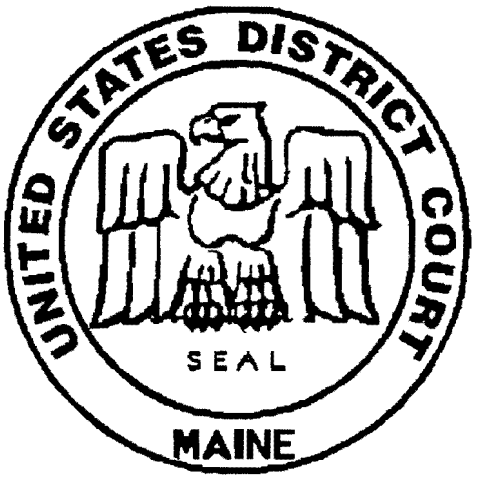
REPORT OF THE ADVISORY GROUP

FOR THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MAINE

APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990



FEBRUARY 1, 1993

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(ORGANIZED AS RECOMMENDED BY THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT)

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I. DESCRIPTION OF THE COURT

A. JUDICIAL RESOURCES

The District of Maine, although a huge geographical area, is a relatively small court serving a population of approximately 1.2 million people. Court is held regularly both in Portland, Maine's largest city and the District headquarters, and in Bangor, located 135 miles north of Portland. There are no divisions.

Two district judges, one full-time magistrate judge and one part-time magistrate judge preside in Portland and one district judge and one full-time magistrate judge preside in Bangor. Both the full-time magistrate judges have been authorized to perform the full range of duties permitted by law and the district judges regularly encourage lawyers to consent to the trials of civil cases by the magistrate judges.

B. SPECIAL STATUTORY STATUS

Not applicable.

C. CURRENT CIVIL CASE MANAGEMENT PRACTICES

In accordance with Rule 2 of the Local Rules of the District, new civil cases are filed based on the county in which the action arose. Cases arising out of the northern and eastern counties of Aroostook, Franklin, Hancock, Kennebec, Penobscot, Piscataquis, Somerset, Waldo, and Washington are filed and ordinarily tried in Bangor. These cases, which represent roughly one-third of the new filings each year, are assigned upon filing to the district judge in Bangor. Those cases arising out of the counties of Androscoggin, Cumberland, Knox, Lincoln, Oxford, Sagadahoc and York are filed and ordinarily tried in Portland. The Portland cases are randomly assigned by the Clerk to the resident Portland judges by lot, so that each is assigned an equal number of new filings.

There are three minor exceptions to the assignment process. First, all the cases in which the State of Maine, a state officer or a state agency is a party would ordinarily be assigned to the one resident judge in Bangor because the state capital, Augusta, is located in Kennebec County. To avoid the inequities that could result by such an allocation (many of the cases where the State is a defendant involve difficult constitutional issues), these cases are randomly assigned to each of the three judges so that each receives an equal number. Similarly, all appeals from the bankruptcy court to the district court are assigned by lot to the three district judges regardless of where the bankruptcy action may have arisen. Finally, although Knox County cases are to be filed in Portland, those actions brought by inmates at the Maine State Prisons in Thomaston and Warren are filed in Bangor and automatically referred to the magistrate judge in Bangor.

For the most part, the judges of the District of Maine utilize the individual calendar system and each judge oversees his own caseload. A team of two deputy clerks is assigned to each district judge and is responsible for performing all the civil and criminal docketing, scheduling, case management practices and courtroom work for that judge.

Each year the clerk prepares a master calendar of trial sessions for the coming year. Utilizing this master calendar, the court issues in each case a Rule 16 Scheduling Order that identifies the month in which that matter will be scheduled for trial. The master calendar is also shared with the United States Attorney's office so that prosecutors may, as much as possible, schedule the prosecution of new criminal cases to avoid scheduling conflicts.

The judges' trial calendars are prepared throughout the year by each team respectively. Periodically, joint trial lists are prepared in which 2 judges or perhaps all 3 preside over the trials of cases set on a single list in either Portland or Bangor. The use of joint trial lists has been very successful. The parties are assured that all the cases scheduled for trial will in fact be reached since the unavailability of one judge will not require the continuance of the trial. Additionally, the practice provides the judges with the opportunity to work together and exposes the trial lawyers throughout the District to each of the judges.

II. ASSESSMENT OF CONDITIONS IN THIS DISTRICT

A. CONDITION OF THE DOCKET

1. CURRENT STATUS OF THE CIVIL AND CRIMINAL DOCKETS

(a) CIVIL DOCKET

After several years of unprecedented growth in the District's caseload during the early 1980's, the number of new filings began to decline in 1987[1], following a record high of 1,018 total filings in 1986. The decline lasted only three years. Total filings increased 11% in 1990 and 6% in 1991. This recent growth runs counter to the national trend in which total filings decreased 5% in 1990 and 4% in 1991. In 4 of the past 5 years, the District of Maine has led all districts in the First Circuit in the total number of filings per judgeship. During 1991 there were 834 total filings in the District, the highest number since 1988.

The recent general decline of civil filings nationally has resulted in part from a significant decrease in the number of new filings based upon diversity of citizenship. In 1990, national diversity filings decreased by 15% and in 1991 by 11%. Perhaps the major reason for this decline is the congressional legislation, effective May 18, 1989, that increased the minimum jurisdictional amount in diversity cases from $10,000 to $50,000. Interestingly, however, and in contrast to the national trend, during each of the past 5 years diversity filings in the District of Maine have remained relatively constant. Although there was an immediate decline in diversity filings following the 1989 legislation, the number of filings in 1991 jumped to 181, the highest since 1987 and now represents one-fourth of the total caseload. See Table 1.

[1] All references are to statistical years, July 1 - June 30, and, unless otherwise noted, the caseload and filing figures are from the annual Management Statistics for United States Courts published by the Administrative Office of the United States Courts.

TABLE 1

CIVIL CASES FILED IN MAINE BY DIVERSITY OF CITIZENSHIP

	Total Civil Filings	Diversity Filings	Percent of Total Pending Civil Cases
1991	691	181	26%
1990	661	142	21%
1989	607	171	28%
1988	736	160	22%
1987	857	185	22%

Moreover, the number of cases removed from state court to federal court in Maine has more than tripled since 1989. In 1989, 29 state cases, representing 5% of the total civil caseload, were removed to the District of Maine. In 1991, 91 cases, representing 13% of the civil cases, were removed from state court. This increase is in part a consequence of the more than 30 bank foreclosure actions that were removed during 1991 by the Federal Deposit Insurance Corporation under legislation permitting it to do so where it has taken over failed state financial institutions. (The New England economic recession has produced a significant increase in litigation involving banks, some of which have now been taken over by the FDIC.) The increase in removals is also attributable to significant uncertainty and delays in the state court system, which is grappling with an increasing caseload in the face of severe budgeting problems and unfilled judicial vacancies.

Despite the increase in civil filings the court has made significant progress in reducing the number of pending cases. Over the past 7 years, the total number of civil and criminal cases pending in the District has decreased 54 percent, from the high of 1,061 cases in 1984 to 575 pending cases in 1991. As shown in Table 2, in almost every year since 1984 the number of terminations in the district has outpaced the number of new filings. While there has been a steady increase nationally in the ratio of pending cases to terminated cases (up to .97 in 1989) the ratio in the District of Maine has decreased in each of the past several years and was remarkably only .65 in 1991.

TABLE 2

DISTRICT OF MAINE WORKLOAD STATISTICS

	Filings	Terminations	Pending Cases
1984	981	969	1061
1985	972	1037	996
1986	1018	1054	960
1987	990	1086	864
1988	864	970	758
1989	708	805	660
1990	786	782	627
1991	834	876	575

Additionally, and in contrast to the national trend, in each of the past several years the median time from filing to disposition for civil cases has declined in the District of Maine. As indicated in Table 3, in 1991, the median time from filing to disposition was 8 months, ranking the District the nineteenth best out of the 94 districts in the nation and the second best in the First Circuit. (Civil median time does not include prisoner petitions, land condemnation cases, and all recovery of overpayments and enforcement of judgment cases [primarily student loan and VA overpayments] which, if included, would further reduce the median disposition time.)

TABLE 3

DISTRICT OF MAINE

MEDIAN TIME FROM FILING TO DISPOSITION
(in months)

	1991	1990	1989	1988	1987	1986
Civil	8	9	9	10	11	9

The median time for disposition of civil cases would likely be improved if the parties more frequently consented to trial before the magistrate judges. Such a consent ordinarily results in the case being specially assigned to trial on a date certain, which can be an attractive alternative to the district judges' trailing lists of cases. The fact remains, however, as reflected in Table 4, that the parties consent to trial before the magistrate judges in less than 4 percent of the civil cases.

TABLE 4

DISTRICT OF MAINE CONSENT CASES

	Number of Consent Cases	Total Pending Caseload	Percentage of Caseload
Dec. 1987	136*	708	19%
June 1988	0**	607	0%
Dec. 1988	3	541	0%
June 1989	23***	536	4%
Dec. 1989	19	526	4%
June 1990	14	528	3%
Dec. 1990	14	474	3%
June 1991	13	466	3%
Dec. 1991	13	457	3%
June 1992	19	403	5%

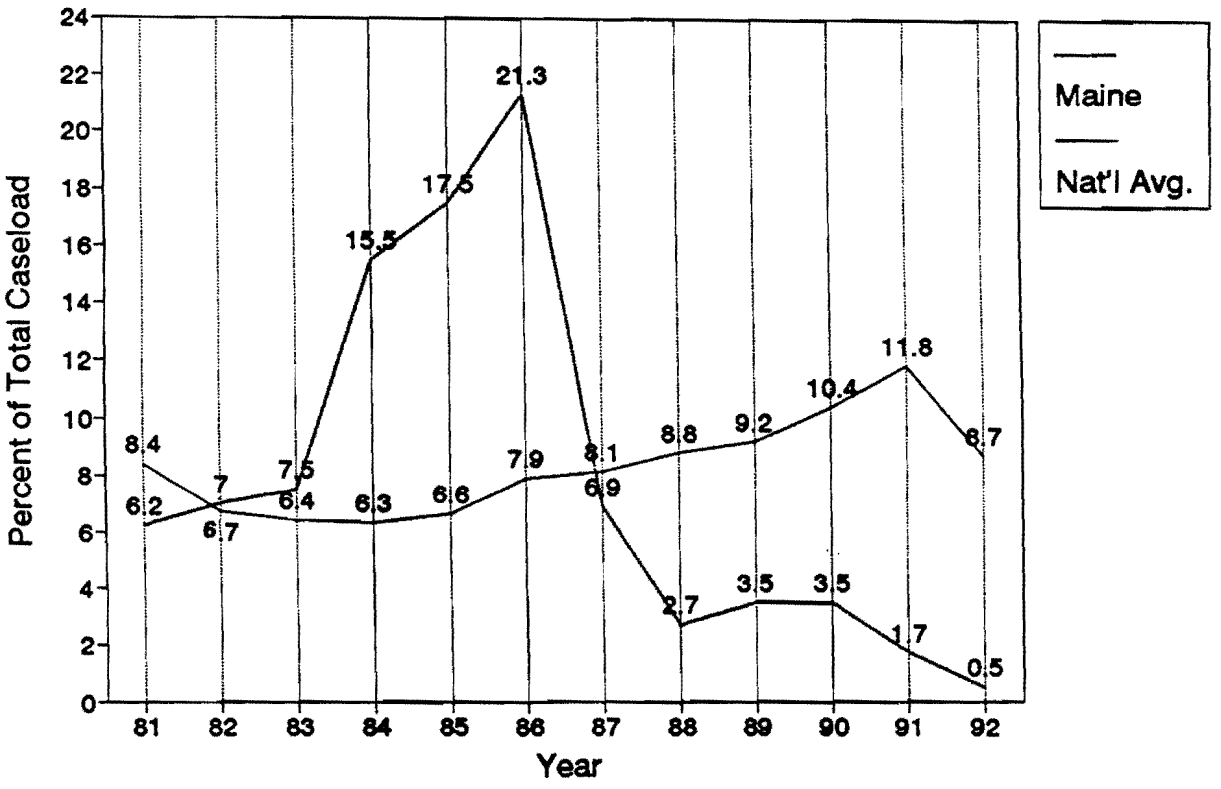
* The full-time magistrate was assigned to all asbestos cases.
** Magistrate position was vacant from 6/10/88 to 10/11/88.
*** As of 3/20/89 there were two full-time magistrates.

As the number of pending cases has decreased, the docket has become more and more current. In 1991, there were only 8 pending 3-year-old cases in the District, representing 1.7% of the total civil caseload. This is substantially lower than the national average, which in 1991 was 11.8%. For the statistical year ending June 30, 1992, there were only 4 pending 3-year old cases in the District, representing 0.5% of the caseload. The national average for June, 1992, was 8.7%. See Table 5. Of the 402 civil cases pending in the District[2] on October 1, 1992, 294 (73%) were filed in calendar year 1992, and 85 cases (21%) were filed in calendar year 1991. See Table 6.

In summary, the present state of the civil docket in the District of Maine is excellent. Civil cases are routinely assigned for trial and terminated within 8 months of filing. Only a few matters are ordinarily under advisement for more than 60 days and rarely are any matters under advisement for more than 6 months. As of June 30, 1992, fewer than 1% of the civil cases had been pending for more than 3 years. Since the third judgeship was filled in August 1991, it is expected that this record will improve still further in the years ahead.

TABLE 5

DISTRICT OF MAINE
Three Year Old Civil Cases



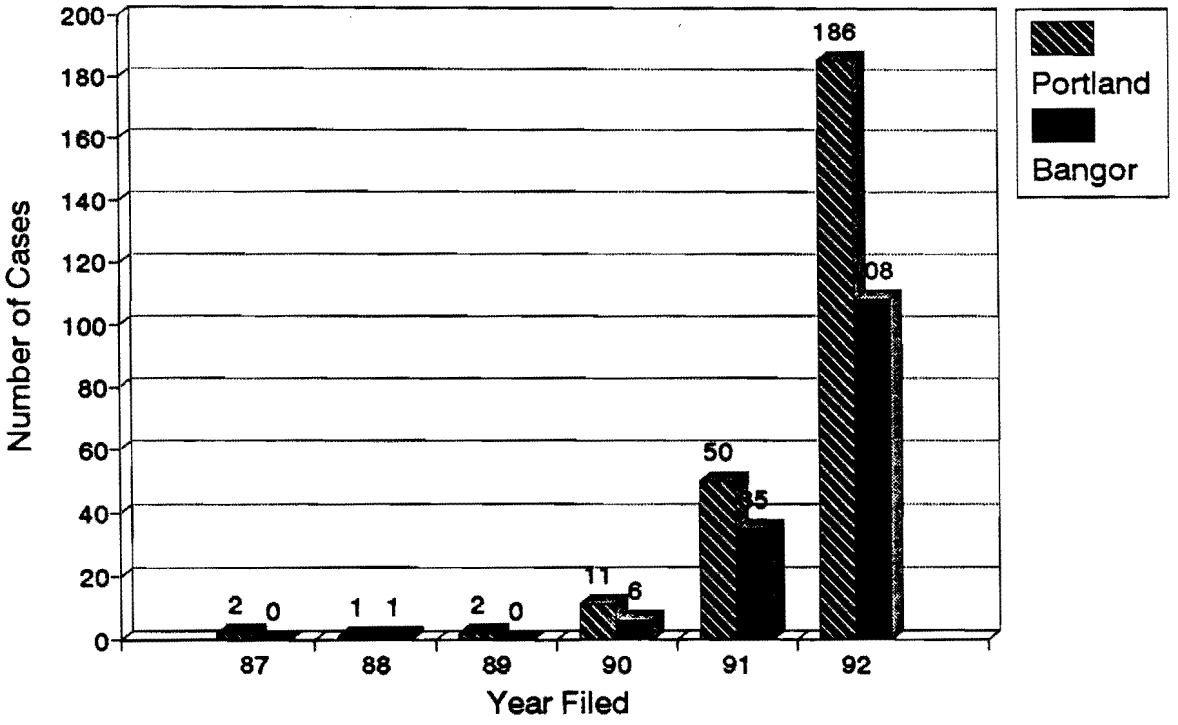
[2] The District of Maine figures do not include asbestos cases which are no longer in the District, having been transferred by the Judicial Panel on Multidistrict Litigation to the Eastern District of Pennsylvania.

TABLE 6

DISTRICT OF MAINE

Pending Civil Caseload

October 1, 1992



(b) CRIMINAL DOCKET

Like the civil docket, the number of new criminal filings in the District of Maine continues to increase annually and the District has ranked either first or second each year since 1982 among all the districts in the First Circuit in new felony filings. As in every court, the criminal docket has had a significant impact on the management of the civil docket.

Because the Speedy Trial Act requires the court to act swiftly on criminal matters, as the number of criminal filings increased there has necessarily been a diversion of judicial time and resources to manage the increased criminal caseload. As a result of these efforts, the median time for the disposition of criminal felony cases has similarly decreased each of the last 2 years and was 5.7 months in 1991. Aside from the increasing number of filings, the complexity of the criminal matters before the court is greater than in the past and there is every expectation to believe that trend will continue.

TABLE 7

DISTRICT OF MAINE

MEDIAN TIME FROM FILING TO DISPOSITION
(in months)

	1991	1990	1989	1988	1987	1986
Criminal Felony	5.7	7.1	8.7	5.7	5.7	5.4

Over the past 2 years, the United States Attorney's Office and the Department of Justice have undertaken a number of criminal justice initiatives that will have a substantial impact on available judicial resources. These new initiatives are primarily in the areas of financial institution frauds, economic crime in general, environmental crime, and weapons-related armed career criminal prosecutions.

However, currently in the District of Maine, substance prosecutions continue to comprise the majority of the cases on the criminal docket. The number of defendants prosecuted for drug law violations increased from 23 defendants in 1981 to 100 defendants in 1990, falling slightly to 88 in 1992.

According to the United States Attorney, the number of drug prosecutions is likely to level off as a result of the effort of the federal and state governments in Maine to bring many more drug case prosecutions in the state court system. Prior to 1988 and the implementation of Maine's Intergovernmental Drug Enforcement Act of 1987, many cases now filed in state court would have been prosecuted in federal court. The policy of the United States Attorney's office reserves federal prosecution for the more complex or organizationally based drug offenses.

The United States Attorney expects there to be a significant increase in financial institution fraud prosecutions in the next several years and has been allocated one new attorney position for work in this area.

During the recent past, the Department of Justice, working jointly with the Treasury Department's Bureau of Alcohol, Tobacco and Firearms, has initiated a program of assistance to state and local prosecutive entities focusing upon career criminals who use firearms in violent or drug trafficking crimes. This initiative has produced an increase in the number of defendants prosecuted for weapons and firearms offenses; however, these cases are relatively straightforward and usually do not go to trial.

The trend of increasing complexity is present in other areas. In 1990, the largest environmental criminal case ever prosecuted in the District of Maine was brought. This case also involved the second largest criminal fine ever imposed in the nation for a hazardous waste related offense.

In addition to the separate category of financial institution fraud, the United States Attorney's office has also undertaken an initiative with respect to the prosecution of economic crime. Exemplifying this increasing emphasis, 3 prosecutions in the last 2-3 years involved the largest cases (of this type) in dollar amounts ever prosecuted in the history of the District of Maine for government program fraud, commercial fraud, and defense procurement fraud. Again, the trend is toward a new area of criminal enforcement, more complicated subject matter, and more demands upon the resources of the court.

Demands on the time of magistrate judges are likely to increase moderately as immigration law enforcement is tightened. The United States Attorney has recently undertaken an initiative to coordinate law enforcement activities on both sides of the Maine-Canadian border. As with weapons-related offenses, prosecutions in this area are not numerous or complex. Nonetheless, the cumulative effect produces a trend of new crimes, tighter enforcement, more aggressive prosecution, and, for the court, a greater demand on resources.

The Federal Sentencing Guidelines continue to have a significant demand on court resources. The Guidelines have radically changed judicial sentencing policies and have required the court to interpret, administer, and effectuate a complex formula in the sentencing of criminal defendants, which frequently requires a mini-trial for the purposes of determining the appropriate sentence. The allocation of judicial and administrative resources to new criminal proceedings necessarily diverts those resources that might otherwise be available for the civil docket.

In summary, federal law enforcement and the demands it places upon the federal courts reflect the increasing complexity and diversity of the problems our society faces. In the next decade, prosecutions will involve crimes and subject matter that were not significantly represented on the court's docket even 5 years ago. Many of these new areas, such as financial institution fraud and environmental crime, are complex and in other areas of the country have required significant allocations of judicial resources. The result is an identifiable, substantial impact on the civil justice system.

2. Trends in Civil Filings and Resulting Demands on the Court's Resources

The civil docket of the federal court in the District of Maine is significantly affected by three principal forces beyond the court's control: the impact of new federal legislation, the indirect effect of policies and problems in the state government and state court system, and the economic and sociological character of the District. It is not possible to trace the impact of these forces precisely, but general paradigms can be used to illustrate the effect of these forces, the trend likely to be seen in the predictable future, and the demands these effects have on the court's resources.

(a) Impact of Federal Legislation

New federal legislation can have a dramatic impact on the number and complexity of cases filed on the civil docket. A clear example of this impact can be seen in the changes in social security legislation in the last decade. In 1980, Congress passed legislation that required an accelerated review of existing disability cases. At the administrative level, the Social Security Administration, through a series of policy changes, tightened the disability standards, particularly in the area of what constituted a "severe" impairment. As a result of this review, 460,000 people were terminated between 1981 and 1984, a fourfold increase over the prior 3-year period. In September, 1984, Congress enacted Pub.L. No. 98-460, the Social Security Disability Benefits Reform Act of 1984. This statute included a moratorium on the disability review process or mental impairment cases, the largest proportion of the termination cases and largely put an end to the Administration's interpretation.

