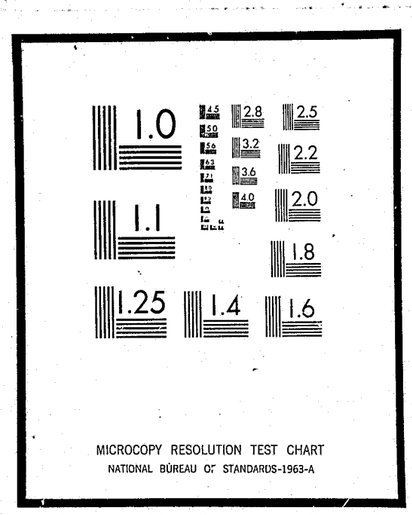

REPORT ON CRIMINAL DEFENSE SERVICES IN THE DISTRICT OF COLUMBIA BY THE JOINT COMMITTEE OF THE JUDICIAL CONFERENCE OF THE D.C. CIRCUIT AND THE D.C. BAR (UNIFIED)

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Introduction

The Joint Committee on Criminal Defense Services was established in 1974, pursuant to a resolution of the Judicial Conference of the District of Columbia Circuit (set forth in Appendix A), to take a fresh look at the entire system for providing defense services to indigents accused of crimes in the District of Columbia.

The Committee is a joint committee of the Judicial Conference and the District of Columbia Bar (Unified). Its membership is a cross section of the private bar of the District of Columbia; it has functioned with the assistance of advisory panels drawn from the United States Attorneys Office and the Public Defenser Service; and it was able to hire a professional staff as a result of a grant from the Law Enforcement Assistance Administration and the District of Columbia Bar (Unified). Out basic inquiry throughout the study has been: What are the essential elements of a system which will ensure that defendants who cannot afford to retain their own counsel are accorded full protection of their rights to the effective assistance of counsel under the Sixth Amendment?

The Criminal Justice Act (CJA) funding crisis in 1974, the resulting flurry of legislative and judicial activity to respond to this crisis, and the enactment on September 3, 1974 of interim legislation to fund CJA representation in the local courts have all combined to raise fundamental questions about the future of the criminal justice system in the District of Columbia. In particular, questions about the role of the Public Defender Service (PDS)

and the private bar, the appropriateness of judicial control over appointments and compensation of defense counsel, and the quality of representation accorded to indigent defendants require answers.

In conducting our inquiry, we have sought to explore all aspects of the system bearing on the basic question before us. Thus we have examined closely the financial, administrative, and ethical problems inherent in judicial control over counsel appointed pursuant to the federal and local Criminal Justice Acts. The Committee staff has conducted extensive personal interviews with both Superior Court and United States District Court Judges, court personnel, Public Defender Service attorneys, CJA practitioners, non-volunteer lawyers appointed to criminal cases, law school clinic directors, and prosecutors in order to obtain a comprehensive, integrated view of the criminal defense system and its problems. Throughout, we have compared our findings with generally-accepted standards for effective representation, notably the A.B.A. Standards for Criminal Justice set forth in The Prosecution Function and the Defense Function and Providing Defense Services, the National Legal Aid and Defenders Association's Standards for Defender Services, Tentative Draft, authorized for use in 1974-75, and the court decisions in this Circuit and elsewhere. The recommendations summarized at the outset of this report are the result.

We believe that our findings and recommendations can serve as a blueprint for making essential changes in the present system for providing criminal defense services. Some of our recommendations

can be implemented in the short term by judicial or administrative actions, but most call for substantial changes in existing legislation. In fact, we are persuaded that nothing less than a compete overhaul and reorientation of the present system will be adequate to secure the kind of effective representation which is mandated by the Constitution and our nation's commitment to equal justice under law.

SUMMARY OF RECOMMENDATIONS

Establishment of a District of Columbia Defender Agency

Rec. 1.1. THE COMMITTEE RECOMMENDS THE ESTABLISHMENT OF A DISTRICT OF COLUMBIA DEFENDER AGENCY TO ADMINISTER, AS SEPARATE DIVISIONS, THE APPOINTED COUNSEL PROGRAM UNDER THE CRIMINAL JUSTICE ACTS FOR BOTH THE LOCAL AND FEDERAL COURTS AND THE EXISTING PUBLIC DEFENDER SERVICE.

Rec. 1.2. THE COMMITTEE RECOMMENDS THAT THE D.C. DEFENDER AGENCY BE GOVERNED BY AT LEAST AN 11 MEMBER BOARD OF TRUSTEES INDEPENDENT OF THE COURTS.

Rec. 1.3. THE BOARD OF TRUSTEES WOULD BE RESPONSIBLE FOR MAKING POLICY FOR THE AGENCY, HIRING THE EXECUTIVE DIRECTOR, AND SERVING AS FINAL ADMINISTRATIVE ARBITER OF GRIEVANCES AND COMPLAINTS BY APPOINTED COUNSEL AND DEFENDANTS.

Utilization of Non-Volunteer Counsel

Rec. 2.1. THE COMMITTEE RECOMMENDS THAT ALL PRACTICING MEMBERS OF THE DISTRICT OF COLUMBIA BAR WHO ARE NOT GOVERNMENT EMPLOYEES OR REGULAR PRACTITIONERS UNDER THE CRIMINAL JUSTICE ACTS BE APPOINTED TO REPRESENT AT LEAST ONE INDIGENT DEFENDANT OR RESPONDENT PER YEAR.

Rec. 2.2. THE COMMITTEE RECOMMENDS THE COMPILATION OF A COMPREHENSIVE LIST OF ALL ATTORNEYS AVAILABLE FOR APPOINTMENT; IT RECOMMENDS THE ADOPTION OF A RATING SYSTEM BASED ON ATTORNEYS' TRIAL EXPERIENCE; IT RECOMMENDS THE ADOPTION OF AN EQUITABLE ROTATION SYSTEM TO ENSURE THAT NO NON-VOLUNTARY ATTORNEY IS APPOINTED TO MORE CASES PER YEAR THAN ANY OTHER; AND IT RECOMMENDS COMPENSATION TO ALL SUCH ATTORNEYS APPOINTED UNDER THE CRIMINAL JUSTICE ACT.

Inclusion of Law School Clinics in the CJA Budget

Rec. 3.0. CLINICAL PROGRAMS HAVE BECOME AN INTEGRAL PART OF THE CRIMINAL JUSTICE SYSTEM IN THE DISTRICT OF COLUMBIA. THE COMMITTEE THEREFORE RECOMMENDS THAT THESE PROGRAMS BE FUNDED AT LEAST IN PART, UNDER THE D.C. CRIMINAL JUSTICE ACT.

Increasing CJA Appropriations and Raising Levels of Compensation

Rec. 4.1. 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.

Rec. 4.2. COVERAGE OF THE D.C. CRIMINAL JUSTICE ACT SHOULD BE EXPANDED TO INCLUDE COMPENSATION TO COUNSEL REPRESENTING INDIGENTS ACCUSED OF ALL PETTY OFFENSES IN WHICH THE APPOINTMENT OF COUNSEL IS CONSTITUTIONALLY REQUIRED.

Rec. 4.3. 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.

Rec. 4.4. COUNSEL SHOULD BE COMPENSATED FOR WORK PERFORMED IN ANY ASSIGNED CJA CASE, WHETHER OR NOT CHARGES ARE FILED.

Rec. 4.5. THE STATUTORY MAXIMUM COMPENSATION FOR MISDEMEANOR AND FELONY CASES SHOULD BE RAISED TO $800 AND $1600, RESPECTIVELY.

Rec. 4.6. 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.

Rec. 4.7. IN ANY CASE WHERE A DEFENDANT MUST PAY A CONTRIBUTION TOWARD HIS DEFENSE, SUCH CONTRIBUTION SHOULD BE PAID INTO THE REGISTRY OF THE PROPOSED D.C. DEFENDER AGENCY.

Rec. 4.8. THE $18,000 ANNUAL LIMIT FOR CJA ATTORNEYS PRACTICING IN D.C. SUPERIOR COURT SHOULD BE ABOLISHED.

Rec. 4.9. PROCEDURES FOR PAYMENT OF EXCESS COMPENSATION SHOULD BE STREAMLINED AND LIBERALIZED. SPECIFICALLY, WE RECOMMEND THAT

- COUNSEL BE PAID THE STATUTORY MAXIMUM IN ANY CASE WHERE EXCESS COMPENSATION IS WARRANTED, I.E., COUNSEL SHOULD NOT HAVE TO AWAIT APPROVAL OF THE ENTIRE CLAIM IN ORDER TO BE PAID AT LEAST THE MAXIMUM;

- EXCESS COMPENSATION SHOULD BE PAID AT THE PROPOSED MAXIMUM RATE OF $40 AN HOUR;
- IN ANY PROTRACTED TRIAL EXTENDING OVER SEVERAL MONTHS, COUNSEL SHOULD BE PAID AT LEAST THE STATUTORY MAXIMUM AT THE END OF EACH MONTH:
- 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 TO THE TRIAL JUDGE AND THE ATTORNEY, BUT IT IS THE DISBURSEMENT AGENCY WHICH SHOULD HAVE FINAL AUTHORITY.

Rec. 4.10. 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. PROCEDURES FOR OBTAINING PRIOR APPROVAL SHOULD BE SIMPLIFIED AND AUTHORITY THEREFOR PLACED IN THE PROPOSED D.C. DEFENDER AGENCY.

The Role of the Public Defender Service

Rec. 5.1. THE COMMITTEE RECOMMENDS THE EXPANSION OF PDS'S CAPABILITY FOR PROVIDING TRAINING AND OTHER SIMILAR SERVICES TO THE PRIVATE BAR.

Rec. 5.2. THE COMMITTEE RECOMMENDS THAT ALL ADMINISTRATIVE RESPONSIBILITIES PERTAINING TO THE CRIMINAL JUSTICE ACT BE TRANSFERRED FROM PDS TO THE APPOINTED COUNSEL PROGRAM OF THE PROPOSED D.C. DEFENDER AGENCY.

Rec. 5.3. THE STAFF OF THE PUBLIC DEFENDER SERVICE SHOULD BE ENLARGED SO THAT THE AGENCY CAN AT LEAST DOUBLE ITS CAPACITY TO HANDLE CRIMINAL AND JUVENILE CASES IN SUPERIOR COURT.

Rec. 5.4. THE COMMITTEE RECOMMENDS THAT THE PUBLIC DEFENDER SERVICE, AS A DIVISION OF THE PROPOSED D.C. DEFENDER AGENCY, SHOULD CONTINUE TO FUNCTION IN THE FEDERAL COURTS IN THE DISTRICT OF COLUMBIA; A SEPARATE FEDERAL PUBLIC DEFENDER ORGANIZATION SHOULD NOT BE ESTABLISHED.

Ensuring Quality Representation

Rec. 6.1. THE COMMITTEE RECOMMENDS THAT THE PROPOSED D.C. DEFENDER AGENCY ESTABLISH CERTIFICATION STANDARDS AND CO-COUNSELING ARRANGEMENTS FOR NEW ATTORNEYS SEEKING APPOINTMENTS TO CJA CASES.

Sec. 6.2. THE COMMITTEE RECOMMENDS THAT THE PROPOSED D.C. DEFENDER AGENCY ESTABLISH A SYSTEM FOR MONITORING THE PERFORMANCE OF CJA COUNSEL AND DEVELOPING SEPARATE CJA ATTORNEY PANELS WHEREBY ASSIGNMENTS TO JUVENILE, MISDEMEANOR, AND FELONY CASES WOULD BE MADE ACCORDING TO COUNSEL'S ABILITY AND EXPERIENCE.

Rec. 6.3. THE COMMITTEE RECOMMENDS THAT THE PROPOSED D.C. DEFENDER AGENCY ESTABLISH AND ENFORCE MAXIMUM CASELOAD STANDARDS TO ENSURE THAT CJA COUNSEL ARE NOT OVER-EXTENDED AT THE EXPENSE OF QUALITY REPRESENTATION. CURRENT PDS CASELOAD STANDARDS SHOULD BE USED AS A GUIDE.

Rec. 6.4. THE COMMITTEE RECOMMENDS THAT THE PROPOSED D.C. DEFENDER AGENCY DEVELOP TRAINING PROGRAMS IN CRIMINAL LAW, PROCEDURE, AND EVIDENCE FOR ALL ATTORNEYS TAKING CJA CASES. ATTENDANCE AT TRAINING SESSIONS SHOULD BE VOLUNTARY DURING THE FIRST TWO YEARS OF OPERATION, BECOMING MANDATORY THEREAFTER.

Rec. 6.5. EFFECTIVE MACHINERY FOR HEARING AND RULING ON COMPLAINTS AND GRIEVANCES AGAINST ALL APPOINTED ATTORNEYS SHOULD BE ESTABLISHED WITHIN THE PROPOSED D.C. DEFENDER AGENCY.

Rec. 6.6. THE COMMITTEE RECOMMENDS THE ADOPTION OF A PILOT PROGRAM FOR SELECTION OF COUNSEL BY INDIGENT DEFENDANTS, INVOLVING 10% TO 15% OF ALL DEFENDANTS ELIGIBLE FOR APPOINTED COUNSEL, WITH A VIEW TO TESTING THE FEASIBILITY AND DESIRABILITY OF THE CONCEPT.

I. ADMINISTRATION OF THE CRIMINAL JUSTICE ACTS

A. COVERAGE OF THE CRIMINAL JUSTICE ACTS

Prior to September 3, 1974, the federal Criminal Justice Act (18 U.S.C., Section 3006A)[1/] was the governing statute for both the local and federal courts in the District of Columbia. The refusal in early 1974 of the Judicial Conference to support any further payments under the federal Act to counsel representing defendants and respondents in D.C. Code cases led to the enactment of an exclusively local statute, P.L. 93-412 (D.C. Code, Section 11-2601 et seq.)[2/] CJA representation in Superior Court and the D.C. Court of Appeals is now funded out of the D.C. Government budget, while CJA representation in District Court and the U.S. Court of Appeals continues to be paid for out of appropriations for the federal judicial system.

The federal Act provides compensation to counsel representing indigents charged with felones or misdemeanors (other than certain petty offenses) or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor. It provides representation for parole and probation violators, for persons in custody as material witnesses, and for

1/ See Appendix B.

2/ See Appendix C.

persons seeking collateral relief under 28 U.S.C., Section 2241, Section 2254, or Section 2255 and 18 U.S.C., Section 4245. And it provides representation for any indigent for whom the Sixth Amendment requires the appointment of counsel or for whom, in a case in which he faces loss of liberty, any federal law requires the appointment of counsel.

The new local Act pays for CJA representation in the same, or similar, categories to those outlined in the federal statute. However, coverage has been expanded to include several types of cases hitherto unmentioned in the federal Act: extradition of fugitives from justice, commitment of mentally ill persons while serving sentence, hospitalization of the mentally ill, and juveniles alleged to be in need of supervision.

The most significant advance in the local Act, however, is its responsiveness to the landmark decision of Argersinger v. Hamlin, 407 U.S. 25 (1972) which held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." The statute reads in relevant part as follows:

> The Joint Committee on Judicial Administration shall place in operation ... in the District of Columbia a plan for furnishing representation to any person in the District of Columbia who is unable to obtain adequate representation -
>
> (1) who is charged with a felony, or misdemeanor or other offense for which the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which he faces loss of liberty, any law of the District of Columbia requires the appointment of counsel. 3/

On its face, the above language calls for appointment and payment of counsel to anyone representing an indigent defendant charged with a D.C. Code or other offense involving loss of liberty. In practice, however, the new Act has not been so broadly interpreted. Superior Court continues to limit CJA coverage to offenses prosecuted by the U.S. Attorney, excluding all petty offenses (other than juvenile matters) prosecuted by the D.C. Corporation Counsel. The magnitude of this exclusion is apparent when one realizes that the Corporation Counsel prosecutes close to 150 criminal offenses (excluding traffic violations) under the D.C. Code, Police Regulations, and other municipal regulations for which a jail sentence may be imposed. Calendar year 1974 statistics for the 17 criminal and traffic offenses most frequently papered 4/ by the Corporation Counsel indicate that the number of cases deemed noncompensable is well in excess of 30,000:

3/ D.C. Code, Section 11-2601.

4/ Papered cases are those cases where formal charges are filed either by information or complaint.

Table I - Seventeen Offenses Most Frequently Papered By the D.C. Corporation Counsel in 1974. 5/

Type of Offense	Maximum Jail Sentence	Number of Cases
ABC Violations (D.C. Code, Section 25-109(a)&(b)	1 year	245
Disorderly Conduct (D.C. Code, Section 22-1107) (D.C. Code, Section 22-1121)	90 days	2,342
Drinking in Public (D.C. Code, Section 25-128)	90 days	146
False Report to Police (D.C. Code, Section 4-150(a))	30 days	33
Indecent Exposure (D.C. Code, Section 22-1112)	90 days	86
Tampering (P.R. Art. 25(15))	10 days	301
Unregistered Gun (P.R. Art. 53(1))	10 days	958
Unregistered Ammunition (P.R. Art. 53(2))	10 days	915
Vending without License (D.C. Code, Section 47-2336)	90 days	63
Wage Payments (D.C. Code, Section 36-607)	90 days	345
Welfare Fraud (D.C. Code, Section 3-216)	1 year	185
Driving while Intoxicated (D.C. Code, Section 40-609(b))	6 months (1st offense) 1 year (2d offense)	1,354

5/ Statistics obtained from Chief Deputy Clerk, D.C. Superior Court Criminal Division.

Type of Offense	Maximum Jail Sentence	Number of Cases
Leaving after Colliding (D.C. Code, Section 40-609(a))		
Property Damage	30 days (1st offense) 90 days (2nd offense)	315
Personal Injury	6 months (1st offense) 1 year (2nd offense)	61
No D.C. Permit (D.C. Code, Section 40-301(d))	90 days	2,878
Operating after Suspension (D.C. Code, Section 302)	1 year	769
Reckless Driving (D.C. Code, Section 40-605(a))	3 months (1st offense) 1 year (2nd offense)	390
Speeding (D.C. Code, Section 40-605(a))	90 days	17,962
	Total ----	29,356

It can readily been seen on the basis of these statistics that Superior Court excludes a vast number of defendants a substantial majority of whom are indigent from coverage under the Act. The reason for continued exclusion of offenses tried by the Corporation Counsel is, of course, largely financial. The question now raised, however, is whether Superior Court's policy is not in direct violation of the requirements of the D.C. Criminal Justice Act.

B. STANDARDS OF INDIGENCY

Early in the morning of presentment or arraignment, defendants in Superior Court are interviewed in the cellblock by the CJA Coordinator [6] or his assistants as to their financial status. If a defendant's income or assets fall below a certain minimum, he or she will be deemed eligible for representation by a CJA or PDS attorney. If the defendant's income or assets are slightly above the minimum, a further inquiry is made to determine eligibility and a contribution order may or may not be entered requiring the defendant to make partial payment directly to counsel.[7]

Various factors are taken into account in the determination of eligibility: employment status, weekly or monthly take home pay, other income, maritial status, number of dependents, cash on hand, and property. For example, if a defendant is a single individual, he or she is accorded a minimum living allowance of $52 a week, while a defendant with five dependents is allowed a minimum living allowance of $165. Depending on weekly income and other assets, a defendant may or may not qualify for full or partial coverage under the Criminal Justice Act.

It is inevitable that the procedures for determining CJA eligibility are less than thorough, given an average of 50 lockup cases arising each day and the fact that interviews must be conducted quickly and at a time early in the morning when verification of information is nearly impossible to make.

6/ The CJA Coordinator administers the appointed counsel program under the supervision of the Director of the Criminal Justice Act program and in coordination with Superior Court judges. See Sec. II B.(3), infra.

7/ This is a formal order of the court signed by the arraignment judge and the defendant.

Standards for eligibility are not followed religiously and determinations are often made on the basis of impressions which are not necessarily inaccurate. But it is nonetheless clear that the system is potentially open to abuse in that defendants could understate their income and not be subject to verification. However, the Committee did not encounter any specific instances of abuse and, thus, has concluded that this problem is overstated, if it exists at all.

In District Court, the eligibility determination is made by the U.S. Magistrate in open court and on the record. Because the number of presentments on any given day in District Court is so small, there is ample time to verify the defendant's information. In fact, the Bail Agency's report [8] - which is usually quite exhaustive on the defendant's background - is generally available to the Magistrate at the time of the eligibility hearing. By contrast, Bail Agency reports are not yet prepared by the time of the eligibility interviews in Superior Court.

On balance, the Committee has concluded that existing proce-

8/ The D.C. Bail Agency is responsible for preparing reports to assist the courts in making bail determinations. See D.C. Code, Section 23-1301, et seq.

dures for determining eligibility are not an area of great concern. Admittedly, the system is less than perfect. But establishing the necessary administrative machinery to determine defendant's income and assets with exactitude would probably be more costly than the resulting marginal improvements would be worth. However, it is clear that the standards for eligibility are in need of revision.[9/] The weekly minimum living allowances (i.e., $52 for single individuals, $77 for individuals with one dependent, on up to $275 for individuals with ten dependents) were set in 1971. Since that time, the Consumer Price Index for Washington, D.C. has gone from 123.5 in August 1971 to 156.1 in November 1974 - an increase of 20.5%.[10/] The trend is continuing and no concomitant effort has been made to raise the minimum living allowances to keep pace with the rate of inflation. As a consequence, many defendants whose take-home pay exceeds these minimum figures and yet whose standard of living is the same as or below that of 1971, are deemed ineligible or only partially eligible for appointed counsel. Increasingly, contribution orders (See Sec. I.G.(1)(c), infra) are entered which defendants are simply unable to pay.

9/ Applicable to both Superior and District Courts.

10/ Bureau of Labor Statistics, U.S. Department of Labor.

C. APPOINTMENT AND REMOVAL OF COUNSEL

(1) Superior Court

Admission to the D.C. Court of Appeals and, thus, membership in the District of Columbia Bar, is the only qualification that counsel must meet in order to take CJA appointments in Superior Court. Counsel is automatically placed on the Court panel upon registration with the CJA Coordinator's office.

If counsel wants a CJA appointment on any given day, he or she calls the CJA Coordinator in the morning and will be assigned one or more cases scheduled for presentment or arraignment that afternoon. Assignments are usually made following a conference between the CJA Coordinator and the arraignment judge.

Judges who had arraignments during the past year and a half were questioned in detail about their appointment practices. All but two of the nineteen judges answering this portion of the questionnaire indicated that they were generally familiar with the legal abilities of the attorneys signed up to take CJA appointments on any given day. However, nearly half of them also stated that they frequently relied on the judgment of the CJA Coordinator when deciding which attorneys should be assigned to particular cases. One of the judges openly acknowledged that he lets the CJA Coordinator make the assignments and exercises a veto power only in those instances where he considers counsel to be incompetent In practice, therefore, the CJA Coordinator appears to exercise

considerable influence over appointments.

Twelve judges stated that there were occasionally days when they were dissatisfied with either the number or quality of attorneys available for appointments. Their responses to this problem varied considerably: six said they would call in additional attorneys from PDS or the so-called "uptown" bar; five said their usual practice was to assign more cases to a single attorney than they normally like to do; and four stated that they assigned stand-in attorneys and continued cases to another day for appointment of permanent counsel. There was some overlap in these answers, with a few judges indicating that they took two or all three of the above steps, depending on the situation. All the judges interviewed stated that they usually tried to match cases to counsel's ability. Nevertheless, there was a frank acknowledgement on the part of many that they often had no alternative but to appoint attorneys they considered incompetent to misdemeanor cases, either because there were too many cases and too few attorneys or because of the difficulty of refusing appointments to attorneys sitting before them in arraignment court.

The vast majority of the CJA Practitioners interviewed stated that they had no objections to judges making appointments. Only a few indicated that some judges were unfair or tended toward favoritism. This result is not surprising. Judges usually seek out the competent attorneys for the more difficult cases, while the relatively less competent attorneys still manage to get appointments to misdemeanors and simple felonies. Everyone gets something, although it may not always be precisely what he or she likes.

However, what judges and attorneys say about the appointment of counsel does not really answer the central question: Do judges, in fact, make sure that cases are assigned according to counsel's ability? Figures compiled by the Public Defender Service (PDS) covering the period April 1, 1973 through March 31, 1974 suggest otherwise. Eleven attorneys who are frequently mentioned by judges and attorneys alike as being either incompetent or uninterested and overloaded with cases were appointed to a total of 657 felonies, 576 serious misdemeanors, and 60 less serious misdemeanors[11/] - about 8.6% of the entire criminal docket for that year. One of these attorneys had 113 felones and 86 serious misdemeanors. Another had 156 felonies and 50 serious misdemeanors. It should be noted, however, that judges occasionally appoint new counsel after indictment.[12/] These figures raise serious questions as to whether judges in fact match competent counsel and cases. Viewed from the relevant perspective - namely, effective representation - it is difficult not to conclude that there are at least some judges in some cases who show insufficient regard for

11/ Serious misdemeanors are defined as those offenses carrying maximum penalties of six months to a year; less serious misdemeanors carry maximum penalties of less than six months in jail.

12/ See (3), infra.

defendants' Sixth Amendment rights when appointing counsel.

Appointments in juvenile cases are handled somewhat differently. Attorneys wanting juvenile cases indicate which days they are available and, as the cases come up, either the CJA Coordinator for the Family Division or the hearing officer[13/] appoints counsel to the cases. The Judge's approval is a perfunctory formality and the decision of the CJA Coordinator is rarely overturned.

(2) District Court

In order to qualify for CJA appointments in District Court, counsel must, of course, first be admitted to practice there and then be placed on the Court's CJA panel upon the approval of the entire bench of District Court judges.

Appointments are made by one of the three Magistrates who presidesover all initial stages of a case through arraignment. District Court judges do exercise some control over which attorneys will appear before them. Occasionally, they will instruct Magistrates not to appoint certain attorneys in cases over which they will preside or ask Magistrates to remove one attorney and replace him or her with another.

A few of the practitioners interviewed raised objections to this system. Since Magistrates preside over bail hearings at

13/ Court employee.

presentment, the point was made that counsel's vigorous representations on bond could, and occasionally do, antagonize the Magistrates, thus cutting counsel off from appointment to future cases. Similarly, judges may deny appointments to attorneys who file "too many" motions or otherwise slow down the court's calendar. In short, some attorneys expressed the view that counsel may pay a severe price for vigorous representation, at least before some Magistrates and judges, and that this, as a minimum, tends to dampen counsel's ardor in behalf of his or her client.

(3) Removal of Counsel

Judges have broad discretion under the local and federal Acts "in the interests of justice, (to) substitute one appointed counsel for another at any stage of the proceeding."[14/] However, our interviews with Superior Court judges and practitioners indicate that the power of removal is exercised sparingly. Only in the most egregious instances of incompetence do judges remove counsel during trial, and usually only after first requesting counsel to voluntarily withdraw from the case. Most judges, however, will remove counsel before trial on motion by counsel because of poor attorney-client relationship. Not all judges will honor defendants' requests for removal of counsel and there are no extant guidelines as to what constitute legitimate reasons for removal.

