹⁸⁹ Most of the law student volunteers initially observed the boycott, and later all law student volunteers were limited (as they usually are) to a relatively few minor misdemeanors.¹⁹⁰

61. The boycott succeeded when key figures in the District's criminal justice system—Francis Carter of PDS and the Chief Judge of Superior Court—became convinced that the system was on the brink of collapse because of the refusal of the CJA lawyers to take on new cases. On September 15, 1983, PDS hand-delivered to the Mayor, the Chief Judge, and Councilmember Rolark the following letter:

Dear Mayor Barry:

We are writing to apprise you of the extremely serious situation that has now developed with respect to the legal representation of indigents in criminal and juvenile delinquency cases in the Superior Court of the District of Columbia. We believe that despite substantial efforts by the Public Defender Service of the District of Columbia ("the Service") the current difficulties in providing counsel in these cases will, by early next week, reach a crisis point.

As you know, the private attorneys who regularly make themselves available to the court for this type of representation are compensated under the District of Columbia Criminal Justice Act, 11 D.C. Code 2601 *et seq.*, at a rate of \$20.00 an hour for out-of-court time and \$30.00 an hour for in-court time. In August of this year the members of the Superior Court Trial Lawyers Association announced that commencing on September 6, 1983 they would no longer accept cases for [64] indigents because this low rate of compensation prevented them from providing adequate legal representation. Attorneys employed by the Public Defender Service to represent indigent defendants

¹⁸⁴ JX 2, pp. 110-114, JX 5, pp. 62-64, 73; CX 231B; RX 105A-J; McEwen 415-420, 448, 449, O'Neill 553-555, Perrotta 703-705, Kline 932, 933.

¹⁸⁵ JX 6, p. 69, JX 10, pp. 65, 85-87, JX 11, p. 45, JX 12, p. 80, JX 13, pp. 76, 101; Isbell 1352, 1353, 1367, 1368.

¹⁸⁶ JX 5, p. 72; Carter 95-97.

¹⁸⁷ JX 3, pp. 150-152; CX's 216A-228E; McEwen 444, 445, O'Neill 545, 546. Prior to the boycott some 35 to 40 CJA regulars called in daily. Robinson 323. After September 6, no more than three or four CJA regulars called in each day. JX 6, p. 69, JX 8, pp. 73, 74; Robinson 380. The number of cases handled by CJA regulars dropped from 85 percent of the total to under 8 percent. Robinson 380.

¹⁸⁸ JX 13, pp. 192, 193; Carter 99-102, 274, 275, Robinson 338, 339. The uptown bar's response was barely adequate at the outset of the boycott, and fell off precipitously in the second week, amounting in all to a handful of associates who picked up a few misdemeanors. Carter 95, 99, 100, Robinson 338, 339.

¹⁸⁹ JX 10, p. 47, JX 13, pp. 192, 193; Lefstein 1479-1484, Branton 1404-1406. In the serious case likely to go to trial, this self-doubt is fully justified, and for the lawyer who does not specialize in criminal law to take such a case would amount to malpractice. Hazard 1158.

¹⁹⁰ Carter 98, Robinson 339, 340.

in criminal cases are not compensated under the Criminal Justice Act, for PDS attorneys are full-time salaried employees and are statutorily prohibited from engaging in any other practice of law or receiving any fee. Since September 6 the Service's attorneys (small in number when compared to the need) have assumed the representation of a very sizable number of the indigent defendants, sometimes as many as eight or nine a day per attorney. This added burden comes at a time when the PDS attorneys were already handling very high caseloads. Therefore, the Service now finds its resources taxed to a point where as of the beginning of next week it can no longer provide this quantity of assistance to the criminal justice system while continuing to render quality, effective legal representation.

Additionally, during this very trying period for the court, the Service has had the overwhelming task of continuing to "... coordinate the operation of a ... system for appointment of private attorneys to represent ..." indigent defendants. D.C. Code § 1-2702(b). We have done this by soliciting assistance from members of our local bar whether they are in solo practice or small or large firms in our city. While the response thus far has been gratifying, it has not been sufficient to continue to assure the appointment of counsel for all indigent defendants. The daily need for representation of indigent defendants (sometimes over 80 such cases a day) has at this point seriously depleted the resources of the private bar who have volunteered to help the court. This leads the Service to conclude that future assistance from this source is problematic, at best.

We respectfully but strongly believe it is imperative for you, together with Councilmember Wilhelmina J. Rolark, Chairperson of the Council's Committee on the Judiciary, and Chief Judge Moultrie of the Superior Court, as leaders and members of the three branches of the city's government to meet before the end of this week to decide on an immediate course of action to address the situation. You are aware that the Service and several other individuals and organizations testified on June 6, 1983 in favor of Bill No. 5-128 (the District of Columbia Criminal Justice Improvements Act of 1983) before the Committee on the Judiciary of the District of Columbia Council. This legislation will, among other things, increase all hourly rates of the local Criminal Justice Act to [65] \$35.00 an hour. A public declaration of your unified support for this Bill and of specific efforts to effect its enactment would, we believe, help greatly to resolve the present situation. In urging this initial course of action, we understand that the enactment of Bill 5-128 would have some fiscal ramifications. But the Service hopes that any additional appropriations necessitated by enactment of the Bill will be viewed not only in the context of a given fiscal year but also in the context of the absence of any intervening adjustments over more than a decade. From that perspective, larger CJA appropriations constitute a very modest investment.

We would be happy to provide you with more particular information on this crisis and will be happy to meet with you, if necessary, but the need for expedited action cannot be overemphasized.

Sincerely,

/s/ Vincent H. Cohen
Chairman, Board of Trustees

/s/ Francis D. Carter
Director
Public Defender Service¹⁹¹

62. The serious situation depicted in the PDS letter was confirmed

¹⁹¹ CX 31A-C.

when the Chief Judge of Superior Court informed the Mayor that the criminal justice system was approaching a crisis point.¹⁹²

63. Upon receipt of the PDS letter, the Mayor telephoned Koskoff to request a meeting that very evening (September 15) [66] with her, Perrotta, and Addison at a downtown restaurant.¹⁹³ The meeting was friendly. The Mayor shook hands all around and congratulated the SCTLA leadership on the success of the boycott. The Mayor then stated that since an emergency now existed, Bill No. 5-128 could be taken up as emergency legislation. He indicated that he would make a public expression of support for the bill by writing a letter to Councilmember Rolark stating that the necessary money to fund the increased compensation levels provided for in Bill No. 5-128 would be found. The Mayor next discussed the mechanics by which the bill could be considered as emergency legislation. He stated that Councilmember Rolark had already informed him of her willingness to mark up and report an emergency bill out of the Judiciary Committee on Monday, September 19. Furthermore, the Mayor said that he understood that D.C. Council Chairman Clarke would suspend the rules of the Council and bring the bill before the Council the following day, Tuesday, September 20, and that the bill would pass on September 20, as an emergency measure. The Mayor explained that two versions of 5-128 would be considered—an emergency bill, which would pass immediately, and an identical permanent bill, which would have to go through the usual legislative process. The Mayor said he would sign the emergency bill as soon as it was passed. In response to Addison's question about when the CJA lawyers should return to work, the Mayor answered by recalling his days as a civil rights organizer, and [67] based on that experience, he said that if he were in the same position of the boycotting CJA lawyers, he would not begin calling in to accept appointments until after the emergency bill had passed. The Mayor also informed the SCTLA leaders that he would agree to support still another bill to increase CJA hourly rates to the \$45/\$55 level after Bill No. 5-128 had passed in both its emergency and regular forms, but that this bill, too, would have to be considered in the normal course of events.

64. On September 16, 1983, the Mayor wrote to Councilmember Rolark.

[B]ecause I believe in the importance of quality representation for indigent defendants and appreciate the significance of the Criminal Justice Act program to the administration of justice in the District, I will, if this legislation is approved by the Council, initiate

¹⁹² Isbell 1352. During the course of the boycott, the Chief Judge indicated that he was sympathetic to the demands of the CJA lawyers but he opposed the use of a boycott. RX 140; Isbell 1352, 1353. Several associate judges of Superior Court expressed their support for both the objective and the method. JX 13, p. 82.

¹⁹³ JX 11, pp. 44-48, JX 12, p. 80, JX 13, pp. 73-76, 100, 101; Perrotta 720-724, Koskoff 824-827.

reprogramming or supplemental actions during FY 1984 sufficient to ensure that the courts have adequate resources to cover the increased costs.

As you know, my position has modified somewhat in the past months. This has been due in large part to your diligence in pursuing the bill, your hard work over the issue of indigent defense, and your support of my efforts to ensure that the Council make a commitment to necessary revenue measures when actions with fiscal impact are taken, [which] has persuaded me that the bill should not be opposed simply because of the financial consequences. I appreciate your and Chairman Clarke's efforts on behalf of this bill, and I look forward to our continued cooperation on matters involving public safety and the administration of justice in Washington, D.C.¹⁹⁴ [68]

65. On the same day that the Mayor was writing his letter, Koskoff and Addison were meeting with Councilmember Rolark at the District Building.¹⁹⁵ Councilmember Rolark explained the emergency legislative process, and stated that her committee would mark up two versions of Bill No. 5-128 at a committee meeting on Monday, one to go through regular channels and the other to be considered as emergency legislation. Councilmember Rolark stated that she was willing to expedite passage of the emergency legislation, that she had always been concerned about the issues underlying Bill No. 5-128, and that she was glad that the Mayor had found a way to fund the emergency bill. Councilmember Rolark, Koskoff and Addison then went down the hall to the office of Council Chairman Clarke. Council Chairman Clarke stated that he would move to suspend the rules so the Council could consider Bill No. 5-128. Koskoff expressed her concern that some striking CJA attorneys would not accept the Mayor's proposal because they sought fees above the \$35 level. Councilmembers Clarke and Rolark agreed to introduce a permanent bill to increase CJA hourly rates to the \$45/\$55 level. Koskoff also requested Councilmembers Clarke and Rolark to accompany her to the Superior Court Building to explain the Mayor's proposal to CJA attorneys who continued to demand a \$45/\$55 hourly [69] rate.¹⁹⁶ Councilmembers Clarke and Rolark agreed to do so, and a meeting was held in a conference room at the Superior Court during the afternoon of September 16.¹⁹⁷ Those present at this meeting included Koskoff and Slight, as well as CJA lawyers James Tatem, Davies Couch, and Roger Pickens. Also present were Claudia Schlosberg of the Family Division Trial Lawyers Association, and David Isbell, President of the D.C. Bar. The proposal of the Mayor and Councilmembers Clarke and Rolark was reviewed at

¹⁹⁴ CX 36X, Y.

¹⁹⁵ JX 13, pp. 96-99; Koskoff 827-831.

¹⁹⁶ When the SCTLTA Strike Committee was first formed, the \$45/\$55 rate was prominently mentioned. See Finding 47. Koskoff and Perrotta reached the conclusion that these levels were not politically feasible and had convinced most CJA lawyers to moderate their demands. Those who remained adamant about the \$45/\$55 rate were organized around the so-called "Ad Hoc Committee" led by Roger Pickens. JX 12, pp. 83, 115. Pickens is not a member of SCTLTA.

¹⁹⁷ JX 8, p. 47, JX 10, pp. 66, 67, JX 13, pp. 99, 100, 103, 104; Koskoff 830, Isbell 1350-1352.

the meeting, including the emergency legislative procedures. Councilmembers Clarke and Rolark also reiterated their willingness to introduce a bill to increase hourly rates to the \$45/\$55 level, but this bill would be in permanent form only and would have to be taken up in the normal course of legislative business. Council Chairman Clarke stated firmly that the \$35 rate was all the D.C. Council would currently pass. He presented the proposal as a take it or leave it proposition, saying nothing would be passed if the CJA lawyers rejected it, and that he had to know by 1:00 p.m. on September 19 whether the CJA lawyers [70] would return to work if Bill No. 5-128 were to pass on an emergency basis.¹⁹⁸

66. At noon on September 19, 1983, SCTL A convened a meeting of CJA attorneys in the Lawyers' Lounge to consider whether to accept the \$35 proposal and to end the boycott.¹⁹⁹ The meeting, which was attended by over 100 CJA attorneys, was presided over by Perrotta as President of SCTL A. The Mayor's proposal and the emergency legislative process for enacting Bill No. 5-128 were reviewed by Perrotta. Debate was then held with each side allotted 10 minutes to make its case. Perrotta, Koskoff and Addison spoke in favor of accepting the proposal. Roger Pickens and James Tatem spoke against acceptance, favoring, instead, continued refusal to accept new appointments until hourly rates were increased to \$55 per hour for in-court time and \$45 for out-of-court time. After the debate, a voice vote was taken. Those in favor of accepting the Mayor's proposal prevailed. The vote was then communicated by Koskoff to Councilmember Rolark's office by the 1:00 p.m. deadline set by Council Chairman Clarke.

67. At 2:00 p.m. on September 19, 1983, a meeting of the D.C. City Council's Judiciary Committee was convened.²⁰⁰ The Committee reported out Bill No. 5-128. The bill, and a Committee Report, prepared by Councilmember Rolark, were both unanimously [71] approved by the Judiciary Committee, and forwarded to the D.C. Council for consideration at its September 20 meeting.

68. At the September 20, 1983, meeting of the D.C. City Council, Council Chairman Clarke suspended the rules for consideration on an emergency basis of Bill No. 5-128. The bill was passed unanimously by voice vote.²⁰¹

69. On September 21, 1983, the CJA regulars resumed calling in to

¹⁹⁸ JX 8, p. 47, JX 10, pp. 66, 67.

¹⁹⁹ JX 5, p. 50, JX 7, pp. 35, 36, JX 10, pp. 70-72, JX 11, pp. 50-55, JX 12, pp. 85, 86, JX 13, pp. 105-109, 160, 161; Koskoff 831, 832.

²⁰⁰ Koskoff 832.

²⁰¹ CX 35C. The permanent form of the bill was passed on October 4, and both versions were signed by the Mayor on October 11, 1983. CX 35A-C; RX 150A, B. After passage of the permanent bill, Councilmember Rolark fulfilled her commitment to the CJA lawyers (see Finding 65) by introducing a bill to raise the rate to the \$45/\$55 level. RX 177A-D.

accept new appointments.²⁰²

70. Respondents' argument that the CJA lawyers lacked the power to create a court emergency and thereby force the District government into passing Bill No. 5-128 is contradicted by the entire record. The best proof of the power of the CJA lawyers lies in the fact that the boycott succeeded. Moreover, the claim of relative weakness of the CJA lawyers is totally inconsistent with respondents' own voluminous evidence proving the vital role played by CJA lawyers in the District's criminal justice system.²⁰³ Perhaps even more significant is the fact that District officials (PDS Director, Mayor, Chief Judge, Councilmembers) must have realized (as the record plainly shows) that the use of emergency alternatives to the CJA lawyers—voluntary or compulsory pro bono from the uptown bar, increased [72] use of law students, or expanded PDS—constituted no meaningful restraint on the power of the CJA lawyers. As a matter of fact, the SCTLTA leadership themselves had argued that since uptown lawyers had no real intention of permanently replacing them, a temporary stint downtown in the criminal justice system would accomplish nothing.²⁰⁴ Certainly no long-term alternative to the CJA lawyers would have solved the emergency situation; besides, the District government had no reason to believe that there was readily available a viable long-term alternative to its mixed system, and without such alternatives, the role of the CJA lawyers as an essential component of the existing system was manifest.²⁰⁵

J. The Effects Of The Boycott

71. The cost of the boycott to the District will be approximately \$4 to \$5 million a year in additional CJA expenditures.²⁰⁶ The District's total annual budget is almost \$2 billion.²⁰⁷

72. In addition to higher costs for the city, the immediate impact of the boycott on the criminal justice system has been a sharp increase in the number of lawyers willing to take on CJA [73] cases because of the higher fee schedule.²⁰⁸ There is some speculation in the record that at the increased fees experienced lawyers will be encouraged to continue CJA work for a longer period of time, court administrators will have a greater choice among lawyers willing to do CJA work thereby opening up the possibility of a quality certification program,

²⁰² JX 13, p. 71; RX 149A-J.

²⁰³ See Finding 19.

²⁰⁴ JX 12, pp. 38, 39, 105.

²⁰⁵ See Finding 21.

²⁰⁶ JX 1, ¶ 46(f); CX's 36W, 38D. An increase of this size was described by PDS Director Carter as a "very modest investment" when viewed "in the context of the absence of any intervening adjustments over more than a decade."

CX 31B, C.

²⁰⁷ JX 1, ¶ 48.

²⁰⁸ JX 2, p. 85; RX's 163A-168B; Carter 255, 256, 260, Robinson 356, 357, Perrotta 677, 743, 744, Koskoff 836, 837, 858.

reduced caseloads made possible by the rate increase will result in more aggressive representation of clients, and that some CJA lawyers may now be able to afford office space and the other amenities of a professional practice.²⁰⁹ The record, however, suggests that these sanguine predictions must be tempered with the realization that criminal law itself tends to burn out all but the most monetarily successful, and that a dramatic transformation in the quality of indigency practice is unlikely.²¹⁰ Perhaps all that can reasonably be expected from the modest boycott-inspired fee increase is that the more dedicated CJA practitioners will have an incentive to continue their work by some indefinite margin beyond the point when it would otherwise end. This is no small achievement. As one seasoned observer of the field has noted—[74]

A defense lawyer must expect to lose more cases than he wins, generally not for reasons related to his legal capabilities, but because most defendants whose cases are not dismissed early in the process are ultimately convicted. Men with enough dedication and self-assurance to accept repeated defeats without coming to doubt the value of their efforts are no easier to find in the bar than anywhere else. All but the most eminent criminal lawyers are bound to spend much of their time in overcrowded, physically unpleasant courts, generally dealing with people who are educationally, economically, and socially underprivileged. It is not the sort of working environment that most professional men choose.²¹¹ [75]

III.

