

Striking a Balance:

Adequate Compensation—Effective Representation

Fair Compensation for Criminal Justice Attorneys



The report of the Massachusetts Bar Association
Commission on Criminal Justice Attorney Compensation

November, 1994

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	(i)
INTRODUCTION	1
ACKNOWLEDGEMENTS	2
METHODOLOGY	3
SUMMARY OF RECOMMENDATIONS	4
ASSISTANT DISTRICT ATTORNEYS	7
Responsibilities	7
Compensation of Assistant District Attorneys	9
ASSISTANT ATTORNEYS GENERAL	11
Responsibilities	11
Compensation of Assistant Attorneys General	12
COMPARATIVE SALARIES	13
Prosecutorial	13
Public Sector	15
PUBLIC DEFENSE COUNSEL	18
Responsibilities	18
Compensation of Public Defense Counsel	20
Comparable Defender Salaries	21
Private Counsel Division Compensation (Bar Advocates)	22
COLLEGE AND LAW SCHOOL LOANS	30
CONCLUSION	31
EXHIBIT A, Comparison: Prosecutorial Salaries	34
EXHIBIT B, Comparison: Mass. Attorneys' Salaries	35
EXHIBIT C, Comparison: Defense Attorneys' Salaries	36

TABLE OF AUTHORITIES

	<u>Page</u>
American Bar Association Standards for Criminal Justice, Chapter 5: Providing Defense Services	23, 24, 28
American Bar Association Standing Committee on Legal Aid and Indigent Defendants, 1979	27
Criminal Justice in Crisis, American Bar Association, 1986	28
Gideon Undone! The Crisis In Indigent Defense Funding, American Bar Association Standing Committee on Legal Aid and Indigent Defendants, 1982	27, 28
The Indigent Defense Crisis, American Bar Association, Section on Criminal Justice, Ad Hoc Committee on the Indigent Defense Crisis, August, 1993	23, 26, 27
Massachusetts Lawyers Weekly, February 28, 1994	11, 14
National Law Journal, May 30, 1994	13, 14
National Association of Attorneys General Salary Survey, January 1, 1992	13
President's Commission on Law Enforcement and Administration of Justice, Task Force Report, The Courts (1967)	23, 24
Superior Court Advocate Resources Subcommittee, September, 1991	26
Superior Court Criminal Justice Study Committee, November 5, 1993	24, 26

INTRODUCTION

In December, 1993, Massachusetts Bar Association President Michael E. Mone, citing widespread concern whether lawyers working in the commonwealth's criminal justice system were adequately and fairly paid, created the Massachusetts Bar Association Commission on Criminal Justice Attorney Compensation. The commission examined the salary structure of prosecutors (assistant district attorneys and assistant attorneys general) and public defenders (full-time staff attorneys employed by the Committee for Public Counsel Services, and private attorneys working for the county bar advocates programs or appointed by the Superior Court).

The commission examined and compared the salaries of Massachusetts criminal justice attorneys to those of attorneys performing the same functions in comparative jurisdictions, to publicly employed attorneys not involved in the criminal justice system and to attorneys in private practice.

The commission was chaired by John M. Callahan of Northampton, MBA past president and former district attorney for the Northwestern District. Commission members included Frances Burns, professor of law at Boston University; Anthony Fugate, criminal defense attorney; Ira A. Jackson, senior vice president for Bank of Boston and former commissioner, Massachusetts Department of Revenue; David H. Locke, former minority leader of the Massachusetts Senate and practicing attorney; Lillian Miranda, justice of the Juvenile Court and former MBA vice-president and staff attorney for the Hampshire County Bar Advocate Program; and J. Owen Todd, practicing attorney and former Superior Court justice. Commission counsel was Martin W. Healy, MBA assistant general counsel.

ACKNOWLEDGMENTS

The Commission on Criminal Justice Compensation wishes to thank the following individuals who provided information and data that helped to conduct its study in a thorough and analytical manner:

- John DeVito, president, Norfolk County Bar Advocate Program.
- Gerald Downing, Berkshire County district attorney and president, Massachusetts District Attorneys Association.
- Robert Gordon, president, Hampden County Bar Advocate Program, and former president, Hampden County Bar Association.
- Thomas Greene, Massachusetts first assistant attorney general.
- Lisa M. Hewitt, general counsel, Committee for Public Counsel Services.
- Edward P. Ryan Jr., president, Worcester County Bar Advocate Program, and former president, Worcester County Bar Association.
- Benjamin Shapiro, executive director, Massachusetts District Attorneys Association.

METHODOLOGY

The Commission on Criminal Justice Attorney Compensation conducted interviews with representatives of the assistant district attorneys, assistant attorneys general, the Committee for Public Counsel Services and private attorneys participating in the County Bar Advocate programs throughout the state. The commission considered factual information and statistical data supplied by witnesses, as well as correspondence from prosecutors and defense attorneys; and it considered relevant data, reports and publications.

The commission gave particular emphasis to comparisons of the compensation paid in states with populations, economies and jurisdictional units similar to Massachusetts. The commission also considered compensation levels afforded attorneys employed by governmental agencies which were not directly involved in the criminal justice system, and to the salaries of attorneys working in private practice.

SUMMARY OF RECOMMENDATIONS

Crime is an ever present aspect of life that affects virtually every citizen. In many areas of Massachusetts it threatens to destroy the very fabric of family and community life.

The protection of our lives, our property and our basic liberties requires a criminal justice system that is swift, efficient and fair. But such a system can only guarantee these protections if it is composed of skilled, motivated and experienced professionals.

The public interest requires that talented assistant district attorneys and assistant attorneys general be employed and retained to assure that those who commit murder, rape and other crimes be vigorously prosecuted and convicted, and those who are innocent not be wrongly charged.

The constitutions of the United States and of Massachusetts mandate that persons facing criminal charges, who cannot afford counsel, must be competently represented. When the commonwealth fails to provide able and experienced defense attorneys to indigent defendants, citizens charged with crimes are denied the fundamental rights of a fair and speedy trial and effective assistance of counsel.

Assistant district attorneys, assistant attorneys general, public defenders and bar advocates (lawyers appointed to defend indigents) are paid less than their counterparts in comparative jurisdictions across the country; they are paid less than lawyers of comparative experience engaged in non-criminal justice work for the commonwealth; they are paid substantially less than criminal justice attorneys working for the federal government; and they are paid far less than their colleagues working in private practice in medium and large law firms in Massachusetts.

Public service is a noble undertaking which requires some sacrifice. However, in view of the immense responsibility involved in the prosecution and defense of criminal cases and the skill, integrity and commitment required of prosecutors and defense attorneys, society must pay compensation which is fair and reasonable. The present salaries paid to those attorneys working in our criminal justice system are so inadequate

that it is extraordinarily difficult to employ or retain the best lawyers. The cost of living, housing, transportation, medical care and education, makes it impossible for dedicated individuals to remain in positions where the sacrifices on themselves and their families have become so burdensome.

The present rates of compensation paid to assistant district attorneys, assistant attorneys general, public defenders and bar advocates are unfair and unjust to the men and women performing this essential and invaluable public service, and to the citizens of the commonwealth who need and deserve a justice system that works properly as our forebearers intended.