14/ D.C. Code, Section 11-2603 (1974); 18 U.S.C., Section 3006A(c).

Many judges use the removal power as a device for getting better counsel into a case after preliminary hearing. This is commonly done just after indictment when the case has been assigned to a felony judge, or when a judge on reassignment inherits a prior judge's felony docket. Those judges who frequently take this step justify it as an exercise of their responsibility to ensure that defendants get effective representation. Since old counsel is removed and new counsel appointed at the very early pre-trial stage of a case, potential damage to the defendant is minimal.

Although the Committee has encountered few complaints from attorneys, the potential for abuse of the removal power remains. The statutory authority is extremely broad and the term "interests of justice" correspondingly vague. Arguably, more stringent standards for removal should be established to ensure that judges do not abuse the power and do not intrude unduly into the attorney-client relationship. It seems clear that so long as defendants have little or no choice in who is appointed to represent them in the first place, defendants should continue to have the option of requesting and obtaining removal of counsel. But whether the removal power should be used as a disciplinary device or method for weeding out incompetent attorneys remains an open question. It may be necessary as long as the system permits incompetent attorneys to practice under the Criminal Justice Act - indeed, that is its principal justification - but the better long-range solution lies in ensuring that inadequate attorneys are not appointed to CJA cases in the first place.

To our knowledge, however, no attorney has ever been barred from taking CJA cases in Superior Court because of incompetence. The only requirement for admission is membership in the unified bar, while existing mechanisms for suspension have proved unworkable. Since its creation, the Criminal Justice Advisory Board, charged with investigating grievances against attorneys, has never succeeded in having an incompetent attorney excluded from CJA practice.

The procedure in District Court for removing attorneys from its CJA panel, however, is no better and raises serious questions of fairness and due process. Decisions to remove an attorney are made in executive session without hearing. If any three of the fifteen District Court judges vote to remove an attorney from the panel, the attorney's name is stricken. This procedure is clearly open to abuse to the extent it leaves removal to the personal predilections of a small group of judges.

D. CJA UTILIZATION OF THE NON-VOLUNTEER BAR

CJA plans of past years have consistently included provisions for drafting attorneys to represent indigents in both the local and federal courts.[15/] The plans have never worked effectively, in part because of the heavy reliance that the courts have placed

15/ See the 1966 and 1971 "Plan for Furnishing Representation to Indigents in the District of Columbia."

on their volunteer panels and the infrequent occasions on which they have sought to draw from the lists of non-volunteers. Only in times of financial crisis - notably during the spring of 1974 when the volunteer bar called a strike because of insufficient CJA funding - has Superior Court tried to revive the non-volunteer panels.

The 1974 experience with drafting non-volunteer counsel was instructive in several important respects. The list of counsel - maintained by PDS pursuant to the 1971 CJA plan - had been drawn up several years before and had not been kept up to date, inasmuch as the courts had indicated to the agency that they were unwilling to utilize drafted attorneys. As a consequence, the list was unreliable and only partially reflective to the bar as a whole. It had to be supplemented with a random selection of some 800 attorneys drawn from the membership list of the D.C. Bar.

In all, 2282 attorneys were called upon to respond to the crisis in Superior Court. Of this number, 990 (43%) appeared, with each taking at least one appointed criminal or juvenile case. No information is available as to why such a large number of attorneys failed to respond to the Court's call. However, it is clear that a substantial number of mailings went astray because of changed addresses, retirements, and the like. The extent to which the non-response was attributable to the uncertainties of payment or simple refusal to cooperate is difficult to say. In any event, Superior Court has since abandoned use of its non-volunteer panel and PDS no longer maintains a list for the

Court.

Non-Volunteer Survey

As part of our research, the Committee selected a list of 50 non-volunteers drafted to represent indigents during the week of April 22-27, 1974. We reached 35 of them for personal interviews, focusing our questioning on five main areas: (1) the number of cases handled and their disposition; (2) the financial impact the draft had upon attorneys and their experience with the voucher system; (3) the extent of support services provided and needs for improvement; (4) their willingness to accept future court appointments; and (5) improvements necessary to make appointments more acceptable. Our findings are as follows:

(1) Number of Cases Handled and Dispositions

The thirty-five attorneys were appointed to twenty felonies and eighteen misdemeanors. These cases were disposed of in the following manner:

First Offender Treatment (misdemeanors)	5
Dismissed at Preliminary Hearing	3
Dismissed for other reasons	
No Papered	4
Nolle Prosequi	6
Motions Granted	3
Assigned to Other Counsel	6
Guilty Pleas	9
Awaiting Trial	1
Awaiting Action of Grand Jury	1

Out of those "assigned to other counsel," four were cases that attorneys thought would go to trial. When funds became available in May, these attorneys requested that the court appoint "volunteer" counsel to handle these cases.

(2) Financial Impact and Submission of Vouchers

Four of the attorneys questioned indicated that the draft had a substantial financial impact on their private practice. These were attorneys from one or two-person firms assigned to relatively complicated cases.

Only six of the thirty-five had submitted vouchers at the time of the interviews. Three of the attorneys submitting vouchers had been paid. Two were paid in full; one was given partial payment on two vouchers submitted. Twenty-seven attorneys indicated that they had not, and would not, submit vouchers to the Court. The reasons for not submitting vouchers varied. But the two most frequently offered reasons were that (1) it would take too much time to fill out the voucher because the form was too complicated (10 attorneys), and (2) the attorney worked for a large law firm which was willing to assume the cost of representation (5 attorneys). While funds should be available to pay these attorneys for their time, this survey suggests that some lawyers will view their appointments as pro bono work which, in turn, could result in some savings to the system.

(3) Prior Experience and Support Systems

The attorneys on our list were, for the most part, older

members of the bar. Only three had been in practice for less than ten years, and twenty-one had been appointed to criminal cases in prior years. These attorneys estimated that they had handled the following number of criminal cases:

No. of Felonies	9 had 1 to 5	8 had more than 5
No. of Misdemeanors	6 had 1 to 5	4 had more than 5
No. of Juvenile cases	7 had 1 to 5	3 had more than 5

Some attorneys gave multiple answers in the above categories. Eight indicated that they had no prior experience in handling criminal or juvenile cases.

As to their most recent trial experience, seven attorneys stated that they had had a criminal trial in the past year, five that they had had one in the last five years, and five that they had had one more than five years ago. Nine said they had had a civil trial in the past year, and one stated that he had handled a civil trial between one and five years ago.

While only seven of the thirty-five attorneys interviewed indicated that they were familiar at the time of appointment with Superior Court procedures, no one felt unduly handicapped by this lack of familiarity. All the attorneys interviewed stated that they could, and did, learn how to shepherd a case through the system and were able to obtain the substantive knowledge requisite to providing effective representation.[16/]

16/ See Rec. 2.2. and supporting commentary where judges' experience with the performance of non-volunteers is discussed.

(4) Availability of Support Services

Many attorneys mentioned the information on Superior Court procedures put out by PDS as helpful, although some felt that more printed information should be made available. Nineteen of the questioned attorneys sought the help of PDS and most of them expressed strong satisfaction with the assistance given to them by the agency. However, three attorneys mentioned that they had difficulties in getting the necessary investigatory services, while two said they had problems reaching a PDS attorney who could answer their questions. One indicated that "information could have been better."

Other than the above problems, two attorneys indicated only two areas where they needed help and couldn't obtain it: preparing motions to suppress and having a defendant admitted to St. Elizabeths Hospital for mental examination.

Twelve of the attorneys had attended the Criminal Practice Institute of the Young Lawyers Section of the D.C. Bar Association and/or training seminars sponsored by PDS. Fourteen attorneys indicated that they would be willing to attend seminars and training programs in the future. The suggestions as to what should be covered in these training sessions concentrated on the basics of criminal practice: e.g., motions practice, general orientation, and Superior Court procedure.

Twenty-one attorneys indicated that they were unwilling to attend training programs, stating by way of explanation that criminal law was not their legal speciality and that they did not have the time to attend weekend training seminars. Ten attorneys out of these twenty-one said they would like to receive training materials from the training programs to study on their own, thus eliminating the confined time element of a weekend institute.

(5) Willingness to Accept Court-Appointed Cases

Twenty-five of the thirty-five attorneys interviewed indicated a willingness to take CJA appointments in the future. Again, their reasons varied. Many thought it was a responsibility of the bar to accept indigent cases and some indicated that they simply enjoyed trying criminal cases. Seven of these twenty-five attorneys were willing to take two or more cases a year. The rest thought that one per year was an appropriate number.

Ten stated that they were unwilling to take CJA cases. Reasons cited for this were: (1) lack of experience; (2) a feeling that the attorney had done his share over the years and that younger members of the bar should assume the burden; (3) inadequate pay given the amount of work involved; and (4) a desire for freedom of choice in selecting the kind of pro bono work an attorney would do.

(6) Improvements Necessary to Make Appointments More Acceptable

In response to Questions 13 and 14 - "What could the Court and the United States Attorney do to ease the task?" and "general comments" - twenty-six attorneys listed court inefficien-

cy and waiting time as the matters most in need of improvement. Attorney after attorney recounted hours of waiting at various stages in the process of his case. Seven attorneys also mentioned lack of cooperation from the U.S. Attorney's Office and particularly objected to long waits for conferences where appointments had been set up ahead of time. Four attorneys mentioned the insufficient advance notice for appearance. Other comments were: (1) judges should not appoint counsel or rule on vouchers as these create conflicts of interest; (2) judges should not cut vouchers; (3) appointments should be distributed equitably throughout the bar; and (4) a court liaison officer should be appointed to direct and assist counsel.

(7) Conclusions from the Survey

Conclusions drawn from this survey must, of course, be viewed in perspective, given the large number of attorneys who did not appear and the fact that our sample was taken from those who did. Indeed, no reliable conclusion can be reached solely on the basis of the survey as to the willingness of the bar as a whole to take CJA appointments. However, we do think the survey points up at least some of the improvements that must be made if a non-volunteer appointment system is to be workable. Specifically:

- A much larger, up-to-date, list of attorneys embracing the entire practicing bar in the District of Columbia should be drawn up to ensure that all qualified attorneys are considered

for appointments.[17] Many of those attorneys who were interviewed felt that the burden was unfairly placed on those who had taken CJA cases before and not on recent members of the bar or those who, for one reason or another, were not on PDS's list of non-volunteer attorneys.

- If non-volunteers are to be drafted, appointments should be distributed equitably throughout the bar. No one attorney should be asked to take more cases than any other unless he or she volunteers to do so, and special consideration with respect to timing of appointments should be given to the financial and other problems faced by sole practitioners or small firms when receiving CJA appointments.

- A staffed and well-coordinated system should be established to prepare and distribute relevant information about court procedures and developments in the criminal law, to assist counsel in obtaining investigative and expert services, and, generally, to answer counsel's questions and otherwise direct them through the criminal process.

- Training programs and seminars - currently conducted by the Young Lawyers Section of the D.C. Bar Association and by PDS - should be encouraged, expanded, and funded, at least partially, by the criminal justice system. Materials prepared for these programs should be made readily available to practitioners who

17/ See Recs. 2.1 and 2.2, infra.

need and want them, but who cannot attend training sessions.

- Finally, steps should be taken by the courts - Superior Court in particular - to reduce the amount of time spent in waiting for court proceedings. This is a problem faced by all attorneys practicing criminal law, but is most acutely felt by non-regulars who are tied up with only one case at a time and, thus, do not have the options of regulars who often have several criminal matters that can be scheduled on one court day. For instance, staggered scheduling of misdemeanor motion hearings, of preliminary hearings, and the like, rather than ordering all counsel to appear at the same time, could do much to alleviate the situation.

E. ROLE OF LAW STUDENTS IN PROVIDING DEFENSE SERVICES

(1) Scope of Clinical Programs

Since the establishment in 1972 of Rule 46 III(a)-(e) of the D.C. Court of Appeals and the parallel Superior Court Criminal Rule 44-I(f)(hereinafter the "student practice rule") which permits third year law students to handle misdemeanor cases, students have assumed a growing share of the burden of representing indigent defendants and respondents in Superior Court. By the close of 1974, students were representing approximately 2664 persons a year.[18/]

There is no student practice rule in District Court. However,

18/ It has been estimated that the U.S. Attorney currently initiates about 12,000 misdemeanor cases each year.

pursuant to Rule 20, the U.S. Court of Appeals permits third year students in accredited law school programs to handle criminal appeals on behalf of indigent appellants. At present, only Georgetown conducts an Appellate Litigation Seminar in the U.S. Court of Appeals. Faculty members are designated as "attorneys of record" and submit vouchers for the representation provided by them and their students. Reimbursements under the federal Criminal Justice Act are used to defray the costs of running the seminar.

Each of the six law schools in D.C. participate in clinical programs established pursuant to the student practice rule of the local courts. Antioch, Georgetown and Howard conduct clinics of their own. American, Catholic, and George Washington University law schools participate in a consortium program called D.C. Law Students in Court. In all, there are approximately 150 third year students currently handling criminal and juvenile cases in Superior Court. A description of these programs follows:

Antioch Law School, Criminal Division

Description of program: 1st, 2nd and 3rd year law students all participate in this program, with 1st year students investigating cases and interviewing clients, 2nd year students preparing motions, and 3rd year students certified under the student practice rule handling misdemeanors. Six full-time and one-part time faculty member supervise the clinic. Supervisors become "attorneys of record," but 3rd year students actually try misdemeanors and assist supervisors with assigned felony cases. Twenty-five third year students are currently certified to try misdemeanors.

Number of cases handled: 233 misdemeanors, 111 juvenile, and 42 felony cases in 1974.

Savings to the system: $34,400 (at $100/case, excluding felonies).

Present funding:

Law School contribution ---	$71,000
L.E.A.A. ----------	$29,000 19/
Other ----------	$50,000

Prospective funding: Same sources as in 1974-75.

Georgetown Criminal Justice Clinic - D.C. Division

Description of the program: This clinic is staffed by three full-time faculty members, one Adjunct Professor, and two Georgetown Legal Interns. Faculty members are responsible for the academic component of the clinic which consists of orientation sessions and classes on evidence and criminal law. The Legal Interns are responsible for seminar sessions on trial tactics and supervision of students in court. Twenty-five students provide representation for indigents charged with misdemeanors.

Number of cases handled: 452 for academic year 1973-74

Savings to the system: approximately $45,200 (@ $100/case)

Present funding: Georgetown University Law Center is presently funding the entire program at an approximate cost of $52,000.

Prospective funding: This clinic is no longer eligible for L.E.A.A. funds and the law school is committing $57,500 to the program for academic year 1975-76.

Georgetown Interdisciplinary Criminal Justice Management Training Program (L.E.A.A. Clinic)

Description of the program: This program includes training in defense, prosecution, and correctional work. Of interest here is the work done by third year law stu-

19/ The Office of National Scope Programs of the Law Enforcement Assistance Administration, U.S. Department of Justice, has discretionary grant funds to support training programs in the area of criminal justice.

dents drawn from various law schools across the country, including D.C. area law schools. Twenty-five students participate in a totally clinical half-year program and all are required to represent indigent misdemeanants. Students receive intensive academic orientation at the beginning of the program and weekly classes in trial tactics and substantive law. Three graduate interns, admitted to practice in D.C., handle felony and misdemeanor cases.

Number of cases handled: 773 (excluding graduate interns)

Savings to the system: $77,300 (at $100/case)

Present funding:

L.E.A.A. ----------	$223,222
Georgetown University ------	$ 39,543

(It must be noted that this amount also pays for a legal intern program and other activities not involving defense work).

Prospective funding: Georgetown has a pending application with L.E.A.A. for academic year 1975-76 in the amount of $343,189. In December, 1975 this clinic will receive its last funding from L.E.A.A.

Georgetown Juvenile Justice Clinic

Description of the program: This program is staffed by two faculty members, an Adjunct Professor and a graduate intern. Twenty students in this clinic represent juveniles in school suspension hearings, delinquency proceedings, supervision and neglect hearings. It is especially in the area of neglect (Not covered under the Criminal Justice Act) that this clinic provides essential services to the court.

Number of cases handled:		
June 1973 - May '74	Delinquency ----------	14
	PINS ----------	25
	Neglect ----------	52 cases (100 clients)
	Compact ----------	22
June - August 1974	Delinquency ----------	39
	Neglect ----------	08 cases (13 clients)

Savings to the system: $5,300 for delinquency cases, (unknown as to others)

Present funding: Cafritz Foundation ---------- $34,000
Georgetown University ------- 10,000

Prospective funding: Cafritz Foundation ------ $34,000
Georgetown University --- $10,000

Howard University Criminal Justice Clinic

Description of the program: The Howard clinic is staffed by three faculty members, one of whom teaches an academic component in the second semester for second year students. Twenty-three students are presently enrolled in the litigation phase of the program which extends into a full academic year.

Number of cases handled: approximately 400

Savings to the system: $40,000 (at $100/case)

Present funding: L.E.A.A. ---------- $40,000
Howard ---------- $46,000

Prospective funding: L.E.A.A. ---------- $43,000
Howard ---------- $46,000

Howard's eligibility for L.E.A.A. funds will terminate in March 1976.

D.C. Law Students in Court

Description of the program: This is a program in which American, Catholic, and George Washington Universities participate. The program is staffed by a Deputy Director and a senior staff attorney. These attorneys teach the orientation program at the beginning of the academic year and weekly class sessions in law and tactics. Students are not required to participate for the entire academic year, though most students do so. In the 1974 fall semester twenty-nine students participated in the program and twenty-five will be continuing in the 1975 spring semester.

Number of cases handled: 201 during 1974 fall semester (approx. 400 for entire year.)

Savings to the system: $40,000 (at $100/case)

Present funding: Law Schools ---------- $50,000
United Fund ---------- $25,000
L.E.A.A. (criminal only) ---- $40,000

Funding is used for both the civil and criminal divisions of this clinic. The best estimate at the present time is that the criminal division costs about $55,000 a year to operate.

Prospective funding: The prospects for L.E.A.A. funding for the 1976-77 academic year are unfavorable. By that time, the program will have exhausted its three year grant maximum and indications are that L.E.A.A. funding will not continue. As of now, it appears that the participating law schools will be either unable or unwilling to assume the full costs of the program.

(2) Quality of Representation

Superior Court's experience with the student practice rule has, on the whole, been excellent. A number of judges who were initially opposed to the rule are now its ardent supporters. Indeed, of the twenty-four judges we surveyed on this issue, twenty had high praise for the diligence and ability of student attorneys. Many judges stated that student practitioners conducted thorough investigations of their cases and were well prepared on the case law. Several mentioned that students were particularly imaginative in arranging for pre-trial diversion and creative sentences. These observations are not surprising. Although law students obviously lack trial experience, their relatively low caseloads enable them to devote the kind of effort to their cases and clients that regular prac-

titioners are often unable to do because of their high caseloads. Moreover, students are supervised by skilled practitioners who can assist them in those areas where their skills may be weak.

The four judges who still opposed the student practice rule cited student inexperience and objected to what they considered to be a tendency on the part of students to file frivolous motions, to overtry their cases, and to try more cases than necessary. However, statistics on the disposition of cases handled by students do not appear to support these criticisms. For example, of the 773 cases handled by Georgetown's L.E.A.A. Clinic, only 26 were taken to trial and, of these, 14 resulted in acquittals. Similarly, students in the Georgetown Criminal Justice Clinic took only 13 of 452 cases to trial, with 8 resulting in acquittals. Statistics for the other clinics in D.C. are roughly comparable.

On balance, we think it fair to conclude that third year law students have proven themselves fully competent to handle misdemeanor cases in Superior Court. In fact, since the establishment of the student practice rule three years ago, students have become an integral - even necessary - part of the criminal justice system.

(3) Savings to the System

The law student contribution to the administration of justice has become particularly significant in light of Argersinger v. Hamlin, 407 U.S. 25 (1972). (See Justice Brennan's concurring opinion in Argersinger wherein he suggests the use of

supervised law school clinics as a source of counsel for indigents accused of petty offenses). This decision mandates the appointment of counsel in any petty criminal case where incarceration is likely. Thus, the courts are now required to appoint counsel in cases where judges have hitherto permitted defendants to act pro se. Since Superior Court continues to exclude CJA payments to counsel prosecuted by the D.C. Corporation Counsel, the tendency has been to appoint students to these cases since they need not be paid (but see Sec. (4), infra). For example, roughly 30% of the Georgetown L.E.A.A. Clinic's 773 cases fell into this category, as did 50% of the Howard's clinic's 200 cases during the 1974 fall semester. Thus, although there is no monetary saving to the court since counsel is normally uncompensated in these cases, law students make a substantial contribution by accepting such appointments and thereby enabling the court to carry out its constitutional responsibilities.

It is difficult to determine precisely how much money students save the court each year. The average CJA payment for a misdemeanor case in calendar year 1974 was $131.00, according to statistics compiled by the Public Defender Service. Thus, in theory, the 2664 cases handled by students in a year would represent a saving of $348,984 insofar as the court would have to appoint and pay CJA counsel if students were unavailable. However, this estimate ignores the high percentage of First Offender

Treatment (FOT) and pre-trial diversion cases[20] handled by students which, by their nature, may involve substantially less defense work than the average misdemeanor. Also, as noted above, students handle a large number of Corporation Counsel-tried cases that are uncompensated in any event. When these factors are considered, it may be estimated conservatively that the saving to the court is somewhere in the range of $100 per case if students were to be compensated - i.e., a total of roughly $266,400 each year. Given that this is a conservative estimate, students save the court at least $266,400 and maybe as much as $348,984 a year.

(4) Funding the Clinical Programs

All but two of the law school programs are funded in part by L.E.A.A. for a maximum three year period. After this time, the law schools must either assume the total cost of the programs, find alternative funding, or discontinue them. Even with L.E.A.A. support some of the programs have had difficutly making ends meet, since L.E.A.A. will not underwrite their entire cost. Administrators of the programs - particularly D.C. Law Students in Court - are forced to spend a disproportionate amount of their time each year soliciting funds to ensure the continued existence of their clinics. Indeed, it is no exaggeration to state that some of the

20/ These are cases where the U.S. Attorney ultimately dismisses the charges if defendants fulfill certain requirements of rehabilitation and education within a specified period of time.

clinical programs lead a tenuous, year-to-year existence.

Despite the substantial savings to the system resulting from the students practice rule, clinical programs receive no financial support under the Criminal Justice Act. There is currently a dispute as to whether the legislative history of the new local Act calls for inclusion of student clinics in the CJA budget. A number of Congressmen, notably D.C. Delegate Walter Fauntroy and Rep. Gilbert Gude, maintain that the legislation was meant to include funding for clinical programs. However, Superior Court has taken the position that these programs cannot be funded out of CJA appropriations because the Act does not provide an appropriate formula for doing so and because of the financial difficulties already faced by the Court in compensatingg regular practitioners.[21] Efforts should be made to resolve the issue.

F. THE VOUCHER SYSTEM

(1) Procedures

The District of Columbia and federal Criminal Justice Acts both provide for payment of appointed counsel at public expense. The CJA voucher lies at the heart of the system. It works essentially as follows:

When counsel is appointed to represent an indigent defendant,

21/ Correspondence: letter from Del. Fauntroy to Chief Judge Harold Greene dated December 6, 1974, and response from Chief Judge Greene to Del. Fauntroy dated January 6, 1975.

he or she will receive a voucher form shortly thereafter, provided that the case is "papered," i.e., a charge is filed, and proceeds beyond the date of arraignment or presentment. Counsel has sixty days from the last court appearance in the case in which to submit the completed voucher for approval. Compensation is at the rate of a maximum of $30 for in-court time, and $20 for out-of-court time; each claim must be substantiated in detail.

In Superior Court, counsel submits the completed voucher to the CJA Coordinator. The Court's Administrative Office then checks it for mathematical accuracy and completeness, whereupon it is submitted to a judge for final review and approval. In theory, vouchers in cases that went to trial are submitted to the trial judge, while all other (i.e., pleas, cases nolle prossed, dismissals) are referred to the Judge in Chambers. In fact, non-trial vouchers are on occasion referred to the judge who took the plea or presided over the last action in the case. After final approval by a judge, vouchers then go to the Court's Administrative Office for disbursement of checks to attorneys.

The system is slightly different in U.S. District Court. There counsel is appointed by one of the three Magistrates. If the case does not proceed beyond presentment or preliminary hearing, or if the Magistrate takes a plea or tries the case, the voucher is submitted to the Magistrate for final approval. Not infrequently, new counsel will be appointed to a CJA case after indictment, by which time the case will be assigned to one of the District Court judges.

Whatever the outcome in the case - trial, plea, or dismissal - that judge will review and approve the voucher. Thereafter, the voucher is submitted to the Administrative Office of U.S. Courts for disbursement of checks to the attorney.

(2) Superior Court of the District of Columbia

Counsel who accept CJA appointments generally agree that they have encountered far more problems with their vouchers in Superior Court than in District Court. Virtually every attorney interviewed said that his or her vouchers had been cut by Superior Court judges at one time or another, while only a small minority stated that they had ever been cut in District Court. Consequently, the Committee decided to focus its analysis on the voucher system as it operates in Superior Court.

(a) Non-Trial Vouchers

Of the approximately 22,000 or so appointed cases processed in Superior Court each year, some 19,000 are disposed of prior to trial. Practically all vouchers for these cases are referred to the Judge in Chambers. This clearly presents a severe administrative burden to the Judge in Chambers who has many other responsibilities beyond reviewing vouchers. Aside from the sheer volume of forms to be reviewed, the Chambers Judge is in an inherently weak position to pass on the merits of attorneys' claims. The most commonly-voiced complaint of judges was that they have no personal familiarity with the case and, thus, do not know whether claims for in-court time, much less claims

for out-of-court time, are accurate and legitimate. Indeed, of the fifteen judges who have sat as Judge in Chambers during the past year and a half, eleven answered "no"when asked if they could give proper consideration to the merits of each voucher; one of the eleven frankly acknowledged that he never touched the stack of vouchers before him because of the administrative problems involved. Even the four judges who stated that they could give proper consideration to the merits of each voucher nevertheless acknowledged that it was difficult and time-consuming to do the job well.

A large majority of the CJA attorneys interviewed stated that their non-trial case vouchers were cut more frequently than their vouchers in cases which went to trial. This is borne out, at least partly, by the results of the voucher-cutting analysis contained in Table II, infra. Furthermore, attorneys said that they were rarely, if ever, informed as to what was cut and why it was cut. Some voiced a concern that certain judges did not, in fact, "review" their vouchers individually but, instead, applied an across-the-board percentage cut.

