UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Report of the Advisory Group Appointed Under the Civil Justice Reform Act of 1990

November 10, 1993

3 Sources of data
A.O.
clerks office
~~[illegible]~~
Gray

WHAT THEY USED

— Attorney Survey
— litigant "
— jurors "
— publication + public comment period on draft
— rule hearing
judicial interviews
— specialized inquiries to those in criminal + complex litigation

JUDGES

3 NOT 3
2 senior
1 Mag.

Cases

PREFACE

The Civil Justice Reform Act of 1990[1] requires each United States District Court to implement a civil justice expense and delay reduction plan after consideration of the recommendations of an advisory group. Former Chief Judge Shane Devine appointed the following members[2] to the New Hampshire Advisory Group (Group) and selected Professor Bruce E. Friedman of the Franklin Pierce Law Center to serve as reporter:

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Mr. John F. Weeks, Jr. served until his resignation in November 1992, when he was replaced by Mr. Savage. James R. Starr, Clerk of Court, served as Chairman.

The Group began meeting in May 1991. It was charged with assessing the condition of the civil and criminal dockets of the United States District Court for the District of New Hampshire (Court), identifying the causes of unnecessary delays and costs in civil litigation, and recommending to the Court ways to reduce unnecessary delays and costs. In order to meet this mandate, the Group met regularly for nearly two years and surveyed litigants, attorneys, and jurors.[3]

[1] The Civil Justice Reform Act of 1990 (Act) is the short title of Title I of the Judicial Improvements Act of 1990, Pub. L. No. 101-650 (1990), codified at 28 U.S.C. §§ 471-482.

[2] Brief biographical information for each member of the Group is included in Appendix A of this Report.

[3] Copies of the surveys and tabulated results are attached as Appendices E through I of this Report.

In September of 1993, a draft Report was sent to frequent litigators in this Court inviting comments on the draft and its recommendations; copies were also made available to the public. A summary was printed in the New Hampshire Bar News. In October the Group considered the comments received, revised parts of the Report, and responded to those who commented. This final Report is being transmitted to the judges who will consider the recommendations. The Act requires the judges to adopt a civil justice expense and delay reduction plan by December 1, 1993.

Our in-depth analysis of the operation of the Court has convinced us that it is staffed by dedicated judges and staff. Their willingness to examine ways to improve the efficiency and reduce the expense of litigation is a tribute to their professionalism.

This unsolicited praise is not based on just our own observations and conclusions but also on the surveys we conducted of litigants, jurors, and counsel. For instance, 49 of 67 jurors did not believe that their experiences involved unnecessary cost or delay. Sixty of 70 jurors believed jury selection was "well organized and efficient"; the same number thought trial "proceeded efficiently." Fifty-one of 52 attorneys in criminal cases "found the Federal Court rules on motions in a reasonable fashion." The magistrate judge received praise for his screening of *pro se* petitions before service of process. Of the lawyers who responded to our question comparing this Court to the Superior Court in terms of cost and delay, 41 responded that this Court was better, only 6 preferred the Superior Court (15 had mixed views or rated the two equally).

When it is remembered that these positive surveys were made before the confirmation of three new judges, these results are a true tribute to the efforts of Judges Devine, Stahl, Loughlin, Magistrate Judge Barry, Clerk Starr and their staffs. Yet, these very same people and the three new judges have been instrumental in

assisting the Group in developing recommendations to implement changes necessary to effectuate civil justice reform.

The Group found itself in a unique position--recommending suggestions for change to an already changing Court. As we completed this Report, the Court had changed substantially from the one we examined at our first meeting.

The direction of the Group and any recommendations initially discussed were based on the situation as it existed at that time. Some recommendations we are able to make now would never have been possible in 1991 given the number of cases pending and the number of judges available. Changes beyond those suggested in this Report are contemplated as a full complement of judges finally have the time to devote to systematic case management.

ACKNOWLEDGEMENTS

We note here the efforts of the people that made this Report possible and thank them for their assistance.

Criminal Subcommittee: Because the members of the Group were selected for their background in civil litigation, the Group did not feel it had the experience and expertise to make recommendations about the criminal docket without the input of lawyers involved in criminal cases. We acknowledge the significant assistance of the following attorneys who were drafted to serve on the Criminal Subcommittee: William Brennan, Peter Papps, Paul Barbadoro, and David Garfunkel.

Assistants to the Reporter: Former law students, Beth George Kane and Carolyn M. Sargelis, provided valuable organization, initiative, research, and editing. The Report's clarity and organization are attributable in large measure to their work.

Judith Prindiville: Ms. Prindiville, a paralegal in the Civil Division of the United States Attorney's Office, drew data from various sources and organized it for the Docket Subcommittee's analysis of the Court's resources.

Kathleen Northrup: As the Chief Deputy Clerk, Kathie helps to keep the Clerk's office running smoothly. She spent countless hours helping the Group understand the office's operation, compiling data, working on and providing information and insight, and helping edit and complete this Report.

Martha Gordon: Attorney Gordon volunteered a great deal of time editing this Report. Her professionalism and dedication are appreciated.

CIVIL JUSTICE REFORM ACT (CJRA)
EXECUTIVE SUMMARY
OF THE REPORT OF THE ADVISORY GROUP
FOR THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

A. ASSESSMENT OF CIVIL AND CRIMINAL DOCKETS

Summary of Docket Analysis Pages 24-5

1.) Cases are becoming more complex.

2.) Congress has had significant impact on the Court's work load by creating more causes of action (*e.g.*, ADA, RICO); more agencies to be reviewed (*e.g.*, local special education decisions); more crimes, more prosecutors, and more complicated steps in the criminal process (*e.g.*, the sentencing guidelines).

3.) Congress and the President have an important impact. Judgeships must be created and filled in a timely fashion when case loads or vacancies warrant.

B. DESCRIPTION AND ANALYSIS OF AREAS EXAMINED FOR POTENTIAL REDUCTION OF COSTS AND DELAY

The Court's Resources Pages 28-9

<u>Building and Facilities</u>

We recommend that:

1.) Congress and the General Services Administration proceed with the appropriation for, and the completion of, the new courthouse.

2.) Until then the Court should minimize the amount of time that judges are not scheduled for courtroom time. With the availability of state court facilities and the renovated magistrate judge courtroom, the Group recommends that four of the five judges, instead of the current three, be scheduled for courtroom time if sufficient cases are ready for trial and other resources permit.

Court Procedures

Assignment Procedures — Page 32

The Group supports the continuation of the random assignment system for the time being and recommends that after the implementation of a Plan with differential case management, the Clerk's Office and the judges keep case load statistics by track for further review.

Time Limits — Page 33

We recommend that only one extension of time for filing an answer be granted by the Clerk before Court review of subsequent extensions and that the extension be for no more than 40 days, for a total of 60 days.

Magistrate Judge — Pages 34-5

The Group recommends that the practice of having the magistrate judge screen *pro se* complaints be adopted as a local rule.

We recommend that the Court consider the following to utilize the magistrate judge's skills, expertise, and authority:

1.) Increase the number of Social Security cases assigned to the magistrate judge.

2.) Resume summary jury trials to be conducted by the magistrate judge.

3.) Assign, by consent, part of the voluntary "rocket docket" to the magistrate judge.

4.) Consider at the pretrial conference, trials by consent before the magistrate judge when counsel know they are going to be ready, need a court date for the convenience of distant witnesses or the certain resolution of the dispute, and/or where the assigned judge's schedule is uncertain.

5.) Explore the magistrate judge's involvement in any anticipated Alternative Dispute Resolution (ADR) program.

Senior and Visiting Judges — Page 35

We recommend that every effort be made to accommodate the needs and facilitate the efforts of Senior Judges Devine and Loughlin.

We recommend that the AO have the ability, on short notice, to temporarily move a judge or magistrate judge and staff to a district when there is an unanticipated increase in litigation.

Communication and Coordination — Page 36

We recommend the following to retain this Court's tradition of communication:

1.) Local rules should be available on LEXIS and any CD ROM services.

2.) The judges should continue to participate in continuing legal education programs to educate the bar on changes in the Court and utilize the Bar Association's Committee on Cooperation with the Courts to exchange ideas and concerns.

3.) Input from the bar and the public should be sought prior to evaluation of the implementation of the Plan after 18 months of operation.

4.) The judges should continue to maintain the collegiality and cooperation that are the hallmark of this Court and its staff.

Litigant and Attorney Practices

General Observations — Pages 37-8

This section highlights five observations made from our surveys and our meetings. First, attorneys should be sensitive to the impact of litigation. Second, defendants do not have a monopoly on dissatisfaction. Third, counsel received the most criticism from their colleagues for "overbroad document requests." Fourth, the "conduct of clients" was criticized by many of the 41 lawyers who found litigation to be

"unnecessarily costly." Finally, as the Court's resources have increased, litigants, lawyers, and law firms will find that they are the causes of delay.

Settlement and Client Participation — Pages 39-40

We recommend:

1.) Clients (or people with real decision-making authority) be required to attend both preliminary and final pretrial conferences unless counsel file a motion to excuse their attendance while assuring their availability by telephone, except in cases involving the United States when the United States is represented by the United States Attorney's Office or agency counsel and in cases involving the State of New Hampshire when the Attorney General's Office has settlement authority.

2.) Consideration of the feasibility and timing of ADR at the preliminary pretrial conference.

3.) Judicial handling of all pretrial conferences (except those handled in the first instance by the magistrate judge).

Page Limit for Memoranda — Page 40

We recommend that there be a 25-page limitation on legal argument, except for good cause, and a 50-page limitation for memoranda on dispositive motions in cases on the complex litigation track.

Special Problems: Civility — Pages 41-2

The Advisory Group believes that civility, i.e., simple common courtesy that often leads to camaraderie, is not inconsistent with an advocate's commitment to his or her client. Indeed, civility often complements the goal of resolving disputes expeditiously and with the least cost. Consequently, we are firm in our belief that lawyers should strive for civility.

Special Problems: *Pro Se* Litigation — Pages 43-4

We make the following observations and recommendations:

1.) The magistrate judge's screening of *pro se* cases, before service, is a commendable practice.

2.) As nonlawyers who "help" promote litigation are not bound by the Rules of Professional Conduct, cannot be disciplined, and are usually without the resources to pay (or be deterred by) financial sanctions, the Attorney General's Office and the Bar Association must continue to be vigilant in enforcing their statutory authority under N. H. Rev. Stat. Ann. § 311:7-a et. seq. to prevent the unauthorized practice of law.

3.) The Group recommends that the Court consider a closer liaison with the *Pro Bono* Program, so that its resources can be tapped when *pro se* complaints survive the initial screening and counsel could help resolve the case.

4.) The Clerk's Office, in conjunction with the Law Center and/or the relevant Bar Association Committee, should find or develop a handbook to give to *pro se* litigants after they file.

Special Problems: U.S. Litigation Pages 44-5

There is one distinctive characteristic of the United States as litigant. The United States Attorney's Office in Concord has authority to settle civil cases for $500,000 or less. But in cases involving higher dollar amounts, agency disagreement with the U.S. Attorney, or policy issues, the New Hampshire U.S. Attorney or other government counsel must obtain a series of authorizations from the Department of Justice. This fact would make it difficult or impossible for the United States as a party to comply with our recommendation that a person with decision-making authority be available at least by telephone for all pretrial conferences. The U.S. Attorney's Office made the Group aware of the reasons why approval by the Department of Justice of major settlements is required and why participation by Justice Department representatives with decision-making authority at pretrial conferences is not always feasible. A majority of the Group still believes that Congress and the Justice Department should consider examining further decentralization of settlement authority.

Special Problems: State and Local Litigation and 28 U.S.C. §472(c)(1)(C)

Other Prisoner Litigation — Page 46

We suggest that the new Commissioner of Corrections may want to consider the adoption of an ombudsman-type system with review of complaints by an independent person or board.

Inmates and their advocates should educate themselves more about the State Board of Claims, which may be faster, easier, and more appropriate than federal court.

The New Hampshire Bar Association and/or public interest groups could and should develop a prison/jail project to reduce the cost and delay created by prisoner litigation. Such a project, devoted to monitoring correctional facilities, might reduce the need for legal action and provide counsel to facilitate litigation when it became necessary.

Other Matters Related to State and Local Litigation — Page 47

With litigation becoming more fast paced in this jurisdiction, public officials and their counsel need to be aware of the changes contained in this Report; otherwise, the changes designed to reduce costs could lead to even greater costs if cases are unnecessarily tried before officials are willing or able to settle. Similarly, we recommend that plaintiffs and their counsel in "impact" cases must carefully evaluate settlement early in the case and make and consider realistic settlement offers.

Examining the Impact of New Legislation on the Court, 28 U.S.C §472(c)(1)(D)

Civil Legislation — Pages 48-9

The Advisory Group accepted Congress's invitation to "examine the extent to which costs and delays could be reduced by a better assessment of the impact of new

legislation on the courts." However, the Group has seen no evidence of any Congressional assessment of the impact of new legislation on the courts.

We recommend a judicial impact statement for each proposed law.

Legislative Inaction Page 49

We recommend that the judicial impact statement for any legislation contain answers to the following questions:

1.) Is there a private right of action?

2.) If so, who is allowed, or not allowed, to bring suit?

Assessment of Criminal Docket and Legislation Pages 49-54

Sentencing has become far more complex under the Sentencing Reform Act. The specialized knowledge and experience required to understand and use the guidelines leads to our recommendation that the Massachusetts Federal Defender Office implement its plan to have a branch of the Federal Defender Program in New Hampshire.

The Group recommends the adoption of a standard discovery order to eliminate the need for many discovery motions and that a final pretrial conference be scheduled two weeks before trial.

A majority of the Group recommends[1] to Congress and the Executive Branch that:

1.) Before passing and signing another measure in the war on crime and drugs, allocating additional resources to law enforcement or prosecution, and/or adjusting the sentencing procedure any further, they remember that each step in the process from initial appearance to disposition involves expenditures of scarce judicial and, with appointed counsel, public resources. Congress and the Executive Branch must take responsibility for their role in the delay of civil cases, unless they rectify the delay to civil litigants by providing the courts with the same increase in resources that is provided to the Justice Department and the investigative agencies.

[1] The U.S. Attorney's Office disagrees with the Group's recommendations and dissents from the majority's recommendations, except as otherwise noted.

2.) Congress should reconsider the sentencing guidelines and mandatory minimum sentences on the ground of efficiency.

3.) The Speedy Trial Act should be reconsidered for those not incarcerated.

The majority of the Group recommends that the United States Attorney:

1.) Institute an open discovery policy.

2.) Continue to work with the Probation Office to increase pretrial diversion (a recommendation in which the United States Attorney's Office can generally join).

ADR

<u>Summary Jury Trials (SJT)</u> Page 57

The Group agreed that this method of ADR should be a last resort for litigants because it consumes a significant amount of court time and resources. When used, however, we recommend that the Court allow SJT juror interviews.

<u>Our Recommendations re ADR</u> Page 61

We recommend that (1) the bar examination be updated to include competency testing for dispute resolution; (2) further CLE programs be held on ADR and related skills; (3) a pamphlet be developed to provide relevant information for clients on ADR options; and (4) the new-lawyer training program should include a component on ADR issues.

Trial and its Antecedents

<u>Pretrial Statements</u> Pages 61-3

Pretrial statements should be returned to what they were originally intended to be--a rather specific listing of the issues, exhibits, and witnesses and a description of the case. The Group believes that a detailed, accurate pretrial statement is a valuable tool which will focus attorneys' attention on their case, promote settlement, and make

the final pretrial conference more meaningful. This, however, would require the (re)education of the Bar.

The Group recommends:

1). Exhibits be specifically identified. Witness lists should contain only the names of those witnesses whom counsel, in good faith, believe will actually be called to testify.

2.) Final pretrial statements should begin with a "brief statement of the case," agreed to by both parties, which the judge could read to the jury to concisely describe the case.

3.) The stipulations as to agreed facts should be binding on the parties.

4.) Where a pretrial statement has been previously filed and the case continued or not reached when assigned, updated pretrial statements should be filed no later than thirty days prior to the final pretrial conference.

5.) Requests for jury instructions should be filed simultaneously with the filing of the pretrial statements. The Group emphasizes that counsel should submit only the case-specific legal and factual elements that must be explained to the jury.