DISCUSSION

The District of Columbia's CJA lawyers, some 100 private practitioners regularly representing indigents in criminal cases before Superior Court, agree that they will not take additional cases unless their fees are raised. The Commission's complaint challenging this concerted action as an illegal boycott under Section 5 of the Federal Trade Commission Act raises three issues: Is the boycott totally exempt from the antitrust laws? Is it a *per se* violation? Or should the boycott be considered under a rule of reason analysis that takes into account the proffered justifications and the actual effects of the ac-

²⁰⁹ JX 2, pp. 87, 89, JX 3, p. 205, JX 5, p. 61, JX 6, pp. 69, 70, JX 8, pp. 80, 81, JX 10, pp. 79-81, JX 11, pp. 122, 123; Perrotta 677, 726, 728, 729, 732-736, Koskoff 837, 838, Addison 887, 888, Hazard 1153, 1154, Lefstein 1539, 1540. The perception of experts is that the District's mixed system suffers from the absence of any effective quality control in the certification and assignment of CJA lawyers. Hazard 1168-1171. See also CX 231A-D, for the certification recommendations of the Braman Committee.

²¹⁰ CX 80E; RX 80A, B; Slight 958, 959, Lefstein 1511.

²¹¹ RX 28N. See RX 55T for the enervating experience of uptown lawyers drafted to defend indigents in 1974. See also JX 2, pp. 49-51, JX 10, pp. 100, 101, 124, 125, JX 13, pp. 23, 24 for accounts of some of the more frustrating aspects of criminal law practice (uncompensated waiting periods and the pressure of arranging the logistics of appearances scheduled in some 43 courtrooms) and JX 7, pp. 22, 23, JX 9, p. 47 for a description of the depressing physical surroundings in which CJA law is practiced.

tion?²¹²

Turning first to the defenses, respondents contend that the anti-trust laws never enter the picture at all because the boycott was a form of political action protected by the First Amendment. Respondents also maintain that even if the boycott does not qualify as protected political action, it was nevertheless a form of petitioning for legislative change (*i.e.*, [76] a statutory increase in fees) exempt from the antitrust laws under the *Noerr-Pennington* doctrine. Finally, respondents argue that the public welfare motivation for the boycott—the concern of CJA lawyers that the Sixth Amendment rights of their indigent clients might not be protected adequately unless CJA rates were raised—amounts to a cognizable justification under a rule of reason analysis applicable to the professions.²¹³

On the question of political action in the form of a boycott, the Supreme Court recently held in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) that the First Amendment rights of speech, assembly, association, and petition, served to immunize from antitrust liability the peaceful aspects of an NAACP-inspired boycott of the white merchants of Port Gibson and Claiborne County, Mississippi. The boycott was imposed after the NAACP's list of "Demands for Racial Justice" was received with indifference by city and county officials. Starting from the [77] premise that the "right of business entities to 'associate' to suppress competition may be curtailed" (*id.* at 912), the Court applied a motive test in distinguishing between such parochially-minded economic conduct and what it characterized as the NAACP's "political activity". *Id.* at 913. As for the impact of the boycott, the Court reasoned that since the *Noerr-Pennington* doctrine affords First Amendment protection, irrespective of motive or effect, to a petition filed for the economic purpose of fostering anticompetitive legislation, then it necessarily follows that a politically motivated boycott—characterized by the Court as a form of petition qualifying

²¹² Throughout this discussion I have used the term "boycott" to describe respondents' action although in standard antitrust usage a boycott is a concerted refusal to deal aimed at driving a competitor from the market. The term, however, has been expanded to cover a concerted refusal to deal for the purpose of increasing prices and I use it in this broader sense, as the Commission did in *Michigan State Medical Society*, 101 F.T.C. 191, 287 (1983). See also *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 at 541 (1978) ("The generic concept of boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target.")

²¹³ Respondents also assert that SCTL is too amorphous an organization to be subjected to FTC jurisdiction or an FTC cease and desist order. Although SCTL is loosely organized and its membership is hard to pin down, the role of this organization in the September boycott can hardly be gainsaid. Its meetings in the Lawyers' Lounge of Superior Court were the rallying point for the boycott, and its officials were the leaders of this action. To suggest that SCTL's failure to adhere strictly to Robert's Rules, or its casual attitude toward the collection of dues, or the fact that its meetings are not held in more elegant surroundings, somehow presents a jurisdictional bar to the Commission, would gratuitously engraft a proviso onto Section 4 of the Federal Trade Commission Act without the support of a single cited authority. SCTL, an unincorporated association, was organized for the profit of its members (see, *e.g.*, *American Medical Assoc.*, 94 F.T.C. 701, *aff'd*, 638 F.2d 443 (2d Cir.), *aff'd mem.*, 455 U.S. 676 (1982)) and since its activities are in or affect commerce in the District of Columbia, it is subject to the Commission's jurisdiction. If an order were appropriate, it could be enforced against SCTL.

for similar First Amendment consideration—must also be exempt from the antitrust laws even though the NAACP “[L]ike the railroads in *Noerr* . . . foresaw—and directly intended—that [the object of the boycott] would sustain economic injury as a result of their campaign.” *Id.*²¹⁴ [78]

Although *Claiborne* borrows freely from *Noerr-Pennington* on the issue of economic effect, it creates a discrete barrier to the “political action” defense. By its terms, *Claiborne* may be invoked only when the boycott is politically motivated since it is only in that special context that the Court treats the communicative aspects of a boycott as a form of petitioning or constitutionally protected expressive speech.²¹⁵ If the action is not politically motivated, there is nothing in *Claiborne* that expands on what *Noerr-Pennington* allows businessmen or professionals to do in the way of a joint effort to persuade government. In other words, both before and after *Claiborne*, *Noerr-Pennington* applies only to certain tactics used to influence legislative or administrative decisions: standard, [79] noncoercive forms of petitioning or lobbying such as speech, advertising, and the distribution of literature. Thus the *Noerr* Court explicitly held that the doctrine does not exempt “the use of such devices as . . . boycotts . . .” 365 U.S. at 136,²¹⁶ and this restriction is not modified by *Claiborne*, except, of course, in the case of politically motivated action.

Respondents’ attempt to show that the CJA boycott meets the strict limitations set out above and therefore qualifies as either exempt political action under *Claiborne* or as an immune petition under *Noerr-Pennington* is similar to the defenses raised and rejected in *Michigan State Medical Society*, 101 F.T.C. 191 (1983) [hereinafter

²¹⁴ In *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127 (1961) the railroads and their public relations firm mounted an advertising campaign designed to foster the adoption of laws restricting the ability of the trucking industry to haul heavy freight over long distances. Even though this effort was marked by misrepresentation and severely impacted on the truckers, the Supreme Court held that the Sherman Act was not intended to regulate joint activity directed toward informing the government, and to impute such a purpose to the antitrust laws would raise serious constitutional questions under the First Amendment. *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965) involved a lobbying campaign by the union and large coal mine operators intended to persuade the Secretary of Labor to establish wage rates that would impact adversely on small mines. In holding that the lobbying activity was protected by *Noerr*, the Supreme Court separated the underlying illegal conspiracy between the union and the operators from their right to engage in joint petitioning. The constitutional basis of the *Noerr-Pennington* exception, which was left uncertain in the earlier decisions, was clarified in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

²¹⁵ The Court does not spell out in detail why a politically motivated trade restraint in the form of a boycott should receive this special antitrust exemption except to observe that the expression of opinion on controversial public affairs issues has always been placed so high in the hierarchy of First Amendment values that we accept the notion that there should be little restriction on how these issues are debated. *Claiborne*, 458 U.S. 913. Consistent with this view, the Court cites with approval *Missouri v. NOW*, 620 F.2d 1301 (8th Cir.) cert. denied, 449 U.S. 842 (1980), but it does so only for the narrow proposition that the right of petition is so important that even when exercised by way of a boycott, it is not subject to state tort law. *Claiborne*, 458 U.S. 886, 914, n. 48. By its limited use of *NOW*, the Court implicitly cautions against acceptance of the Eighth Circuit’s conclusion that a politically motivated boycott (there, a *NOW* hotel and convention boycott designed to pressure Missouri into adopting ERA) is exempt because neither the legislative history of the Sherman Act nor the cases interpreting the legislative history reveal that Congress intended to prohibit a restraint undertaken for such a purpose.

²¹⁶ See also 365 U.S. at 142 (“There are no specific findings that [the railroads] attempted directly to persuade anyone not to deal with the [truckers]”).

MSMS]. In *MSMS*, the Commission held that a threat by an association representing 80 percent of Michigan doctors to withdraw services unless Blue Cross/Blue Shield fee schedules were revised and state Medicaid cuts were restored, went beyond petitioning protected by *Noerr-Pennington*, and because such threats directly interfered with competitive relationships among the doctors themselves and between the doctors and the third party payers, it was not exempt as a politically motivated action under *Claiborne*. The Commission thus clearly signaled in *MSMS* that it intends to limit sharply the availability of both the "petitioning" and "political action" defenses, and that any coercive combination of suppliers aimed at what is called the "competitive process" (101 F.T.C. at 300, 301) [80] will be distinguished from both a permissible political boycott and a permissible communicative petition with the result that it will receive neither *Claiborne* nor *Noerr-Pennington* immunity.

Faced with *MSMS*'s narrow interpretation of the application of *Claiborne* and *Noerr-Pennington*, respondents maintain that its 1983 boycott was indeed "political" and not within the "competitive process" language of *MSMS* because CJA rates are not set by head-to-head competition among CJA lawyers, but are established instead by legislation mandating a uniform rate for all CJA lawyers. The difficulty with this argument is that in *MSMS* the Commission did not equate the term "competitive process" with direct competition. For irrespective of the vigor of the head-to-head contest among Michigan doctors, the Commission indicated that it was concerned in *MSMS* with competition in a larger sense: a marketplace confrontation in which price is set not by dealings between individual doctor and patient, but by negotiations between associations of doctors and either third party insurers or the government acting as surrogates for the patient population. The Commission invoked Section 5 because it did not want to see relative power in this kind of special market distorted by the use of a coercive tactic that might levy otherwise unjustified costs.

Furthermore, under the Commission's treatment of *Claiborne* in *MSMS*, if a coercive tactic is applied to the "competitive process", it does not become an expressive political petition merely because the boycotters are convinced that as a disfavored group (say, lawyers representing another disfavored group, [81] indigent criminals) they could not communicate effectively the connection between their own economic well-being and a political objective. In drawing a sharp line of demarcation at where it will recognize the political action rubric (or if you will the expressive petition concept) the Commission, in effect, said that for purposes of granting or denying a total antitrust exemption, neither label will apply if, in the context of a buyer-seller

confrontation, professionals combine for the purpose of economic gain, irrespective of any ancillary connection between this economic objective and some difficult to achieve but laudable political goal.²¹⁷ [82]

As for the *Noerr-Pennington* doctrine, contrary to respondents' argument, I see nothing in the Commission's decision in *MSMS* suggesting that its availability will turn on whether price is eventually set by legislation, as is the case here (and in *Noerr*) or by negotiation with an administrator who is delegated by statute with the right to make pricing decisions, as in the Michigan doctors case (and in *Pennington*). In either instance, all that is exempt under *Noerr-Pennington* is the right to petition—that is, to make one's views known—which not only is protected by the First Amendment, but also is encouraged by the public policy favoring the free flow of information to the government. But as the Commission indicated in *MSMS*, this communicative function of petitioning is isolated by *Noerr*-[83] *Pennington* from any underlying boycott, which must then stand on its own when tested under the antitrust laws.²¹⁸

²¹⁷ If there is no interference with the "competitive process" (i.e., a marketplace relationship between buyer and seller does not exist) the Commission intimates in *MSMS* that it may allow the political defense even if the coercive tactics aim for a political objective that translates into direct economic gain. This appears to be the basis for the distinction drawn in *MSMS* between the Michigan doctors' threat of a boycott from the actual boycott in *Crown Central Petroleum Corp. v. Waldman*, 486 F.Supp. 759 (M.D. Pa.), *rev'd on other grounds*, 634 F.2d 127 (3d Cir. 1980). In *Crown Central*, gas station operators agreed not to sell gasoline to consumers in order to pressure the Department of Energy into raising the retail price ceiling. Applying a balancing test to the dealer's boycott, the district court held that since the action was not aimed at competition in any sense, and represented the only effective way for the gasoline dealers to exercise their First Amendment right to bring their views to the government's attention, the conduct was a permissible form of joint political expression protected by *Noerr-Pennington*. The importance of *Crown Central* as precedent was diminished, however, when a contrary result was reached in *Osborne v. Pennsylvania-Delaware Serv. Station Dealers Ass'n*, 499 F.Supp. 553 (D.Del. 1980). There the district court held that dealers' boycott aimed at the Department of Energy was joint political activity, but it was not exempt since *United States v. O'Brien*, 391 U.S. 367 (1968) allows for regulation of even manifestly political activity—

... if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. 391 U.S. at 377.

While a decision on the obvious tensions between *Crown Central* and *Osborne* and resolution of the apparent conflict between *Claiborne* and *O'Brien* might define more precisely the bounds of permissible political activity, *MSMS* says in no uncertain terms that the Commission will not allow the political label to be used once there is any form of "competition", broadly defined as a marketplace confrontation, which includes government as a buyer of services provided by a profession.

²¹⁸ See also *Feminist Women's Health Center v. Mohammad*, 586 F.2d 530 (5th Cir.), *cert. denied*, 444 U.S. 924 (1979) (letters from a hospital medical staff and medical societies reporting to the state board of medical examiners alleged inadequacies in the post-operative procedures of an abortion clinic receive antitrust immunity under *Noerr-Pennington*, but any underlying conspiracy to eliminate the clinic by use of coercion is subject to antitrust scrutiny). Complaint counsel seem to be arguing at times that even apart from the use of coercive tactic, there may have been an illegal agreement here when the leadership of SCTLA convened meetings at which there was discussion about the appropriate fee level to be included in proposed legislation—\$35 or \$45 or some higher amount. Given the fact that all CJA lawyers are paid uniform fees as determined by statute, and that CJA lawyers, like any other interest group, have a right to petition for favorable legislation, I doubt that such a theory could survive the constitutional exemption of *Noerr-Pennington*. As for the line of cases that suggest that *Noerr-Pennington* may not apply at all if there is a commercial relationship between government and a seller claiming the exemption, this limitation has only been invoked when the so-called "petition" was in the form of a rigged bid or similar price-fixing device. See, e.g., *George R. Whitten, Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir.),

In addition to the claim that the boycott should receive a total constitutional exemption on the basis of *Claiborne* and *Noerr-Pennington*, respondents also submit that they are entitled to immunity on the grounds that a fee increase is directly related to their status as professionals who have the responsibility of protecting the Sixth Amendment rights of their indigent clients. This is simply a restatement of the argument that professional status alone merits a total antitrust exemption, a defense that should have been laid to rest after [84] *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) where the Court said flatly that irrespective of its public-service aspects, the practice of law is a business, as demonstrated most pointedly in conduct directed at fees—the very issue involved here and in *Goldfarb*. But while *Goldfarb* plainly means that respondents are entitled to no blanket exception from the antitrust laws on the grounds that the CJA segment of the legal profession performs a useful or even a constitutionally-mandated function advanced by the boycott, this seminal opinion also suggests that the special public service role of the professions may justify a departure from black letter antitrust law, including rules relating to boycotts. In its now famous footnote 17, the Court said:

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether the particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.²¹⁹

The fleshing out of the cautionary language cited above began in *Goldfarb* itself where notwithstanding footnote 17 the [85] Court treated the questioned practice—a county bar association's minimum fee schedule for title examination—as price-fixing and per se illegal. The Virginia lawyers essentially sought an immunity from antitrust regulation based solely on their status as a learned profession, and any arguments that may have been made about the public service aspects of the profession were obviously lost in defense of a title search, part and parcel of a standard commercial transaction.

That footnote 17 was more than a gloss became evident, however, in subsequent cases in which the Supreme Court has demonstrated a

cert. denied, 400 U.S. 850 (1970). In any event, as I read the complaint it does not challenge the right of commonly-affected lawyers to forge a position and then to urge a city to adopt it. The issue here is the antitrust consequences of going beyond mere petitioning to the point that joint action not covered by *Noerr-Pennington* (a boycott) is used.

²¹⁹ 421 U.S. at 788-89, n. 17.

reluctance to exclude public interest considerations in evaluating professional restraints. This trend can be seen, for example, in *Nat. Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). Citing to footnote 17, the Court raised the possibility that "ethical norms" (an undefined term) may be justified under a rule of reason approach (*id.* at 696), but rejected as "grossly overbroad" (*id.* at 699-700 (Blackman, J., concurring)) the notion that any competitive bidding would so tempt the engineers to ignore safety factors that a total exemption from the antitrust laws was in order. The Court would not accept such a "frontal assault" on the basic policy of the Sherman Act since it rested on the vague premise that any competition was a potential threat to public safety. *Id.* at 695. What *Professional Engineers* did not answer is how the Court would treat an "ethical norm", which had a marginal impact on competition, was shown by past history (say, a [86] record of collapsing buildings and bridges) to be justified, and was rationally tailored to meet such a proven need.

Following *Professional Engineers*, the possible availability of a public interest exemption for the professions suggested by footnote 17 was again signalled in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). There the Court held that a doctors' maximum fee schedule built into a health insurance plan was per se illegal since the maximum fee might tend to become the minimum. But the continued viability of footnote 17 was immediately reaffirmed as the Court noted that "[t]he respondents do not argue, as did the defendants in *Goldfarb* and *Professional Engineers*, that the quality of the professional service that their members provide is enhanced by the price restraint." *Id.* at 349. Thus notwithstanding its previous rejection of "quality of professional service" justifications in *Goldfarb* and *Professional Engineers*, the Court went out of its way in *Maricopa* to establish the possible availability of just such a defense in the proper case.

Taken together, *Goldfarb*, *Professional Engineers*, and *Maricopa* can be read as saying that while the professions will receive no blanket antitrust immunity for practices resembling illegal commercial activity, the special public service aspects of the professions may require some caution in applying per se rules, and under certain circumstances, policy considerations may excuse the restraint entirely. In *MSMS*, still another caveat was added by the Commission: in treating restraints in professional areas where the Commission has had little previous experience, [87] the per se rules, which exclude even the proffer of a justification, should be applied with special care. The Commission then went on in *MSMS* to grapple with the problem inherent in footnote 17 of evaluating the adequacy of the justifications proffered. Respecting the pressure on Blue Cross/Blue Shield, the respondents apparently wanted the Commission to mediate the

bitterly conflicting claims of the doctors and the Blues and decide whether fee schedules should in fact have been adjusted upward. If an increase was in order (a point heatedly denied by the insurers) then presumably the boycott was justified. The Commission refused to become embroiled in this controversy, and thus rejected out-of-hand the notion that an FTC proceeding is the proper forum for resolving disputes over the adequacy of fees. As for the threatened boycott of state Medicaid, the doctors claimed that unless Medicaid payments were increased the field would be left to disreputable "Medicaid Mills." The Commission did not treat at length with this argument except to note that the doctors could have exercised their rights of petition under *Noerr-Pennington* and brought their views before the Michigan legislature without resorting to collective threats. In all, the justifications advanced in *MSMS* were characterized by the Commission as "either very weak or non-existent". 101 F.T.C. at 296.