(b) Trial Vouchers

Many of the difficulties involved in reviewing non-trial vouchers do not arise when a judge must approve a voucher for a case where he or she presided at trial. Obviously, the judge is at least generally familiar with the case, knows what motions were filed, how many witnesses were called, and how long the case took

to try. Most judges, in fact, keep reasonably careful records for each case in their log books and on case cards and, thus, can check voucher claims against their own records. However, all the judges interviewed acknowledged that out-of-court time is difficult, if not impossible, to verify and some were frankly skeptical that attorneys do all the work they claim.

It is clear from interviews with both judges and CJA attorneys that trial vouchers are frequently cut despite the somewhat better time records that judges keep on tried cases. Given the importance of determining why vouchers are cut, judges were interviewed in great detail on their attitudes to CJA practitioners, their policies, if any, with respect to voucher cutting, and the types of claims they tended to disallow. The results are revealing:

Nineteen of the judges interviewed said that there were a few attorneys who consistently pad their vouchers, while five said that there were none. However, all but two judges agreed that voucher padding is confined to a small minority of attorneys and that these attorneys were generally well known to the Court. A few instances of alleged overcharging have been referred to the U.S. Attorney's office for investigation, but none have resulted in prosecution. A number of judges suggested that there was another group of attorneys who, although not padders, use their time inefficiently and, thus, claim compensation for time ill spent.

Nineteen judges answered "yes" when asked if young attorneys

and non-regular CJA practitioners spend more time on their cases than do CJA regulars. Four answered "no." As a follow-up to this question, judges were asked if these attorneys should receive full compensation, assuming that their claims could be fully substantiated. Twelve answered "no," citing funding constraints and arguing that it was not the function of the courts to pay for the education of inexperienced attorneys. Six answered, "yes," suggesting that full compensation is necessary in order to attract young attorneys and so-called "uptown" lawyers into criminal law.

Judges were asked if they had any policies with respect to cutting vouchers. Only one candidly admitted to having a policy - namely, an automatic one-third cut of all waiting and travel time. This was justified on the ground that other judges arbitrarily cut vouchers and that a stated policy at least has the virtue of alerting attorneys to how much of a cut they can expect. Although only one judge admitted to having a policy, it became clear from a more extensive exploration of the issue that most judges do, in fact, have at least an implicit policy.

Three judges indicated that the first thing they do when reviewing a voucher is to note the attorney's name and, if the attorney is either one of the known padders or reputedly incompetent, to subject his voucher to close scrutiny. Given that nineteen judges suspect a few regular CJA attorneys of voucher padding, it may reasonably be assumed that considerably more than three judges follow this procedure in reviewing vouchers.

Despite the generally held view that voucher padding is not a pervasive practice, almost all the judges interviewed said that they were seriously troubled by attorneys' claims for waiting time. By statute, time spent waiting in open court for proceedings to commence appears to be compensable. By judicial policy, such time is compensated at the rate of $20 an hour. Nevertheless, many judges are clearly reluctant to award waiting time and acknowledge that this is an area in which they frequently make cuts. A variety of justifications were offered for this policy: many attorneys with several cases scheduled before different judges on a given day are double billing for waiting time; attorneys may, in fact, be taking care of other business when claiming waiting time; if attorneys are not taking care of other business, they should be; some attorneys are in the lawyers' lounge and, yet, claim compensation for in-court waiting time. Implicit in these justifications is a pervasive view among judges that waiting time is, in a sense, "down time" which ought not be compensated, particularly given the limited CJA funds available.

It is often difficult to control court scheduling no matter what is done. Nevertheless, it does seem clear that court procedures and practices are often to blame for keeping counsel waiting. All counsel are required to appear at 9:30 A.M. for preliminary hearings, status calls, etc. even though an individual attorney's case may not be called before late afternoon. Little effort is made to stagger cases. Similarly, certification procedures for

sending misdemeanor cases out to trial are extremely time-consuming, and it is not uncommon for counsel to be kept waiting all day from certification in the morning to actual assignment to a trial judge. Certified cases are often continued for weeks when no misdemeanor judges are found to be available by the end of the day.[22/]

Nearly all the judges said they have difficulty with counsel's claims for out-of-court time. Twelve said they cut time claimed for legal research and preparation of motions. Some indicated that they frequently cut claims for investigation and witness interviews. Other categories cited were travel time, jail visits, getting official records, and the like. Only two judges said that they usually give the attorney the benefit of the doubt because of the inherent difficulty of verifying counsel's expenditures of out-of-court time.

In light of the above findings, the question remains as to how judges review vouchers and arrive at final compensation figures. Most indicated that they take a "balanced" view of the voucher, assessing the complexity of the case, the competence of counsel, time spent in trial, etc. and then arrive at a "ballpark" figure.

22/ In an analysis of 104 randomly selected vouchers submitted by counsel during June 1974, we found that 64 included claims for waiting time. Attorneys spent a total of 128.8 hours in court and 531.6 hours out of court, of which 179.5 hours represented waiting time. Waiting time, therefore, amounted to 27% of all time spent on a case and 33% of all time spent out of court. If this sample is representative, it is clear that a majority of CJA practitioners spend more than a quarter of their time on a case waiting for court proceedings to get under way.

If the voucher is within range of what they consider the case to be worth, they will generally not cut. If the voucher appears to be excessive, they will look closely at various categories of out-of-court time such as waiting time, investigation, and legal research. One judge indicated that he goes so far as to evaluate the necessity and propriety of actions taken by defense counsel - that is, if counsel spent five days of court time on a motion or trial which the judge thinks should have taken only two days, counsel will be compensated for only two days of court time. Or, if he denies a motion without a hearing, he regards it as frivolous and will not compensate counsel for time spent in its preparation. This is, of course, an extreme position, but it does throw into relief a practice that appears to be pervasive among judges: there is a tendency to play Monday morning quarterback, to make judgments about counsel's tactics and expenditures of time, and then to cut vouchers in accordance with these judgments. Given the widely differing backgrounds and attitudes of Superior Court's 44 judges, there is inevitably an equally wide divergence of views as to what is a legitimate expenditure of time and what is not. The end result is a patchwork of inconsistent policies and practices.

Beyond the individual predilections of judges, it should be noted that the over-riding reality of limited CJA fundings has an impact on a large majority of the judges when reviewing vouchers. In 1973 and 1974, CJA funds for paying appointed counsel

were exhausted several months before the end of the fiscal year, thus presenting the Court with a severe crisis. The same situation may arise in Fiscal Year 1975. Eighteen judges frankly acknowledged that voucher cutting was necessary, if for no other reason than to stretch limited resources, while only seven felt that such a rationale was either inappropriate or unfair to attorneys. However, the picture would not be complete without an acknowledgement that the judges of both Superior Court and the D.C. Court of Appeals have fought long and hard over the years to secure adequate funds for the Criminal Justice Act program.

Table II. Voucher Cutting - Superior Court[23/]

Judge	Number of Vouchers	Percentage Approved of Amounts Claimed
a	27	99.5
b	212	73.1
c	25	89.5
d	18	85.6
e	12	63.8
f	44	96.6
g	127	86.9
h	21	89.0
i	30	90.0
j	36	95.6
k	32	94.2
l	13	76.3
m	38	80.6
n	54	95.4
o	35	66.5
p	10	93.5
q	53	71.7
r	501	65.0
s	36	94.8
t	14	87.7
u	65	95.8
v	25	94.5
w	55	98.7
x	17	80.7
y	284	87.4
z	46	80.9
aa	80	91.6
bb	17	95.0
cc	71	84.9
dd	201	93.0
ee	30	97.4
ff	145	51.0
gg	39	79.3
hh	32	86.3
ii	21	97.5
jj	21	87.6
kk	48	95.4
ll	97	100.00

23/ Thirty-eight of Superior Court's forty-four judges are represented in this table. The six excluded did not have criminal or

(c) Impact of Voucher Cutting on the Quality of Representation

As a rule, counsel does not know that a voucher has been cut until receipt of his or her check. Although half of the judges interviewed stated that they mark their cuts on the front of the voucher form, a copy is not sent to the attorney. The rest of the judges do not indicate what they have cut, much less their reasons for doing so. Thus, counsel's only hope of learning what has been cut and why is to make an inquiry of the judge. But many attorneys are reluctant to do this for fear of antagonizing the judge and appearing undignified. In any event, only thirteen judges said they usually respond to such inquiries, four stated that they will never speak to an attorney about a voucher, and the rest indicated that they are reluctant to respond to counsel's inquiries. It is the rare judge - only three of those interviewed - who takes the initiative of informing counsel of any problem before he cuts a voucher.

Attorneys are understandably resentful when their vouchers are cut without being told why. Many attorneys, having spent

family division assignments during the year from which figures are taken or reviewed so few vouchers that conclusions as to their voucher authorizing practices would not be accurate. The basic period covered was January through April 1974, although we did look at other months before and after this period in a few instances in order to get a representative sample. It was not always possible to distinguish between trial and non-trial vouchers. However, those judges with more than a hundred vouchers approvals were clearly serving as Judge in Chambers.

considerable time and effort in preparing and filling out the complicated voucher forms, regard voucher cuts as attacks on their integrity.

The impact that voucher cutting has on the quality of representation is difficult to calculate with any precision. However, the committee's research indicates that there are at least two major effects. First, voucher cutting tends to discourage counsel from making an all-out effort on behalf of each client. Thinking that his voucher may be cut, counsel will think twice about filing a motion, visiting the client in jail, attending a line-up, tracking down witnesses, investigating every possible lead, and the like. The end result in many instances is that some attorneys will take on a large volume of cases, do little more work on them than absolutely necessary, and try to get as many of their clients to plead guilty as they can. These attorneys seriously compromise the quality of their representation by doing a volume business in order to make what they consider to be an adequate living. Compounding this vicious cycle is the suspicion of many judges that these same attorneys pad their vouchers in the expectation that they will be cut.

A second effect which is particularly disturbing is the defection of able, young attorneys who start out taking CJA cases and then abandon criminal practice in Superior Court. Five of the 26 attorneys we interviewed said that they used to accept many CJA appointments in 1973 and early 1974 but have since taken up

criminal practice in U.S. District Court, Maryland, or Virginia. All of them said that they simply could no longer afford to practice criminal law in Superior Court, citing voucher cuts and the attendant indignities as the principal reasons. None of them is willing to compromise his or her standards in order to make an adequate living.

Voucher cutting, therefore, tends to encourage ineffective representation and to discourage the infusion of new talent. This is not to suggest that there are no highly skilled CJA lawyers practicing in Superior Court. Indeed, there are many. But there is no question that these are attorneys with strong constitutions - persons who are both able and willing to live with the situation in order to ply their craft.

(d) Conclusions

It is clear from extensive interviews that dissatisfaction with the voucher system is widespread. Some complaints are traceable to administrative problems, others to matters of a more fundamental character. As for the former, these can be summed up briefly:

- The Court has adopted no overall policies or guidelines to inform judges and practitioners alike of applicable standards for reviewing, cutting, and approving vouchers. Each judge has almost total discretion in determining how much of a voucher claim should be paid.

- The procedure for dealing with non-trial vouchers (more

than 85% of all vouchers) are close to unworkable. The Judge in Chambers in handicapped from the outset by lack of familiarity with the cases involved and then has neither the time nor resources to check and investigate all claims adequately.

- Attorneys are rarely, if ever, told what has been cut and why. Judges' cutsmay be legitimate in many instances, but the almost total lack of communication between judges and attorneys with respect to vouchers tends to breed suspicion and distrust. Counsel have no assurance that they have been treated fairly and most are reluctant for reasons of proprity to make inquiries.

- There is no grievance procedure available to attorneys who feel their vouchers have been cut unjustly. The individual judge is the court of last resort on such questions and is naturally reluctant to reverse an earlier position, even assuming that he or she will consider responding to counsel's inquiries in the first place.

- Delays in getting payment - at least during 1974 - have at times been extraordinarily long. Some attorneys have waited as long as six months to be reimbursed for outlays of time and expenses. This can be traced to CJA funding problems in mid-1974, to hold-ups in judge's chambers, and to processing delays in the Court's Administrative Office.

Tinkering with the existing system could undoubtedly alleviate some of the administrative problems outlined above. Guide-

lines on voucher cutting could be published; an auditor-master arrangement, possibly in the Court's Administrative Office, could be instituted to check and review all vouchers before they are submitted to judges for final approval; attorneys could be informed ahead of time when their vouchers are about to be cut; a grievance procedure could be established so that attorneys would have the opportunity to challenge cuts they consider to be unfair; the payment process could be speeded up. However, reforms such as these do not begin to address the central problem with the voucher system.

The inconsistent approaches of judges to voucher cutting, the large and apparently arbitrary cuts made by some judges, and the potential impact of judicial voucher cutting on matters of defense tactics and strategy all raise a fundamental question: Should the voucher power continue to remain in the hands of the judges?

We have concluded that it should not. No matter how conscientiously exercised, the authority judges have over payments to counsel is fraught with conflicts of interest. On the one hand, each judge in his or her individual capacity is a guardian of the court's limited resources while, on the other, the judge is charged with ensuring that every defendant is effectively represented and accorded a fair trial. As long as judges can, and do, cut vouchers in order to stretch available funds, defense counsel and, more importantly, defendants will suffer. The two

responsibilities are inherently incompatible. Finally, the power that judges have over vouchers gives them a lever over defense counsel - akin to an employer-employee relationship - which can only skew the traditional adversary process. CJA attorneys should be insulated from this potential interference, as are prosecutors and retained counsel.

G. ADEQUACY OF COMPENSATION

(1) Compensation to Counsel

The legislative history of the Criminal Justice Act indicates that compensation to attorneys representing indigent defendants was never designed to be on a par with fees charged in retained criminal cases. Congress evidently intended - and the courts have so interpreted the Act - that attorneys taking CJA cases are discharging, at least partially, a pro bono function. Consequently, compensation over the last several years has been limited to a statutory maximum of $30 for in-court time and $20 for out-of-court time.[24/]

A majority of the 26 CJA attorneys interviewed indicated that the allowable maximums were adequate, but just barely and only on the assumption that vouchers are not cut back. However,

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24/ The Courts have consistently interpreted the statutory language as giving them discretion to award less than the maximum hourly amounts authorized. See, in particular, the opinion of Chief Judge David Bazelon in United States v. Thompson, 361 F. Supp. 879 (1973).

comparing CJA compensation with fees that attorneys charge in retained cases suggests that, in fact, most of these attorneys consider their services to be worth considerably more. A small minority maintain a distinction between charges for in-court and out-of-court time, but most attorneys do not make this differentiation. The usual procedure is for counsel and client to determine together what the defense of a case may involve and then to agree on a flat fee. In practice, this will work out to an hourly rate of anywhere from $30 to $100, depending on the individual attorney and his billing practices. The average hourly rate charged by CJA practitioners in retained cases falls somewhere between $40 and $50.

A considerable number of the attorneys whose practice is predominantly, if not exclusively, CJA cases maintain a minimum overhead. Many do not have secretaries and pay relatively little in office rental. This would appear to be at least partly attributable to the low CJA fee schedule. Indeed, certain expenses are explicitly excluded under the Act - i.e., office overhead, rent, telephone, secretarial help, and printing of briefs. Regular CJA practitioners naturally try to keep such costs to a minimum.

The sole CJA practitioner, however, cannot provide a reliable measure of the costs of running an adequately staffed and equipped law office. A survey of four recently-established law firms with moderate operating costs disclosed that monthly overhead per attorney (including rent, secretarial salaries, payroll taxes,

office supplies, telephone, reproduction, etc.) ranged from a low of $1,028 in a three-man partnership to a high of $1,550 in a two-man firm. The two-man firm estimated that a busy attorney could bill clients for no more than 30 hours a week. On the basis of this estimate, overhead per billable hour in the two above-cited examples ranges from $9.00 to $13.00.

It is clear from attorney interviews that many lawyers who take $1,500 worth of CJA cases per month (see discussion of the $18,000 Limit, infra) are engaged in CJA practice almost full time. Thus, it is evident that the attorney whose overhead is $1,028 cannot clear more than $472 a month, and the attorney whose overhead is $1,550 would actually lose money by taking CJA cases. Attorneys receiving $20 an hour for out-of-court time would clear from $7.00 to $11.00 an hour for out-of-court time.[25/] The conclusion to be drawn is that the full-time CJA practitioner can survive financially only by keeping overhead costs to an absolute minimum, thereby reducing the range and quality of services he can provide his client.

Attorneys often provide services for which there is no compensation whatever. For instance, when counsel signs up in the morning to take CJA cases in Superior Court, he or she will cus-

25/ Based on a random selection of 104 vouchers submitted by counsel during June 1974, we found that attorneys spend, on the average, 74% of their time in out-of-court preparation on a case. This time is, of course, compensable at the rate of $20 an hour.

tomarily be appointed to one or two cases. The first duty of counsel is to interview the client in the cellblock, to call relatives and employers, to verify information essential for the bond hearing, and, if necessary, to arrange for third party custody. Counsel may then wait an hour or more in court for the case to be called, only to learn that the case has been "no papered." If a case is not papered, it is not numbered and no voucher is prepared. In short, any work that counsel may have done on the case is uncompensated, and it is by no means rare for counsel to spend the better part of a day preparing and waiting for an arraignment or presentment that does not take place.

As noted earlier, there are also a large number of criminal offenses - e.g., disorderly conduct, welfare fraud, traffic violations, and violations of police regulations - which are prosecuted by the D.C. Corporation Counsel and are not compensated under the Criminal Justice Act. Judges are naturally reluctant to allow indigent defendant accused of these offenses to act pro se - indeed, Argersinger now requires the appointment of counsel in any case where incarceration is likely. As a rule, third year law students are appointed to these cases, but this is not always possible and, thus, regular practitioners must be assigned to provide representation. Unless counsel can obtain compensation directly from the client, he or she will remain unpaid.

(a) The $18,000 Limit

Congressional distress generated by publicity three years ago about the large payments made to a few CJA attorneys led Superior Court to impose an $18,000 ceiling. Thus, attorneys now practicing under the Act cannot receive more than $18,000 in CJA payments in any one year. This policy has been applied on a monthly basis, with attorneys excluded from appointments if they have submitted $1,500 in vouchers during the previous month. The $18,000 limitation has not worked particularly well. Since the exclusion is based on attorneys' voucher claims and not on actual compensation, attorneys may, in fact, be held well below the ceiling when their vouchers are cut; because attorneys have sixty days within which to submit vouchers, they may be able to circumvent the monthly ceiling by their timing of voucher submissions; some able attorneys have been excluded from further CJA appointments at times when the court could well have used their services; and, finally, the ceiling has forced practitioners into U.S. District Court where there is no ceiling and where, in fact, they are not needed as badly as in Superior Court.

The $18,000 ceiling serves a public relations function at best. It blinks at the overriding reality that the majority of CJA practitioners rely on appointed cases for their living and it does not necessarily discriminate between competent and incompetent attorneys. The overall effect of the limitation is

to depress arbitrarily the income that attorneys can make - a factor that is particularly significant during times of rapid inflation.

(b) Excess Compensation

Both the District of Columbia and federal CJA statutes provide for compensation in excess of the maximum figures ($1,000 for felonies, $400 for misdemeanors) in cases involving "extended or complex representation." However, the procedures for obtaining excess compensation are cumbersome and time-consuming, and, thus, tend to discourage counsel from applying. Prior to enactment of the local statute on September 3, 1974, all excess compensation claims submitted in Superior Court were referred to Chief Judge of the U.S. Court of Appeals for final approval. Delays of two or three years before final action were not uncommon. Since passage of the new Act, a voucher for excess compensation, once approved by the trial judge and supported by a detailed justifying memorandum, is referred to the Chief Judge of Superior Court for approval.

Few Superior Court judges have received vouchers for excess compensation. Of the fifteen who have, only six have approved any. The reason given for this low rate of approval is simply that, on the one hand, it is too troublesome for judges to prepare the memoranda supporting the requests while, on the other, attorneys are usually reluctant to tolerate the lengthy delays in-

volved in obtaining payment. In fact, judges and attorneys alike commonly agree to the statutory maximum, particularly in those instances where the sum requested is no more than a few hundred dollars above the limit. On the whole, then, counsel rarely seek excess compensation, and when they do, approval is given reluctantly, if at all.

(c) Contribution Orders

Some defendants do not qualify entirely for representation under the Criminal Justice Acts and, yet, cannot afford to retain their own counsel. The usual practice is to assign them CJA counsel with the added condition that they pay a certain sum to their attorney. The contribution order is signed by the defendant and the arraignment judge. Unless the contribution order is ultimately vacated, the amount specified in the order is automatically subtracted from the attorney's voucher whether or not it has been paid.

The contribution order is a source of widespread dissatisfaction among CJA attorneys. Few have been successful in getting clients to pay. Attorneys have only a few alternatives available to them: repeated requests for payment, motions directed against clients to show cause for non-payment; or motions to vacate the contribution orders entirely. Many of the attorneys interviewed are reluctant to employ either of the first two techniques because of the adverse effect it has on the attorney-

client relationship. In any event, the show cause order does little more than reiterate the court's earlier order that the defendant pay, and judges are understandably reluctant to enforce it with a citation for contempt. In the final analysis, the motion to vacate is usually the attorney's best hope - but this necessarily calls for a justification that often cannot be made. Most attorneys simply abandon their attempts to collect and, thus, end up providing representation for which they are not paid. The problem has recently become more acute as an increasing number of defendants are asked to make contributions toward their defense. Many are financially unable to comply with the contribution orders. (See Sec. I.B, Standards of Indigency, supra.)

(2) Compensation for Experts, Investigators, and Other Services

The Acts set a maximum fee of $300 per person or organization for expert witnesses and other services incidental to the defense of a criminal case. The Acts do permit counsel to pay a maximum of $150 for such services without prior court authorization, but this practice is not favored and rarely used. In fact, counsel is well advised to seek court authorization before engaging any outside services if counsel wishes to be compensated.

Authorization to pay experts or investigators in a felony case is obtained directly from the judge assigned to the case. This procedure is relatively straightforward. However, the pro-

cedure in a misdemeanor case is burdensome and often time-consuming. Counsel must make his or her request in person to the Judge in Chambers and this necessarily involves a lengthy wait. As a consequence, many attorneys do not consider it worth the expenditure of time to ask for authorization and frequently absorb the cost themselves. In practice, therefore, this procedure tends to discourage the use of outside services in misdemeanors.[26]

Attorneys were asked if the $300 maximum for expert fees is too low. There was some division of opinion on this point, with most of those interviewed stating that experts could usually be obtained for this amount. However, some indicated that they have trouble getting experts - especially psychiatrists - at these rates and stated that experts are often reluctant to become involved without payment in advance. Obviously, this maximum flat fee does not accommodate the unusual and complex case where one or more experts may have to do extensive work both in and out of court. A comparison with the practice at PDS is instructive: expert fees incurred by PDS attorneys need not be submitted to the court for approval, and experts are paid out of budgeted funds on the basis of the amount of work involved. Thus, PDS attorneys have a decided advantage over private practitioners in

26/ In addition, CJA counsel often have difficulty obtaining authorization to hire investigators and to pay for pre-trial transcripts. The U.S. Attorney does not face this problem and, infrequently, orders transcripts directly from the court reporter. Copies ordinarily are not given to defense counsel, placing the latter in an obvious disadvantage.

their ability to obtain and pay for the services of experts, notwithstanding that PDS and CJA attorneys are charged with providing the same types of services to indigent defendants.

H. CONCLUSIONS

1. The Committee has concluded that authority to appoint and remove counsel under the Criminal Justice Acts should be delegated to an agency independent of the Court. (See Rec. 1.1, infra.)

The power to appoint and remove counsel now rests in the hands of Magistrates and judges. See D.C. Code, Section 11-2602 and 2603 (1974) and 18 U.S.C., Section 3006A(b) and (c). The principal justification offered for placing this authority in the courts is that judicial officers are familiar with the abilities of counsel and, thus, are in the best position to select, appoint, and remove counsel.

However true this may be in theory, the Committee's research indicates that the authority to appoint is not always exercised with due regard for defendant's Sixth Amendment rights to effective representation. A number of attorneys practicing in Superior Court continue to receive CJA appointments despite the generally-held view that they are not competent to handle either the volume or complexity of the cases to which they are appointed.

Of greater concern to the Committee, however, is the subtle impact that the judicial powers of appointment and removal have upon the adversary process. Judges exercise a power over CJA

counsel that they do not have over prosecutors or retained counsel. Effective representation often requires counsel to resist the wishes of a judge, to press a point, and to appear uncooperative. Yet, the indigent defendant and his appointed counsel are potentially subject to judicial authority and interference in ways inapplicable to the defendant who can afford to retain his own lawyer. We believe that the integrity of the adversary system is best served by insulating defendant and counsel alike from this exercise of judicial authority.[27/] In short, we are in full agreement with the standards enunciated by the American Bar Association and the National Legal Aid and Defenders Association:

> 1.4 Professional Independence.
> The plan should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. One means for assuring this independence, regardless of the type of system adopted, is to place the ultimate authority and responsibility for the operation of the plan in a board of trustees. Where an assigned counsel system is selected, it should be governed by such a board. The board should have the power to establish general policy for the operation of the plan, consistent with these standards and in keeping with the standards of professional conduct. The board should be precluded from interfering in the conduct of particular cases.
> A.B.A. Standards, Providing Defense Services.
>
> 3.1 However attorneys are selected to represent qualified clients, they shall be as independent as any other private counsel who undertakes the defense of an accused person.

27/ Standards for removal over the objections of the client should be the same for appointed and retained counsel.

> To accomplish this end, the assigned counsel whether defender or private assigned counsel should not be selected by the judiciary or an elected official, nor should he be an elected official. The most appropriate method of assuring independence modified with a proper mixture of supervision, is to create a board of directors representing various segments of the community.
> N.L.A.D.A., Standards for Defender Services.

2. The Committee has similarly concluded that authority to approve all Criminal Justice Act vouchers should be placed in an agency independent of the courts.

The power that judges have over compensation to CJA attorneys is subject to the same criticisms applicable to their power to appoint counsel. We have documented the problems of the present voucher system as it operates in Superior Court. The most serious criticism turns on the extraordinary discretion that judges have in approving and denying claims for compensation and the potentially adverse impact this has on the quality of CJA representation.

It is clear from extensive interviews that judges find themselves in an uncomfortable position when having to rule on voucher claims. Although most are unwilling to relinquish this power (even if the statutes did not require them to exercise it), virtually all of them concede that the administrative burdens posed by vouchers, particularly to the Judge in Chambers, are substantial and, at times, overwhelming. Many would welcome an easing of this burden. Logically and administratively, there would seem to be little reason for judges to continue to be

saddled with the responsibility of having to deal with the thousands of vouchers submitted each year. Moreover, as we have already discussed at length, there is a tendency under the existing system for judges to treat vouchers with skepticism. A different approach is needed. Vouchers should be treated with a "presumption of regularity." Claims against the Government should be dealt with in the same fashion as any other bill submitted to an attorney or his client.