6.) Motions in limine, to the extent they can be anticipated by the time of filing pretrial statements, should be filed with the final pretrial statements so they can be considered by the Court at the final pretrial conference.

<u>Trial Scheduling</u> Page 63

The Group recommends continuing the current practice of "stacking" cases for trial. The Group also recommends that when the Court implements an integrated, automated calendar system, this information be made available to the public and the bar via computer.

<u>Final Pretrial Conference</u> Pages 63-5

The Group recommends:

1.) A uniform pretrial procedure should be used by all judges so that attorneys and parties can reasonably anticipate what will happen

at all pretrial conferences. The Report lists 11 subjects which should be considered at the final pretrial conference.

2.) The Court should continue its current practice of holding a final pretrial conference approximately two weeks prior to trial since this appears to be an ideal time to effectuate settlement.

3.) The length of the final pretrial conference should not be limited to thirty minutes.

4.) More emphasis should be placed by the trial judge in attempting to reach settlement at the final pretrial conference. To increase settlement, the Group recommends that:

   a.) Attorneys with authority to settle cases should be present at the pretrial conference.

   b.) Attendance of clients is required unless excused by motion or specific exemption. Telephone availability should be required in all cases where a party is not present in person, except in cases involving the United States or the State of New Hampshire, if the Attorney General's Office has settlement authority.

   c.) Judges' training conferences and seminars should give special consideration to the role of judges in the promotion of settlement.

   d.) Counsel should endeavor to give more accurate estimates of the length of trial to allow the Court to better schedule cases. If counsel are able to disclose the order of witnesses and order of proof without compromising legitimate advocacy, this will facilitate more accurate estimates.

   e.) No continuances should be granted except in extraordinary circumstances. The Group strongly recommends that efforts be made to create an integrated system with the state system to minimize the need for continuances.

   f.) With respect to exhibits, the local rules should be clarified as to whether all exhibits must be listed or only exhibits which will be offered by a party as evidence in their case in chief. The need to

list impeachment exhibits should be clarified and a uniform practice among the judges on this issue should be promulgated. We strongly recommend that the judges discuss and develop a standard policy for the related, but different, issues which arise with exhibits:

1. Disclosure vs. marking.
2. Impeachment exhibits vs. cross examination exhibits.
3. Rebuttal exhibits vs. impeachment exhibits.

Drawing Juries — Page 66

We recommend that counsel arrive at court at least 45 minutes early on the day of the draw.

C. CONTENT OF CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN

Systematic, Differential Treatment of Civil Cases for Purposes of Case-Specific Management — Pages 69-70

The Group believes that several compatible goals can be achieved by building upon and expanding the current differential treatment of cases. First, those cases that are currently handled in an established and satisfactory manner should be handled no differently.

All other cases will gradually be slotted into one of three tracks--a voluntary six-month "rocket docket," a one-year track from complaint to trial for most cases, and a two-year track for complex litigation. The Group recommends phasing in the tracks.

Involvement of Judicial Officers in Pretrial Process — Pages 73-4

The Group believes that the establishment of an early, firm trial date at a meaningful and early pretrial conference conducted by a judge is essential to achieving the Act's goals. But case management must be tempered by a recognition that it is still the responsibility of lawyers to plan their clients' cases.

Assessing and Planning the Progress of the Case Page 76

The initial scheduling order required by Fed. R. Civ. P. 16 already includes essential elements for efficient management of most cases.

We urge that this Court adopt a policy that in all cases (except in existing track cases) an initial pretrial conference be held before a judge.

Early, Firm Trial Dates Page 78

The trial date should be established early in the litigation. In most cases, the date can be set in the initial scheduling order under Fed. R. Civ. P. 16. For complex cases, we recommend that the trial date be set after a settlement conference which would occur approximately six months after the complaint is filed.

Control of Discovery Page 80

We recommend increased attention on a case-specific basis to the tools already in Rule 26.

We recommend that the preliminary pretrial conference form specifically require that discovery limitations are to be discussed at the pretrial conference.

Setting at the Earliest Practicable Time Deadlines for Filing Dispositive Motions, and a Time Framework for their Resolution Page 82

We recommend:

1.) Careful consideration of the timing of filing dispositive motions and the efficacy of oral argument at the preliminary pretrial conference. We recommend that counsel be permitted to request oral argument on any motion with 20 minutes allotted for each side.

2.) A guideline of 60 days for ruling on dispositive motions should be adopted, and the Chief Judge should have the discretion to reassign work when one judge's docket makes the guideline difficult to meet.

3.) Careful consideration by counsel of the efficacy of dispositive motions.

Managing Complex Cases Page 84

As the Time Limit Chart for Complex Cases on page 75 and our other recommendations indicate:

1.) Judges would hold preliminary pretrial conferences with the parties at which settlement would be explored.

2.) Up to five status and pretrial conferences would be held in the two-year period, reflecting the Group's belief that judicial involvement is necessary in complex cases.

3.) A case management order should issue as a result of the preliminary pretrial conference and be followed or revised but only if absolutely necessary.

4.) Appropriate limitations on, and sequencing of, discovery will be considered.

Before filing particularly complex litigation, lawyers should consider discussing a case management order with the Clerk.

Voluntary Exchange of Information Page 88

We recommend that:

1.) By local rule, this District opt out of the proposed changes to Rule 26(a).

2.) The Court develop a series of standing discovery orders, for certain types of cases, to be considered at the preliminary pretrial.

3.) The Court reevaluate its decision to opt out of Rule 26(a) after consideration of experience in other districts with full voluntary disclosure and experience here with the proposed standing orders.

Attempting To Reach Agreement Before Filing Discovery Motions Page 88

The Group recommends that the practice outlined in Local Rule 11(b) be continued.

ADR Pages 88-9

The Group recommends that the Court should utilize ADR. To summarize the recommendations previously discussed, the Court should:

1.) Utilize ADR on a case-by-case basis where appropriate.

2.) Have the parties fill out in advance of the preliminary pretrial conference a simple ADR form so that the issue will be discussed at the preliminary pretrial conference and a referral can be made to an agreed-on neutral, unless the court orders otherwise.

3.) Refer parties to "approved" neutrals from a list kept by the Clerk's Office based upon experience and such other criteria as may be adopted.

4.) Have the parties each pay the neutrals one-half of their regular fee (with a reasonable cap), provided that the neutral agrees to take a small number of cases annually for no or half fee.

5.) By rule, make it clear that ADR results are confidential and inadmissible (with any relevant exception required by law).

6.) Arrange for ADR in the courthouse if possible.

7.) Evaluate ADR closely after 18 months of data is compiled and annually thereafter.

8.) Allow the parties or the court to make referrals to ADR.

9.) Consider having an intermediate pretrial to schedule ADR if it is not feasible to do so at the preliminary pretrial conference.

10.) Be careful of the appearance of conflict between the judge's role as case manager and the judge's role as fact finder.

Litigation Management Techniques in 28 U.S.C. §473(b) Pages 90-2

Joint Presentation of Discovery Case Management Plans: Should Congress adopt this proposed rule, it is our recommendation that the Court exercise its prerogative to opt out of this requirement at this time.

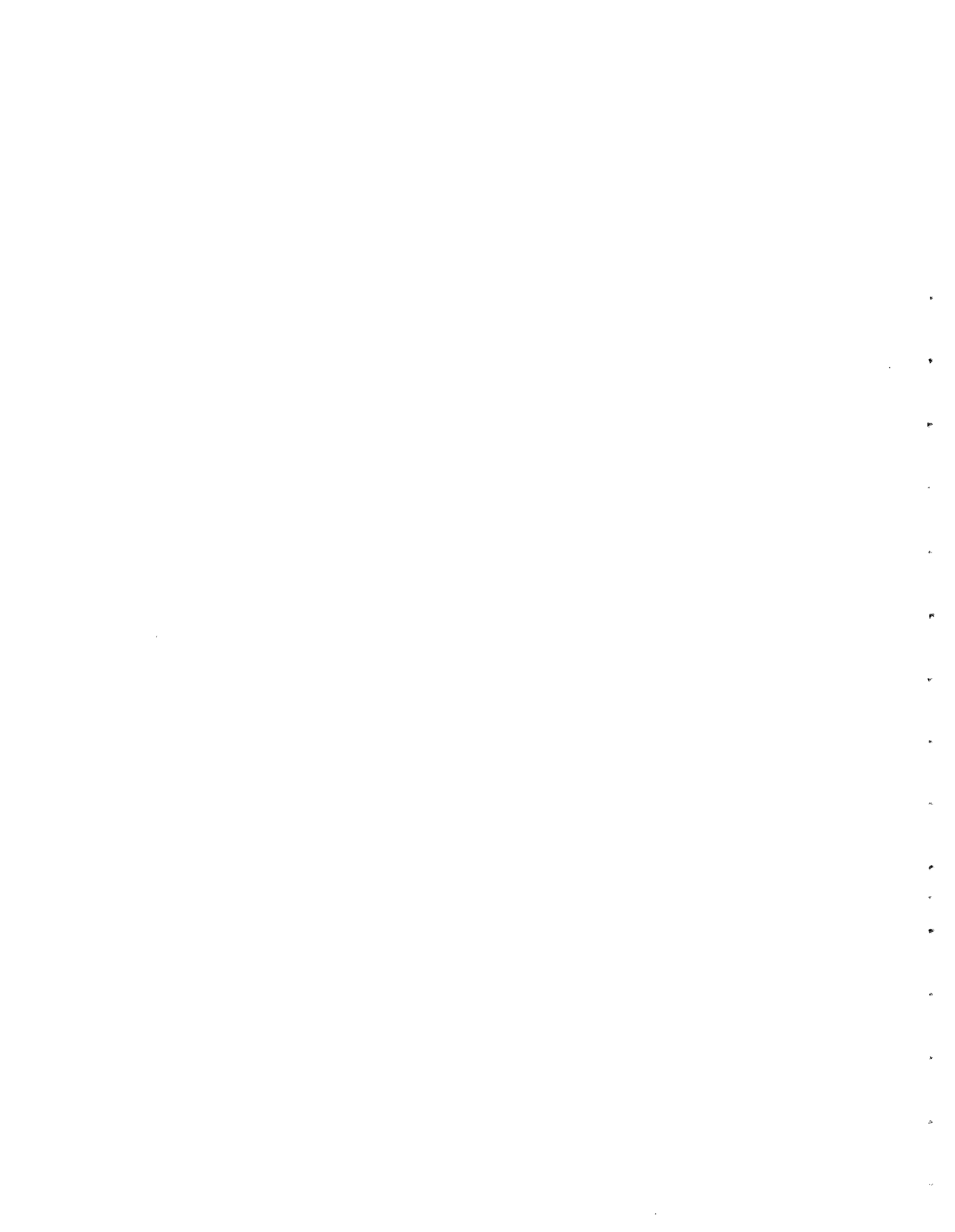
Representation at Each Pretrial Conference by a Lawyer with Authority: We recommend that Local Rule 10(a) be amended to include the language "at the preliminary pretrial conference and each and every pretrial and status conference thereafter." (This recommendation is moot if proposed Rule 16(c) survives Congressional review.)

All Extensions Signed by Attorney and Party: We believe a modification of the State Superior Court Rule 49 properly balances the need to have clients informed of extensions and the reasons for them with the difficulty and expense of obtaining client approval for routine or unexpected reasons for extensions. Accordingly, we recommend the adoption of a local rule that reads as follows:

> All motions for continuances or postponement or extension of deadlines in any civil action shall be signed and dated by counsel. Each motion, except in cases involving the federal or state government, shall contain a certificate by counsel that the client has been notified of the reasons for the continuance or postponement or extension and, in the case of continuances of trial, has assented thereto either orally or in writing and, with all motions for extensions of deadlines, has been forwarded a copy of the motion. In short or routine extensions, the motion to the Court can serve as the notification.

D. CONCLUSION Page 93

After analysis and discussion of the results of the considerable data gathered, this Group concluded that the Court was doing a good job with the resources allocated to it. With the additional resources now available and with these recommendations being adopted by the judges, the Clerk's Office, litigants, their attorneys, and the government, the United States District Court for the District of New Hampshire will do an even better job of dispensing justice efficiently.



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A. ASSESSMENT OF CIVIL AND CRIMINAL DOCKETS

I. ASSESSMENT OF STATISTICS

A. INTRODUCTION

The statistical data provided in this Report was prepared by the Administrative Office of the United States Courts (AO), the Clerk of the Court (Clerk), and the Group's Subcommittee on the Court's Docket. Statistics provided by the AO are based on either a fiscal year (ending 6/30) or a calendar year (ending 12/31) basis. The Subcommittee provided analysis for both the fiscal and the calendar years.[1]

The statistics for this Court were provided by the Clerk for 1981 through 1992. The national statistics provided by the AO range from three to eleven years. The time frame reported in this Report will vary depending on the statistics being analyzed.

B. OVERALL WORK LOAD STATISTICS

The overall filing of cases in the Court steadily decreased from 1984 to 1987, and then leveled off for the next four years. In the year ending June 30, 1992, civil filings rose dramatically from 579 in 1991 to 844—a 45.8% increase. The Subcommittee attributes this increase to the following factors:

1.) The increase in Federal Deposit Insurance Corporation (FDIC) cases resulting from the failure of five major banks and seven other banks in New Hampshire. More than 125 FDIC cases were filed (or removed from state court) during the period October 10, 1991 to November 12, 1991, and 55 more cases were filed subsequently.

2.) The doubling of both Social Security cases (from 20 to 44) and governmental recovery cases (from 13 to 26) from 1991 to 1992.

3.) The prolonged regional recession which has led to litigation involving a variety of issues.

[1] Because these time variations often led to confusion, comparisons of national and local statistics in this Report will use the June 30 fiscal year measurement, but all other statistical reporting will use a calendar year measurement.

4.) The availability of a third judge in 1990, which may have led to a perception that justice could be more quickly obtained here than in the state courts.

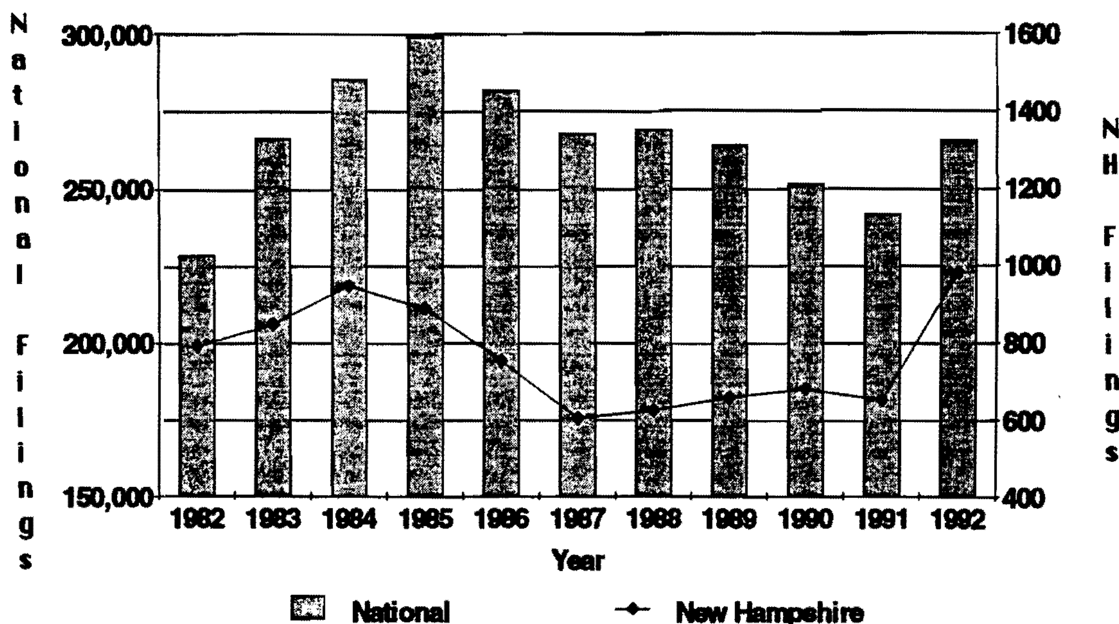
The Group cannot predict whether the filings in 1991–1992 constitute an anomaly in the otherwise steady decrease in civil litigation or signal the start of an overall upsurge in filings. The uncertainty about the economy and the unknown impact of changes in the state judicial system (*e.g.*, the opening of the Nashua Superior Court, the implementation of Superior Court Rule 170, and the increase in private ADR) further obscure the accuracy of any such prediction. A reasonable conclusion, based upon historical perspectives and expected Court resources, is that litigation ultimately will return to the 1990-1991 levels after a short-term increase as lawyers and litigants choose a federal forum based on the perception that the now five-judge court will process cases more quickly.