Inadequate funding for the attorneys handling the prosecution and defense responsibilities within our system presently denies the commonwealth's citizens a criminal justice system that functions properly.

The administration of criminal justice is in crisis, and will remain in crisis, until we adequately compensate those attorneys responsible for making the system work. The need to act is obvious, and the time to act is now.

Accordingly, this commission recommends that:

- Salaries of assistant district attorneys, assistant attorneys general and full-time public defenders (attorneys in the public counsel division of the CPCS) be increased at least 20 percent.
- Steps should be taken to keep the levels of compensation of full-time criminal justice attorneys at least equal to that of other public sector attorneys. Salaries must be indexed to cost of living increases.
- The compensation for both the full-time practitioners in the criminal justice system and for the private practitioners who work in the county bar advocate programs should be fair and reasonable "in accordance with prevailing standards."

- Compensation of bar advocate attorneys be increased for in-court and out-of-court work performed to: \$50 per hour for all district court criminal matters including juvenile; \$65 per hour for all Superior Court criminal matters and juvenile court transfers (except murder) and for appeals; and \$85 per hour for all murder cases and murder appeals.
- Bar advocate attorneys' hourly rate should be reviewed every two years and periodically increased as appropriate.

ASSISTANT DISTRICT ATTORNEYS

Responsibilities

The 11 district attorney offices in Massachusetts are mandated by law to: (1) represent the commonwealth in criminal matters in the Superior Court as well as in the six-person jury sessions in all district courts; (2) prosecute appeals in the Appeals Court and the Supreme Judicial Court; (3) represent the various counties in all civil suits to which they are a party; (4) investigate the circumstances of all suspicious deaths and prosecute when there is evidence of criminal conduct; (5) investigate and prosecute cases of child abuse and investigate and prosecute cases of neglect that are referred to the district attorney by the Department of Social Services; (6) investigate and prosecute cases of neglect and abuse (economic and otherwise) against the elderly that are referred to the district attorney by the Department of Elder Services; (7) investigate and prosecute cases of abuse or neglect against the physically and/or mentally handicapped; and (8) investigate possible violations of open meeting laws and institute civil actions to remedy violations.

The roles and responsibilities of district attorneys have increased dramatically during the past two decades. Until the advent, in the early 1970s, of District Court prosecutors working out of the district attorneys' offices, thousands of cases were prosecuted in the District Court by police officers. Until 1978, most district attorneys and assistant district attorneys were part-time employees who maintained private law practices. In 1978, by act of the legislature, all district attorneys and assistant district attorneys became full-time public employees and were prohibited from conducting outside legal practice. Funding of the district attorneys was transferred from the counties to the state. With the changes that resulted from the Court Reorganization of 1978, there came a striking increase in the workload of the district attorney. This increase resulted from laws imposing new responsibilities on district attorneys and from the increase in crime that was endemic to the 1970s and 1980s, and that has

continued into the 1990s. Essentially, a district attorney is expected to control prosecution of most criminal matters, not just those where his or her appearance is required by statute.

Over the past 20 years, district attorneys have created specialized teams which focus on particular categories of crimes. These units include: crime prevention and control units of state police officers assigned to district attorney offices who conduct investigations into major crimes; white collar crime units that investigate and prosecute economic and other white collar crimes; repeat and serious offender units that "fast track," or speedily prosecute, certain cases with the intention of removing dangerous criminals from our communities; child sexual and physical abuse units that investigate and prosecute all Department of Social Services referrals; civil rights units that combat civil rights violations, including hate crimes; elder abuse investigation and prosecution units; domestic violence units; drug task forces; and victim witness programs which were instituted in order to guide the victim through the criminal justice system.

Assistant district attorneys with 0-2 years experience carry a caseload consisting of various district court matters such as felonies and serious misdemeanors including domestic violence cases, motor vehicle offenses such as operating to endanger, drunk driving offenses, assault and battery with a dangerous weapon, larcenies, receiving stolen property, breaking and entering a building in the nighttime, malicious damage of personal property, possession with intent to distribute drugs, and indecent assault and battery. Some assistant district attorneys with only two to three years experience are also at times assigned to the jury-of-six session handling these same offenses.

Assistant district attorneys with approximately three to five years experience are assigned to a great variety of tasks. Some are assigned to Superior Court and begin with entry level superior court cases, e.g., non-violent felonies with little or no serious personal injury. These lawyers progress to more serious felonies including crimes of violence. They may be assigned to supervisory responsibilities in the district court. Some lawyers are assigned to specialized units, e.g., child abuse, domestic violence or

special investigations. Others do appellate work, handle open meeting law issues and render other legal opinions. Most participate in a rotation assignment being available 24 hours a day to assist with search warrants and other emergency legal matters. Many prepare and present training programs for law enforcement personnel as well as engage in other educational and informational programs within the community. By the fourth and fifth years, many assistant district attorneys have progressed to key positions. Some have become experienced and highly competent trial lawyers who have handled a number of significant criminal trials.

Assistant district attorneys with five to 15 years experience usually handle the most serious and complex matters in their areas of expertise. They are normally either at supervisory levels in the District Court, office administrators or trying felonies in the Superior Court. The most able trial lawyers are assigned to handle a wide variety of the most serious and violent cases including homicide, aggravated rape, armed home invasions, elderly abuse, career criminal prosecutions and those cases involving particularly difficult legal or evidentiary issues.

On the average, a Superior Court assistant district attorney's caseload in most offices is approximately 40 active cases. This number does not include on-going investigations prior to indictment, or cases still in the District Court. A District Court assistant may be handling many times that number.

Compensation of Assistant District Attorneys

The average starting salary of an assistant district attorney in Massachusetts is \$23,000 to \$25,000. Thereafter, the salary will depend upon experience, work load, difficulty of work load and performance. Generally, salaries fall into the following schedule:

0-3 Years	\$23,000 - \$28,000
3-5 Years	\$28,000 - \$36,000
5-10 Years	\$36,000 - \$45,000
10-15 Years	\$45,000 - \$62,500

A few assistants, skilled in the prosecution of major felony cases or who are senior administrators may receive compensation somewhat in excess of the schedule, if the budget of a particular district attorney permits.

The commonwealth's 11 elected district attorneys last received a salary increase on July 1, 1987. At that time, the salary of a district attorney was increased from \$62,500 to \$72,500. From 1987 to 1994, inflation rose over 30 percent in the Northeast.

The failure of the Legislature to increase the salaries at the top of the criminal justice system has had a direct effect upon the progress of salary schedules for assistant district attorneys. There have been some additional assistants appointed and some improvement in some assistants' salaries. However, the salary paid assistant district attorneys in 1987 has lagged far behind increases in the cost of living, and the struggle of assistant district attorneys to meet their expenses and support themselves and their families has become even more difficult.