How far the Commission would have allowed the doctors to go in the way of showing a justification is not made clear in *MSMS* and is a bone of contention between the parties here. Complaint counsel argue that footnote 17 and its progeny were interpreted [88] by the Commission as meaning that the only justification allowable is evidence relating to procompetitive "efficiencies"—that is, whether the concerted activity enhanced competition by injecting new forms of competition, reducing entry barriers, or facilitating or broadening consumer choice. While complaint counsel are correct that these points are stressed, the Commission did not exclude quality and patient care arguments. It merely stated that on the facts of this case such arguments could have been made by means short of a boycott. 101 F.T.C. at 294–95. More importantly, complaint counsel's interpretation of *MSMS* would tend to diminish the actual language of footnote 17 since the Court spoke there of "the public service aspect" of the professions—a much broader perspective than the "enhancement of competition" test pressed by complaint counsel. In short, the Court in *Goldfarb* seems to recognize that there may be special problems of public policy properly within the concern of the professions, and that these problems need not be shunted aside in total deference to the economist's perception of efficiencies.

Some insight into what the *Goldfarb* Court may have had in mind in the way of justification was provided in *Wilk v. American Medical Ass'n*, 719 F.2d 207 (7th Cir.), cert. denied, 104 S.Ct. 2399 (1984), a case involving concerted activity by doctors aimed at limiting the hospital privileges of chiropractors. The Seventh Circuit, applying the rationale of footnote 17, concluded that under a rule of reason analysis it would allow the doctors to show (1) that the action was motivated by a genuine concern for patient care, (2) that this concern is objec-

tively [89] reasonable, (3) that the concern was the dominant motivating factor behind the action, and (4) that this concern for patient care could not have been adequately satisfied in a manner less restrictive of competition. *Id.* at 227.

There is nothing in *Wilk*, *Maricopa*, *Professional Engineers*, or *Goldfarb*, however, which even hints at expanding the rule of reason to accommodate the kind of "quality of care" justification advanced here by respondents—namely, that a group of professionals should be allowed to engage in collective activity so that they may increase their fees up to a level that permits them to serve their clients better. In *Wilk*, for example, the doctors did not argue that chiropractors had to be excluded from hospitals so that medical fees could be increased. By the same token, in *Maricopa* the majority and the dissent did not part company over a possible connection between the income level of Arizona practitioners and better care for the hospitalized: the issue there was whether the Court should look behind the questioned plan to determine if it might serve the interests of patients as a cost containing alternative to existing health insurance. Only in *Professional Engineers* do we see a defense in an antitrust case that even comes close to the one advanced here by the CJA lawyers—a restraint imposed for the purpose of obtaining or protecting a so-called reasonable level of professional income should receive antitrust immunity because the public will suffer if the engineers suffer. The Court gave short shrift to this "frontal assault" on the antitrust laws, and there is no reason to expect that it would be any more receptive to an [90] antitrust defense grounded, for example, on the notion that what's good for the county bar is good for the rest of the county, or any variation thereof requiring (a) a suspension in belief about the prevalence of selfless group pricing decisions, and (b) a willingness (or the wherewithal) to determine the reasonableness of a particular price.²²⁰

Up to this point I have dealt solely with the adequacy of the exemptions and the justifications advanced by respondents. For the reasons given above, I believe that they would all fail to pass antitrust muster. Arguably, this matter should then be disposed of by invoking *MSMS*' modified per se rule without further investigation of effects or market power. But given the Commission's total lack of institutional experience in dealing with the constitutional, political, and social pressures

²²⁰ A recent decision heavily relied upon by respondents, *Kreuzer v. American Academy of Periodontology* (*sic*), 5 Trade Reg. Rep. (CCH) ¶ 66,029 (D.C. Cir. 1984) has nothing to do with increasing fees to a reasonable level so that professionals might improve "quality of care." On the contrary, *Kreuzer*, like *Wilk*, strongly suggests that the rationale of footnote 17 will have no application when the economic self-interest of the profession is apparent, and that it will be confined instead to the context of self-regulation, restrictive membership rules, or other technical requirement directed toward a legitimate patient care purpose. Thus in *Kreuzer* the issue was whether a limited practice requirement for membership in an association of dental specialists (*i.e.*, certified periodontists could not practice periodontal prosthesis), which at least ostensibly was unrelated to the members' own economic interests, served to improve patient care by assuring a high level of periodontic skill.

permeating the criminal justice field, I was persuaded in the trial of this matter to allow respondents to make a full record so that both the trier of the facts and the reviewing authorities [91] might have before them any special circumstances surrounding a boycott in this unfamiliar area.²²¹

What the record shows is that the level of CJA fees is the end result of a legislative process that reflects, among other things, the low regard by the public for the constituency involved (indigent criminals and their lawyers), an assessment of what will satisfy the constitutional requirement for effective representation, the lofty sentiment that all lawyers owe a professional obligation to represent indigents, the budgetary pressures of conflicting priorities, and whatever influence the CJA lawyers can bring to bear in support of their demands for higher fees. These factors have nothing to do with ordinary market forces in the sense that there is an expectation on the part of the buyer (the D.C. government) that rates will be affected by any meaningful competition among CJA lawyers. On the other hand, ordinarily there is also no expectation by the buyer that the mechanism for setting price, which here happens to be [92] legislative, will be disrupted by the imposition of coercion by the sellers (the CJA lawyers) in the form of a boycott.

As for the effect of the boycott, certainly once it was imposed it was successful in accomplishing what it set out to do—to force an increase in the fees of CJA lawyers by creating an emergency and thus putting pressure on the District government to pass the required legislation. But it was a singularly curious form of coercion. For the record also shows that the boycott was not vigorously opposed by the Mayor who believed that an increase was fully merited but could not be brought about unless the city was confronted with an actual emergency demonstrating the importance of the CJA lawyers to the administration of the criminal justice system.²²² (The Mayor was hardly alone in his view that an increase was justified; as far as this record will allow, every expert who had studied the problem had concluded that

²²¹ I also find some support for this approach in *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) where the per se price-fixing label was withheld from a form of boycott—a concerted refusal to license individual music compositions and the use instead of a “blanket license”. The Court indicated that the background facts—the development of the blanket license in response to a market embracing thousands of users, a host of copyright owners, and millions of compositions—require a discriminating examination of the putative restraint under a rule of reason analysis. Similarly, in *NCAA v. Board of Regents*, 52 U.S.L.W. 4928 (June 27, 1984), the Court held that where an unconventional market is involved (there athletic competition requiring a balance of power among market participants) the per se rule against output restrictions, which might otherwise apply to an NCAA limitation on the number of football games member colleges could telecast, should be suspended in favor of a rule of reason approach that weighs actual adverse effects.

²²² The ambivalent role played by the District government in the events surrounding the CJA rate increase may explain its failure to invoke the city’s own antitrust laws (JX 14C, ¶ 4; CX 240A-L), as well as the conspicuous absence of District officials as supporters of the complaint. This cool reaction by those most directly affected stands in marked contrast to the vigorous state opposition elsewhere to boycotts organized by professional groups for the purpose of securing favorable legislation. See, e.g., *New York v. Roth*, 1979-2 Trade Cases ¶ 62,828 (Nassau County Ct. 1979).

the pre-boycott rates, which had not been adjusted for over 10 years, were woefully inadequate.)

In summary, under *MSMS* the professionals who sell legal services to the city receive no blanket "political action" or "petitioning" anti-trust exemptions or access to special "quality of care" justifications when they act in concert in order to [93] obtain higher fees. And if the city had not been so supportive of the boycotters' demands (or to put it somewhat differently, if the identity of the victim was not so elusive) I have little doubt that an order would be appropriate. However, when the seller's action is accompanied by the buyer's knowing wink, this suggests that presumptions about the way free markets work and the inevitable adverse effects flowing from this kind of concerted activity should be saved for another day—perhaps one when the buyer is more determined to deal at arm's length with the seller over the adequacy of compensation paid for an essential service.

In reaching the conclusion that the Commission should depart here from the strong authority of *MSMS* on the narrowest possible anti-trust grounds—no adverse effects in the special circumstances of the 1983 boycott—I necessarily assume, as I have emphasized throughout this discussion, that on the basis of *MSMS* all of respondents' preferred justifications and claimed exceptions, including those grounded on the political action defense, would be rejected if tested solely within the four corners of the Commission's earlier opinion. But while *MSMS* is clearly binding on an ALJ, I am constrained to point out that the Commission's handling of the constitutional problem raised by *Claiborne*—i.e., the Commission's bright line separation of politically motivated action from coercion directed at the "competitive process"—assumes a purity of purpose that may not reflect the actual mixed motivation of lawyers for the indigent. As it happens, the record here lends itself to more [94] than just a colorable claim of strong political motivation even though the immediate objective of the boycott was a fee increase. Thus the record shows that the CJA lawyers sincerely believed that protection of the constitutional rights of their clients was directly related to reducing caseloads, which, in turn, was a function of a rate change. But even more important is the evidence indicating that city officials (and practically everyone else concerned with the criminal justice system) were convinced in 1983 that (a) the optimal economic price was inadequate to satisfy the "political" (i.e., constitutional) requirement of effective representation, and (b) the CJA lawyers were unlikely to achieve higher fees if they continued to rely on communicative political petitioning alone. The perceptions of these local officials (whose judgment is not easily susceptible to second-guessing since they not only must provide for equal justice under law, but also must pay for it) would seem to argue strongly

against pressing for an unnecessary and possibly uncertain confrontation between the Commission's antitrust perspective, which would treat this boycott solely in terms of presumed adverse effects upon the competitive process, and broader constitutional principles, which may allow for an expressive demonstration if the political motivation evidence is credible.²²³ I see no point in striving resolutely for an antitrust triumph in this sensitive area when this particular case can be disposed of on a more pragmatic basis—there was no harm done. [95]

IV.

CONCLUSIONS OF LAW

1. The Superior Court Trial Lawyers Association ("SCTLA") is subject to the jurisdiction of the Federal Trade Commission. In addition, the Federal Trade Commission has jurisdiction over the named individual respondents and the subject matter of this complaint.

2. SCTLA, the named individual respondents, as well as the members of SCTLA and other CJA attorneys, put into effect on September 6, 1983, a boycott of Superior Court. This boycott took the form of a concerted refusal to accept new indigency assignments unless the existing fee schedule was raised.

3. Under the holding in *MSMS*, the boycott by SCTLA and the CJA lawyers was not a form of political action protected by *Claiborne*.

4. Under the holding in *MSMS*, the boycott by SCTLA and the CJA lawyers was not political petitioning exempt from the antitrust laws by *Noerr-Pennington*.

5. Since the boycott by SCTLA and the CJA lawyers was designed to improve the economic well-being of the CJA lawyers, it is not within the ambit of the public service caveat for the professions suggested by footnote 17 of *Goldfarb*, notwithstanding the fact that the action was also motivated by a genuine belief among CJA lawyers that their ability to render effective representation to indigent criminal defendants was directly connected to a rate increase. [96]

6. In the context of the special circumstances of this case, it cannot be presumed that the higher costs attributable to the 1983 boycott are adverse effects. On the contrary, the evidence strongly indicates that in this instance the boycott was viewed by city officials as the only feasible way of getting a rate increase, which was unpopular with the general public but was supported by virtually all elements of the community concerned with implementing the public policy behind the Sixth Amendment.

²²³ See Note, *A Market Power Test For Noncommercial Boycotts*, 93 Yale L.J. 523 (1984).

Accordingly, the following order should be issued.

ORDER

The complaint is dismissed.

OPINION OF THE COMMISSION

By AZCUENAGA, *Commissioner*:

In the summer of 1983, the District of Columbia Superior Court Trial Lawyers Association ("SCTLA"), its officers, members and other lawyers agreed to stop providing legal services to the District of Columbia for indigent criminal defendants, until the District increased the fees it paid for such services. In furtherance of their agreement, the individual respondents and other SCTLA lawyers refused to accept new indigency cases beginning September 6, 1983, until the District raised the fees. On September 20, 1983, in order to resolve the crisis [2] caused by the boycott in its program for the legal representation of indigents, the District government enacted emergency legislation to increase the fees it paid under the Criminal Justice Act ("CJA")¹ to lawyers who participated in the program.

The Commission issued a complaint alleging that the Superior Court Trial Lawyers Association, the three named officers of the association, and the chairperson of the SCTLA Strike Committee entered into an agreement to restrain trade by refusing to compete for or to accept new CJA appointments unless the fees were raised. The complaint alleges that this conduct constitutes a conspiracy to fix prices and to conduct a boycott in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

After a hearing, the Administrative Law Judge found that the Superior Court Trial Lawyers Association and the named respondents had engaged in a concerted refusal to deal for the purpose of increasing the CJA fees and that the boycott had the effect of increasing those fees. He also concluded that the boycott was not political action protected by the First Amendment from application of the antitrust laws. The Administrative Law Judge nevertheless dismissed the complaint on the ground that the boycott had no adverse effects, because an increase in the CJA fees was necessary to "satisfy the 'political' (i.e., [3] constitutional) requirement of effective representation"² and

¹ D.C. Code Ann. §§ 11-2601 to -2609 (1981).

² I.D., slip op. at 94. We use the following abbreviations in this opinion:

I.D. - Initial Decision
I.D.F. - Initial Decision Finding
R.A.B. - Respondents' Answering Brief
JX - Joint Exhibit

that the strike was the "only feasible way" to secure the increase.³

We affirm the Administrative Law Judge's conclusions that the respondents engaged in a concerted refusal to deal for the purpose of raising prices and that their boycott is not immune under the First Amendment from the antitrust laws.⁴ We reverse the Administrative Law Judge's decision as to liability, and we conclude instead that the SCTLA lawyers' boycott was a *per se* violation of Section 5 of the Federal Trade Commission Act. Our conclusion would be the same under a rule of reason analysis.

THE FACTS

The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." If the [4] accused cannot afford counsel, then counsel must be appointed by the court.⁵ In order to comply with the requirements of the Sixth Amendment to provide counsel for indigent criminal defendants, the District of Columbia provides a mixed system of private lawyers compensated under the Criminal Justice Act and government lawyers employed by the District's Public Defender Service ("PDS").⁶

By statute, the Public Defender Service may represent only indigent criminal defendants who are charged with an offense punishable by imprisonment for six months or more and may represent no more than 60 percent of the indigents in this category.⁷ Private practitioners appointed and paid under the Criminal Justice Act provide most of the remaining balance of the representation of indigents.⁸ PDS lawyers handle the more serious felony cases, and the CJA lawyers provide the larger volume of the District's criminal indigency representation.⁹ In fiscal year 1982, CJA lawyers handled 19,475 of the 25,000 misdemeanor indigency cases closed that year and approximately 4,000 felony cases, usually those involving less serious felonies than those handled by the PDS lawyers. [5]

Every member in good standing of the District bar who has a local address and telephone number and who registers with the CJA office of the Public Defender Service is eligible for assignment of cases under the CJA. Although more than 1,200 private attorneys are regis-

CX - Complaint Counsel's Exhibit

Testimony is cited by the name of the witness followed by the transcript page.

³ I.D., slip op. at 96.

⁴ The Commission's findings of fact and conclusions of law are stated in this opinion. The findings and conclusions of the Administrative Law Judge, except as specifically adopted herein, are rejected.

⁵ See, e.g., *United States v. Cronin*, 466 U.S. 648 (1984).

⁶ I.D.F. 15.

⁷ I.D.F. 17.

⁸ In addition, private attorneys working on a *pro bono* basis and third-year students from local law school participating in clinical programs provide about 5% of the legal representation for indigent defendants. I.D.F. 20

⁹ I.D.F. 19.

tered for CJA assignments, most appointments go to approximately 100 CJA "regulars," who derive almost all their income from representing indigents and make themselves available to take CJA appointments on a regular basis.¹⁰

Case assignments under the CJA are generally made on a rotation basis by a judge or commissioner, who assigns a CJA attorney from the daily list of those who have called in for CJA appointments to each eligible person listed on the daily lock-up list. The assigning commissioner or judge may depart from this rotation in order to assign a particularly complex case to a more experienced attorney, to limit a new attorney to misdemeanor cases, or to accommodate an attorney's request that he or she be assigned only to a particular type of case (*e.g.*, only felonies or only misdemeanors).¹¹ The most important case assignment criterion, however, is availability.¹²

In 1983, before the strike, the CJA fees paid by the District were set at \$20 per hour for out-of-court time and \$30 per hour for in-court time, with case maximums of \$1,000 for [6] felonies, \$400 for misdemeanors and \$1,000 for appeals.¹³ Each lawyer was also limited to annual maximum earnings under the CJA program of \$42,000.¹⁴ The amount of compensation actually paid to a CJA lawyer in each case is subject to the approval of the presiding judge, who has the authority to reduce the amount sought, although this is done in only a small percentage of cases. Occasionally, a lawyer may request compensation greater than the established per case limit on the ground that the particular case was extended or complex. Most of these requests are approved.¹⁵

The Superior Court Trial Lawyers Association is a loosely organized group of CJA-registered lawyers. Because lawyers are constantly entering and leaving CJA practice, the membership of the Association is difficult to determine precisely. Technically, membership and the right to vote in elections depend upon the payment of annual dues, but this requirement has not been enforced vigorously. In practice, virtually any lawyer who is registered for CJA assignments can participate in SCTLTA [7] meetings, vote in elections and even hold office in the organization.¹⁶

Despite its loose structure, the SCTLTA was the "rallying point" for

¹⁰ I.D.F. 18.

¹¹ I.D.F. 22 & 23.

¹² I.D.F. 24.