Until 1991–1992, the Court did not follow the national trend because more filings occurred here in 1991 than in 1987 and 1988. Nonetheless, the overall percentage decrease in the number of filings from 1986 to 1991 comports with the national trend. Nationally, the total filings decreased by 14.4% from a high of 299,164 in 1986 to 241,420 in 1991. In this Court, the total filings decreased 13.4% from 1986 to 1991, from 752 to 651.

Nationally, the number of filings decreased by 9.9% from 1987 to 1991, by 10.3% from 1988 to 1991, by 8.5% from 1989 to 1991, and by 3.9% from 1990 to 1991. The number of filings in the Court during the same time period does not follow this trend. In 1991 this District observed an 8% increase in filings from 1987, a 4.3% increase in filings from 1988, a 1.1% decrease in filings from 1989, and a 4.3% decrease in filings from 1990. *See* Appendices C and D for Tables One and Two.

FIGURE ONE

COMPARISON OF NEW HAMPSHIRE
AND NATIONAL FILINGS



1. CIVIL AND CRIMINAL WORKLOAD STATISTICS

The number of civil cases filed in this Court has fluctuated considerably over the past twelve years. Until 1992 a clear trend had emerged in which the number of civil filings decreased significantly from the highs of the early 1980s. By 1987 this Court had experienced a substantial decline in civil filings, dropping to 570 in 1987 compared to 922, 860, and 711 in 1984, 1985, 1986 respectively. Until last year, the number of civil filings had leveled off over the previous five years. The average number of filings for the six years from 1981 to 1986 was 786; the average number for the five years from 1987 to 1991 was 588.

The number of criminal cases filed in this Court has always been relatively small. However, consistent with national statistics, a surge of filings occurred in 1990 and 1991. As of June 30, 1990, 86 filings had occurred compared to 42 in 1989. The

number decreased to 72 in 1991 and remained steady in 1992 with 75 filings. From 1981 through 1989, the average number of criminal filings was 36, compared to the current average of 78 for the past three years.

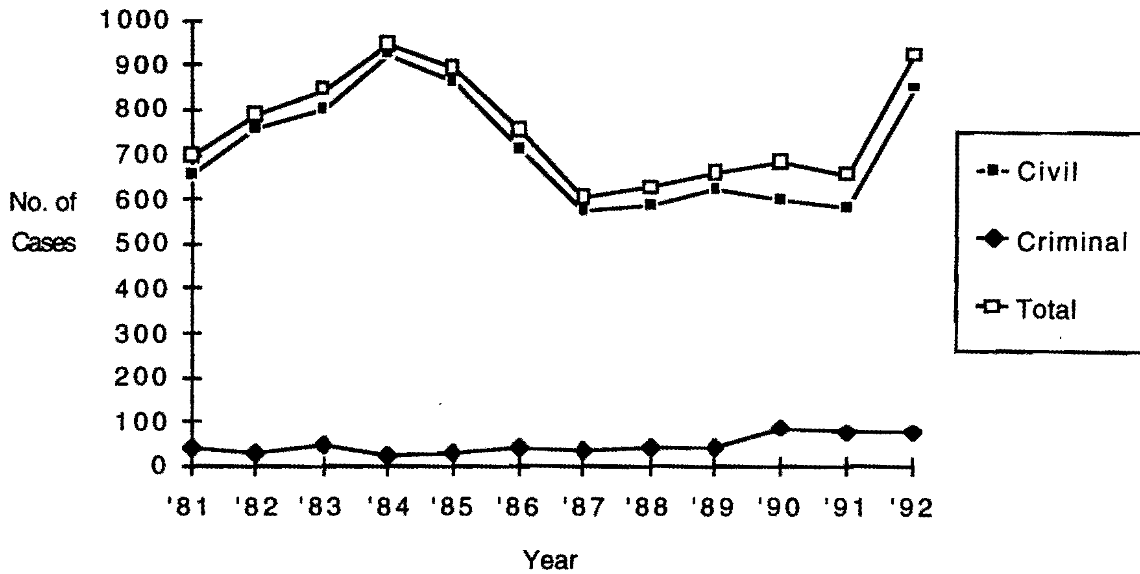
TABLE THREE

CASES FILED FOR EACH YEAR ENDING 6/30

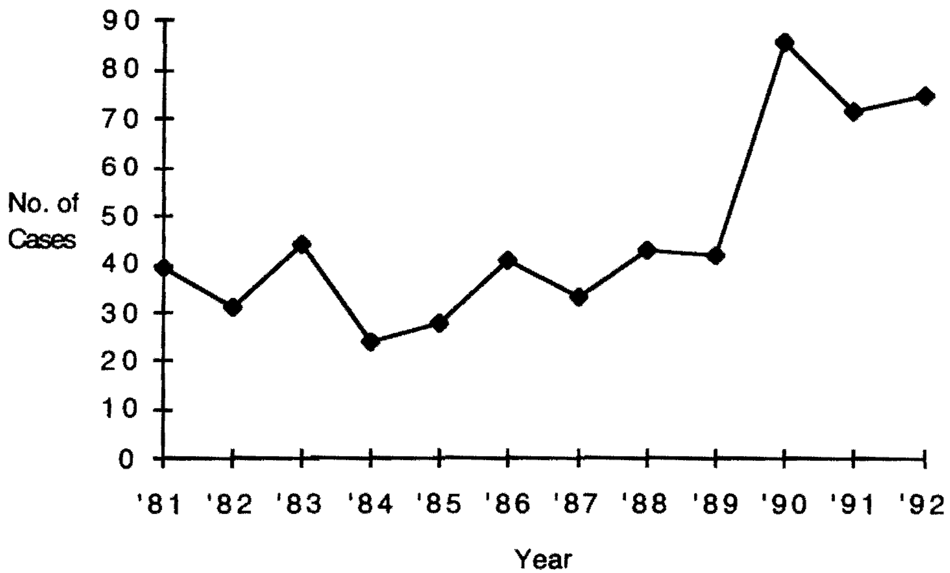
Year	Civil	Criminal	Total
1981	659	39	698
1982	759	31	790
1983	802	44	846
1984	922	24	946
1985	860	28	888
1986	711	41	752
1987	570	33	603
1988	582	43	625
1989	616	42	658
1990	594	86	680
1991	579	72	651
1992	844	75	919

FIGURES TWO

COMPARISON OF NUMBER OF CIVIL AND CRIMINAL CASES FILED
FOR 12–MONTH PERIOD ENDING 6/30



CRIMINAL CASES FILED
FOR 12–MONTH PERIOD ENDING 6/30



2. NATURE OF CIVIL CASES FILED IN THE DISTRICT

As detailed in Table Four, this Court has experienced considerable variance in the nature of civil cases filed over the past 12 years. Tort cases have consistently dominated, accounting for approximately 26% of filings in each year except 1992. Although only three fewer tort claims were filed in 1992 than in 1991, the percentage of such cases filed in this Court dropped from over 25% to 16 1/2% due to the increase in bank cases and contract actions. The percentage of tort cases seemed low in 1984 and 1985 when tort filings accounted for 22% and 21% of the filings respectively. However, this decrease was an anomaly resulting from a significant increase in Social Security cases in 1984 and a significant increase in filings for recovery of overpayments and enforcement of judgments in 1985. Although the number of tort cases has generally decreased over the years, an increase occurred in 1990 when 187 tort cases were filed, accounting for 31% of all civil filings. Since that time, this number has steadily decreased in both raw numbers and as a percentage of this Court's docket.

Contract cases comprise the second most significant category of cases in this Court. Except for 1992 when contract cases constituted 25% of the docket, they have accounted for approximately 17% of civil filings over the past twelve years. This percentage dropped in 1984 and 1985 as a result of isolated increases in other types of cases. The numbers of actual filings generally remained constant until 1992 when the FDIC/bank-related cases accounted for a dramatic increase.

Over the past twelve years, prisoner petitions have constituted the third highest number of filings in the Court. From 1981 to 1991, these cases accounted for approximately 9% of the total civil filings, although the actual number of cases has varied significantly over the years (from a low of 36 in 1988 to a high of 113 in 1992). In 1991 the Court experienced an increase in the number of prisoner petitions

compared with the previous four years, with 86 filings compared to 62, 69, 36, and 58 in 1990, 1989, 1988, and 1987 respectively. Prisoner petitions accounted for approximately 15% of the civil filings in 1991 and 1992.

Given the increase in the prison population, no decline in prisoner complaints can reasonably be expected in the near future. This Court has taken a responsible and efficient approach to the handling of these cases with an initial review by the magistrate judge prior to service and his practice of traveling to the prison for hearings. However, such cases continue to absorb significant Court resources.

Civil rights filings account for slightly less than 9% of the total civil filings over the past twelve years. Until prisoner cases increased in 1992, civil rights cases paralleled these filings. Civil rights petitions decreased from 73 filings in 1989 to 60 filings in 1991. This Court experienced the lowest number of civil rights filings in 1987 and 1988 with 44 and 45 respectively, representing 8% of the civil filings each year. The highest number of civil rights filings was 84 in 1982, which represented 11% of the total number of civil filings. The greatest percentage of civil rights filings for this Court occurred in 1989 with 73 petitions, representing 12% of the civil cases filed that year.

Social Security, recovery of overpayments and enforcement of judgments, forfeiture, penalties and tax suits, real property, labor disputes, and copyright, patent, and trademark cases also account for a significant amount of the cases filed in this Court. Social Security cases were at an all-time low with 23 filed in 1990 and 20 in 1991 which represented only 3% to 4% of the total number of civil cases filed. That trend was short-lived as Social Security cases doubled in 1992. The number of Social Security filings peaked in 1984 with 161, compared to 81 in 1983 and 70 in 1985. The recovery of overpayments and enforcement of judgments constituted a sizable sector of the civil cases in 1982 through 1985. There were 135 filings in 1982, 154 in 1983, 150 in 1984, and 232 in 1985, representing 18%, 19%, 16%, and 27% of the civil

cases filed in those years. The number of such cases filed in recent years has decreased from 33 cases in 1987, 26 in 1988, 42 in 1989, 24 in 1990, 13 in 1991, and 26 in 1992 representing 6%, 4%, 7%, 4%, 2%, and 3% of the civil filings in those years.

Real property suits decreased to less than 2% of the civil suits filed during the past four years. Labor cases have hovered between 2% and 5% of the total civil filings over the past twelve years. Copyright, patent, and trademark suits have accounted for approximately 2% to 3% of all civil filings filed in this Court. One to two antitrust cases are filed in this Court each year.

TABLE FOUR

NATURE OF CIVIL CASES FILED IN THIS DISTRICT
FOR 12–MONTH PERIOD ENDING 6/30

	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991
Social Security	56	58	81	161	70	56	51	81	35	23	20
Recovery of Overpayments & Enforcement of Judgments	69	135	154	150	232	90	33	26	42	24	13
Prisoner Petitions	43	37	52	54	94	94	58	36	69	62	86
Forfeiture, Penalties & Tax Suits	7	9	12	19	9	5	21	4	21	7	23
Real Property	24	17	14	26	22	13	13	20	11	9	9
Labor Suits	36	35	42	28	21	26	28	24	30	14	17
Contracts	107	137	130	132	120	113	107	118	110	106	122

TABLE FOUR CONTINUED

NATURE OF CIVIL CASES FILED IN THIS DISTRICT
FOR 12-MONTH PERIOD ENDING 6/30

	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991
Torts	202	191	208	207	183	200	159	148	147	187	141
Copyright, Patent & Trademark	9	22	14	15	19	16	16	23	21	17	12
Civil Rights	74	84	58	77	53	53	44	45	73	61	60
Antitrust	4	3	1	2	2	1	2	---	2	1	2
All Other Civil	28	31	36	51	35	44	38	57	55	83	74

3. CASES PENDING AT END OF 12-MONTH CALENDAR PERIOD

Table Five sets forth the total number of cases filed in this Court in each of the past 11 years. Table Six sets forth the total number of cases pending at the end of the same period. Figure Three compares the total filings to the number of pending cases each year to examine whether the number of increased filings contributes to the Court's backlog. Although the distributions indicate that the number of pending cases correlates with the number of total filings, it is not clear whether increases or decreases in any particular type of cases has contributed to a backlog.

TABLE FIVE

CASES FILED FOR EACH YEAR ENDING 12/31

Year	Civil	Criminal	Total
1981	700	51	751
1982	789	30	819
1983	856	38	894
1984	903	29	932
1985	829	32	861
1986	602	41	643
1987	566	46	612
1988	579	42	621
1989	622	55	677
1990	610	112	722
1991	789	67	856
1992	757	83	840

TABLE SIX

CASES PENDING AT END OF 12–MONTH PERIOD ENDING 12/31

Year	Civil	Criminal	Total
1981	700	11	711
1982	686	13	699
1983	734	9	743
1984	807	18	825
1985	818	13	831
1986	768	18	786
1987	681	17	698
1988	660	24	684
1989	754	38	792
1990	803	61	864
1991	921	53	974
1992	894	55	949

FIGURE THREE

TOTAL FILINGS COMPARED TO THE NUMBER OF PENDING CASES
AT THE END OF 12-MONTH PERIOD ENDING
12/31

Although the total number of cases filed has statistical importance, it does not accurately predict or reflect the work load these cases may impose upon the Court. For this reason, the AO uses a system of case weights based upon the amount of judicial time devoted to different types of cases. Table Seven sets forth this Court's case load measured against the recognized standard of 400 weighted cases, but it does not accurately reflect the case load because it is based upon three authorized judgeships. Congress did not authorize a third position until five months of the statistical year had expired. Therefore, Table Seven understates the actual work load of this Court in 1991.

TABLE SEVEN

CASE LOADS MEASURED AGAINST RECOGNIZED STANDARD OF 400 WEIGHTED CASES YEAR ENDING 12/31

	Per Authorized Judgeship	Per Active Sitting Judge
1981 (Per Judge)	(2)	(2)
Total Filings	349	349
Civil Filings	330	330
Criminal Filings	19	19
Pending Cases	323	323
Weighted Cases	397	397
1982 (Per Judge)	(2)	(2)
Total Filings	395	395
Civil Filings	380	380
Criminal Filings	15	15
Pending Cases	385	385
Weighted Cases	436	436
1983 (Per Judge)	(2)	(2)
Total Filings	423	423
Civil Filings	401	401
Criminal Filings	22	22
Pending Cases	384	384
Weighted Cases	402	402
1984 (Per Judge)	(2)	(2)
Total Filings	473	473
Civil Filings	461	461
Criminal Filings	12	12
Pending Cases	433	433
Weighted Cases	449	449
1985 (Per Judge)	(2)	(2)
Total Filings	444	444
Civil Filings	430	430
Criminal Filings	14	14
Pending Cases	405	405
Weighted Cases	351	351

TABLE SEVEN CONTINUED

CASE LOADS MEASURED AGAINST RECOGNIZED STANDARD
OF 400 WEIGHTED CASES
YEAR ENDING 12/31

1986 (Per Judge)	(2)	(2)
Total Filings	376	376
Civil Filings	356	356
Criminal Filings	20	20
Pending Cases	397	397
Weighted Cases	374	374
1987 (Per Judge)	(2)	(2)
Total Filings	302	302
Civil Filings	285	285
Criminal Filings	17	17
Pending Cases	365	365
Weighted Cases	325	325
1988 (Per Judge)	(2)	(2)
Total Filings	312	312
Civil Filings	291	291
Criminal Filings	21	21
Pending Cases	352	352
Weighted Cases	333	333
1989 (Per Judge)	(2)	(1.88)
Total Filings	329	350
Civil Filings	308	328
Criminal Filings	21	22
Pending Cases	378	402
Weighted Cases	393	418
1990 (Per Judge)	(2)	(1.15)
Total Filings	340	591
Civil Filings	297	517
Criminal Filings	43	75
Pending Cases	437	760
Weighted Cases	422	734
1991 (Per Judge)	(2.58)[2]	(2)
Total Filings	252	326
Civil Filings	224	446
Criminal Filings	28	65
Pending Cases	349	656
Weighted Cases	303	392

[2] The Court's statistics indicate three authorized judgeships for 1991. However, the third judgeship was not authorized until five months into the statistical year (July - June 30).