ASSISTANT ATTORNEYS GENERAL

Responsibilities

The office of the attorney general for the commonwealth of Massachusetts is the chief law enforcement agency for the state. It is charged with the responsibility of representing the commonwealth in all matters in which the commonwealth is a party or has an interest. The office is composed of five bureaus - executive, government, criminal, family and community crimes, and public protection. The bureaus are further divided into a number of units and divisions. These units and divisions handle a wide array of matters on behalf of the citizens of the commonwealth such as white collar criminal offenses, fair labor and business practices, environmental enforcement efforts, medicaid fraud control, public corruption enforcement, narcotics and organized crime, consumer protection, civil rights enforcement and the regulation of public utilities.

The annual operating budget for the attorney general's office for fiscal year 1994 is \$18,399,500. In fiscal year 1989, the total operating budget for the attorney general's office was \$19,554,471. This represents a decline in state budget appropriation of 2.052 percent. The attorney general's appropriation has decreased every fiscal year since 1989. Some fiscal years have been marked with a larger decrease than evident in FY94. In FY92, the state attorney general's appropriation was established at \$15,481,804, a 17.314 percent decrease compared to FY89.

As of February 1, 1994, there were a total of 217 assistant attorneys general employed by the attorney general's office. In addition, a total of 277 non-attorney support personnel were employed by the office. In comparison, a survey published by the Massachusetts Lawyers Weekly on February 28, 1994, showed only three of Boston's law firms with more attorney personnel than the attorney general's office.

In an effort to supplement additional personnel in light of the dwindling state appropriations, the office of attorney general has maximized its use of volunteer resources. In FY91, the office had a total volunteer staff of 111 and in FY93, the

volunteer staff nearly doubled with 210 volunteers. In another cost savings trend, the office has decreased its use of contracting out legal services to outside counsel.

As of January 1, 1994, the office had a total caseload of 13,116 matters pending. Of these matters, 6,742 were directly attributed to the criminal bureau's caseload. In FY93, the total pending caseload was 9,533. As every year has demonstrated, the responsibilities of the office of attorney general, as reflected in the caseload, have continued an upward spiral, yet funding of the office continues to slip in a downward trend. This observation is also reflective of the caseload of the criminal bureau where in 1991, a 21 percent cumulative caseload growth was reported compared to a 205 percent cumulative caseload growth for 1994.

Compensation of Assistant Attorneys General

Since January 1992, the starting salary of attorneys employed by the attorney general's office is \$25,000. Generally, salaries fall into the following schedule:

0-2 years	\$25,000
2-5 years	\$25,000 to \$27,500
5-9 years	\$30,000 to \$35,000
10 or more years	\$40,000 to \$50,000

The attorney general's office has a total of 46 assistant attorneys general who are paid below the \$30,000 level; assistant attorneys general making below \$35,000 total 86; with a majority of attorneys (119) employed by the office having salaries below \$40,000.

The Massachusetts attorney general receives \$65,000 annually as the chief law enforcement officer of the state. The attorney general has, as previously indicated, a staff of 277 non-attorney personnel and 217 assistant attorneys general to manage, along with five bureaus and numerous units and divisions, each handling distinct areas of law enforcement.

COMPARATIVE SALARIES

Prosecutorial

Between the years 1987-1993, Connecticut's appointed chief prosecutor's salary rose from \$62,725 to \$79,860, an 18 percent increase; Michigan's elected prosecutor's salary rose from \$59,162 to \$71,286, a 20 percent increase; New Jersey's appointed prosecutor's salary rose from \$85,000 to \$100,000, a 15 percent increase; and New York City's (Manhattan) elected prosecutor's salary increased from \$97,000 to \$115,000 or 19 percent. By contrast, as previously indicated, Massachusetts' elected district attorneys saw no increase during this period.

Connecticut provides a prime example of how a state with comparable criminal justice problems compensates its prosecutors. The entry level salary at Connecticut's state's attorney's office is \$42,132. A recent salary survey published May 30, 1994 by the National Law Journal revealed the following entry level salaries for prosecutors: Alameda County, California \$43,380; Maricopa County, Arizona \$35,714; Dane County, Wisconsin \$36,180; Kalamazoo County, Michigan \$32,885; New York County, New York (Manhattan) \$32,000; St. Louis, Missouri \$30,833; Utah County, Utah \$28,938; Baltimore, County, Maryland \$28,854; Ada County, Idaho \$28,000. The survey reports salaries across the country in the following areas: prosecutors, public defenders, state attorneys general, starting salaries for the law school class of 1994, median salaries for the law school class of 1993, public interest lawyers, city attorneys, law clerks (in federal and state courts), government attorneys, state bar disciplinary counsel, legal services lawyers, federal judges, associates at large law firms, associates at small law firms, state judges, partners at large firms, court administrative staff.

Michigan's attorney general receives \$109,000 annually; New Jersey's attorney general receives \$95,000 annually; and New York's attorney general receives \$110,000 annually.

In the latest survey conducted by the National Association of Attorneys General, dated January 1, 1992, information was obtained on neighboring states to

Massachusetts, as well as other states of similarly comparable size and character to Massachusetts. The comparisons to neighboring states showed that in Connecticut, the entry level salary for assistant attorneys general was between \$36,000 and \$47,000. The starting salary for New Hampshire's entry level was between \$33,000 and \$49,000. Maine started its assistant attorneys general at \$28,000.

When Massachusetts was compared to similarly sized industrial states, a similar disparity was found. See Exhibit "A". For example, New Jersey assistant attorneys general receive a starting salary in the range of \$35,000 to \$39,000; Michigan's starting range for entry level assistant attorneys general was \$24,000 to \$46,000.

The National Association of Attorneys General's report also concluded that "there continues to be a disparity between the salaries of public and private sector attorneys."

A survey undertaken by the Massachusetts Lawyers Weekly and published on February 28, 1994 reflects salaries earned by associates and partners in private practice in Massachusetts law firms. These salaries far exceed those paid to criminal justice system attorneys of comparative experience.

The National Law Journal survey, and the Massachusetts Lawyers Weekly survey show that some first year lawyers in private practice in Massachusetts are earning more than the attorney general and as much as the elected district attorneys; and that law firm associates with three to six years experience are earning far in excess of the highly experienced trial attorneys that represent the state on a daily basis in its most serious criminal cases.

The Massachusetts District Attorneys Association has provided other examples of comparable starting salaries. Their report indicates that full-time assistant district attorneys in Albany, New York start at \$32,000, full-time assistant county prosecutors in New Jersey start at \$30,000 and that despite a complicated method of payment involving state and local contributions, full-time assistant district attorneys in Alabama normally start at approximately \$30,000. The average starting salary for full-time

assistant state attorneys in Maryland is \$32,626 and the average starting salary in California is \$32,500. (Because many jurisdictions continue to have part-time assistants, comparison must be made with full-time positions.)

Public Sector

Massachusetts public sector attorneys practicing in non-criminal justice roles are more highly compensated than their criminal justice counterparts. See Exhibit "B". Generally, starting salaries for attorneys at Massachusetts agencies and departments are higher than the salaries paid assistant district attorneys. For example, the Department of Mental Health, the Department of Mental Retardation and the Department of Revenue start their attorneys at \$33,896.