¹³ I.D.F. 26. The District's Criminal Justice Act, D.C. Code Ann. § 11-2604(a), provided for compensation of CJA attorneys "at a rate . . . not to exceed the hourly scale established by" the federal statute for appointed counsel, 18 U.S.C. 3006A(d). The District's preboycott fees were equal to the federal maximum. The 1983 amendment to the District's Criminal Justice Act provides for fees "not to exceed the rate of \$35 per hour."

¹⁴ I.D.F. 29; Carter Tr. 132. The annual ceiling was increased to \$50,000 after the boycott.

¹⁵ I.D.F. 27.

¹⁶ I.D.F. 3.

the CJA lawyers at the time of their strike.¹⁷ The Association held informal meetings from time to time in the lawyers' lounge of the Superior Court, it had a board of directors and elected officers, and it maintained a bank account. At one time, the SCTLTA organized a political action committee that collected funds and made contributions to political candidates who supported an increase in the level of fees paid under the CJA. Officers of the SCTLTA initiated a preboycott lobbying campaign to increase the CJA fees and paid the expenses of the campaign out of the SCTLTA treasury. SCTLTA officers organized the 1983 strike for higher fees, and the Association paid strike-related expenses. In general, SCTLTA held itself out as the representative of CJA lawyers, and its officers were generally perceived to be authorized to speak on behalf of CJA lawyers regarding fee levels and other matters affecting CJA practice.¹⁸

The respondent Ralph J. Perrotta is a CJA regular, with about 90 percent of his practice consisting of CJA cases. Mr. Perrotta was elected president of SCTLTA in the fall of 1982 and [8] chairman in October 1983.¹⁹ The respondent Karen E. Koskoff, also a CJA regular, derives about 99 per cent of her practice from CJA assignments. In late 1982, Ms. Koskoff was elected vice-president of SCTLTA and, in October 1983, she was elected SCTLTA's president.²⁰ The respondent Reginald G. Addison, another CJA regular, derives about 90 per cent of his practice from CJA cases. In 1983, he was elected secretary of SCTLTA and, in October 1983, he was elected SCTLTA's vice-president.²¹ During the period of time with which this action is concerned, the respondent Joanne D. Slight was a CJA regular who derived 95 per cent of her practice from CJA cases. In August 1983, Ms. Slight was named chairperson of the SCTLTA "Strike Committee."²² In December 1983, she left CJA practice for a position with a public interest research group in New York, but she has since returned to practice in the District and is again accepting cases under the CJA.²³

Before the strike, the CJA lawyers, through the officers of SCTLTA, engaged in a vigorous lobbying campaign for an increase in CJA fees.²⁴ This campaign, which was funded by the SCTLTA [9] treasury, included meetings with the Chief Judge of the Superior Court and the court's administrative officer to seek their support for a fee increase, with the Counsel to the Mayor to discuss legislative possibilities, with the Dean of the Howard University School of Law to seek advice on

¹⁷ I.D.F. 2.

¹⁸ I.D.F. 4.

¹⁹ I.D.F. 5.

²⁰ I.D.F. 6.

²¹ I.D.F. 7.

²² I.D.F. 8.

²³ Supplemental Filing of Respondents, August 1, 1985.

²⁴ I.D.F. 37-45.

how to secure passage of legislation raising the CJA fees, and with a staff member of the Subcommittee on the District of Columbia of the Senate Committee on Appropriations to explore the possibility of federal funding to increase the CJA fees.²⁵ The SCTLTA also rallied supporters to testify before the City Council's Committee on the Judiciary in favor of pending legislation to increase the CJA fees.²⁶ Despite the introduction of various legislative initiatives in the City Council, SCTLTA did not succeed in its lobbying efforts to obtain passage of legislation raising the CJA fees.²⁷ City officials in the legislative and executive branches told the CJA lawyers that no money could be found to fund the increase.²⁸

In early August 1983, the SCTLTA leaders told the other CJA lawyers at an SCTLTA meeting that the pending legislation to increase the CJA fees was unlikely to be passed because of the lack of funding. In response, the CJA lawyers voted to form a "strike committee," later designated the "SCTLTA Strike [10] Committee," to consider additional action to obtain a fee increase.²⁹ The members of the strike committee met shortly thereafter and agreed that the only way to obtain higher fees was for the CJA lawyers to stop accepting new CJA cases until the city complied with their demands. They also agreed that they should demand an increase to \$45 per hour for out-of-court time and \$55 per hour for in-court time.³⁰

Ms. Slaight was designated chairperson of the strike committee, and Mr. Perrotta, Ms. Koskoff and Mr. Addison were designated as the "Negotiating Team." Other CJA lawyers were assigned responsibility for making sure that all the CJA lawyers knew about the strike, contacting other groups of lawyers and contacting the media.³¹

At an SCTLTA meeting on August 11, 1983, a group of about 100 CJA lawyers agreed to strike if the CJA fees were not increased by September 6th.³² Immediately following this meeting, a petition was drafted and posted in the lawyers' lounge. The petition stated: [11]

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

²⁵ I.D.F. 37-40 & 44.

²⁶ I.D.F. 42.

²⁷ I.D.F. 42 & 43.

²⁸ I.D.F. 36, 42, 43 & 45.

²⁹ I.D.F. 46.

³⁰ Before the 1983 boycott, the District's CJA fees were set at the maximum, \$20 and \$30, provided in the federal Criminal Justice Act, 18 U.S.C. 3006A(d)(1)-(2). In October, 1984, one year after the boycott, the federal statute was amended to provide for fees "not exceeding" \$60 per hour for in-court time and \$40 per hour for out-of-court time.

³¹ I.D.F. 47.

³² I.D.F. 48.

Act.³³

The petition was signed by a number of CJA attorneys including Mr. Addison and Ms. Slaight.

By late August, the SCTLA lawyers were working to assure the success of the strike scheduled for September 6. The SCTLA (over Mr. Perrotta's signature) sent a letter to a number of law firms in the city announcing the impending strike to increase CJA fees and asking them to "support [SCTLA's] goals by not making your firm available to accept cases during this period."³⁴ The SCTLA Strike Committee solicited the written commitment of other CJA lawyers to support the boycott.³⁵ SCTLA members also addressed several lawyers' associations, making the same request, and made additional efforts to persuade the few remaining holdouts among the CJA lawyers to join in the strike.³⁶

On August 29, immediately before a press conference scheduled by SCTLA to discuss the planned strike, SCTLA representatives met with Mayor Barry to discuss their demand for an increase in the CJA fees.³⁷ According to Mr. Perrotta, the [12] Mayor was sympathetic to the need for an increase in the CJA fees, but he did not know where the city would find the money to fund such an increase.³⁸ The Mayor explained the city's legislative and budgetary process to the SCTLA representatives and said that, except in an emergency, the process can take months.³⁹ The SCTLA representatives told the Mayor that the SCTLA lawyers had voted to strike beginning on September 6 if the CJA fees had not been increased by that time. The Mayor responded that even if he could find the money to fund an increase, he would be unable to do so by that date.⁴⁰

On September 6, 1983, the strike began as planned. All of the named respondents and almost all of the CJA regulars stopped calling in to place their names on the daily list of attorneys willing to accept CJA appointments.⁴¹ The SCTLA Strike Committee also staged a series of events—rallies, picket lines, handouts of "press kits," and newspaper and television interviews—designed to inform the general public about the goals of the strike.⁴²

As anticipated by the SCTLA, the strike had a severe impact on the District's criminal justice system. The city's need for legal services for

³³ CX 4B-D.

³⁴ CX 6A.

³⁵ CX 8A, CX 10A.

³⁶ I.D.F. 55.

³⁷ CX 13.

³⁸ Perrotta Tr. 700; I.D.F. 50.

³⁹ Perrotta Tr. 701.

⁴⁰ *Id.*

⁴¹ I.D.F. 56.

⁴² I.D.F. 58.

indigent criminal defendants continued during [13] the strike and the available alternatives to replace the CJA lawyers were inadequate to the need.⁴³ Within a few days, the Public Defender Service lawyers were swamped with cases. As many as eight or nine indigent defendants per day were assigned to PDS lawyers who already were carrying full caseloads. The few CJA regulars who continued to accept cases were also soon overloaded. The overall response of lawyers in private law firms to a call from the Public Defender Service for help was, in the words of the Administrative Law Judge, "feeble."⁴⁴

On September 15, 1983, Messrs. Cohen and Carter of the Public Defender Service hand-delivered to Chief Judge Moultrie of the Superior Court, the Mayor, and City Councilwoman Wilhelmina Rolark a letter "to apprise [them] of the extremely serious situation that has now developed with respect to the legal representation of indigents in criminal and juvenile delinquency cases in the Superior Court of the District of Columbia" as a result of the strike by the SCTLAs lawyers.⁴⁵ Messrs. Cohen and [14] Carter stated that the PDS was unable to provide the necessary quantity and quality of legal services during the strike and that the daily demand for representation had "seriously depleted" the private bar as a resource for counsel for indigent defendants. The PDS urged Councilwoman Rolark, Chief Judge Moultrie and Mayor Barry to declare their support for pending legislation to increase the CJA fees in order to alleviate the "crisis."⁴⁶ Chief Judge Moultrie also informed the Mayor that in his view the criminal justice system was approaching a crisis point.⁴⁷

Immediately after receiving the letter from the Public Defender Service, the Mayor set up a meeting with the respondents Koskoff, Perrotta, and Addison. The purpose of the meeting was to negotiate an end to the SCLTA lawyers' strike.⁴⁸ The Mayor first proposed that he would support an increase in the CJA fees to \$35 an hour for both in-court and out-of-court time, consistent with the legislation then pending, through the normal legislative process. This commitment by the Mayor to fund the increase was a commitment he had declined to

⁴³ I.D.F. 60. Before the strike, 35 to 40 CJA lawyers called in daily for case assignments and handled about 85% of CJA cases. After September 6, only three or four CJA lawyers called in daily, and the percentage of indigency cases handled by them dropped to about 8%. I.D.F. 60 n.187.

⁴⁴ I.D.F. 60. The PDS requested volunteers from a list of 40 law firms with "conspicuous pro bono programs." The SCLTA Strike Committee, in late August, had requested these firms to support SCLTA by refusing to accept cases during the strike. See text at note 34 *supra*. It is unclear from the record whether the firms' lack of response to the PDS request for assistance resulted from the SCLTA letter. I.D.F. 55 n.169.

⁴⁵ CX 31A-C.

⁴⁶ *Id.*

⁴⁷ I.D.F. 61 & 62. The Chief Judge also said that he was "unalterably opposed to a strike or an organized boycott as a method to bring about the needed changes." RX 140 (Letter to David B. Isbell, President, D.C. Bar Association (Sept. 10, 1983)).

⁴⁸ JX 11, at 45.

give at the August 29 meeting with the SCTLAs leaders.⁴⁹ The SCLTA representatives [15] said, however, that the CJA lawyers would be unlikely to resume calling in for CJA assignments on the basis of a commitment to fund a bill that might pass three or four months later. The Mayor then agreed to support emergency legislation for the increase.⁵⁰ After the Mayor agreed to support emergency legislation to increase the CJA fees to \$35 an hour and to support introduction of a second bill to increase the CJA fees to the \$45 and \$55 levels, the SCLTA representatives agreed to urge the CJA lawyers to resume calling in for cases.⁵¹

On September 16, the Mayor notified Councilwoman Rolark that he would "initiate reprogramming or supplemental actions . . . to ensure that the courts have adequate resources to cover the increased costs" of the proposed \$35 CJA fee.⁵² Councilwoman Rolark and Council Chairman Clarke, at a meeting with Ms. Koskoff and Mr. Addison, agreed to consider the bill to increase the CJA fees to \$35 on an emergency basis. When Ms. Koskoff expressed concern that some of the striking attorneys might not accept the \$35 proposal, Chairman Clarke and Councilwoman Rolark agreed to introduce a bill to increase the CJA fees to the \$45/\$55 levels, but only for future consideration in the normal course of legislative business.⁵³ [16]

At Ms. Koskoff's request, the councilmembers agreed to meet with those CJA attorneys who were demanding the higher rate. Chairman Clarke told the lawyers that the increase to \$35 an hour was the only increase that the Council would consider on an emergency basis and that the Council would not consider any increase if the CJA lawyers rejected the offer. He also said that the CJA lawyers must tell him by 1:00 p.m. on September 19 whether they would accept the proposed \$35 increase.⁵⁴

On September 19, 1983, the SCLTA membership voted to accept the \$35 offer and end their boycott.⁵⁵ Later the same day, the City Council's judiciary committee met and reported out the emergency legislation.⁵⁶ On September 20, Chairman Clarke suspended the rules for consideration of the proposed increase on an emergency basis, and the increase was approved unanimously by the City Council.⁵⁷ On September 21, 1983, the CJA regulars resumed calling the CJA office to

⁴⁹ JX 12, at 67 & 97; see text at notes 38 & 40 *supra*.

⁵⁰ JX 11, at 48.

⁵¹ *Id.*

⁵² I.D.F. 64.

⁵³ I.D.F. 65.

⁵⁴ *Id.*

⁵⁵ I.D.F. 66.

⁵⁶ I.D.F. 67.

⁵⁷ I.D.F. 68.

accept new cases.⁵⁸ [17]

LEGAL ANALYSIS

I. The Boycott

On September 6, 1983, the officers of SCTLTA and other CJA lawyers jointly refused to accept new CJA appointments, until the District of Columbia increased the CJA fees.⁵⁹ Their strike was successful. The city's CJA program for providing counsel to indigents approached the "brink of collapse,"⁶⁰ and the city responded to the emergency by offering to increase the CJA fees if the respondents would end the strike. On September 19, the SCTLTA lawyers voted to accept the city's proposed fee increase,⁶¹ and they resumed accepting new CJA assignments on September 21.⁶² The question before us is whether the respondents' joint and coercive refusal to deal with the city until the city raised the price for their services constitutes unlawful conduct under section 5 of the FTC Act.⁶³ We conclude that it does. [18]

A.

We find that the city's purchase of CJA legal services for indigents is based on competition.⁶⁴ The price offered by the city is based on competition, because the city must attract a sufficient number of individual lawyers to meet its needs at that price. The city competes with other purchasers of legal services to obtain an adequate supply of lawyers, and the city's offering price is an element of that competition.⁶⁵ Indeed, an acknowledgement of this element of competition is implicit in the respondents' argument that an increase in the CJA fee was "necessary to attract, and retain, competent lawyers."⁶⁶ If the offering price had not attracted a sufficient supply of qualified lawyers willing to accept CJA assignments for the city to fulfill its constitutional obligation, then presumably the city would have increased its offering price or otherwise sought to make its offer more attractive. In fact, however, the city's offering price before the boycott apparently was sufficient to obtain the amount and [19] quality of legal ser-

⁵⁸ I.D.F. 69.

⁵⁹ I.D.F. 48-49. Mr. Perrotta and Ms. Koskoff did not sign the petition or vote for the strike, I.D.F. 49 & note 153, but both participated in the boycott. I.D.F. 56.

⁶⁰ I.D.F. 61.

⁶¹ I.D.F. 66.

⁶² I.D.F. 69.

⁶³ The "[u]nfair methods of competition" proscribed by section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), include restraints of trade violative of the Sherman Act, 15 U.S.C. 1. *FTC v. Cement Institute*, 333 U.S. 683, 694 (1948).

⁶⁴ Accordingly, we reject the respondents' contention that antitrust analysis is inappropriate because the purchase of CJA services by the city does not involve competition. R.A.B. at 41-42.

⁶⁵ Counsel for the respondents acknowledged at oral argument that the preboycott CJA fees were the market (i.e., the competitive) price. Transcript, Oral Argument, Feb. 7, 1985, at 52.

⁶⁶ R.A.B. at 9. The respondents suggest that a "benefit" of their boycott was an increase in the number of lawyers willing to take CJA cases. R.A.B. at 23. The Supreme Court has rejected this argument. See note 81 *infra*.

vices that it needed.⁶⁷

The lawyers who provide legal services to the city under the CJA program are competitors, individual entrepreneurs, selling their services to the District of Columbia. Each lawyer who is eligible for the CJA program is free to determine, on a daily basis, whether to accept CJA assignments at the city's offering price or to seek clients elsewhere. In making the decision whether to accept CJA assignments, the individual lawyer may consider not only the price offered by the city for CJA services but also the prices offered by other potential clients or employers.⁶⁸ The supply of lawyers to the city's CJA program depends upon these independent decisions of numerous individuals.

The number of CJA assignments available to each lawyer and, hence, his income from the CJA program, depend upon the number of indigent criminal defendants who require CJA counsel and the number of other lawyers who make themselves available for such cases, as well as the lawyer's own availability for the assignments. This competition does not differ from that confronting any lawyer—or indeed from that confronting an accountant, a plumber or any other seller of services—whose work load and income depend upon his availability, the [20] availability of competing providers, the demand for the service and the fee for the service.

The lawyers who sold their services to the CJA program did not and could not negotiate their fees on an individual basis because the city established one fee for all, regardless of their experience or other qualifications. Individually negotiated prices, however, are not a prerequisite for competition. In most markets, either the seller or the buyer posts a price. In many indisputably competitive product markets, such as the wholesale crude oil, grain and other commodity markets, a buyer unilaterally posts an offering price and potential sellers vie with one another to determine whether they will sell at the offering price or hold out for a higher price. The challenge facing the city is the same as that facing many buyers: to announce a price sufficient to obtain the desired quantity and quality of services without paying more than the market requires. This type of pricing arrangement differs only superficially from the more usual arrangement in which offering prices are posted by the sellers. Under either price arrangement, sellers who agree among themselves to restrict supply in order to raise prices are acting in concert to force the buyer to pay a higher price. [21]

⁶⁷ Counsel for the respondents admitted at oral argument that CJA representation before the boycott satisfied minimum constitutional standards. Transcript, Oral Argument, Feb. 7, 1985, at 53. See also I.D.F. 25 & note 91.

⁶⁸ The respondents also acknowledge this competition with their statement that many lawyers move from CJA practice "to a more lucrative practice as soon as they have the opportunity to do so." R.A.B. at 8.

B.

In deciding whether the respondents have unlawfully restrained competition in the market for CJA services, we first must determine whether to use a *per se* or rule of reason analysis. The choice between the two approaches depends upon "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979).