4. PENDING CASES COMPARED TO THE NUMBER OF TRIALS OVER 10 DAYS

Table Eight and Figure Four examine a possible correlation between the number of cases pending in a given year and the number of trials which lasted for more than ten days to determine whether longer trials have contributed to a civil backlog in this Court. No significant relationship between pending cases and the number of trials over ten days can be drawn based upon these statistics.

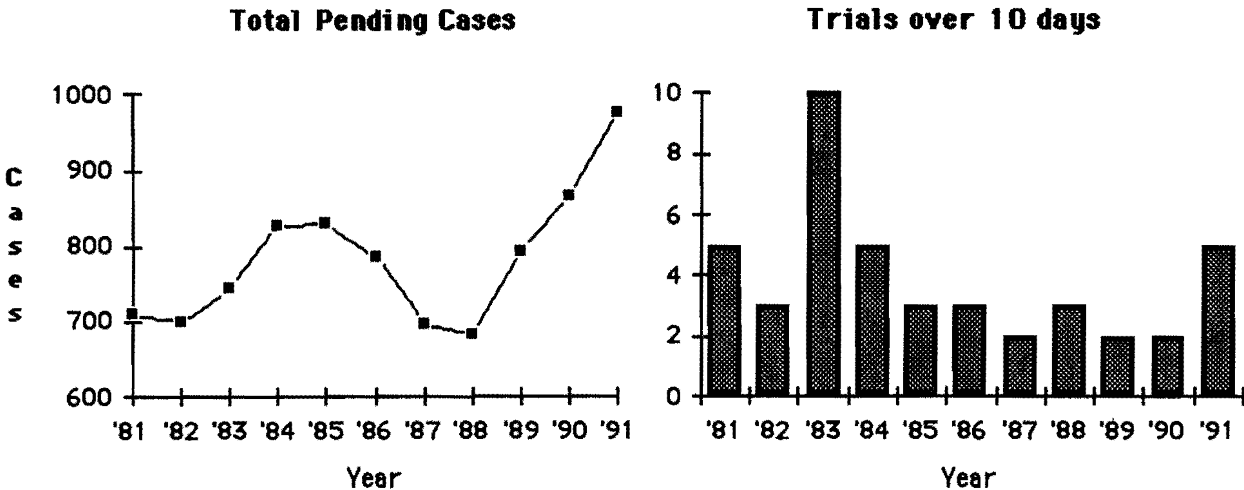
TABLE EIGHT

NUMBER OF TRIALS OF 10 DAYS OR MORE IN LENGTH
YEAR ENDING 12/31

Year	Civil	Criminal	Total
1981	4	1	5
1982	2	1	3
1983	5	5	10
1984	1	4	5
1985	1	2	3
1986	3	--	3
1987	2	--	2
1988	3	--	3
1989	2	--	2
1990	1	1	2
1991	3	2	5

FIGURE FOUR

PENDING CASES COMPARED TO THE NUMBER OF TRIALS OVER 10 DAYS
YEAR ENDING 12/31



5. CIVIL CASES THREE YEARS OR OLDER

Table Nine lists the number of cases in this Court which are three years or older and sets forth the overall percentage of the case load such cases represent. Figure Five is a graphic representation of the information contained in Table Nine and reveals three trends. First, from 1981 to 1984, less than 5% of the total case load was three years or older. Second, a dramatic increase in the number of cases three years or older began in 1985 and continued through 1989, averaging 11.1% of the total case load. Third, in 1990, the number of cases three years or older decreased to, and remained at, 8% of the total case load in 1990 and 1991.

In comparing these statistics with Figure Two, reflecting the total cases filed each year, a clear pattern emerges. The total number of filings from 1982 until 1984 increased each year. A corresponding increase occurred in the number of cases three years or older in 1985, 1986, and 1987. As the total number of filings decreased since 1985, with the exception of an isolated increase in 1989, a corresponding decrease occurred in cases three years or older. A significant decrease in the number of court

hours in 1989, compared to all other years, may provide some further explanation for the increase in 1989 in cases three years or older.

TABLE NINE

CASES THREE YEARS OR OLDER FOR 12–MONTH PERIOD ENDING 6/30

Year	Number of Cases	Percentage of Caseload
1981	23	3.7
1982	16	2.1
1983	25	3.3
1984	41	4.9
1985	78	9.8
1986	85	11.0
1987	89	12.5
1988	75	10.9
1989	86	11.7
1990	65	8.0
1991	69	8.1
1992	45	4.8

FIGURE FIVE
CASES THREE YEARS OR OLDER FOR 12-MONTH PERIOD ENDING 6/30

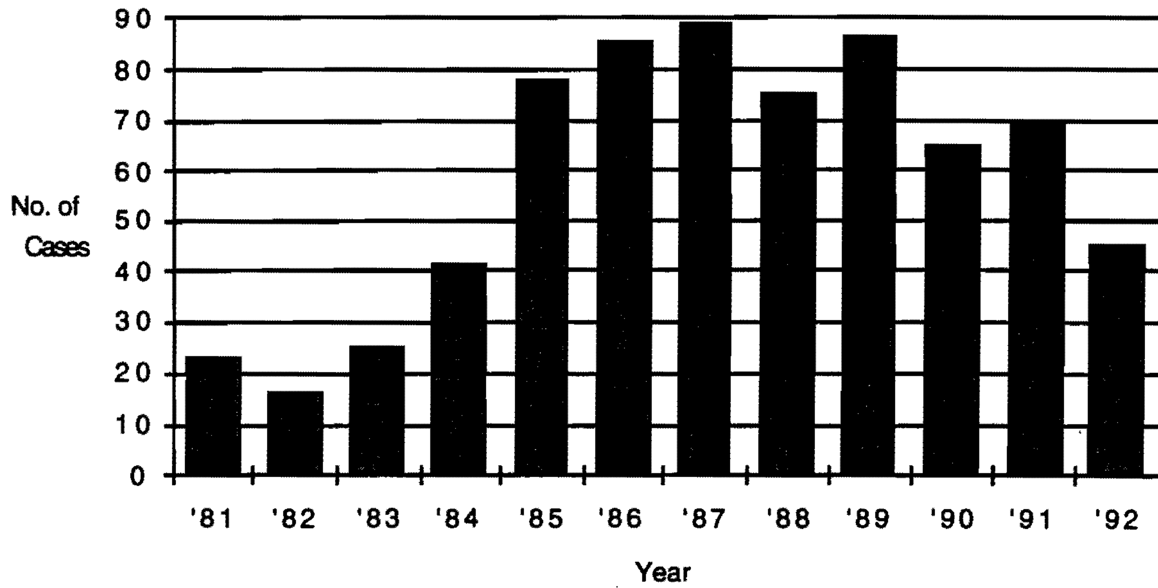
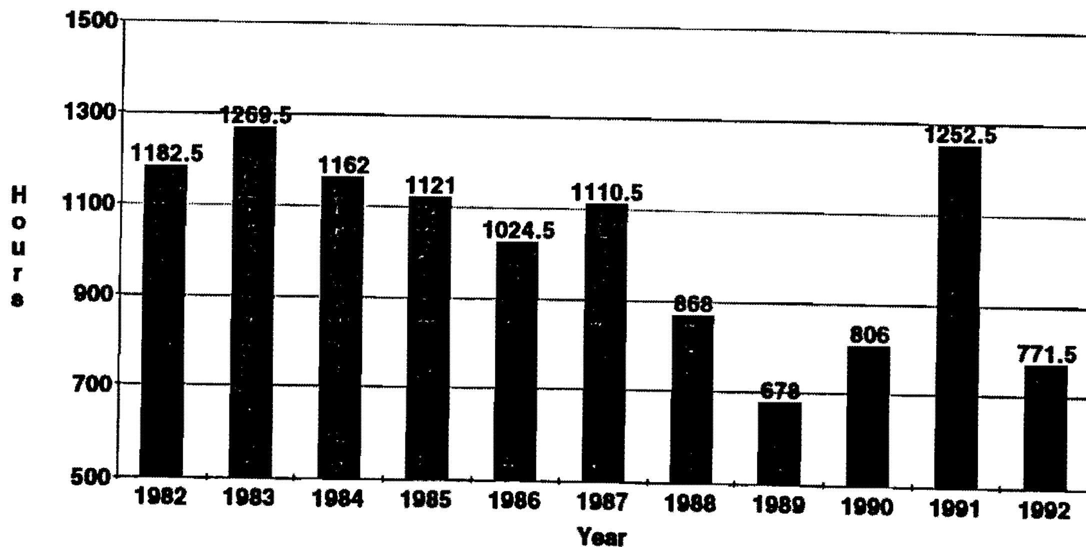


FIGURE SIX
TOTAL COURT HOURS FOR 12-MONTH PERIOD ENDING 6/30



6. UTILIZATION OF COURT TIME

Table Ten indicates the number of trials tried by each judge and the number of hours spent on trials for the years 1982 through 1992. Under the statistical definitions used, a trial constitutes any proceeding in which evidence is introduced before a judge. From 1985 through 1990 the hours spent on trials in this Court by visiting judges exceeded 14% of the total court time with a high of 22% in 1987 and 1990 and a low of 14% in 1985. This Court's necessary reliance upon visiting judges during these years demonstrated the need for the third judgeship authorized in 1990.

TABLE TEN

NUMBER OF TRIALS AND TRIAL TIME
YEAR ENDING 12/31

Year	Judge	Jury	Non-Jury	Criminal	Civil	Hours
1982	Devine	*[3]	*	14	48	434.0
	Loughlin	*	*	6	36	229.0
	Visiting	*	*	2	6	109.0
1983	Devine	*	*	6	18	610.5
	Loughlin	*	*	18	31	416.0
	Visiting	*	*	2	7	68.0
1984	Devine	*	*	14	32	387.5
	Loughlin	*	*	11	26	561.5
	Visiting	*	*	2	6	89.5
1985	Devine	*	*	7	33	415.0
	Loughlin	*	*	13	19	455.5
	Visiting	*	*	0	7	143.0
1986	Devine	12	16	8	20	402.0
	Loughlin	10	30	17	23	304.5
	Visiting	9	4	1	12	171.5
1987	Devine	9	16	4	21	249.5
	Loughlin	8	28	11	25	491.5
	Visiting	11	1	0	12	202.0

[3] *Figures not reported.

TABLE TEN CONTINUED

NUMBER OF TRIALS AND TRIAL TIME
YEAR ENDING 12/31

Year	Judge	Jury	Non-Jury	Criminal	Civil	Hours
1988	Devine	9	8	8	9	161.0
	Loughlin	17	27	14	30	424.0
	Visiting	6	3	1	8	133.0
1989	Devine	5	6	7	4	84.5
	Loughlin	17	20	13	24	350.5
	Visiting	6	8	1	13	89.0
1990	Devine	14	19	26	7	225.0
	Loughlin	12	21	21	12	246.0
	Stahl	0	1	1	0	2.0
	Visiting	8	10	2	16	134.5
1991	Devine	17	17	27	7	384.0
	Loughlin	19	16	10	25	349.5
	Stahl	11	17	11	17	268.0
1992	Devine	9	22	21	10	172.0
	Loughlin	11	20	6	25	183.5
	Stahl	5	23	21	7	120.5
	Visiting	—	4	3	1	6.5

Table Eleven illustrates the number of court proceedings other than trials heard by each judge and the number of hours spent on such proceedings from 1981 through 1991. The percentage of time spent by visiting judges in nontrial proceedings exceeded 11% of total court time from 1984 through 1989 with a high of 24% in 1986 and a low of 12% in 1983, 1987, and 1989. In 1990, with the third judgeship, the reliance on visiting judges dropped to 8%.

TABLE ELEVEN

NUMBER OF COURT PROCEEDINGS AND TIME OTHER THAN TRIALS
YEAR ENDING 12/31

Year	Judge	Pleas, Arraign.	Senten-cings	Final Pretrial	Motions	Others	Total	Hours
1981	Devine	22	25	63	72	21	203	64.0
	Loughlin	20	18	74	94	9	215	115.5
	Visiting	0	0	7	7	0	14	15.0
1982	Devine	24	37	94	54	21	230	75.0
	Loughlin	17	18	70	70	12	187	203.5
	Visiting	0	0	7	23	0	30	29.0
1983	Devine	35	34	68	33	7	177	52.5
	Loughlin	21	17	68	79	13	198	102.0
	Visiting	0	0	18	26	0	44	20.5
1984	Devine	10	20	71	22	12	135	44.0
	Loughlin	7	9	37	52	11	116	66.5
	Visiting	1	2	16	7	1	27	13.0
1985	Devine	14	25	69	7	17	132	45.5
	Loughlin	9	8	13	28	7	65	42.5
	Visiting	0	0	18	8	5	31	19.5
1986	Devine	*[4]	*	*	*	*	147	59.5
	Loughlin	*	*	*	*	*	85	51.5
	Visiting	*	*	*	*	*	38	35.5
1987	Devine	*	*	*	*	*	104	45.0
	Loughlin	*	*	*	*	*	114	103.0
	Visiting	*	*	*	*	*	29	19.5
1988	Devine	*	*	*	*	*	90	42.0
	Loughlin	*	*	*	*	*	229	87.5
	Visiting	*	*	*	*	*	45	20.5
1989	Devine	24	12	12	15	7	70	39.5
	Loughlin	39	28	55	28	23	173	96.0
	Visiting	3	4	24	3	3	37	18.5
1990	Devine	62	43	10	24	6	145	76.0
	Loughlin	45	30	49	32	9	165	99.5
	Stahl	4	0	6	3	1	14	6.0
	Visiting	0	0	36	2	1	39	17.6

[4] *Figures not available.

TABLE ELEVEN CONTINUED

NUMBER OF COURT PROCEEDINGS AND TIME OTHER THAN TRIALS
YEAR ENDING 12/31

Year	Judge	Pleas, Arraign.	Sentencings	Final Pretrial	Motions	Others	Total	Hours
1991	Devine	31	53	30	18	14	146	76.5
	Loughlin	11	22	21	18	12	84	55.5
	Stahl	41	17	74	17	14	163	119.0

7. TIME INTERVALS

Table Twelve sets forth the median times for civil cases measured in months for the years 1981 through 1992. It demonstrates a substantial increase in the required time to process civil cases during 1989-1991 compared to 1981-1986. The expanding criminal docket, judicial illness, and the increased civil filings in the mid-eighties all contributed to this increase. (The lower the rank, the quicker the disposition compared to the 94 federal courts nationwide and the six federal courts in the First Circuit.)

TABLE TWELVE

CIVIL MEDIAN TIMES (in months)
YEAR ENDING 6/30

Year	Filing To Disposition	Rank US/1st Cir.	Issue to Trial	Rank US/1st Cir.
1981	6	6/1	26	79/2
1982	6	19/2	15	44/2
1983	6	27/2	27	84/2
1984	6	23/2	25	88/4
1985	5	11/1	23	87/3
1986	7	37/2	31	91/5
1987	10	66/4	34	91/5
1988	8	26/2	32	91/5
1989	11	60/4	24	85/5
1990	12	70/4	21	75/4
1991	13	81/5	26	86/5
1992	8	16/2	23	75/4

8. PETIT JURY COSTS

Petit jury costs for the twelve–month periods ending September 30 each year varied considerably from 1985 through 1992. The highest amount was $240,745.75 in 1991. The 1991 figure appears aberrational as petit jury costs were in the $140,000 range in 1985, 1989, and 1990 and in the $120,000 range for the years 1986, 1987, and 1988. Although the 1991 increase can be attributed to selection of jurors for a potential seven-week trial with a sequestered jury, it will be important to scrutinize the petit jury costs over the next several years to determine if the increase in 1991 is the beginning of a trend. *See* Table Thirteen and Figure Seven.