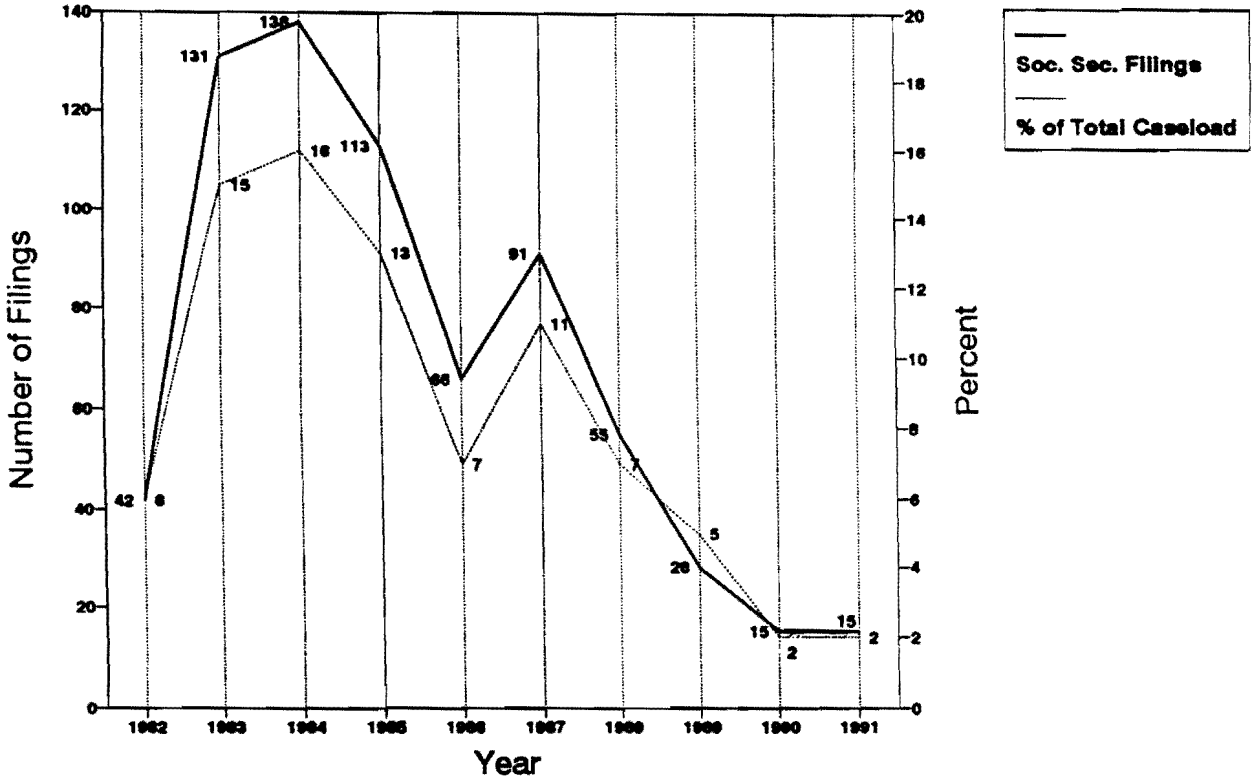
The effect of these legislative and administrative changes on the District of Maine was dramatic because the termination of and denial of social security disability cases involving mental impairments accounted for at least

15 percent of the case filings in Maine at that time as estimated by legal service organizations. When in 1984 statutory amendments required the Social Security Administration to revise standards for evaluating mental impairment cases, the result was not only a suspension of termination cases involving mental impairments, but also reviews, including remands of pending court cases, to redetermine the eligibility of initial claimants who were alleging a disability based on a mental impairment.

The effect upon the civil docket was obvious. As Table 8 shows, the number of social security filings rocketed from 42 in 1982 to 131 in 1983, representing 15 percent of the total cases filed in the district. The trend continued higher in 1984. The legislative changes in 1984 produced an immediate and dramatic downward impact on filings, with the result that social security filings were cut in half between 1984 and 1986, shrinking from 16 percent of the total number of filings to 7 percent. With the exception of a one year spike in 1987, filings continued their downward trend, leveling off at 15 filings, representing 2 percent of the total cases, in 1990 and in 1991.

TABLE 8

DISTRICT OF MAINE
Social Security Filings 1982-1991



The immediate effect of changes in federal legislation can be seen in other areas. For example, although there was a national decline in diversity filings following the increase in the jurisdictional minimum in 1989, diversity filings in the District of Maine are now at their highest level in five years, partly because of the increasing number of diversity cases which are removed from the state court to the federal court. Similarly, the large number of cases removed from state court is also a consequence of federal legislation permitting the Federal

Deposit Insurance Corporation to remove pending state court cases to federal court where it has succeeded to the interests of failed insured financial institutions. The result is an immediate and unanticipated increase in the civil docket that is unlikely to dissipate as long as New England's recession continues to produce litigation resulting from the collapse of the real estate market.

Other changes in federal law, particularly those granting private rights of action, directly increase the demands on the court's resources. The District of Maine, like other districts in the country, has seen an increase in the number of Section 1983, ERISA and civil RICO actions. Some predict a dramatic increase in civil lawsuits from 1992's Americans with Disabilities Act. Obviously, any federal statute creating new rights or permitting review of agency action in federal court produces an increase in filings and a corresponding increase in the demands on the court's resources.

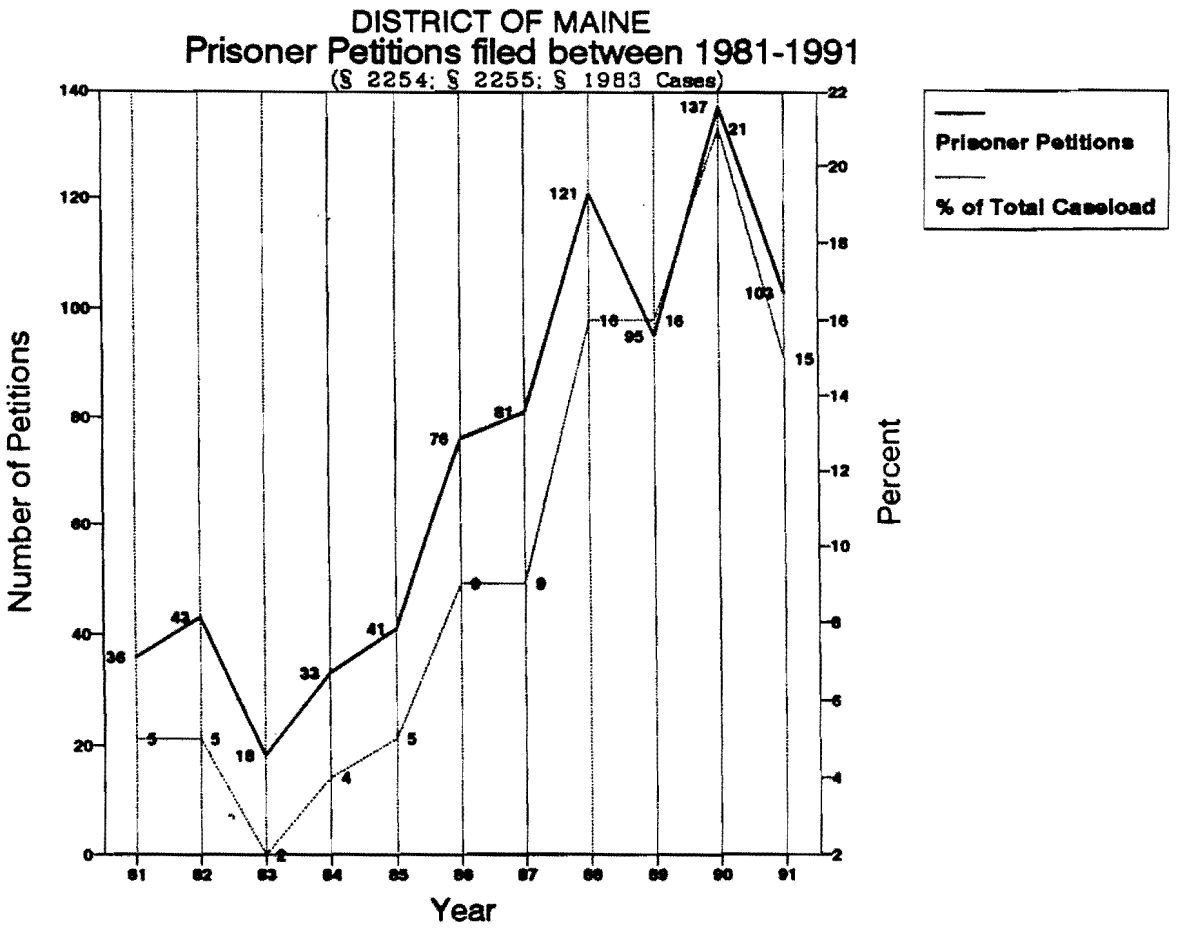
(b) Impact of State Government

The federal court in the District of Maine is also indirectly affected by Maine state government policies and problems. To the extent that the state court system provides an efficient and predictable means of litigating civil cases, the federal court may expect to see a decrease in filings within its concurrent jurisdiction; to the extent that the state courts are underfunded and overcrowded, the District experiences a corresponding increase. Similarly, problems in the state criminal justice system produce direct effects on the federal court through prisoners attempting to bypass the state system and exercise federal rights.

An example of the effect of state policies and problems on the federal court docket is the experience of this District in processing prisoner petitions during the decade from 1981-91. In 1979, the state implemented a new procedure for post-conviction review, which tended to reduce the number of habeas petitions filed in the District, since the state provided a swift, orderly and adequate state remedy for post-conviction review of constitutional rights. Although the state continues to provide post-conviction review, filings by prisoners have nevertheless increased due in large part to conditions in the state prison system. It is generally recognized at all levels of state government that the state's principal prison facility is overcrowded, antiquated, and inadequate to meet current state demands. These conditions have produced filings in federal court arising from such things as double-celling, complaints about classification, and administrative segregation. Although there exists an in-house dispute resolution mechanism at the prison, that process has not led many prisoners to forego the attempt to seek redress of their grievances in federal court. From 1983 through 1991, filings from prisoners showed a steady increase, increasing by about 20 percent per year. Prisoner petitions increased from a low of 2 percent of total cases, representing 18 filings, in 1983 to a high of 21 percent of total cases, representing 137 filings in 1990. See Table 9. The vast majority of these cases are filed pro se and most are decided without trial on summary judgment or procedural grounds. The federal court has little control over this source of filings.

Another example of the impact of state problems and policies on federal civil filings is reflected in the tripling of removals of state court cases to federal court. The state of Maine and its judicial system have been required by economic conditions to impose drastic budget cuts. Throughout most of 1991 and 1992, 2 judgeships out of 16 in the state's principal trial court and 1 of the 7 seats on the state's Supreme Judicial Court were vacant for several months. Budget cutbacks reducing the amount of jury trial time, combined with fewer judges for bench trials, have produced significant delays in the state system. By contrast, only three years ago, the state

TABLE 9



court had created a new fast track docket that made state court a swift and predictable path to the disposition of civil cases. The state judicial system's budgetary problems during the last two years have produced a predictable increase in the number of removed cases and an increase in the number of diversity filings in federal court, where cases are scheduled for trial within eight months of filing. To the extent that the state and federal courts have concurrent jurisdiction over matters, it may be expected that the number of filings in the federal court will increase as long as the state's civil and criminal justice system is hampered by a lack of resources.

(c) Impact of General Economic Conditions

The federal court in the District of Maine cannot escape the influence of the general economic condition of the region and state in which it sits. Generally, an economic recession produces more litigation, some percentage of which will find its way to the federal court. The State of Maine has experienced a prolonged economic recession that has produced a wholesale devaluation of the real estate market, corresponding civil litigation to enforce the collection of mortgage notes, devaluation of bank loan portfolios, and failure of several regional banks. The result is the removal of FDIC-administered litigation to federal court, the filing of stock fraud class action suits under the federal securities laws, a record increase in bankruptcy filings and appeals, and other predictable effects of economic downturn on the civil docket.

3. Trends in Court Resources

Prior to 1979 there was only one judgeship in the District. However, recognizing the impact of a growing civil caseload on a one-judge court, Congress authorized a second judgeship for Maine in 1978. The first full-time magistrate judge was appointed in 1982. A second full-time position was created in 1988. Then in 1990, primarily in response to a steadily increasing rate of criminal filings, Congress authorized a third judgeship for the District.

There are no pending requests for additional judgeships nor are any requests anticipated in the foreseeable future. There is no possibility of any judge assuming senior status for the next 8 years.

Because of the Judicial Conference's policy against combination clerk/magistrate judge positions, our part-time magistrate judge position, occupied by our Clerk of Courts, has to be defended every 4 years.

B. Cost and Delay

1. Delay

Civil cases proceed through the District of Maine very expeditiously and no unnecessary court-created delay exists.

The median time from the filing of a civil case to disposition in the District of Maine is 8 months and only 19 districts throughout the federal court system have faster median times for disposition. Recognizing that a national comparison of these figures may not be entirely relevant, we have compared the Maine median times with those of two other Districts of similar size and caseloads. The median times in the other districts (Vermont and New Hampshire) were 10 and 13 months, 25% and more than 50% longer than in the District of Maine. An equally revealing statistic is that the number of 3-year-old cases in the District of Maine is a very small percentage of the total caseload and is declining. As previously noted, for the year ending June 30, 1992, there were only 4 such cases pending in the District, representing only .05% of the total civil docket. This compares extremely favorably to the national average of 11.8% for the same period of time.

The District of Maine, by any standard, has been extremely successful in managing its civil docket. With civil cases routinely concluded within 8 months of filing, the speed and efficiency of the disposition of civil cases in this District represents one of the best records in the Circuit, and, indeed, in the country. Like other federal district courts, however, the District faces challenges from the increasing number and complexity of criminal prosecutions, and the increase in civil filings resulting from substantial problems in the state civil justice system and in the state generally. With three district judges and two magistrate judges who have significant responsibility, the District is well-positioned to meet the challenges it faces in the future.

2. Cost

Over 95% of the civil cases in the District of Maine do not go to trial. Accordingly, unnecessary trials do not appear to be an important component of avoidable costs in this District. On the other hand, many cases are not resolved until just before trial. Attorney fees and costs are incurred during the case processing even

though ultimately no trial occurs. Any steps that could speed up the resolution of cases during this process, therefore, might reduce costs. Moreover, the general consensus among lawyers is that the primary factor driving litigation costs is discovery abuse: too many depositions; too many interrogatories; and use of discovery to harass an opponent. Such abuse is already limited by the short discovery period that the District now allows the parties in preparing for a civil trial but steps could be taken to limit depositions and interrogatories. On the other hand, some lawyers believe that no change is needed except greater court enforcement of the currently available sanction rules.[3]

The only "client" information we were able obtain on this subject comes from insurance claims managers. See Appendix H. They agree that discovery abuse is a great contributor to increased costs.

It has been suggested that faster rulings on dispositive motions could reduce excess costs in cases where those rulings will dispose of all or part of the case.

There also appears to be a belief that ADR can reduce costs under appropriate circumstances.

The Committee debated at length whether attorney fees were a subject we must take up in light of the Congressional directive to reduce the costs of litigation. Obviously, attorney fees are a primary cost of most litigation. We were made aware that some Districts have set arbitrary limits on contingent fee percentages, capping such percentages somewhere in the neighborhood of 33%. We believe that this is not a problem in Maine, however, for seldom does a contingent fee agreement exceed 33%. Moreover, any client who believes he or she has been charged excessively has the right to compulsory arbitration of fees under the Maine Bar Rules and contingent fees in particular are limited to fees which are "reasonable." Inquiry of the Fee Arbitration Panel revealed that contingent fees have generally not been subject to challenge and that the greatest area of controversy is domestic relations cases, an area where the federal court is not involved. See Appendix K. A wide variety of articles in the Wall Street Journal and legal periodicals also makes clear that many types of fee arrangements are currently undergoing scrutiny in the marketplace. Ordinary commercial litigation is now sometimes turning to contingent fee agreements as a way to cap costs, and various new approaches are being used by corporations and others. It appears that competitive forces are at work and are able to deal better with imposing limits on fees than any attempt to mandate such fees through court scrutiny.

Our final decision with respect to the issue of fees generally, therefore, is to conclude that we are not in the best position to address it. Primarily the issue of attorney fees is a state matter, for regulation, if at all, by the Board of Overseers of the Bar. Beyond that, determination of appropriate limits is a difficult and complex issue for the small of group of lawyers and lay people on this Committee to resolve. In light of the absence of significant federal fee complaints to the Fee Arbitration Panel, the presence of continuing intense competition among Maine lawyers and the fact that the Civil Justice Reform Act Committee is already recommending a number of proposals that are at least moderately controversial, we have concluded not to make any recommendations concerning fees at this time. Since the Civil Justice Reform Act Committee is, by statute, an ongoing committee, the continuing members of the Committee should examine the impact of the remedial measures we have recommended in other respects and determine over time whether some more direct action is necessary on fees. In the meantime, we believe that if our recommendations concerning discovery and case

[3] There appears to be a division of opinion whether the pending amendments to the federal discovery rules will reduce costs or generate more disputes and thus greater costs.

management are successful, fees will be reduced significantly for those clients who pay their lawyers on an hourly basis and, in addition, should result in lower fees, even for contingent fee clients, where cases settle at an earlier stage thereby reducing the percentage escalator present in most fee agreements.

III. RECOMMENDATIONS AND THEIR BASIS

PREAMBLE

There appears to be no delay in civil litigation in this district. Cases are resolved promptly and the general consensus appears to be that no increase in the speed of disposition is possible or desirable. The focus of our recommendations, therefore, is to reduce cost in litigation (without, we hope, causing delay). In this respect we undoubtedly differ from a great many jurisdictions in the rest of the country that face considerable case backlogs and time delay in reaching conclusion in civil litigation. Some of the proposals that other districts are considering or implementing, therefore, do not appear applicable to Maine.

A. RECOMMENDED MEASURES

If adopted, these measures (but for Numbers 11 and 12) are intended to constitute the cost and delay reduction plan required by statute for the District of Maine.

1. We recommend differentiated case management or tracking as follows. Scheduling Orders shall continue to be issued in each case and include all the topics now addressed (subject matter jurisdiction; jury or nonjury; deadline for joinder of claims and parties; discovery deadlines; motion deadlines; settlement deadlines). In addition, we recommend the following:

(a) We applaud the successful efforts of the State Attorney General's Office and Pine Tree Legal Assistance to reach a protocol for the treatment of their cases that will reduce cost and delay. These cases shall proceed on a separate track in accordance with that protocol. An appropriate order shall be entered in those cases. See Appendix I. It would also be appropriate to see if the protocol could include the United States Government and perhaps other legal services agencies such as Legal Services for the Elderly.

(b) Asbestos cases currently are automatically transferred to the Eastern District of Pennsylvania. If the Order of the Multi-District Litigation Panel to this effect should change, they shall be assigned to a separate track for management along the lines to which they were previously subject. See Appendix J for a description of that process.

(c) Other cases that are transferred to other districts by the MDL Panel shall, on their return to Maine, be placed on the complex track (below).

(d) Cases that are transferred to Maine by the MDL Panel shall be placed on the complex track (below).

(e) In pro se prisoner cases, once issue is joined, a magistrate judge shall schedule a visit to the prison for a conference/hearing with the prisoner plaintiff and the attorney(s) for the defendant(s). That

conference/hearing should be on the record, with either a court reporter or, in the interests of economy, a well-functioning tape recorder. The purpose of the session is to obtain an explanation and elaboration of the plaintiff's complaint. This could be accomplished through questioning by the magistrate judge or deposition-type questioning by the defendant's attorney. The result should be immediate dismissal or summary judgment in those cases where it becomes apparent that there is no viable federal claim. In other cases, immediate remedial steps may be available to take care of the grievance. Finally, in the remaining cases, the magistrate judge will proceed to define the discovery and motion practice that is needed in the case and issue a scheduling order.

(f) In the following categories of cases, discovery shall be prohibited entirely unless specific approval is obtained from a judicial officer. These categories are: habeas corpus cases; social security disability cases; government collections of student loans and VA benefits; government foreclosures; special education appeals; and bankruptcy appeals. An automatic scheduling order shall issue providing for prompt disposition. The method of this disposition will vary. In social security cases, for example, the matters are heard orally by the magistrate judge. Student loan cases ordinarily proceed to default before settlement but need to be scheduled for trial if they do not. Government foreclosures are generally resolved by summary judgment or default. Habeas matters proceed first to a magistrate judge for initial evaluation and are usually resolved on written submissions. Special education cases are usually briefed on the underlying administrative record.

(g) In simple cases -- such as vehicle collision cases involving only negligence claims; slip and fall cases; foreclosure actions other than Government foreclosures; statutory forfeiture cases; simple contract cases; declaratory judgments re insurance coverage; FELA cases (railroad negligence); Jones Act cases; foreclosure of first preferred ship mortgages; and complaints for copyright violations for unauthorized musical performances -- the scheduling order shall limit the number of interrogatories, not including legitimate subparts, to 30 per party; 30 requests for admission per party; 2 requests for production per party; and 5 depositions per party.

If a lawyer wishes to alter these discovery limits, she or he must request a conference with the judicial officer. A request for such a conference constitutes a professional representation by the lawyer to the court that he or she has used his or her best efforts to reduce cost and delay and has advised the client accordingly.

Prior to this conference the lawyers must meet and discuss the following topics: voluntary exchange of information and discovery; a discovery plan; the various alternative dispute resolution options; consenting to trial by the magistrate judge; the legal issues in the case; a plan for raising and disposing of serious and legitimate dispositive motions; settlement; and stipulations.

Not less than 2 business days prior to the conference, the lawyers must submit to the Court their proposed discovery and motion plan and any proposal for ADR.