Schedules of executive branch attorney salaries for 1993-1994 reveal the following: the position of Counsel I which requires no previous legal experience, has a salary range of \$33,896 to \$45,399. Counsel II positions which require one year of legal experience have a salary range of \$38,851 to \$51,864. The position of assistant general counsel requires one or more years of experience and has a range of \$35,000 to \$50,000. A regional counsel which carries some management responsibility is paid a salary of \$56,000. Deputy general counsels are paid in the range of \$44,590 to \$55,850 with the degree of legal experience varying. General counsels are paid in the range of \$52,700 to \$66,437. This is a management position and degree of legal experience varies.

In addition to general executive agency positions, the commission surveyed some state agency salaries at entry-level, mid-level and top-level staff attorney positions:

- Massachusetts Auditors Office:
 - Associate counsel \$37,300 to \$45,000
 - General counsel \$46,500 to \$54,700

- Department of Education:
 - Entry-level position (Counsel II) \$38,851 to \$51,864
 - Mid-level positions \$41,017 and \$51,210

- Office of the Inspector General:

Entry-level position (Staff Counsel)	\$30,000 to \$45,000
Assistant general counsel	\$35,000 to \$50,000
General counsel	\$50,000 to \$65,000
First assistant inspector general for legal affairs	\$55,000 to \$70,000

- Executive Office of Communities and Development:

Counsel II position	\$38,851 to \$51,864
Chief counsel position	\$48,478 to \$60,911

- Department of Mental Health:

Associate general counsel	\$41,017 to \$51,210
Assistant general counsel	\$44,590 to \$55,850

- Massachusetts Port Authority:

Chief legal counsel	\$84,000 to \$126,100
Senior legal counsel	\$52,100 to \$78,300
Labor counsel	\$63,100 to \$94,600
Legal counsel	\$42,400 to \$63,500

The salary schedule for Massachusetts probation officers provides for an entry level salary of \$34,628. It should be noted that the starting salary for a court officer in Massachusetts is \$31,358 and that the pay scale increases to \$40,421 after seven years. The minimum entry requirements for a court officer are a high school degree and two years of law enforcement or security experience and three days of training.

The U.S. Department of Justice, including the Immigration and Naturalization Service, U.S. Attorneys Office, Bureau of Prisons, Drug Enforcement Administration, Federal Bureau of Investigation and Marshall's Service is comprised of approximately 7,280 attorneys. In 1994, the starting salary for Department of Justice attorneys who have just completed law school is \$35,045. After passing the bar and completing one year (or in some cases, a lesser period of time) of service, attorneys may receive a salary of more than \$40,000.

The salary range for assistant united states attorneys runs from \$27,900 to \$87,900 for non-supervisory personnel and for supervisory personnel and senior attorneys \$88,100 to \$107,300. United states attorneys are paid \$115,700. The U.S. Attorneys Office is comprised of 93 U.S. attorneys and approximately 4,000 assistant U.S.

attorneys. The U.S. attorneys executive office notes a trend toward a longer tenure in U.S. attorney offices for staff than was the case in the past. Given this salary structure, it is understandable that retention of experienced federal prosecutors is much better than that for top-flight assistant district attorneys and assistant attorneys general. In all other departments and agencies of the federal government the normal entry-level salary is \$35,045.

PUBLIC DEFENSE COUNSEL

Responsibilities

Massachusetts General Laws Chapter 211D, section 9(a) mandates that Public Counsel Division attorneys provide: "[V]ertical or continuous representation at pre-trial and trial states by the attorney assigned or appointed, whenever possible." This provision fundamentally shapes the responsibilities of the Public Counsel Division attorney staff.

Defender agencies in many other states employ legions of inexperienced lawyers to cover arraignments and preliminary hearings, and a handful of veterans to handle trials. In these agencies, the staff can resemble a pyramid, a handful of senior lawyers on top, with a broad base of new lawyers at the bottom.

In the public counsel division, every lawyer must be a Superior Court litigator. For this reason, every newly hired public defender receives a rigorous, month-long training program that includes intensive practice exercises. Upon completion of the program and assignment to a local office, the attorney is supervised and receives ongoing additional training. Indeed, the first case assigned to a new public defender will be a Superior Court felony. It is rare for a public defender to appear in any case that is not a Superior Court felony. The need to attract and retain a staff composed entirely of Superior Court specialists is the most serious challenge facing the public counsel division.

The Committee for Public Counsel Services was established by Chapter 673 of the Acts of 1983, which is set out in Chapter 211D of the Massachusetts General Laws. Prior to 1983, no single agency was responsible for the delivery of criminal and non-criminal legal services to indigents entitled to representation. The Massachusetts Defenders Committee, which had been in existence since 1960, provided the principal representation in serious criminal cases through its salaried, full-time public defender staff. The county bar advocate program, affiliated with the county bar associations,

provided the bulk of the representation in all counties except Suffolk (Boston) and Berkshire, where judges appointed private attorneys from court lists. The Roxbury Defenders Committee, a private non-profit corporation provided representation in cases in Roxbury District Court and Suffolk Superior Court.

With the exception of the defenders committee, the other programs and the private bar appointments were all paid from funds administered by the chief administrative justice of the Trial Court. Chapter 673 consolidated all of these defense programs, placing them under the auspices of a 15-member committee appointed by the Supreme Judicial Court.

Chapter 211D provides for the division of cases between the public and private counsel divisions. The Public Counsel Division is directed to handle Superior Court cases and probable cause felony cases in the District Court, except when there are co-defendants in the case or a conflict of interest with another client. The staff attorneys are salaried employees. The Private Counsel Division is made up of more than 2,000 attorneys in private practice. These attorneys are either members of a bar advocate program or are certified to take cases and are selected from a list provided to the court by CPCS.

Private attorneys handle all criminal cases over which the District Court has final jurisdiction, and cases assigned by the Probate and Family Courts and the Housing Court. Private counsel are compensated through an hourly fee structure of \$35 for in-court service and \$25 for out-of-court service in criminal cases, \$35 per hour for non-criminal cases and \$50 per hour for murder cases.

CPCS is also responsible for the establishment of standards for counsel. It is required to "establish standards for the public and private counsel divisions which shall include (a) vertical representation, (b) required training, (c) caseload limitation, (d) investigative service, (e) social service, (f) expert witness availability, (g) support service and (h) adequate supervision." Finally, CPCS must monitor and evaluate compliance with the standards and the performance of counsel to ensure competent representation.

CPCS is also responsible for the development of training programs for both the public and private counsel divisions, for the appointment of counsel in murder cases and all appellate cases, and for compensating attorneys who receive appointments under the auspices of the private counsel division, a task previously handled by the Trial Court. In addition, CPCS has the responsibility to establish rates of compensation payable to private attorneys, but only after holding public hearings and subject to appropriation.

Compensation of Public Counsel

Like their prosecutorial counterparts, salaried public defenders in the CPCS public counsel division are significantly underpaid relative to their peers in comparable jurisdictions, and to counsel positions in other branches of Massachusetts government.