TABLES THIRTEEN

PETIT JURY COSTS

Period	Cost
October 1, 1984 to September 30, 1985	$146,904.95
October 1, 1985 to September 30, 1986	$124,845.86
October 1, 1986 to September 30, 1987	$121,998.64
October 1, 1987 to September 30, 1988	$120,743.38
October 1, 1988 to September 30, 1989	$142,774.65
October 1, 1989 to September 30, 1990	$149,981.32
October 1, 1990 to September 30, 1991	$240,745.75
October 1, 1991 to September 30, 1992	$158,639.57[5]

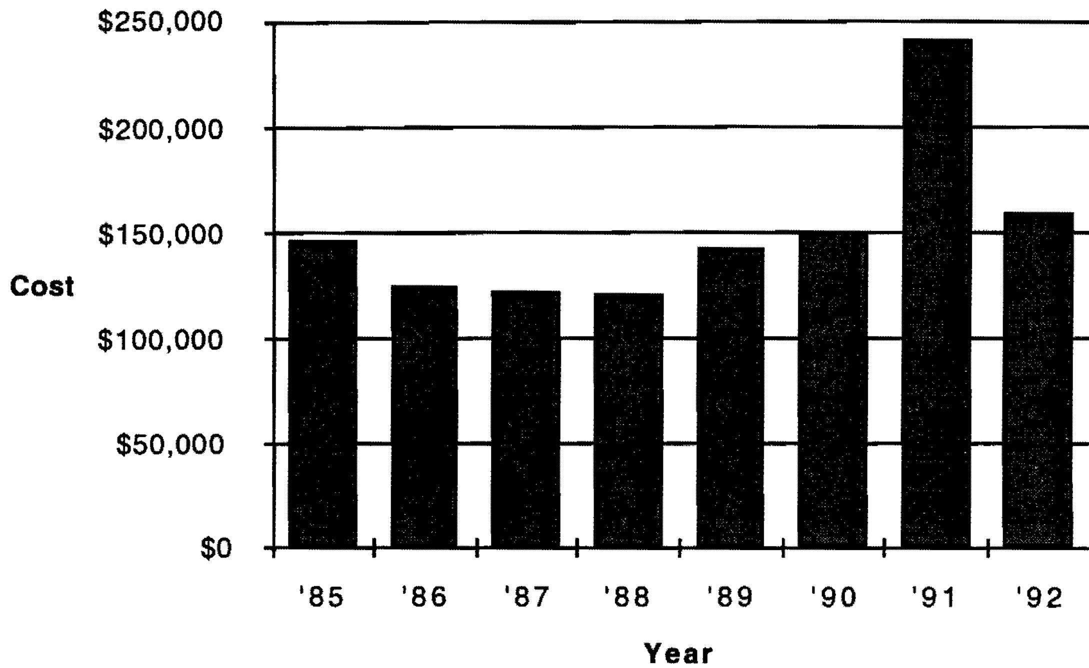
JURY DAYS PER CALENDAR YEAR

Year	Days
1986	120
1987	111
1988	118
1989	123
1990	124
1991	127
1992	109

[5] Includes five (5) days of sequestered jury.

FIGURE SEVEN

PETIT JURY COSTS
YEAR ENDING 12/31



The costs, not surprisingly, correlate with the total number of jury trials. For example, a significant increase in the total number of jury trials occurred in 1991 due to the third judgeship position and the extensive use of visiting judges. Total civil and criminal jury trials for the years 1986 through 1991 were:

1986	31
1987	28
1988	32
1989	28
1990	34
1991	47

9. CURRENT CASE LOAD VOLUME

As of August 31, 1993, 771 civil cases were pending:

Judge Devine	158
Judge Loughlin	117
Judge DiClerico	159
Judge Barbadoro	161
Judge McAuliffe	169
Other	7

As of August 31, 1993, there were 62 criminal cases pending, involving 90 defendants. The total number of cases and defendants assigned to each judge is as follows:

	Cases	Defendants
Judge Devine	3	5
Judge DiClerico	14	26
Judge Barbadoro	22	33
Judge McAuliffe	18	26

II. SUMMARY OF DOCKET ANALYSIS

The statistics for this Court show trends and quirks. Examples of the latter are (1) the upsurge in Social Security cases; (2) backlogs worsened by several lengthy civil and criminal trials; and (3) the FDIC cases filed after the collapse of five New Hampshire banks in October 1991.

Trends are more difficult to analyze. After an explosion of litigation in the early 1980s, the number of suits filed decreased, then leveled off, and has now increased. Whether this recent increase is a trend is uncertain. Three observations can be made about the Court's docket with some degree of confidence:

1.) Cases are becoming more complex.

2.) Congress has had significant impact upon the docket of the federal courts by creating more causes of action, (*e.g.*, ADA, RICO); more agencies to be reviewed (*e.g.*, local special education decisions); more

crimes, more prosecutors, and more complicated steps in the criminal process (*e.g.*, the Sentencing Guidelines).

3.) Congress and the President have an important impact. For that impact to be positive, judgeships must be created and filled in a timely fashion when case loads or vacancies warrant, and sufficient resources must be allocated for administrative support.

We would request that Congress, which called for the creation of our Group, consider carefully the effect its actions may have on the ability of courts to minimize cost and delay. Changes in judicial practices, case management, wise use of ADR, and further regulation of discovery undoubtedly will reduce the cost and the delay of litigation. But, as this Court brings its docket under control, the creation of more crimes, more causes of action, and more controversies for judicial resolution may undermine efforts to achieve the goals of civil justice reform. Simply put, federal legislation should carry a judicial impact statement. If Congress deems it important to create new federal causes of action for the courts to resolve, it would seem those new causes are important enough to give the federal courts sufficient resources to expeditiously handle those cases. Congress may also find it important to consider alternative means of dispute resolution (such as administrative hearings or administrative judges) whenever new legislation creating causes of action is considered.

B. DESCRIPTION AND ANALYSIS OF AREAS EXAMINED FOR POTENTIAL REDUCTION OF COSTS AND DELAY

I. THE COURT'S RESOURCES

Headquartered in the state capitol, Concord, the District includes the entire state of New Hampshire. Although the United States Bankruptcy Court is currently located in Manchester, it will be moved to the federal courthouse in Concord when the new courthouse is completed.

A. JUDGES

In 1979, when the second judge for this Court was authorized, the civil case load for the court was 518. By 1989 that figure had grown to 755 with no corresponding increase in judicial resources. More important, the cases were generally more complex, requiring more judicial time.

The Court has undergone significant changes in judicial personnel in the past several years. Two judgeships have been authorized since 1979; the Omnibus Judgeship Act of 1990 increased that number to three. As a result of the added judicial position and the determination of two judges to take senior status, this Court currently has five judges.

Former Chief Judge Shane Devine has served since July 18, 1978 and assumed senior status on September 8, 1992. Judge Martin F. Loughlin, who has served since May 4, 1979, assumed senior status on May 15, 1989. Senior judges may work fewer hours and may limit the types of cases they hear. Judges Devine and Loughlin have opted to limit the type of cases they will hear, rather than significantly limit their hours. For example, Judge Loughlin will no longer do criminal sentencing because of his distaste for the sentencing guidelines, and Judge Devine will sentence but not try criminal cases. Judges Devine and Loughlin both carry a nearly full complement of civil cases.

Judge Norman H. Stahl remained a district judge for only two years after his appointment to the bench in May 1990. On August 3, 1992 Judge Stahl was elevated to the First Circuit of Appeals, filling the vacancy in that Court created by Justice David Souter's appointment to the United States Supreme Court. On September 11, 1992 Judge Joseph A. DiClerico, Jr., the former Chief Justice of the New Hampshire Superior Court, filled the new judgeship position and assumed the duties of chief judge.

As a result of Judge Stahl's appointment to the Court of Appeals and Chief Judge Devine's assumption of senior status, two judgeship vacancies were created. On September 8, 1992 President Bush nominated Steven McAuliffe and Paul Barbadoro to fill these vacancies.

The Court has one full-time Magistrate Judge, William H. Barry, Jr.

Although the Senate authorized a second bankruptcy judgeship for New Hampshire due to the high rate of bankruptcy filings, Judge James E. Yacos currently serves as the sole bankruptcy judge in the District. Mark Vaughan of Manchester has been selected to the fourteen-year position and will be sworn in on November 12, 1993.

These numerous personnel changes are so new that the full extent of their impact cannot be adequately assessed. However, members of the bar should be aware that the availability of five judges to hear civil cases, coupled with other changes recommended in this Report, will radically change the speed and pace of civil litigation.

B. CLERK'S OFFICE

For years, the clerks of smaller courts felt that the administrative system favored larger courts in resource allocation and staffing. A new staffing formula was eventually adopted in 1992. Under this formula, this Court is eligible for a total of 24 employees.

However, due to serious budget problems in recent years, full implementation of the formula has been delayed.

In spite of these chronic shortages, the Clerk's staff has grown from 10 in 1988 to 19 in 1993, three of whom have been devoted to automation.

Deputy clerks are responsible for all docketing, preparation and entry of judgments, case management, monitoring of deadlines under local rules or court orders, liaison with attorneys, preparation of statistics, scheduling, and attendance at all court proceedings held in open court.

C. BUILDING AND FACILITIES

The Court has three large courtrooms which accommodate multiparty cases, a small jury courtroom, and chambers for each of the judges. Justice Souter and Circuit Judges Bownes and Stahl also have chambers in the building. With five judges, one magistrate judge, and occasional visiting judges, there is not enough space to dedicate a courtroom to each judicial officer on a full-time basis to schedule and hear cases.

Although a new courthouse is planned, the Court is currently faced with the dilemma of either not scheduling two of the five available judges for courtroom time or double-booking the courtrooms or using other facilities, *e.g.*, the state courthouses, the use of which is limited by budget and staffing restrictions.

The magistrate judge's courtroom is small and unsuitable for multiparty litigation. With recent and proposed renovations, and the installation of state-of-the-art sound recording equipment, the use of this smaller courtroom may increase.

We recommend that:

1.) Congress and the General Services Administration proceed with the appropriation for, and the completion of, the new courthouse.

2.) **Until then the Court should minimize the amount of time that judges are not scheduled for courtroom time. With the availability of state court facilities and the renovated magistrate judge courtroom, the Advisory Group recommends that four of the five judges, instead of the current three, be scheduled for courtroom time if sufficient cases are ready for trial and other resources permit.**

D. AUTOMATION

Since May of 1990 the Court has adopted an aggressive approach to automation. At that time, the Court had two personal computers for the use of the Clerk's office; it now has 86, running on two Novell networks.

Civil docketing has been automated since January 1991. In March 1992 the Clerk's office implemented two public access programs--PACER (Public Access to Court Electronic Records), a nationally sponsored program, and PIP (Public Inquiry Program), which the Clerk's Office developed. Through use of these programs, the Court now offers direct access to its docket via modem and also provides two terminals for public use in the lobby of the Clerk's Office.

Pacer
PIP

All chambers are equipped with WESTLAW/LEXIS. Automated criminal docketing began in October 1993. The Clerk's Office is presently working on implementing an opinion index service that will provide attorneys and the public with access to an index and the full text, if desired, of significant opinions.

The Court is also implementing Real Time court reporting which automatically translates a court reporter's shorthand notes to words. Real Time will not only assist judges during trials but will also provide transcripts to counsel and litigants in a more timely fashion.

The Court will install CHASER (Chambers Access to Electronic Records) in January 1994. This program, written for use in chambers, will allow judicial officers

Chaser
1/1994

and staff to have easier access to the Court's docket and enable them to run selected case management reports.

The Clerk's office will continue to automate additional functions in both chambers and the Clerk's office to help provide better service and more efficient use of time and resources.

E. BUDGETING

The federal budget has greatly impacted on the courts for the last several years. In fiscal 1993 it reached crisis proportions. The 1993 appropriation for the federal judiciary was $130 million less than the amount needed to keep pace with the services provided in fiscal year 1992. A total of $200 million less was received than requested.

1.) Operating Expenses: The federal courts have been allocated approximately 54% of last year's funds for operating expenses for fiscal 1993.

2.) Special Funds: In its fiscal 1993 appropriation for jurors' fees, Congress approved $5.2 million less than was requested. The judiciary sought a supplemental appropriation of $7.5 million for this account which was later reduced to $5.5 million. As funds had to be reserved to continue criminal trials through the end of fiscal year 1993, and assuming the request for supplemental funds might not be approved, the Court was notified in March 1993 that it would have no funds with which to pay jurors impaneled in civil cases after May 12, 1993. On June 18, 1993 the courts ran out of money for the payment of civil juries, and all trials were suspended until an additional allocation came from Congress in early July 1993.

Funds were also temporarily suspended for payment of counsel appointed under the Criminal Justice Act (CJA) until an additional $55 million for defense attorneys was appropriated by Congress in July 1993.

3.) Personnel: There was a hiring freeze from July 21, 1992 to on or about February 3, 1993.

The Judicial Conference delayed by two months the 3.7% cost-of-living allowance for judiciary employees which Congress had approved for all General Schedule employees effective on January 1, 1993.

The Clerks' Offices are presently operating with only 79% of the staff needed to fully discharge their duties. Reduction in staff for those courts over the approved level will occur through attrition although reduction in force and furloughs continue to be discussed.

The Group acknowledges that operating under budgeting constraints makes effective future planning difficult. As the judiciary consumes less than 1/2 of 1% of the entire federal budget, improvements to the process should be explored.

II. COURT PROCEDURES

A. ASSIGNMENT PROCEDURES

The Clerk's Office assigns cases to the judges by a random card system, allotting a total of 56 cards--12 each for district judges, 10 each for the senior judges. The office must screen for conflicts from the individual judge's recusal list and take into consideration related actions. The Clerk's Office attempts to avoid assigning to the same judge several cases which require immediate, often intensive, attention.[6]

The Court presently takes no action to prevent one judge from receiving two complex cases while another judge receives two simpler cases. Historically a balance is achieved by the randomness of the draw. Even after checking the recusal lists and knowing the parameters set by the individual judges, a case must occasionally be reassigned because of a conflict. With earlier intervention, such conflicts should be discovered sooner.

[6] The Clerk's Office plans to test an automated assignment system developed by the AO which would allow it to distribute specified types of actions on a rotating basis.

The Group discussed a system which would be more dependent upon weighting cases (based upon counsel's initial assessment of the length and complexity of the case) and/or a judge's expertise. The latter factor was rejected because a concentration of cases could lead to judicial "burn out." The former factor was rejected because of the Group's recommendation of adopting three tracks (the "rocket docket," the regular docket, and the complex track). **During the first year after implementation of differential case management, the Clerk should tally the number of cases on each track pending before each judge. When the Plan is reviewed, this information can be analyzed to determine if the variations indicate anything about the way individual judges track their cases and/or if random assignment should be replaced by a system requiring more effort by counsel and the Clerk.** The Group generally supports the continuation of the random assignment system at this time to discourage "judge shopping."

B. TIME LIMITS

Under the Court's local rules and current practices, counsel must seek concurrence in requests for extensions in filing answers and other pleadings; such concurrence is routinely given. The Court's practice is to grant two assented-to motions for extension with the exception of trial and other specified continuances.

Although definite figures on extensions of time to answer are not readily available, for the period January 1, 1991 to May 31, 1993, in excess of 2500 requests to extend time limits appear in the Court's automated system. This figure includes all requested extensions, *e.g.*, to answer, to file reply briefs, to file motions, or to complete discovery. Attorneys surveyed were not entirely tolerant of all extensions. Six felt that other counsel made "too many requests for extensions," causing "substantial" unnecessary costs or unreasonable delays, and 12 attorneys thought extensions a

"moderate cause" of delay. *See* Attorney Questionnaire #14(a), #12. However, the concerns of these 18 attorneys (out of the 116 surveyed) were not deemed sufficient to conclude that there is a reason to change the practices for the first extension. Only 2 of the 116 attorneys thought the judges were "far too permissive" about "deadlines"; four attorneys thought the judges and magistrate judge "somewhat too permissive." *See* Attorney Questionnaire #15(a)(3).

The Group did debate recommending action concerning extensions for filing an answer. The Group felt that local practices should not overrule Fed. R. Civ. P. 12(a) which requires a response 20 days from service of the complaint. Some of the Group members felt that extensions undermined the "speedy" resolution of disputes envisioned by Rule 1. However, Group members also acknowledged that 20 days is not enough time, particularly in complex cases, to take all the steps necessary to comply with the commands of Rules 8(b-d), 11 and 12. Because counsel must sign every pleading under Rule 11's threat of sanctions, counsel may be required to interview witnesses or to examine documents before answering a complaint.