The agenda at the conference with the judicial officer shall include the following topics: narrowing the case to its essential issues; sequencing discovery and motion practice; a trial date; all legal issues; limits on discovery; what, if any, discovery motion practice will be permitted; settlement; ADR options (mediation, arbitration, early neutral evaluation, summary jury trial, minitrial, etc.); reference to a magistrate judge; and the date for the next conference.

At the conference the judicial officer must be aggressive in exploring the actual discovery needs and costs and imposing limits.

The date for the next conference is within the discretion of the judicial officer. For most cases, the next conference will be the final pretrial conference. Any case that is determined at the initial conference to involve substantial discovery, on the other hand, will be reassigned to the complex track.

(h) In all remaining cases, presumably complex cases, an initial scheduling conference shall be held, usually by telephone, before a judicial officer. The case shall be calendared for this conference as soon as issue is joined. First, however, the lawyers must confer (face-to-face or by telephone) and discuss the following topics: voluntary exchange of information and discovery; a discovery plan; the various kinds of alternative dispute resolution; consenting to trial by the magistrate judge; the legal issues in the case; a plan for raising and disposing of serious and legitimate dispositive motions; settlement; and stipulations.

Not less than 2 business days before the conference, the lawyers must submit to the Court their proposed discovery and motion plan and any proposal for ADR.

The agenda for the conference with the judicial officer shall include the following topics: narrowing the case to its essential issues; sequencing discovery and motion practice; a trial date; all legal issues; limits on discovery; what, if any, discovery motion practice will be permitted; settlement; ADR options; reference to a magistrate judge; and the date for the next conference.

During the conference the judicial officer must be aggressive in exploring the actual discovery needs and costs and imposing limits and the advisability and utility of ADR.

The date for the next conference is within the discretion of the judicial officer. For any case that involves substantial discovery, continuous monitoring by the judicial officer is required in person or by telephone and it would therefore not be unexpected that conferences might occur every 60 days or so.

At the first conference (whether by telephone or in person), the judicial officer shall determine whether clients or client representatives should be required to attend the next conference. If that next conference is to be a settlement conference (and it usually should be), the judicial officer should ordinarily require such attendance in person or by telephone, but has the discretion to excuse such attendance in unusual cases.

At each conference after the initial conference, a judicial officer other than the one presiding at trial (unless the lawyers agree otherwise) should discuss in a detailed manner the settlement status of the case, as well as ongoing and projected litigation costs. At each conference the judicial officer should also explore the list of ADR options and should also be aggressive in discouraging unnecessary motion practice.

(i) Generally. Although there is no desire to lengthen the time to disposition in civil litigation, in certain cases serious dispositive motions (for example, on subject matter jurisdiction) might justify a temporary stay of discovery and expedited treatment of the motions by the judicial officer so that the case can move forward. Likewise, in considering the phasing of discovery and motion practice, the judicial officer should consider that in certain cases dispositive motions at the end of discovery may be sufficiently meritorious as to justify delaying the expenses caused by final pretrial preparation. This matter must be handled with great sensitivity, however, for it could lead to encouragement of unnecessary dispositive motions simply to postpone the final day of reckoning and thereby both increase attorney fees through extra briefing and delay disposition.

The judicial officer must also be alert at the first and later conferences to identify issues that can be presented orally without briefing, thereby reducing attorney fees. Discovery issues in particular can usually be presented in an informal fashion and in many cases can be presented by telephone conference thereby avoiding travel costs and time.

2. We recommend that a conference with a judicial officer occur in every case in categories (g) and (h) midway to the discovery deadline. In addition, the court should takes steps to make clear to the bar that a conference of counsel with the court is always available upon request by any party.

3. We recommend that written discovery motions be prohibited. Instead, anyone with a discovery dispute must seek an early hearing with a judicial officer by telephone or in person. If particular discovery materials are needed for the judicial officer to understand the dispute, they can be provided in hand or by fax. Otherwise, only if the judicial officer cannot resolve the dispute satisfactorily without the filing of motion papers and legal memoranda will permission be granted to file the latter.

4. We recommend that the Court be more amenable to holding oral argument in dispositive motions. In order to avoid excess, strict time limits should be imposed in advance and, if at all possible, the judicial officer should attempt to rule orally from the bench.

5. The experimental use of a different trial day schedule for long jury trials should be continued. In some lengthy civil cases, the jury has come in at 8 a.m. and stayed until 1:30 p.m. with no lunch break but 2 15-minute recesses. The theory behind this schedule is that legal issues and in limine matters that might ordinarily delay the jury in the course of a trial day can be scheduled for the afternoons without delaying the jury. In a lengthy trial the jurors have the opportunity in the afternoon to conduct their business or family affairs. The lawyers have the opportunity to prepare their cases better and thereby often avoid needlessly duplicative testimony by planning and streamlining their presentations and reaching agreement with opposing counsel. Certain costs may be reduced by avoiding overtime of support personnel. The judges have the opportunity to attend to the other demands of the docket. General reaction to the experimental schedules has been positive from jurors, lawyers and court officials. One concern is the lagging attention of a jury toward the end of the day without food. It may be advisable to provide some snack at the second break.

6. The setting of time limits for long civil cases should be encouraged. Under this device, the presiding judge, after consulting with the trial lawyers, establishes the amount of time that each side will have for its case, including its own cross-examination of the other side's witnesses. The lawyers must then organize their case to fit these limits, although in exceptional circumstances the limits can be enlarged. At the outset the lawyers tend to complain bitterly, but those who have been through the process seem to agree that it actually improved their presentations by compelling them to focus consciously on the method of presentation and the best way to get the evidence before the jury in an efficient manner.

7. We recommend that a judicial officer who is not going to preside at trial (unless the lawyers otherwise agree) should fully explore the parties' settlement positions with client representatives in attendance at or about the time of the final pretrial conference.

8. It is apparent that compliance with some final pretrial orders is very expensive. Final pretrial orders generally require the lawyers to provide one-paragraph summaries of each witness's testimony; a comprehensive

listing of all exhibits, including which exhibits are objectionable; an identification of all deposition testimony to be offered with objections so that the judicial officer can rule on admissibility questions before the jury is brought in; submission of voir dire questions for the jury; submission of proposed jury instructions; submission of trial briefs; and intensive investigation and submission concerning lien negotiations. Many lawyers feel that an important segment of the costs of litigation occurs here. Other lawyers and some judicial officers believe that these costs contribute to settlement, both because of the very existence of the costs and more importantly because they compel the lawyers finally to confront the nitty gritty strengths and weaknesses of their cases and prepare the case for final disposition. We make the following recommendations designed to recognize both concerns:

(a) The final pretrial order deadlines shall be such that they do not come into play until after the last settlement conference has been held and it appears that trial is unavoidable.

(b) In any case where there is a pending dispositive motion, one item on the final pretrial conference agenda shall be whether the provisions and deadlines of the final pretrial order should be stayed until the motion is resolved. This would avoid the substantial expense of complying with the final pretrial order in cases that are going to be resolved by motion. It also requires the judicial officer to take a preliminary look at the motion, however, and determine whether it genuinely deserves to delay the otherwise firm trial date.

(c) The judicial officer presiding at the final pretrial conference shall tailor the order to the individual case and consider that certain provisions of the final pretrial order be waived. For example, in a simple automobile negligence personal injury case it may not be necessary to list exhibits or summaries of witness testimony. In such cases trial briefs and draft jury instructions may also be unnecessary.

(d) The number of copies of documents to be filed shall be limited. In a jury case, the original set of exhibits should be sufficient and should not be filed with the Clerk before trial. In a nonjury case, one extra set for the judge to review in advance of the trial should be adequate. Trial briefs, voir dire, jury instructions, etc. should be simply the original and one copy.

9. Pro Se Litigation. We recommend that a written handout be prepared and distributed by the Clerk's Office to any pro se litigator highlighting the disadvantages of pro se litigation and the requirement that pro se litigators comply with all the rules just as if they were lawyers, and referring the pro se litigant to the Federal Rules of Civil Procedure, the Local Rules, the CJRA Plan and other pertinent information.

So far as pro se prison litigators are concerned, we believe that the requirement of an early magistrate judge conference at the prison will take care of many of the difficulties.

We recommend that the court establish a separate program for appointing counsel in an in forma pauperis case in federal court. We believe that many law firms would be agreeable to assigning some of their associates to this kind of work, particularly because it would give useful experience in federal court practice.

We also recommend that one of the continuing legal education programs, perhaps at the bar association meeting, deal with the issue of pro se litigants and that the judges be willing to participate in such a program.

10. We recommend that there be regular (annual or biennial) District-wide conferences – like a Circuit conference – but for the District only. Lawyers who practice in federal court should be invited, along with all judicial personnel and representatives of ancillary personnel (Clerk's Office, Probation, Marshal). This would

be an opportunity for continuing education (e.g., Guideline sentencing, bankruptcy practice, practice before magistrate judge) as well as informal interchange between Court and Bar.

11. We recommend that this Committee and the Local Rules Committee be merged and that a reporter, perhaps a law professor, be appointed to provide an institutional memory. Merger would be advantageous because many of the recommendations of this Committee have direct implications for the Local Rules and, by statute, this Committee must be ongoing and review the practices of the District on an annual basis. It seems unnecessary to have two committees. On the other hand, there is need for an identity to the group dealing with the Local Rules so that the same proposals are not considered again and again over the years. Perhaps, therefore, a subcommittee of this Committee could deal with the Local Rules if merger takes place but there should be a direct relationship. Along those same lines, it will be important (to maintain expertise and familiarity with the project) that the membership of that subcommittee have continuity and not turn over too quickly.

For this Committee generally we recommend that the court adopt the following practice for replacing members: The Chief Judge should divide the Committee into three approximately equal groups and assign them to staggered three-year terms, the first group's terms to expire in 1993, the second in 1994, and the third in 1995.

12. We make certain recommendations for the benefit of other actors even though the courts and lawyers themselves cannot control these items. Primarily these involve factors that cause delay by consuming judicial resources rather than additional litigation costs, although some of them involve the latter as well.

(a) For Congress:

(i) Limits on prisoner litigation in the federal courts;

(ii) Reducing the time-demanding nature of Guideline Sentencing procedures;

(iii) Consideration of the consequences of new legislation on the federal courts. For example, the proposed crime control bill provision that would have federalized any crime involving a weapon that had travelled in interstate commerce would have shifted an enormous number of cases from state to federal courts. Likewise the proposed legislation concerning violence against women would probably shift a great many domestic relations disputes from the state courts to the federal courts;

(iv) Standardizing the procedures for lawyers in districts around the country. Congress should recognize that having different procedures from district to district does affect the cost of litigation and can also cause forum shopping. Congress should consider, therefore, whether a national court system of standardized procedures is the paradigm to be achieved here or whether the experimentation and wide differences that have been engendered by the Civil Justice Reform Act should be preserved;

(v) Consequences of divergences between state and federal rules. Differences can lead to removal of certain cases from the state trial courts to the federal trial court as is referred to in subparagraph (d)(ii) infra;

(vi) Consequences of reduced federal funds for the fiscal health of state government. Budgetary problems in the state have led to many judicial vacancies and shortened trial days. This causes a greater number of removals and initial filings in federal court.

Additionally, budget constraints in the state prison system and the resulting overcrowding lead to an increase in the amount of federal prisoner litigation.

(b) For the Circuit or Circuit Council:

(i) Establishment of bankruptcy appellate panels to avoid requiring district judges to address bankruptcy issues in what is essentially an appellate fashion;

(ii) Adoption of pattern jury instructions as has been done in a number of other Circuits would undoubtedly reduce a great amount of trial preparation time for lawyers. (This may be a subject more properly for lawyers and district judges than the Council.) Perhaps standard instructions could be devised even for the District.

(c) For the Executive Branch:

Attention to the dramatic consequences that can occur from administrative decisions. For example, the decision several years ago to reduce large numbers from the disability rolls of social security created an enormous log jam in the federal courts, including this district. There does not appear to be any outstanding problem, but it is a matter that the Executive Branch should be alert to.

(d) For State Government:

(i) Consequences of the health of the state government. Anecdotally, it seems apparent that the budget constraints in the state prison system and the increasing overcrowding lead to an increase in the amount of prisoner litigation in federal court. It also seems apparent that budgetary problems in the state courts that have led to many judicial vacancies and shortened trial days have caused a greater number of removals and initial filings in federal court.

(ii) Consequences of divergences between state and federal rules. For example, the different evidentiary rule concerning the consequence of "subsequent remedial measures" apparently leads to removal of certain cases from the state trial courts into the federal trial court.

(e) For U.S. Attorney's Office:

Continued attention to screening federal criminal cases so that the court's resources are properly used.

* * * * *

It is apparent that most of our proposed measures will not reduce judge time but in fact will increase it. It is unlikely that settlement rates will be increased more than marginally. Although we may hope that earlier settlements will occur, it remains unlikely that the number of trials will be significantly decreased. Consequently, what we are proposing is more judge power spent in the earlier stages of a case without any likely decrease of later judicial requirements. Instead, the sole benefit to be achieved here is reduction in litigation activity for the benefit of the public. This is an important benefit and one that Congress has directed us to pursue. Judge power,

however, is limited. We must recognize that, if either the criminal or civil docket significantly increases, the District probably will not be able to continue to implement these recommendations.

Finally, we should view all these recommendations as experimental. Ideally, a pilot program would be carried out by which a random sample of cases went through particular procedures while others did not and a comparative evaluation was later made concerning the costs that ensued. We do not have either the personnel or financial resources to carry out such a study. Instead, the Standing Committee must continue to evaluate as best it can whether these devices, if the Court should ultimately adopt them, actually contribute to a significant reduction in litigation costs, on the one hand, and, on the other hand, whether they impose significant additional burdens that cannot be justified.

B. Significant Contributions to be Made by the Court, the Litigants and the Litigants' Attorneys

1. Court. The Plan, if adopted, contemplates a significant increase in the number of pretrial conferences. It also contemplates that some of those conferences will canvass significant additional matter and therefore require more time to be spent at the conference and in preparation. Collectively, these requirements will require an increase in the amount of magistrate judge and judge time. We do not see any offset for this time since the settlement rate already appears to be as high as it can realistically go. Instead, the benefit, if any is to be achieved in reducing litigation costs.

The Plan also contemplates an annual or biennial conference of the judicial officers and trial lawyers in the District.

Finally, in some cases the judicial officers will have to spend additional time in attempting to resolve motions prior to the next stage of a case or trial, despite the already pending demands of their criminal and civil trial dockets.

2. Litigants. Our Plan is short on requiring extra measures by litigants. In part, this may be because lawyers traditionally prefer to engage in litigation as professionals without their clients looking over their shoulders at each stage. We assume, however, that clients will take advantage of the highly competitive practice of law in Maine to seek lower fees and better service.

3. Litigants' Attorneys. One set of contributions has already occurred in the form of the meetings between the State Attorney General's office and Pine Tree Legal Assistance, Inc. with the resulting protocol for dealing with cases to which they are parties. This has been a significant contribution by the litigants' attorney in this narrow but significant area of federal court practice.

The new conferences with judicial officers will require more involvement by lawyers and will require meetings and preparation by the lawyers before those conferences.

Finally, two or three lawyers in the District have already volunteered to begin the process of organizing a committee to draft pattern jury instructions for the Circuit.

C. Plan's Use of the Six Principles and Six Techniques of Section 473 (See Appendix G)

The Plan, if adopted, would use many, but not all, of the principles and techniques outlined in § 473 of the Act. We have considered all of them but have chosen not to adopt some. Our use is as follows:

1. Systematic Differential Treatment of Civil Cases . . . We have adopted this concept totally, providing for separate tracks for various categories of cases and a resulting different intensity of case management by the court.

2. Early and Ongoing Control of the Pretrial Process . . . We have adopted this principle in total. The District's trial dates are already firm and trials occur early, long before 18 months after filing. Discovery will be controlled through the automatic discovery limits for certain kinds of cases, the midpoint status conference in all cases, and the early and continuing conferences in more difficult cases. Deadlines for motions are set at the outset under the scheduling orders.

3. Discovery Case Management Conferences for Complex Cases. In complex cases, our Plan contemplates these conferences taking place with attention to the various pieces of information set forth in this category.

4. Voluntary Exchange of Information and Cooperative Discovery Devices. We have not discovered a way to encourage voluntary and cooperative discovery except to the extent that the short deadlines for discovery in this District seem to encourage some of that already and the smallness of the Bar seems to encourage cooperation, at least to a degree not seen in the larger metropolitan areas. We have also required the lawyers at least to discuss this topic before any conference with a judicial officer.

5. Certification of a Conference as a Precondition to a Discovery Motion. Our Local Rules already have this requirement and we contemplate that it will be continued.

6. ADR Programs. Maine appears to be too small to institute a formal court-sponsored program. Instead, our goal is to keep the topic in the forefront of everyone's mind by requiring it to be on the agenda at any conference. Certainly, the need for ADR as a docket-clearing device is not present in Maine and we are uncertain at present how to identify those cases where it will actually reduce litigation costs.

7. Joint Presentation of Discovery Case Management Plans. For cases that require a conference with a judicial officer, we have required that the parties confer before the conference and present to the court their respective discovery case management plans. This will no doubt result in joint proposals in many cases but we have not seen any value in requiring it for all cases.

8. Representation at Each Pretrial Conference by a Lawyer with Authority. This does not appear to have been a problem in Maine and we see no need therefore to institute a special requirement.

9. Signing of all Extension Requests by Lawyer and Party. The current practice requires that all such extension requests be signed by a lawyer. They are not a great problem in Maine and we see no need to make the parties sign as well.

10. Neutral Evaluation Programs. We are not adopting this requirement. There are certain independent professionals in Maine who can conduct such a program and the court may recommend it in particular cases.

11. Availability of Parties with Authority to Bind at Settlement Conferences. This is currently the practice in the District of Maine and we have not recommended any additional requirement.

12. Such Other Features. Not applicable.

D. Recommendation of a Plan

Our recommendations stated under Section (III)(A), with the exception of Numbers 11 and 12, serve as the Recommended Plan.

E. Dissenting Views

The following dissenting views are attached:

OFFICE OF THE CLERK

United States District Court

DISTRICT OF MAINE

WILLIAM S. BROWNELL
CLERK

Edward T. Gignoux U.S. Courthouse
156 Federal Street, Rm. 102
Portland, Maine 04101
Tel. (207) 780-3356

January 5, 1993

Honorable D. Brock Hornby
U. S. District Judge
156 Federal Street, Room 226
Portland, Maine 04101

Dear Judge Hornby:

I have reviewed the final draft of the CJRA Report and, although I do not have a formal vote on the matter, I write to indicate my support for the Report with the following reservation.

I would oppose Recommendation 2 which requires that a status conference be held in every case midway through the discovery process. While such regular, hands-on judicial involvement may indeed be beneficial in managing complex cases, I do not believe it will be so in simple cases.

The discovery deadline in simple cases is typically not more than five months after the issuance of the Scheduling Order. We ordinarily publish trial lists 2-3 months prior to the commencement of trial and include at that time the notice of the final pretrial conference (which is scheduled 4 weeks prior to trial). A status conference in simple cases held midway through the discovery process would therefore be conducted within a month or so of the final pretrial conference and would likely be treated as a "preliminary pretrial conference". You will recall that our previous experience with those types of conferences was not productive (and presumably costly) and we decided to forego the practice 10 years ago.

Mindful that the Court is committed to meeting with counsel whenever reasonably requested to do so, I suggest that a status conference in all simple cases not be mandated in the Report.

Very truly yours,

WILLIAM S. BROWNELL

WSB/cwc

VOTE

REPORT OF THE ADVISORY GROUP
FOR THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE
APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990

Name: V. W. Dyer

Date: January 7, 1993

[XX] I dissent.

Comments: I regret that neither I nor other non-lawyer members attended the committee's meeting of November 19, 1992. Our presence may have mildly influenced the final deliberations and voting which took place. At any rate, we acknowledge the final draft of the Report of the Advisory Group, dated Jan. - 1993.

On behalf of the selected members of the insurance industry who participated in identifying some of the principal causes of cost in civil litigation and recommended how cost containment may be achieved, thank you for the opportunity to respond and comment as to the reason for our dissenting vote.

As previously reported to you in my letter dated Nov. 23, 1992, insurance industry representatives were generally very supportive of the "Recommendations and their Basis". However, they feel that in order to more effectively manage and control "lawyer driven costs", insurance industry employee representatives should be provided the right and opportunity to attend and participate in pre-trial and settlement conferences with their own counsel. (Note that originally they recommended that litigating company's claims representatives and plaintiffs be required to attend and participate in the pre-trial proceedings. We have moderated our position recognizing this could impose an unreasonable hardship on those companies who are not represented in this state by a full service or claim's office operation.)

The draft report is recommending "more aggressive early care management by the court" and also proposes more"judge power in the earlier stages of a case". We concur and recognize that the immediate and/or potential benefit to be achieved is in the reduction of litigation costs. However, to insure that we achieve reducing litigation costs and "lawyer driven costs, we are proposing (and have consistently urged you and the committee to adopt our position and reform proposal) that another dimension be added to this equation, namely, that the court permit and encourage industry employee representatives to also be "playmakers" in this process, and participate in the pre-trial and settlement proceedings and conferences. These individuals hold the purse strings and ultimately make the final decisions and provide instructions to their own defense counsel. They are also held accountable for operational costs and judgment decisions. Considering their background, settlement authority and management responsibilities, they should be where the action is and an integral part of the process. Direct participation by the employee representative will open the communication doors to the court and provide this representative the opportunity to appreciate the forceful persuasion and arguments of the judge. We believe this modus operandi will lead to and encourage "on the spot" early decision making, thus precluding the necessity for extension of the litigation process.

Finally, we believe that exclusion of this important "playmaker" (industry employee representative) from being an active and strategic participant in the pre-trial proceedings and settlement conferences, will only result in business as usual. Our goal to achieve a significant reduction of litigation costs will not be possible since "lawyer driven costs" will continue to erode the system.