For salary analysis purposes, the public defenders employed by CPCS are comprised of four groups:

1) Beginning Lawyers. The starting salary for a beginning public defender is \$28,600. There has been no increase in this amount since 1988. Lawyers at this salary level will be carefully supervised, but will very quickly assume direct responsibility for a caseload of 40 to 50 open Superior Court felonies. Supervisors exercise some judgment in assigning these cases (no new lawyer will enter a murder case) but none of the cases assigned to new lawyers is trivial. All new lawyers cases are felonies, most are now directly indicted, and new lawyers quickly find themselves involved in intensive Superior Court practice.

2) Mid-Range Lawyers. At the end of 10 years, mid-range lawyers hit a ceiling of \$48,000, but the majority of mid-range lawyers earn far less with an average earning approximately \$36,000. These lawyers are expected to handle a high volume of the most serious criminal cases, excluding only first-degree murder cases. They assume supervisory responsibilities for the least experienced lawyers, and provide much of the training staff for public and private counsel division's training programs.

3) Senior Trial and Appellate Counsels. The public counsel division has managed to maintain the services of a number of extremely senior lawyers, with up to 25 years of experience in criminal litigation. The standard salary for senior trial counsels is \$55,161. They handle the full range of criminal cases, including murders, and are mentors to the entire criminal defense bar. The lawyers in this role can be thought of as comparable to first assistant district attorneys. They train the younger lawyers, take the toughest cases and assume administrative responsibilities.

4) Regional Supervisors. Each regional office is headed by a senior lawyer who acts as the defense counterpart to the district attorney. The regional supervisors are paid \$62,192 for an extremely difficult and complex job that includes the continued defense of their own serious and extensive caseloads. They supervise attorneys and office staff, train public and private counsel division attorneys, maintain relations with the courts, prosecutors and other criminal justice system representatives, execute CPCS's policies in their region and act as the leaders of the defense bar. Their average length of CPCS service is 17 years.

Comparable Defender Salaries

At each of these levels, Massachusetts public defenders are hard-pressed. See Exhibit "C". According to the survey published in the National Law Journal survey, the CPCS public defender salary range suffers badly in comparison to the salary ranges in most jurisdictions. For example, in Hartford, Connecticut, the public defender salary range is from \$42,132 to \$94,940; in Baltimore, the range is from \$35,113 to \$89,000; in Chicago, it is from \$29,770 to \$90,000; in Denver, it is from \$31,800 to \$79,500; and in Los Angeles, it is from \$42,461 to \$135,000.

Other comparable salary ranges are:

Atlanta:	\$37,000 - \$65,000
Arizona:	\$29,000 - \$90,000
Boise:	\$26,000 - \$70,000
Charlotte:	\$23,000 - \$71,000
Dallas:	\$32,000 - \$78,000

District of Columbia:	\$34,000 - \$81,000
DesMoines:	\$30,000 - \$63,000
Madison:	\$36,000 - \$76,000
Miami:	\$28,000 - \$94,000
Minnesota:	\$33,000 - \$91,000
Richmond:	\$31,000 - \$106,000

CPCS public defender salaries in Massachusetts lag far behind the salaries offered by the federal public defender in Boston. In the past two years, one trial defender switched from CPCS to federal practice for a nearly \$20,000 increase in salary; and one CPCS investigator was hired by the federal defender office at a salary level which CPCS pays to its most experienced mid-range lawyers.

CPCS's ability to provide high quality representation is jeopardized by the financial strains on its mid-range lawyers. Typically, these public defenders are burdened with law school and/or college debts exceeding their annual salaries. Loan payments of \$600 to \$1,000 each month by staff attorneys are not uncommon. They are fully trained, capable of handling any case, and extremely productive. Increasingly, they find themselves forced to choose between their work with CPCS and their families' financial needs.

Private Counsel Division Compensation (Bar Advocates)

Section 11 of Chapter 211D requires the Committee for Public Counsel Services to "establish rates of compensation payable to appointed or assigned counsel in the private counsel division, and to review such rates at least every two years. The statute provides that such rates are "subject to appropriation" of the necessary funds. The existing rates were established in 1981 by the Trial Court.

While CPCS has recently approved slightly increased rates, the money to pay them has not yet been appropriated. The present hourly rates as outlined previously are \$25 for out-of-court and \$35 for in-court services in all criminal cases except murder cases (which are compensated at a flat rate of \$50 an hour) and family and other civil cases which are paid at a flat rate of \$35 per hour.

The Commission on Criminal Justice Attorney Compensation believes after careful review that the present rate of compensation is not only confiscatory but, in fact, casts a chilling effect on an indigent client's right to counsel.

As demonstrated by the ABA's August, 1993 publication, The Indigent Defense Crisis, inadequate funding of assigned counsel services leads directly to ineffective representation:

Some attorneys, whose practices are largely dependent on court appointments, find that they must make up for the low compensation per case by taking on more clients than they can properly represent. For others who take on indigent assignments, a temptation to devote their energies to paying clients and neglect their indigent clients exists.

Even the most diligent and dedicated attorney, when inadequately compensated, might have to forgo necessary case preparation and consultation with expert witnesses and critical witnesses may be overlooked without proper investigative resources.

The Indigent Defense Crisis, at 6.

Standard 5-2.4 Compensation of the ABA Standards on Providing Defense Services states:

Assigned counsel should be compensated for time and service performed. The objective should be to provide reasonable compensation in accordance with prevailing standards....

According to the Commentary following the Standard, it is stated

This standard thus rejects the view that lawyers are required to provide pro bono legal services in criminal cases....[t]he President's Crime Commission also rejected the notion that members of the bar should be required to provide defense representation without adequate payments for their time and efforts.

The Commission referred to was the President's Commission on Law Enforcement and Administration of Justice in its Task Force report, the Courts, 61 (1967). That Commission had stated:

Assigned counsel should be paid a fee comparable to that which an average lawyer would receive from a paying client for performing similar services. Most presently proposed standards for compensation of assigned counsel call for a fee which is less than could be

commanded in private practice. It has been argued that these standards are sufficient because it is part of a lawyer's obligation as a member of the bar to contribute his services to the defense of the poor. But these standards unavoidably impose a stigma of inferiority on the defense of the accused....[I]t is undesirable to perpetuate a system in which representation for the poor seems to be obtained at a discount.

The Standard 5-2.4 goes on to say:

There are a variety of reasons for requiring that reasonable compensation be paid to assigned counsel. First, it is simply unfair to ask those lawyers who happen to have skill in trial practice and familiarity with criminal law and procedure to donate time to defense representation. It is worth remembering that the judge, prosecutor, and other officials in the criminal courtroom are not expected to work for compensation that is patently inadequate. Lawyers do, of course, have a public service responsibility, but the dimensions of the national need and constitutional importance of counsel is so great that it cannot be discharged by unpaid or inadequately compensated attorneys. Indeed, where payments for counsel are deficient, it is exceedingly difficult to attract able lawyers into criminal practice and to enhance the quality of the defense bar. But most important, the quality of the representation often suffers when adequate compensation for counsel is not available. Absent remuneration for time and effort, even the most dedicated lawyers may fail to do all within their power to defend vigorously the cause of the indigent.

The commission's research included a review of two recent recommendations for increasing rates for private attorneys: 1) The Committee for Public Counsel Services own study and report; and 2) the Report of the Superior Court Criminal Justice Study Committee, November, 1993.

