

Complaint

IN THE MATTER OF

**ROBERT LEWIS, JAMES SOWDER, GERALD WEAR,
AND JOEL R. YOSEPH, INDIVIDUALLY**

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-4111; File No. 0310155
Complaint, July 23, 2004--Decision, July 23, 2004*

This consent order, among other things, prohibits four attorney Respondents -- who provide criminal defense services to indigents in Clark County, Washington -- from entering into or facilitating any agreement between or among any attorneys: (1) to negotiate with payors on any attorney's behalf; (2) to deal, to refuse to deal, or to threaten to refuse to deal with payors; (3) regarding the terms of dealing with any payor; or (4) not to deal individually with any payor. The order also prohibits the respondents from facilitating exchanges of information between attorneys concerning whether, or on what terms, to deal with a payor; from attempting to engage in, or inducing anyone to engage in, any action prohibited by the order.

Participants

For the Commission: *Joseph Lipinsky, Stuart Hirschfeld, Robert Schroeder, Charles A. Harwood, Michele Cerullo, and Roberta S. Baruch.*

For the Respondents: *Robert Lewis, James Sowder, Gerald Wear, and Robert Yoseph.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended ("FTC Act"), 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Robert Lewis, James Sowder, Gerald Wear, and Joel R. Yoseph, hereinafter collectively referred to as "Respondents," have violated Section 5 of the FTC Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest,

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hereby issues this Complaint stating its charges in that respect as follows:

NATURE OF THE CASE

1. This matter concerns Respondents' actions in organizing horizontal agreements, among 43 competing attorneys who constitute most of the attorneys who provide criminal defense services to indigents in the Clark County, Washington, area, to fix price and other terms charged to the government payor. In furtherance of their agreements, the Respondents organized a boycott against the payor of criminal indigent defense services for the Clark County area. The boycott culminated in a written agreement among the 43 competing attorneys titled "Indigent Defense Bar Consortium Contract." The agreement appointed the Respondents as the exclusive representatives, in negotiating the 2002 and 2003 Superior Court Felony Indigent Defense Contract: Homicide and Persistent Offender cases, for the 43 criminal indigent defense attorneys that were negotiating with the payor of criminal indigent defense services for the Clark County area. Respondents negotiated collectively agreed upon price and other contract terms with the payor, and Respondents and the other competing attorneys agreed to refuse to negotiate individually with the payor. This conduct raised the price of criminal indigent legal services in the Clark County area.

RESPONDENTS

2. Respondent Robert Lewis, an individual, is an attorney who represents indigent criminal defendants. His principal address is 430 NE Everett Street, Camas, WA 98607. He was one of four leaders and organizers of the boycott.

3. Respondent James Sowder, an individual, is an attorney who represents indigent criminal defendants. His principal address is 1600 Daniels, P.O. Box 27, Vancouver, WA 98666. He was one of four leaders and organizers of the boycott.

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4. Respondent Gerald Wear, an individual, is an attorney who represents indigent criminal defendants. His principal address is 207 East 19th Street, Vancouver, WA 98663. He was one of four leaders and organizers of the boycott.

5. Respondent Joel R. Yoseph, an individual, is an attorney who represents indigent criminal defendants. His principal address is 1305 Main Street, Vancouver, WA 98660. He was one of four leaders and organizers of the boycott.

6. Respondents' general business practices, including the acts and practices herein alleged, are in or affecting "commerce" as defined in the FTC Act, as amended, 15 U.S.C. § 44.

ALLEGATIONS OF VIOLATIONS

7. Except to the extent that competition has been restrained as herein alleged, the Respondents and the other criminal indigent defense attorneys that participated in the boycott have been and are now in competition among themselves and with other attorneys in deciding independently whether and to what extent they will seek criminal indigent cases at fees offered by Clark County, as opposed to other legal work, and in obtaining appointments to represent indigent criminal defendants for homicide and persistent offender cases in the Superior Court of Clark County.

8. Near the end of 2001, Clark County started its biennial contract negotiations with the private attorneys that had provided criminal indigent defense services during the preceding contract period. Early in these negotiations, the Respondents presented the County with a document titled "Indigent Defense Bar Consortium Contract" (hereinafter "Consortium Contract") that was signed by 43 of the criminal indigent defense attorneys who had signed felony contracts with the County during the previous contract period.