PIERCE, ATWOOD, SCRIBNER,
ALLEN, SMITH & LANCASTER

ATTORNEYS AT LAW

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207 773-6411 FAX 207/773-5419

PETER W. CULLEY

January 19, 1993

The Honorable D. Brock Hornby
United States District Court
156 Federal Street
Portland, ME 04101

Re: Civil Justice Advisory Committee Draft Report

Dear Judge Hornby:

I am writing in response to your memorandum of January 14th. Attached to that memorandum was a very persuasive letter from Bill Brownell suggesting that mandated status conferences in every case, midway through the discovery process, may not be appropriate. I think Bill has an excellent point.

While I am sure there are many cases where such a conference would be appropriate, I am sure there are a significant number where it may not be necessary and would in fact increase the Court's workload and costs on the litigants to participate in such a conference. For this reason, I concur in Bill's suggestion that we not mandate a conference in all cases, but leave it available as an option.

Sincerely,

PWC/dlc
cc: Civil Justice Advisory Committee

6712.1-LIT

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January 25, 1993

The Honorable D. Brock Hornby
United States District Court
156 Federal Street
Portland, Maine 04101

RE: Civil Justice Advisory Committee Draft Report

Dear Judge Hornby:

I have had an opportunity to read Bill Brownell's comments and I feel that they are appropriate and support his position.

Sincerely,

Harold J. Friedman

HJF:cpp
hjf\civil\hornby.ltr

cc: Mr. Bill Brownell

APPENDIX A

MEMBERS OF THE CIVIL JUSTICE ADVISORY COMMITTEE

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Honorable D. Brock Hornby, Chairman
United States District Judge

Bruce N. Bagni, Esq. Portland, Maine	Former Vice-President & Chief Counsel, UNUM (Resigned midway because of relocation to Florida)
Richard S. Cohen, Esq. Portland, Maine	United States Attorney for the District of Maine
Jack B. Comart, Esq. Augusta, Maine	Attorney, Pine Tree Legal Assistance, Inc.
Peter W. Culley, Esq. Portland, Maine	Chair, Subcommittee on Delay Trial Attorney (large firm) and Fellow of American College of Trial Lawyers
John R. DiMatteo Portland, Maine	Retired President, The Portland Newspapers
V.W. Dyer, Jr. Cumberland, Maine	Retired Chief Claims Adjuster, Liberty Mutual Insurance Co.
Duane D. Fitzgerald, Esq. Bath, Maine	Chief Executive Officer, Bath Iron Works
Harold J. Friedman, Esq. Portland, Maine	Chair, Subcommittee on Costs Trial Attorney (mid-sized firm) and Chairman of Federal Section of Maine State Bar Association
Charles A. Harvey, Jr., Esq. Portland, Maine	Chair, Subcommittee on Docket Trial Attorney (large firm) and Chairman of the Local Rules Advisory Committee for the District of Maine
Harry R. Pringle, Esq. Portland, Maine	Attorney (large firm) Representing Municipal Governments and School Boards
Warren M. Silver, Esq. Bangor, Maine	Attorney (solo practitioner) with General Civil and Criminal Practice

George Z. Singal, Esq. Bangor, Maine	Trial Attorney (small firm) and Fellow of American College of Trial Lawyers
Sally Sutton Portland, Maine	Director, Maine Civil Liberties Union
Vendean V. Vafiades, Esq. Augusta, Maine	Chief Deputy Attorney General of the State of Maine

William S. Brownell, Esq.
Clerk of Court
Reporter

APPENDIX B

COMMITTEE OPERATING PROCEDURES

In accordance with the provisions of the Civil Justice Reform Act of 1990 (the "Act") Chief Judge Gene Carter of the United States District Court for the District of Maine appointed 14 attorneys and laypersons to serve as the Court's Advisory Group to assess the condition of the court's civil and criminal dockets, to identify the causes of unnecessary delays and costs in civil litigation, and to develop a plan to reduce unnecessary costs and delays. The Advisory Group was comprised of federal practitioners and non-lawyers each representing various interest groups that regularly appear before the court[1]. Members included the United States Attorney for the District of Maine, the Chief Deputy Attorney General for the State of Maine, trial attorneys from large and small firms in the district experienced in both plaintiff and defense litigation, corporate and legal services counsel, as well as the Executive Director of the Maine Civil Liberties Union and representatives of business and industry. The Group was chaired by United States District Judge D. Brock Hornby. William S. Brownell, Clerk of the District Court, was an ex officio member who also served as the Reporter.

The Advisory Group held its organizational meeting on May 3, 1991, at which time each member was provided with copies of the District Court's local rules and with a written summary of the Court's case management practices and procedures. In an attempt to acquaint the lay members of the group with the rudiments of federal civil practice, a time line analysis of a typical federal civil case was presented by three of the attorney members. Commencing with the attorney's initial interview of the client, through to the filing of a complaint, the discovery process, trial, and execution of judgment the attorneys identified those stages in the litigation process that are most likely to cause greater client expense and be

[1] In accordance with the Act's mandate the membership of the Advisory Group was "balanced and include(d) attorneys and other persons who are representative of major categories or litigants in (the) court. . . ." 28 U.S.C. § 478(b).

subject to continuances and delay. The preliminary consensus of the Group after this exercise was that ordinarily less than 10% of a plaintiff's costs and less than 5% of a defendant's costs are incurred prior to the filing of a complaint and that between 40% and 60% of the entire cost of litigation is usually incurred during the course of discovery and motion practice. While the exercise was by no means precise, it proved to be an instructive aid in preparing the Advisory Group for its charge.

A second meeting was held on May 23, 1991, at which time Chief Judge Gene Carter addressed the Committee and expressed his concerns about the pending caseload and his ideas about case management. While enthusiastic about the challenging mission facing the Advisory Group, Judge Carter cautioned the Committee to be "realistic in its goal-setting." At that meeting the Advisory Group also heard from United States Attorney Richard S. Cohen who discussed the causes of the increasing volume and complexity of the criminal prosecutions in the District.

A third meeting of the committee of the whole was held in early June, 1991, at which time Clerk Brownell presented an analysis of the District's pending caseload and filings; Magistrate Judge David M. Cohen described the role and duties of the full-time magistrate judges in the District; and an assistant attorney general experienced in representing the State in prisoner civil rights cases discussed the unique issues that are associated with pro se litigation and how those cases impact upon the Court's resources. At that meeting, the Advisory Group divided into three working subcommittees each of which was chaired by a trial lawyer. Each subcommittee was responsible for reviewing in depth one of the major topics of the Act and was given the responsibility of preparing a report and any proposed recommendations to the entire Advisory Group. The three sub-committees were:

(1) a subcommittee to examine the condition of the civil and criminal dockets, to identify the case filing trends and to describe the demands being placed on the court's resources;

(2) a subcommittee to identify the principal causes of cost in civil litigation, and to examine not only court procedures but attorney and client behaviors as well; and

(3) a subcommittee to identify the principal causes of delay in civil litigation and to consider court procedures and attorney behavior.

The subcommittees met throughout the following six months and on January 24, 1992, the entire Advisory Group met to receive and consider the preliminary reports of the subcommittees.

Since then, the entire Advisory Group has met five more times. The Chair and the Subcommittee Chairs presented the initial conclusions and recommendations to the annual meeting of the Maine State Bar Association in the summer of 1992 and received comments. The Chair has also had a series of breakfast meetings with Portland and Bangor area lawyers, seeking comment.

APPENDIX C

COST AND DELAY REDUCTION PLAN

Our Cost and Delay Reduction Plan is stated in the recommendations made in Section (III)(A).

APPENDIX D

REPORT OF THE SUBCOMMITTEE ON THE CONDITION OF THE DOCKET

The Subcommittee was asked to examine in detail the condition of the civil and criminal dockets, identify the case filing trends, and describe the demands being placed on the court's resources. The subcommittee consists of Richard Cohen, Jack Comart, Sally Sutton, Bill Brownell (ex officio), and Chuck Harvey, Chair. The subcommittee also received significant assistance from Jack Gleason of the U.S. Attorney's Office.

The subcommittee has found that the present state of the civil and criminal dockets in the District of Maine reflects coordination between the U.S. Attorney's Office and the court in scheduling the criminal docket and aggressive management by the court of civil pretrial proceedings. Although the filing of civil cases has increased in the past decade, the median time between filing and disposition in routine civil cases is approximately eight months, probably the minimum amount of time necessary for the average federal civil case to be ready for trial. With the appointment of a third district judge, it is expected that the District of Maine will continue its record of active management and swift disposition of civil cases.

Despite the district's record in managing its civil caseload, the court faces challenges from several sources. As criminal actions increase in number and become more complex in content, the management of the criminal docket, particularly with the pressures imposed by the Speedy Trial Act, will divert more of the court's resources from the disposition of the civil docket. Changes in legislation, such as the amendments to the Social Security Act in the early 1980s, have an immediate and identifiable impact on the civil docket, both in the increase and decrease in filings.

Finally, the federal civil justice system will be directly affected by events taking place in the state in which the district is located. For example, changes in state post-conviction laws, mandatory sentences, and prison overcrowding have produced record numbers of filings by prisoners. The severe economic

recession has and will produce a significant increase in civil filings, particularly removals from state courts where the FDIC has succeeded to the interests of failed litigant banks. Ironically, the success of the district in managing its civil docket will attract more diversity cases that might otherwise have been filed in a state court system now experiencing significant delays caused by budget cutbacks. In short, the district has successfully met the challenges posed by its own internal management of the civil docket. The increasing demands placed on its resources are likely to come from external forces such as changes in federal law, the effect of a regional economic recession, and significant problems in the state administration of the civil and criminal justice system.

The District of Maine

The District of Maine, although a huge geographical area, is relatively small court serving a population of approximately one million two hundred thousand people. Court is held regularly in both Portland, Maine's largest city and the district headquarters, and in Bangor, located 135 miles north of Portland.

Prior to 1979, there had only been one judgeship in the District. However, recognizing the impact of a growing civil caseload on a one-judge court, Congress authorized a second judgeship for Maine in 1978. Then in 1990, primarily in response to a steadily increasing rate of criminal filings, Congress authorized a third judgeship for the District.

Two district judges, one full-time magistrate judge and one part-time magistrate judge preside in Portland and one district judge and one magistrate judge preside in Bangor. Both the full- time magistrate judges have been authorized to perform the full range of duties permitted by law and the district judges regularly encourage counsel to consent to the trials of civil cases by the magistrate judges.

Assignment of Cases

In accordance with Rule 2 of the Local Rules of the District, new cases are filed in each location of court based on the county in which the action arose. Cases arising out of the northern and eastern counties of Aroostook, Franklin, Hancock, Kennebec, Penobscot, Piscataquis, Somerset, Waldo and

Washington are filed and ordinarily tried in Bangor. These cases, which represent roughly one-third of the new filings each year, are assigned upon filing to the district judge in Bangor. Those cases arising out of the counties of Androscoggin, Cumberland, Knox, Lincoln, Oxford, Sagadahoc and York are filed and ordinarily tried in Portland. The Portland cases are randomly assigned by the Clerk to the resident Portland judges by lot, so that each is assigned an equal number of new filings.

There are two minor exceptions to the assignment process. First, all the cases in which the state, a state officer or a state agency is a party would ordinarily be assigned to the one resident judge in Bangor because the state capital, Augusta, is located in Kennebec County. To avoid the inequities that may result by such an allocation, those cases are randomly assigned to any of the three judges so that each receives an equal number. Similarly, all appeals from the bankruptcy court to the district court are assigned by lot to the three district judges regardless of where the bankruptcy action may have arisen. This procedure assures that no district judge is assigned a disproportionate number of these appeals.

For the most part, the judges in the District of Maine utilize the individual calendar system and each judge is responsible for managing his own caseload. Each year the clerk prepares a master calendar of anticipated trial sessions from which trials are scheduled throughout the year. The judges frequently conduct "joint trial sessions" during which cases assigned to one or more judges will be tried by either of two judges. All cases ready for trial are scheduled well in advance. Continuances are not freely granted. Unless settled or dismissed by the parties, all cases scheduled are reached for trial or other disposition by the court.

Present State of the Docket

After several years of unprecedented growth in the district's caseload during the early 1980's, the number of new filings began to decline in 1987,[1] following a record high of 1,018 total filings in 1986. The decline lasted only three years. Total filings have increased 11 percent in 1990 and 6 percent

[1] All references are to statistical years, July 1 - June 30, and unless otherwise noted, the caseload and filing figures are from the annual Management Statistics for U.S. Courts published by the Administrative Office of U. S. Courts.

in 1991. This recent growth is in contrast to the national trend in which civil filings declined 7 percent in 1990 and 5 percent in 1991. Nationally, criminal filings rose 6 percent in 1990, but decreased 4 percent in 1991. In four of the past five years, the District of Maine has led all districts in the First Circuit in the number of filings per judgeship. During 1991 there were 834 total filings in the district, the highest number since 1988.

The recent general decline of civil filing nationally has resulted from a significant decrease in the number of new filings based upon diversity of citizenship. In 1990, national diversity filings decreased by 15 percent and by 11 percent in 1991. One reason for this decline is legislation effective in May, 1989, which increased the jurisdictional minimum from $10,000 to $50,000. In contrast to the national trend, during each of the past 5 years diversity filings in the District of Maine have remained relatively constant. Although there was a decline in diversity filings following the 1989 legislation, the number of filing in 1991 was the highest since 1987 and represents a quarter of the total caseload.

TABLE 1

DISTRICT OF MAINE

CIVIL CASES FILED BY DIVERSITY OF CITIZENSHIP

	Total Civil Filings	Diversity Filings	Percent of Total Pending Civil Cases
1991	691	181	26%
1990	661	142	21%
1989	607	171	28%
1988	736	160	22%
1987	857	185	22%

While the number of new diversity filings have remained constant in the District of Maine, the number of cases removed from state court to the federal court has more than tripled since 1989. In 1989, 29 state cases, representing five percent of the total civil caseload, were removed to the District of Maine. In 1991, 91 cases, representing thirteen percent of the civil cases, were removed from state court. This increase is in part a consequence of the more than thirty bank foreclosure actions which were removed during 1991 by the Federal Deposit Insurance Corporation under new legislation permitting it to do so

where it has taken over failed state financial institutions. The New England economic recession has produced a significant increase in litigation involving banks, some of which have now been taken over by the FDIC. The increase in removals is also attributable to significant uncertainty and delays in the state court system, which is grappling with an increasing caseload in the face of severe budgeting problems and unfunded trial court judgeships.

In addition to the increase in civil filings, the criminal caseload is also increasing. Maine has ranked first or second each year since 1982 among all the districts in the First Circuit in new felony filings. The court has made a significant effort to reduce the number of pending cases. Over the past seven years, the number of total civil and criminal cases pending in the District has decreased 54 percent, from the high of 1,061 cases in 1984 to 575 pending cases in 1991.

As shown below, in almost every year since 1984 the number of terminations in the district have outpaced the number of new filings. While there has been a steady increase nationally in the ratio of pending cases to terminated cases (up to .97 in 1989) theratio in the District of Maine has decreased in each of the past several years and was remarkably only .65 in 1991.

TABLE 2

DISTRICT OF MAINE
1984 - 1991
WORKLOAD STATISTICS

	Filings	Terminations	Pending Cases
1984	981	969	1061
1985	972	1037	996
1986	1018	1054	960
1987	990	1086	864
1988	864	970	758
1989	708	805	660
1990	786	782	627
1991	834	876	575

Additionally, and in contrast to the national trend, in each of the past several years the median time from filing to disposition for civil cases has declined in the District of Maine. In 1991, the median time from filing to disposition was 8 months, ranking the District of Maine the nineteenth best out of the

94 districts in the nation and the 2nd best in the First Circuit. Civil median time does not include prisoner petitions, land condemnation cases, and all recovery of overpayments and enforcement of judgment cases (primarily student loan and VA overpayments), which, if included, would further reduce the median disposition time. The median time for the disposition of criminal felony cases has likewise decreased each of the last 3 years to 5.7 months for 1991.

TABLE 3

DISTRICT OF MAINE
1986 - 1991
Median Time from Filing to Disposition
(in months)

	1991	1990	1989	1988	1987	1986
Criminal Felony	5.7	7.1	8.7	5.7	5.7	5.4
Civil	8	9	9	10	11	9

The median time for disposition of civil cases could be improved if counsel more frequently elected to consent to trial before the magistrate judges. A consent to proceed before the magistrate judge will ordinarily mean that the case will be specially assigned to trial on a date certain, which can be an appealing alternative to the district judges' trailing lists of cases. The fact is, however, as seen in Table 4 below, that counsel consent to the magistrate judges in less than 4 percent of the civil cases.

TABLE 4

District of Maine
1984 - 1991
Consent Cases

	Number of Consent Cases	Total Pending Caseload	Percentage of Caseload
Dec. 1987	136*	708	19%
June 1988	0*	607	0%
Dec. 1988	3**	541	0%
June 1989	23	536	4%
Dec. 1989	19	526	4%
June 1990	14	528	3%
Dec. 1990	14	474	3%
June 1991	13	466	3%

* The full-time magistrate was assigned to all asbestos cases.
** Magistrate position was vacant from 6/10/88 to 10/11/88.
*** As of 3/20/89 there were two full-time magistrates.

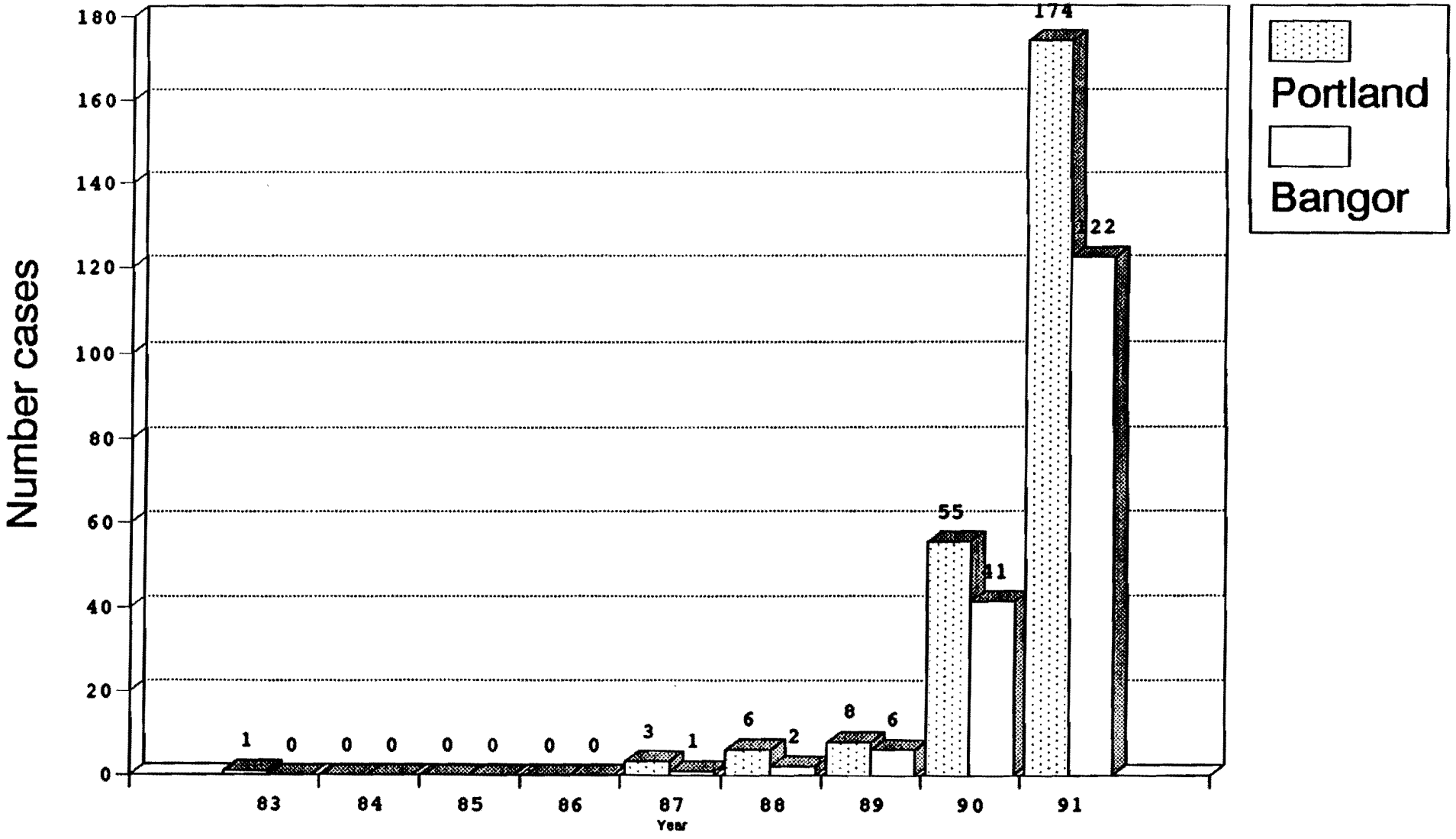
As the number of pending cases has decreased, the docket has become more current. Of the 419 civil cases pending in the district on 9/19/91, 296 (71 percent) were filed in calendar year 1991 and 96 cases (23 percent) were filed in calendar year 1990. See Table 5, Appendix. Significantly, in 1991 there were only 8 pending three-year-old cases in the district, representing 1.7 percent of the total civil caseload. This is substantially lower than the national average, which in 1990 was 10.4 percent. See Table 6, Appendix. It is likely that this record can be improved, since in 1990 one of the then two judgeships authorized at that time was vacant for 6.5 months.

In summary, the present state of the civil and criminal dockets in the District of Maine is excellent. Civil cases are routinely assigned for trial and terminated within 8 months of filing. Only a few matters are ordinarily under advisement for more than 60 days and rarely are any matters under advisement for more than 6 months. As of June 30, 1991, fewer than 2 percent of the civil cases had been pending for more than three years. Since the third judgeship was filled in August, 1991, it is expected that this record can be improved in the years ahead.