CPCS held hearings in December 1993 and January 1994 in various locations throughout the commonwealth. At that time testimony was taken from private attorneys concerning the present rates of compensation. Overwhelmingly, the testimony focused on the fact that most practitioners could not afford to continue to take cases at these rates. Citing overhead costs, malpractice insurance and workers compensation issues, attorneys stated that at these rates "there is not much left over to live on." Furthermore, the need for an increase was characterized by the Suffolk County Bar Advocate Program in a position paper before the CPCS Bar Advocate

Compensation hearing in Middlesex County in December of 1993 as "the most pressing problem now facing the appointed counsel system". They further stated that a fair hourly rate which will attract and maintain competent attorneys to indigent criminal defense work must be established.

In response to these hearings the CPCS unanimously endorsed a new scale of compensation for the private bar. This action was taken with the explicit caveat that these rates would not be implemented until an adequate appropriation to cover the change in rate is secured. The CPCS Committee stated that: "[t]he decision on whether to fund any increase in rates obviously belongs exclusively to the legislature. We therefore understand CPCS' statutory role in "establishing" new rates as being limited to making recommendations to the General Court." The CPCS Committee also noted that "under the existing, inadequate rates of compensation, it is already very expensive and becoming more so to provide for the wide variety of legal services now mandated by statutes." The new rates endorsed by CPCS are:

- \$50 per hour for all District Court criminal, juvenile (non-transfer), appeals (except murder) and all civil cases.
- \$65 per hour for all Superior Court criminal and juvenile court transfers (except murder).
- \$85 per hour for all murder cases and murder appeals.

The CPCS Committee's endorsement of increased rates was coupled with a recognition of its responsibility to improve the quality of client representation and safeguard the expenditure of public funds. The Committee has consistently sought and continues to seek additional funding for expansion of its audit and oversight capacity and its mentor support for assigned counsel. It also imposed, in addition to the pre-existing annual assignment limit, a pending caseload limit for certain family law cases, an overall 1,800 hour annual cap on billable service hours, and a rigid policy seeking to deter any instances of deliberate overbilling. The commission believes that diligent

audit practices and aggressive oversight are essential to the integrity of this program. The commission believes the increased counsel fees are essential to the fair and effective administration of justice.

In August and September, 1991, the Advocate Resources Subcommittee of the Superior Court in conjunction with Massachusetts Continuing Legal Education, Inc. conducted a survey of approximately 2,000 Massachusetts attorneys. The survey indicated that more than half (58 percent), do not accept appointments to represent indigent criminal defendants in the Superior Court. The reasons stated included the complexity of the cases, the inadequacy of the compensation, and the aggravations that accompany both the litigation and billing process. The subcommittee reviewed these findings and recommended that the hourly fee for appointed defense be raised to at least \$50 per hour for Superior Court cases generally, and \$75 per hour for murder cases.

Stating that "neither of the suggested rates is close to a reasonable market rate," the study found that attorneys responses suggested that "even these relatively small changes in rates would have significant import in the terms of the acceptance level of the fee structure." Report of the Superior Court Criminal Justice Study Committee (November 5, 1993) at 28-29 and Appendix IV.

An August, 1993 report entitled The Indigent Defense Crisis, and prepared by Richard Klein and Robert Spangenberg presented to the American Bar Association Section Criminal Justice Ad Hoc Committee on the Indigent Defense Crisis, states in its introduction:

The funding crisis facing our nation's justice system has grown substantially over the past five years due to several factors including the recession, major increases in drug filings, the 'War on Crime,' and reduced revenues for state and local government. All too often, the limited resources available to the criminal justice system have been used to place more police officers on the street and to build more prisons, ignoring the effects that these policies have on other major components of the system - prosecution, the courts and public defense.

Despite rising demands on the system, public resources devoted to the justice system have remained static for several years. The most recent data reported by the U.S. Department of Justice, Bureau of Justice Statistics shows that total justice spending by federal, state and local governments in FY 1990 was \$74 billion nationally or three percent of total spending. Of this amount, only 2.3 percent was spent on public defense, while 42.8 percent was spent on police, 33.6 percent on corrections, 12.5 percent on courts and 7.4 percent on prosecution.

While all components of the criminal justice system are suffering from the lack of adequate resources, the current level of funding for a majority of the indigent defense programs around the country has reached the crisis level and threatens the effective implementation of the Sixth Amendment right to counsel.

In Massachusetts, we believe that the inadequate funding of our indigent defense program has clearly reached the crisis level and drastically impedes the implementation of the Sixth Amendment rights to counsel and to a fair and speedy trial. Included in the Klein and Spangenberg report was a recitation of the long history of the efforts of the American Bar Association to improve this situation and to increase public recognition of the problem. In 1979, the ABA Standing Committee on Legal Aid and Indigent Defendants initiated a three-year study examining state and local expenditures for indigent defense representation throughout the country. The introduction to its report concluded that:

Overall, there is abundant evidence in this report that defense services for the poor are inadequately handled. As a result, millions of persons in the United States who have a constitutional right to counsel are denied effective legal representation. Sometimes defendants are inadequately represented; other times, particularly in misdemeanor cases, no lawyer is provided or a constitutionally defective waiver of counsel is accepted by the court. Defendants suffer quite directly, and the criminal justice system functions inefficiently, unaided by well-trained and dedicated defense lawyers.

In 1982 the ABA Standing Committee on Legal Aid and Indigent Defendants, in conjunction with the Criminal Justice Section of the ABA and the General Practice Section of the ABA, and the National Legal Aid and Defender Association in its report, Gideon Undone! The Crisis in Indigent Defense Funding, concluded that the financing

of criminal defense services for indigents was generally inadequate, public defenders had too many cases, and that in certain areas of the country indigents were not provided with competent counsel. The report strongly advised that, "We must be willing to put our money where our mouth is; we must be willing to make the constitutional mandate a reality."

In 1986, the ABA again funded a special committee to study the impact of constitutional rights on crime and crime control. That committee report, entitled Criminal Justice in Crisis, found that representation of the indigent defendant "is too often inadequate because of underfunded and overburdened public defender offices." Once again, excessive caseloads of defenders were highlighted. The report concluded that even the most competent, well-intentioned lawyers cannot do all they need to for their clients when "they are continually facing caseloads which they know they cannot handle."

In 1990, the American Bar Association revised the ABA Standards for Criminal Justice, Chapter 5: Providing Defense Services. Standard 5-5.3 on workload now reads:

(a) Neither defender organizations, assigned counsel nor contractors, for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Special consideration should be given to the workload created by representation in capital cases.

(b) Whenever defender organizations, individual defenders, assigned counsel or contractors for services determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organization, individual defender, assigned counsel or contractor for services must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments. Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations."

This standard is necessary to remind individuals and organizations that no matter how committed or dedicated they are they must limit the work load they take to keep it within their capacity of providing quality representation. This commission notes, acknowledges and firmly supports the principle that the resources required for the system to function must include attorneys who are adequate in number, as well as attorneys who are adequately compensated.