We have concluded that the best solution lies in a transfer of all voucher functions to an independent agency (see Rec. 1.1, infra). As long as judges have the authority to second-guess defense counsel's use of time, they can subtly, if not overtly, direct counsel's handling of a case. A judge with a reputation for cutting claims for interviewing time, time spent preparing motions, time spent visiting clients in jail, and the like, may well exert a chilling effect on counsel's efforts in behalf of his or her clients. This amounts to an intrusion into matters of defense tactics and strategy which would not be countenanced by retained counsel and certainly would be rejected by prosecutors. We believe that equal protection for indigent defendants and the importance of preserving the traditional balance of forces in the adversary process are sufficient to justify placing the power of the purse in hands independent of the courts.

3. The Committee has concluded that a unitary administration of the local and federal Criminal Justice Acts is desirable.

Most of the Committee's research has naturally focused on the administration of the Criminal Jusitce Act in D.C. Superior Court. This court has, by far, the largest caseload and the most serious problems. However, the principles we have articulated are equally applicable to administration of the federal Act in U.S. District Court and the U.S. Court of Appeals for the D.C. Circuit. Thus, although the specific recommendations which follow could be implemented with regard only to the local D.C. courts, we think it desirable to include the federal courts in the District of Columbia in the overall administration of any future plan.[28/]

This would necessarily involve amendments to 18 U.S.C., Section 3006A, as well as to the local Criminal Justice Act. For example, it would require amendment of the appointing authority, the judicial authority to rule on vouchers, and the maximum rates of compensation under the Acts. Whether the amendments we recommend to the federal statute should be applicable throughout the country or only in the District of Columbia is a matter best left to Congress and the Judicial Conference of the United States on the basis of experience elsewhere.

28/ The Committee considered and defeated a motion to defer recommendations on including the federal courts in the overall plan proposed for the District of Columbia. The motion urged that the recommendations should cover only the local courts and that, if adopted there, further study should be given to the desirability of including the federal courts.

I. RECOMMENDATIONS

Establishment of a District of Columbia Defender Agency

Rec. 1.1. THE COMMITTEE RECOMMENDS THE ESTABLISHMENT OF A DISTRICT OF COLUMBIA DEFENDER AGENCY TO ADMINISTER, AS SEPARATE DIVISIONS, THE APPOINTED COUNSEL PROGRAM UNDER THE CRIMINAL JUSTICE ACTS FOR BOTH THE LOCAL AND FEDERAL COURTS AND THE EXISTING PUBLIC DEFENDER SERVICE.

Elsewhere in this report, we have documented the many deficiencies in the existing system for providing defense services to indigents under the Criminal Justice Acts. Specifically, we have found, among other things, that

- There is no coordination in appointments of counsel between the local and federal courts. Thus, there is no guarantee that appointments are equitably distributed among members of the bar most competent to handle criminal cases.

- Mechanisms for ensuring quality representation are virtually non-existent. No caseload limitations are currently in force. Discipline of attorneys not providing adequate representation has been left to the individual discretion of judges and, on the whole, little has been done to establish workable and systematic procedures for screening complaints and monitoring the quality of CJA practice.

- The voucher system, particularly as it operates in Superior Court, has become administratively unmanageable, depen-

dent as it is, on the individual judgments of 44 judges who have more important things to do than spend the time necessary to ensure fair administration of payments to counsel.

High on the list of concerns is the extent to which judicial authority over all aspects of the appointed counsel program may distort the adversary process. We are convinced, as we have already indicated in the preceding statement of conclusions in Sec. H, supra, that an independent agency is needed to administer both the local and federal Criminal Justice Acts. Suggestions have been made that these responsibilities be lodged in the Public Defender Service. However, we think there are at least two reasons why this should not be done:

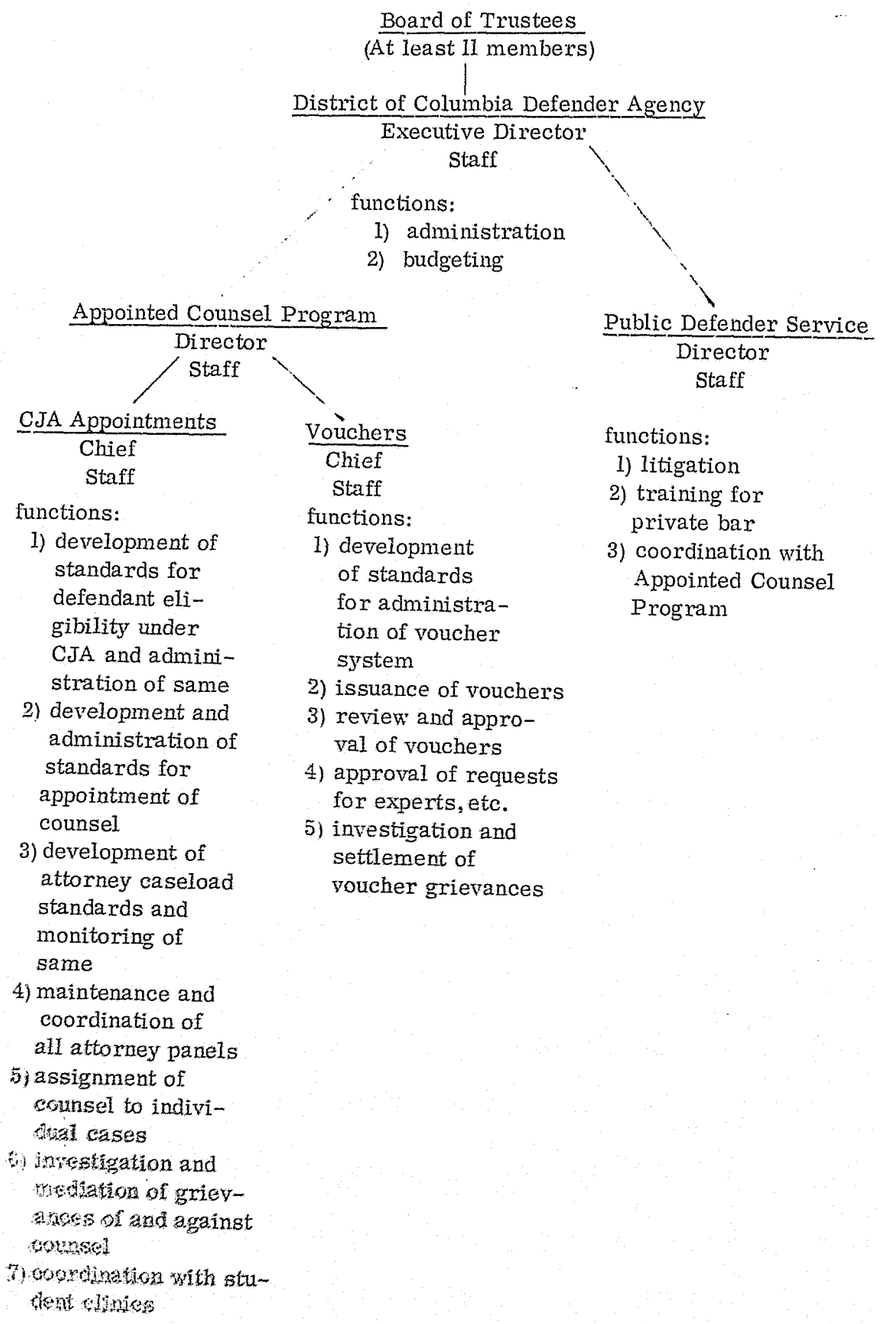
- It would tend to dillute PDS's capacity to do what it does best, i.e., litigation on behalf of indigent defendants. Adding these weighty duties to PDS's existing mandate would call for establishment of a sizeable administrative machinery which would, in a fundamental way, alter the basic purpose and outlook of the agency. We believe that this is neither desirable nor necessary.

- The private bar, which currently handles nearly 85% of all appointed cases in Superior Court and virtually all appointed cases in U.S. District Court that proceed beyond preliminary hearing, needs to have an independent agency to which it can look for guidance, redress of grievances, and the like.

Thus, we propose the establishment of a separate Appointed

Counsel Program within a new District of Columbia Defender Agency with full authority over appointment and payment of counsel under the Criminal Justice Acts. For reasons of management efficiency, coordination, and budgeting, we also recommend inclusion of the Public Defender Service in the new Agency, although PDS would continue to make its own policy and management decisions, with the approval of the Executive Director and the Board of Trustees (see Rec. 1.2 and 1.3, infra).

The organizational structure of the Agency we envision would look like this:



The functions and responsibilities of the Board of Trustees and the various divisions of the proposed Agency are spelled out in greater detail below.

Rec. 1.2. THE COMMITTEE RECOMMENDS THAT THE D.C. DEFENDER AGENCY BE GOVERNED BY AT LEAST AN 11 MEMBER BOARD OF TRUSTEES INDEPENDENT OF THE COURTS.

As the National Advisory Commission on Criminal Standards and Goals recently observed:

> A public defender under the policy control and supervision of judges may experience unwarranted judicial interference in the defense of criminal cases. Those aware of the problems faced by defender offices are strong in their opposition to any substantial degree of judicial control of administration or supervision. The realities of criminal practice are such that the adversary system in this arena is not a two-way but a three-way encounter. The mediator between two adversaries cannot be permitted to make policy for one of the adversaries. (Citations omitted) 29/

We submit that this principle applies with respect not only to the Public Defender Service but also to appointed counsel under the CJA program generally. It is essential, therefore, that the D.C. Defender Agency be governed by a Board of Trustees that is at least as independent as the present PDS Board and more broadly representative of the community.

We therefore recommend the dissolution of the present PDS Board of Trustees and its replacement by an enlarged Board to

29/ Courts, p.271 (1973)

govern the entire D.C. Defender Agency. Eleven members would appear to be the minimum size necessary for carrying out of the responsibilities of the Agency and would permit the establishment of subcommittees.

The Board should be selected by a panel representing the judiciary, the practicing bar, and the electorate. No person presently serving as judge or prosecutor should be permitted to serve on the Board, nor should membership be limited to attorneys.

Rec. 1.3. THE BOARD OF TRUSTEES WOULD BE RESPONSIBLE FOR MAKING POLICY FOR THE AGENCY, HIRING THE EXECUTIVE DIRECTOR, AND SERVING AS FINAL ADMINISTRATIVE ARBITER OF GRIEVANCES AND COMPLAINTS BY APPOINTED COUNSEL AND DEFENDANTS.

Final authority to set standards, to make policy, and to hire the Executive Director would rest in the Board. Also, we envision the establishment of a subcommittee of the Board empowered to arbitrate grievances and complaints by appointed counsel and defendants that cannot be resolved at the staff level. Given that the Agency would have authority over appointments and payment to counsel, the types of grievances involved would include defendant's complaints about counsel, charges of ineffective respresentation and unethical practices, and attorneys' grievances regarding appointments, voucher cuts, and allocation of funds for ancillary services. The Board would have authority to take any necessary administrative actions in resolution of grievances and to make referrals, including recommendations for

action, to the United States Attorney and the Disciplinary Board of the D.C. Bar in appropriate cases where the Trustees cannot act on their own. See Rec. 6.5, infra.

A. FUNCTION OF THE DISTRICT OF COLUMBIA DEFENDER AGENCY

(1) Appointed Counsel Program

The Director of the Appointed Counsel Program would be in charge of two divisions: CJA Appointments and Vouchers.

(a) CJA Appointments

This division would have overall authority to manage the system for appointing counsel from the private bar and the Public Defender Service. It would be empowered to appoint lawyers to all criminal and juvenile cases requiring the appointment of counsel, thus assuming the powers now held by individual judges and U.S. Magistrates. Judges would still retain the power of removal in exceptional cases.

The division would be fully staffed with line and investigative personnel. In carrying out its responsibilities, the division would be charged with:

- Developing standards of defendant eligibility for appointment of counsel and administration of same through intake interviews with accused persons. See Sec. I.B., supra.

- Developing standards, with the approval of the Executive Director and the Board of Trustees, for appointment of counsel to different types of cases requiring different levels of experience

and competence. See Recs. 6.1 and 6.2, infra.

- Developing attorney caseload standards and monitoring same to ensure quality representation. See Rec. 6.3, infra.

- Maintaining and coordinating all panels of appointed counsel - i.e., the PDS panel, the volunteer CJA panel for Superior Court, the volunteer panel for U.S. District Court, the non-volunteer panel, and the student panel for misdemeanor cases. See Recs. 2.1, 2.2 and 6.2, infra.

- Assigning counsel from these panels, on the basis of their competence and experience, to individual criminal and juvenile cases. See Recs. 2.1, 2.2, 6.1 and 6.2, infra.

- Coordinating with PDS the provision of training, materials, and guidance to appointed counsel. See Recs. 5.1 and 6.4, infra.

- Investigating and mediating grievances of counsel and defendants, referring those matters to the grievance committee of the Board which cannot be resolved satisfactorily at the staff level. See Rec. 6.5, infra.

(b) Vouchers

This division would be charged with administration of the voucher system, retaining final authority to review and approve all vouchers issued under the Criminal Justice Acts. It would also have authority to approve attorney requests for experts, investigators, and other services essential to the preparation of a case.

The Voucher Division would be authorized to promulgate substantive and procedural standards for administration of the voucher system. Standards with respect to all claim categories (e.g., waiting time, investigation time, interviewing time, research time) should be spelled out in detail to ensure uniformity and fairness in application.

The Voucher Division should also make provision for an administrative grievance procedure whereby counsel with voucher problems can be heard.

(2) Public Defender Service

Recommendations with respect to PDS are treated in detail in Sec. II, infra. Essentially, the agency would retain its existing structure and authority, giving up only its responsibilities for administering the D.C. Criminal Justice Act and assuming a larger responsibility for providing training, materials, and advice to the private bar. With respect to the latter, PDS would work closely with the Appointed Counsel Program in coordinating and developing appropriate programs.

Utilization of Non-Volunteer Counsel

Rec. 2.1. THE COMMITTEE RECOMMENDS THAT ALL PRACTICING MEMBERS OF THE DISTRICT OF COLUMBIA BAR WHO ARE NOT GOVERNMENT EMPLOYEES OR REGULAR PRACTITIONERS UNDER THE CRIMINAL JUSTICE ACTS BE APPOINTED TO REPRESENT AT LEAST ONE INDIGENT DEFENDANT OR RESPONDENT PER YEAR.

The Committee strongly endorses the concept of a mixed

system of representation under the Criminal Justice Act. Spreading the burden among PDS, regular CJA practitioners, and the bar as a whole has the overriding virtue of involving the entire legal community in the administration of criminal justice without unduly overloading any one segment or, we think, diluting the quality of representation. There has long been a separation and resulting lack of communication between the criminal defense bar and the rest of the bar; many members of the latter have little idea of the problems faced by the courts, defendants, and criminal lawyers in ensuring that the criminal justice system functions fairly and efficiently. Although our recommendation for a mixed system of representation is not new, we think it is time that these barriers to communication are broken and that an equitable system for engaging the entire bar in the criminal process be established. We believe that an infusion of new ideas and perspectives and a more widely-held appreciation of the problems faced by the courts would result in substantial improvements in the criminal justice system.

The concept of bar-wide involvement appears to enjoy the support of the principal organizations of the legal community. The Board of Governors of the District of Columbia Bar (Unified) - to which all local attorneys must belong - recently endorsed the principle that the bar as a whole has a responsibility to represent indigent defendants.[30/] The Washington Bar Association and

30/ Resolution adopted on November 14, 1974.

the Bar Association of the District of Columbia have both taken a similar position.[31/] Moreover, despite the disinclination of the Joint Committee on Judicial Administration composed of the Chief Judges of the local courts and members from each court to adopt a similar recommendation made in the fall of 1974, our own research indicates that 22 out of 27 Superior Court judges who responded to this issue favor the increased utilization of the non-volunteer bar under the Criminal Justice Act. Thus, we believe that our recommendation comes at a time when there is growing recognition of the problems of the courts and increasing acceptance of the bar's responsibility to help.

Rec. 2.2. THE COMMITTEE RECOMMENDS THE COMPILATION OF A COMPREHENSIVE LIST OF ALL ATTORNEYS AVAILABLE FOR APPOINTMENT; IT RECOMMENDS THE ADOPTION OF A RATING SYSTEM BASED ON ATTORNEYS' TRIAL EXPERIENCE; IT RECOMMENDS THE ADOPTION OF AN EQUITABLE ROTATION SYSTEM TO ENSURE THAT NO NON-VOLUNTEER ATTORNEY IS APPOINTED TO MORE CASES PER YEAR THAN ANY OTHER; AND IT RECOMMENDS COMPENSATION TO ALL SUCH ATTORNEYS APPOINTED UNDER THE CRIMINAL JUSTICE ACT.

Two principal objections have been raised against the concept of an attorney draft: first, that it would tend to lower the quality of representation because of the relative inexperience of many members of the non-volunteer bar in handling crimi-

31/ As indicated in correspondence from Ruth E. Hankins, President of the Washington Bar Association, to Chief Judge Harold H. Greene, and letter from Lawrence E. Carr, Jr., President of the Bar Association of the District of Columbia, to Chief Judge Greene, both dated November 18, 1974.

nal cases and, second, that it would tend to drive away the regular CJA practitioners on whom the courts principally rely to represent indigent defendants.

As to the first objection, Superior Court's experience with those attorneys who appeared in the spring of 1974 was far more favorable than expected. Many judges found that, although non-volunteers initially had difficulty finding their way around the court system, the quality of their representation was ultimately high as result of their sense of professional pride and responsibility. Concededly, attorneys unfamiliar with the system may have been relatively "expensive" because of the time they spent in familiarizing themselves with law and procedure, but, in the view of many judges, their performance compared favorably with that of attorneys regularly engaged in criminal practice.

It does seem clear, however, that any system drawing upon the services of non-volunteers must ensure that cases are appropriately matched to counsel's ability and experience. Consequently, we strongly endorse a plan by which each member of the D.C. Bar is required to fill out a detailed questionnaire, stating, among other things, the nature of his or her practice, the name and size of the law firm, and the extent of his or her civil and criminal trial experience. This information would be up-dated on a regular basis. The proposed D.C. Defender Agency would evaluate each non-volunteer attorney according to his or her experience. Appointments to juvenile, misdemeanor, and

felony cases would, in turn, be made in such a way as to ensure that an assigned case falls reasonably within counsel's competence.

As to the second objection, we find little basis for it, given a large and growing number of criminal cases brought each year, the relatively small group of regular criminal lawyers available to take appointments, and the obvious desirability of reducing their caseloads to ensure guality representation. It has been variously estimated that there are approximately 6,000 members of the Bar who would be eligible for appointments under the proposed plan. Thus, if each attorney were to be assigned to one case, there would still be some 16,000 cases to be divided among PDS, volunteer lawyers, and law students.

In sum, we think it both necessary and desirable to involve the entire bar in the defense of criminal cases. Rather than draw upon this resource only in times of crisis, we believe that non-volunteers should be made an integral part of the criminal justice system in the District of Columbia.

Inclusion of Law School Clinics in the CJA Budget

Rec. 3.0. CLINICAL PROGRAMS HAVE BECOME AN INTEGRAL PART OF THE CRIMINAL JUSTICE SYSTEM IN THE DISTRICT OF COLUMBIA. THE COMMITTEE THEREFORE RECOMMENDS THAT THESE PROGRAMS BE FUNDED AT LEAST IN PART, UNDER THE D.C. CRIMINAL JUSTICE ACT.

There is no question that law schools are making a significant contribution to the administration of justice. Aside from

the diligent representation they give their clients, student attorneys provide an invaluable service to Superior Court by taking cases where counsel might otherwise be unavailable and by handling many First Offender Treatment cases and other pre-trial diversions. Yet, current funding problems faced by these programs make it uncertain whether they can continue on a permanent basis. Unquestionably, the services that students now provide would be sorely missed in the event that clinical programs had to be adandoned for lack of funds.

Since clinical programs have become an integral, working part of the system, the Committee recommends that they receive CJA funding so as to place them on a more permanent footing. We recognize that the clinics are, foremost, educational programs and that the law schools have responsibilities to serve their students as well as the surrounding community. Thus, we do not suggest that the entire cost of the clinics be borne by the Criminal Justice Act, but, rather, that funds be allocated in sufficient measure to ensure that the programs can continue and that the law schools do not bear the whole burden of finding funds to defend some 2664 misdemeanor and juvenile cases a year.

We make no recommendation as to the total sum that should be appropriated for clinics under the Act. Nor do we offer any specific recommendation as to the appropriate formula. That is best left to the discretion of the proposed D.C. Defender Agency which would have annual budgeting responsibilities for the components

of the criminal defense system. However, we think that some substantial portion of the money that the clinics presently save the court should be made available and that allocations to the various programs could be based on projections of the number of cases they can handle each year.

It should be the responsibility of each clinic director to keep the Director of the proposed Appointed Counsel Program informed about all relevant aspects of their programs. In particular, the latter needs to know how many students are qualified to take jury-triable cases, how many are not, and how many students will be available for misdemeanor appointments on any given day or week. This is necessary for integration of law students into a total plan for providing defense services.

Increasing CJA Appropriations and Raising Levels of Compensation

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 are desperately needed, but they are inadequately compensated and frequently abused.

The point is that the system can no longer function adequately without facing up to hard realities:

- 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. (See Commentary to A.B.A. Standard 2.4, Providing Defense Services).

- 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.

- 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.

In light of these realities, the Committee makes the following recommendations:

Rec. 4.1. 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.

Fiscal Year 1975 figures indicate a severe imbalance in the

allocation of public resources between prosecution and defense in the District of Columbia.

Table III - Resources for Prosecution and Defense - F.Y. 1975

U.S. Attorney for D.C. (criminal only) ---	$5,331,542	32/
D.C. Corporation Counsel		
Law Enforcement Division ----------	$ 484.500	33/
Juvenile Division ----------	$ 434,000	
Total --------	$6,250,042	
D.C. Criminal Justice Act ----------	$2,100,000	34/
Public Defender Service (excluding mental health) ----------	$1,656,795	35/
Total --------	$3,756,795	

These figures do not tell nearly the whole story. Appropriations for the D.C. Criminal Justice Act and the Public Defender Service include funds for investigators, experts, transcripts, and all other ancillary services. These are not included in the above amounts spent on prosecution. Indeed, if one were to include the vast investigative and expert services available to the D.C. Corporation Counsel and the U.S. Attorney's Office from the Metropolitan Police, 36/ the Federal Bureau of Investigation and

32/ Figures obtained from the Executive Office of the U.S. Attorney for the District of Columbia. The amount includes costs of prosecution in U.S. District Court.

33/ Figures obtained from D.C. Corporation Counsel.

34/ F.Y. 1975 appropriation for D.C. Criminal Justice Act. This includes funds for court administration of the Act.

35/ F.Y. 1975 appropriation for Public Defender Service.

36/ The F.Y. 1975 budget for the Metropolitan Police Department alone (excluding retirement benefits) is $91,591,000.

other government agencies, the imbalance between prosecution and defense would be even more pronounced. As a minimum, we believe that this imbalance should be redressed in order to safeguard the adversary process.

In any event, the criminal justice system can no longer be permitted to stagger from year to year with inadequate funding. The shortfalls by March and April of the last two fiscal years have posed critical problems for the courts, creating an air of uncertainty and disorder within the system. Attorneys have paid the price in voucher cuts and delays in payment, but the ultimate victim has been the defendant. The annual recurrence of this crisis is no longer tolerable.

Rec. 4.2. COVERAGE OF THE D.C. CRIMINAL JUSTICE ACT SHOULD BE EXPANDED TO INCLUDE COMPENSATION TO COUNSEL REPRESENTING INDIGENTS ACCUSED OF ALL PETTY OFFENSES IN WHICH THE APPOINTMENT OF COUNSEL IS CONSTITUTIONALLY REQUIRED.

Despite the mandate laid down in Argersinger v. Hamlin, 407 U.S. 25 (1972) and the apparent responsiveness of the new Act to this decision, Superior Court continues to exclude all cases prosecuted by the D.C. Corporation Counsel from coverage under the Act. Argersinger leaves considerable discretion to judges in deciding whether counsel need be appointed - if the defendant is likely to be sentenced to jail, he must be represented; if not, counsel need not be appointed. Judges clearly deem many minor offenses to fall into this latter category. Nevertheless, petty

cases do arise where the defendant is incarcerated and where representation is mandated by the Sixth Amendment. Unless a student lawyer can be found to represent the defendant, judges must look to the regular CJA practitioner to handle the case.

Ideally, every indigent defendant accused of a criminal offense, no matter how trivial, should be represented by counsel. We recognize the severe budgetary constraints under which the D.C. Criminal Justice Act is now administered and, thus, do not recommend total inclusion. However, we do recommend that the blanket exclusion of all Corporation Counsel-tried cases be lifted to accommodate the situation where the appointment of counsel is mandated. On the same theory articulated earlier, counsel should not be expected to provide representation without compensation.

Rec. 4.3. 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.

No one disputes that existing rates of CJA compensation are low relative to what attorneys charge in retained cases. This distinction between CJA and retained practice has been maintained largely because of a continuing belief that attorneys practicing under the Acts are discharging, at least partly, a pro bono function. We reject that notion as an invalid basis for providing compensation under the Acts.

The existing $30 and $20 limits were established in 1970.

Since then, inflation has cut substantially into real income.[37/] Furthermore, we alluded in Sec.I.G.(1), supra, to the reduced services that regular CJA practitioners provide their clients because of the low rates of compensation as well as to the high cost of running an adequately staffed and equipped law office. We therefore think it appropriate at this time to recommer flat rate of not less than $40 an hour, regardless of whether time claimed is spent in or out of court.[38/] Most attorneys do not make this differentiation and, in fact, we find little logic in the distinction. In reality, close to 90% of all criminal cases are disposed of short of trial, and the time that counsel spend investigating and preparing their cases represents nearly 75% of all time that they put in.[39/] Since this out-of-court preparation on a case, whatever the outcome, lies at the heart of an effective defense, we cannot see a rationale for compensating it at a rate lower than that awarded for time spent in court.

The recommendation that we make is a moderate one, repre-

37/ See Sec. I.B., supra.

38/ The Committee notes that in Blankenship v. Boyle, U.S.D.C. Civil No. 2186-69 (Jan. 7, 1972), Judge Gerhard Gesell awarded plaintiffs' counsel $45 an hour for the 14,886 hours of work involved and additionally awarded a bonus of $15 an hour because of the contingency of recovery and the complexity of the case. Thus, the Committee's recommendation still falls short of rates of compensation deemed fair and equitable in other types of cases.

39/ See Fn. 22, supra.

senting, as it does, a compromise between the principle of full compensation at rates which retained counsel would customarily charge and the economic realities of increasing competition for limited public funds. We are mindful that many lawyers practicing under the Act are willing to accept appointments at current rates, but believe that the proposed increase in compensation represents the absolute minimum necessary to attract and hold good criminal lawyers and assure their ability to render effective representation to their clients.