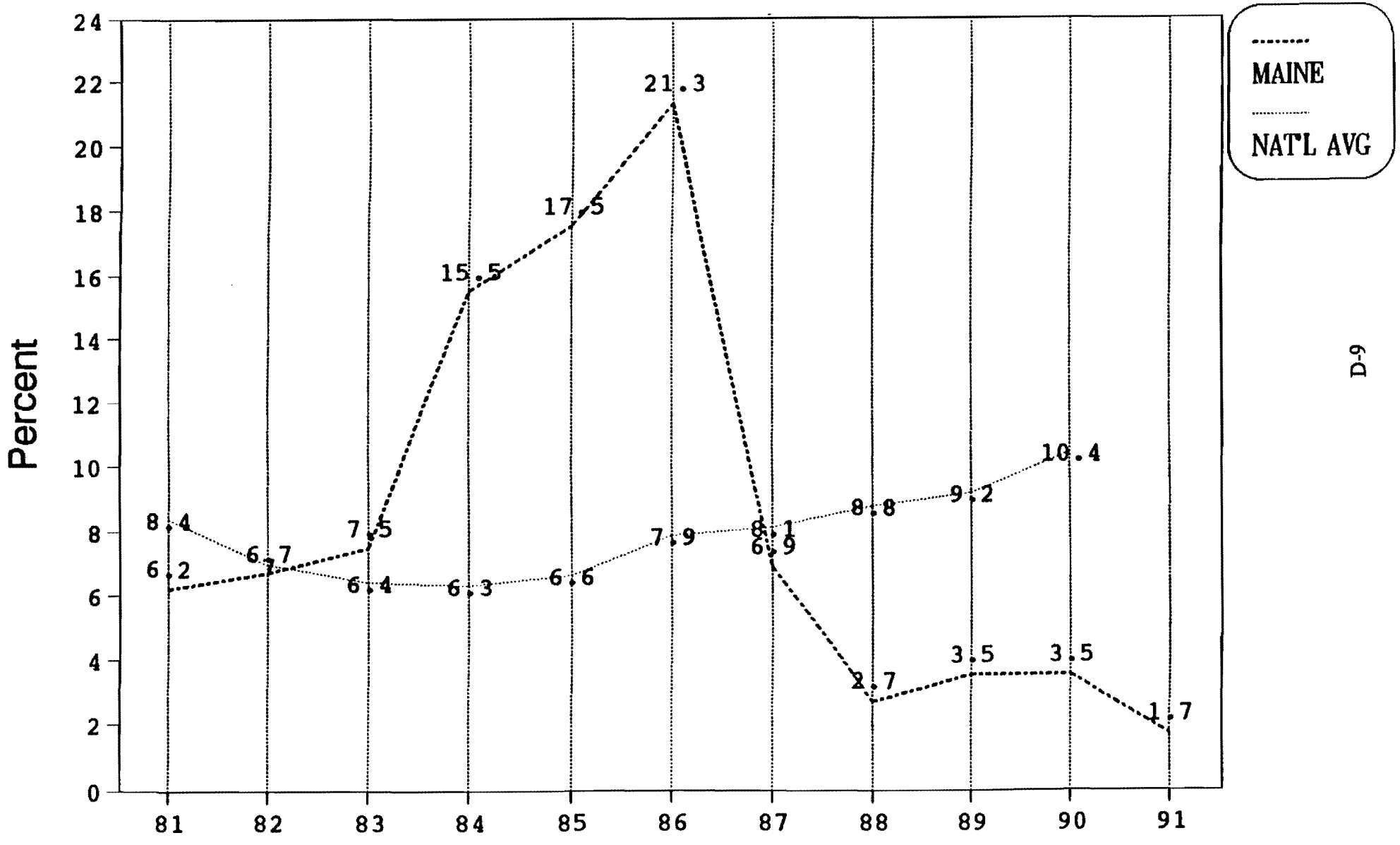
TABLE 5

Pending Civil Caseload

September 19, 1991



Civil Caseload Pending More Than 3 Yrs.
District of Maine



Trends in Criminal Filings and Resulting Demands on the Court's Resources

The criminal docket has a significant impact on the management of the civil docket. The Speedy Trial Act requires the court to act swiftly on criminal matters and as the number of criminal filings increases, there is necessarily a diversion of resources to managing the increased criminal caseload. Aside from the increasing number of filings, the complexity of the criminal matters before the court is significantly greater than in the recent past. For the future, the trend will likely be more matters of greater complexity, thereby demanding more judicial resources that would otherwise be available for the civil caseload.

There can be no doubt about the trend in the years ahead. Over the past 18 months, the United States Attorney's office and the Department of Justice as a whole have undertaken a number of criminal justice initiatives that will have a substantial impact on available judicial resources. These new initiatives are primarily in the following areas: financial institution frauds; economic crime in general, environmental crime, and weapons-related armed career criminal prosecutions. Since the most recent statistics are for calendar year 1990, however, in most of these areas a statistical basis is not as yet available demonstrating this expected impact.

In the District of Maine, substance prosecutions will continue to comprise a substantial percentage of the criminal docket. While there is not likely to be a substantial increase in the numbers of defendants prosecuted for these violations, the cases themselves will be more complex because they are anticipated to involve organizationally-based drug offenses. Indeed, within the past six months two such complex cases, which involved both drug and federal income tax violations, resulted in pleas of guilty before trial. Had they gone to trial, each of these cases would have involved between four to six weeks of trial time.

The increasing complexity of controlled substance prosecutions is reflected in other areas, such as financial institution fraud, general economic crime, and environmental crime. An illustration of this trend is the fact that in six separate areas, the last 18 months has recorded the largest case in dollar

amount ever prosecuted in the history of the District of Maine to that type of case. These cases were prosecutions for bank embezzlement, government program fraud, defense procurement fraud, commercial fraud, commercial extortion, and environmental crime. Fortunately, all but two of the above cases resulted in pleas of guilty before trial. If any of the four cases had resulted in trials, there would have been a significant requirement for trial time from a week up to a month or more.

For the foreseeable future, controlled substance prosecutions will continue to be a substantial, increasing percentage of the criminal docket. The number of defendants prosecuted for drug law violations steadily increased from 23 defendants in 1981 to 100 defendants in 1990. The increased need for prosecution of drug- related offenses in the last 10 years is apparent from the ratio of drug-related prosecutions to total prosecutions over the last decade. In 1981, the United States Attorney's office initiated prosecution of 77 defendants, only 23 of whom were prosecuted for drug offenses. In 1990, 182 defendants were prosecuted, 100 of whom were prosecuted for drug-related offenses. In the last three years the number of prosecutions has leveled off: seventy defendants were prosecuted for drug-related offenses in 1988, 120 in 1989 and 100 in 1990, for an average of 96 defendants each year.

The rate of increase in the number of prosecutions has slowed as a result of the effort of the federal and state governments in Maine to bring many more drug case prosecutions in the state court system. Prior to 1988 and the implementation of Maine's Intergovernmental Drug Enforcement Act of 1987, many of these cases would have been prosecuted in federal court. The United States Attorney's office has reserved federal prosecution for the more complex or organizationally based drug offenses. Thus, even if the number of prosecutions remains constant, the prosecutions themselves will continue to be more complex.

Federal legislation has created an entirely new source of civil cases arising from criminal activity. Asset forfeiture cases now frequently appear on the docket. The majority of asset forfeiture cases brought in the District of Maine are based upon drug related conduct. Although formal statistics are not available, the U.S. Attorney's office has records reflecting forfeiture decrees issued in Fiscal Year 1991 (October

1, 1990 through September 30, 1991). There were a total of 39 asset forfeiture decrees entered in Fiscal Year 1991 covering fifty different assets forfeited to the United States. The dollar value forfeited was $1,730,393.

At present, the U.S. Attorney's office does not expect a significant increase in the judicial workload on these cases in the District of Maine, but there is likely to be a gradual increase in cases as the office continues to pursue prosecution of organizationally based drug-related offenses.

Thus far, the cases have not consumed trial time. Of the 39 decrees entered, only three involved trials, none of which lasted more than one day.

In the next few years, there is expected to be a significant increase in financial institution fraud prosecutions. During the past 18 months, the Department of Justice has placed emphasis on the investigation and prosecution of financial institution fraud. The United States Attorney's office has been allocated one new attorney position for work in this area. In addition to this new position, a portion of the time of three other prosecutors has been dedicated to this area.

This increased emphasis is reflected in a comparison of statistics falling within the categories of Larceny, Embezzlement, and Fraud for calendar years 1989 as opposed to 1990. In this district, most financial institution fraud cases would fall within one of these three categories, although there may be a few additional non-financial institution cases which would fall within those statistical categories as utilized by the Administrative Office of the Courts. In calendar year 1989, there were 14 defendants prosecuted in those three areas. In 1990, the number had increased to 24. The U.S. Attorney's office expects the same rate of increase in calendar year 1991.

There is also a trend towards increasing sophistication in the cases prosecuted. Although not reflected in published statistics, the last year demonstrated a significant shift in the levels of corporate responsibility held by the defendants who have been prosecuted. In the current year alone, seven officers of financial institutions have been prosecuted. During the last year, thelargest bank embezzlement case in the history of the District of Maine was prosecuted.

More court time will be required to deal with the increasing complexity and numbers of financial institution fraud prosecutions. The district has been fortunate that its financial institution fraud prosecutions have not involved illegal activity at the controlling stockholder, director or chief executive officer level. In other parts of the country, prosecutions of individuals at these levels have had a significant impact on judicial resources available for the civil docket. It remains to be seen whether the more significant and numerous prosecutions will be brought by the Department of Justice's newly created New England-wide financial institution fraud investigative and prosecutive task force headquartered in Boston.

Within the last 12 months the Department of Justice, working jointly with the Treasury Department's Bureau of Alcohol, Tobacco and Firearms, has initiated a program of assistance to state and local prosecutive entities focusing upon career criminals who use firearms in violent or drug trafficking crimes. This initiative produced an increase from 6 defendants prosecuted for weapons and firearms offenses in 1989 to 14 prosecuted in 1990. By the end of 1991, this number of defendants has appropriately doubled again. While the number of defendants prosecuted will certainly increase, these cases are relatively straightforward and usually end in pleas of guilty. Where a trial does result, only 1-2 days of court time is needed.

The trend of increasing complexity is present in other areas. In 1990, the largest environmental criminal case ever prosecuted in the District of Maine was brought. This case also involved the second largest criminal fine ever imposed in the nation for a hazardous waste related offense.

Prosecutions of the environmental crimes are not numerous, but are labor intensive for investigators and attorneys. Accordingly they do not result in large raw numbers in terms of defendants prosecuted. Perhaps for this reason the Judicial Workload Statistics complied by the Administrative Office of the Courts do not contain a category for criminal environmental prosecutions. The United States Attorney's office has designated one member of the existing staff to work on environmental

criminal prosecutions. There will be an increasing focus on criminal environmental violations, and prosecutions could require significant blocks of trial time.

Demands on the time of magistrate-judges are likely to increase moderately as immigration law enforcement is tightened. The United States Attorney has recently undertaken an initiative to coordinate law enforcement activities on both sides of the Maine- Canadian border. As with weapons-related offenses, prosecutions in this area are not numerous (8 defendants in 1989, 11 in 1990) or complex. Nonetheless, the cumulative effect produces a trend of new crimes, tighter enforcement, more aggressive prosecution, and, or the court, a greater demand on resources.

In addition to the separate category of Financial Institution Fraud, the United States Attorney's office has also undertaken an initiative with respect to the prosecution of economic crime. Exemplifying this increasing emphasis, three prosecutions in the last 18 months involved the largest cases of their type in dollar amounts ever prosecuted in the history of the District of Maine for government program fraud, commercial fraud, and defense procurement fraud. Again, the trend is toward a new area of criminal enforcement, more complicated subject matter, and more demands upon the resources of the court.

Recent federal legislation that promises to have a continuing and significant demand on court resources are the Federal Sentencing Guidelines. The guidelines have radically changed judicial sentencing policies and have required the court at the judicial and administrative levels to interpret, administer, and effectuate a complex set of guidelines in the sentencing of criminal defendants. Indeed, in cases in which the court has avoided a trial by accepting a plea of guilty, the guidelines frequently require a mini-trial for the purposes of determining the appropriate sentence under the guidelines. This is not necessarily a criticism of the guidelines themselves or the policies they seek to effectuate, but the day-to-day reality in a federal district court is that the guidelines require increasing amounts of judicial resources. The allocation of scarce judicial and administrative resources to new criminal proceedings necessarily diverts those resources that might otherwise be available for the civil docket.

In summary, federal law enforcement and the demands it places upon the federal courts reflects the increasing complexity and diversity of the problems our society faces. In the next decade, prosecutions will involve crimes and subject matter that were not significantly represented on the court's docket even five years ago. Many of these new areas, such as financial institution fraud and environmental crime, are extremely complex and in other areas of the country have required significant allocations of judicial resources. The result is an identifiable, substantial impact on the civil justice system.

Trends in Civil Filings and Resulting Demands on the Court's Resources

The civil docket of the federal court in the District of Maine is significantly affected by three principal forces beyond its control: the impact of new federal legislation, the indirect effect of policies and problems in the state government and state court system, and the economic and sociological character of the district. It is not possible to trace the impact of these forces precisely, but general paradigms can be used to illustrate the effect of these forces, the trend likely to be seen in the predictable future, and the demands these effects have on the court's resources.

Impact of Federal Legislation

New federal legislation can have a dramatic impact on the number and complexity of cases filed on the civil docket. A clear example of this impact can be seen in the changes in social security egislation in the last decade. In 1980, Congress passed legislation which required an accelerated review of existing disability cases. As a result of this review, 460,000 people were terminated between 1981-84: a fourfold increase over the prior three year period. In September, 1984, Congress enacted Pub.L. No. 8-460, the Social Security Disability Benefits Reform Act of 1984. his statute included a moratorium on the disability review process or mental impairment cases, the largest proportion of the termination cases.

At the administrative level, the Social Security Administration, through a series of policy changes, tightened the disability standards, particularly in the area of what constituted a "severe" impairment. In

this district, it is estimated by legal service organizations that at least 25 percent of the social security filings in Maine were "severity" cases. Again, in 1984, statutory changes largely put an end to the administration's interpretation.

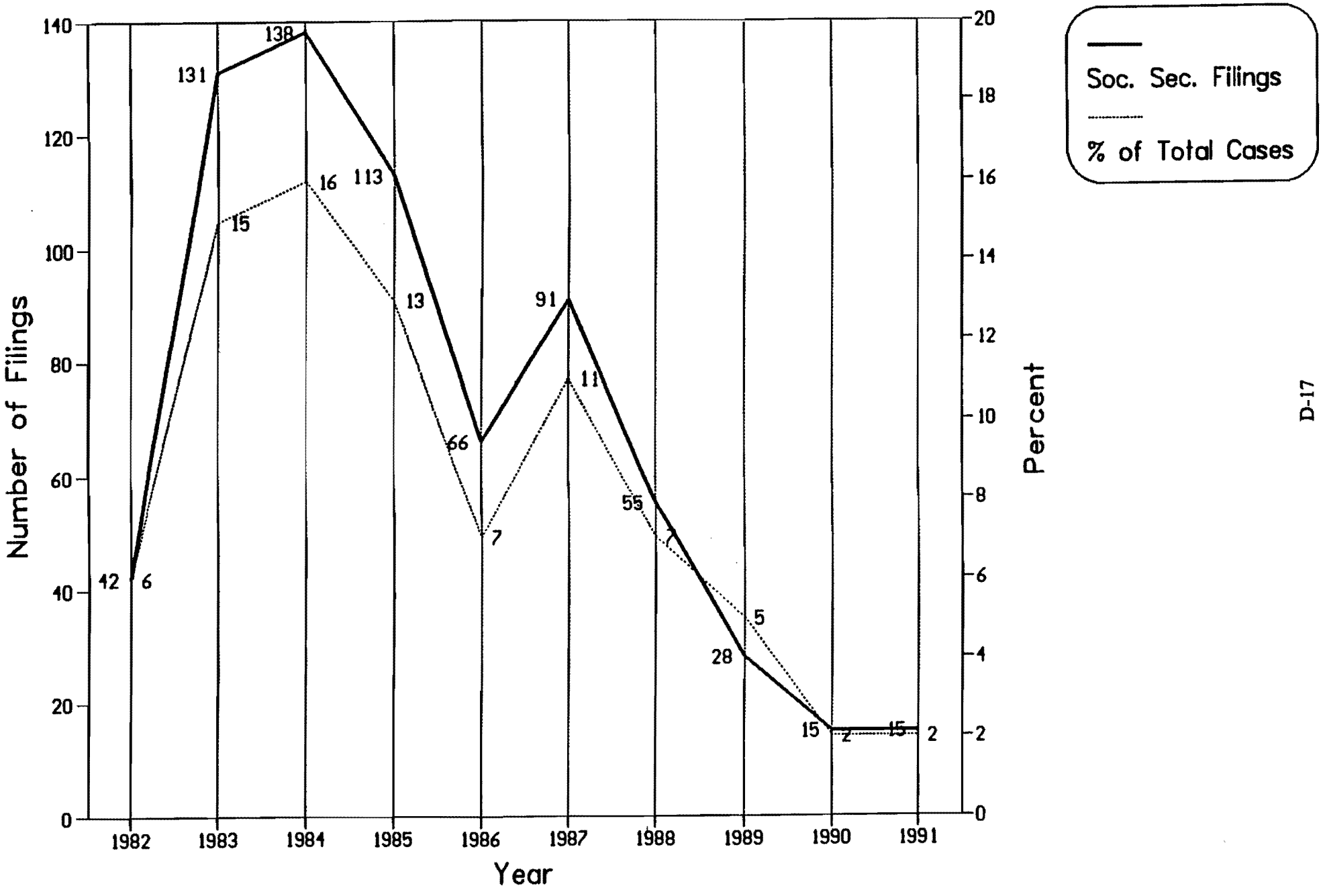
The effect of these legislative and administrative changes on the District of Maine was dramatic because the termination of and denial of social security disability cases involving mental impairments probably accounted for at least 25 percent of the case filings in Maine. When in 1984 statutory amendments required the Social Security Administration to revise standards for evaluating mental impairment cases, the result was not only a suspension of termination cases involving mental impairments, but also reviews, including remands of pending court cases, to redetermine the eligibility of initial claimants who are alleging a disability based on a mental impairment.

The effect upon the civil docket was obvious and dramatic. As Table 7 shows, the number of social security filings rocketed from 42 in 1982 to 131 in 1983, representing 15 percent of the total cases filed in the district. The trend continued higher in 1984. The legislative changes in 1984 produced an immediate and dramatic downward impact on filings, with the result that social security filings were cut in half between 1984 and 1986, shrinking from 16 percent of the total number of filings to 7 percent. With the exception of a one year spike in 1987, filings continued their downward trend, leveling off at 15 filings, representing 2 percent of the total cases, in 1990 and in 1991.

The immediate effect of changes in federal legislation can be seen in other areas. For example, although there is a national decline in diversity filings following the increase in the jurisdictional minimum in 1989, diversity filings in the District of Maine are at their highest level in five years and the number of cases removed from the state court to the federal court have tripled since 1989. In 1991, 13 percent of the civil cases came to federal court by removal from state court. This increase is in significant part a consequence of federal legislation permitting the Federal Deposit Insurance Corporation to remove pending state court cases to federal court where it has succeeded to the interests of failed insured financial institutions. The result is an immediate and unanticipated increase in the civil docket

TABLE 7

Social Security Filings 1982 - 1991



that is unlikely to dissipate as long as New England's recession continues to produce litigation resulting from the collapse of the real estate market.

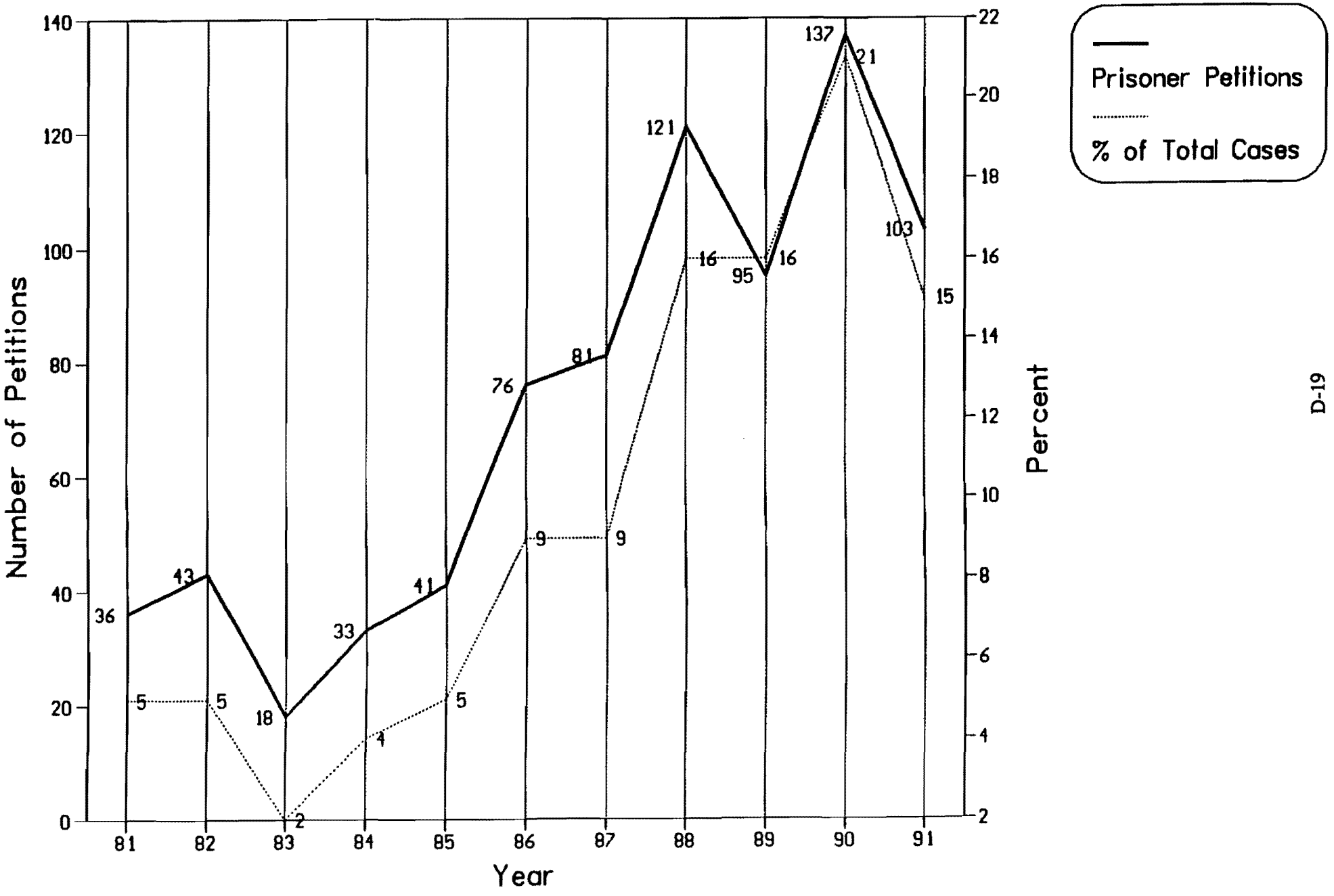
Other changes in federal law, particularly those granting private rights of action, directly increase or decrease the demands on the court's resources. The District of Maine, like other districts in the country, have seen an increase in the number of Section 1983, ERISA and civil RICO actions. Obviously, any federal statute creating new rights or permitting review of agency action in federal court produces an increase in filings and a corresponding increase in the demands on the court's resources.