The Group considered recommending that Congress amend Rule 12 by extending the time for answering but realized that rather than eliminating the need to file for an extension of time to answer, it would just as likely delay it. Thus, **we recommend that only one extension of time for filing an answer be granted by the Clerk before Court review of subsequent extensions and that the extension be for no more than 40 days, for a total of 60 days.**

C. MAGISTRATE JUDGE

William H. Barry, Jr. has been the full-time, full-range Magistrate Judge since 1984. After serving as the Clerk of Court for 15 years, he assumed duties as a part-time magistrate in 1971. His current duties include preliminary pretrials; handling one-

sixth of all Social Security cases (in which he makes a report and recommendation); hearing and/or deciding discovery and nondispositive motions; and hearing and/or deciding dispositive motions. A significant percentage of his time is devoted to criminal matters, *e.g.*, bail or detention hearings, arraignments.

The magistrate judge also has the primary responsibility for screening *pro se* and prisoner complaints to determine whether there are grounds to allow service on the defendants. He may, after such review, either allow a plaintiff time to amend, recommend dismissal of certain counts or the entire action, or direct service and response by the defendant. The Group believes this initial review is important in that it eliminates the time and expense involved in responding to frivolous claims. **The Group recommends that the practice of having the magistrate judge screen *pro se* complaints be adopted as a local rule.**

Although Rule 73 and the local rules allow the magistrate judge to try cases by consent, the option has not been widely used. *See* Attorney Questionnaire #42(a) and (b) indicating that 21 of 116 counsel consented. If the Group's recommendation that the judges conduct preliminary pretrial conferences is adopted, the magistrate judge will have one less function to perform. Although we do not anticipate a decline in the prisoner and criminal dockets, which occupy 25% of the magistrate judge's time, **we recommend that the Court consider the following to utilize the magistrate judge's skills, expertise, and authority:**

1.) Increase the number of Social Security cases assigned to the magistrate judge.

2.) Resume summary jury trials to be conducted by the magistrate judge.

3.) Assign, by consent, part of the voluntary "rocket docket" to the magistrate judge.

4.) **Consider at the pretrial conference, trials by consent before the magistrate judge when counsel know they are going to be ready, need a court date for the convenience of distant witnesses or the certain resolution of the dispute and/or, where the assigned judge's schedule is uncertain.**

5.) **Explore the magistrate judge's involvement in any anticipated Alternative Dispute Resolution (ADR) program.**

D. SENIOR AND VISITING JUDGES

Senior judges are those judges who, by virtue of a combination of years of service and age, have officially retired from active service but choose not to leave the judiciary.

The Advisory Group recognizes that Senior Judges Devine and Loughlin, with their experience, their practical approach to litigation, and their availability for civil cases, are a valuable resource of the Court. **We recommend that every effort be made to accommodate their needs and to facilitate their efforts.**

The Court has historically relied heavily on visiting judges. From 1980 to 1992, it reported a total of 658 days of visiting judge time. With a full complement of judges, its need for visiting judges has been reduced. However, the Group believes that visiting judges are a valuable resource when Congress and the President are slow to fill judicial vacancies, when a very lengthy case dominates a judge's docket, or when an unexpected increase in cases occurs.

We recommend that the AO have the ability, on short notice, to temporarily move a judge or magistrate judge and staff to a district when there is an unanticipated increase in litigation.

E. COMMUNICATION AND COORDINATION

The communication and coordination between the individual judges and the Clerk's Office are excellent. The Court has been conscious of the need to

communicate decisions, local rules, and other changes which impact the members of the bar and the public.

The Group has been impressed by the Court's willingness to seek input. With the support of the Court, this Group sought an extensive amount of information about the Court by sending detailed questionnaires to litigants, attorneys, and jurors; directing specialized queries to those involved in criminal cases and summary jury trials; holding a public hearing; and seeking comments from the 250 lawyers who received our Draft Report. The dissemination of information about the work of this Group and the broad circulation of this Report underscore the importance that the Group and the Court place on the importance of communication among the Court, the bar, and the public.

We recommend the following to retain this Court's tradition of communication:

1.) **Local rules should be available on LEXIS and any CD ROM services.**

2.) **The judges should continue to participate in continuing legal education programs to educate the bar on changes in the Court and utilize the Bar Association's Committee on Cooperation with the Courts to exchange ideas and concerns.**

3.) **Input from the bar and the public should be sought prior to evaluation of the implementation of the Plan after 18 months of operation.**

4.) **The judges should continue to maintain the collegiality and cooperation that are the hallmark of this Court and its staff.**

III. LITIGANT AND ATTORNEY PRACTICES

A. GENERAL OBSERVATIONS

This section highlights five observations made by the Group concerning litigant and attorney practices.

First, attorneys should be sensitive to the impact of litigation. A defendant in our Litigant Questionnaire expressed this view:

> People are using the courts, not for justice, but as a way to a free entry into a Megabucks lottery.

Another litigant, who won a medical malpractice case at trial which occurred three years after the suit was brought and almost nine years after the alleged incident, reminds us that there is:

> No way to put a cost figure on the mental anguish involved.

We considered, but rejected, the suggestion of the latter litigant that "for such suits . . . if the plaintiffs were responsible for the defendant's costs when the defendant is found not guilty [sic] this type of suit might be controlled." Not only is such a change beyond the authority of this Group, but were it in our power to recommend such a "reform," the majority of the Group believes that Rule 11 and the *Harkeem* standard adequately protect litigants from frivolous claims. In addition, Congress has enacted over 100 fee-shifting statutes. Shifting fees to the unsuccessful party would discourage innovative but meritorious law suits. Moreover, as one company president responded, fee reform may not make much difference. After having his company's employees spend 750 hours preparing for and participating in a $500,000 case, he complained:

> The problem is not the Court or the way it proceeds, the problem is the legislation on products liability.

The Group simply reminds the bar that good lawyers know which cases should not be brought.

Second, defendants do not have a monopoly on dissatisfaction. A plaintiff underscored the need for one of our central recommendations--a prompt, certain trial date--with the comment:

If set for a date certain for trial, this case would have settled sooner.

Defendants were criticized for delaying settlement until it became unavoidable, while plaintiffs were criticized for unreasonably high demands.

Third, counsel received the most criticism from their colleagues for "overbroad document requests." Of the 33 respondents who thought opposing counsel contributed significantly to unreasonable delays or unnecessary costs, 24 felt that "overbroad document requests" were a "substantial or moderate" cause. *See* Attorney Questionnaire #14 and #14(a). The Group's recommendation to develop standard required disclosures for certain cases addresses this concern.

Fourth, the "conduct of clients" was criticized by many of the 41 lawyers who found litigation to be "unnecessarily costly." Nearly half (19) found the conduct of the clients to have a "substantial" or "moderate" contribution to those costs. *See* Attorney Questionnaire #13(a). Because our survey did not refine the inquiry, the Group drew no conclusions from this finding.

Finally, as the Court's resources have increased, litigants, lawyers, and law firms will find that they are the causes of delay. Litigants may not necessarily be able to have their attorney of choice try their case even if they are willing to wait because cases cannot be postponed indefinitely due to the unavailability of counsel. Prominent counsel may have to adjust their schedules accordingly. Law firms must ensure their litigation departments are sufficiently flexible to meet the faster pace of litigation called for by the Act and to heed the cries of many litigants who remind us that "justice delayed is justice denied."

B. SETTLEMENT AND CLIENT PARTICIPATION

The February 28, 1991 AO's "Guidance to Advisory Group Memorandum" suggests dealing with the issues of settlement and client participation separately. The Group concluded they are inextricably intertwined.

One statistic stands out: litigants had face-to-face negotiations with the other party in only 14 of 67 cases. *See* Litigant Questionnaire #18. Several of our recommendations focus on the problem reflected by the data and eloquently expressed by one Group member at our November 1991 meeting:

> I think one of the most significant ways to reduce the cost and delay of civil litigation is to get the parties themselves into the case and make them responsible and make the lawyers responsible to their parties . . . I think that people involved in the litigation early may be significant [at] pretrial--and it's going to put some pressures on the lawyers.

Thus, we recommend modifications to facilitate settlement by:

1.) Giving litigants more participation.

2.) Acknowledging human nature--the undeniable tendency to delay when there is no deadline.

3). Making judicious use of ADR.

Specifically, we recommend:

1.) Clients (or people with real decision-making authority) be required to attend both preliminary and final pretrial conferences unless counsel file a motion to excuse their attendance while assuring their availability by telephone, except in cases involving the United States when the United States is represented by the United States Attorney's Office or agency counsel and in cases involving the State of New Hampshire when the Attorney General's Office has settlement authority.

2.) **Consideration of the feasibility and timing of ADR at the preliminary pretrial conference.**

3.) **Judicial handling of all pretrial conferences (except those handled in the first instance by the magistrate judge).**

Supporting these changes are the questionnaires, the experience of the Group and the judges, successes elsewhere, and the fact that the Court finally has sufficient judicial resources. Judge Stahl pinpointed the importance of having the decision makers present at the conference when he said:

> I don't have many years of experience, but every single case where the ultimate client decision maker has been in my conference room has been settled, every single case. *Id.*

The recommendations concerning ADR and pretrial conferences are discussed in depth elsewhere.

C. PAGE LIMIT FOR MEMORANDA

The Group believes that a page limit on legal writing will lead to savings for lawyers, litigants, and judges. Sixty-nine of the lawyers who were surveyed believed that a "30 page limitation for memoranda of law, except for good cause shown" would have a positive effect; only one believed it would result in cost and delay. The Group concurred but had a concern for dispositive motions where analysis of the facts, pleadings, or record could require more pages. Accordingly, **we recommend that there be a 25-page limitation on legal argument, except for good cause, and a 50-page limitation for memoranda on dispositive motions in cases on the complex litigation track.**

D. COMPLIANCE WITH LOCAL RULES

The District has 42 local rules, including Local Rule 11 which requires that counsel seek concurrence and so certify before filing any motion and that counsel file

a memorandum with any motion (or indicate why one is not appropriate). *See* Local Rules 11(b) and (c). A vast majority of attorneys surveyed believed the local rules "enhanced counsel's ability to practice effectively" (41) or had "no effect" (38) while only 13 thought the local rules "hampered" counsel.

Similarly, nearly 70 attorneys believed the local rules were "about right" in number (69) and "content/scope" (68); 21 attorneys disagreed with the number and 18 attorneys objected to the content or scope.

Despite the responsibility of local counsel to ensure that out-of-state counsel comply with the local rules (Local Rule 5(b)), the Court and the Clerk still have problems with out-of-state counsel and new lawyers. The Group considered recommending a test for membership in the federal court bar, a mailing to out-of-state counsel about the local rules, and a requirement for out-of-state counsel to certify that they are familiar with the local rules. We concluded that the judicious and publicized use of sanctions would achieve more complete compliance without the inconvenience to the Clerk's office of a test, a mailing, or a certification requirement.

E. SPECIAL PROBLEMS: CIVILITY

New Hampshire has a tradition of civility in its bar. The Group believes that simple common courtesy which often leads to camaraderie is not inconsistent with an advocate's commitment to his or her client.

Although civility often complements the goal of resolving disputes expeditiously and with the least cost, a minority of the bar seems to believe that civility is a sign of weakness. The Group believes that the conduct of this minority costs time and money, leading lawyers to waste their clients' money on unnecessary pleadings, costly correspondence, and motions for sanctions.

The impact on the profession is also troublesome. Many lawyers no longer find satisfaction in the practice of law. The Group is firm in its belief that lawyers should strive for civility to:

1.) Save their clients money.

2.) Receive professional courtesy when needed.

3.) Reduce the unnecessary stress in a profession already filled with stresses.

4.) Increase the professional satisfaction of all concerned.

5.) Reduce the unproductive time spent on litigation over sanctions.

We could have suggested that the Court incorporate the Guidelines for Professionalism as a local rule, but we simply recommend that lawyers follow them.

IV. SPECIAL PROBLEMS: PRO SE LITIGATION

Lawyers and judges assessing cost and delay in civil litigation could easily condemn *pro se* litigation as time consuming, frustrating, and expensive. The Group, however, fully realizes that for *pro se* litigants, their efforts are their only access to justice. From *Gideon v. Wainwright*, 372 U.S. 335 (1963), to our own *Laaman v. Helgemoe*, many advances in the law have been initiated by *pro se* litigants. In this jurisdiction *pro se* litigation involves approximately 10% of cases; of these cases, 85% involve prisoners challenging their conviction or conditions of their confinement. See discussion, *infra*. Ten of the 113 respondents to our Attorney Questionnaire were involved in cases where the other party appeared *pro se*. Because these cases represent a relatively small fraction of the docket, we did not undertake an in-depth analysis of them.

The Group's attitude about *pro se* litigation could be characterized as being somewhere between reluctant tolerance and admiration; however, we recognize that

the 10% of cases involving *pro se* litigants take up a disproportionate amount of time for the Clerk's Office, judges, opposing parties, and counsel. Thus the Group balanced our mandate of reducing the expense and delay of litigation with the fundamental First Amendment right of individuals to redress of grievances.

Accordingly, we make the following observations and recommendations:

1.) **The magistrate judge's screening of *pro se* cases, <u>before service</u>, is a commendable practice. Though the Group understands and approves of the motives of most *pro se* plaintiffs, in a minority of those cases the plaintiff cannot state a cause of action. Review by the magistrate judge benefits the system and the innocent defendant by preventing the unnecessary cost and delay (and emotional toll) resulting from defending cases.**

2.) **As nonlawyers who "help" promote litigation are not bound by the Rules of Professional Conduct, cannot be disciplined, and are usually without the resources to pay (or be deterred by) financial sanctions, the Attorney General's Office and the Bar Association must continue to be vigilant in enforcing their statutory authority under N. H. Rev. Stat. Ann. § 311:7-a *et. seq.* to prevent the unauthorized practice of law.**

3.) **The New Hampshire Bar Association (through its Lawyer Referral and Information Service, Reduced Fee Referral Program, and *Pro Bono* Program) has a laudatory record of finding counsel for many litigants (1050 referrals last year). The availability of attorneys fees for civil rights cases under 42 U.S.C. § 1988, and to a lesser extent, the *ad hoc* availability of fees under the Equal Access to Justice Act, 28 U.S.C. § 471-482, may reduce the number of *pro se* cases filed. The increased use of appointed counsel in apparently meritorious *pro se* cases might facilitate settlement. Because the *Pro Bono* Program has attorneys who would prefer not to be called upon to handle domestic cases--the vast majority of its cases--the Group recommends that the Court consider a closer liaison with the *Pro Bono* Program. The resources of the *Pro Bono* Program could be tapped when *pro se* complaints survive the initial screening and counsel could help resolve the case. We believe this modest proposal**

makes it unnecessary for us to recommend appointing counsel in civil cases more often.

4.) The Clerk's Office, in conjunction with the Law Center and/or the relevant Bar Association Committee, should examine whether there are any handbooks in use elsewhere which are given to *pro se* litigants, after they file, to ease the burdens on the Clerk's Office, the Court, and opposing parties and counsel. If not, the groups above should develop a handbook for *pro se* litigants.

V. SPECIAL PROBLEMS: UNITED STATES LITIGATION

The United States is a party to a high percentage of civil cases filed in the Court.

Because of the varying nature of litigation involving the United States,the Group made no specific findings. We do, though, note the following:

1.) The United States is frequently involved in the most complex litigation. Our recommendations for complex litigation will apply equally to these kinds of cases.

2.) There is one distinctive characteristic of the United States as litigant. The United States Attorney's Office in Concord has authority to settle civil cases for $500,000 or less. In cases involving higher dollar amounts, agency disagreement with the United States Attorney, or policy issues, the New Hampshire United States Attorney or other government counsel must obtain a series of authorizations from the Department of Justice. This makes it difficult or impossible for the United States as a party to comply with our recommendation that a person with decision-making authority be available, at least by telephone, for all pretrial conferences. Because the Attorney General or a deputy with authority cannot always be by the phone, the federal government's chain of decision making may undermine our suggested reforms in cases involving the United States.

Originally, certain members of the Group believed that there should be no exception for the federal government to our recommendation that a party with

decision-making authority participate in pretrial conferences. However, the United States Attorney's Office made the Group aware of the reasons why approval by the Department of Justice of major settlements is required and why participation by Justice Department representatives with decision-making authority at pretrial conferences is not always feasible. A majority of the Group still believes that Congress and the Justice Department should consider examining further decentralization of settlement authority.

3.) Some members of the Group believe that the absence of interest in money awards against the federal government provides a disincentive for the United States to settle. The United States Attorney's Office strongly disagrees. The Group did not undertake an analysis of litigation with the federal government to determine whether the lack of prejudgment interest had any impact on cost or delay. If such statistical analysis in the future demonstrates that there is a correlation, the Group would recommend that the AO, Congress, and/or the Justice Department consider whether changes in the law should be made.