Rec. 4.4. COUNSEL SHOULD BE COMPENSATED FOR WORK PERFORMED IN ANY ASSIGNED CJA CASE, WHETHER OR NOT CHARGES ARE FILED.

It is current practice in Superior Court to assign counsel to CJA cases in the morning, thereby giving attorneys time to interview their clients, prepare for bond hearings, and arrange third-party custody before arraignments and presentments in the afternoon. If formal charges are not filed and the defendant is released, the CJA Coordinator does not prepare a voucher form and counsel remains unpaid for any work performed on the case. See Sec. I.G.(1), supra.

Consistent with our view that CJA counsel should not be required to work without compensation, the Committee recommends that attorneys assigned to cases that are not papered should be compensated as in any other case for time spent in preparing and waiting for court proceedings.

Rec. 4.5 THE STATUTORY MAXIMUM COMPENSATION FOR MISDEMEANOR AND FELONY CASES SHOULD BE RAISED TO $800 AND $1600, RESPECTIVELY.

The existing statutory maximum limits for misdemeanors ($400) and felonies ($1000) should be raised to reflect the increase in hourly rates recommended in 4.3, supra. Serious and complex cases, whether misdemeanors or felonies, often involve substantial investigative work, legal research, and motions practice calling for investments of time that would exceed the existing statutory maximum limits at the proposed rate of $40 an hour. If the limits are raised as recommended, counsel would be less constrained in rendering complete services to their clients and would be less frequently compelled to make claims for excess compensation.

Rec. 4.6. 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.

18 U.S.C., Section 3006A(d)(2), adopted by incorporation in D.C. Code, Section 11-2604(1974), provides a statutory maximum of $250 for representation in a post-trial motion, probation revocation, and other post-trial proceedings. Considerable investigation and legal research are often involved in handling motions of this kind. In fact, habeas corpus motions and motions attacking sentence (D.C. Code, Section 23-110 and 28 U.S.C., Section 2255) frequently require extensive filings akin to appel-

late briefs. Counsel should in no way be constrained by low rates of compensation from providing effective representation. Thus, we recommend that the statutory maximum limit for post-trial representation be raised to conform with Rec. 4.5, supra.

Rec. 4.7. IN ANY CASE WHERE A DEFENDANT MUST PAY A CONTRIBUTION TOWARD HIS DEFENSE, SUCH CONTRIBUTION SHOULD BE PAID INTO THE REGISTRY OF THE PROPOSED D.C. DEFENDER AGENCY.

A viable attorney-client relationship is difficult enough to establish in a CJA case without the added problems associated with attorneys dunning clients for payment. The existing procedure for contribution orders tends to undermine the attorney-client relationship. Thus, we recommend that no money be exchanged directly between a lawyer and his CJA client, and that the latter make his payments, possibly on an installment basis, to the proposed D.C. Defender Agency which, in turn, would reimburse counsel. The responsibility for assuring defendants' compliance with contribution orders would thereby rest in the Agency which ordered contribution, thus improving counsel's prospects of payment.

Rec. 4.8. THE $18,000 ANNUAL LIMIT FOR CJA ATTORNEYS PRACTICING IN D.C. SUPERIOR COURT SHOULD BE ABOLISHED.

The $18,000 ceiling serves little useful purpose. It arbitrarily depresses the income that CJA practitioners can make, while failing to discriminate between good and bad lawyers. We recommend that it be abolished.

However, we do believe that caseload limits whould be established and enforced to ensure that attorneys practicing under the Act are not overextended at the expense of quality representation. See Rec. 6.3, infra. The $18,000 limit is certainly the wrong instrument for accomplishing this end. We note by way of illustration that one attorney received 189 CJA cases and another 146 CJA cases during the first six months of Fiscal Year 1975.[40/] This is, of course, far in excess of the maximum caseload that each PDS attorney is permitted to maintain during the entire year. See Sec.II.C., infra. In any case, effective enforcement of caseload standards and equitable distribution of appointed cases would obviate the need for a monetary limitation.

Rec. 4.9. PROCEDURES FOR PAYMENT OF EXCESS COMPENSATION SHOULD BE STREAMLINED AND LIBERALIZED. SPECIFICALLY, WE RECOMMEND THAT

- COUNSEL BE PAID THE STATUTORY MAXIMUM IN ANY CASE WHERE EXCESS COMPENSATION IS WARRANTED - I.E., COUNSEL SHOULD NOT HAVE TO AWAIT APPROVAL OF THE ENTIRE CLAIM IN ORDER TO BE PAID AT LEAST THE MAXIMUM;
- EXCESS COMPENSATION SHOULD BE PAID AT THE PROPOSED MAXIMUM RATE OF $40 AN HOUR:
- IN ANY PROTRACTED TRIAL EXTENDING OVER SEVERAL MONTHS, COUNSEL SHOULD BE PAID AT LEAST THE STATUTORY MAXIMUM AT THE END OF EACH MONTH;
- 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 INTERVIEWED BY THE CHIEF JUDGE OF THE COURT. IF THE DISBURSEMENT AGENCY HAS QUESTIONS ABOUT A CLAIM, THESE MAY BE ADDRESSED TO THE TRIAL JUDGE AND THE ATTORNEY, BUT IT IS THE DISBURSEMENT AGENCY WHICH SHOULD HAVE FINAL AUTHORITY.

40/ Statistics maintained by the Director of the Criminal Justice Act Program, Public Defender Service.

Existing procedures for reviewing and approving claims for excess compensation are heavily weighted against counsel. They discourage attorneys from applying because of strong pressure from the courts to keep compensation within maximum limits and the lengthy delays involved in getting payment. As a consequence, counsel may be discouraged from doing all that a complicated case calls for, or, if he or she is conscientious, counsel may do the work necessary, but at an hourly rate substantially below the statutory maximum. The potential chilling effect is manifest.

Moreover, existing procedures place a particularly heavy burden on counsel appointed to a protracted case. A recent six-month long trial in Superior Court is a case in point. Counsel appointed in that case had to drop all other business for the duration of the trial and none were paid in full until long after sentencing of the defendants. The financial and personal sacrifices were substantial - in fact, one of the attorneys involved was forced to terminate his practice and seek a teaching job. It should be noted for the sake of comparison that PDS attorneys are not handicapped in this fashion when engaged in protracted litigation.

It has been common practice of the courts to compensate excess claims at rates below the statutory hourly maximum limits.[41/] This, of course, presents an anomalous situation in that counsel

41/ See United States v. Thompson, 361 F. Supp. 879 (D.C.D.C. 1973).

who are appointed to "extended and complex" cases because of their greater skills are paid less per hour than attorneys appointed to cases where compensation claimed falls within maximum case limits. The financial burdens on CJA practitioners who find themselves in this situation are doubly severe when taking into consideration that most are sole practitioners or members of small law firms. We therefore recommend that attorneys be compensated at the proposed rate of $40 an hour for all time devoted to representation in a case where compensation in excess of the statutory maximum case limits is deemed appropriate.[42/]

Finally, it should be noted that excess compensation cases are relatively unusual. The burdensome and time-consuming superstructure of review, approval, re-review and final approval by the Chief Judges hardly seems justified by the low number of excess compensation claims submitted each year. In any event, consistent with our view that vouchers should not be subject to judicial approval, we recommend that excess compensation claims be handled by the Voucher Division of the proposed D.C. Defender Agency.

Rec. 4.10. 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. PROCEDURES FOR OBTAINING PRIOR APPROVAL SHOULD BE SIMPLIFIED AND AUTHORITY THEREFOR PLACED IN THE PROPOSED D.C. DEFENDER AGENCY.

42/ The Amicus Curiae brief of the D.C. Bar in United States v. Hunter, U.S. District Court Cr. No. 2008-68, filed December 19, 1974, takes this position. See also the memoranda filed in the other cases consolidated with Hunter.

The $300 limit on compensation for outside services is too inflexible and may, at times, be inadequate for payment of certain types of experts, notably psychiatrists. Flexible standards, realistically based on the actual costs of obtaining various types of expert services, should be established to provide excess compensation to experts in appropriate cases. Responsibility for this should be lodged in the Voucher Division of the proposed D.C. Defender Agency.

Similarly, procedures for obtaining approval to engage outside services should be greatly simplified so that counsel may move quickly to investigate and prepare their cases for preliminary hearings, motions, and trials. The determination of need for outside services should rest primarily with counsel, and there should be an operating presumption that counsel's requests are legitimately based on professional judgment. In short, standards and procedures to be established should intrude as little as possible on counsel's freedom to defend a case as he or she sees fit.

II. ROLE OF THE PUBLIC DEFENDER SERVICE

A. STATUTORY AUTHORITY

The Public Defender Service (PDS) was established in 1970 pursuant to P.L. 91-358 (D.C. Code, Section 2-2221, et. seq.).[43/] By statute, PDS is charged with providing representation in all courts in the District of Columbia for indigents in the following types of cases: (1) criminal offenses punishable by imprisonment of six months or more; (2) parole and probation violations; (3) mental health commitment proceedings; (4) civil commitment proceedings under the Narcotic Addict Rehabilitation Act; (5) juvenile proceedings; (6) proceedings for commitment of chronic alcoholics; and (7) proceedings related to confinement of persons acquitted on the ground of insanity. The agency is limited by statute to representing no more than 60% of all persons unable to afford their own counsel.

PDS is also authorized to furnish technical and other assistance to private attorneys appointed to represent persons who qualify under the Criminal Justice Act and is responsible for establishing and coordinating with the courts a system for appointment of private counsel. Finally, PDS is empowered to determine

43/ PDS is the successor to the Legal Aid Agency established by Act of Congress June 27, 1960, P.L. 86-531. See Appendix D for current statute.

its allocation of resources between the various courts where it provides representation.

B. FULFILLING THE STATUTORY MANDATE

(1) Trial-Level Representation

Since 1971, PDS has allocated the majority of its manpower and resources to representation in D.C. Superior Court. This decision paralleled Superior Court's assumption of jurisdiction over all criminal offenses chargeable under the D.C. Code. Thus, on the average, PDS has 22 attorneys and supervisors assigned to adult criminal cases, and juvenile cases in Superior Court, while only one PDS attorney is assigned in U.S. District Court to handle exclusively pre-trial and collateral matters. This allocation of manpower corresponds roughly to the current distribution between the two trial-level courts in D.C. of criminal and juvenile cases requiring the appointment of counsel:

D.C. Superior Court	U.S. District Court
15,000 criminal cases	1,100 criminal cases
7,500 juvenile cases	no juvenile cases
22,500 cases per year	1,100 cases per year

Based on these estimates and PDS's F.Y. 1974 figures that it closed 1,474 criminal (1172 felonies, 302 misdemeanors), 1,077 juvenile, and 776 miscellaneous cases in Superior Court, it appears that the agency represents no more than 15% of all indigents

charged in Superior Court.[44/] If one were to include the 2,100 civil mental health commitment cases that PDS handles each year, the figure rises to 22% of the total (24,600 cases).

Although the one PDS attorney assigned to the Magistrates in U.S. District Court handled 263 preliminary hearings and collaterial matters in F.Y. 1974, it would be misleading to conclude that this represents a substantial proportion of the workload there. PDS counsel is used for a limited purpose in the initial stages of a case and private counsel is customarily appointed to take cases that proceed beyond preliminary hearing. Thus, PDS is rarely involved at the trial stage in federal criminal cases. In effect, PDS provides a service to the Court in instances where counsel is otherwise unavailable.

(2) Appellate-Level Representation

Because of the D.C. Court of Appeals' continuing policy of assigning trial counsel to litigate appeals by their clients, PDS has been compelled to maintain a large appellate staff. Currently, 9 attorneys and 1 supervisor (25% of the entire legal staff of PDS) are assigned to prepare and argue appeals. Given the ex-

44/ PDS's declining proportion of representation is partly attributable to the rising incidence of crime. The U.S. Attorney for D.C. papered 28.8% more adult criminal cases in July through December, 1974 than in the comparable period for 1973. Similarly, the D.C. Corporation Counsel filed charges in 9.2% more juvenile cases in the same time span as compared to the year before.

tensive work involved, this appellate staff is able to close only 80 to 100 appeals a year.

PDS's contribution to appellate representation in the U.S. Court of Appeals for the D.C. Circuit is minimal. On occasion, the agency is asked to prepare amicus briefs, but, consistent with its allocation of resources to the local courts, PDS does not provide representation in the Circuit Court on a regular basis.

(3) Post-Conviction Services

Pursuant to a grant from L.E.A.A., PDS also administers a program to provide a full range of legal and other services to convicted defendants serving time at Lorton, the Women's Detention Center, and D.C. Jail. Students from area law schools provide the manpower and PDS, in turn, has overall administration responsibility for management of the program.

(4) Administration of the CJA Program

By statute, PDS is called upon to assist the court in administering the Criminal Justice Act. A Director is presently assigned to this task and his work deals exclusively with administration of the Act in Superior Court and the D.C. Court of Appeals. His responsibilities do not include the federal courts.

A Criminal Justice Act Advisory Board was established in 1971 by the local courts to assist the Director in carrying out his functions and, particularly, to provide him with a mechanism for

handling complaints and disciplinary problems. The Board did not have a significant impact on administration of the Act and has since become inactive.

The Director has overall supervisory responsibility for the operations of the CJA Coordinators in Superior Court (See Sec. I. B. and C., supra). He maintains basic statistics pertaining to administration of the Act: he keeps records of all appointments made and vouchers submitted in the local courts; he administers the $18,000 limit now in force in Superior Court, informing the CJA Coordinators in the criminal and family divisions of any attorneys who have exceeded the ceiling; he advises the various court committees on the operations of the Act; he mediates complaints by defendants and attorneys and, in appropriate cases, refers these to individual judges and disciplinary bodies; he maintains panels of non-volunteer attorneys for appointment to CJA cases, referring names to the courts whenever requested; and he is responsible for providing manuals and other information to private attorneys appointed to criminal cases in both Superior Court and the D.C. Court of Appeals.

In reality, the Director's job is largely administrative and advisory in character, carrying with it little real power or authority. Appointments are handled exclusively by judges (with the advice of the CJA Coordinators); vouchers are similarly approved exclusively by the courts; and substantive policies are made by the Chief Judges and various judicial committees. On

balance, then, PDS's role in this area is basically limited to record-keeping and providing ancillary services to the courts and to appointed counsel.

(5) Services to the Private Bar

In addition to the services mentioned above, PDS assists private counsel in a number of other ways. A Duty Day attorney is regularly assigned to answer questions from the public, and most attorneys on the staff are otherwise available to advise private counsel in the preparation of criminal cases. The PDS library is open to outside counsel and an extensive collection of sample motions, memoranda, and other materials is available for their use. In practice, however, private counsel do not make extensive use of these services.

The agency employs four investigators and a supervisor to handle almost exclusively requests for case investigations from CJA attorneys. Those private attorneys who have used this service have generally been satisfied with the quality of work performed. However, there is currently a waiting period of about six weeks for PDS investigators, and the small staff assigned to this task presently can handle investigations of no more than 2% to 3% of all CJA criminal and juvenile cases brought in Superior Court. Most private attorneys do not use PDS investigators, primarily because of the extensive delays involved. On balance, one would have to conclude that PDS's contribution in this area is

quite limited when matched against the potential need.[45/]

The Offender Rehabilitation Division (ORD) provides social services to both PDS and CJA counsel. The Division assists counsel in securing employment for their clients, in preparing pre-trial release plans, securing medical assistance, housing, food, preparing pre-sentence reports and devising rehabilitation programs. However, most CJA attorneys interviewed indicated a preference for using other social services organizations in the city.

Finally, PDS under a grant from L.E.A.A. is now making a substantial contribution in the area of training for the private bar. In late 1973, PDS revived publication of the PDS Bulletin and, to date, has published four issues dealing with various aspects of pre-trial preparation, sentencing alternatives and problems, pre-trial release, and eyewitness identification. Concurrently, the agency has sponsored three well-attended seminars for the private bar, covering in practical terms some of the issues discussed in the PDS Bulletin. In addition, many PDS attorneys have contributed to the annual Criminal Practice Institute of the Young Lawyers Section which last year drew more than 600 attorneys for lectures, workshops, and seminars over two weekends. It is clear from the strong response of the Bar to these efforts that PDS is meeting a vital need.

45/ Pursuant to a grant, PDS is now developing a training program for future investigators drawn from area law schools and a referral service to CJA attorneys needing investigators from this enlarged pool.

C. QUALITY OF REPRESENTATION

The Committee conducted no internal study of the quality of PDS since this would be duplicative of other efforts. A recent evaluation conducted by Abt Associates found that PDS met sufficiently high standards of performance to justify its selection as an L.E.A.A. "Exemplary Project" appropriate for replication elsewhere in the nation. Specifically, Abt cited the following outstanding features:

- Effective caseload limitations geared to the agency's primary responsibility to provide quality representation;
- Strong leadership and effective management of resources;
- Comprehensive training programs for staff attorneys;
- Effective utilization of supportive, non-legal resources for delivery of ancillary services;
- A strong orientation to law reform;
- A productive relationship with the private bar;
- Adequate funding and adequate staff salaries combined with a clearly-defined set of priorities designed to ensure quality representation for as many clients as possible; and
- Individualized and continuous client representation to ensure client confidence and attorney accountability.

It is clear from our own interviews with Superior Court and U.S. District Court judges that PDS enjoys an excellent reputation. Twenty-five of the twenty-seven Superior Court judges

questioned on this point indicated that PDS attorneys ranged from "good" to "outstanding." Twelve stated that PDS representation was uniformly "very good" or "outstanding." The only criticisms offered were a tendency of PDS attorneys to be "over-technical" and a disinclination on the part of some attorneys to seek plea dispositions. These criticisms could reasonably be taken as indications of vigorous representation.

A comparative study of the relative performance of PDS and all other defense attorneys was recently conducted at the Committee's request by the Institute for Law and Social Research. Results of this study are contained in Sec. III.A., infra. Suffice it to note here that PDS attorneys perform better than others in obtaining third-party custody and unsecured bail for their clients, and substantially better in winning acquittals in felony trials.

Case-Load Standards

Over the years, PDS has developed a sophisticated set of standards to ensure that attorneys provide quality representation and, yet, maintain a reasonable caseload. The standards are flexible, based on a continuing review of a number of factors and variables that may change at any given time. The sine qua non, of course, is the duty of counsel to provide effective representation, a standard that is not quantifiable. It is affected, however, by a number of other factors: the speed of turnover of

cases, the percentage of cases that go to trial (roughly 10% to 12%), the extent of support services available to counsel, court delays, and complex or protracted litigation. In analyzing these factors, PDS arrived at a maximum felony caseload of 30 open cases per attorney at any time, of which 20 are assumed to be in an active posture, and a maximum of 38 open juvenile cases, of which 15 are assumed to be active. The expectation was that each attorney could close between 110 and 120 criminal cases or 180 juvenile cases annually, but in practice the number of closed cases has fallen short of this goal.

It should be noted that these limits on maximum caseloads take full account of the extensive services available to PDS attorneys. Compared to the relative paucity of services available to regular CJA practitioners, one could reasonably conclude that private attorneys should carry no greater caseloads than PDS attorneys, and probably less.

D. RELATIONSHIP OF PDS TO THE COURTS AND LOCAL GOVERNMENT

(1) Board of Trustees

PDS is governed by a 7-man Board of Trustees selected by a panel composed of the Mayor and the Chief Judges of Superior Court, the D.C. Court of Appeals, U.S. District Court and the U.S. Court of Appeals for the D.C. Circuit. No judge may serve on the Board.

Despite selection of its members by the courts and the Mayor, PDS's Board of Trustees has operated in a fully independent fashion. The fact that the Board is selected by no one body or individual has undoubtedly been a significant factor in ensuring its independence. Indeed, the apparent immunity of the Board to judicial and political pressure has been an important ingredient in the agency's considerable success in controlling its own destiny and resisting pressures to assume excessive caseloads. The Board-promulgated caseload standards discussed supra and the agency's successful adherence to them attests to the Board's independence and firm commitment to quality representation.

(2) The Budgetary Process

PDS budgetary requests are handled in the same fashion as those of any other agencies of the D.C. Government. The agency submits its requests to the Mayor who, in turn, approves or disapproves them. The PDS requests then become part of the D.C. Government's total package submitted to the City Council for its consideration. Subsequently, the package is presented to Congress for final approval. The agency is generally afforded an opportunity at each stage of the process to testify in support of its requests for funding.

Unlike the local courts, whose budgets are not controlled by the D.C. Government but are submitted directly to Congress, PDS is subject to competition with other D.C. Government agencies for

limited funds. To some extent, therefore, PDS is potentially subject to political pressures that would be less likely to arise were it authorized to submit its funding requests directly to Congress in the same fashion as the local courts. Safeguards are needed to ensure that PDS retains the financial and political independence requisite for providing quality representation.

E. CONCLUSIONS

PDS is basically a sound and well-managed agency and the quality of the representation it provides is uniformly high. The increasing concentration of the agency's resources in the local courts, the incorporation of its budget within the D.C. Government's budget, and the prospects of involvement by the D.C. City Council in future legislation on the criminal justice system[46/] make it clear that PDS's relationship to the judiciary, the private bar, and the D.C. Government will likely undergo major redefinition. It is critically important, therefore, that these changes do not alter the basic purpose and structure of the agency. PDS's independence must be preserved and nurtured to the maximum extent possible. It is with this thought in mind that the Committee, while bowing to the inevitability of some of these pressures, makes a number of recommendations in the following pages.

46/ Beginning in 1977, the D.C. City Council will have authority to legislate amendments to the D.C. Criminal Code. See also D.C. Code, Section 11-2609 (1974).

F. RECOMMENDATIONS

(Rec. 1.1. THE COMMITTEE RECOMMENDS THE ESTABLISHMENT OF A DISTRICT OF COLUMBIA DEFENDER AGENCY TO ADMINISTER, AS SEPARATE DIVISIONS, THE APPOINTED COUNSEL PROGRAM FOR BOTH THE LOCAL AND FEDERAL COURTS UNDER THE CRIMINAL JUSTICE ACTS AND THE EXISTING PUBLIC DEFENDER SERVICE.)

This recommendation has been set forth in detail in Sec. I. I., supra. Under that proposal PDS would continue to exist as a separate and distinct entity within an enlarged agency embracing all key aspects of providing criminal defense services to indigents. PDS would be administered by a Director accountable to the Executive Director of the D.C. Defender Agency and its Board of Trustees.

Rec. 5.1. THE COMMITTEE RECOMMENDS THE EXPANSION OF PDS'S CAPABILITY FOR PROVIDING TRAINING AND OTHER SIMILAR SERVICES TO THE PRIVATE BAR.

PDS is uniquely qualified to provide training for the private bar since it already has an extensive program for training of its own personnel. The agency's constant involvement and current familiarity with developments in criminal law and procedure make it the logical repository and disseminator of information to CJA counsel.

We therefore recommend that funds appropriated to the proposed D.C. Defender Agency under the Criminal Justice Act be earmarked for use by the Public Defender Service in establishing a compre-

hensive training program and ancillary services for private counsel. Whatever efforts PDS currently makes in this area are funded out of grants from L.E.A.A. and the agency's existing, but limited, budget. These programs should now be funded on a permanent basis.

Rec. 5.2. THE COMMITTEE RECOMMENDS THAT ALL ADMINISTRATIVE RESPONSIBILITIES PERTAINING TO THE CRIMINAL JUSTICE ACT BE TRANSFERRED FROM PDS TO THE APPOINTED COUNSEL PROGRAM OF THE PROPOSED D.C. DEFENDER AGENCY.

The establishment of the proposed D.C. Defender Agency would obviate the need for a continued PDS role in administering the Criminal Justice Act. Given that the Appointed Counsel Program would be granted the powers of appointment and compensation to counsel, all other responsibilities for administering the program are more appropriately lodged there. In short, PDS would become primarily a litigating agency, responsible for administering its own program and staff, while providing training and advice to the private bar in coordination with the Appointed Counsel Program.

Rec. 5.3. THE STAFF OF THE PUBLIC DEFENDER SERVICE SHOULD BE ENLARGED SO THAT THE AGENCY CAN AT LEAST DOUBLE ITS CAPACITY TO HANDLE CRIMINAL AND JUVENILE CASES IN SUPERIOR COURT.

As noted earlier, PDS represents only 15% of all criminal defendants and juvenile respondents in Superior Court who are eligible for representation by appointed counsel. This obviously falls far below the 60% maximum authorized by statute.

The Committee recommends, therefore, that funds be appropriated to enable the agency to increase this capacity to at least 30%. The Committee does not thereby recommend that PDS attorneys assume larger caseloads than they already have. Indeed, the Committee is fully persuaded that PDS's caseload standards are both realistic and necessary to ensure the kind of quality representation for which the agency is justly noted.

The argument has often been made that the Public Defender Service should assume the entire burden of representing indigents in the District of Columbia. We reject this argument for several reasons. First, it would saddle the agency with an enormous caseload that would be impossible to handle in a personalized way. Second, it would push the agency in the direction of becoming an arm of the courts to the extent that it would be compelled to serve all the courts' needs, with consequent erosion of its independence and capacity to provide quality representation. Third, it would serve to insulate the rest of the bar from the criminal process. We have stated elsewhere our strong belief that a mixed system of representation is essential for a proper functioning of the adversary process.

Nevertheless, we are firmly of the view that PDS should play a substantially larger role than it now does. A greater number of defendants should be entitled to the kind of quality representation that the agency has proven itself capable of providing. Moreover, it is our belief that an enlarged PDS role would serve

to improve the overall quality of representation in Superior Court, galvanizing the courts and CJA attorneys alike to raise their sights.

Rec. 5.4. THE COMMITTEE RECOMMENDS THAT THE PUBLIC DEFENDER SERVICE, AS A DIVISION OF THE PROPOSED D.C. DEFENDER AGENCY, SHOULD CONTINUE TO FUNCTION IN THE FEDERAL COURTS IN THE DISTRICT OF COLUMBIA; A SEPARATE FEDERAL PUBLIC DEFENDER ORGANIZATION SHOULD NOT BE ESTABLISHED.

The Committee gave serious consideration to the desirability of establishing a separate Federal Public Defender Organization to provide indigent defense representation in the U.S. District Court and the U.S. Court of Appeals for the D.C. Circuit.[47/] We rejected that alternative for a number of reasons.

First, as we have stated, the Public Defender Service has an outstanding reputation and a record of excellence in providing criminal defense services. A separate Federal Public Defender Organization could not be justified because of deficiencies in the quality of services provided by PDS.

Second, the Office of the United States Attorney for the District of Columbia prosecutes all cases on behalf of the United States in both local and federal courts. It seems desirable that

47/ Establishment of such an organization would require a change in the federal Criminal Justice Act, since such organizations are authorized under 18 U.S.C., Section 3006A(h) and this subsection is inapplicable in the District of Columbia under Section 3600A(1).

the public defender services should likewise be unified between the two court systems, so as to afford the same level of representation which the prosecution is able to provide in both systems.