Impact of State Government

The federal court in the District of Maine is directly affected by state government policies and problems. To the extent that the state court system provides an efficient and predictable means of litigating civil cases, the federal court may expect to see a decrease in filings within its concurrent jurisdiction; to the extent that the state courts are underfunded and overcrowded, the district experiences a corresponding increase. Similarly, problems in the state criminal justice system produced direct effects on the federal court through prisoners attempting to bypass the state system and exercise federal rights.

An example of the effect of state policies and problems on the federal court docket is the experience of this district in processing prisoner petitions during the decade from 1981-91. In 1979, the state implemented a new procedure for post-conviction review, which tended to reduce the number of habeas petitions filed in the district, since the state had provided a swift, orderly and adequate state remedy for post-conviction review of constitutional rights. From 1983 through 1991, however, filings from prisoners showed a steady increase, increasing by about 20 percent per year. Prisoner petitions increased from a low of 2 percent of total cases, representing 18 filings, in 1983 to a high of 21 percent of total cases, representing 137 filings in 1990. See Table 8. The vast majority of these cases are filed pro se by the prisoners and most are decided without trial on summary judgment or on procedural grounds. Although the state continues to provide post-conviction review, the increased number of filings by prisoners is due in large part to conditions in the state prison system. It is generally recognized at all

Prisoner Petitions 1981–1991
(2254; 2255; 1983 Cases)



levels of state government that the state's principal prison facility is overcrowded, antiquated, and inadequate to meet current state demands. These conditions have produced filings in federal court arising from double-celling, complaints about classification, administrative segregation, and the like. Although there exists an in-house dispute resolution mechanism at the prison, that process has not led many prisoners to forego the attempt to seek redress of their grievances in federal court. The federal court has little control over this source of filings, and this example illustrates the extent to which the state criminal justice system impacts the court's docket.

Another example of the impact of state problems and policies on federal civil filings is seen in the tripling of removals of state court cases to federal court. The state of Maine and its judicial system has been required by economic conditions to impose drastic budget cuts. At present, two judgeships out of sixteen in the state's principal trial court and one of the seven seats on the state's Supreme Judicial Court have been vacant and unfunded for several months. Budget cutbacks reducing the amount of jury trial time, combined with fewer judges for bench trials, have produced significant delays in the state system. By contrast, only three years ago, the state court had created a new fast track docket that made state court a swift and predictable path to the disposition of civil cases. The state judicial system's budgetary problems during the last two years have produced a predictable increase in the number of removed cases and an increase in the number of diversity filings in federal court, where cases are assigned to an individual judge or a magistrate-judge and by schedule for trial within eight months of filing. To the extent that the state and federal courts have concurrent jurisdiction over matters, it may be expected that the number and complexity of filings in the federal court will increase as long as the state's judicial system is hampered by a lack of resources.

Impact of General Economic Conditions

The federal court in the District of Maine cannot escape the influence of the general economic condition of the region and state in which it sits. Generally, an economic recession produces more litigation, some percentage of which will find its way to the federal court. The state of Maine has

experienced a prolonged economic recession that has produced a wholesale devaluation of the real estate market, the corresponding civil litigation to enforce the collection of mortgage notes, the devaluation of bank loan portfolios, and the failure of several regional banks. The result is the removal of FDIC-administered litigation to federal court, the filing of stock fraud class action suits under the federal securities laws, a record increase in bankruptcy filings and appeals, and the other predictable effects of economic downturn on the civil docket.

Conclusion

The District of Maine, by any standard, has been extremely successful in managing its civil docket. With civil cases routinely concluded within eight months of filing, the speed and efficiency of the disposition of civil cases in this district represents one of the best records in the circuit, and, indeed, in the county. Like other federal district courts, however, the district faces challenges from the increasing number and complexity of criminal prosecutions, and the increase in civil filings resulting from substantial problems in the state civil justice system and in the state generally. With three district judges and two magistrate-judges who have significant responsibility, the district is well positioned to meet the challenges it faces in the future.

APPENDIX E

REPORT OF THE SUBCOMMITTEE ON DELAY

In his memorandum of June 12, 1991, Judge D. Brock Hornby, Chairman of the Civil Justice Advisory Committee for the District of Maine, constituted a subcommittee consisting of John DiMatteo, Harry Pringle, George Singal and Peter Culley. This Committee was charged with the responsibility of identifying "the principle causes of delay in civil litigation and, . . . consider court procedures and litigant and attorney behavior."

In furtherance of its task, this Subcommittee has met on several occasions since June, its chairman has met with and consulted with the Clerk, William S. Brownell, and the Subcommittee has reviewed and evaluated all of the material readily available which we believe bears on the issue of delay. Specifically, the Subcommittee has reviewed the Guidance to Advisory Groups Appointed Under the Civil Justice Advisory Reform Act of 1991 (February, 1991) for the District of Maine, the District of New Hampshire and the District of Vermont; the Guidance to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990, SY91 Statistic Supplement (October, 1991); the statistics for the fiscal years ending June 30, 1991 reflecting the addition of the third action Judge to the District 1991; and the docket sheet for each case identified on the list maintained by the Clerk of civil cases pending in the District for three years or more as of June 30, 1987 through June 30, 1991. Finally, the members of the Subcommittee have contacted counsel in most, if not all, of those cases to discuss with them the reasons why those cases lasted longer than three years.

The following are the significant findings of the Subcommittee.

I. Median time from filing to disposition of a civil case in the District is eight months. Only 19 out of 94 Districts have a faster median time of disposition.

In 1991, the median time from filing to disposition of a civil case in the District of Maine was 8 months. In 1990 and 1989 it was 9 months, in 1988 10 months and in 1987 it was 11 months. (U.S. District Court, Maine, -- Judicial Workload Profile, 1986-1991; exhibit not attached). This ranks the District of Maine as 20th out of 94 Districts nationally and 2nd in the First Circuit in the length of time it takes to dispose of cases. (The higher the ranking the faster the District disposes of cases).

Although the median time for disposition compares very favorably with national statistics, a national comparison or even a comparison within the circuit may not be appropriate. Accordingly, the Subcommittee reviewed the median time from filing to disposition of civil cases in the other two Districts in northern New England, New Hampshire and Vermont. There are obvious similarities among the three states and in each there is one District comprising the entire state. For 1991 in New Hampshire the median time of disposition of a civil case was 13 months, up from 12 months in 1990 and from 11 months in 1989. (U.S. District Court, New Hampshire, -- Judicial Workload Profile, 1985-1990; exhibit not attached). The District for Vermont has held steady at 10 months for the last three years. (U.S. District Court, Vermont, -- Judicial Workload Profile, 1985-1990; exhibit not attached). Using the speed of disposition of cases as a criteria, it is obvious the District of Maine fares well in both national and regional comparisons.

The Subcommittee recognizes that it should not place undue emphasis on the statistic of median disposition times. For example, the average age of cases terminated (median time from filing to disposition), can go up when a Court disposes of more cases in a given year. When a Court disposes of a large number of cases, it may dispose of many older cases and the median age of the cases can rise even though the Court dramatically increased its efficiency by disposing of more cases. This phenomenon

does not exist in the District of Maine, however, since the Court has not recently disposed of large number of cases which could skew the statistics.

An equally telling statistic when considering a Court's case load is the ratio of new filings to dispositions. In this regard, the District of Maine, with the exception of 1990 when new filings and terminations were almost identical, has for the past six years terminated a significantly larger number of cases than were filed. During that period, the pending civil case load in the District has declined steadily from a high of 996 cases to 575 cases pending at the end of 1991.

As demonstrated by all readily available data cases in the District of Maine move faster than the national average and faster than the Districts of New Hampshire and Vermont which may be more appropriate statistical comparisons.

II. The number of cases three years old or older in the District is a small percentage of the total pending cases and declining.

The District of Maine keeps records of all civil cases pending three years or more as of June 30 of each calendar year. That number has declined from a high of 51 cases on June 30, 1987 to 18 cases pending as of June 30, 1991. (It should be noted that the most dramatic reduction occurred between June 30, 1987 and June 30, 1988 when then Magistrate Hornby took responsibility for the asbestos cases pending in the District which comprised the vast majority of cases three years old and older). For this most recent year end the percentage of civil cases pending in the District for three years or more was 1.7% of the total pending caseload. In this respect, the District has the lowest percentage of old cases in the First Circuit. The District of New Hampshire has the next lowest percentage (4.1%) and Massachusetts the highest (30.5%).

III. Case filings in the District of Maine have not increased dramatically.

Although filings in 1991 increased over 1990, the filings in each of those years was less than the filings in any of the years 1985 through 1988 inclusive. The 1990 filings were 11% higher than the previous year but during the four years prior to that filings decreased by an average of 17.9%.

IV. The available full time judicial officers in the District of Maine increased in 1991.

At present, the District of Maine has its full complement of three active Judges and two full time Judge Magistrates. Although Judge Brody was not sworn in until after June 30, 1991, his position was authorized for the District as of that date. Accordingly, the pending caseload per judgeship as of June 30, 1991 was 192. This is the lowest caseload in the circuit and only five Districts in the United States have fewer pending cases per active Judge.

V. The cases that take longer than three years to conclude are unique and are not delayed due to any problems in judicial administration within the District.

The Subcommittee has spoken with counsel of record in most if not all of the cases that were three years old and older as of June 30th in each of the previous five fiscal years. These interviews were conducted to determine if there were any trends or patterns in those cases that resulted in the much slower disposition time. A variety of factors were identified as causing delay in these cases, very few of which can be attributed to procedures currently employed in this District. Some were delayed pending decisions in companion cases in other jurisdictions or because of an expected dispositive ruling from an appellate court, some involved complex legal issues that required additional time and effort by the Court and counsel, and some involved parties in bankruptcy.

Some lawyers commented that cases handled by judicial officers, no longer members of this Court, were slow to move.

On balance, most counsel felt cases move at about the right pace in this District. Some counsel expressed concern at the prospect of cases moving any faster through the system since they feel that if cases moved any faster, Justice may not be served.

CONCLUSION

Civil cases move expeditiously in the District of Maine. The Committee need not make recommendations to move cases faster and indeed should be concerned at the prospect of cases moving more rapidly than they do at present.

Respectfully Submitted By

Peter W. Culley
John R. DiMatteo
Harry R. Pringle
George Z. Singal

APPENDIX F

REPORT OF THE SUBCOMMITTEE ON COSTS

The Subcommittee on Costs of the Civil Justice Advisory Committee has endeavored to identify the principal causes of cost in civil litigation and to propose suggestions for cost reduction. The subcommittee consists of V.W. Dyer, Duane Fitzgerald, Warren Silver, Vendean Vafiades and Harold Friedman. (Bruce Bagni, an initial member of the committee, moved out of state and resigned.)

In order to isolate the sources of excessive and unnecessary costs, the subcommittee conducted a series of in-depth interviews with various participants in the litigation process. Specifically, the subcommittee interviewed 13 Maine attorneys specializing in litigation, claims managers from four insurance companies, corporate counsel for national corporations, as well as the following members of the court: Chief Judge Gene Carter, Judges Brock Hornby and Morton Brody, Magistrates David Cohen and Eugene Beaulieu, and William Brownell, Clerk of the United States District Court for the District of Maine. This report synthesizes the information from these interviews and contains the committee's suggested proposals for various cost-cutting measures that can be utilized to reduce the cost of litigation.

At first glance, it may appear self-evident that the most effective way to cut costs would be to encourage more settlements. However, in the District of Maine over 90 percent of all civil cases settle. Realistically, there is no practical way to improve upon this high percentage.

However, procedures geared towards efficient case management would lead to a likelihood of earlier settlements in the litigation process, and a reduction in costs. There is a consensus among the members of the legal community interviewed by this Committee that court involvement in certain areas will result in reducing the costs of litigation.

A. View from the Bar

There was nearly universal agreement among the attorneys interviewed that abuses in the discovery process are the primary factor driving litigations costs skyward.

In particular the attorney interviewees cited the following as the most abusive practices:

1. Attorneys take too many depositions;

2. Attorneys serve too many interrogatories;

3. Attorneys use discovery as an offensive weapon to browbeat and harass opponents.

There are a number of available methods for reducing discovery abuses. The Court does utilize fast-track discovery schedules. A shortened discovery period encourages attorneys to take only the discovery necessary for trial preparation and settlement evaluation. A longer schedule allows counsel too much time to delve into unnecessary matters. The amount of discovery allowed should be determined on a case-by-case basis. For example, the number of depositions or interrogatories allowed could be set by the court early on in the litigation; more complex cases would be allowed more discovery latitude while simpler, more straightforward controversies would be allowed less discovery.[1]

Requiring a party seeking discovery to show why it needs or is entitled to the information could also prevent discovery abuse. A party pressed to demonstrate need would be less likely to request excessive information. This requirement would also isolate areas of true controversy when discovery disputes arise.

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[1] However, some attorneys expressed concern over the proposed amendments to Fed.R.Civ.P. 30 limiting the number of depositions to ten per side and limiting depositions to one day per deposition. In complex controversies, especially those involving numerous defendants, there is concern that the "ten per side rule" would be too stringent and lead to numerous disputes among counsel. It was noted that the one day per witness rule could lead to problems to the extent that unscrupulous counsel could encourage witnesses to dodge questions knowing that the deposition would terminate at the end of the day. While these concerns may appear to conflict with the concerns regarding excessive discovery discussed above, it highlights the general consensus that courts should exercise hands-on control over discovery matters and adopt differential case treatment. See p. 6, infra.

There were mixed responses to the proposed amendment to Fed. R. Civ. P. 26(b). Some interviewees felt that an initial informal exchange of key documents could facilitate discovery by allowing the parties to frame the scope of future discovery early-on. Others, however, believe that the new rule would lead to more discovery disputes, and thus greater costs. There was also concern that, because the Federal Rules require only notice pleading, an initial requirement that defendants turn over documents with only the complaint as a basis for discerning the details of plaintiff's claim, would lead to over-disclosure in order to avoid the risk of being sanctioned. Attorneys were especially concerned about the burden that this Rule would place on defendants in complicated litigation, such as complex products liability cases. Opponents of this rule have also criticized it because it may encourage the filing of frivolous claims with the hopes of uncovering information during disclosure and because it undermines the work-product doctrine by requiring an attorney to reveal his mental processes.

There have been alternative solutions suggested that seemingly would alleviate these concerns. One suggestion is that counsel confer within 30 days of the answer to discuss (1) the nature of the claims and defenses; (2) the scope and schedule of discovery; (3) a preliminary exchange of information; and (4) settlement possibilities. The matters agreed to would form the basis for a future discovery order.[2]

Another proposal is for the plaintiff, early on in the case, to make an initial disclosure of key documents and witnesses and a detailed statement of its claim. The defendant, in turn, would file within a stated period of time a similar disclosure of documents and witnesses.

In general, the attorney interviewees believe that Fed. R. Civ. P. 26 as it now exists adequately addresses the scope of discovery and Fed. R. Civ. P. 11 and 37 adequately empower the court to sanction discovery abuse. Some attorneys, however, believe that courts are too hesitant to employ these sanctions.

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[2] One interviewee, a representative of the Products Liability Advisory Counsel, an organization consisting of corporate counsel and attorneys from the products liability bar, has proposed this "meet and confer" framework as an alternative to the proposed change in Rule 26.

(It is encouraging to note that a number of attorneys believe that discovery abuse in the District of Maine is not as prevalent as it is in other courts.)

B. View from the Bench

There is concern among the judiciary that attorneys bring too many unnecessary discovery disputes to the court. One suggestion is to demand more strict compliance with Local Rule 16(e), requiring counsel for parties to confer before bringing discovery motions. Other suggestions include (1) greater use of telephone conferences as a method of speeding up the resolution of discovery disputes; and (2) greater use of fast-track discovery schedules to cut back on delay and abuse.

C. Insurance Claims Managers

It should come as no surprise that insurance companies are among those particularly concerned about containing costs of litigation. The insurers are particularly concerned with controlling what they term "lawyer-driven" costs.

Although claims manager interviews focused primarily on cost savings through in-house controls, the interviewees universally perceive that discovery abuse contributes greatly to increased costs.

The managers all concur that a vital part of their internal case management is in the control over the nature and extent of discovery. One cost-control measure employed by the companies is the requirement that counsel prepare a litigation plan and budget for each case that includes an estimate of the cost of discovery and analysis of what discovery is necessary.

Insurers have also taken the following steps to attempt to control costs:

1. Policies regarding cost control and defense counsel procedures are initiated at a company-wide level;

2. Early analysis of settlement possibilities are encouraged;

3. Defense counsel fee changes are negotiated;

4. Companies take an active and often leading role in the negotiation of settlements;

5. Companies undertake a greater amount of trial preparation work than in the past; and

6. Claims management representatives attend and participate in all pre-trial proceedings.

The claims managers were unanimous that court-imposed limits on the number of interrogatories and depositions would greatly reduce discovery abuse.

PROPOSALS TO BE FURTHER EXAMINED

A. Initial Case Management by the Courts

The general consensus among the interviewees was more aggressive early case management by the court could save substantial time and reduce costs. The court could develop a number of "tracks" depending upon the type of case (i.e. general negligence, products liability, anti-trust). Each track could have its own standing order regarding discovery dates, dispositive motions, trial dates, etc. One disadvantage of such a system is that there can be a wide discrepancy in the size and complexity of cases within each track. (For example, products liability encompasses a broad range of litigation, from the simple to the complex. The court could develop sub-groups within each track to address this concern.)

Courts could tailor scheduling orders to the particulars of each case. Realistic, yet firm, schedules regarding discovery deadlines, dispositive motions, amendment of pleadings and trial dates[3] that are tailored to the nuances of each dispute could play a key role in avoiding disputes among the parties and reducing motion practice that drive up costs. If arbitrary limits on numbers of depositions and interrogatories were specified in the Federal Rules disputes may only increase. Tailor-made discovery orders setting forth such matters on a case-by-case basis, however, could "rein in" counsel anxious to conduct unnecessary discovery. Attorney input in the case management plan should be encouraged. Active management by the judiciary would especially facilitate the progress of more complicated cases.

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[3] The interviewers consider an early, firm trial date a significant factor in encouraging early settlement.

B. Court-Sponsored Settlement

Both the attorneys and judiciary agreed that court involvement in settlement negotiations could facilitate early settlement thus reducing litigation costs. One question that must be answered is when in the process will court involvement became helpful. Judicial involvement too early, before each side has developed an understanding of the other's case, probably would not encourage meaningful negotiations. Others include:

1. Pre-trial conferences with required attendance by clients;

2. Settlement conferences chaired by a judge;

3. Encouraging judges to give informal opinions early on in the case in order to facilitate settlement negotiations;[4] and

4. In appropriate cases, summary jury trials held at the close of discovery could move parties towards settlement.[5]

C. Other Court-Driven Case Management Procedures

A number of attorney interviewees cited prompt rulings on dispositive motions as a source of reducing excess costs. Prompt ruling on such motions could lead to disposal of cases without the need for complete discovery or trial preparation. Some attorneys suggested that the courts adopt the practice of some jurisdictions of suspending discovery while summary judgment motions are pending.

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[4] There was a split of opinion among the interviewees regarding whether the judge hearing the case should chair the settlement conference or give the informal opinion.

[5] The claims adjusters interviewed noted a growing trend within the insurance industry towards viewing disputes on a "plan for resolution" rather than a "plan for defense" basis. This change of attitude is based upon an awareness that a great majority of cases settle and that early settlement can cut down substantially on "lawyer-driven costs."

ADR

The interviewees were nearly unanimous that ADR should be encouraged and has the potential for greatly cutting costs. They felt equally strongly, however, that ADR should not be mandatory and should only be pursued if the parties agree to pursue it in good faith. Most interviewees believe that if the parties are making a good faith effort to participate in ADR that the court should facilitate it by staying any proceedings.

CONCLUSION

The Costs Subcommittee has based these recommendations upon the interviews described above and upon its review of reports adopted in other districts. These recommendations are not all-inclusive and the Costs Subcommittee realizes that other Committee members may have additional opinions or opposing views. The Costs Subcommittee intends these recommendations to provide a framework for future discussion among the Committee as a whole.