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9. The Consortium Contract appointed the Respondents as the group's exclusive contract negotiators. Moreover, it stated:

The 2002 contract for indigent defense services with Clark County Superior Court will be accepted on the condition it contains the following:

- a. All non-death penalty aggravated murders will be paid at the rate of \$65.00 per hour. The appointed attorney shall be guaranteed a minimum \$12,500.00. There will be a cap of \$50,000.00, subject to review by the assigned judge.
- b. Non-aggravated murders, including vehicular homicides, and persistent offender cases, shall be paid at the rate of \$55.00 per hour with a minimum guarantee of \$7,800.00 and a cap of \$30,000.00, subject to review by the assigned judge.
- c. Attempted murders, first degree manslaughter and second degree manslaughter shall be paid at the rate of \$50.00 per hour with a minimum guarantee of \$3,450.00, and a cap of \$15,000.00, subject to review by the assigned judge.
- d. Death penalty cases shall be paid at the rate of \$75.00 per hour with a minimum guarantee of \$15,000.00, and a cap of \$100,000.00 per attorney, subject to review by the assigned judge.

These fee demands were significantly higher than the fees the County paid in the previous year's contract and were also much higher than the County was offering in the current negotiations.

10. The Consortium Contract also included provisions to bind its signatories to its terms. In particular, it stated that "[t]he undersigned have agreed not to contract with Clark County for felony defense services in any manner inconsistent with the above and if such acts are taken, shall be subject to liability for attorney fees for any lawsuit or arbitration engaged in by the Consortium to

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uphold this agreement. This would include restraining orders and money damages."

11. In addition to the actions referenced in Paragraphs 8 through 10, Respondent James Sowder acted as a representative for many criminal indigent defense attorneys from 1990 to 2002 in contract negotiations with Clark County, where he negotiated prices and other competitively significant terms on behalf of competing criminal indigent defense attorneys and facilitated the competing criminal indigent defense attorneys' coordinated responses to contract offers.

**RESPONDENTS HAVE ENGAGED IN RESTRAINTS OF
TRADE**

12. Respondents have acted to restrain competition by, among other things, organizing and acting as the exclusive representatives of the Consortium Contract and thereby facilitating, negotiating, entering into, and implementing agreements among competing criminal indigent defense attorneys on price and other competitively significant terms.

**RESPONDENTS' ACTIONS HAVE HAD SUBSTANTIAL
ANTICOMPETITIVE EFFECTS**

13. Respondents' actions described in Paragraphs 8 through 12 of this Complaint have had, or have tended to have, the effect of restraining trade unreasonably and hindering competition in the provision of criminal indigent defense services in the Clark County area in the following ways, among others:

- a. price and other forms of competition among Respondents and the other signatories to the Consortium Contract were unreasonably restrained;
- b. prices for criminal indigent defense services for homicides, attempted homicides, and persistent offenders were increased; and

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- c. Clark County and its taxpayers were deprived of the benefits of competition among criminal indigent defense attorneys.

14. The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such combination, conspiracy, acts, and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-third day of July, 2004, issues its Complaint against Respondents.

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DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of Robert Lewis, James Sowder, Gerald Wear, and Joel R. Yoseph (hereinafter collectively referred to as "Respondents"), and Respondents having been furnished thereafter with a copy of the draft of Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order to Cease and Desist ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and the Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment received pursuant to Section 2.34 of its Rules, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34 (2003), the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Order:

1. Respondent Robert Lewis, an individual, is an attorney who represents indigent criminal defendants. His principal

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address is 430 NE Everett Street, Camas, WA 98607.

2. Respondent James Sowder, an individual, is an attorney who represents indigent criminal defendants. His principal address is 1600 Daniels, P.O. Box 27, Vancouver, WA 98666.
3. Respondent Gerald Wear, an individual, is an attorney who represents indigent criminal defendants. His principal address is 207 East 19th Street, Vancouver, WA 98663.
4. Respondent Joel R. Yoseph, an individual, is an attorney who represents indigent criminal defendants. His principal address is 1305 Main Street, Vancouver, WA 98660.
5. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. "Respondents" means Robert Lewis, James Sowder, Gerald Wear, and Joel R. Yoseph.
- B. "Payor" means any person or entity paying for indigent criminal defense services in the State of Washington.
- C. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

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- D. "Principal address" means either (1) primary business address, if there is a business address, or (2) primary residential address, if there is no business address.