Third, there is no practical justification for establishing a separate Federal Public Defender Organization. The current criminal caseload in the U.S. District Court is approximately 1,100 cases per year, a sharp drop from the caseload prior to court reorganization in the District of Columbia. Moreover, the District Court caseload is likely to decline even further if the D.C. Code is amended, as proposed, to encompass many of the narcotics offenses presently prosecuted in District Court under the U.S. Code. Establishing a separate Federal Public Defender Organization, with all that this would entail in terms of staff, administrative, and other overhead costs, makes little sense, in view of the declining need for appointed counsel in District Court.[48/]

Fourth, establishment of a separate Federal Public Defender Organization would be clearly inconsistent with our proposal for a D.C. Defender Agency. That Agency's comprehensive responsibilities for appointment of counsel, vouchering, provision of training services to the private bar, and overall administration of the Criminal Justice Acts in the District of Columbia would be under-

48/ In any event, District Court presently has a CJA panel of 374 attorneys which, at least in terms of numbers, is more than adequate to handle the present caseload.

cut by a separate defender agency limited to the federal court system. The duplication and overlap of administrative and other functions would impair the delivery and increase the overall cost of defense services in the District of Columbia and the potentialities for conflict and competition for funds between such dual agencies would be manifold.

We believe that our plan for a D.C. Defender Agency, with authority to appoint counsel in both the local and federal courts, is a better solution to the problem of providing defense services in our dual court system. The Agency would have authority to assign attorneys from its Public DefenderService division to federal criminal cases where this was deemed necessary and appropriate. The division of PDS services between the local and federal court systems would be determined by the Agency on the basis of need.

III. QUALITY OF REPRESENTATION

A. PERFORMANCE OF CJA COUNSEL

It is a difficult task, at best, to measure objectively the quality of CJA representation. There are many highly-qualified attorneys practicing under the Acts, just as there are some who are generally reputed to be incompetent. Thus, statistics for the group as a whole must be viewed with some skepticism since they cannot discriminate between competent and incompetent attorneys. Ideally, detailed data on each attorney's performance would be needed to elucidate the differences. And sophisticated analysis of such data would necessarily have to include the innumerable variables involved in evaluating the outcome of a case: e.g., the strength of the government's evidence, the complexity of the case, the likelihood of acquittal at trial, the prospects of a plea to lesser included offenses, the prior criminal record of the defendant, and the sentencing practices of the judge. Data of this kind are simply unavilable at this time.

However, the Committee opted for a comparision between PDS attorneys and all others (including a selection of 40 CJA attorneys with heavy caseloads) on the theory that this would give us a rough measure of CJA counsel's performance. The tables which follow were prepared by the Institute for Law and Social Research,

using data from the U.S. Attorney's PROMIS[49/] system for criminal cases closed during calendar year 1973[50/]

Table IV - Bond Status; 1973 Closed Felony Cases, Superior Court

Release Type	Public Defender	Other than Public Defender 51/
1) Personal Recognizance	41.4% (223)	41.4% (989)
2) Third Pary Custody	20.6% (111)	15.3% (367)
3) Surety Bond	18.6% (100)	23.4% (560)
4) Cash Bond	11.5% (62)	10.5% (250)
5) Other	2.6% (14)	4.3% (102)
6) Unknown	5.2% (28)	5.1% (123)
	100% (538)	100% (2391)

49/ Prosecutors Management Information System.

50/ 1973 is the last year for which reasonably complete PROMIS data are available. The 6393 felony and misdemeanor cases in the sample (excluding the 1614 felonies handled by 40 CJA attorneys since these are, in most instances, duplicative of cases in the 6393 - case sample) represent about 65% of all criminal cases papered and closed in Superior Court by the U.S. Attorney during 1973. Data for the remaining 35% of 1973 closed cases were incomplete and, thus, these cases were not considered.

51/ This includes both retained and appointed counsel, although 85% to 90% were appointed under the Criminal Justice Act. Thus, the figures provide a reasonably good indicator of CJA counsel's performance.

It can readily be seen from this table that the bond hearing performance of PDS and other attorneys is roughly comparable. Both were equally successful in obtaining personal recognizance, although PDS attorneys had somewhat greater success in setting up third party custody and obtaining unsecured bond for their clients.

Table V(a) - Closed Felonies

Final Disposition	Public Defender	Other than Public Defender	40 CJA Lawyers 52/
1) Dismissed at Preliminary Hearing	5.6% (30)	5.1% (123)	3.8% (62)
2) Dismissed by Procecutor after Preliminary Hearing	36.4% (196)	38.9% (931)	32.6% (526)
3) Ignored by Grand Jury	4.3% (23)	4.0% (96)	3.4% (55)
4) Plea	29.7% (160)	29.8% (712)	36.2% (585)
5) Dismissed by Prosecutor after indictment	3.5% (19)	2.9% (69)	2.9% (40)
6) Dismissed by Judge after indictment	6.7% (36)	4.9% (117)	4.8% (78)
7) Trial - Guilty Verdict	5.9% (32)	8.4% (201)	10.5% (170)
8) Trial - Not Guilty Finding	6.7% (36)	5.0% (119)	4.8% (78)
9) Other	1.1% (6)	1.0% (23)	.8% (14)
	100% (538)	100% (2391)	100% (1614)

52/ All CJA practitioners who took more than 75 appointed cases

Table V(b) - Felony Conviction Rate

	Public Defender	Other than Public Defender	40 CJA Lawyers
Conviction (4 & 7 above)	35.6% (192)	38.2% (913)	46.8% (755)
Non-conviction (1,2,3,5,6,8, & 9, above)	64.4% (346)	61.8% (1478)	53.2% (859)
	100% (538)	100% (2391)	100% (1614)

Table V(c) - Felony Trial Outcome

Guilty (7 above)	47.1% (32)	62.8% (201)	68.5% (170)
Not Guilty (8 above)	52.9% (36)	37.2% (119)	31.5% (78)
	100% (68)	100% (320)	100% (248)

in Superior Court during 1973 were selected for this sample. They range from a low of 75 appointments to a high of 210. The average CJA caseload for the 40 attorneys was 115. It should be noted that there is a substantial overlap in the 1614 cases handled by these 40 attorneys and the 2391 handled by all other non-Public Defender Counsel.

Table VI(a) - 1973 Closed Misdemeanors

Final Disposition	Public Defender	Other than Public Defender
1) Plea	32.2% (47)	33.2% (1102)
2) Trial - Guilty Verdict	4.8% (7)	9.7% (320)
3) Trial - Not Guilty Finding	6.2% (9)	9.1% (300)
4) Dismissed by Prosecutor	49.3% (72)	42.9% (1423)
5) Dismissed by Judge	6.8% (10)	4.7% (156)
6) Other	.7% (1)	.5% (17)
	100% (146)	100% (3318)

Table VI(b) - Misdemeanor Conviction Rate

Conviction (1 & 2 above)	37.0% (54)	42.9% (1422)
Non-Conviction (3,4,5, & 6 above)	63.0% (92)	57.1% (1896)
	100% (146)	100% (3318)

Table VI(c) - Misdemeanor Trial Outcomes

Guilty (2 above)	43.8% (7)	51.6% (320)
Not Guilty Finding (3 above)	56.2% (9)	48.3% (300)
	100% (16)	100% (620)

As can be seen in these tables, dismissal rates for felonies (1,2,3,5, and 6 in Table V(a)) are nearly identical as between PDS (56.5%) and all other attorneys (55.8%). However, the 40 CJA attorneys with heavy caseloads had a substantially lower dismissal rate (47.5%).

The plea rate for both felonies and misdemeanors is comparable as between PDS and other attorneys. However, here again, the 40 CJA attorneys with more than 75 cases in 1973 entered guilty pleas on behalf of a substantially greater percentage of their clients (36.2% as opposed to 29.7% for PDS and 29.8% for all others). Unfortunately, no data are available to show comparative success rates in obtaining pleas to lesser included offenses.

The most striking difference in performance is to be found in felony trial outcomes. PDS and all other attorneys take roughly the same percentage of their cases to trial, but PDS clients were convicted at a rate of only 47.1% as opposed to 62.8% for all others. The conviction rate for defendants represented by the 40 CJA attorneys was even greater (68.5%). One can reasonably conclude from these figures that PDS attorneys do a substantially better job at trial than do other attorneys.

The above statistics do not provide a complete picture of the relative performances of different categories of attorneys representing indigents in Superior Court. As indicated, no data are available to show comparative success rates in obtaining pleas to lesser included offenses. Nor are there any sentencing

data available by which to measure the entire performances of counsel.

Nevertheless, our findings here and elsewhere in the report make it clear that renewed efforts must be made to establish standards of CJA practice, to set forth and enforce maximum caseload standards, to monitor the performance of CJA counsel and to establish effective grievance procedures for disciplining errant and incompetent members of the CJA bar. Recommendations addressed to these issues are contained in Sec. III C., infra.

B. DEFENDANT'S CHOICE OF COUNSEL

In recent years, courts and legislatures have sought to narrow the gap between indigent defendants and those of means. Every indigent defendant is now entitled to be represented by an attorney in any criminal case where he or she faces a loss of liberty. See Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963); and Argersinger v. Hamlin, 407 U.S. 25 (1972). Indigents have also been given rights to appeal and to transcripts. See Griffin v. Illinois, 351 U.S. 12 (1956), and Douglas v. California, 372 U.S. 353 (1963). The Supreme Court in these cases enunciated the principle that there can be no equal justice where the kind of trial and appeal a man gets depends on the money he has. In addition, legislatures have expanded the meaning of "indigent" and have provided for compensation to attorneys who are appointed to defend indigents, thus

lessening the possibility that attorneys will favor paying over "charity" clients. However, there is one important right in this area where a substantial difference exists between the indigent defendant and the defendant with means. The defendant who can afford it may choose his or her attorney, while the indigent defendant must accept the lawyer appointed by the court.

The Sixth Amendment and the Due Process Clause require that a defendant be given reasonable opportunity to retain the lawyer of his or her choice. Appellate courts have also held it to be an abuse of discretion for trial courts to refuse to continue cases so that counsel retained by the defendant could appear. Heard v. Gomel, 321 F.2d 88 (5th Cir. 1962); Reickauer v. Cunningham, 299 F.2d 120 (4th Cir. 1962); United States v. White, 139 U.S.App.D.C. 32, 429 F.2d 711 (1970). However, the courts have uniformly held that the right of an indigent defendant to an attorney does not include the right to choose counsel. See Brown v. United States, 105 U.S.App.D.C. 77, 264 F.2d 363 (1959), cert. denied 360 U.S. 911 (1959); United States v. Burkeen, 355 F.2d 241 (6th Cir. 1966). The courts have been unpersuaded that indigent defendants who are not given the opportunity to choose their own counsel are denied equal justice under the law to the extent found in Gideon and Griffin, supra.

Nevertheless, in D.C. Superior Court, a few judges will give an indigent defendant some choice at the time of arraignment if the attorney requested by the defendant is available. In citation

cases,[53] judges will customarily ask a defense attorney to confer briefly with the defendant. When the case is recalled, the judge will then ask the defendant if he or she is wants the court to appoint the attorney with whom the defendant has just conferred. However, there is usually no mention of an alternative lawyer and the defendant, for all practical purposes, is left with the choice of that defense counsel or none at all. Four of the nineteen judges, when asked if they thought defendants should be given a right to choose counsel, expressed the view that if the state pays, the state should choose the attorney.

Requesting the court to remove counsel is the only manner in which a defendant may have some control over who will be his or her defense attorney. However, just as the indigent defendant has no inherent right to select counsel, so the defendant has no right to have appointed counsel removed - this is entirely within the discretion of the trial judge. See Smith v. United States, 122 U.S.App.D.C. 300, 353 F.2d 838 (1965); McKoy v. United States, 263 A.2d 645 (D.C.C.A. 1970). The McKoy court set out the relevant considerations for removal: the merits of defendant's complaint; the delay between cause and request for removal; the nearness of trial or completion thereof; and general dictates of fairness. Most Superior Court judges indicated their willingness to remove

53/ Cases where the defendant is not jailed after arrest, but is given a court date on which to appear.

court appointed attorneys on a defendant's request, particularly where the defendant alleges that counsel has failed to maintain client contact. Other judges regarded removal as a drastic measure to be used only in serious cases of documented ineffective assistance. The defendant takes a calculated risk in informing the court that he or she is not satisfied with counsel. In making a request for new counsel, the defendant may be viewed as uncooperative, hostile, or attempting to delay the case.

There have been few studies of the difference between the attorney-client relationship in which the attorney has been appointed and in which he or she has been chosen by the defendant. Both the N.L.A.D.A. standards and the A.B.A. standards are replete with examples of how difficult it is to establish a viable attorney-client relationship in cases where counsel has been appointed. There is an inherent distrust that the attorney selected by the system may subvert the defendant's interests. In suggesting that defendants be given some limited option of rejecting assigned counsel, the N.L.A.D.A. standards point out that "providing the defendant with some choice will assist in alleviating the dehumanizing process of the criminal justice system, make the client more responsible for his own destiny and instill more faith in our system." The A.B.A. standards also recognize the benefits of permitting the defendant to select counsel, as this is "one method of increasing his confidence that he is being provided competent counsel and of providing as nearly as possible

the same conditions for the professional relation that obtain when counsel is retained by a defendant of means." A.B.A. Standards, Providing Defense Services, p.30.

A system which allows defendants to choose their own attorneys, though often supported in principle, is usually rejected as being administratively unworkable. Thus, the A.B.A. Standards in Providing Defense Services reject the concept because of fears that it would cause serious disruption to a rotation of counsel system, which the Standards find preferable. The A.B.A. Standards also mention the risk of habitual offenders retaining the best attorneys before other defendants can reach them. Seven of the nineteen Superior Court judges questioned about this opposed any plan in which defendants chose their counsel because it would be "unmanageable" and would "add to the confusion." Two judges also expressed the belief that better known attorneys would receive a disproportionate share of the appointments. However, five judges approved of the concept, arguing that the attorney-client relationship would be improved by permitting defendants to choose counsel.

C. RECOMMENDATIONS

Rec. 6.1. THE COMMITTEE RECOMMENDS THAT THE PROPOSED D.C. DEFENDER AGENCY ESTABLISH CERTIFICATION STANDARDS AND CO-COUNSELING ARRANGEMENTS FOR NEW ATTORNEYS SEEKING APPOINTMENTS TO CJA CASES.

Any attorney who wants to represent indigent defendants under the Criminal Justice Act in Superior Court need only become a member of the D.C. Bar and thereupon register with the CJA Coordinator. No formalized standards or procedures exist for bringing new attorneys into the system at an appropriate level of competence and experience.

We therefore recommend that standards for admission to CJA practice be established and that attorneys new to the system initially be assigned to simple misdemeanors and gradually advanced to more complex cases. Possible standards could include prior experience in a law school criminal justice clinic or a prosecutor's office, required attendance in training seminars, or acting as co-counsel with experienced attorneys. In any event, we are convinced that attorneys new to criminal practice should develop a level of competence at each stage before being allowed to advance to the next.

This recommendation clearly does not begin to solve the problem of long-time CJA practitioners whose competence is in question. They obviously have "experience" in the conventional sense and, thus, would probably meet any criteria that one could

establish for initiates. However, we believe that implementation of the recommendations which follow herein could begin to weed out and reduce the number of incompetent practitioners.

Rec. 6.2. THE COMMITTEE RECOMMENDS THAT THE PROPOSED D.C. DEFENDER AGENCY ESTABLISH A SYSTEM FOR MONITORING THE PERFORMANCE OF CJA COUNSEL AND DEVELOPING SEPARATE CJA ATTORNEY PANELS WHEREBY ASSIGNMENTS TO JUVENILE, MISDEMEANOR, AND FELONY CASES WOULD BE MADE ACCORDING TO COUNSEL'S ABILITY AND EXPERIENCE.

In conjunction with Rec. 6.1, we urge the establishment of a system for monitoring the performance of CJA counsel. This is clearly a difficult task given the many variables involved and the obvious problems inherent in having third parties scrutinize the judgments of counsel. Indeed, one of our principal objections to judicial control over appointments and compensation has its source in that very fact. However, it is equally evident to us that there us a number of CJA practitioners who seriously jeopardize the rights of their clients.

As a minimum, we envision a monitoring system that would keep careful track of defendants' complaints and counsel's adherence to ethical and professional standards of conduct. For instance, counsel's failure to maintain client contact, to investigate a case, to file necessary motions, or to interview witnesses should be considered a serious breach of professional responsibility. See, in particular, the A.B.A. Standards set forth in The Prosecution Function and the Defense Function.

A natural outgrowth of an effective monitoring system would be the establishment of a rating system whereby counsel would be assigned to misdemeanor, juvenile, and felony panels in accordance with their experience, competence, and past performance. As they gain competence and experience, attorneys would move on to the more difficult cases, while those who no longer measure up would be demoted to one of the lesser panels or removed altogether if warranted.

Rec. 6.3. THE COMMITTEE RECOMMENDS THAT THE PROPOSED D.C. DEFENDER AGENCY ESTABLISH AND ENFORCE MAXIMUM CASELOAD STANDARDS TO ENSURE THAT CJA COUNSEL ARE NOT OVER-EXTENDED AT THE EXPENSE OF QUALITY REPRESENTATION. CURRENT PDS CASELOAD STANDARDS SHOULD BE USED AS A GUIDE.

Even the best attorney reaches a point of diminishing returns when representing too many clients. The problem is doubly aggravated when counsel is less than fully competent.

Elsewhere in this report (see Sec. I.C.(1), Sec. I.F.(2)(c) and Rec. 4.6, infra, we have alluded to the high caseloads that some CJA attorneys maintain. Our analysis earlier in this section of the performance of 40 CJA attorneys strongly suggests that there is a correlation between high caseloads and ineffective representation. The only way to deal with the problem is to establish maximum caseload standards and to enforce them strictly. A monetary limit such as the $18,000 ceiling in Superior Court offers no guarantee of reducing caseloads and, in fact, may aggravate the problem by encouraging counsel to do a high-volume, low-quality

business by taking a large number of cases and submitting abnormally low voucher claims.

We therefore recommend that serious consideration be given to development of a set of caseload standards for CJA attorneys modeled on those now in effect at the Public Defender Service (see Sec. II.C.(1)). Based on the agency's considerable experience, PDS found that attorneys should have no more than 30 pending felonies at any time for a total of some 110 to 120 cases a year, or no more than 35 pending juvenile cases for a total of approximately 180 a year. In actuality, caseloads of PDS attorneys have fallen below these maximum limits. The "open" or "pending" case approach is clearly the best, since it enables the appointing authority to keep a running account of an attorney's workload.[54/] Moreover, it could be adjusted and administered in such a way as to take account of the varying abilities, experience, and competence of counsel.

Rec. 6.4. THE COMMITTEE RECOMMENDS THAT THE PROPOSED D.C. DEFENDER AGENCY DEVELOP TRAINING PROGRAMS IN CRIMINAL LAW, PROCEDURE, AND EVIDENCE FOR ALL ATTORNEYS TAKING CJA CASES. ATTENDANCE AT TRAINING SESSIONS SHOULD BE VOLUNTARY DURING THE FIRST TWO YEARS OF OPERATION, BECOMING MANDATORY THEREAFTER.

It is, of course, counsel's duty to keep abreast of all developments in his field of specialty. However, as a practical

54/ A full exploration of this concept is contained in the commentary to Standard 4.1, N.L.A.D.A. Standards for Defender Services.

matter, this may not always be possible and, in fact, there is a substantial number of CJA practitioners who make little effort to keep pace with recent developments in the law.

We have already recommended expansion of existing PDS efforts to train the private bar (see Rec. 5.1). Here we take that recommendation a step further by urging voluntary attendance at training sessions for all regular CJA practitioners during the first two years of operation, with attendance becoming mandatory thereafter. A similar proposal was recently introduced in California and implementation is currently underway.[55/]

Rec. 6.5. EFFECTIVE MACHINERY FOR HEARING AND RULING ON COMPLAINTS AND GRIEVANCES AGAINST ALL APPOINTED ATTORNEYS SHOULD BE ESTABLISHED WITHIN THE PROPOSED D.C. DEFENDER AGENCY.

One of the most serious weaknesses in the existing system is the lack of effective machinery for hearing grievances and taking disciplinary action against errant and incompetent attorneys (see Sec. I.C.(3) and Sec. II.B.(3), supra). There is a natural reluctance on the part of attorneys to pass judgment on other members of their profession.

However, we submit that CJA practice is a privilege, not a right, and that defendants' rights to effective representation outweigh those of CJA attorneys to make a living. Thus, as we

55/ "Should a lawyer's license to practice be good for life?" L.S. Janofsky, Calif. S.B. J. 48: 121, Mar. - Apr. 73.

have already proposed (see Rec.1.3, supra), machinery should be established withinthe D.C. Defender Agency whereby grievances against counsel can be promptly investigated, heard, and resolved. The Agency should be adequately staffed to handle these responsibilities. Sanctions should include removal from a case, removal from a panel, suspension from CJA practice, and referral to prosecutive agencies, and the Disciplinary Board of the D.C. Bar where warranted.

Rec. 6.6. THE COMMITTEE RECOMMENDS THE ADOPTION OF A PILOT PROGRAM FOR SELECTION OF COUNSEL BY INDIGENT DEFENDANTS, INVOLVING 10% TO 15% OF ALL DEFENDANTS ELIGIBLE FOR APPOINTED COUNSEL, WITH A VIEW TO TESTING THE FEASIBILITY AND DESIRABILITY OF THE CONCEPT.

The Committee is persuaded that the principle of permitting indigent defendants to choose their counsel warrants an experimental program. There has always been a lingering suspicion on the part of defendants that appointed counsel, because they are selected by the courts, are not fully committed to the defense of their clients. Consequently, counsel and defendant alike are often faced with the mutually trying and time-consuming problem of establishing a viable, trusting relationship. Much time and effort is wasted, and the courts, in turn, are frequently confronted by motions to withdraw as counsel when attorney-client problems cannot be resolved. Furthermore, we believe that it would be highly desirable as a matter of equity to give the indigent defendant a power approaching that held by the defendant

who can afford to select and retain his own counsel.

We envision a system along the following lines:

(1) A random selection (e.g., 10% to 15%) of all defendants deemed eligible for court-appointed lawyers would receive from the CJA Administrator: (a) a list of all attorneys available for CJA appointments, and (b) an appointing form containing the charges against the defendant and all relevant CJA guidelines (e.g., maximum compensation for misdemeanors and felonies).

(2) Using that list, the defendant would then contact counsel who, if he or she accepted the case, would return the appointing form to the CJA office for issuance of a voucher and any further instructions.

(3) From that point on, the case would be handled as is every other appointed case.

In most cases, it would probably not be possible to have counsel selected in this manner be present at the initial court proceeding. However, stand-in attorneys (for example, law students or other attorneys in court on a given day) could be appointed for the limited purpose of the arraignment, presentment, and bond hearing. Chosen counsel would make his or her appearance later, much as the system now works when a defendant indicates to the court at presentment or arraignment that he wants to retain counsel. Grand jury originals would be relatively easier to handle, since there is usually ample time between indictment and arraignment for defendants to find counsel.

APPENDIX A

RESOLUTIONS ADVANCED BY E. BARRETT PRETTYMAN, JR. AND ADOPTED BY THE JUDICIAL CONFERENCE OF THE DISTRICT OF COLUMBIA CIRCUIT ON MARCH 18, 1974

Resolution I

It is the position of the Judicial Conference for the District of Columbia that the Congress has an obligation to provide adequate funds for the effective representation by appointed counsel in criminal indigent cases in the District of Columbia.

Resolution II

Be it resolved that the Judicial Conference of the District of Columbia Circuit authorize the Chairman to select a committee (or committees) to make a study and submit a report to this conference with respect to the following matters.

1. A study of whether the Public Defender Service for the District of Columbia should retain its dual nature as an agency serving both the Federal and local court systems of the District, or whether it should become a purely local agency.

2. If the Public Defender Service becomes a local agency serving only the local court system, a study of whether the Criminal Justice Act, Title 18 U.S. Code, Section 3006A, should be amended so as to make the Act applicable to the Federal court system in the District of Columbia in the same manner and to the same extent as the Act is applicable in the rest of the country, insofar as the representation of indigent defendants in criminal cases is concerned.

3. A comparison of the current system for delivery of criminal defense services in the District of Columbia Circuit with other systems in existence in Federal and

State Courts, having regard to models recommended or proposed by national organizations concerned with this problem.

As a result of this study the committee should be prepared to report whether or not any proposed amendments to the Criminal Justice Act should be transmitted to the Judicial Conference of the United States.

APPENDIX B

FEDERAL CRIMINAL JUSTICE ACT.

18 U.S.C., Section 3006A.

§ 3006A. Adequate representation of defendants

(a) Choice of plan.—Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation (1) who is charged with a felony or misdemeanor (other than a petty offense as defined in section 1 of this title) or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation, (2) who is under arrest, when such representation is required by law, (3) who is subject to revocation of parole, in custody as a material witness, or seeking collateral relief, as provided in subsection (g), or, (4) for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel. Representation under each plan shall include counsel and investigative, expert, and other services necessary for an adequate defense. Each plan shall include a provision for private attorneys. The plan may include, in addition to a provision for private attorneys in a substantial proportion of cases, either of the following or both:

(1) attorneys furnished by a bar association or a legal aid agency; or

(2) attorneys furnished by a defender organization established in accordance with the provisions of subsection (h).

Prior to approving the plan for a district, the judicial council of the circuit shall supplement the plan with provisions for representation on appeal. The district court may modify the plan at any time with the approval of the judicial council of the circuit. It shall modify the plan when directed by the judicial council of the circuit. The district court shall notify the Administrative Office of the United States Courts of any modification of its plan.

(b) Appointment of counsel.—Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan. In every

criminal case in which the defendant is charged with a felony or a misdemeanor (other than a petty offense as defined in section 1 of this title) or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation and appears without counsel, the United States magistrate or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the defendant waives representation by counsel, the United States magistrate or the court, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him. Such appointment may be made retroactive to include any representation furnished pursuant to the plan prior to appointment. The United States magistrate or the court shall appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel, or when other good cause is shown.

(c) Duration and substitution of appointments.—A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate or the court through appeal, including ancillary matters appropriate to the proceedings. If at any time after the appointment of counsel the United States magistrate or the court finds that the person is financially able to obtain counsel or to make partial payment for the representation, it may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate. If at any stage of the proceedings, including an appeal, the United States magistrate or the court finds that the person is financially unable to pay counsel whom he had retained, it may appoint counsel as provided in subsection (b) and authorize payment as provided in subsection (d), as the interests of justice may dictate. The United States magistrate or the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.

(d) Payment for representation.—

(1) Hourly rate.—Any attorney appointed pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding $30 per hour for time expended in court or before a United States magistrate and $20 per hour for time reasonably expended out of court, or such other hourly rate, fixed by the Judicial Council of the Circuit, not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district. Such attorney shall be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the United States magistrate or the court.