COLLEGE AND LAW SCHOOL LOANS

When evaluating the salaries paid assistant district attorneys and other attorney employees in the criminal justice system, the immensely burdensome costs of college and law school education must be considered, as well as the fact that many law school graduates, by the time their education is completed, have amassed huge educational loan debts. A recent survey done by the Middlesex County district attorney's office in Middlesex County of 12 new assistant district attorneys revealed that nine of them were repaying student loans. Of those nine, the average loan burden exceeded \$43,000. From the information the commission received, it is evident this survey is representative of the average burden carried by most new assistant district attorneys, as well as new assistant attorneys general and new public defenders.

Given the current low salaries, such loan burdens prevent many otherwise qualified lawyers from accepting employment as criminal justice system attorneys, and cause many others who do accept such employment to look for higher paying jobs as soon as they have gained experience and honed their skills.

CONCLUSION

The MBA Commission on Criminal Justice Attorney Compensation has found that by every relevant statistical comparison the present levels of compensation paid to attorneys who work in the commonwealth's criminal justice system are inadequate and inequitable.

The commission has heard from many prosecutors and defense attorneys of the personal and family burdens caused by the present inadequate compensation they receive for performing their important and essential public roles. These dedicated individuals accept that public service necessitates some degree of financial sacrifice. However, a commitment by attorneys to serve society with integrity and competence in our criminal justice system must be recognized by fair compensation. It is our obligation to adequately pay those whom we charge with making our system of justice work.

The comparisons between the compensation paid by the commonwealth to criminal justice attorneys, and that of other non-criminal justice attorneys, reveals a clear undervaluing of the services of the former. Other states put a higher premium on the services of their criminal justice work force than does Massachusetts. By comparing the salaries of federal government attorneys and state attorneys, a wide salary gap is revealed. The gap widens even more when a comparison is made to salaries paid at Massachusetts' medium and large private law firms.

The inadequacy of public criminal justice attorneys' salaries makes it extraordinarily difficult to retain lawyers of skill, experience and talent. Many exceptional attorneys are leaving Massachusetts public service for better paying private practices. The responsibilities and accomplishments of our criminal justice attorneys deserve and demand better treatment. The citizens of Massachusetts who are the victims of crime deserve the most competent prosecutors, and the poor who are accused by the state of criminal behavior, have a right to effective assistance of counsel.

Public service is a high calling and public service by prosecutors and defense attorneys is essential to a society that functions safely and justly. The United States Constitution, the Massachusetts Constitution, and the public interest requires the commonwealth, as well as the defendant, be represented by lawyers of skill and experience.

The information the commission has examined, and a plethora of studies and reports over the past 10 years, make obvious that the key to developing a criminal justice system is to secure broad-based public support for adequate and balanced funding for all of its elements: the prosecution, the defense, the courts, as well as, law enforcement and prisons. Lack of proper compensation for the people who are so critical to the administration of criminal justice means that justice will continued to be delayed and denied, and those individuals who suffer from inadequate compensation will be inordinately and wrongly burdened.

The people of Massachusetts and the Legislature must give real meaning to the fundamental constitutional rights of fair and speedy trial and of effective assistance of counsel. For unless these rights are protected and given sustenance through a commitment of adequate funding, our constitutional mandates will be no more than false promises and the hopes and needs of our citizens will be ignored.

As a community which believes in the meaning of justice as set forth in our constitutional, statutory and case law we must acknowledge that there is a cost to providing a system of justice that works effectively and fairly. That cost includes equitable and adequate compensation for the lawyers who participate in it.

Without question, such compensation is not now being paid. Without question, this situation must be rectified immediately by the adoption and implementation of the following recommendations: salaries of assistant district attorneys, assistant attorneys general and full-time public defenders (attorneys in the public counsel division of the CPCS) be increased at least 20 percent; steps should be taken to keep the levels of compensation of full-time criminal justice attorneys at least equal to that of other public

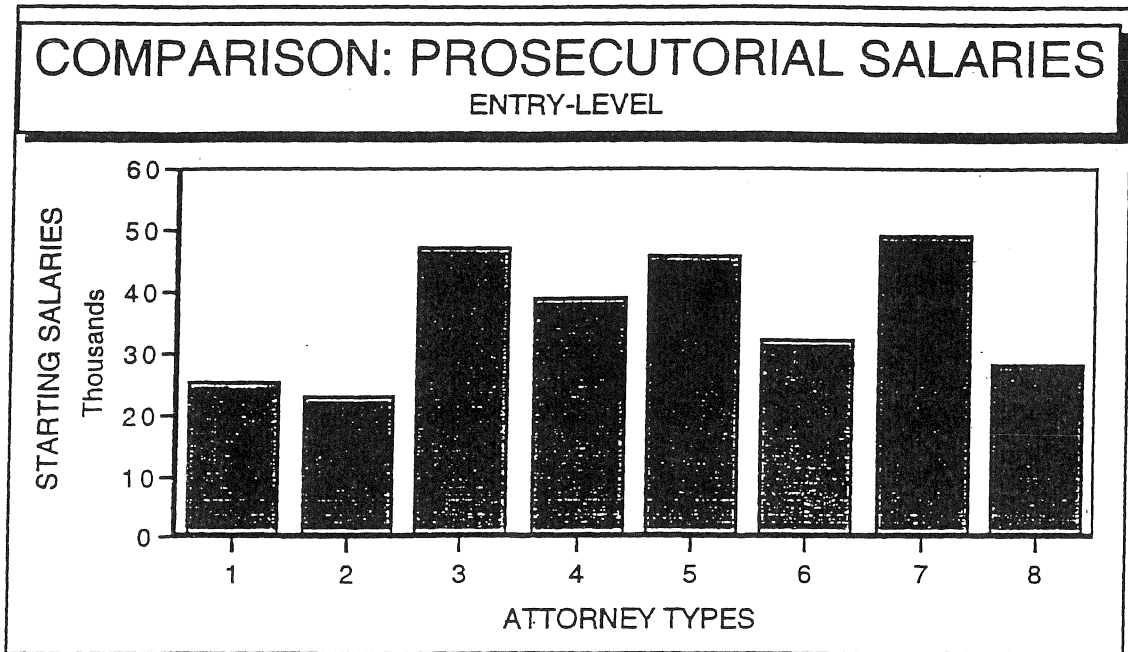
sector attorneys; salaries must be indexed to cost of living increases; the compensation for both the full-time practitioners in the criminal justice system and for the private practitioners who work in the county bar advocate programs should be fair and reasonable "in accordance with prevailing standards;" compensation of bar advocate attorneys should be increased for in-court and out-of-court work performed to \$50 per hour for all district court criminal matters including juvenile, \$65 per hour for all Superior Court criminal matters and juvenile court transfers (except murder) and for appeals and \$85 per hour for all murder cases and murder appeals; bar advocate attorneys' hourly rate should be reviewed every two years and periodically increased as appropriate.