APPENDIX G

December 11, 1991

Harold J. Friedman, Esq.
Friedman & Babcock
Six City Center
P.O. Box 4726
Portland, Maine 04112-4726

Re: Subcommittee on Cost in Civil Litigation
Report on Recommendations Submitted by Insurance Company Representatives
Personal Interviews and Written Questionaire

Dear Harold:

Judge Hornsby requested that our subcommittee identify the principal causes of cost in civil litigation. After meeting with your subcommittee members, it was determined the best means to obtain this information was by a process of a combination of personal interviews and written questionnaires. Your October 29, 1991 "game plan" designated the specific assignments for each subcommittee member in respect to interviewing attorneys, legal representatives and members of the insurance industry.

Subcommittee Assignment - V. W. Dyer

To insure that we cover all bases in respect to identifying the principal causes of cost in civil litigation, it is necessary that we obtain the thoughts and viewpoints from the perspective of the insurance industry, and particularly, from the claims personnel who are responsible for the investigation and payment of losses, and managing and directing the litigation. My subcommittee assignment has been to contact insurance company claims managers and obtain their suggestions and viewpoints in respect to the following:

1. Identifying the principal causes of cost in civil litigation
2. How cost containment may be achieved
3. What procedures are being utilized in respect to controlling "lawyer driven costs".

Identification of the Insurance Companies and their Claims Managers who have been interviewed

1. Commercial Union
   27 Pearl Street
   Portland, Maine 04112

   Jim Connellan - Regional Claims Manager
   Ray Spencer - Claims Manager

2. Hanover Insurance Company
   8 Ashley Drive
   Scarborough, Maine 04070-5001

   John Hall - Vice President - Claims Manager

3. U.S.F.& G.
   100 Foden Road West
   South Portland, Maine 04101

   David McQuade - Claims Manager

4. Liberty Mutual Insurance Company
   2385 Congress St.
   Portland, Maine 04102-0604

   Larry McKay - Claims Manager

Methods and Procedures Utilized to Assemble Information

1. Questionnaire

   The participating claims managers were initially provided a questionnaire which was to be completed prior to my conducting a follow-up personal interview with each manager.

   The questionnaire was specifically designed and tailored for an insurance claims person's viewpoints and response in respect to commenting upon the programs and procedures his company was implementing to control "lawyer driven costs".

2. Personal Interviews

   A personal interview was conducted with each claims manager following his completion of the insurance oriented questionnaire which I drafted. In each interview the manager's written responses were reviewed and discussed. This was followed by posing selected questions from the questionnaire you personally drafted. I utilized only those that were appropriate for an insurance industry spokesman to comment upon.

Summary of the Insurance Claims Managers Responses to the Written Questionnaire

A sampling of the insurance industry claims representatives confirms their serious concerns as to escalating costs associated with the judicial process.

The following is a summary of written answers provided by the insurance industry claims management representatives:

1. Implementation of specific claims operating guidelines, procedures and performance standards in respect to

controlling and containing legal costs

Answer: Yes. Without exception the company representatives stated that their home offices have taken charge in respect to providing company policy, guidelines and operating procedures for the purpose of insuring legal expense control. By the same token, several of the local managers have supplemented the program with their own cost containment initiatives.

It is interesting to note that in the case of Hanover Insurance Company, attention to legal costs is also being discussed and managed as a philosophical issue as opposed to a procedural issue - for example, emphasis is being placed on changing adjusters' attitudes from "plan for defense" to "plan for resolution". This is an interesting concept and certainly deserves the attention of the entire industry since most cases have a value and eventually are settled. Early decision making will contribute to efficiently manage "lawyer driven costs".

2. Negotiate competitive hourly rate fee schedules with defense counsel

Answer: Yes. Three of the four companies adhere to the above program. They also negotiate fee changes or increases when they occur. One of the companies has stood firm and has refused to entertain any fee increases. In the latter case, defense counsel has accepted the company's position in view of volume assignments and/or exclusive handling of the client's legal matters.

Hanover Insurance Company advises us they do not negotiate competitive hourly rate fee schedules with defense counsel. They do refer to the fact that some attorneys provide them with "volume discounts". It is their contention that "hourly rates have very little to do with defense costs, as it is very simple for attorneys to merely bill for more hours". They feel that a more significant measuring stick is the average cost per case. In order to capture that type of data, Hanover states that they are currently developing more sophisticated computer programs.

3. Company designates the particular defense attorney to handle the lawsuit and provides specific instructions as to managing the litigation process

Answer: Yes. All companies comply

4. After suit has been referred to counsel, company maintains responsibility for file direction

Answer: Yes. All companies are in agreement and comply.

5. Company exercises control on all discovery

   Answer: Yes. All companies comply and are in agreement. They may discuss with counsel and reach agreement as to nature and extent of discovery required.

6. Company reserves the right to conduct all settlement discussions before and during the trial

   Answer: Yes. All companies comply. However, two of the interviewees state they make exceptions when it is felt that defense counsel may be more effective in dealing with the plaintiff attorney.

7. After suit is initiated, counsel is required to advise the company of each and every step that is being contemplated

   Answer: Yes. All companies are in agreement.

8. Company instructs counsel not to undertake any trial preparation work that can be done by its own claims staff

   Answer: Yes. Companies basically agree and comply. However, one manager states that some of his claims staff "tend to delegate to the attorney some trial preparation that they could and thus should be doing themselves". (Personnel reports deal with this performance issue)

9. Detail the initiatives being exercised in respect to controlling "lawyer driven costs" where there is adverse legal loss expense developments

   Answer: The following information is a composite response from all 4 managers.

   a. Considering the cost of defense vs the cost of settling

   b. Require counsel to prepare a budget estimating total legal costs for the year and predicting the cost of every new file assigned for defense litigation. Estimate for cost of defense through trial should include discovery, pre-trial and trial.

   c. Require interim billing, at least on a 6 month basis.

   d. Require use of junior members when possible.

   e. Utilizing the alternate dispute resolution process.

   f. Refuse to pay for consulting time with fellow attorneys in the same office.

g. Not agreeing to an hourly increase of fees

h. Requiring pro-rating of expenses and time when handling a series of cases at court for a number of companies.

i. Commercial Union indicates that it is considering creating their own defense counsel's office. (This in-house defense office is already functioning in respect to handling W.C. claims.)

Note: It is interesting to note that Hanover states they have experienced a flat growth in legal costs in all lines with the exception of W.C. This fine result is attributed to implementing the defense plans and other issues described in the answers to this questionnaire.

10. Require litigating company's claims management representatives to attend and participate in all pre-trial proceedings with his own counsel.

Answer: Yes. All companies are totally on agreement. It has been further suggested that the plaintiff be required to attend these proceedings with his own attorney.

Responses of the Interviewees to selected questions as found in your civil advisory panel questionnaire

1. Should attorney's fees be awarded to the prevailing party?

Answer: The interviewees are divided on this question.

2. Does abusive discovery exist? Is it a significant factor in increasing the cost of litigation?

Answer: Unanimous - Yes

3. Should there be a limitation on the number of depositions and interrogatories?

Answer: Unanimous - Yes

4. Should clients as well as the attorneys be required to attend pretrial conferences?

Answer: Unanimous - Yes

5. Do you think that Federal civil cases in this district are reached for trial in a timely fashion? If not, do they take too long or too short a period of time?

Answer: Unknown

6. Do you believe that the court makes unreasonable demands on attorneys that result in increased costs?

   Answer: Interviewees do not have the information to comment.

7. After litigation has commenced, if the parties in good faith agree to Alternative Dispute Resolution, including arbitration, should the court stay the action to facilitate this?

   Answer: The interviewees are divided on this matter.

8. Do you believe that ADR can effectively be used to save costs?

   Answer: Unanimous - Yes

9. Should the court be authorized to require various forms of ADR at the initial pretrial conference?

   Answer: All interviewees agree with the exception of one industry representative who does not favor arbitration as a form of ADR.

Assessment of the insurance industry's performance in respect to Cost Containment Objectives and controlling "lawyer driven costs"

Generally, insurance industry representatives express concern in respect to the proliferation of adverse legal loss expense developments. This serious problem is continuing to be addressed by both their corporate and local claims managers. My interview of selected claims managers confirms the fact that attention is being given to the implementation of specific loss control procedures and establishing performance standards to reverse the trend and achieve cost containment objectives. It is recognized that cost containment cannot be achieved until "lawyer driven costs" as well as attorney and client behaviors are brought under control.

Critique: My personal assessment of this issue and problem (adverse legal loss expense developments) is that the various corporate or home office claims management personnel have provided the tools and guidelines for their field offices, expecting that they will manage and achieve cost containment objectives in respect to controlling legal costs.

However, based on my informal and off the record discussions with these same interviewees, there is reason to believe that there are major players in the litigation process who are providing only lip service in respect to effective implementation of cost containment procedures and policy. It has been

suggested that failure of some managers to effectively fulfill the mandates of their company may be partially attributed to inexperienced claims staffs who are assigned exorbitant workloads. This excuse is not acceptable. Simply stated, it would appear that any failure to contribute to cost containment objectives rests solely with management who have not demanded accountability on the part of their staff and required them to meet specific standards of performance.

Summary of Viewpoints and Recommendations of Insurance Industry Representatives

1. Discovery reform must be considered. The present system requires an overhaul, it is abused, it has gotten out of control, contributes to cost and delay, and it only benefits the lawyers who are responsible for creating a nightmare.

2. The concept of requiring defense counsel to prepare a budget estimating total legal costs for the year and on every newly assigned case appears to be a useful tool and measurement guide. It is felt that this will help keep counsel from building up hours and expenses.

3. Require interim billing. (6 months or less) This will contribute to creating awareness on the part of both attorney and client as to the urgency and need for maintaining sensible economics - settling now versus defending the case.

4. "Lawyer driven costs" may be partially controlled provided the client maintains total case control, prepares case for trial, follows the suit pleadings, controls the discovery process, attends trial and assumes responsibility for all settlement discussions. These are industry representative's responsibilities and should not ordinarily be delegated to counsel.

5. Negotiate acceptable competitive fee limits and schedules, volume discount or flat fee arrangements.

6. Company insurance claims representatives agree that management staffs on the local level must step in and take charge and be made accountable for managing legal expenses. Do not allow defense attorneys to "roam unfettered" through the system.

7. The court should be expected to take a "hard look" at any request for continuances, whether they involve pretrial conferences or commencement of trial.

8. Litigating entities agree that trials should not be continued over the weekend provided they can be concluded on a Saturday.

9. Require litigating company's claims representatives to attend and participate in the pretrial proceedings with their attorneys.

10. Require plaintiffs to attend and participate in the pre-trial proceedings with their attorneys.

11. Interviewees agree that their cases on the Federal suit docket are being processed in a timely fashion - no criticism in respect to backlog.

12. Assessment of interest - litigating companies should not be subject to penalty over which they have no control. It is suggested that this rule be reviewed and assessment of interest to commence after a settlement recommendation has been submitted (and rejected) by the court at the time of the pretrial conference.

13. The industry representatives are urging the court to use its influence in pretrial matters and forcefully persuade the parties to resolve their differences outside of the court room.

14. The industry representatives believe that Alternative Dispute Resolution can effectively be used to save costs. It is being suggested that the court be authorized to require various forms of A.D.R. at the pretrial conference.

Remarks: Please note that the questionnaire and work sheets are attached to this report.*

Cordially,

V. W. Dyer, Jr.

VWD:bd

cc: Hon. Gene Carter
Hon. D. Brock Hornby

*Although these were attached to the original report, they are not included here.

Exhibits
(NOT ATTACHED)

1. Civil Justice Advisory Committee Questionnaire Drafted specifically for insurance industry representatives.

2. Response from Commercial Union

3. Response from Hanover Insurance Company

4. Response from U.S.F.& G.

5. Response from Liberty Mutual Insurance Company

APPENDIX H

Each United States District Court shall consider the following principles and guidelines:

1. Systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case;

2. Early and ongoing control of the pretrial process through involvement of a judicial officer in –

   A. assessing and planning the progress of a case;

   B. setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months after the filing of the complaint, unless a judicial officer certifies that –

      (i) the demands of the case and its complexity make such a trial date incompatible with serving the ends of justice; or

      (ii) the trial cannot reasonably be held within such time because of the complexity of the case or the number or complexity of pending criminal cases;

   C. controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion; and

   D. setting, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition;

3. For all cases that the court or an individual judicial officer determines are complex and any other appropriate cases, careful and deliberate monitoring through a discovery-case management conference or a series of such conferences at which the presiding judicial officer –

   A. explores the parties' receptivity to, and the propriety of, settlement or proceeding with the litigation;

   B. identifies or formulates the principle issues in contention and, in appropriate cases, provides for the staged resolution or bifurcation of issues for trial consistent with Rule 42(b) of the Federal Rules of Civil Procedure;

   C. prepares a discovery schedule and plan consistent with any presumptive time limits that a district court may set for the completion of discovery and with any procedures a district court may develop to –

      (i) identify and limit the volume of discovery available to avoid unnecessary or unduly burdensome or expensive discovery; and

(ii) phase discovery into two or more stages; and

D. sets, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition;

4. Encouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices;

5. Conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion; and

6. Authorization to refer appropriate cases to alternative dispute resolution programs that –

A. have been designated for use in a district court; or

B. the court may make available, including mediation, minitrial and summary jury trial.

Each United States District Court shall consider the following techniques:

1. A requirement that counsel for each party to a case jointly present a discovery-case management plan for the case at the initial pretrial conference, or explain the reasons for their failure to do so;

2. A requirement that each party be represented at each pretrial conference by an attorney who has the authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters;

3. A requirement that all requests for extensions of deadlines for completion of discovery or for postponement of the trial be signed by the attorney and the party making the request;

4. A neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a nonbinding conference conducted early in the litigation;

5. A requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference; and

6. Such other features as the district court considers appropriate after considering the recommendations of the advisory group referred to in section 472(a) of this title.

APPENDIX I

MEMORANDUM OF AGREEMENT

BETWEEN

PINE TREE LEGAL ASSISTANCE, INC.

and

THE MAINE ATTORNEY GENERAL'S OFFICE

==========

Both Pine Tree Legal Assistance, Inc. (hereinafter "Pine Tree") and the Maine Attorney General's Office (hereinafter "Attorney General") mutually agree to enter into this Agreement to serve as a protocol for litigation in federal court between Pine Tree Legal Assistance on behalf of its clients, and the Maine Department of Human Services. Both parties recognize that in an era of declining resources, unnecessary time and expense should not be spent on litigation when there are alternatives to litigation. Next, both parties recognize and understand the concern of the courts that these cases be resolved expeditiously and with a minimum of rancor. Lastly, both parties agree that it is in the best interest of the citizens of Maine that both Offices cooperate in resolving the many legal issues that concern the poor and underprivileged citizens of Maine.

Therefore, Pine Tree Legal Assistance and the Attorney General agree that the following protocol should be observed in all federal court litigation between Pine Tree Legal Assistance and the Department of Human Services, and should not be varied from unless good reason exists to do so. Should this protocol not be observed in a particular piece of litigation, or its terms departed from, both parties shall make an effort to inform the

other of this fact in writing, and the good reasons therefore. Nothing in this agreement shall interfere with the attorney-client relationship.

The term "days" as used in this agreement shall refer to calendar days.

PRE-LITIGATION PROTOCOL

Pine Tree understands the need to notify the State of its intent to commence class action litigation, and further understands the need for a period of time in which to allow the State to review the issue in order to render an opinion regarding settlement of the problem. The Attorney General, on the other hand, recognizes Pine Tree's obligations to serve its clients, and that in some cases time may be of the essence. Both parties therefore agree that flexibility needs to be observed on both sides in order to allow meaningful settlement discussions to occur prior to the initiation of litigation. The protocol shall therefore be as follows:

In cases where Pine Tree Legal Assistance is of the opinion that the Department is violating the law, prior to the commencement of any class action litigation Pine Tree shall send a letter to the Bureau of the Department involved and the Deputy Attorney General of the Human Services Division of the Attorney General's office regarding its intention to sue if the matter is not resolved. In most cases the parties understand that such a letter will invoke at least a fifteen (15) day waiting period prior to the initiation of any litigation. The Attorney

General's office will respond to this correspondence within fifteen (15) days of its date. If the Attorney General indicates that there is a serious possibility of settlement, that a meeting has been scheduled with the agency official regarding settlement and that a final decision will be made within thirty (30) days of the date of the original Pine Tree letter, Pine Tree will not commence litigation until after that date unless time is of the essence, or unless delay would otherwise not be in the best interest of the client. The parties may agree to an expedited schedule when warranted by the circumstances. In appropriate cases, settlement may result in the filing of a complaint, together with a proposed Consent Judgment.

If counsel for plaintiff believes that time is of the essence, counsel shall notify the Attorney General's office of that fact in the preliminary correspondence and shall explain the need for expeditious action. Even where the pre-litigation protocol appears inappropriate because time is of the essence, the parties will still abide by the post-litigation settlement protocol.

In cases where the plaintiff is seeking preliminary relief, it is understood that the foregoing time schedule will generally not be adhered to. In such cases, the parties will still engage in settlement discussions as appropriate.

COMMENCEMENT OF LITIGATION

Should pre-litigation settlement negotiations be unsuccessful, Pine Tree Legal Assistance and the Attorney General

agree that formal service need not be made as required by the Maine Rules of Civil Procedure. Rather, Pine Tree shall forward the Summons and Complaint to the Deputy Attorney General of the Human Services Division, along with a Waiver of Service. The Deputy Attorney General shall return the Waiver of Service by the next day after it is received.

SCHEDULING ORDER

Counsel for plaintiff shall provide to counsel for defendant a proposed scheduling order with the court at the time that the complaint is filed, which shall ordinarily incorporate the settlement schedule contained in the attached model Scheduling Order. Counsel for defendant shall respond to the proposed scheduling order within seven days. The parties shall attempt to agree to a scheduling order. The parties shall submit their joint proposed scheduling order to the court within 10 days of service of the complaint. (Failing agreement, each party shall submit a proposed order within ten (10) days.) The parties shall endeavor, whenever possible, to submit the case for decision on the basis of a stipulated record, recognizing that this procedural device allows the court to resolve any lingering issues of material fact in researching its decision on the merits whereas cross-motions for summary judgment do not. Both parties understand that bringing in (or intervention by) a Federal agency official will result in a significantly different scheduling order. The parties therefore agree to maintain the spirit of this agreement in negotiating a proposed scheduling order and

discovery schedule when the Federal government is a party.

A model scheduling order is attached to this Agreement.

DISCOVERY

As early in the litigation as is appropriate, counsel for both parties shall exchange statements as to the scope of their discovery needs. Where informal discovery is possible, both parties agree to be cooperative and prompt in providing information so that resort to more costly and time consuming discovery can be avoided. Counsel for both parties reserve the right to propound formal discovery requests at any time, consistent with the Scheduling Order.

SETTLEMENT NEGOTIATIONS DURING LITIGATION

1. Counsel shall conduct settlement discussions during negotiations in accordance with the settlement schedule contained in the Scheduling Order.

2. If either party believes that further settlement negotiations may be fruitful, that party may notify the court and request a conference with the District Court Judge or with the Magistrate Judge. Unless the parties expressly consent, however, settlement conference with the court should not be held before the district court judge or magistrate judge who may ultimately rule on the merits of the case if the case is not resolved by settlement.

3. Nothing contained in this agreement shall alter the obligation of counsel to comply with deadlines imposed by the Federal Rules of Civil Procedure, by any scheduling order, or

otherwise imposed by the district court.

4. The foregoing procedure may also be initiated by counsel to pursue settlement of other matters, e.g., motions for contempt.

5. Throughout the litigation, counsel shall maintain their practice of adhering to good faith settlement practices; all settlement correspondence shall be responded to promptly and thoroughly.

6. Unless the parties expressly agree to a partial settlement, agreements reached on some but not all of the issues in litigation are not final until expressly consented to in writing by the parties.

USE OF THE COURT BY THE PARTIES

Both parties agreed that intervention by the court from time-to-time may be useful in resolving disputed issues. Should disputes occur, both parties agree to review the possibility of seeking a conference of counsel (either by telephone or in person) either by the Magistrate Judge, or by the District Court Judge. Both parties reserve the right to request such a conference on their own, even if the other party disagrees with that judgment.

JOINDER OF FEDERAL DEFENDANTS

The parties shall make expeditious decisions regarding joinder of federal officials as parties. The defendant, where possible, shall join such parties no later than by the time the state defendant files its Answer or Motion to Dismiss.

SOVEREIGN IMMUNITY AND CLASS CERTIFICATION

When the Department does not object to certification of a class, other than in the context of a sovereign immunity claim, the parties agree that they will stipulate that the class may be certified, but that the Department does not waive its objection to raise its sovereign immunity defense with respect to the relief which may be ultimately awarded to the certified class.

EFFECTIVE DATE

The parties agree that the above-stated protocol shall be utilized in litigation between Pine Tree Legal Assistance, Inc. and the Maine Department of Human Services from the date the final signatures by the party, and shall remain in effect until otherwise amended or terminated by either of the parties.

The parties shall review this agreement within one year and shall make any modifications which appear appropriate.

Dated: September 17, 1992

Christopher C. Leighton
Deputy Attorney General
Office of the Attorney General
Human Services Division

Dated: Sept 29, 1992

Linda Christ, Esquire
Pine Tree Legal Assistance, Inc.

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

_____ _____,	)	
Plaintiff	)	
-vs-	)	Civil No._____
COMMISSIONER, MAINE DEPARTMENT OF HUMAN SERVICES,	)	
Defendant	)	

SCHEDULING ORDER

Unless a party, directly or through counsel, files within ten (10) days a statement seeking alteration of one or more of the provisions of this Order or specifically requests a conference, this document shall thereupon become the Scheduling Order of this Court and shall govern all further proceedings in this matter.