(2) Maximum amounts.—For representation of a defendant before the United States magistrate or the district court, or both, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed $1,000 for each attorney in a case in which one or more felonies are charged, and $400 for each attorney in a case in which only misdemeanors are charged. For representation of a defendant in an appellate court, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed $1,000 for each attorney in each court. For representation in connection with a post-trial motion made after the entry of judgment or in a probation revocation proceeding or for representation provided under subsection (g) the compensation shall not exceed $250 for each attorney in each proceeding in each court.

(3) Waiving maximum amounts.—Payment in excess of any maximum amount provided in paragraph (2) of this subsection may be made for extended or complex representation whenever the court in which the representation was rendered, or the United States magistrate if the repre-

sentation was furnished exclusively before him, certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit.

(4) Filing claims.—A separate claim for compensation and reimbursement shall be made to the district court for representation before the United States magistrate and the court, and to each appellate court before which the attorney represented the defendant. Each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and expenses incurred while the case was pending before the United States magistrate and the court, and the compensation and reimbursement applied for or received in the same case from any other source. The court shall fix the compensation and reimbursement to be paid to the attorney or to the bar association or legal aid agency or community defender organization which provided the appointed attorney. In cases where representation is furnished exclusively before a United States magistrate, the claim shall be submitted to him and he shall fix the compensation and reimbursement to be paid. In cases where representation is furnished other than before the United States magistrate, the district court, or an appellate court, claims shall be submitted to the district court which shall fix the compensation and reimbursement to be paid.

(5) New trials.—For purposes of compensation and other payments authorized by this section, an order by a court granting a new trial shall be deemed to initiate a new case.

(6) Proceedings before appellate courts.—If a person for whom counsel is appointed under this section appeals to an appellate court or petitions for a writ of certiorari, he may do so without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.

(e) Services other than counsel.—

(1) Upon request.—Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

(2) Without prior request.—Counsel appointed under this section may obtain, subject to later review, investigative, expert, or other services without prior authorization if necessary for an adequate defense. The total cost of services obtained without prior authorization may not exceed $150 and expenses reasonably incurred.

(3) Maximum amounts.—Compensation to be paid to a person for services rendered by him to a person under this subsection, or to be paid to an organization for services rendered by an employee thereof, shall not exceed $300, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court, or by the United States magistrate if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit.

(f) Receipt of other payments.—Whenever the United States magistrate or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency or community defender organization which provided the appointed attorney, to any person or organization authorized pursuant to subsection (e) to render investigative, expert, or other services, or to the court for deposit in the Treasury as a reimbursement to the appropria-

tion, current at the time of payment, to carry out the provisions of this section. Except as so authorized or directed, no such person or organization may request or accept any payment or promise of payment for representing a defendant.

(g) **Discretionary appointments.**—Any person subject to revocation of parole, in custody as a material witness, or seeking relief under section 2241, 2254, or 2255 of title 28 or section 4245 of title 18 may be furnished representation pursuant to the plan whenever the United States magistrate or the court determines that the interests of justice so require and such person is financially unable to obtain representation. Payment for such representation may be as provided in subsections (d) and (e).

(h) **Defender organization.—**

(1) **Qualifications.**—A district or a part of a district in which at least two hundred persons annually require the appointment of counsel may establish a defender organization as provided for either under subparagraphs (A) or (B) of paragraph (2) of this subsection or both. Two adjacent districts or parts of districts may aggregate the number of persons required to be represented to establish eligibility for a defender organization to serve both areas. In the event that adjacent districts or parts of districts are located in different circuits, the plan for furnishing representation shall be approved by the judicial council of each circuit.

(2) **Types of defender organizations.—**

(A) **Federal Public Defender Organization.**—A Federal Public Defender Organization shall consist of one or more full-time salaried attorneys. An organization for a district or part of a district or two adjacent districts or parts of districts shall be supervised by a Federal Public Defender appointed by the judicial council of the circuit, without regard to the provisions of title 5 governing appointments in the competitive service, after considering recommendations from the district court or courts to be served. Nothing contained herein shall be deemed to authorize more than one Federal Public Defender within a single judicial district. The Federal Public Defender shall be appointed for a term of four years, unless sooner removed by the judicial council of the circuit for incompetency, misconduct in office, or neglect of duty. The compensation of the Federal Public Defender shall be fixed by the judicial council of the circuit at a rate not to exceed the compensation received by the United States attorney for the district where representation is furnished or, if two districts or parts of districts are involved, the compensation of the higher paid United States attorney of the districts. The Federal Public Defender may appoint, without regard to the provisions of title 5 governing appointments in the competitive service, full-time attorneys in such number as may be approved by the Judicial Council of the Circuit and other personnel in such number as may be approved by the Director of the Administrative Office of the United States Courts. Compensation paid to such attorneys and other personnel of the organization shall be fixed by the Federal Public Defender at a rate not to exceed that paid to attorneys and other personnel of similar qualifications and experience in the Office of the United States attorney in the district where representation is furnished or, if two districts or parts of districts are involved, the higher compensation paid to persons of similar qualifications and experience in the districts. Neither the Federal Public Defender nor any attorney so appointed by him may engage in the private practice of law. Each organization shall submit to the Director of the Administrative Office of the United States Courts, at the time and in the form prescribed by him, reports of its activities and financial position and its proposed budget. The Director of the Administrative Office shall submit, similarly as under title 28, United States Code, section 605, and subject to the conditions of that section, a budget for each organization for each fiscal year and shall out of the appropriations therefor make payments to and

APPENDIX C

Public Law 93-412
93rd Congress, S. 3703
September 3, 1974

An Act

To authorize in the District of Columbia a plan providing for the representation of defendants who are financially unable to obtain an adequate defense in criminal cases in the courts of the District of Columbia, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "District of Columbia Criminal Justice Act".

District of Columbia Criminal Justice Act. D.C. Code 11-2601 note. 87 Stat. 473. 88 STAT. 1089 88 STAT. 1090

SEC. 2. Title 11 of the District of Columbia Code is amended by adding at the end thereof the following new chapter:

"Chapter 26.—REPRESENTATION OF INDIGENTS IN CRIMINAL CASES

"Sec.

"§ 11-2601. Plan for furnishing representation of indigents in criminal cases

"The Joint Committee on Judicial Administration shall place in operation, within ninety days after the effective date of this chapter, in the District of Columbia a plan for furnishing representation to any person in the District of Columbia who is financially unable to obtain adequate representation—

"(1) who is charged with a felony, or misdemeanor, or other offense for which the sixth amendment to the Constitution requires the appointment of counsel or for whom, in a case which he faces loss of liberty, any law of the District of Columbia requires the appointment of counsel;

"(2) who is under arrest, when such representation is required by law;

"(3) who is charged with violating a condition of probation or parole in custody as a material witness, or seeking collateral relief, as provided in—

"(A) Section 23-110 of the District of Columbia Code (remedies on motion attacking sentence),

"(B) Chapter 7 of title 23 of the District of Columbia Code (extradition and fugitives from justice), D.C. Code 23-701.

"(C) Chapter 19 of title 16 of the District of Columbia Code (habeas corpus), D.C. Code 16-1901.

"(D) Section 928 of the Act of March 3, 1901 (D.C. Code, sec. 24-302) (commitment of mentally ill person while serving sentence); 31 Stat. 1340; 69 Stat. 611.

"(4) who is subject to proceedings pursuant to chapter 5 of title 21 of the District of Columbia Code (hospitalization of the mentally ill); D.C. Code 21-501.

"(5) who is a juvenile and alleged to be delinquent or in need of supervision.

Representation under the plan shall include counsel and investigative, expert, and other services necessary for an adequate defense. The plan shall include a provision for private attorneys, attorneys furnished by the Public Defender Service, and attorneys and qualified students participating in clinical programs.

"§ 11-2602. Appointment of counsel

"Counsel furnishing representation under the plan shall in every case be selected from panels of attorneys designated and approved by the courts. In all cases where a person faces a loss of liberty and the Constitution or any other law requires the appointment of counsel, the court shall advise the defendant or respondent that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the defendant or respondent waives representation by counsel, the court, if satisfied after appropriate inquiry that the defendant or respondent is financially unable to obtain counsel, shall appoint counsel to represent him. Such appointment may be made retroactive to include any representation furnished pursuant to the plan prior to appointment. The court shall appoint separate counsel for defendants or respondents having interests that cannot properly be represented by the same counsel, or when other good cause is shown. In all cases covered by this Act where the appointment of counsel is discretionary, the defendant or respondent shall be advised that counsel may be appointed to represent him if he is financially unable to obtain counsel, and the court shall in all such cases advise the defendant or respondent of the manner and procedures by which he may request the appointment of counsel.

88 STAT. 1090
88 STAT. 1091

"§ 11-2603. Duration and substitution of appointments

"A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the court through appeals, including ancillary matters appropriate to the proceedings. If at any time after the appointment of counsel the court finds that the person is financially able to obtain counsel or to make partial payment for the representation, it may terminate the appointment of counsel or authorize payment as provided in section 2606 of this chapter, as the interests of justice may dictate. If at any stage of the proceedings, including an appeal, the court finds that the person is financially unable to pay counsel whom he had retained, it may appoint counsel as provided in section 2602, and authorize payment as provided in section 2604, as the interests of justice may dictate. The court may, in the interest of justice, substitute one appointed counsel for another at any stage of the proceedings.

"§ 11-2604. Payment for representation

"(a) Any attorney appointed pursuant to this chapter shall, at the conclusion of the representation or any segment thereof, be compensated at a rate fixed by the Joint Committee on Judicial Administration, not to exceed the hourly scale established by the provisions of section 3006A(d)(1) of title 18, United States Code. Such attorney shall be reimbursed for expenses reasonably incurred.

Expenses.

"(b) For representation of a defendant before the Superior Court or before the District of Columbia Court of Appeals, as the case may be, the compensation to be paid to an attorney shall not exceed the maximum amounts established by section 3006A(d)(2) of title 18, United States Code, in the corresponding kind of case or proceeding.

Excess amounts, claims.

"(c) Claims for compensation and reimbursement in excess of any maximum amount provided in subsection (b) of this section may be approved for extended or complex representation whenever such payment is necessary to provide fair compensation. Any such request for payment shall be submitted by the attorney for approval by the chief judge of the Superior Court upon recommendation of the presiding judge in the case or, in cases before the District of Columbia Court of Appeals, approval by the chief judge of the Court of Appeals upon recommendation of the presiding judge in the case. A decision shall be made by the appropriate chief judge in the case of every claim filed under this subsection.

"(d) A separate claim for compensation and reimbursement shall be made to the Superior Court for representation before that court, and to the District of Columbia Court of Appeals for representation before that court. Each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and expenses incurred while the case was pending before the court, and the compensation and reimbursement applied for or received in the same case from any other source. The court shall fix the compensation and, reimbursement to be paid to the attorney. In cases where representation is furnished other than before the Superior Court or the District of Columbia Court of Appeals, claims shall be submitted to the Superior Court which shall fix the compensation and reimbursement to be paid.

Statement.

"(e) For purposes of compensation and other payments authorized by this section, an order by a court granting a new trial shall be deemed to initiate a new case.

"(f) If a person for whom counsel is appointed under this section appeals to the District of Columbia Court of Appeals, he may do so without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28, United States Code.

"§ 11-2605. Services other than counsel

"(a) Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court shall authorize counsel to obtain the services.

"(b) Counsel appointed under this section may obtain, subject to later review, investigative, expert, or other services, excluding the preparation of reporter's transcript, without prior authorization if necessary for an adequate defense. The total cost of services obtained without prior authorization may not exceed $150 or the rate provided by section 3006A(e)(2) of title 18, United States Code, whichever is higher, and expenses reasonably incurred.

Limitation.

"(c) Compensation to be paid to a person for services rendered by him to a person under this subsection shall not exceed $300, or the rate provided by section 3006A(e)(3) of title 18, United States Code, whichever is higher, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the presiding judge in the case.

"§ 11-2606. Receipt of other payments

"(a) Whenever the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney, or to any person or organization authorized pursuant to section 2605 of this title to render investigative, expert, or other services, or to the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section. Except as so authorized or directed, no such person or organization may request or accept any payment or promise of payment for representing a defendant.

"(b) Any person compensated, or entitled to be compensated, for any services rendered under this chapter who shall seek, ask, demand, receive, or offer to receive, any money, goods, or services in return therefor from or on behalf of a defendant or respondent shall be fined not more than $1,000 or imprisoned not more than one year, or both.

88 STAT. 1092
88 STAT. 1093

"§ 11-2607. Preparation of Budget

"The joint committee shall prepare and annually submit to the Commissioner of the District of Columbia, in conformity with section 1743 of this title, or to his successor in accordance with section 145 of the District of Columbia Self-Government and Governmental Reorganization Act, for inclusion in the annual budget, annual estimates of the expenditures and appropriations necessary for furnishing representation by private attorneys to persons entitled to representation in accordance with section 2601 of this title.

87 Stat. 800. D.C. Code 1-101 note.

"§ 11-2608. Authorization of appropriations

"There are hereby authorized to be appropriated, out of any moneys in the Treasury credited to the District of Columbia, such funds as may be necessary for the administration of this chapter for fiscal years 1975 and 1976. When so specified in appropriation Acts, such appropriations shall remain available until expended.

"§ 11-2609. Authority of Council

"Section 602(a)(4) of the District of Columbia Self-Government and Governmental Reorganization Act shall not apply to this chapter.".

87 Stat. 813. D.C. Code 1-101 note.

SEC. 3. (a) Paragraph (1) of section 3006A, title 18, United States Code, as amended, is amended to read:

"(1) APPLICABILITY IN THE DISTRICT OF COLUMBIA.—The provisions of this Act, other than subsection (h) of section 1, shall apply in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. The provisions of this Act shall not apply to the Superior Court of the District of Columbia and the District of Columbia Court of Appeals.".

Effective date. D.C. Code 11-2601 note.

SEC. 4. This Act shall take effect upon the date of its enactment. Any person appointed on or after July 1, 1974, but prior to the commencing date of the plan referred to in section 11-2601 of the District of Columbia Code (as added by section 2 of this Act), by a judge of the Superior Court or the District of Columbia Court of Appeals to furnish to any person in the District of Columbia, who is financially unable to obtain adequate representation, that representation and those services referred to in such section 11-2601, may be compensated and reimbursed for such representation and services rendered, including expenses incurred therewith, upon filing a claim for payment. Payment shall not be allowed in excess of the amounts authorized in accordance with those sections added to the District of Columbia Code by such section 2.

Approved September 3, 1974.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 93-1172 (Comm on the District of Columbia) and No. 93-1295 (Comm. of Conference).
SENATE REPORT No. 93-966 (Comm. on the District of Columbia).
CONGRESSIONAL RECORD, Vol. 120 (1974):
June 27, considered and passed Senate.
July 9, considered and passed House, amended.
Aug. 20, House agreed to conference report.
Aug. 21, Senate agreed to conference report.

GPO 38-139

APPENDIX D

2 D.C. Code, Section 2221, et seq.

IRW.".

TITLE III—PUBLIC DEFENDER SERVICE

REDESIGNATION OF LEGAL AID AGENCY AS PUBLIC DEFENDER SERVICE

SEC. 301. The Legal Aid Agency for the District of Columbia is redesignated the District of Columbia Public Defender Service (hereafter in this title referred to as the "Service").

AUTHORITY OF SERVICE

SEC. 302. (a) The Service is authorized to represent any person in the District of Columbia who is a person described in any of the following categories and who is financially unable to obtain adequate representation:

(1) Persons charged with an offense punishable by imprisonment for a term of six months, or more.

(2) Persons charged with violating a condition of probation or parole.

79 Stat. 750. D.C. Code 21-501.

(3) Persons subject to proceedings pursuant to chapter 5 of title 21 of the District of Columbia Code (Hospitalization of the Mentally Ill).

(4) Persons for whom civil commitment is sought pursuant to title III of the Narcotic Addict Rehabilitation Act of 1966 (42 U.S.C. 3411, et seq.) or the provisions of the Hospital Treatment for Drug Addicts Act for the District of Columbia (D.C. Code, sec. 24-601, et seq.). 80 Stat. 1444. 70 Stat. 609.

(5) Juveniles alleged to be delinquent or in need of supervision.

(6) Persons subject to proceedings pursuant to section 7 of the Act of August 4, 1947 (D.C. Code, sec. 24-527) (relating to commitment of chronic alcoholics by court order for treatment). 82 Stat. 621.

(7) Persons subject to proceedings pursuant to section 927 of the Act of March 3, 1901 (D.C. Code, sec. 24-301) (relating to confinement of persons acquitted on the ground of insanity). Ante, p. 601.

Representation may be furnished at any stage of a proceeding, including appellate, ancillary, and collateral proceedings. Not more than 60 per centum of the persons who are annually determined to be financially unable to obtain adequate representation and who are persons described in the above categories may be represented by the Service, but the Service may furnish technical and other assistance to private attorneys appointed to represent persons described in the above categories. The Service shall determine the best practicable allocation of its staff personnel to the courts where it furnishes representation.

(b) The Service shall establish and coordinate the operation of an effective and adequate system for appointment of private attorneys to represent persons described in subsection (a), but the courts shall have final authority to make such appointments. The Service shall report to the courts at least quarterly on matters relating to the operation of the appointment system and shall consult with the courts on the need for modifications and improvements.

(c) Upon approval of its Board of Trustees, the Service may perform such other functions as are necessary and appropriate to the duties described above.

(d) The determination whether a person is financially unable to obtain adequate representation shall be based on information provided by the person to be represented and such other persons or agencies as the court in its discretion shall require. Whoever in providing this information knowingly falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious, or fraudulent statement or representation, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry shall be fined not more than $1,000 or imprisoned not more than one year, or both.

BOARD OF TRUSTEES OF SERVICE

SEC. 303. (a) The powers of the Service shall be vested in a Board of Trustees composed of seven members. The Board of Trustees shall establish general policy for the Service but shall not direct the conduct of particular cases.

(b) (1) Members of the Board of Trustees shall be appointed by a panel consisting of—

(A) the chief judge of the United States Court of Appeals for the District of Columbia Circuit;

(B) the chief judge of the United States District Court for the District of Columbia;

(C) the chief judge of the District of Columbia Court of Appeals;

(D) the chief judge of the Superior Court of the District of Columbia; and

(E) the Commissioner of the District of Columbia.

The panel shall be presided over by the chief judge of the United States Court of Appeals for the District of Columbia Circuit (or in his absence, the designee of such judge). A quorum of the panel shall be four members.

(2) Judges of the United States courts in the District of Columbia and of District of Columbia courts may not be appointed to serve as members of the Board of Trustees.

(3) The term of office of a member of the Board of Trustees shall be three years. No person shall serve more than two consecutive terms as a member of the Board of Trustees. A vacancy in the Board of Trustees shall be filled in the same manner as the original appointment. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term.

(c) The trustees of the Legal Aid Agency for the District of Columbia in office on the date of enactment of this Act shall serve the unexpired portions of their terms as trustees of the Service.

(d) For the purposes of any action brought against the trustees of the Service, they shall be deemed to be employees of the District of Columbia.

DIRECTOR AND DEPUTY DIRECTOR OF SERVICE

SEC. 304. The Board of Trustees shall appoint a Director and Deputy Director of the Service, each of whom shall serve at the pleasure of the Board. The Director shall be responsible for the supervision of the work of the Service and shall perform such other duties as the Board of Trustees may prescribe. The Deputy Director shall assist the Director and shall perform such duties as he may prescribe. The Director and Deputy Director shall be members of the bar of the District of Columbia. The Board of Trustees shall fix the compensation to be paid to the Director and the Deputy Director without regard to chapter 51 and subchapter III of chapter 53 of title 5 of the United States Code, but compensation for the Director shall not exceed the rate prescribed for GS-18 of the General Schedule and compensation for the Deputy Director shall not exceed the maximum rate prescribed for GS-17 of the General Schedule. 80 Stat. 443, 467. 5 USC 5101, 5331. 35 F.R. 6247.

STAFF

SEC. 305. (a) The Director shall employ a staff of attorneys and clerical and other personnel necessary to provide adequate and effective defense services. The Director shall make assignments of the personnel of the Service. The compensation of all employees of the Service, other than the Director and the Deputy Director, shall be fixed by the Director without regard to chapter 51 and subchapter III of chapter 53 of title 5 of the United States Code, but shall not exceed the compensation which may be paid to persons of similar qualifications and experience in the Office of the United States Attorney for the District of Columbia. All attorneys employed by the Service to represent persons shall be members of the bar of the District of Columbia.

(b) No attorney employed by the Service shall engage in the private practice of law or receive a fee for representing any person.

FISCAL REPORTS

Report to Congress.

SEC. [illegible]. (a) The Board of Trustees of the Agency shall submit a fiscal year report of the Service's operations to the Congress of the United States, to the chief judges of the Federal courts in the District of Columbia and of the District of Columbia courts, and to the Commissioner of the District of Columbia. The report shall include a statement of the financial condition of the Service and a summary of services performed during the year.

(b) The Board of Trustees shall annually arrange for an independent audit to be prepared by a certified public accountant or by a designee of the Administrative Office of the United States Courts.

APPROPRIATIONS, GRANTS, AND CONTRIBUTIONS

SEC. 307. (a) For the purpose of carrying out the provisions of this title, there are authorized to be appropriated for each fiscal year, out of any moneys in the Treasury to the credit of the District of Columbia, such sums as may be necessary to implement the purposes of this title. Such sums shall be appropriated for the judiciary to be disbursed by the Administrative Office of the United States Courts to carry on the business of the Service. The Administrative Office, in disbursing and accounting for such sums, shall follow, so far as possible, its standard fiscal practices. The budget estimates for the Service shall be prepared in consultation with the Commissioner of the District of Columbia.

(b) Upon approval of the Board of Trustees, the Service may accept public grants and private contributions made to assist it in carrying out the provisions of this title.

TRANSITION PROVISION

SEC. 308. All employees of the Legal Aid Agency for the District of Columbia on the date of enactment of this Act shall be deemed to be employees of the Service and shall be entitled to the same compensation and benefits as they are entitled to as employees of the Legal Aid Agency for the District of Columbia.

Appendix E

MEMORANDUM: STANDARDS FOR EFFECTIVE REPRESENTATION 1/

I. DEFENSE FUNCTION

It is now clear that a defendant has a right to counsel in all criminal cases where he faces a loss of liberty. In Gideon v. Wainwright, 372 U.S. 335 (1963), the Court held that defendants have a right to counsel in all but petty offenses. Subsequently, the Court held that in any case where the defendant faces a loss of liberty, regardless of the charge, he has a right to counsel. Argersinger v. Hamlin, 407 U.S. 25 (1972). However, the appointment of counsel alone does not satisfy the Sixth Amendment. Thus, as early as the landmark case of Powell v. Alabama, the Court observed that the duty to appoint counsel "is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of case." 287 U.S. 45 (1932). (emphasis added).

Initially this circuit used the "mockery of justice" test as the criterion for determining if the defendant had received effective assistance of counsel. Commentators have recommended that a more appropriate standard "should be whether counsel exhibited the normal and customary degree of skill possessed by attorneys fairly learned and skilled in the criminal law." Finer, Ineffective Assistance of Counsel, 58 Cornell L.Rev. 1077 (1973).

1/ Prepared by Committee staff.

See also Moore v. United States, 432 F.2d 730 (3rd Cir. 1970); United States ex rel Green v. Rundle, 434 F.2d 1112 (3rd Cir. 1970)(both substituting a test of "normal competency" for the "farce and mockery" standard). In DeCoster v. United States, this circuit adopted a similar standard: "A defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent and conscientious advocate." 159 U.S.App.D.C. 326, 487 F.2d 1197, 1202 (1973). In determining what is "reasonably competent" the Court stated that, in general, an attorney should be guided by the A.B.A. Standards set forth in The Prosecution Function and Defense Function. (These Standards are discussed below in detail.) In Angarano v. United States, 312 A.2d 295 (D.C.C.A. 1973), the Court used the DeCoster test to find that there had been effective assitance of counsel.

INTERVIEWING

3.1 Establishment of relationship.
(a) Defense counsel should seek to establish a relationship of trust and confidence with the accused. The lawyer should explain the necessity of full disclosure of all facts known to the client for an effective defense, and he should explain the obligation of confidentiality which makes privileged the accused's disclosures relating to the case.

3.2 Interviewing the client.
(a) As soon as practicable the lawyer should seek to determine all relevant facts known to the accused. In so doing, the lawyer should probe for all legally relevant information without seeking to influence the direction of the client's responses. A.B.A. Standards, The Prosecution Function and Defense Function.

The client is usually the primary source of information for an effective defense. A prompt interview will allow the defense attorney to begin a factual and legal investigation of the case. Often, however, the defendant is reluctant to supply this information to his attorney. This is particularly true where the court has selected counsel for the accused. A.B.A. Standards, The Prosecution Function and Defense Function, p. 198. It is essential that counsel establish a relationship of trust. Where the court has appointed counsel, this relationship will "ordinarily take considerable time and patience to establish ... . Several conferences, or many, may elapse before the accused is willing to put his trust and confidence in the lawyer." A.B.A. Standards, supra, at 198. Thus, counsel should "confer with his client without delay and as often as necessary to elicit matters of defenses, or to ascertain that potential defenses are available." DeCoster, supra, at 1204.

3.1 Establishment of relationship.
(c) To insure the privacy essential for confidential communication between lawyer and client, adequate facilities should be available for private discussions between counsel and accused in jails, prisons, court houses and other places where accused persons must confer with counsel. A.B.A. Standards, The Prosecution Function and the Defense Function.

PRE-TRIAL

3.6 Prompt action to protect the accused.
(a) Many important rights of the accused can be protected and preserved only by prompt legal action. The lawyer should inform the accused of his rights forthwith and take all necessary action to vindicate such rights.

> He should consider all procedural steps which in good faith may be taken, including, for example, motions seeking pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for a change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, or seeking dismissal of the charges. A.B.A. Standards, The Prosecution Function and The Defense Function.

One of the most vital rights of the accused is the right to be released pending trial. Pending trial, counsel should be concerned with the accused's right to be released from custody and be prepared to make all the necessary motions to that end. DeCoster, supra, at 1203.

Counsel must also file all necessary motions. The fact that no pretrial motions, including pretrial release, were filed was one of the factors that led the court in United States v. Hammonds to conclude that defendant had been denied effective representation of counsel. 138 U.S.App.D.C. 155, 425 F.2d 597 (1970). See also Dyer v. United States, 126 U.S.App.D.C. 3, 379 F.2d 89 (1967).

> 4.1 Duty to investigate.
> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty. A.B.A. Standards, The Prosecution Function and the Defense Function.