Respectfully submitted,

John M. Callahan, Chair
Frances Burns
Anthony Fugate
Ira A. Jackson
David Locke
Lillian Miranda
J. Owen Todd

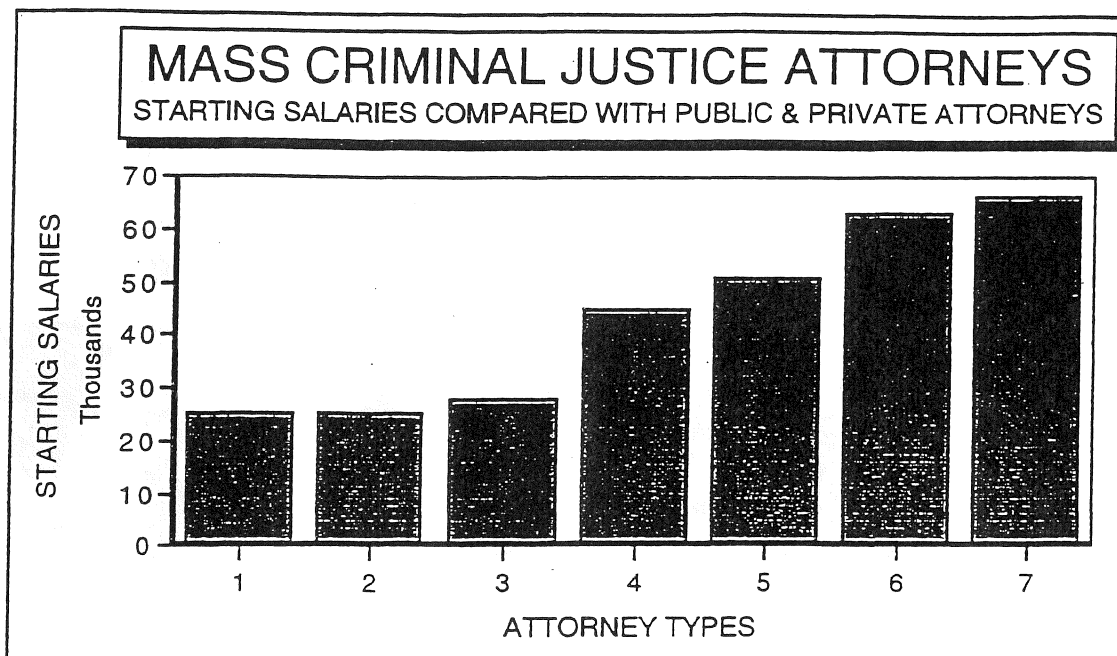
Martin W. Healy, Counsel

EXHIBIT "A"



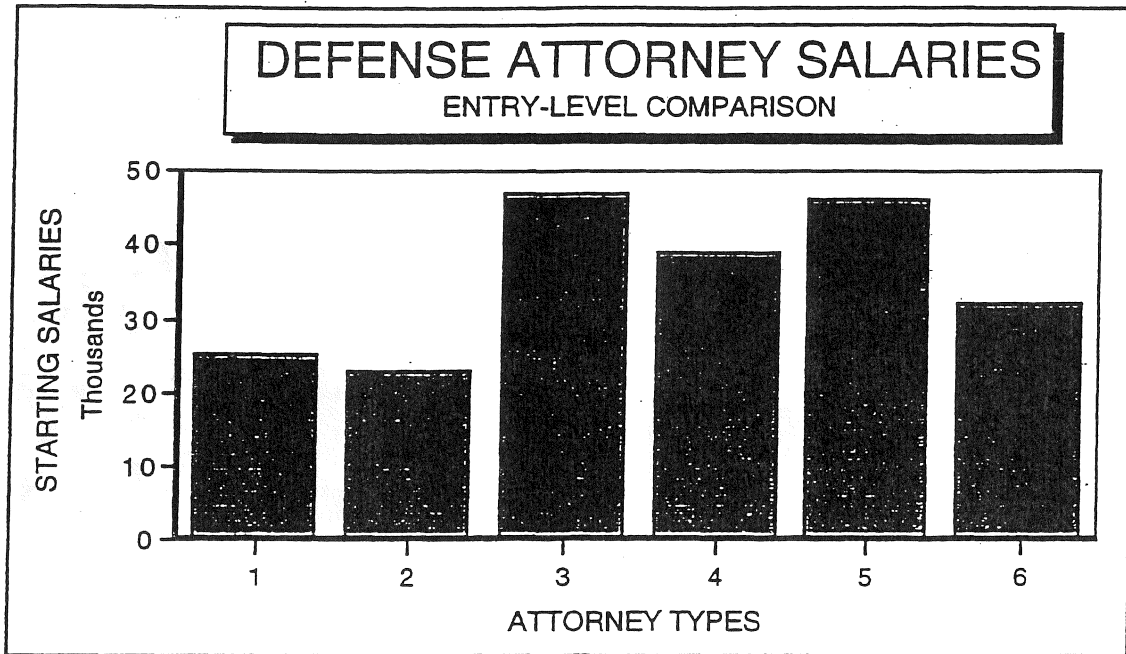
- | | | |
|---|----------|---------------------------------------|
| 1 | \$25K | MASS ASST. ATTORNEYS GENERAL |
| 2 | \$23K | MASS ASST. DISTRICT ATTORNEYS |
| 3 | \$36-47K | CONNECTICUT STATE ATTORNEY'S OFFICE |
| 4 | \$35-39K | NEW JERSEY ASST. ATTORNEYS GENERAL |
| 5 | \$24-46K | MICHIGAN'S ASST. ATTORNEYS GENERAL |
| 6 | \$32K | NEW YORK COUNTY, NY PROSECUTORS |
| 7 | \$33-49K | NEW HAMPSHIRE ASST. ATTORNEYS GENERAL |
| 8 | \$28K | MAINE ASST. ATTORNEY GENERAL |

EXHIBIT "B"



- | | | |
|---|----------|---|
| 1 | \$23-25K | ASST. DISTRICT ATTORNEY - ENTRY LEVEL |
| 2 | \$25K | ASST. ATTORNEYS GENERAL - ENTRY LEVEL |
| 3 | \$28K | PUBLIC DEFENDER - ENTRY LEVEL |
| 4 | \$33-45K | EXECUTIVE BRANCH COUNSEL 1 (STATE)- ENTRY LEVEL |
| 5 | \$38-51K | EXECUTIVE BRANCH COUNSEL 2 (STATE)- ENTRY LEVEL 1 YR EXP. |
| 6 | \$42-63K | MASS PORT AUTHORITY LEGAL COUNSEL-STARTING SALARIES |
| 7 | \$66K | TOP 20 LAW FIRMS STARTING SALARIES |

EXHIBIT "C"



- | | | |
|---|-------|---------------------------------------|
| 1 | \$28K | MASS. PUBLIC DEFENDER |
| 2 | \$42K | HARTFORD, CONNECTICUT PUBLIC DEFENDER |
| 3 | \$37K | ATLANTA, GEORGIA PUBLIC DEFENDER |
| 4 | \$35K | BALTIMORE, MARYLAND PUBLIC DEFENDER |
| 5 | \$36K | MADISON, WISCONSIN PUBLIC DEFENDER |
| 6 | \$34K | DISTRICT OF COLUMBIA PUBLIC DEFENDER |