4.) The Group discussed whether the resources of the federal judiciary are appropriately expended on review of Social Security Administration determinations and concluded that having some independent review is necessary, although time consuming.

VI. SPECIAL PROBLEMS: STATE AND LOCAL LITIGATION, 28 U.S.C. §472(c)(1)(C)

A. HABEAS

Prisoner litigation concerning convictions from state court is relatively light. Whether this is attributable to the quality of the state appellate defender program and/or the New Hampshire Supreme Court cannot be ascertained. As no death-

penalty cases have gone to judgment in the state court in decades, this jurisdiction has been spared onerous and lengthy challenges to death-penalty proceedings.

B. OTHER PRISONER LITIGATION

The judges, the magistrate judge, and the Clerk made it clear to the Group that prison condition cases take an inordinate amount of their time. The Attorney General's Office correctly maintains that it has an enviable record in these cases. But the judges and the magistrate judge point out that the fact the state prevails in most § 1983 cases does not necessarily mean that prisoner complaints are invalid.

Though some prisoner litigation may be generated more by modern technology than by legitimate grievances, the number of incidents with some merit may indicate the need for changes to the current grievance system. The Group believes that it is not the role of the federal court to act as a safety valve and that the State should provide administrative relief to its incarcerated citizens when warranted.

Accordingly, **we suggest that the new Commissioner of Corrections may want to consider the adoption of an ombudsman-type system with review of complaints by an independent person or board.** The ombudsman should have the power to resolve disputes and should have the respect of inmates and the administration to enable it to facilitate and mediate resolution. **Inmates and their advocates should educate themselves more about the State Board of Claims, which may be faster, easier, and more appropriate than federal court.**

The New Hampshire Bar Association and/or public interest groups could and should develop a prison/jail project to reduce the cost and delay created by prisoner litigation. Such a project, devoted to monitoring correctional facilities, might reduce the need for legal action and provide counsel to facilitate litigation when it became necessary.

C. OTHER MATTERS RELATED TO STATE AND LOCAL LITIGATION

There are also special problems inherent in the expeditious settlement of cases involving the state and local governments due, in part, to the difficulty of focusing the decision maker(s) on resolving a suit without a judicial deadline. Due to the limited financial resources and the need for approval of expenditures from an elected body, cases involving state and local entities may not settle as quickly (or at all) as cases involving private litigants acting upon a cost/benefit analysis. Moreover, settlement of these cases may be complicated because public policies are involved.

This is particularly true of the few cases which deal with system-wide conditions in state institutions and agencies. Such "impact" cases consume an enormous amount of judicial, litigant, and taxpayer resources in discovery, negotiations, trial and appeal. If the plaintiffs prevail or settle, designing relief, implementing it, and monitoring compliance takes a long time. The Group recognizes that state and local governments may be doing themselves, taxpayers, and the Court a disservice by allowing some problems to reach crisis proportion and then spending their precious resources in litigation.

With litigation becoming more fast paced in this jurisdiction, public officials and their counsel need to be aware of the changes contained in this Report; otherwise, the changes designed to reduce costs could lead to even greater costs if cases are unnecessarily tried before officials are willing or able to settle. Once litigation has been initiated, all appropriate decision makers should be involved in the decision of whether to oppose or settle the case. Similarly, we recommend that plaintiffs and their counsel in "impact" cases must carefully evaluate settlement early in the case and make and consider realistic settlement offers.

VII. SPECIAL PROBLEMS: COMPLEX CASES

Prior to November 1992, when the Court first had five judges available to hear civil cases, the increase in criminal and civil litigation did not allow the Court to take all the steps necessary to manage complex cases. Through the reports and experience of other districts the Group has learned that judicial management of complex cases reduces both cost and delay.

VIII. EXAMINING THE IMPACT OF NEW LEGISLATION ON THE COURT, 28 U.S.C. §472 (c)(1)(D)

A. CIVIL LEGISLATION

The Group accepted Congress's invitation to "examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts." 28 U.S.C. §472 (c)(1)(D). However, the Group has seen no evidence of any Congressional assessment of the impact of new legislation on the courts.

Other advisory groups have commented on a variety of legislative initiatives (*e.g.*, RICO, ERISA, ADA). We limit our observations to one specific act illustrative of the problem--the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 42 U.S.C. § 9601 *et. seq.* (1980), also known as "Superfund." This Court's *Ottati & Goss*[7] case was one of the first cases tried under CERCLA. Its 114 trial days had an adverse impact on the Court's docket that cannot be overstated.

This Court's experience with *Ottati & Goss* demonstrates the need for Congress to consider the judicial impact of any legislation it debates. The New Hampshire legislature, even with its limited staff, is able to attach a fiscal note to every bill containing an analysis of the impact on state, local, and county expenditures and revenues. **We recommend a similar judicial impact statement for proposed**

[7] *United States v. Ottati & Goss, Inc.*, Civ. No. 80-225-L.

legislation to make Congress aware of the impact of legislation on potential litigants and the judiciary.

We are also confident that if Congress confronts the impacts of proposed legislation, it would create more efficient and less expensive alternatives to jury trials or the protracted procedures which accompany some legislation. For instance, a Congress cognizant of the true costs of CERCLA to courts, litigants, taxpayers, and the environment might create regionalized and specialized tribunals. At a minimum, the step of considering judicial impact would lead Congress to filling in policy gaps in legislation leaving less to be litigated repeatedly in 94 district courts.

B. LEGISLATIVE INACTION

Although other Reports have featured discussions of a variety of areas of legislative inaction (*e.g.*, unspecified statutes of limitation, choice of law, federal common law), we highlight only one--implied causes of action. As litigation continues over the proper test to determine if Congress intended citizens to be able to sue, *compare, Cort v. Ash*, 422 U.S. 66 (1975), *Wilder v. Virginia Hosp. Ass'n*, 110 S.Ct. 2510 (1990) *and Suter v. Artist M.*, 112 S.Ct. 1360 (1992), the Group is prompted to ask Congress to clarify standing to sue for an alleged violation of federal legislation.

Accordingly, we recommend that the judicial impact statement for any legislation contain answers to the following questions:

1.) Is there a private right of action?

2.) If so, who is allowed, or not allowed, to bring suit?

IX. ASSESSMENT OF CRIMINAL DOCKET AND LEGISLATION

The analysis of the Court's criminal docket indicates an increase in the number of cases pending at the end of each calendar year from 9 in 1983 to 53 in 1991.

The increase in criminal cases correlates with an increase in the staff of the United States Attorney's Office from 6 in 1983 to 14 in 1991.

As a result of the recent increase in judges, a leveling off of indictments, and an increase in guilty pleas, the current impact of the criminal docket upon the civil docket has been greatly reduced. However, the increases in federal crimes (from 3 crimes in 1789 to 2000 or more today) and prosecutors have not been without consequences.

The Group is not alone in recognizing this impact. In a June 1993 address on "Drugs and Violence," Chief Justice Rehnquist pointed out that criminal cases, which account for 15% of the total cases in the federal courts, took 49% of judges' time. The Group believes Congress should carefully consider whether cooperation with and support of state and local efforts in the war on crime may be more appropriate then "federalizing" more criminal activity.

Although the purpose of this Report is not to undertake a wholesale analysis of the Federal Rules of Criminal Procedure or the federal sentencing guidelines, several observations should be made. First, **sentencing has become far more complex under the Sentencing Reform Act. The specialized knowledge and experience required to understand and use the guidelines leads to our recommendation that the Massachusetts Federal Defender Office implement its plan to have a branch of the Federal Defender Program in New Hampshire.** This will reduce the time required to find counsel for defendants eligible for appointed counsel, and it should improve representation. The government will also realize substantial cost savings.

It is apparent in this Circuit, as well as in other circuits, that there is a significant increase in the number of appeals arising as a result of the federal sentencing guidelines. According to Justice Rehnquist's statistics, 22% of appeals to the Circuits are in criminal cases and 45% of these involve sentencing. It is the sense of some

members of the Group that with a greater certainty as to the sentence to be imposed there would be an increase in pleas, as well as a reduction in appeals of the sentences imposed. *See* Criminal Defense Attorney Questionnaire #7-7(a).

The defense bar feels that the United States Attorney's Office should be encouraged by the Court to engage in pleas pursuant to Rule 11(e)(1). The United States Attorney points out that decisions regarding negotiated dispositions into which it will enter remain a prerogative of the executive branch.

The defense bar also is of the opinion that "open-file discovery" leads to a greater increase in the number of guilty pleas, as well as an ability to address and resolve dispositive issues on a timely basis, and that it is appropriate for the government and defendant to enter into an omnibus discovery process at the time of arraignment, under the appropriate circumstances, even though there is nothing in Rule 16 which requires the government to engage in this process. The United States Attorney notes that in appropriate cases it has engaged in so-called "open-file discovery." The United States Attorney's Office is considering a standard order of automatic discovery under the Federal Rules of Criminal Procedure in all cases except where it would endanger witnesses. **The Group recommends the adoption of a standard discovery order to eliminate the need for many discovery motions**. This recommendation is supported by our survey of 51 criminal defense lawyers practicing in this State who indicated that voluntary discovery "caused or contributed to the entry of 24 guilty pleas" while leading to trial only 7 times. The correlation between "open discovery" and the speedy resolution of criminal cases is believed to be more than mere coincidence.

The Group also believes that it would be appropriate to hold a final pretrial conference several weeks prior to trial. Even though the judge cannot participate in

sentence negotiations, the pretrial conference can identify evidentiary issues and focus the parties on particular areas of concern.

Finally, the Group is of the opinion that the use of pretrial diversion, which has steadily increased in this District, should be actively used under appropriate circumstances, although the government is considering a reduction in cases it refers for pretrial diversion. The fact that a case may not merit federal prosecution does not mean that it should not be referred for consideration by the Attorney General's Office or a county attorney.

A. RICO

In 1970 Congress enacted the Organized Crime Control Act, Title IX, otherwise known as the Racketeer Influenced and Corrupt Organization Act (RICO). This Court's first and only RICO case was litigated in 1992. Consequently, the time and resources resulting from this legislation are minimal.

B. THE SPEEDY TRIAL ACT

In 1974 Congress enacted the Speedy Trial Act, 18 U.S.C. § 3161, to standardize procedures and protect criminal defendants from undue delay. The Report of the Advisory Committee of the Northern District of Georgia describes the Act and echoes our findings, particularly prior to November 1992 when the District did not have five judges hearing civil cases:

> The Speedy Trial Act requires that a criminal indictment or information be filed within 30 days of arrest or service of a summons upon the defendant in connection with the criminal charges. 18 U.S.C. § 3161(b). In addition, a criminal trial must commence not more than 70 days from the date of the filing of the information or indictment, or from the date of the defendant's arraignment, whichever is later. 18 U.S.C. § 3161(c)(1). The only exceptions to this 70-day trial requirement are certain periods of "excludable time" which by statute are deemed permissible periods of delay and are excluded from computation of the time limits of the Speedy Trial Act. 18 U.S.C. § 3161(h). If a defendant is not indicted

within the 30-day time limitation, the charges must be dropped. 18 U.S.C. § 3162(a)(1). If a defendant is not tried within the 70-day time limitation, the defendant may move to have the indictment dismissed. 18 U.S.C. § 3162(a)(2).
The Advisory Group found that the ramification of the Speedy Trial Act for civil litigants is that it results in criminal matters being accorded priority over civil cases. Civil cases included on a trial calendar that also includes criminal cases may never be reached by the Court during that calendar duration because of the amount of time consumed by the criminal cases, which having been accorded priority over the civil cases, were tried first. *Id.* at 39.

Only 27% (or 13) of the criminal defense attorneys found "the time limits for the setting of trial dates under the Speedy Trial Act" to be "reasonable." By contrast, 31% (or 16) found the time limits far too restrictive and 41% (or 20) found them somewhat restrictive. The Subcommittee noted that extensions to the time limitations imposed by the Speedy Trial Act were usually granted unless the requests became too numerous.

C. RECOMMENDATIONS ABOUT CRIMINAL MATTERS

A majority of the Group recommends[8] to Congress and the Executive Branch that:

1.) Before passing and signing another measure in the war on crime and drugs, allocating additional resources to law enforcement or prosecution, and/or adjusting the sentencing procedure any further, they remember that each step in the process from initial appearance to disposition involves expenditures of scarce judicial and, with appointed counsel, public resources. Congress and the Executive Branch must take responsibility for their role in the delay of civil cases, unless they rectify the delay to civil litigants by providing the courts with the same increase in resources that is provided to the Justice Department and the investigative agencies.

[8] The U.S. Attorney's Office disagrees with the Group's recommendations and dissents from the majority's recommendations, except as otherwise noted.

2.) **Congress should reconsider the sentencing guidelines and mandatory minimum sentences on the ground of efficiency.**[9]

3.) **The Speedy Trial Act should be reconsidered for those not incarcerated.**

The majority of the Group recommends that the United States Attorney:

1.) **Institute an open discovery policy.**

2.) **Continue to work with the Probation Office to increase pretrial diversion (a recommendation in which the United States Attorney's Office can generally join).**

The Group (including the United States Attorney's Office) recommends to the Court that a final pretrial conference be scheduled two weeks before trial. Finally, to the Massachusetts Federal Defender Office, the entire Group supports the plan to open a New Hampshire branch.

X. ALTERNATIVE DISPUTE RESOLUTION

Section 471 of the Act states, *inter alia*, that "[t]he purpose of each plan [is] to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes." The Act mandates that in formulating its plan, the court shall consider and may subsequently include "authorization to refer appropriate cases to alternative

[9] Some members of the Group also believe that these Acts should be reconsidered because of the necessity to tailor the punishment to the criminal. Justice Rehnquist pointed out to the Sentencing Commission that the law of unintended consequences was at work with mandatory minimum sentences; "mules," and not just drug kingpins, were receiving long sentences. These Group members believe that Congress should be aware that good judges have retired rather than take part in sentencing procedures they cannot tolerate. The United States Attorney's Office is of the view that the sentencing guidelines do account for the characteristics of the individual defendant. The United States Attorney's Office also points out that guideline sentencing is necessary and appropriate to encourage nationwide uniformity of sentencing for particular crimes.

dispute resolution programs" such as mediation, mini-trial, and summary jury trial. Section 473(a)(6). Our report on Alternative Dispute Resolution (ADR) is divided into four parts: (1) Current Use and Attitudes; (2) Summary Jury Trials; (3) What We Studied, Considered, and Recommend,[10] and (4) Our Conclusions for the Bar.

A. CURRENT USE AND ATTITUDES

Of the 116 attorneys who responded to our survey, the following information was reported:

In terms of promoting a quicker or less costly resolution in this case, what was or would have been the impact of: (Check the appropriate column(s) for **each** method)

	[1] Was tried & failed	[2] Was tried & succeeded	[3] Not tried but could have helped	[4] Not tried but would not have helped	[5] Cost more than worth
1. Case evaluations	2	4	34	52	6
2. Mediation	0	8	36	53	4
3. Nonbinding Arbitration	0	2	30	57	8
4. Settlement Conference[11]	10	17	34	39	2
5. Summary Jury Trial	2	0	30	56	17

Thus, only 18 of 116 attorneys reported using nonjudicial ADR. Less than 40% of the lawyers indicated that ADR "could have helped." Yet of those who tried ADR, 14 of the 18 "succeeded." When questioned about arbitration and mediation in general, a large majority of the surveyed attorneys believed that mandatory nonbinding arbitration (of cases below $100,000), mediation, or early neutral case evaluations would be effective devices "in expediting civil litigation or reducing its costs." The following indicates the favorable reaction to ADR:

[10] Our recommendations are discussed in some length here and summarized, *infra* page 89.

[11] "Settlement Conference" was included in the survey but is not being characterized or calculated as ADR as it involves a judge or magistrate.

With respect to each possible solution to address delays and costs, please indicate your opinion as to its effectiveness in expediting civil litigation or reducing its costs by checking the appropriate column.