II.

IT IS FURTHER ORDERED that Respondents, directly or indirectly, or through any corporate or other device, in connection with the provision of legal services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

- A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any attorneys:
1. To negotiate on behalf of any attorney with any Payor;
 2. To deal, refuse to deal, or threaten to refuse to deal with any Payor;
 3. Regarding any term, condition, or requirement upon which any attorney deals, or is willing to deal, with any Payor, including, but not limited to, price terms; or
 4. Not to deal individually with any Payor;
- B. Exchanging or facilitating in any manner the exchange or transfer of information among attorneys concerning any attorney's willingness to deal with a Payor, or the terms or conditions, including price terms, on which the attorney is willing to deal with a Payor;
- C. Attempting to engage in any action prohibited by Paragraph II.A or II.B above; and

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- D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C above.

PROVIDED, HOWEVER, that, nothing in this Paragraph II shall prevent Respondents from:

- (i) Exercising rights under the First Amendment to the United States Constitution to petition any government body concerning legislation, rules or procedures;
- (ii) Providing information or views in a noncoercive manner to persons engaged in or responsible for the administration of any program to obtain legal services for persons eligible for appointed counsel.

III.

IT IS FURTHER ORDERED that Respondents shall:

- A. Within thirty (30) days after the date on which this Order becomes final:
- 1. Send by first-class mail, with delivery confirmation, a copy of this Order and the Complaint to each attorney who signed the Indigent Defense Bar Consortium Contract; and
 - 2. Send by first-class mail, with delivery confirmation, a copy of this Order and the Complaint to each Payor that contracted with any Respondent for the provision of legal services to indigents; and

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- B. File verified written reports within sixty (60) days after the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each report shall include:
1. A detailed description of the manner and form in which Respondents have complied and are complying with this Order;
 2. The name, address, and telephone number of each Payor with which Respondents have had any contact; and
 3. Copies of the delivery confirmations required by Paragraphs III.A.1 and III.A.2.

IV.

IT IS FURTHER ORDERED that each Respondent shall notify the Commission of any change in his principal address within twenty (20) days of such change.

V.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondents shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to inspect and copy all non-privileged books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in their possession, or under their control, relating to any matter contained in this Order; and
- B. Upon ten (10) days' notice to Respondents, and in the presence of counsel, and without restraint or interference

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from Respondents, to interview Respondents or the employees of Respondents.

VI.

IT IS FURTHER ORDERED that this Order shall terminate on July 23, 2024.

Analysis

**Analysis of Agreement Containing Consent Order to Aid
Public Comment**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with Robert Lewis, James Sowder, Gerald Wear and Joel R. Yoseph. The Respondents are attorneys who provide criminal defense services to indigents in Clark County, Washington. The agreement settles charges that these parties violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by orchestrating and implementing a conspiracy among 43 competing attorneys to fix prices and other terms charged for providing criminal defense services to indigents.

The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order or to modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by any Respondent that said Respondent violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

The Complaint

The allegations of the complaint are summarized below.

In Clark County, Washington, criminal defense services for indigent defendants are provided by private attorneys working in individual practices or as members of small law firms, who work

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under contract with Clark County. Those attorneys were and are separate and independent competitors of one another in all material respects.

Near the end of 2001, Clark County started its biennial contract negotiations with the attorneys who had provided criminal indigent defense services during the preceding contract period. Early in these negotiations, the Respondents presented the County with a document titled "Indigent Defense Bar Consortium Contract" (hereinafter "Consortium Contract") signed by 43 of the attorneys who had previously signed felony contracts with the County. In that document, the Respondents and their colleagues purported to form a "Consortium" and stated their intention to authorize the Consortium, as represented by the Respondents, to be the sole negotiator on behalf of all signatories. The document further stated the signatories' collective demand to alter the payment methodology and substantially increase the payment for all homicide, attempted homicide, persistent offender and death penalty cases. The signatories also stated their intention to refuse to accept any further such cases unless the County acceded to their demands, and authorized the Consortium to take legal action against any signatory who agreed to provide criminal defense services on terms inconsistent with those demanded by the Consortium.