The *per se* rule applies to facially anticompetitive agreements, "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are 'illegal *per se*.'" *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). The rule of reason applies to agreements the competitive effects of which can be evaluated only by analyzing the facts peculiar to the business and the purpose and effect of the restraint. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918). Whichever analysis applies, the purpose is to determine whether the conduct under scrutiny unreasonably restrains competition, and "the inquiry is confined to a consideration of impact on competitive conditions." *National Society of Professional Engineers v. United States*, 435 U.S. at 690. [22]

We conclude, as discussed below, that the respondents' concerted refusal to deal for the purpose of raising the fees paid to them under the CJA program is unlawful and that application of the *per se* standard is appropriate on the facts of this case. We would reach the same conclusion under a rule of reason analysis.

1. *Per se* Analysis

The basic facts are not in dispute. The respondents collectively refused to accept new CJA assignments until the city increased the CJA fees. The purpose of the boycott was to increase fees. The Administrative Law Judge found, and we agree, that the respondents' boycott succeeded in forcing the city to increase the CJA fees.⁶⁹ Such concerted action to raise prices has consistently been held unlawful by the courts. "Price is the 'central nervous system of the economy,' *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59, and an agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face." *National Society of Professional Engineers v. United States*, 435 U.S. at 692.

The respondents' boycott to raise prices directly and immediately

⁶⁹ I.D.F. 61 & 70.

eliminated virtually all competition among the participating lawyers for CJA appointments at the city's offering price and dramatically reduced the supply of lawyers to the CJA [23] program. The city's ability to fulfill its constitutional obligation to supply counsel for criminal indigent defendants was severely strained, and some city officials feared a "crisis point"⁷⁰ in the CJA system. The crisis was resolved when the city capitulated to the respondents' demands and increased the CJA fees. On its face, the boycott to raise prices unreasonably restrained trade within the meaning of section 1 of the Sherman Act and section 5 of the FTC Act, and application of the *per se* rule appears to be appropriate. See, e.g., *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 342-55 (1982); *National Society of Professional Engineers v. United States*, 435 U.S. at 692-93.

The respondents contend that a *per se* analysis of their conduct is inappropriate because any agreement among them "that could conceivably be called price-fixing as distinct from a boycott would be protected under *Noerr-Pennington*."⁷¹ We need not and do not address the question of the lawfulness of any agreement on price "as distinct from a boycott." We consider only the lawfulness of the respondents' coercive, concerted refusal to deal for the purpose of increasing the CJA fees, and our conclusion that the respondents have violated the law is based on that conduct, not upon their price agreement alone nor upon their preboycott collective efforts to persuade the city government, solely by the force of argument, to raise the fees. [24]

The respondents' assertion that their boycott "is not of the type which has been held to be *per se* unlawful, i.e., concerted group action to injure or eliminate a competitor of one or more of the participants,"⁷² does not change our analysis. If the boycott had not had the purpose and effect of raising prices, then a more elaborate analysis might be required. Here, however, the boycott was a single course of action, a coercive, concerted refusal to deal, with a single purpose—to increase the fees paid to the boycott participants in their capacity as CJA lawyers. "[W]hen there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'" *NCAA v. Board of Regents*, 468 U.S. 85, 109 (1984), citing *National Society of Professional Engineers v. United States*, 435 U.S. at 692; see also *San Juan Racing Association, Inc. v. Asociacion de Jinetes de Puerto Rico, Inc.*, 590 F.2d 31 (1st Cir. 1979).

The conduct of the CJA lawyers in pressuring the city to increase

⁷⁰ I.D.F. 61.

⁷¹ R.A.B. at 49.

⁷² R.A.B. at 49.

the CJA fees clearly falls within the "generic concept of 'boycott.'" *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 541 (1978). Because it was aimed at their customer, the respondents' boycott was different from those boycotts in which the target is a competing firm and the purpose is to drive the target from the market or to impede its ability [25] to compete.⁷³ Whether a concerted refusal to deal is aimed at a customer or at a competitor, however, the question remains the same: "whether the challenged agreement is one that promotes competition or one that suppresses competition." *National Society of Professional Engineers v. United States*, 435 U.S. at 691; accord, *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S.Ct. at 2620. Applying this standard to the facts before us, we conclude that application of the *per se* rule to the respondents' coercive boycott to raise prices is appropriate.

The respondents argue that they lacked the ability to set the price for CJA services,⁷⁴ because formal legislative action by the city was necessary to increase the fees, and that their conduct "is more accurately described as a horizontal price-related restraint"⁷⁵ than as horizontal price fixing. This does not exonerate the participants in the boycott, because the evidence shows that they coerced the city to increase the CJA fees. Indeed, the record shows that the City Council sought the [26] SCTLAs' approval of a proposed legislative increase before the Council would act.⁷⁶

The respondents also claim that the public service aspect of their practice of law makes the *per se* rule inapplicable, under the authority of *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), at least when the conduct involved is not direct price fixing.⁷⁷ We have concluded, however, that the SCTLAs' concerted refusal to deal for the purpose and with the effect of raising prices is price fixing and is therefore subject to the *per se* rule. In *Goldfarb*, the Court applied the *per se* rule to price fixing by lawyers for title examinations: "Whatever else it may be, the examination of a land title is a service; the exchange of such a service for money is 'commerce' in the most common usage of that word." *Id.* at 787-88. We discern no reason for applying a different rule here. A lawyer who provides legal representation for an indigent defendant also provides a service, and the exchange of this service for money is also commerce. The respondents,

⁷³ Sometimes a showing of "market power or exclusive access to an element essential to effective competition" is necessary in a case involving a refusal to deal. See *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S.Ct. 2613, 2621 (1985). Proof of market power is not required here, because, "[a]s a matter of law, the absence of proof of market power does not justify a naked restraint on price or output." *NCAA v. Board of Regents*, 468 U.S. at 109, citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).

⁷⁴ R.A.B. at 48.

⁷⁵ R.A.B. at 50.

⁷⁶ I.D.F. 65-66.

⁷⁷ R.A.B. at 48.

like the lawyers in *Goldfarb*, refused to provide legal services unless their price demands were met.

The respondents also contend that a *per se* analysis is inappropriate because “the political dimensions of this case . . . ensure that the usual presumptions about conduct drawn [27] from the economic sphere simply do not apply.”⁷⁸ As we discussed earlier, in determining that competition exists in the market for CJA services, principles of economics do apply to the purchase and sale of legal services for indigent criminal defendants. Those principles do not vary depending upon the identity of the sellers or of the purchaser of the service. The fact that the purchaser is a city government and the fact that the sellers are lawyers who provide a service that benefits the public have no economic significance that affects the performance of the market. The extent to which the identity of the market participants may or may not have legal significance is addressed in Part II of this opinion. None of the “political dimensions” to which the respondents allude alters the nature of their coercive boycott to increase prices, conduct with which the courts and the Commission are familiar. The boycott immediately restricted supply at the existing price and resulted in increased prices. “Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.” *NCAA v. Board of Regents*, 468 U.S. at 107–08.

2. Rule of Reason Analysis

We conclude that the respondents’ boycott would also be unlawful under a rule of reason analysis. On its face, the [28] boycott was a naked restraint on price and output.⁷⁹ The question under the rule of reason, then, is whether the respondents have established any countervailing competitive justifications for the restraint. *FTC v. Indiana Federation of Dentists*, No. 84–1809, slip op. at 11–12 (U.S. June 2, 1986); *NCAA v. Board of Regents*, 468 U.S. at 113. It is important to note that the respondents do not claim that their boycott was “designed to ‘increase economic efficiency and render markets more rather than less competitive.’” *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. at 20. The boycott created no new product, as in *Broadcast Music*, nor did it accompany any legitimate joint endeavor that might “increase sellers’ aggregate output and thus be procompetitive.” *NCAA v. Board of Regents*, 468 U.S. at 103; see also *Arizona v. Maricopa County Medical Society*, 457 U.S. at 356–57; R. Bork, *The Antitrust Paradox* 332–34 (1978).

The respondents argue in defense that the boycott was justified

⁷⁸ R.A.B. at 48.

⁷⁹ Although we agree with the finding of the Administrative Law Judge that the respondents had market power, i.e., the ability to raise price above the competitive level, *NCAA v. Board of Regents*, 468 U.S. at 109; no showing of market power is necessary. See text at note 69 & note 73 *supra*.

because of their concerns with the quality of legal services provided to indigents.⁸⁰ They suggest that the increase in CJA fees will improve the quality of legal services because individual lawyers will be able (without financial loss) to take fewer CJA cases and to devote more time to each [29] one.⁸¹ These asserted benefits do not amount to procompetitive efficiencies that can be achieved only by joint action.⁸² The quantity and quality of legal services provided by each lawyer to the CJA program necessarily depend upon his or her individual commitment of resources and ability.⁸³ There is no question here involving "[e]thical norms [that] may serve to regulate and promote this competition, and thus fall within the Rule of Reason," *National Society of Professional Engineers v. United States*, 435 U.S. at 696, nor is there any "product" whose "integrity . . . cannot be preserved except by mutual agreement." *NCAA v. Board of Regents*, 468 U.S. at 102; see [30] also *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 279-81 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).

The argument that higher CJA fees would result in higher quality legal services is not an argument that the boycott promoted competition. Rather, it is an argument that the respondents should be permitted to replace the competitive price with their preferred price. The respondents seek to impose their "views of the costs and benefits of competition on the entire marketplace." *National Society of Professional Engineers v. United States*, 435 U.S. at 695; see also *FTC v. Indiana Federation of Dentists*, slip op. at 14.

This argument, that the adverse effects of competition on the quality of services justifies price fixing, was squarely rejected by the Supreme Court in *National Society of Professional Engineers v. United States*, 435 U.S. at 695:

The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the

⁸⁰ R.A.B. at 45-47.

⁸¹ They also suggest that increased fees will attract more lawyers to enter and to remain in CJA practice. R.A.B. at 23. This is the likely effect of any cartel price and was rejected as a defense to horizontal restraints on price or output in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649 (1980):

[I]n any case in which competitors are able to increase the price level or to curtail production by agreement, it could be argued that the agreement has the effect of making the market more attractive to potential new entrants. If that potential justifies horizontal agreements among competitors . . . , it would seem to follow that the more successful an agreement is in raising the price level, the safer it is from antitrust attack. Nothing could be more inconsistent with our cases.

⁸² Less restrictive alternatives for ensuring the quality of legal services may be available. See, e.g., Schwarzer, *Dealing with Incompetent Counsel—The Trial Judge's Role*, 93 Harv. L. Rev. 633 (1980).

⁸³ Incompetent lawyers would not be deterred by supracompetitive prices. The Administrative Law Judge concluded that the fee increase was unlikely significantly to improve the overall quality of indigency representation. I.D.F. 72.

immediate cost, are favorably affected by the free opportunity to select among alternative offers.

Each of the respondents was free individually to decide that he or she could not provide adequate legal services at the price the city was offering under the CJA program and to seek other clients, but their collective agreement to withhold their services until a price increase was enacted is unlawful. "[T]he Rule of Reason does not support a defense based on the assumption [31] that competition itself is unreasonable." *Id.* at 696; accord, *NCAA v. Board of Regents*, 468 U.S. at 117; see also *FTC v. Indiana Federation of Dentists*, slip op. at 15.

In the usual case involving conduct that is a naked restraint of trade for which no competitive justification exists, it is unnecessary to examine anticompetitive effects. See *Arizona v. Maricopa County Medical Society*, 457 U.S. at 355-57; *National Society of Professional Engineers v. United States*, 435 U.S. at 692. In this case, however, the Administrative Law Judge dismissed the complaint on the ground that there were "no adverse effects in the special circumstances of the 1983 boycott," because the city was "supportive of the boycotters' demands."⁸⁴ We disagree, and we find that the boycott did result in anticompetitive effects.

First, the SCTLAs lawyers, acting in concert, directly and immediately restrained competition among themselves. They explicitly agreed that they would not provide legal services to the city until their price demands were met. This concerted refusal to deal eliminated competition among the SCTLAs lawyers. The boycott dramatically reduced the supply of lawyers to the city's CJA program and adversely affected the city's ability to meet its constitutional obligation to provide counsel for indigent defendants. The city capitulated to the respondents' demands. The boycott forced the city government to increase the CJA fees from a level that had been sufficient to obtain an [32] adequate supply of CJA lawyers to a level satisfactory to the respondents. The city must, as a result of the boycott, spend an additional \$4 million to \$5 million a year to obtain legal services for indigents.⁸⁵ We find that these are substantial anticompetitive effects resulting from the respondents' conduct.

The Administrative Law Judge also concluded that "the boycott was viewed by city officials as the only feasible way of getting a rate increase,"⁸⁶ that the city was "supportive of the boycotters' demands,"⁸⁷ and that the respondents' conduct was "accompanied by

⁸⁴ I.D., slip op. at 93.

⁸⁵ I.D.F. 71.

⁸⁶ I.D., slip op. at 96.

⁸⁷ I.D., slip op. at 93. Judge Needelman elsewhere describes the city's role as "ambivalent." I.D., slip op. at 92 n.222.

the buyer's knowing wink."⁸⁸ We find that the record does not support these conclusions.

The record shows that the District government increased the fees for lawyers under its CJA program only when it was coerced by the respondents to do so.⁸⁹ Although Chief Judge Moultrie of the District of Columbia Superior Court, the Mayor, and some members of the City Council and of the Mayor's staff expressed sympathy with the respondents' desire for increased CJA fees, the city declined in 1982 and in 1983 before the boycott to enact an increase because of budgetary constraints.⁹⁰ When the boycott [33] was put into effect, the city government responded to deal with the "crisis,"⁹¹ to reestablish the CJA program as quickly as possible. Although the Chief Judge supported a fee increase to end the boycott, he expressly disapproved the respondents' boycott tactics.⁹² In order to end the boycott, the Mayor proposed and the City Council enacted emergency legislation. The record shows a direct causal link between the respondents' coercive boycott and the city government's capitulation to their demands. Indeed, the City Council sought the respondents' approval of the proposed legislative increase in fees before it would act.⁹³ We find nothing in these events to support the Administrative Law Judge's conclusion that the city supported the boycott.

Even if proved, the acquiescence or support of some members of the city government would not immunize the respondents' boycott to increase prices from the antitrust laws. This defense was considered and rejected in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 226, where the Supreme Court said: "Though employees of the government may have known of those [price stabilization] programs and winked at them or tacitly approved them, no immunity would thereby have been obtained." The Court reasoned that if such a "knowing wink" defense to the antitrust laws were permitted, national competition policy would be [34] determined "not by Congress nor by those to whom Congress had delegated authority but by virtual volunteers."⁹⁴ Accordingly, we reject the so-called "knowing wink" defense on both the facts and the law.

⁸⁸ *Id.* at 93.

⁸⁹ See I.D.F. 61 & 70.

⁹⁰ I.D.F. 36, 37 n.127 & 42-43.

⁹¹ Carter Tr. 104-05.

⁹² I.D.F. 62 & note 192.

⁹³ I.D.F. 65-66.

⁹⁴ 310 U.S. at 227. See also *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980); Fischel, *Antitrust Liability for Attempts To Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80, 95 (1977).

C.

Finally, the respondents argue that, for various reasons unique to this market, antitrust analysis is simply inappropriate in this case. We have already addressed and refuted their principal argument that competition does not exist in the market for CJA services. After considering the respondents' other reasons for questioning the applicability of the antitrust laws to their conduct, we conclude that it is appropriate to apply the antitrust laws in this case.

According to the respondents, the economic principles underlying the antitrust laws do not apply to the purchase and sale of CJA services, because "it is in the [District] government's interest from an economic standpoint to provide the poorest possible quality of [CJA] services."⁹⁵ Their [35] explanation for this provocative assertion is that if the city buys better quality legal services for indigent criminal defendants, its "opponents in court," then the city will also have to pay more for better prosecutors and additional court staff.⁹⁶ We disagree with their assessment of the city's economic interest.

One of the District's functions as a unit of government is to provide a system for the administration of justice consistent with our national commitment to substantive and procedural fairness. The provision of effective counsel to indigent criminal defendants is an essential part of such a system. In addition to its inherent governmental interest in seeing justice accomplished, the city, as the respondents correctly note, is also required by law to provide effective counsel to indigent defendants. We have no reason to doubt that the city government is philosophically as well as legally committed to providing effective counsel for indigent criminal defendants.

We also have no reason to doubt that the District has an interest in the efficiency of its judicial system. But it simply does not follow that the city affirmatively prefers to offer the "poorest possible quality of services." Indeed, the efficiency of our adversarial system of justice is undoubtedly affected adversely when one of the parties is inadequately represented, and the cost of providing poor quality legal representation, which may result in appeals on the ground of inadequate counsel [36] and in reversals, could be high. We conclude that the city's economic interest is in obtaining a quality of service sufficient for its needs at the lowest price. We reject as a matter of economic theory the notion that the District government affirmatively preferred lower quality CJA representation, and we find that the record evidence does not support such a preference as a matter of fact.

The respondents also suggest that antitrust analysis is inappropri-

⁹⁵ R.A.B. at 43.

⁹⁶ R.A.B. at 42 (emphasis omitted).

ate in this case, because the application of antitrust principles somehow threatens to drive the quality of CJA legal representation below an acceptable level. Their theory is that to apply the antitrust laws here might "endanger the Sixth Amendment right to effective counsel,"⁹⁷ because "effective assistance of counsel . . . necessarily requires a level of compensation sufficient to produce this result, regardless of whatever [price] level antitrust and economic analysis would determine to be optimal or even adequate."⁹⁸ This is the economic version of the legal argument we rejected earlier, when we concluded that an interest in providing higher quality service does not provide sufficient justification, under a rule of reason analysis, to excuse the respondents' conduct.

The respondents are saying that in this market, as opposed to all other markets, a price higher than the competitive price is necessary to ensure the requisite quality of services. We [37] disagree. As the Supreme Court has recognized, the economic theory underlying the antitrust laws is that competition will result in an optimal price-quality mix for goods and services. Recently, in *NCAA v. Board of Regents*, 468 U.S. at 104 n.27, the Court said:

The Sherman Act . . . rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. . . . *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 4-5 (1958).

Accord, National Society of Professional Engineers v. United States, 435 U.S. at 695.