Subject Matter Jurisdiction: Federal Question

Jury Trial: None

Deadline for Joinder of Other Parties and Amendment of the Pleadings:

[If case is to be submitted for decision on basis of a stipulated record (see Boston Five Cents Sav. Bank v. Secretary of the Dep't of Hous. & Urban Dev., 768 F.2d 5, 11-12 (1st Cir. 1985):]

Deadline for Stipulated Record and Cross-Motions for Judgment on the Basis of The Stipulated Record

Deadline for Memoranda Supporting Cross-Motions

Deadline for Reply Memoranda

[Otherwise:]

Deadline for (Plaintiff's) (Defendant's) Motion for Summary Judgment and Supporting Memorandum;

Deadline for Memorandum in Response:

Deadline for Memorandum in Reply:

Deadline to Complete Discovery:

Deadline for Filing of all Motions with Supporting Memoranda:

Expected Trial Date: The parties shall expect to try this case during the month of _____

Further Matters in Aid of Disposition:

a. Counsel for plaintiff shall furnish to counsel for defendant a written settlement proposal no later than seven (7) days after the filing of the Scheduling Order.

b. Counsel for defendant shall confirm receipt of the settlement proposal within seven (7) days thereafter and shall make a preliminary indication, in writing, as to whether the case is amenable to settlement.

c. Counsel for defendant shall, within thirty (30) days of the date of plaintiff's settlement correspondence, make a full and formal written response to each aspect of the settlement proposal.

d. If settlement appears possible, counsel for plaintiff and defendant shall hold a good faith settlement conference within ten (10) days of defendant's settlement response.

e. Within seven (7) days of the conference, plaintiff shall submit to counsel for defendant a written statement of those issues which have been agreed to. Counsel for Plaintiff shall confirm agreement in writing within seven (7) days of the date of defendant's letter.

Counsel are hereby advised that, absent some excusable circumstance, discovery initiatives must be taken sufficiently

in advance of the discovery deadline to permit the opposing party to file in advance of the discovery deadline its appropriate response within the period allowed by the civil rules for such response.

SO ORDERED.

Dated at _____, Maine this _____ day of _____, 19_____.

_____
United States District/Magistrate Judge

Innovations Break Asbestos Litigation Logjam

D. Brock Hornby, United States Magistrate

On June 30, 1986, 328 asbestos cases were pending in the District of Maine, well over one-third of the court's civil docket. Only a small number of lawyers were available to try them; and only one judicial officer, Senior Judge Edward T. Gignoux, could preside. Yet by April, 1987, that caseload had declined to 141 cases after only 34 trial days. This efficient resolution of such a large number of complex cases is attributable to the hard work and dedication of the lawyers together with the use of some innovative judicial procedures.

Finding an efficient procedure for these difficult cases was not without its false starts. An early attempt to try consolidated groups of ten cases proved too cumbersome, requiring 35 days of trial before a jury verdict was rendered in the 6 cases which did not settle before trial. Judge Gignoux next consolidated the entire asbestos caseload (most of the cases originated in one of Maine's two shipyards) for trial on the issue of strict product liability, expecting to follow it with a regular schedule of summary jury trials on damages in each plaintiff's case. After repeated (and unsuccessful) settlement conferences, however, all parties came to oppose the consolidated liability trial, insisting instead that a variety of Maine jury verdicts on damages would do the most to foster meaningful settlement negotiations.

As a result of ideas gleaned from discussions with Maine's asbestos lawyers, several other judges and law professors, and as a result of the parties consenting to my trying the cases under 28 U.S.C. §636(c), Judge Gignoux and I signed a joint order on June 10, 1986 which (1) created a so-called Suspense Docket; (2) established a trial schedule for the two of us spanning the next 21 months; (3) set all pending cases for trial in groups of 15 to 25; and (4) directed that, in each group, a single jury would first determine damages for each plaintiff consecutively in separate trials, and then determine liability in a consolidated trial. The trial dates established by this order were then applied to an ambitious uniform discovery timetable which the lawyers had negotiated. Cases filed after June 10, 1986 have likewise been added to this trial and discovery schedule.

Suspense Docket

By electing to go on the suspense docket, plaintiffs transfer their cases from the active to an inactive trial docket. Our suspense docket is a modification of a procedure instituted by the lawyers and Judge Rya Zobel in the District of Massachusetts. Its rationale is that a significant number of plaintiffs, with counsel's advice, file suit even though they have only minimal symptoms. They fear that the statute of limitations may be running as a result of these symptoms and might thereby preclude recovery for later, more serious injuries. These plaintiffs presumably have little desire to proceed to trial for what are still only minimal damages but are unwilling to engage in any settlement that would preclude them from later recovering damages if their conditions worsen. The defendants do not wish to pay money in cases where little apparent injury has yet occurred and may never occur, especially if the settlement agreement leaves open their exposure to later, more serious injuries. By using the suspense docket, plaintiffs need not engage in the expense of trial for what are still minimal damages, but are protected in their right to recover if their symptoms later worsen. For defendants, the procedure is costless and carries the possibility that plaintiffs will live out their lives without significant injury from asbestos.

There is a deadline (3 weeks before trial) for plaintiffs' elections to use the suspense docket so that it does not simply become a last-minute escape valve for a case that is not prepared for trial. The parties have agreed and the court has entered as part of its order the additional requirements that a case coming off the suspense docket go to the end of the trial list and not in any event proceed to trial earlier than 9 months from the date the plaintiff elected the suspense docket. Moreover, prejudgment interest is waived while the case is on the suspense docket. Some 95 cases have already elected the suspense docket, a *prima facie* indication of its usefulness.

Reverse Bifurcation

"Reverse bifurcation" is the inevitable obfuscatory jargon coined by lawyers and judges to describe the trial of a case where damages are established first and liability second. Variations on this procedure have been used in federal courts from Pennsylvania to Texas, but Maine has its own peculiarities. Our bifurcation contemplates the following division in the two phases. Phase one establishes medical causation and damages—i.e., does the plaintiff have a disease caused by exposure to asbestos or was it caused by something else such as other chemicals or cigarette smoking; and if asbestos exposure is the cause, what are the plaintiff's total compensatory damages without regard to contributory negligence or assumption of the risk and without regard to which, if any, defendant or defendants are liable. Phase two establishes whether any defendant is liable on a theory of either negligence or strict liability (breach of warranty claims are generally waived), reduces the previous damage verdict for assumption of the risk or contributory negligence, if any, and allocates the damages among the defendants.

(Cont. on pg. 34)

Asbestos Litigation (from pg. 33)

In phase one (damages) trials, cases in each group are scheduled in a generally ascending order of severity: asbestosis and pleural plaque, then lung cancer, then mesothelioma. This avoids inflaming the jury with the possibility of serious consequences in cases where those consequences do not exist. Since the jury goes through an educational process in hearing a sequence of cases, the opening statements and the details of the expert testimony generally diminish as a particular group of cases goes forward. Moreover, a fairly standard set of jury instructions has emerged and counsel quickly learn how the court will rule on certain evidentiary matters so that full argument need not be repeated each time. The phase one (damages) trials have run one to three days each and usually take two days. A consolidated phase two (liability) trial is estimated to require about three trial weeks.

Consolidation, Trial Calendars, Jury Selection, Discovery

In the June, 1986 order, trials were scheduled for the consolidated caseload on the following basis. In each of two succeeding months, separate groups of 15 to 25 cases were set for trial on medical causation and damages. Every third month was left free for consolidated liability trials of the preceding two months' cases. Although the earliest groups of cases were grouped by plaintiffs' lawyer, shipyard and trade, most of the docket was grouped simply by shipyard and date the complaint was filed. An extensive discovery order (prepared mostly by agreement) governs all the significant events in pretrial preparation including custody of x-rays and specimens, supplemental answers to interrogatories, identification of experts, provision of expert reports, etc. As the trial approaches, the lawyers are given a date by which they must provide the court their occurrence and expert witness lists. An extensive juror questionnaire is then mailed to all potential jurors requiring their answers under oath to a wide variety of questions ranging from employment, educational history and smoking history, to their acquaintance with parties, witnesses, and their knowledge about asbestos. The lawyers are given access to these written responses and, before the jurors are brought in, attend a hearing at which they may advance challenges for cause. In this way, certain jurors need not be brought into court. The Clerk's office estimates that for each *voir dire* the process has saved the Government more than $10,000 in juror fees and mileage. Moreover, the attorneys obtain better information about prospective jurors and have more time to consider their positions on challenges for cause and, ultimately, on peremptory challenges. The "screened" juror pool is then assembled for oral *voir dire*, additional challenges for cause, and peremptory challenges.

Settlement Information

Law clerks prepare charts which list each case that has gone to trial, certain characteristics of each case (plaintiff's age, disease, work history, etc.), and the ultimate damage award. The clerk's office then forwards these charts to all asbestos counsel. Although the lawyers can prepare such charts on their own, and some obviously do, our goal is to be sure that the information is fully disseminated to encourage settlements. Not surprisingly, and quite properly, the lawyers have been quick to call our attention to any errors or omissions in the data.

Results

From a docket management point of view, the procedures I have described must be adjudged a resounding success to date. Ninety-five cases have voluntarily gone on the suspense docket. Of the remaining 233 cases, 18 have undergone a complete or partial (directed verdict, voluntary dismissal, settlement, etc.) phase one trial. All of these have thereafter settled, apart from certain third party claims, so that *no* phase two (liability) trial has yet been required. Seventy-four other plaintiffs have settled or dismissed their cases with the defendants as a result of the lawyers' analysis of the damage verdicts. Of the initial 328 cases, then, only 141 remain after 34 trial days. (In addition, 27 new cases have been filed since June 10 of 1986.)

More importantly, can the procedures be adjudged a success from the point of view of the administration of justice? From where I sit, I can give only a partial answer and must leave to the lawyers and parties a more complete response. First, it seems apparent that providing a day in court to parties who have been waiting up to 8½ years to have their cases heard is an important step forward. Second, procedures that cost significantly less (two trial days versus several weeks) to provide a final resolution are beneficial to all parties if the final resolution is just. Third, a process that enables parties to settle a case voluntarily and produce an agreed-to final resolution without the uncertainties of litigation and the delay of appeals is proper.

Are the verdicts and the inferences used in settlement negotiation reliable? I believe that overall they are within the range of what might reasonably be expected from Maine juries (there are obvious exceptions as in any individual trial). I leave to Maine's lawyers the ultimate answer to this question.

Finally, can any of these procedures usefully be tried in other contexts?

Two successful components of asbestos case management were already integral parts of docket management in Portland: firm discovery timetables and firm trial dates. These are elements which I believe parties and lawyers always prefer and deserve in preparing a case for trial. Consolidation is also a frequently useful device where cases have important factual issues in common. What is unusual here is only the ***number*** (328) of cases sharing common issues.

Written juror questionnaires can be useful in exceptional cases but are not worth the time and effort for traditional

(Cont. on pg. 35)

Asbestos Litigation (from pg. 34)

cases. The procedure is not unique to Maine, but is used from time to time in high media publicity cases. Judge Gignoux used it, for example, in impanelling a criminal jury for the trial of Judge Alcee Hastings in the Southern District of Florida. To get the questionnaire drafted, distributed, returned and analyzed, however, requires significant advance notice and significant effort, and must be reserved for exceptional cases.

What about reverse bifurcation? The process deserves consideration if a short damages trial and a lengthy liability trial is predicted. The damage verdict may be all the parties need to settle the matter. If there is a multitude of parallel cases so that repeated liability trials are likely, the process deserves even more consideration. Finally, if the same group of lawyers and/or the same nucleus of defendants is involved in each case, the arguments for reverse bifurcation are increased. Generally, however, I suspect the process is appropriate only for a fairly narrow category of cases.

The suspense docket, although highly useful for the asbestos caseload, could possibly be abused if it were generally available. Some of you, however, are probably familiar with an available device that serves the same purpose: agreement by a defendant not to plead the statute of limitations if a plaintiff voluntarily dismisses a case without prejudice, reserving the right to re-file if his or her symptoms worsen.

Finally, all lawyers recognize the value of accurate information on verdicts and settlements; this very publication has contributed by making such information regularly available. Obviously, the courts cannot regularly be in the business of generating the information, but perhaps it is only a matter of time until some entrepreneur systematically collects and computer codes it according to various criteria so that a lawyer can obtain the range of verdicts in specific situations.

Conclusion

What seemed an intractable logjam of asbestos cases only months ago has now been broken, and the cases are moving forward to resolution in an orderly and expeditious manner. Thanks to the hard work and dedication of Maine's asbestos trial bar, the procedures I have described are working effectively, and the District of Maine can be proud of being in the forefront of devising innovative methods of fair, effective, and efficient dispute resolution within the traditional court structure.

D. Brock Hornby has served as United States Magistrate for the District of Maine since 1982. Before this appointment, Magistrate Hornby was a partner in the Portland firm of Perkins, Thompson, Hinckley & Keddy and an associate professor at the University of Virginia School of Law. A graduate of the University of Western Ontario and Harvard Law School, he has been active in many civic and professional organizations, and has been published in several law reviews. Magistrate Hornby welcomes your comments on the processes described in his article.

Editor's Note: The following comments on issues raised by Magistrate Hornby come from Maine's asbestos trial bar. Linda Monica's firm (Bernstein, Shur, Sawyer & Nelson) represents the Asbestos Claims Facility Defendants. Thomas Schulten's firm (Perkins, Thompson, Hinckley & Keddy) represents defendant Eastern Refractories.

Thomas Schulten

The 1986 asbestos trials were single-issue trials. Nothing was presented for jury resolution but the amount of damages attributable to the plaintiff's asbestos exposure. Yet the trial of only one issue among many, in only 18 cases among the 187 cases disposed of between June 1986 and April 1987, brought about a 57% reduction in the asbestos docket in the District of Maine. What is at work behind these numbers is the interaction of the litigated result with a negotiated result that had been achieved on a broader front, the two together resulting in final case dispositions. Put differently, the success that was achieved was a success in isolating the key issue and in selecting the procedural devices by which to expose just that one issue to trial.

If the achievement of the District of Maine 1986 asbestos litigation was one of selection, it follows that the worth of the procedural devices themselves remains unproven. Here the numbers are of no help. We know that 95 plaintiffs obtained suspense docket status (some suspense docket elections were successfully challenged) without knowing whether the preponderant result will be increased case dispersion rather than avoidance of trial. "Reverse bifurcation" worked to eliminate the need for extended all-issue trials in 18 consecutive cases, all with a strong family resemblance, but we don't know whether it will work in the 19th case, or whether the reason for its failure will result from some shortcoming inherent in reverse bifurcation or from a change in some other aspect of the case. As a method of case presentation, reverse bifurcation arguably increases the unpredictability of the result. The practice of consolidation into groups of as many as 25 cases for trial, which requires one plaintiff after another, without interruption, to present his or her damage case to the same jury, quite possibly affects the outcome of some of those cases by nothing more than their order within the group. Perhaps these drawbacks are justified by the special context of the asbestos litigation, but if it is the context which supplies the justification, the limits of such a justification ought to be respected.

Linda A. Monica

Suspense Docket

The "Suspense Docket" has helped to solve one of the most troubling aspects of the asbestos litigation, that is, what to do with pending claims of individuals who may have been exposed to asbestos but who have no asbestos-related symptoms or disability. The ACF Defendants, as defendants in any civil suit, were and are opposed to paying money to settle cases where there are no present damages and may never be any damages.

"Reverse Bifurcation"

In any civil lawsuit, one issue on which the parties are usually far apart is the value of the case for settlement purposes. In the context of a single civil action, it is easier for the parties to bridge that gap than it is in the asbestos litigation, since the settlement of one asbestos case will directly impact on the settlement value of many other "similar" cases. Therefore, the realistic settlement value of an asbestos case takes on greater importance when viewed in the context of the number of pending cases. With both sides believing that their value of the case was the more realistic, jury verdicts on damages were essential if these cases were to ever be resolved.

(Cont. on pg. 39)

Protection from Abuse

(from pg. 38)

enjoined from the abuse of the other. The court may then go on to provide the other relief allowed by the statute. It appears that without a finding that abuse has occurred, the court has no jurisdiction to enter an order, even if the parties wish it.

Even when abuse has been admitted, a third area of difficulty for counsel concerns the litigation over the appropriate relief. It is not uncommon to find yourself litigating possession of the marital home, primary residence of the children, and visitation rights with very little preparation time. Not only does the defendant have a right to a hearing within 21 days, there is a right to an expedited hearing on two days notice. Your client will have to live with the resulting order through the divorce process unless he or she moves for dissolution or modification pursuant to Title 19, M.R.S.A. Section 765(5).

A fourth point to consider is the temptation to send your client to court to get her own order. Of course, the client saves legal fees. However, she may improperly allege the facts, fail to put the case across, and receive inadequate relief. If the case goes to hearing, the lawyer and client will have to live with the facts sworn to. Again, you may be haunted by the petition and its result during the ensuing divorce. At a minimum, it is prudent to aid the client who has not already gone to court *pro se*, in preparing the complaint. If possible, it is always preferable to accompany a client to see the judge, ensuring that appropriate relief is requested.

One last caveat: getting an order and enforcing it are two different matters. Enforcement relies on the day-to-day judgment calls of the officer on the scene, the workload of the particular enforcement agency, and, of course, the cooperation of the District Attorney's Office in prosecution of an alleged violation. Often the attorney's greatest contribution is as a liaison between the victim and the authorities. But, this is a subject for another essay.

The Complaint for Protection from Abuse is a powerful tool for the victim of abuse and the divorce practitioner as well. However, the procedure must be implemented with care, treated with respect, and above all, its use must be limited to appropriate cases.

Judith W. Andrucki practices with the Lewiston firm of Marshall, Raymond & Bonneau, P.A. A graduate of the University of Maine School of Law, she also received an M.S.T. from Cornell University. Her practice concentrates on civil litigation, family law, and employment matters.

MTLA Announcements:

WANTED! A few good attorneys looking for an opportunity to sharpen their oratory skills, improve their writing, and test their ability to think on their feet.

The battle to save Maine's civil justice system is not over. New bills to abolish joint and several liability and the collateral source rule; to put caps on jury awards and your fees; and to end product and corporate liability are being filed daily in the Maine Legislature. The insurance industry and its Liability Crisis Alliance are pressuring your legislative representatives to pass laws designed to strip your clients of a fair chance to be fully compensated for their injuries by Maine judges and juries.

The Maine Trial Lawyers Association needs volunteers to attend legislative committee hearings and to argue the people's case on tort reform.

If you are willing and committed, call Maine Trial Lawyers Association, Executive Director, Suzanne Harland, at (207) 623-2661 or write Maine Trial Lawyers Association, Post Office Box 428, Augusta, Maine 04330. At stake is the preservation of a civil justice system that has taken over 900 years of evolving English Common Law to build.

Asbestos Litigation (from pg. 35)

As the Magistrate points out, no liability trials have yet been required. One possible reason for this is that it appears easier for the parties to evaluate the effect of the liability issues on a known damage award than it is for the parties to guess at what a jury will award for damages. Accordingly, cases in which there have been jury verdicts on damages have been resolved by each side recognizing appropriate discounts related to various defenses which would be raised in a liability trial.

Jury Selection

The juror questionnaires have been very helpful, especially in these cases where many potential jurors have opinions concerning asbestos and smoking about which they must be questioned. The questionnaires have certainly provided the lawyers with much better information about prospective jurors than would be otherwise available and, having this information, the Court and attorneys have been able to conduct further oral *voir dire* in a more focused and efficient manner. Although the written questionnaires can never be a substitute for oral *voir dire*, the procedure in these cases have saved time and money to all involved.

Conclusion

While the Defendants appreciate the Magistrate's recognition that the "hard work and dedication of Maine's asbestos trial bar" have enabled the above procedures to work effectively in Maine, the efforts of the Court cannot be overlooked. A situation like the Maine asbestos cases requires continual time and attention from the Court on numerous discovery and pretrial matters and, of course, for actual trials. There is no question that the hours spent on these cases by Judge Gignoux, Magistrate Hornby and Court personnel have been an essential ingredient in the overall process.

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APPENDIX K

November 13, 1992

The Honorable D. Brock Hornby
United States District Court
District of Maine
156 Federal Street
Portland, Maine 04101

Re: Civil Justice Advisory Committee: Fee Arbitration Panel

Dear Judge Hornby:

As you suggested, I looked into the experience of the fee arbitration panel, particularly as it relates to our charge to reduce the cost in litigation. I spoke with Roger Therriault, who heads the panel. As you may know, the fee arbitration panel is payee initiated, which means that it can be initiated not only by the client, but by anyone responsible for the payment of the legal bill, such as an opposing party in a domestic relations matter. The arbitration process is compulsory for lawyers if it is invoked by the client.

Roger informs me that approximately two-thirds of the cases handled by the panel arise from domestic relations matters. I suppose we should not be surprised at this given the combination of the emotional content of these cases and the frequency of payment obligations imposed on opposing parties.

Of the remaining one-third of the docket, a large proportion of the cases is shunted into arbitration by clients sued by attorneys. In a significant fraction of these cases, there is really no dispute about the engagement of the attorney and the performance of the work; the client either simply can't pay or is upset at the amount of the fee. Only two cases have involved contingent fee agreements, and one of those was dismissed for lack of jurisdiction since it was really a dispute between two attorneys as to how the fee should be split. The other

contingent fee case involved a question of whether the fee should be calculated on the amount of cash involved in the settlement or the cash combined with the fair value of a conveyance of land pursuant to the settlement.

As the discussion above indicates, the fee arbitration panel's experience probably has little application to our task. I do think that it is worth pointing out, however, that Roger's experience has been that the problems seem to arise from the failure of lawyers to communicate clearly fee arrangements and the economics of litigation and, even where the lawyer does communicate, the failure of the client to believe or absorb the information.

In any event, I thought I would report on my conversation with Roger. We can follow up further if you think it would be fruitful.

Sincerely,

CAHjr:cw