After receiving the document from the Respondents, Clark County agreed to a new contract adopting the payment methodology demanded by the Consortium and substantially increasing reimbursement rates for all homicide, attempted homicide, persistent offender and death penalty cases. The Respondents, by orchestrating the formation of the Consortium and threatening the County with a refusal to deal, have violated Section 5 of the FTC Act.

The Proposed Consent Order

The proposed order is designed to remedy the illegal conduct charged in the complaint and prevent its recurrence. It is modeled

Analysis

after the remedy sought by the Commission and approved by the Supreme Court in *Federal Trade Commission v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990), in which the Court held that a boycott among criminal indigent defense attorneys was a per se violation of the antitrust laws, despite the lawyers' claims that the boycott was a political act ostensibly designed to improve the quality of representation by increasing their reimbursement rates. The Court observed that "[n]o matter how altruistic the motives of respondents may have been, it is undisputed that their immediate objective was to increase the price that they would be paid for their services." 493 U.S. at 427.

The proposed order's specific provisions are as follows:

Paragraph II.A prohibits the Respondents from entering into or facilitating any agreement between or among any attorneys: (1) to negotiate with payors on any attorney's behalf; (2) to deal, to refuse to deal, or to threaten to refuse to deal with payors; (3) regarding the terms of dealing with any payor; or (4) not to deal individually with any payor.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the Respondents from facilitating exchanges of information between attorneys concerning whether, or on what terms, to deal with a payor. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A or II.B; and Paragraph II.D proscribes inducing anyone to engage in any action prohibited by Paragraphs II.A through II.C.

Paragraph II contains a proviso clarifying that the order does not prohibit rights to petition government officials, as guaranteed by the First Amendment, nor does the order prohibit the Respondents from providing information or views to the County or its representatives.

Analysis

Paragraphs III, IV and V impose various obligations on Respondents to report or provide access to information to the Commission to facilitate monitoring Respondents' compliance with the order.

The proposed order will expire in 20 years.

Commission Opinion

IN THE MATTER OF
SOUTH CAROLINA STATE BOARD OF DENTISTRY

**OPINION OF THE COMMISSION AND ORDER IN REGARD TO
ALLEGED VIOLATIONS OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT**

Docket 9311; File No. 0210128

Complaint, September 12, 2003--Opinion and Order, July 28, 2004

In a unanimous Opinion, the Commission addressed a motion filed by Respondent South Carolina State Board of Dentistry to dismiss the administrative complaint in this matter on the ground that its actions were protected by the state action doctrine. The Commission concluded that an emergency regulation issued by the Board – which required dental preexaminations in school settings – appeared to contravene state law, and therefore determined that dismissing the complaint on state action grounds would be inappropriate. In particular, the Commission concluded that – as a subordinate state regulatory entity – the Board was not automatically entitled to protection from antitrust liability because its actions were not those of the state as sovereign. The Commission also determined that the Board had failed to show that its emergency rule was issued pursuant to a clearly articulated state policy. In the accompanying Order, the Commission retained jurisdiction over the matter, and remanded it to an administrative law judge for further findings concerning whether the Board is likely to reimpose the dental preexamination requirement, in order to address the Board’s separate argument that the complaint should be dismissed on grounds of mootness.

Participants

For the Commission: *Michael B. Kades, Andrew S. Ginsburg, Garth W. Huston, K. Shane Woods, John T. Delacourt, Jeffrey Brennan, Robert J. Schroeder, Charles A. Harwood, D. Bruce Hoffman, Mark N. Hertzendorf, and Charissa P. Wellford.*

For the Respondent: *Lynne W. Rogers, General Counsel, South Carolina Department of Labor, Licensing & Regulation, and William H. Davidson, II, Andrew F. Lindemann, and Kenneth P. Woodington, Davidson, Morrison and Lindemann P.A.*