The respondents' argument also ignores substantial judicial precedent that "foreclose[s] the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition." *National Society of Professional Engineers v. United States*, 435 U.S. at 689 (citations omitted); *accord, Arizona v. Maricopa County Medical Society*, 457 U.S. at 349-55 & 350 n.22; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 221-22; *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897). A similar argument was made in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), where the Court concluded that the public service aspect of the practice of law does not provide an exemption from the Sherman Act. Although the [38] Court noted that "[t]he fact that a restraint operates upon a profession as

⁹⁷ R.A.B. at 43.

⁹⁸ *Id.*

distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act," *id.* at 788 n.17, the Court rejected the notion that the antitrust laws should not apply in the first place.

As the Court noted in *Professional Engineers*, competition may force prices down and an inexpensive service may be inferior to one that is more costly. 435 U.S. at 694. Based on these considerations, the city might determine that its interest in quality can be satisfied at a lower price, or an individual lawyer might independently determine that he or she cannot provide adequate services at the price offered by the city. We see no reason to suppose, however, that the District would ever purchase services inadequate to meet its obligations under the law. Application of the antitrust laws does not change the fact that a manufacturer of complex equipment will not buy component parts that do not meet its product specifications. The same is true here. Regardless of whether we apply the antitrust laws in this case, the District will not purchase less than effective counsel, because that would not satisfy its requirements. In purchasing legal representation for indigent criminal defendants, presumably the District will seek the best price for the quality of representation it requires. To ensure a competitive market, application of the antitrust laws is entirely appropriate. [39]

Finally, we reject the argument that the "political dimension" of this case makes antitrust analysis inapposite. The respondents claim that because the CJA program is legislatively created to comply with constitutional obligations, "there can be no presumption that an increase in price is due to cartelization and a restriction of output, rather than to political action that has shifted out the demand curve,"⁹⁹ and that "the straightforward inferences that can be drawn in normal economic markets about which actions are coercive and which are not are simply not available."¹⁰⁰ Our conclusions in this case are not based on presumptions and inferences, but rather on specific findings that the SCTLA lawyers' boycott restrained competition and forced the city to act to increase prices. To the extent that the respondents' arguments imply that competition does not exist in the market for CJA services, we reject them for the reasons discussed above. To the extent that these arguments imply that a political dimension negates the evidentiary findings of cause and effect in this case,¹⁰¹ we reject them as against the weight of the evidence. [40]

⁹⁹ R.A.B. at 44.

¹⁰⁰ *Id.*

¹⁰¹ See I.D.F. 70.

II. Immunity Under the First Amendment

The respondents assert that their conduct constituted political activity to influence legislation that is protected by the First Amendment from scrutiny under the antitrust laws. This defense often arises in antitrust cases where, as here, the conduct at issue involves efforts to obtain governmental action. In antitrust cases, the defense usually arises under the *Noerr-Pennington* doctrine,¹⁰² which is generally understood to immunize from the antitrust laws political activity, undertaken for anticompetitive purposes, to influence public officials to take action that would produce anticompetitive effects.

The First Amendment right to petition also has been asserted as a defense in cases involving boycotts undertaken to further goals extrinsic to the competitive process, where the boycott is not particularly directed to influencing competition in a product market or relevant line of commerce. These cases, involving consumer boycotts organized to promote various social, religious or political goals, we will call, for ease of reference, the political boycott cases. Either line of authority, if it applies, could immunize from liability those who participated in the boycott of the District of Columbia's CJA program.[41]

The political boycott cases involve conduct that was initiated by consumers for the purpose of influencing governmental policy-making to further social and political goals. The respondents claim that their conduct is entitled to immunity under the political boycott cases, because their purpose was "to obtain more effective counsel for indigent criminal defendants in furtherance of their Sixth Amendment rights."¹⁰³ We disagree. Unlike the political boycott cases, the boycott of the CJA program was agreed upon among competitors and was designed to restrain competition for their direct economic benefit. The members of SCTLTA explicitly sought to force concessions from the District government in its role as a buyer of services rather than its role as a policy maker. Because the boycott of the CJA program was undertaken to improve the economic well-being of the participants as competitors in the market for CJA services, the political boycott cases do not apply and we must examine the conduct under the antitrust laws and address the applicability of the *Noerr-Pennington* doctrine.

The First Amendment, as applied to antitrust cases through the *Noerr-Pennington* doctrine, protects a variety of petitioning conduct undertaken for anticompetitive purposes to produce anticompetitive effects through governmental action. The case before us, however, involves a coercive boycott rather than the kind of petitioning activity protected in *Noerr*. This kind of coercive conduct does not warrant

¹⁰² *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

¹⁰³ R.A.B. at 30.

immunity from the antitrust [42] laws. Second, this is not an appropriate case in which to invoke the protections of *Noerr-Pennington*, because the anticompetitive effects of the respondents' conduct were brought about not by the governmental action to which the conduct was addressed, but rather resulted directly from the respondents' conduct. A fundamental principle underlying all the cases in the *Noerr-Pennington* line of authority is that immunity from the antitrust laws is contingent on the fact that the restraint of trade in question has been brought about by government rather than private action. Here the joint action of private individuals generated the restraint and the government was simply a customer who, like any other customer, had a valid interest in obtaining a competitive price. As explained more fully below, we find no immunity for the respondents under the cases dealing with efforts to influence governmental action.

A. Political Boycotts

Those who have engaged in political boycotts have invoked the First Amendment to protect themselves from various legal sanctions. *E.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Missouri v. National Organization for Women, Inc.*, 620 [43] F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).¹⁰⁴ In *Claiborne Hardware*, the Court held that the nonviolent elements of an NAACP-inspired boycott of white merchants "to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself" were entitled to First Amendment protection. 458 U.S. at 914. The Court said that "[w]hile States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case." *Id.* at 913. Similarly, in the *NOW* case, the court held that NOW's boycott of convention facilities in states that had not ratified the Equal Rights Amendment was privileged activity protected from state tort law claims under the First Amendment. 620 F.2d at 1317-19.¹⁰⁵ In addressing the antitrust count, the court reviewed the legislative history of the Sherman Act and concluded that the Act does not prohibit "a boycott in a non-competitive political arena for the purpose of influencing legislation." *Id.* at 1315. [44]

The respondents seek to characterize their boycott as a political boycott and, therefore, protected speech under the First Amendment

¹⁰⁴ Although they have included counts under state and federal antitrust law, the political boycott cases basically sound in tort. In *Claiborne Hardware*, for example, the Mississippi Supreme Court affirmed liability on the common law tort theory but dismissed the state antitrust claim. The Supreme Court, noting that no antitrust questions were before it for consideration, 458 U.S. at 915 n.49, addressed only the propriety of the common law tort holding under the First Amendment.

¹⁰⁵ This holding was cited with approval in *Claiborne Hardware*, 458 U.S. at 914 n.48.

within the meaning of *Claiborne Hardware* and *NOW*. They say that the "essence" of their argument is that the protection given to speech under the First Amendment should be extended to conduct "at least when undertaken for the purpose of securing Constitutional rights"¹⁰⁶ and that "a principal purpose [of] such 'speech' was to obtain more effective counsel for indigent criminal defendants in furtherance of their Sixth Amendment rights."¹⁰⁷ The legislation that the respondents sought was an increase in the fees paid to them under the city's CJA program. Because there is no constitutional right, presumably, to be paid \$35 or \$45 an hour, the respondents' argument depends upon the factual assumption that the purpose of their boycott was, as asserted, "to obtain more effective counsel for indigent criminal defendants in furtherance of their Sixth Amendment rights." Although we have no reason to doubt that the respondents are indeed concerned about Sixth Amendment rights, we find, as discussed below, that the purpose and effect of their conduct was commercial, not political, as evidenced by the facts that they were competitors and that their primary object was to promote their own economic well-being. Accordingly, their conduct is not immune from the antitrust laws under *Claiborne Hardware* and *NOW*. [45]

The participants in the *Claiborne Hardware* and *NOW* boycotts were plainly motivated by social concerns, and both courts considered the purpose of the boycott in holding that the conduct was protected. The boycotters were consumers who brought economic pressure to bear by their collective purchasing decisions and who were motivated by noncommercial concerns.¹⁰⁸ In *Claiborne Hardware*, the purpose of the boycott was "to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice." 458 U.S. at 907. Although the boycott directly affected the white merchants' businesses, the boycotters were not in competition with the white merchants and did not by their conduct seek to further their own competitive position. *Id.* at 915.¹⁰⁹ Similarly, in *NOW*, the purpose of the boycott was to bring economic pressure to bear on the states that had not ratified the Equal Rights Amendment. The members of *NOW* who instigated the [46] boycott were not in competition

¹⁰⁶ R.A.B. at 37 & 35-40, generally.

¹⁰⁷ R.A.B. at 30.

¹⁰⁸ As used here, a group's purpose is "commercial" or "economic" if the group is made up of competitors and the objective is profit. A noncommercial boycott is motivated by political, social, religious or other noncompetitive purpose, and the members of the group lack a significant business interest in the goal of the boycott. See Bird, *Sherman Act Limitations on Noncommercial Concerted Refusals To Deal*, 1970 Duke L.J. 247, 248-50 (1970); Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 Nw. U.L. Rev. 705, 712-13 (1962); Note, *Protest Boycotts Under the Sherman Act*, 128 U. Pa. L. Rev. 1131, 1133 (1980).

¹⁰⁹ The boycotters shared an interest in the well-being, economic or otherwise, of blacks generally, just as the boycotters in *NOW* sought equal rights for women. This general interest in the well-being of the group, however, is different from the immediate financial or commercial interest of a business or provider of services in the competitive state of the market in which it competes. See Coons, *supra* note 108, at 712-13.

with one another or with the targets of the boycott, and they were not motivated by their own commercial interests. 620 F.2d at 1311-12.¹¹⁰

In *Claiborne Hardware*, the "purpose" of the boycott "was not to destroy legitimate competition" but rather "to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself." 458 U.S. at 914. The Court quoted with approval Judge Ainsworth's distinction between, on the one hand, boycotts by those who "were in competition" with merchants who would be injured, boycotts that arise "from parochial economic interests" and boycotts "organized for economic ends," and, on the other hand, boycotts "to protest racial discrimination," which constitute "essential political speech lying at the core of the First Amendment." *Id.* at 914-15, quoting *Henry v. First National Bank of Clarksdale*, 595 F.2d at 303.

In *NOW*, the court made the same distinction between boycotts intended to affect competition and boycotts intended to promote other interests:

In the instant case, an infringement upon the people's right to petition the government by a boycott should also not be lightly attributed to Congress. We perceive a more accurate phrasing of Congress' concern to be [47] not the elimination of boycotts, but elimination of *boycotts used by a competitor against a competitor (or against a supplier, customer, etc.)* in the business of competing.

620 F.2d at 1310 (emphasis added). The "orientation" of *NOW* in organizing the boycott on behalf of the ERA was "not one of profit motivation." *Id.* at 1312. The "crux of the issue," according to the court, was "that *NOW* was politically motivated to use a boycott to influence ratification of the ERA." *Id.* at 1314. The court clearly distinguished between politically motivated boycotts and anticompetitive boycotts cognizable under the antitrust laws.

As the respondents note, Justice O'Connor addressed the significance of purpose in her concurring opinion in a case involving First Amendment claims of freedom of association. *Roberts v. United States Jaycees*, 468 U.S. 609, 631 (1984). She said that in determining whether an association is "primarily engaged in protected expression," the "purposes of an association, and the purposes of its members in adhering to it, are doubtless relevant . . ." As examples, she stated that "[l]awyeering to advance social goals may be speech" while "ordinary commercial law practice is not," and that a boycott "for political

¹¹⁰ In *Claiborne Hardware*, as in *NOW*, the noncompetitive context of the boycott was important in distinguishing political from antitrust boycotts. 458 U.S. at 915. See also *Henry v. First National Bank of Clarksdale*, 595 F.2d 291, 303-04 (5th Cir. 1979), cert. denied, 444 U.S. 1074 (1980) (upholding federal district court injunction against execution of state court judgment in *Claiborne Hardware, Inc. v. NAACP*, No. 78,353 (Miss. Ch. Ct. Aug. 9, 1976)).

purposes" may be speech, whereas one "for purposes of maintaining a cartel is not." *Id.* at 636.

Because these cases focus on the purpose of the conduct, we turn now to an examination of the respondents' purpose for boycotting the CJA program. Although the participants in a boycott may have both political and economic interests in the [48] results they seek to achieve, the question we must consider is which of their concerns provided the incentive that caused them to act.¹¹¹ Although we do not question the respondents' genuine concern for their clients, we find unpersuasive the respondents' argument that they undertook their coercive course of conduct for altruistic rather than for commercial purposes. We find instead that the respondents' purpose in conducting the boycott was to improve their own economic well-being. Unlike the situations in *Claiborne Hardware* and *NOW*, where the objective of the participants in the boycott was independent of the economic harm the boycott imposed, here the objective is precisely that harm—to reduce output and raise prices.

The SCTLTA petition announcing the boycott plainly reflected and only reflected the respondents' economic purpose: "unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act."¹¹² Unlike the boycotts in *Claiborne Hardware* and *NOW*, this boycott took place in a competitive commercial context. The goal of the participants in this boycott was directly related to their own economic self-interest in the level of fees paid to them. The individual CJA lawyers were in competition with one another for appointments to represent criminal indigent defendants under the city's CJA program. The target of the [49] boycott, the city, was a purchaser of their services. The Administrative Law Judge found, and we agree, that the "immediate goal" of the respondents' boycott was to increase the fees paid to them as CJA lawyers.¹¹³

Usually our inquiry under the political boycott cases need go no further. Where, as here, a group of competitors acts in concert with the purpose and effect of forcing their customer to pay a higher price for their services, the mere assertion or even the existence of an additional, social concern does not transform their anticompetitive conduct into conduct entitled to immunity from the antitrust laws under the political boycott cases. Rather, as the Court said in *Claiborne Hardware*, "even though [governmental] regulation may have an incidental effect on rights of speech and association . . . [t]he right of business entities to 'associate' to suppress competition may be cur-

¹¹¹ See Kennedy, *Political Boycotts, the Sherman Act, and the First Amendment: An Accommodation of Competing Interests*, 55 S. Cal. L. Rev. 983, 989-91 (1982).

¹¹² CX 4B-D.

¹¹³ T T F 57

tailed." 458 U.S. at 912. In these circumstances, the usual rule of antitrust cases, that good intentions will not protect otherwise unlawful conduct, applies. See, e.g., *National Society of Professional Engineers v. United States*, 435 U.S. at 688-90; *Chicago Board of Trade v. United States*, 246 U.S. at 238.

In this case, however, we go on to consider the conclusion of the Administrative Law Judge that the boycott was not unlawful, because an increase in the CJA fees was necessary to "satisfy the 'political' (i.e., constitutional) requirement of [50] effective representation."¹¹⁴ As discussed above, the law rejects the motion that restraints on competition can be justified by a purpose to establish, for example, a "reasonable" price, and the asserted need for an increase in the CJA fees is irrelevant to antitrust liability. Even assuming the relevance of any need for higher fees, however, we find that the evidence does not support the Administrative Law Judge's conclusion.

The Administrative Law Judge's conclusion and the respondents' assertion that "the boycott was undertaken primarily^[115] to effect the Sixth Amendment right to counsel"¹¹⁶ suggest that the Sixth Amendment rights of indigent criminal defendants were in jeopardy. Yet the record shows that the quality of representation provided by CJA lawyers before the boycott was adequate under Sixth Amendment standards.¹¹⁷ If the city's fees for CJA lawyers had been inadequate to elicit competent counsel for indigents, a history of reversals of criminal convictions on Sixth Amendment grounds would have signalled that inadequacy. In fact, such reversals were [51] exceedingly rare.¹¹⁸ Counsel for the respondents acknowledged in oral argument that the quality of representation under the CJA program was sufficiently competent to meet the constitutional standard.¹¹⁹ The asserted constitutional concern with the quality of representation for indigents is simply not supported by a record of failure by CJA lawyers to meet constitutional standards of representation at the pre-boycott fees.

According to the respondents, if the fees paid to them as CJA lawyers were increased, they would be able to devote more hours to fewer cases, thereby provide better representation and still end up with an adequate annual income.¹²⁰ It may well be true, as the Administrative

¹¹⁴ I.D., slip op. at 94.

¹¹⁵ Even the respondents do not assert that their *only* motive was to promote the interests of indigent criminal defendants.

¹¹⁶ R.A.B. at 31.

¹¹⁷ I.D.F. 25. The Administrative Law Judge also found that the consensus was that the pre-boycott quality of representation had improved markedly. *Id.*

¹¹⁸ In the three and one-half years preceding the SCTLA boycott, only one or two cases were reversed on Sixth Amendment grounds. CX 38K (Followup Hearings on District of Columbia Appropriations for Fiscal Year 1984: Hearings Before a Subcomm. of the Senate Comm. on Appropriations, 98th Cong., 1st Sess. 242 (September 27, 1983) (statement of Ralph Perrotta, president, SCTLA)).

¹¹⁹ Transcript, Oral Argument, Feb. 7, 1985, at 53.

¹²⁰ Perrotta Tr. 726-28; Koskoff Tr. 834; Addison Tr. 886-88.

Law Judge found, that the respondents believed that the level of CJA fees adversely affected the quality of representation they provided.¹²¹ But this belief does not make their boycott "essential political speech," entitling them to immunity under the political boycott cases. Rather, their concern about the adequacy of their incomes [52] confirms that theirs was "a boycott organized for economic ends," different in purpose from political boycotts and subject to governmental regulation. *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 914-15; see *National Society of Professional Engineers v. United States*, 435 U.S. at 692-96.

We agree that effective representation for indigent criminal defendants is an important social goal. The goal is expressed in the Sixth Amendment to the Constitution, and it is implemented in the District's Criminal Justice Act. If a group of citizens who would not stand to benefit personally from an increase in CJA fees engaged in a boycott to promote this goal, their conduct might well merit immunity under the political boycott cases. But that situation is not before us. Here, where the immediate goal of the boycott—higher fees—directly benefited the participants, the respondents' attempt to elevate their "political" concerns over their own personal interests in obtaining higher fees is not convincing.