The duty of the lawyer to investigate is predicated on the fact that cases are not won in the courtroom but "in the long

hours of laborious investigation and careful preparation and study of legal points which proceed to trial." The Prosecution Function and the Defense Function, p. 224. Furthermore, the lawyer's duty to investigate is not discharged by the accused's admission of guilt since it is the lawyer's function to determine whether the prosecution can establish guilt in law. In DeCoster, the court stated that it is a duty of defense counsel to conduct investigations, both factual and legal, to determine what matters of defense can be developed. This includes interviewing defense witnesses, government witnesses, if accessible, and obtaining relevant discovery from the procesutor. DeCoster, supra, at 1202.

> 3.8 Duty to keep client informed.
> The lawyer has a duty to keep his client informed of the developments in the case and the progress of preparing the defense.

> 5.1 Advising the defendant.
> (a) After informing himself fully on the facts and the law, the lawyer should advise the accused with complete candor concerning all aspects of the case, including his candid estimate of the probable outcome.
> (b) It is unprofessional conduct for a lawyer intentionally to understate or overstate the risks, hazards or prospects of the case to exert undue influence on the accused's decision as to his plea.
> (c) The lawyer should caution his client to avoid communication about the case with witnesses, except with the approval of the lawyer, to avoid any contact with jurors or prospective jurors, and to avoid either the reality or the appearance of any other improper activity. A.B.A. Standards, The Prosecution Function and the Defense Function.

Implicit in these two standards and the two that follow is the notion that the case is the defendant's and that he is enti-

tled to be kept informed about his lawyer's work. Also, there are specific decisions which the defendant must make in the case. These decisions can only be made intelligently if the lawyer has fully advised his client.

6.1 Duty to explore disposition without trial.
(a) Whenever the nature and circumstances of the case permit, the lawyer for the accused should explore the possibility of an early diversion of the case from the criminal process through the use of other community agencies.
(b) When the lawyer concludes, on the basis of full investigation and study, that under controlling law and the evidence a conviction is probable, he should so advise the accused and seek his consent to engage in plea discussions with the prosecutor, if such appears desirable.
(c) Ordinarily the lawyer should secure his client's consent before engaging in plea discussions with the prosecutor.

6.2 Conduct of discussions.
(a) In conducting discussions with the prosecutor the lawyer should keep the accused advised of developments at all times and all proposals made by the prosecutor. A.B.A. Standards, The Prosecution Function and the Defense Function.

.8 The defender should be sensitive to all of the problems of his client community and particularly sensitive to the difficulty generally experienced by the members of such community in comprehending his role. Specifically, he should be concerned with the following:
(1) He should seek, by all possible and ethical means, to interpret the process of plea-bargaining and the defender's role in it to the client community, as this is a traditional area of relationship difficulty. N.L.A.D.A. 2/ Standards for Defender Services.

It is important that the defendant be kept informed of all plea discussions so that he will be aware of the alternatives open to

2/ National Legal Aid and Defenders Association.

him. Counsel must also explain to the accused the consequences of a guilty plea in terms of the sentence which the court may impose and any other collateral effects. The Prosecution Function and the Defense Function, p. 251.

TRIAL

5.2 Control and direction of the case.
(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are: (i) what plea to enter; (ii) whether to waive jury trial; (iii) whether to testify in his own behalf.
(b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client.
(c) If a disagreement on significant matters of tactics or strategy arises between the lawyer and his client, the lawyer should make a record of the circumstances, his advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relation. A.B.A. Standards.

While the decisions on trial tactics are the exclusive province of the defense lawyer, the court will occasionally examine these tactics. The Court found ineffective assistance of counsel in the following cases: Failure to appear at arraignment, to conduct voir dire, to cross-examine two of four government witnesses, to request jury instructions, to make any pretrial motions, to speak on the accused's behalf at sentence, futile closing argument. United States v. Hammonds, 138 U.S.App.D.C. 166, 425 F.2d 597 (1970). Casual summation which was non-adversarial was ineffective representation, though harmless error. Matthews v.

United States, 145 U.S.App.D.C. 323, 449 F.2d 985 (1971). Failure to call defendant to the stand, to subpoena an allegedly material witness, to object to hearsay testimony and closeness of the case required reversal for ineffective assistance of counsel. Dyer v. United States, 126 U.S.App.D.C. 3, 379 F.2d 89(1967). In United States v. Thompson, 154 U.S.App.D.C. 347, 475 F.2d 931 (1973), the Court stated, at 931, "failure to investigate or call particular witnesses surely may amount to ineffective assistance of counsel in certain circumstances."

SENTENCING

8.1 Sentencing.

(a) The lawyer for the accused should be familiar with the sentencing alternatives available to the court and should endeavor to learn its practices in exercising sentencing discretion. The consequences of the various dispositions available should be explained fully by the lawyer to his client.

(b) Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused. If a presentence report or summary is made available to the defense lawyer, he should seek to verify the information contained in it and should be prepared to supplement or challenge it if necessary. If there is no presentence report or if it is not disclosed, he should submit to the court and the prosecutor all favorable information relevant to sentencing and in an appropriate case be prepared to suggest a program of rehabilitation based on his exploration of employment, educational and other opportunities made available by community services.

(c) Counsel should alert the accused to his right of allocution, if any, and to the possible dangers of making a judicial confession in the course of allocution which might tend to prejudice his appeal. A.B.A. Standards, The Prosecution Function and the Defense Function.

Sentencing is a critical phase in a criminal proceeding; therefore, the right to counsel attaches. Mempha v. Rhay, 389

U.S. 128 (1967); See also Townsend v. Burke, 334 U.S. 736 (1948). In United States v. Martin, 154 U.S.App.D.C. 359, 475 F.2d 943 (1973), Judge Bazelon, in his dissent, citing Mempha, stated that the "right to counsel at sentencing, as at other stages, is the right to effective assistance of counsel. That right includes, at a minimum, the aid of counsel in marshalling of facts, introducing evidence of mitigating circumstances and in general, aiding and assisting the defendant to present his case as to sentence."

In order to fully prepare himself for sentencing the lawyer should approach sentencing with the urgency that he gives to preparing for trial. The lawyer should at least conduct an extensive interview about his client's background and criminal record. Contact with defendant's family or close friends should also be made. Miller, The Role of Counsel in the Sentencing Process, (Cipes, Criminal Defense Techniques, 1969).

II. DEFENSE SERVICES

This section outlines the necessary components of a system which ensures effective representation. The first requirement is that there be a system.

1.2 Systems.

Counsel should be provided in a systematic manner in accordance with a widely publicized plan employing a defender or assigned counsel system or a combination of these. A.B.A. Standards, Providing Defense Services.

The question whether a defender, appointed counsel or mixed system is best has been widely debated under the A.B.A. Standards do not

take a position on this question. However the N.L.A.D.A. Standards for Defense Services do recommend a mixed system:

> .2 Delivery of Defense Services: Methods:
>
> A. A full-time defender organization should be available for all communities, rural or metropolitan, as the preferred method of supplying legal services to those charged with crime who are financially unable to employ counsel. The full-time defender organization may be a public activity, a private organization, a panel attorney system under an administrator, or any appropriate combination of the foregoing.

The N.L.A.D.A. Standards commentary to this section points out the major problem in states having a well-established defender system in the attrition among the membership of the private criminal defense bar. This is viewed as a loss to the system because defense-oriented law reform has often come from the private bar, and public defenders are likely to suffer without the support of the organized bar. N.L.A.D.A., p. 10. The President's commission on Law Enforcement and Administration of Justice: The Courts also recommends a mixed system. This recommendation is based on the fear that defender offices forced to handle massive caseloads will become too concerned with efficiency - to the detriment of the attorney-client relationship. Also they point out the innovative aspects of a mixed system where each method can be expected to challenge and test the other. The Courts, p. 60.

A. Independence

The most crucial element of any system designed to ensure effective representation is the independence of the defense

lawyer.

> 1.4 Professional independence.
> The plan should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. One means for assuring this independence, regardless of the type of system adopted, is to place the ultimate authority and responsibility for the operation of the plan in a board of trustees. Where an assigned counsel system is selected, it should be governed by such a board. The board should have the power to establish general policy for the operation of the plan, consistent with these standards and in keeping with the standards of professional conduct. The board should be precluded from interfering in the conduct of particular cases. A.B.A. Standards, Providing Defense Services.
>
> 1.2 Delivery of Defense Services
>
> B. If a panel of attorneys provide defense representation, such service should be supervised by a full-time administrator who is responsible for the selection, rotation, and removal of attorneys, the continuing education of these attorneys in criminal law, the preparation of interested attorneys for the panel, the selection of counsel for specific cases, and the delivery of quality representation by panel attorneys. A panel of attorneys may also be used to supplement a public or private defender organization. N.L.A.D.A. Standards for Defender Services.
>
> 3.1 However attorneys are selected to represent qualified clients, they shall be as independent as any other private counsel who undertakes the defense of an accused person. To accomplish this end, the assigned counsel whether defender or private assigned counsel should not be selected by the judiciary or an elected official, nor should he be an elected official. The most appropriate method of assuring independence modified with a proper mixture of supervision, is to create a Board of Directors representing various segments of the community. N.L.A.D.A. Standards.
>
> 3.2 Policy shall be determined by the Director of the Defender office with the advice of the selection and advisory board.

(a) A majority of the selection and advisory board shall consist of practicing attorneys.
(b) At least one-third of the board members should be representative of groups whose members derive a particular benefit from the proper functioning of the Defender's office.
(c) Persons with whom the Defender may have a professional or adversary relationship, including the members of the judiciary and prosecution, shall not serve on such a board.
(d) It shall be the duty of the board, on the one hand, to insure that the duties of the Defender are discharged properly with diligence and competence and, on the other hand, to insure that the office of the Defender is insulated against political pressures and influences. N.L.A.D.A. Standards for Defender Services.

These Standards recognize that real and potential conflicts exist w ere judges have the power of appointment. Often the role of defense counsel as an advocate requires him to resist the wishes of a judge, to press a point, and to appear uncooperative. A.B.A. Standards, The Prosecution Function and the Defense Function, p. 173. In order to take these sometimes "unpopular" stances, the lawyer should be sheltered as much as possible from undue influence outside the attorney-client relationship. In addition to the real conflicts that may result from a judicial appointment system, the standards point out that this system encourages a lack of confidence in the criminal justice system. "For the defendant may be suspicious of his lawyer's ability to zealously guard his rights under such circumstances." A.B.A. Standards, Providing Defense Services, p. 21.

Both the N.L.A.D.A. Standards and the A.B.A. Standards recommend that because the board "(W)ould exercise general supervision over the policies and operations of an agency composed of lawyers performing professional work, the board should be composed of lawyers." The N.L.A.D.A. Standards recommend that the majority of the selection and advisory board should be attorneys, with "various segments of the community" comprising the rest of the board. Both standards agree on who should be excluded from membership of the governing boards: judges, prosecutors and elected officials. Elected officials should not become involved because that system may become a patronage depository. N.L.A.D.A. Standards, p. 30; A.B.A. Standards, Providing Defense Services, p. 21. "Prosecutors and judges should be excluded from membership of governing boards to remove any basis for implication that defense counsel are under the control of those who appear as their adversaries or before whom they must appear in the representation of defendants." A.B.A. Standards, Providing Defense Services, p. 21; See also N.L.A.D.A. Standards, p. 11.

B. Supportive Services

4.3 Essential to the provision of effective representation is the adequacy of supportive services for the defender. Supportive services should include, but are not limited to, secretarial, investigative and other necessary personnel, and sufficient funds should be provided to retain various experts for investigation, consultation, and/or attendance in court. N.L.A.D.A. Standards for Defender Services.

1.5 Supporting services.
The plan should provide for investigatory, expert and other services necessary to an adequate defense. These should include not only those services and facilities needed for an effective defense at trial but also those

> that are required for effective defense participation in every phase of the process, including determinations on pretrial release, competency to stand trial and disposition following conviction. A.B.A. Standards, Providing Defense Services.

Both of these standards recommend the use of non-legal personnel to assist the lawyer. Non-legal personnel can assist attorneys in those fields where the attorney's expertise may be lacking and may at the same time reduce the cost of performing some of the duties enumerated in section one of this memorandum. These standards recommend trained investigators be used by defense counsel. Trained investigators will lessen the cost to the system, where otherwise an attorney must personally conduct the investigation. The use of trained investigators also alleviates the difficult situation of an attorney who may have to take the stand to impeach a witness he has previously interviewed. A.B.A. Standards, Providing Defense Services, p. 23.

The Standards also report the need for expert services. Many experts are available to the government through various law enforcement agencies. Where these resources are denied to the defense, the system "cannot fairly be characterized as a system of adequate representation since one of the assumptions of the adversary system is that counsel for the defense will have at his disposal the tools essential to conduct a proper defense." Attorney General's Committee, Report on Poverty and Administration of Federal Criminal Justice, p. 46 (1963).

The standards also recommend that social workers be available to assist defense counsel. If counsel is to meet the standards articulated by the A.B.A. in regards to sentencing, he will need the assistance of those trained in the fields of sociology and psychology.

C. Compensation

> 2.4 Compensation.
> Assigned counsel should be compensated for time and service necessarily performed in the discretion of the court within limits specified by the applicable statute. In establishing the limits and in the exercise of discretion the objective should be to provide reasonable compensation in accordance with prevailing standards. A.B.A. Standards, Providing Defender Services.

The N.L.A.D.A. Standards Commentary to Section 2.1 calls for payment to be aligned with current bar minimum fee schedules. The President's Commission: The Courts makes the same recommendation, p. 61. The A.B.A. Standards suggest that what is "reasonable" should be studied further.

D. Training

Part Five: Training of Defenders and Assigned Counsel

> 5.1 The Training of Defenders and assigned counsel panel members should be systematic and comprehensive. Defenders should receive training which is at least on an equal par with that received by the prosecutor and the judge.
>
> 5.2 An intensive entry-level training program should be established to ensure that all attorneys, prior to representing the indigent accused, have the basic defense skills necesary to provide adequate and effective representation. N.l.A.D.A. Standards for Defender Services.

E. Attorneys eligible for appointment.

2.1 Systematic assignment.

An assigned counsel plan should provide for a systematic and publicized method of distributing assignments. Except where there is need for an immediate assignment for temporary representation, assignments should not be made to lawyers merely because they happen to be present in court at the time the assignment is made. A lawyer should never be assigned for reasons personal to the person making assignments. If the volume of assignments is substantial, the plan should be administered by a competent staff able to advise and assist assigned counsel.

2.2 Eligibility to serve.

Assignments should be distributed as widely as possible among the qualified members of the bar. Every lawyer licensed to practice law in the jurisdiction, experienced and active in trial practice, and familiar with the practice and procedure of the criminal courts should be included in the roster of attorneys from which assignments are made. A.B.A. Standards, Providing Defense Services.

1.5 Trial lawyer's duty to administration of criminal justice.

(a) The bar should encourage through every available means the widest possible participation in the defense of criminal cases by experienced trial lawyers. Lawyers active in general trial practice should be encouraged to qualify themselves for participation in criminal cases both by formal training and thorough experience as associate counsel.

(b) All qualified trial lawyers should stand ready to undertake the defense of an accused regardless of public hostility toward the accused or personal distaste for the offense charged or the person of the defendant.

(c) Qualified trial lawyers should not assert or announce a general unwillingness to appear in criminal cases; law firms should encourage partners and associates to appear in criminal cases. A.B.A. Standards, The Prosecution Function and the Defense Function.

These Standards express the obligation of the bar to meet its responsibility in providing competent counsel. The commentary to these standards suggest two benefits that may result from enlarged participation of the bar in the trial of criminal cases. First, the civil lawyer's participation will cause him to play a larger role in the reform and improvement of the criminal law and its

processes. Second, it will avoid the "(U)ndersirable professional isolation of the criminal trial specialists." Both the N.L.A.D.A. and A.B.A. Standards reflect the idea that not every attorney is qualified to practice criminal law. The A.B.A. Standards suggest that appointments be limited to those with trial experience. They also suggest that criminal trial experience can be obtained by establishing a panel of attorneys who would co-counsel cases with experienced trial counsel. The N.L.A.D.A. Standards suggest that the "panel of attorneys should be small enough to provide a sufficient number of cases so that participating attorneys may justify giving priority to such appointed cases," but rotation should allow any interested and qualified lawyer to participate in at least one case annually. N.L.A.D.A. Standards for Defender Services, p. 11.

APPENDIX F. INTERVIEWING FORMS

1. QUESTIONS ADDRESSED TO JUDGES

Name of Judge Phone Chambers

Criminal Assignments, October 1973 through September 1974

Calendar Control - Motions

Arraignments

Judge in Chambers

Misdemeanors

Felony II

Felony I

Preliminary Hearings

Juvenile

I. CJA Voucher System

A. General

(1) When reviewing a voucher in which you sat as trial judge

(a) Do you review your case card?

(b) Do you record court time, motions filed, etc. in your record book? Do you review that?

(c) Do you ever review the court jacket?

(d) Do you ever talk to the attorney involved?

(2) Do you feel you can give proper consideration to the merits of each voucher, particularly when sitting as Judge in Chambers?

(3) From your experience, are there certain attorneys whom you generally suspect of padding their vouchers?

Do you consider it to be a pervasive practice among regular CJA attorneys?

(4) If you feel that some attorneys pad their vouchers, please specify the types of claims where you think that is the case:

(a) Time to get official records

(b) Preparing motions and memos

(c) Waiting time

(d) Travel time and parking

(e) Other

(5) Do you have a policy with respect to cutting vouchers?

(a) Across the board percentage cut

(b) Percentage cuts of certain types of claims

(c) Disallowance of certain types of claims

(6) Do you feel that young attorneys and non-regular practitioners spend more time on a case than regular practitioners?

Assuming all their claims can be fully substantiated, do you think they should be fully compensated for this time?

(7) When you cut a voucher, is it clear from the voucher form which areas you have cut?

Do you ever indicate to counsel your reasons for making the cuts?

(8) Do CJA funding constraints cause you to cut vouchers on claims that you might otherwise approve?

(9) Do you ever disapprove requests for expert and other services?

If so, do you deny the request with a written order that could be appealed?

B. <u>Excess Compensation</u>

(1) How often do you get claims for excess compensation?

(2) Have you ever approved such claims?

(3) What factors compel you to approve a claim for excess compensation?

(a) Counsel's success

(b) Counsel's legal ability

(c) Complexity of the law

(d) Complexity of the facts

(e) Number of motions filed

(f) Length of trial

(g) Length of representation

(h) Other

(4) Having approved an excess compensation claim, do you think any purpose is served by having it referred to the Chief Judge for final approval?

C. Conclusions

(1) Would you prefer that vouchers going to Judge in Chambers be handled by someone else?

(2) Would you prefer that vouchers for cases over which you have presided be handled by someone else?

(3) Or would you prefer to rule on vouchers, but have them subjected to thorough check and review beforehand by an administrator or some other body?

(4) What do you consider to be the most serious problems with respect to the voucher system? Are there any changes you would like to see made?

II. CJA Appointment System

A. Questions directed to Magistrates and Superior Court judges who have had arraignments in the past year:

(1) Are you acquainted with the legal abilities of counsel who appear on the daily lists of attorneys available to take appointments?

If not, what kinds of inquiries do you make?

(2) Do you ever find yourself dissatisfied with the quality of attorneys listed as available on the day of appointment?

If so, what do you do if you are dissatisfied?

(3) What do you do if the number of attorneys listed is insufficient for the number of cases to be arraigned or presented on a given day?

(a) Do you assign more cases to the available attorneys than you would like?

(b) Do you continue the proceedings?

(c) Do you have someone stand in and then appoint counsel later?

(d) Do you make an effort to call in additional attorneys?

(4) Do you give preference to any class of attorneys for different types of offenses [e.g. misdemeanors to students, complicated felonies to PDS]?

(5) Do you think appointments should be handled by judges and magistrates?

If so, why?

(6) Is there any other manner of appointment that you would find acceptable?

(7) Assuming that arraignments or presentments could be handled without interruption, would you object to a procedure whereby the defendant selected his own counsel from a list of attorneys who have volunteered for that purpose?

III. Quality of Practitioners

(1) Do you think that attorneys appointed under CJA should meet criteria other than just bar membership?

If so, what should these criteria include?

(2) Do you think that attorneys now practicing under the Act could use advanced training in the criminal law and skills?

Should attorneys practicing under the Act be required to attend training sessions?

(3) Do you think that some attorneys practicing

under CJA have excessive caseloads?

If so, how is that evident to you?

(a) Complaints by defendants

(b) Requests for continuances

(c) Quality of representation

(d) Other

(4) What phases of a criminal case do you think regular CJA appointed attorneys tend to neglect?

(a) Arraignment/presentment and bond hearing

- preparation for bond hearing
- preparation and filing of bond review motions

(b) Pre-trial motions

(c) Investigation and preparation

(d) Securing appearance of witnesses

(e) Trial techniques

(f) Disposition and sentencing

(g) Other

(5) Do you notice any difference between attorneys who regularly handle Felony I's, Felony II's, misdemeanors, and juvenile cases?

(6) How would you compare the performance of the following categories of attorneys with respect to the categories set out in question (4) above:

(a) Law students

(b) Georgetown Interns

(c) PDS attorneys

(d) Non-regular CJA practitioners

(e) Retained counsel

(7) What action do you take in a case where there is or has been ineffective representation?

(8) What are the circumstances in which you will remove counsel from a case?

(9) Would you prefer that PDS could provide more counsel to take cases?

If so, why?

(10) Would you prefer that there were more non-regular attorneys available to take CJA cases?

If so, why?

Do you feel that attorneys without extensive trial experience should be appointed to CJA cases?

If so, how would you bring them into the system?

2. QUESTIONS ADDRESSED TO CJA PRACTITIONERS

I. Adequacy of Compensation

(1) Are the $30 and $20 limits realistic vis a vis costs to you of handling CJA cases?

What are the hourly rates you charge in retained cases?

In billing for retained cases do you differentiate between in-court and out-of-court time?

What is the overhead cost per billing hour of running your office?

Do you have a secretary, full or parttime?

(2) Are the maximum allowances for experts, investigators, and other services realistic?

If not, what would be adequate compensation for different types of experts and services--by category?

If the rates are too low, do they inhibit the use of expert testimony? If so, to what extent and in what type of cases?

(3) Excess compensation

How frequently do you put in for this? In what types of cases?

Are there built-in inhibitions against claiming excess compensation? If so what are these?

II. Voucher System

(1) What types of claims are generally disapproved although authorized by statute (e.g., research time, waiting time)?

(2) What types of claims are not entered on vouchers in the knowledge and expectation that they will be disapproved?

Are there certain judges who invariably disallow certain types of expenses, and, thus claims are not made? Name judge and type of claim.

(3) When a voucher is cut do you know what portion was cut?

(a) Do you know why it was cut?

(b) Do you ever ask the judge?

(c) Do you get an answer in those circumstances?

(4) When you are appointed to a client who qualifies partially for CJA what has been your success in getting the client to honor the contribution order?

(5) Do you feel any inhibitions in filing motions and taking other actions that consume court time or slow down the dockets arising out of judges holding both the power of appointment/

removal and the power of the purse?

(6) Have you found any difference in voucher cutting between Superior Court and U.S. District Court?

(7) What do you consider to be the most serious problem with respect to the voucher system?

III. CJA APPOINTMENTS

(1) How many panels are you on for taking CJA appointments?

(a) Superior Court

(b) District of Columbia Court of Appeals

(c) United States District Court

(d) United States Court of Appeals

(2) Have you been getting appointments from each of the courts where you are listed? In which court is the bulk of your practice?

(3) Roughly how many CJA appointments do you handle each year?

(a) How many retained criminal cases?

(b) How many retained civil cases?

(4) Do you have a preference for taking cases in Superior Court or U.S. District Court? If so, why?

(5) Have you been removed from appointed cases at the instance of judges during the past year?

(a) How many times?

(b) What were the circumstances?

(6) How many times over the past year have you asked to withdraw from appointed cases?

(a) What were the circumstances?

(7) What kinds of difficulties, if any, have you encountered in maintaining client contact with defendants incarcerated in D.C. Jail, Women's Detention Center, or Lorton?

(8) Would you prefer that the appointing power not be in the hands of the judges and magistrates? If so, why? If not, why not?

(9) Do you see any major problems with the present system of making CJA appointments? Please specify.

IV. Services

(1) Investigation--do you use investigators?

(a) How frequently?

(b) Do you hire your own or use those available through PDS?

(c) If PDS, what was your experience with PDS investigators?

(d) If you hire your own, how do you pay them? (1) According to what the judge awards you? (2) Flat rate?

(2) Social Services--Do you think there is a need for social workers to work on cases with attorneys?

(a) Have you ever used ORD?

(b) What was your experience with them?

3. INTERVIEW QUESTIONS FOR NON-REGULAR CJA PRACTITIONERS

Name of Attorney _____

Phone _____

Case[s]:

Name of Defendant	Charge[s]	Sup.Ct. No.

(1) Is the case [or cases] to which you were appointed last April closed?

- First Offender Treatment [misdemeanor]
- Dismissed at preliminary hearing
- Dismissed for other reasons
- Guilty plea
- Verdict [by judge or jury?]
  - acquittal
  - conviction
- Sentence

If still open, what stage is the case in?

(2) If your case [or cases] is closed, have you submitted a CJA voucher?

If so, when did you submit it?

- How much did you claim?

- How does this claim break down between various categories?

- Has the voucher been reviewed by a judge? By whom?

- Did the judge approve full or partial payment?

- Have you received payment from the Administrative Office? If so, when?

(3) To what extent, if any, did other members of your firm assist in handling the case?

(4) What was the extent of your criminal trial experience prior to your CJA appointment?

- No. of felonies

- No of misdemeanors

- No of juvenile cases

(5) How recent was that trial experience, if any?

(6) Given the existing system, would you be willing to take more CJA cases?

If so, how many appointments per year do you feel you could take?

(7) Was there any particular area wherein you felt handicapped in providing effective representation?

- Lack of familiarity with Superior Court procedures?

- Lack of familiarity with trial procedure?

- Lack of familiarity with the law of evidence?

- Lack of current knowledge of developments in the criminal law?

- Inability [either in terms of time or resources] to investigate and prepare your case[s] fully?

- Difficulty in maintaining contact with your client?

- Other

(8) Did you seek the advice of the Public Defender Service on any phase of your case?

If so, please specify and indicate whether or not the assistance PDS gave you was adequate?

If you did not seek the advice of PDS, is it because you did not know their assistance was available?

(9) Are there any particular areas with respect to law and tactics in which you would have liked some help? Please specify.

(10) Would you be willing to attend seminars and training programs?

(11) What subjects would you consider most useful for someone in your position?

(12) If any effort were made to provide more extensive services to CJA attorneys along the lines you have suggested above, would you be more willing than you are now to accept CJA appointments?

(13) What, if anything, do you think the court and the U.S. Attorney could do to ease the task of attorneys handling CJA cases?

(14) Please give us any other comments you may have with respect to your recent experience in handling CJA cases.

END