The concern of the CJA lawyers with the level of fees paid to them is familiar in a commercial setting. The same concern is evidenced by a sales clerk who, in order to earn a higher sales commission, stresses to a customer the merits of a cashmere sweater over those of a less expensive version in lambswool. Adding a public service gloss does not change the essential nature of the concern. See *National Society of Professional Engineers v. United States*, 435 U.S. at 692-96. The respondents' counsel acknowledged this in oral argument: [53]

There [was] a Chevrolette [sic] sort of quality . . . service being provided. There were some people who thought we really ought to have an Oldsmobile quality service.¹²²

What the respondents are really suggesting is that they should be allowed to force their collective judgment of the appropriate price-quality mix for legal services on the city. To continue the analogy, they want the privilege to coerce the District of Columbia to pay Oldsmobile prices, so that they can profit from the result. We conclude that the respondents' purpose was promotion of their own economic interests and that their conduct is not protected political speech within the meaning of *Claiborne Hardware*.

¹²¹ I.D.F. 57. The Supreme Court has rejected the notion that quality of professional services necessarily is related to the level of fees charged. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 378-79 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 766-69 (1976).

¹²² Transcript, Oral Argument, Feb. 7, 1985, at 53.

B. Conduct in Pursuit of Anticompetitive Goals

Having found that the respondents' boycott was motivated primarily by their commercial interest in higher fees rather than by social or other noncommercial concerns, we next consider the applicability of the cases that involve conduct in pursuit of anticompetitive goals.¹²³ Under this line of authority, [54] generally known as the *Noerr-Pennington* doctrine, the First Amendment rights of association and petition protect from the antitrust laws efforts by competitors to persuade a government body or official to take action that would restrain competition. In the *Noerr-Pennington* cases, where the defendants' purpose is assumed to be competitive gain, the focus in determining whether antitrust immunity should attach is on the nature of the conduct and on the fact that government is the source of the anticompetitive restraint. The emphasis of the respondents' argument under this line of authority shifts, appropriately enough, from their assertions of selfless motivation to the fact that the boycott was directed to the city government. Regardless of their motivation, they note that "the sole purpose" of the boycott "was to influence legislation."¹²⁴

In certain respects, this case is indeed like *Noerr* and *Pennington*. In those cases, as here, the goal of the defendants was to influence the government and the motive was anticompetitive. In *Noerr*, the defendant railroads allegedly engaged in an unfair and deceptive publicity campaign in violation of the Sherman Act aimed at changing state law and law enforcement practices. Their "sole motivation" was to injure their competitors in the trucking industry. 365 U.S. at 129. The Court said that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws," *id.* at 135, that this principle is clear [55] "at least insofar as those activities comprised mere solicitation of governmental action," *id.* at 138, and that the legality of such activity "was not at all affected by any anticompetitive purpose it may have had." *Id.* at 140. In *Pennington*, a union and certain mine operators were charged with violating the Sherman Act for having jointly "approached" the Secretary of Labor to establish a minimum wage and for having petitioned TVA officials to limit coal purchases from mines exempt from the minimum wage standard. 381 U.S. at 660-61. The Court affirmed that an anticompetitive purpose by itself is not sufficient reason to subject to the Sherman Act efforts to influence public officials. *Id.* at 669-70.

¹²³ To avoid confusing these cases with those addressed in the preceding section, it is important to remember two points. First, like the political boycott cases discussed in the preceding section, some of these cases involve boycotts, but, because they involve anticompetitive conduct, these are antitrust rather than political boycotts. Second, in the *Noerr-Pennington* cases, the phrase "political activity" refers to the fact that the defendants seek governmental action and does not refer to the motivation of the defendants in doing so.

¹²⁴ R.A.B. at 30.

But this case also differs from *Noerr* and *Pennington* in two major respects. First, the respondents' conduct was different. They did not merely solicit governmental action or attempt to influence the decisions of public officials through meetings or a publicity campaign. Instead, they engaged in a coercive boycott. Second, the anticompetitive effects of the respondents' activity resulted directly from the boycott itself and not from the independent action of the government. The fact that the participants in the boycott of the District's CJA program sought action from the government, therefore, does not end our inquiry. To determine whether the respondents' boycott warrants *Noerr-Pennington* immunity, we must examine the nature of their conduct. Then we will turn our attention to the source of the anticompetitive restraint. Finally, we will address certain [56] other cases in which the government itself has been the victim of an anticompetitive restraint.

1. Nature of the Conduct

We have found scarce authority addressing whether immunity should be granted to conduct essentially like that at issue here, but the cases do provide guidance for making that determination. The principle underlying the need for immunity is, of course, the First Amendment right to petition the government.¹²⁵ If the respondents' activity had been limited to "mere attempts to influence the passage or enforcement of laws," *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. at 135, then the respondents would merit the protection of the First Amendment under *Noerr* and succeeding cases. Not all methods of communicating with the government, however, are protected from the antitrust laws by the First Amendment. Because the respondents' activities were not limited to mere petitioning, we must review their conduct in light of the principles the cases have established. [57]

The Court in *Noerr* made clear that concern over the right to petition was paramount to its conclusion.¹²⁶ The Court recognized the legitimacy of the power of government to restrain trade and the need to protect "the ability of the people to make their wishes known to their representatives," 365 U.S. at 137, and emphasized its concern over the implicit constitutional questions in the case:

¹²⁵ The First Amendment protects freedom of speech and of the press, the right peaceably to assemble and the right to petition the government. In this opinion, we use "right to petition" to encompass First Amendment rights generally. See *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (First Amendment rights, "though not identical, are inseparable").

¹²⁶ At least one commentator maintains that the holding in *Noerr* was based solely on construction of the Sherman Act and that the First Amendment basis for the doctrine was not developed until *California Motor Transport*. Fischel, *Antitrust Liability for Attempts To Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80, 82-84 (1977).

The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Id. at 138. In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972), the Court further examined the relationship between First Amendment rights and the scope of the antitrust laws:

We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors.

It is important to remember that in *Noerr*, the defendant railroads engaged only in a publicity campaign in which they used “[c]irculars, speeches, newspaper articles, editorials, magazine [58] articles, memoranda and . . . other documents” in an attempt to influence the government. 365 U.S. at 142.

The Supreme Court took care to distinguish the publicity campaign in *Noerr* from the kind of anticompetitive conduct at issue here. The Court said that associations that attempt to persuade the government to take particular action that would produce a restraint or a monopoly “bear very little if any resemblance to the combinations normally held violative of the Sherman Act.” *Id.* at 136. The Court described the latter kind of combination as one in which

the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements.

Id. Notably, the Court stated that in the case before it, there were “no specific findings that the [defendant] railroads attempted directly to persuade anyone not to deal with” their trucker competitors. *Id.* at 142. These passages suggest that the Court probably would have reached a different result had the conduct before it been more akin to that before us today.

First Amendment rights are not absolute. The Court has consistently held that some conduct is subject to regulation to preserve other legitimate government interests, even though the conduct has a communicative aspect. *E.g.*, *Roberts v. United States Jaycees*, 468 U.S. at 628. In *California Motor Transport*, the Court said that “[i]t is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.” 404 U.S. [59] at 514. In *Claiborne Hardware*, the Court explained that “[g]overnmental regulation that has an inciden-

tal effect on First Amendment freedoms may be justified in certain narrowly defined instances." 458 U.S. at 912, citing *United States v. O'Brien*, 391 U.S. 367 (1968). Even though the "regulation may have an incidental effect on rights of speech and association . . . [t]he right of business entities to 'associate' to suppress competition may be curtailed." 458 U.S. at 912, citing *National Society of Professional Engineers v. United States*, 435 U.S. at 697.

There are many different ways to communicate, ranging along a broad spectrum from pure speech to violent actions. In this case, for example, the respondents initially chose to communicate their collective view that an increase in the CJA fees was desirable by speaking to members of the city government and other individuals who were thought to be influential.¹²⁷ Although some commentators have suggested that such activity alone should be unlawful,¹²⁸ we need not and do not address that question here. We think it is clear, however, that if the respondents had elected to kidnap a city official and to hold him hostage until their demands were granted, their conduct would be subject to governmental regulation, despite its communicative aspect. See [60] *NAACP v. Claiborne Hardware, Inc.*, 458 U.S. at 933; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 501 (1949) (no "constitutional right . . . to violate valid laws designed to protect important interests of society"); *Thomas v. Collins*, 323 U.S. 516 (1945).¹²⁹ The mere fact that the purpose of the scheme was to obtain governmental action would not change the character of the conduct from unlawful kidnapping to speech protected from regulation by the First Amendment.¹³⁰

To help us determine where the boycott of the CJA program should be placed on the spectrum of ways to communicate, let us briefly return to the competitive context in which it occurred. The city, in order to fulfill its constitutional obligation to provide counsel to indigent defendants, offered to pay a fee to attorneys under the city's CJA program. Before the boycott, the number of lawyers who responded

¹²⁷ I.D.F. 37-40.

¹²⁸ P. Areeda & D. Turner, *Antitrust Law* ¶ 205, at 51-52 (1978) (hereafter "Areeda & Turner"), suggest that discussions among competitors concerning an appropriate price for their product in order to petition government for price support legislation "should constitute unlawful price collaboration, because their discussions create a severe danger for competition without being, in any way, indispensable for conducting protected political activity." *Id.* at 52.

¹²⁹ In *Thomas v. Collins*, 323 U.S. at 537-38, the Court said that attempts to persuade are within the First Amendment, but "[w]hen to this persuasion other things are added which bring about coercion, . . . the limit of the right has been passed."

¹³⁰ See note, *Noerr-Pennington Immunity from Antitrust Liability Under Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.: Replacing the Sham Exception with a Constitutional Analysis*, 69 *Cornell L. Rev.* 1305, 1323-25 & 1324 n.130 (1983):

If a [terrorist kidnapping or the bribery of a public official] is undertaken with a genuine desire to influence governmental decisionmaking, then it is bona fide petitioning activity. However, it would be ludicrous to assume that such behavior merits protection under the first amendment given the government's overriding interest in restricting such behavior.

to the city's offer was apparently sufficient to meet the city's needs.¹³¹ At least, [61] the city saw no need to increase the offering price to attract a greater number of lawyers.¹³² None of the lawyers who served the city's CJA program was obligated to accept the city's price. Each was free to sell his services to the city or to seek clients elsewhere. If too few lawyers responded to the city's offering price, then presumably the city would independently have determined to increase its offering price. The boycott of the CJA program disrupted this competitive process. The resulting anticompetitive effects were immediately felt by the city, because the number of lawyers willing to accept employment at the city's offering price shrank dramatically.¹³³

This disruption of the normal channels of government decision-making is wholly unlike lobbying, and the policy reasons for protecting lobbying do not apply to it.¹³⁴ Lobbying is an attempt to influence or persuade or inform, where the channels of government are open to conflicting views and where the government, although presumably responsive to the concerns of constituents, retains its authority to weigh competing [62] considerations and to determine policy independently. The respondents abandoned their attempts to persuade the government to act when the city failed to act favorably to their interests. They elected instead to engage in a coercive price-fixing boycott to get their way. Clearly, they went beyond persuasion as a technique to influence the government. The CJA lawyers successfully forced the city government to resolve the crisis in the city's criminal justice system, that the lawyers themselves intentionally had created, in the manner they demanded.

The Administrative Law Judge suggested that the respondents' abandonment of persuasion in favor of coercive conduct was justified because their pre-boycott efforts to obtain a fee increase were unsuccessful.¹³⁵ We reject this suggestion. Virtually every issue a government entity must address will involve resolution of conflicting views of what the result should be. See *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. at 144-45. The First Amendment right to petition the government does not include the right to be effective.

¹³¹ During the strike, only three or four CJA lawyers called in daily. See note 43 *supra*.

¹³² The record shows that in 1982 and in 1983 before the boycott, the city considered but did not enact legislation that would have increased the CJA fees because of lack of money to fund such an increase. See I.D.F. 36, 42 & 43. Nevertheless, the CJA system worked until the respondents instituted their boycott. See I.D.F. 60-62 & 70.

¹³³ I.D.F. 60 n.187 & 61.

¹³⁴ *Areeda & Turner*, *supra* note 128, at 52, suggest that *Noerr* immunity should not extend to conduct that creates a severe danger to competition, when less dangerous alternatives are obviously available and the conduct is not a customary form of lobbying.

¹³⁵ See I.D.F. 34. Judge Needelman's decision implicitly suggests that the preboycott price was unreasonable and that the boycott was therefore in the public interest. Neither of these implicit justifications is cognizable under the antitrust laws. See *National Society of Professional Engineers v. United States*, 435 U.S. at 692-96; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 218-23; see also *Michigan State Medical Society*, 101 F.T.C. 191, 293 (1983).

The means employed by the respondents were those usually held unlawful under the antitrust laws: collective action by [63] competitors to set the terms at which they will sell. See, e.g., *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). As the Court said in *Pennington*, "It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that runs counter to antitrust policy." 381 U.S. at 668. In both *Noerr* and *Pennington*, the Court distinguished precisely this kind of private action in restraint of trade from petitioning that is immune from the antitrust laws. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. at 136; *United Mine Workers v. Pennington*, 381 U.S. at 668.

We think that *Noerr* and *Pennington* alone provide sufficient guidance for our conclusion that First Amendment immunity should not extend to the kind of conduct in which the respondents have engaged. We would reach the same conclusion, however, under a general First Amendment analysis of expressive conduct. The standard for determining whether a person's conduct that is intended to communicate merits First Amendment protection was articulated in *United States v. O'Brien*, 391 U.S. at 377:

[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

We conclude, after applying this four-part test, that no immunity is justified in this case. [64]

The federal antitrust laws easily satisfy the first three criteria. First, Congress is empowered to enact the Sherman Act and the Federal Trade Commission Act under its constitutional authority to regulate commerce.¹³⁶ Second, the governmental interest underlying these Acts, which is the protection of uninhibited competition, has long been accepted as important or substantial.¹³⁷ Third, the policy underlying the antitrust laws plainly is unrelated to the suppression of free expression.¹³⁸ Finally, application of the Federal Trade Com-

¹³⁶ United States Constitution, Art. I, § 8, cl. 3. "Congress, exercising the full extent of its constitutional power, sought to establish a regime of competition as the fundamental principle governing commerce in this country." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398 (1978) (footnotes omitted).

¹³⁷ "The heart of our national economic policy long has been faith in the value of competition." *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951).

¹³⁸ The Sherman Act can be distinguished, for example, from a statute prohibiting "displays [of] any flag, badge, banner, or device . . . as a sign, symbol or emblem of opposition to organized government." Such a statute, which regulates conduct because the message communicated by the conduct is itself thought to be harmful, is unconstitu-

mission Act to the respondents' conduct will not materially inhibit the respondents' right to free expression. The respondents can present their views and arguments to the District government in person, through others or through a varied campaign of publicity. We have weighed the strong government interest in prohibiting restrictions on competition, such as the respondents' coercive economic tactics, against any negligible inhibitions [65] that application of the law here might impose on the respondents' freedom of expression. On balance, we conclude that any restriction this enforcement action might impose on the respondents' First Amendment freedoms is incidental at best and no greater than is essential to the furtherance of the government's interest in protecting competition. See, e.g., *National Society of Professional Engineers v. United States*, 435 U.S. at 696-99.

The respondents assert that, consistent with the reasoning in *Crown Central Petroleum Corp. v. Waldman*, 486 F.Supp. 759 (M.D. Pa.), *rev'd on other grounds*, 634 F.2d 127 (3d Cir. 1980), even boycotts to advance the participants' own economic interests are protected speech exempt from the antitrust laws under the *Noerr-Pennington* doctrine.¹³⁹ In *Crown Central*, a group of independent gasoline retailers agreed to close their service stations for three days for the purpose of influencing the U.S. Department of Energy to raise the existing gasoline price ceiling. The court held that the boycott was protected from the antitrust laws by the First Amendment as symbolic speech. On the same facts, the court in *Osborn v. Pennsylvania-Delaware Service Station Dealers Association*, 499 F.Supp. 553 (D. Del. 1980), concluded that "a boycott, along with its communicative component, has a coercive economic effect which ordinarily may be regulated without serious jeopardy to First Amendment interests." *Id.* at 557-58. The *Osborn* court's reasoning appears [66] to be consistent with *O'Brien*, *Claiborne* and numerous other cases:

[W]hen speech and non-speech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms so long as that interest "is unrelated to the suppression of free expression."

499 F.Supp. at 557, citing *United States v. O'Brien*, 391 U.S. at 376-77. Faced with the conflicting opinions in *Crown Central* and *Osborn*, we find that the analysis of the *Osborn* court is more consistent with precedent and is more persuasive.¹⁴⁰

¹³⁹ R.A.B. at 29.

¹⁴⁰ Professor Areeda agrees "more with the balance struck by *Osborn* than with that adopted by *Crown Central*." P. Areeda, *Antitrust Law* ¶ 205, at 34 (Supp. 1982). See also note, *Commercial Entities and Political Boycotts: First Amendment Protections Versus Sherman Act Prohibitions*, 14 Conn. L. Rev. 391, 407-08 (1982).

2. Source of the Anticompetitive Restraint

All of the cases we have addressed in the preceding section differ from the instant case in one important respect: in none of them was the government itself the economic—as opposed to the political—target of the boycott. In the case before us, the anticompetitive effects of the respondents' boycott resulted not from the independent action of the government but from the collective action of the CJA lawyers. The fact that anticompetitive restraints would be brought about by governmental rather than private action was the basis for a crucial [67] distinction in *Noerr* and *Pennington* that is plainly absent here.

In *Noerr*, the Court said that “where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out.” 365 U.S. at 136, citing *Parker v. Brown*, 317 U.S. 341 (1943). The reason for this, according to the Court, is that “the question whether a law of that kind should pass . . . is the responsibility of the appropriate legislative or executive branch of government . . .” 365 U.S. at 136. In *Pennington*, the union and certain mine operators jointly petitioned the Secretary of Labor to establish a minimum wage for coal miners and petitioned the TVA to limit coal purchases from mines exempt from the minimum wage standard. In denying relief, the Court observed that “the action taken to set a minimum wage for government purchases of coal” was the independent decision of a public official. 381 U.S. at 671.

In the usual case in which the *Noerr-Pennington* doctrine has been held to apply, the government has played the role of an independent decision maker who is not a participant in the market. Usually, the goal has been to persuade the government, for whatever reasons and in response to whatever political influences, to impose requirements causing competitive harm to the buyers, sellers or other players in a market operating in the economy at large. Here, the government is itself a player in the relevant line of commerce and has been coerced as a customer—indeed, the only customer—in the market for CJA services. The fact that the government is involved is incidental to its role as [68] a buyer in the marketplace.

The principle underlying the decision in *Noerr*, that immunity under the antitrust laws is contingent on a showing that the government imposed the restraint of trade, is the same principle that provides the basis for decision in those cases dealing with the “sham” exception to the *Noerr-Pennington* doctrine. In *California Motor Transport*, for example, the “sham” exception was held to apply because private rather than governmental action had restrained trade and because the normal channels of government had been disrupted

by the private restraint of trade. 404 U.S. at 511–16.¹⁴¹ The defendants in *California Motor Transport* allegedly acted to bar their competitors from access to adjudicatory tribunals and “so to usurp that decisionmaking process.” *Id.* at 512. The alleged result was that the defendants, instead of government, “became ‘the regulators of the grants of rights’” to the plaintiffs. *Id.* at 511.

Judge Needelman found, and we agree, that the boycott of the CJA program forced the District government to act to increase the CJA fees,¹⁴² an action that the city previously, in its [69] discretion, had declined to take. As sellers, the respondents acted in concert to compel their customer, the city, to pay a higher price. Unlike *Noerr* and *Pennington*, here the respondents by their boycott successfully substituted their collective view of an appropriate price for that determined by the government. The restraint was *on* the government, not *by* the government.

3. The Government as Victim

The conduct in which the respondents have engaged would be unlawful where the victim of the boycott is not the government, and no policy reason supports an immunity from the antitrust laws simply because the government is the target. The denial of *Noerr* immunity here is consistent with the right of state and municipal governments to sue for treble damages to protect themselves from violations of the antitrust laws. *Georgia v. Evans*, 316 U.S. 159 (1942); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906).¹⁴³ Professors Areeda and Turner have stated that the denial of immunity when government is the victim is consistent with the policy of the *Noerr* doctrine:

The fact that the government is the victim of an otherwise improper act by a private party cannot immunize the actor. Immunity would be inconsistent with the state and federal government’s statutory right to damages for injuries resulting from antitrust violations. More fundamentally, immunity would lack any policy justification. . . . A concern for keeping government channels open [70] and available to all, including this particular seller, is not relevant in this context and thus not ground for permitting what would be condemned in dealing with any other buyer.¹⁴⁴

The government was both victim and customer in *COMPACT v.*

¹⁴¹ See also P. Areeda, *Antitrust Law* ¶ 203.1a, at 5 (Supp. 1982) (injury from “sham” activity results directly from antitrust defendant’s activity, rather than from governmental action).

¹⁴² I.D.F. 61 & 70.

¹⁴³ The United States may recover actual damages for antitrust violations. Section 4A of the Clayton Act, 15 U.S.C. 15a.

¹⁴⁴ Areeda & Turner, *supra* note 128, ¶ 206b, at 53 (footnotes omitted); see also note, *Application of the Sherman Act to Attempts To Influence Government Action*, 81 Harv. L. Rev. 847, 848 (1968) (“no substantial reasons to distinguish attempts to influence private commercial conduct, to which the antitrust laws clearly apply, from efforts to influence the government in its role as a customer”).

Metropolitan Government of Nashville, 594 F.Supp. 1567, 1572-83 (M.D. Tenn. 1984), *appeal pending*, where three black architectural firms joined together to "present a united front" for negotiating minority participation on selected construction projects. *Id.* at 1569. The three firms were allegedly the only black-owned architectural firms in the area and, until they formed COMPACT, had bid against one another for minority business set-aside shares on public contracts. The two projects initially targeted by the group were public projects. The court denied *Noerr* immunity to the architectural firms, on the ground that the Constitution does not protect "commercial activity by businessmen when dealing with government in its proprietary capacity." *Id.* at 1573. The court noted that the architects might have sought to achieve their goal of increasing minority participation by lobbying the state legislature or Congress. Instead, they chose to negotiate jointly with the government contractor. The court [71] said, "COMPACT's actions were taken in the marketplace" and are not immune from the Sherman Act. *Id.*¹⁴⁵

Some courts have declined to grant *Noerr* immunity to private parties when they deal with government acting in a commercial capacity instead of in its policy-making role. *E.g.*, *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970). Two courts have granted *Noerr* immunity where the government was a participant in the market, but in neither case was the government the victim of private restraints. *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607 (5th Cir. 1985); *In re Airport Car Rental Antitrust Litigation*, 693 F.2d 84 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133 (1983). We would reach the same result in these two cases under the analytical framework we have used in this opinion—that is, we would find that the *Noerr-Pennington* doctrine applies. Both cases involved challenges to restrictive airport concessions granted by municipalities to private parties. In each case, the restraint on competition emanated from the government, not from private action. In addition, the allegedly unlawful conduct appears to be petitioning of government, not coercion of government. The court's conclusion in *Airport Car Rental* that "the nature of the [72] government activity is one factor in determining the type of public input acceptable to the particular decision-making process," 693 F.2d at 88, is consistent with our own.

In the instant case, the city was the purchaser of CJA services. The government, like any other buyer, has an interest in obtaining the

¹⁴⁵ See also *City of Atlanta v. Ashland-Warren, Inc.*, 1982-1 Trade Cas. (CCH) ¶ 64,527, at 72,928 (N.D. Ga. 1981) (nature of conduct and role of government are factors in determining applicability of *Noerr*).

requisite supply at a competitive price. Here, the District government effectively expressed this interest by repeatedly declining, on budgetary grounds, to increase the CJA fees. Like any other customer subject to a price-fixing conspiracy, the government, during the respondents' boycott, was unable to obtain a competitive price. Permitting a price-fixing boycott directed at the government as buyer does not foster the *Noerr* goal of free exchange of information between people and the government. At the same time, prohibiting such conduct does not interfere with anyone's ability to choose to sell his services to the government or to make his views on the appropriate price known to the government.

We hold that the respondents are not immune from liability under the *Noerr-Pennington* doctrine. The CJA lawyers are a group of sellers who, when unable to obtain a satisfactory price for their services through noncoercive efforts to persuade the government, elected to participate in an explicit price-fixing boycott. The mere fact that the government, as the only purchaser of CJA services, was the target does not protect their boycott from regulation. An order prohibiting the respondents from engaging in a price-fixing boycott of the city's CJA program [73] will protect the governmental interest in free competition and will not adversely affect the respondents' ability to exercise their First Amendment right to petition the government.

III. THE ORDER

We have concluded that the concerted refusal to deal by SCTLTA and the individual respondents for the purpose of increasing the CJA fees constitutes an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. Having found a violation of the Act, the Commission is empowered to enter an appropriate order to prevent a recurrence of the violation. The order must, of course, be reasonably related to the violation found to exist. *See, e.g., F.T.C. v. National Lead Co.*, 352 U.S. 419 (1957); *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608 (1946).

The order in this case narrowly prohibits the respondents from engaging in the conduct that we have concluded was unlawful and recognizes their right under the First Amendment to petition the government. The order requires the respondents to cease and desist from concerted refusals to provide legal representation to any government program that provides such services for indigent criminal defendants in connection with efforts to affect the level of fees paid for such representation. Paragraphs I.B, I.C and I.D of the order require the respondents to cease and desist from certain specific practices that they employed to ensure the success of their boycott. These provisions

are clearly related [74] to the law violation found to exist and no broader than necessary to prevent a recurrence of the violation.

Paragraph I of the order specifically provides that nothing in the order shall prevent the respondents from exercising their rights under the First Amendment to petition the government concerning any legislation, rules or procedures. Although in our view, the cease and desist provisions of the order are sufficiently narrow that they do not inhibit the respondents' constitutional right to petition, we include this proviso in the interest of clarity. See *National Society of Professional Engineers v. United States*, 435 U.S. at 697-98 & note 27.

Paragraph II of the order provides that notice of the order be given to the members and officers of the Superior Court Trial Lawyers Association. For the purpose of notifying CJA lawyers who may not have registered their addresses with the SCTLA, the order requires that a copy be posted for a limited time in the same place that SCTLA notices are customarily posted. Paragraphs III, IV and V set forth the respondents' compliance obligations under the order. These provisions are designed to assist the Commission in monitoring compliance with the order and they impose only a minimal burden on the respondents.

The respondents claim, without citing authority for the proposition, that an order should not issue against SCTLA because it is not an "association" within the meaning of Section 4 of the [75] FTC Act, 15 U.S.C. 44.¹⁴⁶ The law provides that an unincorporated voluntary association is subject to the Commission's jurisdiction. See *National Harness Manufacturers' Association v. FTC*, 268 F. 705, 708-09 (6th Cir. 1920); see also *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 383-92 (1922). The record shows as a matter of fact that the SCTLA is an association. See, e.g., *Ripon Society v. National Republican Party*, 525 F.2d 567, 571 n.5 (D.C. Cir. 1975), cert. denied, 424 U.S. 933 (1976); *Georgia v. National Democratic Party*, 447 F.2d 1271, 1273 n.2 (D.C. Cir.), cert. denied, 404 U.S. 858 (1971).

Although the SCTLA is a loosely knit organization, the Association has officers, holds meetings, collects dues, maintains a bank account and helps to promote the pecuniary and other interests of its members, CJA lawyers.¹⁴⁷ At a minimum, the SCTLA provided a "rallying point"¹⁴⁸ for the 1983 boycott. The officers of SCTLA presented themselves and were perceived as spokesmen for the SCTLA lawyers. The vote to strike if the fees were not increased and the vote to resume work if the city increased the CJA fee to \$35 were taken at SCTLA meetings, presided over by SCTLA officers. The Association was inte-

¹⁴⁶ R.A.B. at 55-56.

¹⁴⁷ I.D.F. 1-4.

¹⁴⁸ I.D.F. 1.

grally involved in the boycott. Although the structure of the SCTLA may vary over time, it has been in existence for at least ten [76] years,¹⁴⁹ and there is no reason to conclude that the SCTLA will not continue to be active as an organization for the interests of the CJA lawyers. We conclude that the SCTLA is an association within the meaning of the Act and that it is appropriate to name the SCTLA in the order.

The respondents also claim that an order against the SCTLA would "pose serious due process problems of notice,"¹⁵⁰ because CJA lawyers have no way of knowing whether they are members of the SCTLA or whether they may be held responsible for the acts of others on behalf of the Association. The order, however, does not impose liability merely for the use of SCTLA facilities or for knowledge of the unlawful conduct of another.¹⁵¹ The respondents would violate the order only if they themselves engaged in concerted action prohibited by the order or if they authorized an agent to engage in such conduct on their behalf. The Association now exists, and it has officers and members. The Commission is empowered to issue an order requiring the respondents to cease and desist from their unlawful conduct, and the order provides for notice to them. We perceive no problem of lack of notice in those provisions.

An order is appropriate to prevent a recurrence of the violation. The SCTLA, its members and the individual respondents were active participants in and organizers of the strike. At the [77] time of the hearing, Mr. Perrotta, Ms. Koskoff, and Mr. Addison were officers of the SCTLA. Although Ms. Slight, the chairperson of the SCTLA strike committee, left CJA practice after the boycott and entered private employment away from Washington, she has since returned to the District and is once again accepting cases under the CJA.

The circumstances that gave rise to the SCTLA lawyers' demands for increased CJA compensation levels have not changed substantially. The record demonstrates that some of the respondents and other CJA lawyers believe that CJA rates are still too low.¹⁵² The federal CJA fees, as amended in 1984, are now higher than the District's CJA fees. Although legislation has been introduced in the City Council to raise the CJA fees to the levels first demanded by the SCTLA lawyers, the legislation has not been enacted. The CJA lawyers boycotted the CJA program twice before the 1983 boycott.¹⁵³ One of the boycotts, like that in 1983, was for the purpose of increasing fees. The other boycott was sparked by complaints that judges were mistreating CJA

¹⁴⁹ I.D.F. 2.

¹⁵⁰ R.A.B. at 56.

¹⁵¹ *Id.*

¹⁵² I.D.F. 65; JX 10, at 80; JX 13, at 128; CX 43B.

¹⁵³ JX 6, at 61; O'Neill Tr. 557.

lawyers, but economic issues emerged as well.¹⁵⁴ The entry of an order is appropriate to prohibit the respondents from initiating another boycott to raise the CJA fees whenever they become dissatisfied with the results or pace of the city's legislative process. [78]

The respondents object also to the entry of paragraph IV of the order, requiring the individual respondents to notify the Commission, for a period of five years, of any change in their law practice. According to the respondents, this provision is "pure harassment" and "serves no legitimate purpose."¹⁵⁵ We disagree. The order prohibits concerted action to raise the fees paid by governments under programs to provide counsel to indigent criminal defendants. Because the level of fees for such legal services in other jurisdictions is similar to or lower than the fees in the District of Columbia, the individual respondents may have a financial incentive to engage in similar conduct in other locales. For example, the fees under the federal Criminal Justice Act continued to be \$20 and \$30 per hour for one year after the SCTLAs lawyers had succeeded in raising the District's fee to \$35 an hour. In 1983, the fees in Maryland were \$20 and \$25. The fees in New York, where Ms. Slaight lived for several years after the boycott, were \$15 and \$25. The maximum in Virginia for a felony case was \$400, less than half of the District's \$1000 fee.¹⁵⁶ We conclude that this provision of the order also is reasonably related to the violation in this case and appropriate to prevent a recurrence of the violation. [79]

The respondents have demonstrated no recognition that a price-fixing boycott is an unlawful means by which to seek increased reimbursement rates from the government. *SEC v. Savoy Industries, Inc.*, 587 F.2d 1149, 1168 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 913 (1979). Under these circumstances, there is a cognizable risk that the unlawful conduct will be repeated by these respondents absent an order to cease and desist. See *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1945).

CONCLUSION

The respondents disrupted the criminal justice system in the District of Columbia and coerced the District government into raising the fees paid to them under the Criminal Justice Act. This coercive, concerted refusal to provide legal services to the District government unless and until the fees for those services were raised constitutes an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. The Administrative Law Judge concluded

¹⁵⁴ Perrotta Tr. 672; JX 11, at 112-115. The record does not tell us anything more about the previous boycotts.

¹⁵⁵ R.A.B. at 59.

¹⁵⁶ CX 38J. This exhibit, showing a state-by-state breakdown of fees for indigent criminal cases, is reprinted in Hearings Before a Subcomm. of the Senate Comm. on Appropriations, 98th Cong., 1st Sess. 240-41 (1983).

that the disruption of the criminal justice system and the additional cost to the city for the CJA program were not "adverse effects," because the District government assertedly supported an increase in CJA fees. We find neither legal nor factual support for this conclusion. Accordingly, we reverse the Administrative Law Judge's decision and issue the attached order against SCTLTA and the individual respondents.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of complaint counsel from the initial decision, and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying opinion, the Commission has determined to grant the appeal and reverse the initial decision. Accordingly, [2]

It is ordered, That the findings of fact and initial decision of the Administrative Law Judge be rejected except as specifically adopted in the findings of fact and conclusions of law contained in the accompanying opinion. The findings of fact and conclusions of law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following order to cease and desist be, and the same hereby is, entered:

I.

It is ordered, That respondent Superior Court Trial Lawyers Association, an association, its successors and assigns, and its officers, directors and members; Ralph J. Perrotta, individually and as a director of Superior Court Trial Lawyers Association; Karen E. Koskoff and Reginald G. Addison, individually and as officers of Superior Court Trial Lawyers Association; Joanne D. Slight, individually; and respondents' agents or representatives, directly or through any device, in connection with their activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall cease and desist from entering into, continuing, cooperating in, or carrying out any agreement, understanding, or planned common course of action, either express or implied, to: [3]

A. Refuse to provide legal services to any government program that provides legal services for persons eligible for appointed counsel in connection with any effort to fix, increase, stabilize, or otherwise affect the level of fees for such legal services;

B. Interfere with the operation of the Superior Court of the District

of Columbia or of any court or of any government agency in connection with any effort to fix, increase, stabilize, or otherwise affect the level of fees for legal services for persons eligible for appointed counsel;

C. Coerce any person not to provide or discourage any person from providing legal services in connection with any effort to fix, increase, stabilize, or otherwise affect the level of fees for legal services for persons eligible for appointed counsel;

D. Encourage, suggest, advise, or induce respondent Superior Court Trial Lawyers Association, any member of Superior Court Trial Lawyers Association, or any other person to engage in any action prohibited by this order;

Provided, That nothing in this order shall prevent respondents from: [4]

(1) Exercising rights under the First Amendment to the United States Constitution to petition any government body concerning legislation, rules or procedures; or

(2) Providing information or views in a noncoercive manner to persons engaged in or responsible for the administration of any program to obtain legal services for persons eligible for appointed counsel.

II.

It is further ordered, That respondent Superior Court Trial Lawyers Association shall:

A. Distribute by first-class mail a copy of this order to each of its members, officers and directors within thirty (30) days after this order becomes final;

B. Distribute by first-class mail a copy of this order to each person who becomes a member, officer or director of Superior Court Trial Lawyers Association within thirty (30) days of such person's becoming a member, officer or director, during each of the first three (3) years after this order becomes final; and [5]

C. Within thirty (30) days after the order becomes final and for ninety (90) days thereafter, post a copy of this order in each location in which notices of meetings of respondent Superior Court Trial Lawyers Association are customarily posted.

III.

It is further ordered, That the respondents herein shall within sixty (60) days of service upon them of this order file with the Commission a report, in writing, setting forth in detail the manner and form in

which they have complied and are complying with this order, and shall file such other reports of compliance as the Commission may from time to time require.

IV.

It is further ordered, That each of the individual respondents named herein shall, for a period of five years after this order becomes final, promptly notify the Commission of the discontinuance of his or her present legal practice, business or employment and his or her affiliation with a new legal practice, business or employment. Each such notice shall include the individual respondent's new business address and a statement of the nature of the legal practice, business or employment in which the respondent is newly engaged. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order. [6]

V.

It is further ordered, That respondent Superior Court Trial Lawyers Association shall notify the Commission at least thirty (30) days before any proposed change in its form of organization that may affect compliance obligations arising out of this order.

Chairman Oliver and Commissioner Strenio did not participate.

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