	[1] Substantial Effect	[2] Moderate Effect	[3] Slight Effect	[4] No Effect At All	[5] Negative Effect	[6] No Opinion
23. Requiring mandatory, non-binding arbitration of all disputes in which the amount in controversy is less than:						
1. $100,000	33	24	15	3	17	1
2. $200,000	22	23	14	8	15	2
3. $1,000,000	17	20	12	15	17	3
24. Providing court-annexed mediation upon mutual consent of parties for some or all issues in dispute	30	44	14	4	2	1
25. Making available attorneys who are experts in the subject matters in dispute to evaluate claims and defenses and to assist parties in settlement negotiations ("early neutral evaluation")	31	34	16	6	4	4

Of the 73 litigants who responded, only 14 reported negotiating "with the other side present." Eight of the 11 litigants who discussed mediation with their counsel used it; 2 of the 6 who discussed arbitration with their counsel used it; 6 of the 15 who discussed case evaluation used it; and 10 of the 20 who discussed summary jury trials used them. Despite the high opinion of the value of ADR held by a majority of attorneys, relatively few attorneys discussed ADR with their clients. This may indicate that clients are not fully apprised of the options their lawyers think might assist in resolving their disputes efficiently and effectively. This analysis supports our recommendations for a preliminary pretrial conference with clients present that

specifically includes consideration of ADR and for an informational pamphlet to be distributed to litigants describing court-sanctioned ADR options.

B. SUMMARY JURY TRIALS (SJT)

The purpose of the SJT is to produce settlements by giving litigants a common basis for predicting how a jury might decide a case. The Group agreed that this method of ADR should be a last resort for litigants because it consumes a significant amount of court time and resources.

From 1988 to 1990 the Court utilized the SJT. We surveyed those attorneys who had been involved in SJTs, and found, based on the 24 responses:

1.) 18 cases were assigned by the Court.

2.) 15 cases settled after the SJT.

3.) 14 1/2 attorneys felt "the SJT process [was] helpful in resolving" the case.

4.) 19 of the 24 attorneys thought the SJT was "worth the preparation . . . and attendance" time.

5.) 20 attorneys thought it "cost effective" for their client.

6.) 19 attorneys felt "shortly after close of discovery and filing of pretrial material" was the best time for SJTs; the same number wanted the ability to interview jurors **(the Group recommends that the Court allow SJT juror interviews).**

7.) The biggest difference of opinion concerned the assignment of SJTs; eight attorneys wanted it by agreement of counsel, 4 at the request of one counsel, and 8 assigned by the Court using established criteria.

Since 1991 (with a few exceptions), SJTs have not been held because the necessary resources have not been available until recently.

C. WHAT WE STUDIED, CONSIDERED, AND RECOMMEND

In addition to the Questionnaires (summarized in Appendices I, H, and E), the Group also looked at:

1.) Other districts' plans.

2.) The New Hampshire Superior Court's Rule 170 Program (mandatory ADR programs where the parties choose case evaluation, mediation, nonbinding or binding arbitration).

3.) The District of Columbia System.

4.) Literature on ADR. *See, e.g.,* articles by Dayton, Brazil, and Resnik.

We considered the following issues:

1.) Mandatory v. Nonmandatory ADR: The Group did not favor mandatory ADR in every case. Instead, the decision to participate meaningfully in some form of ADR should be made at the option of the parties or judge during the preliminary pretrial conference or after some written discovery has been conducted. In either event, the use of ADR mechanism is best if case specific. For instance, in a more complex case, complete discovery may be necessary so that the parties better understand their positions before attempting to use ADR, whereas in a less complex case ADR may be appropriate before discovery has been completed.

   In addition, the Committee felt that a form providing litigants and their attorneys with a menu of ADR choices should be developed. This form would be used as a case management tool during the preliminary pretrial conference to motivate attorneys to prepare themselves and their clients to discuss the possible use and timing of an ADR mechanism. Our proposal envisions the parties selecting the type of ADR and the neutral at the preliminary pretrial conference or, by that time, setting a date certain for selection.

2.) Binding v. Nonbinding ADR: Only nonbinding ADR should be ordered by the Court. The parties may, however, agree to binding ADR.

3.) Providing Certified (or approved) Neutrals: The Group agreed that case evaluators, mediators, and arbitrators used by the Court required some type of "certification" process to insure quality. Currently, the Superior Court has selected mediators based upon experience and reputation

and has offered them training for a day and a half. *See* New Hampshire Superior Court Rule 170.

Important to the "certification" or "approval" process is the method for the selection (and monitoring) of neutrals. Quality neutrals, at least for case evaluations and arbitration purposes, must have experience, skills, and respect. The members of the Group felt that they could easily identify such people.

Articulating standards other than experience may be more elusive or difficult. Given the Court's desire not to create a bureaucracy to administer the ADR list and test people to be on it, there is some tension in devising an efficient and fair selection process with minimal written standards and quality control. One way to minimize this tension is to be relatively inclusive about who can be considered as a court-referred neutral and have the parties and counsel agree on a person from a list of three or five. In any event, this problem may also be lessened by learning from the Superior Court's use of neutrals under Rule 170.

This Group believes that it would be beneficial to communicate with the Superior Court to permit the District Court to develop its own system while building on the strengths of the state system. In addition, the Group agreed that a list of "certified" mediators, organized by specialty, will be maintained by the Court. We did not finalize the details of the "certification" system, preferring to wait and gain from the Superior Court experience. The parties may also agree to a neutral not presently listed with the Court.

4.) Paying Neutrals v. Volunteers: There was no unanimity regarding the issue of compensating neutrals. Some believed that "some" compensation (*i.e.*, less than an attorney's hourly rate) was necessary to attract a pool of quality mediators; others believed that neutrals should receive full hourly fees to attract and keep quality mediators. This led to concern that the need to pay a fee in addition to the attorney's fee would deter litigants from using ADR. Essentially, the Group did not want to create a system in which people who can afford it obtain faster resolution while others wait in line. Possible solutions were discussed. One idea was that attorney neutrals who provide their services *pro bono* could receive recognition through *pro bono* credit. However, the New Hampshire Bar Association's Pro Bono Program prefers that volunteer neutrals be honored through separate recognition in the *Bar News*. Consequently, this option is most likely the least viable. Second, an approved list of neutrals could be developed and maintained by the Clerk's Office with those on the list agreeing to take a case or so per year for no or half fee. This list will track and place a limit on the number of

hours that an attorney neutral would be asked to offer their services *pro bono*. By limiting the number of hours any one neutral may mediate *pro bono* and requiring all to handle some *pro bono* , if necessary, the possibility that only a few select neutrals will share the *pro bono* load disproportionately will be avoided.

5.) Confidentiality: Generally, anything that occurs between the parties in the course of case evaluation, mediation, and arbitration should remain confidential and inadmissible. Specifically, the Group agreed that nothing from ADR may be introduced at trial if the litigants fail to reach a settlement. The SJT, however, should be open to the public.

6.) Courthouse / Elsewhere: Mediation or other ADR may be conducted in the courthouse if space is available. The Clerk's office will attempt to arrange a place and time for the mediation to occur in the courthouse if the efficacy of such an arrangement is discussed at the preliminary pretrial conference; otherwise, the parties and neutral will select a convenient site.

7.) Selected Cases v. All Cases: The Group agreed that the decision to use ADR will be case specific.

8.) Experimental Basis: Although this Court had been using SJTs, the use of other methods of ADR is still experimental. Consequently, the Group agreed that a subcommittee would be developed to keep statistics on the use of ADR and review such statistics after 18 months to evaluate whether to continue the program and, if so, with what modifications. Thereafter, a less rigorous review should be held annually. The Group did not believe that a control-group experiment was wise.

9.) Requested Cases or Assigned Cases: The parties could agree or the court could assign a case for ADR.

10.) Timing: The most efficient method of determining when ADR should be attempted depends heavily upon the court setting a firm trial date. A firm trial date set at the preliminary pretrial allows the parties to determine when ADR may be appropriate. There is a tension, however, between having enough information to have meaningful ADR and having ADR soon enough to minimize cost and delay. A firm trial date will also force attorneys to complete or be near completing discovery so that ADR becomes a viable option for the litigants at an ascertainable time. The Group believes that the time for scheduling ADR varies. As a guideline, it was thought that 30 to 60 days after the disclosure of experts is a satisfactory amount of time for the attorneys to complete necessary discovery, have a thorough understanding of the case, and be prepared

to participate in meaningful ADR. While 30 to 60 days is a general parameter within which the Court may want to work, the Group acknowledges that flexibility is necessary to address the specific issues of each case.

11.) Judicial Involvement: In nonjury cases, it was the opinion of the Group that judges must be very cautious to ensure that the judge's prior involvement will not affect or give the appearance of impacting the result. For instance, a judge should not participate in SJT and later sit during the trial. Furthermore, in order to avoid the judge's decision being tainted, nothing related to the result of ADR should be contained in the Court's file.

D. OUR CONCLUSIONS FOR THE BAR

One message that the bar should heed is that many lawyers are going to have to be familiar with the various forms of ADR. Clients and Congress are demanding that cases be resolved quicker. With new judicial resources in both the state and federal systems, together with the expansion of ADR, cases will now be resolved in closer to a year than the present three years.

Accordingly, the Bar Association should continue to have appropriate programs for its members focusing on the changes which will result from ADR. **We recommend that (1) the bar examination be updated to include competency testing for dispute resolution; (2) further CLE programs be held on ADR and related skills; (3) a pamphlet be developed to provide relevant information for clients on ADR options; and (4) the new-lawyer training program should include a component on ADR issues.**

XI. TRIAL AND ITS ANTECEDENTS

A. PRETRIAL STATEMENTS

Pretrial statements should be what they were originally intended to be--a specific listing of the issues, exhibits, and witnesses and a description of the case. The Group believes that a detailed, accurate pretrial statement is a valuable tool which

focuses attorneys' attention on their case, promotes settlement, and makes the final pretrial conference more meaningful. This, however, will require the (re)education of the bar. The Group acknowledges that the requirement that pretrial statements be specific may lead to inadequate statements being returned to counsel but believes that this extra effort is worthwhile.[12]

Accordingly, the Group recommends:

1). Exhibits be specifically identified. Witness lists should contain only the names of those witnesses whom counsel, in good faith, believe will actually be called to testify. Because it is often difficult for counsel to know exactly which witnesses they will call, it was agreed that considerable flexibility was required. The purpose of the list of proposed witnesses is to inform the court and opposing counsel, not to conceal information.

2.) Final pretrial statements should begin with a "brief statement of the case," agreed to by both parties, which the judge could read to the jury to concisely describe the case.

3.) The stipulations as to agreed facts should be binding on the parties. The present practice of merely requiring a unilateral statement of facts believed to be uncontested accomplishes little. Consequently, judges should enforce the local rule which requires both counsel to meet and stipulate to facts not contested.

4.) Where a pretrial statement has been previously filed and the case continued or not reached when assigned, updated pretrial statements should be filed no later than thirty days prior to the final pretrial conference unless the parties file a stipulation that the pretrial statements previously filed require no change.

5.) Requests for jury instructions should be filed simultaneously with the filing of the pretrial statements. The Group emphasizes that counsel should submit only the case-specific legal and factual elements that must be explained to the jury. Counsel need not include instructions that will be covered by

[12] One member of the Bar expressed strong dissatisfaction with any strict pretrial requirement that would take surprise and strategy out of litigation. For instance, a plaintiff should not be required to disclose that his first witness will be the defendant.

the standard federal charges to the jury. This requirement will encourage counsel to think about the claims and theories behind their case earlier in the trial preparation process. The Group recognizes that this recommendation may require a change to Rule 51 of the Federal Rules of Civil Procedure.

6.) **Motions in limine, to the extent they can be anticipated by the time of filing pretrial statements, should be filed with the final pretrial statements so they can be considered by the Court at the final pretrial conference.**

B. TRIAL SCHEDULING

The Group recommends continuing the current practice of "stacking" cases for trial. The Group also recommends that when the Court implements an integrated, automated calendar system, this information be made available to the public and the bar via computer.

The Group rejects the concept of sanctions for settling shortly before trial but suggests that the Court be actively involved in exploring settlement with counsel at the final pretrial conference. Attorneys, however, who do not promptly advise the Court that the case has been settled should be sanctioned.

C. FINAL PRETRIAL CONFERENCE

The Group recommends:

1.) **A uniform pretrial procedure should be used by all judges so that attorneys and parties can reasonably anticipate what will happen at all pretrial conferences. The following subjects should be considered at the final pretrial conference:**

   a.) **The marking of exhibits for identification or as full exhibits, and their exchange.**

   b.) **The admissibility of exhibits not agreed to by counsel prior to the conference.**

   c.) **Voir dire.**

   d.) **Special questions.**

e.) Special problems with the case.

f.) View arrangements.

g.) Challenges, jury lists, and problems with specific jurors.

h.) Motions in limine.

i.) Order of witnesses (in terms of arrangements and scheduling problems, not precise trial strategy).

j.) Order of presentation in multiparty cases.

k.) Jury instructions.

2.) The Court should continue its current practice of holding a final pretrial conference approximately two weeks prior to trial since this appears to be an ideal time to effectuate settlement.

3.) The length of the final pretrial conference should not be limited to thirty minutes. Additional time will afford an opportunity to discuss any dispositive motions, motions in limine, or other questions that may facilitate the trial or settlement of the case. Most important, it will allow additional time for the judge to be a catalyst in settlement negotiations.

4.) More emphasis should be placed by the trial judge in attempting to reach settlement at the final pretrial conference. If settlement is not accomplished, at least an assessment can be made whether the case will be tried to a conclusion and thus delay other cases on the trial list. To increase settlement, the Group recommends that:

a.) Attorneys with authority to settle cases should be present at the pretrial conference.

b.) Attendance of clients is required unless excused by motion or specific exemption. Telephone availability should be required in all cases where a party is not present in person, except in cases involving the United States or the State of New Hampshire, if the Attorney General's Office has settlement authority.

c.) Judges' training conferences and seminars should give special consideration to the role of judges in the promotion of settlement.

d.) Counsel should endeavor to give more accurate estimates of the length of trial to allow the Court to better schedule cases. If counsel are able to disclose the order of witnesses and order of proof without compromising legitimate advocacy, this will facilitate more accurate estimates.

e.) No continuances should be granted except in extraordinary circumstances. Some members of the Group expressed concern about this recommendation, particularly because of scheduling conflicts for trial counsel between state and federal court. It was suggested that trial conflicts could be reduced if a firm trial date were scheduled well in advance, perhaps as much as 8 to 12 months. The Group commends the attempt by the Clerk's office to minimize conflicts in the schedule of trial counsel through the use of its computer capability. Unfortunately, there is no complete or compatible computer-based system in the state trial courts. The Group strongly recommends that efforts be made to create an integrated system to minimize the need for continuances.

f.) With respect to exhibits, the local rules should be clarified as to whether all exhibits must be listed or only exhibits which will be offered by a party as evidence in their case in chief. The need to list impeachment exhibits should be clarified and a uniform practice among the judges on this issue should be promulgated. We strongly recommend that the judges discuss and develop a standard policy for the related, but different, issues which arise with exhibits:

1. Disclosure vs. marking.
2. Impeachment exhibits vs. cross examination exhibits.
3. Rebuttal exhibits vs. impeachment exhibits.

D. DRAWING JURIES

With respect to drawing juries, the Group has the following observations:

1.) The present Tuesday draw of jurors seems to work. It allows Mondays to be a last working day for parties to settle a case before proceeding.

2.) The practice of drawing multipanels on the one Tuesday seems to be a substantial cost saving for the system and is encouraged.

3.) Counsel should be made aware that early arrival on the day of the jury draw substantially expedites the business of the Court. Almost invariably, counsel have issues to take up with the Court before the jury is to be drawn. If counsel do not arrive early, it means that the entire jury panel is held while brief conferences are held with counsel. Accordingly, **we recommend that counsel arrive at court at least 45 minutes early on the day of the draw.**

E. TRIAL

As a general observation, the Group believes that there is little opportunity to save time once trial actually begins. The Group discussed, but rejected recommendations, such as:

1.) Limiting the number of witnesses.

2.) Limiting the time for opening and closing statements.

3.) Offering direct testimony of experts and others by written documentation.

Although the Court should retain discretion to consider these measures in specific cases, it was generally felt that an arbitrary rule in this regard was unnecessary given the Court's current practices. The Group's rejection of such recommendations is based not only on concern for due process but also on the observations of the jurors who responded to our Questionnaire. By a large majority (49 to 18), jurors did not believe their "experiences . . . involved unnecessary cost or delay." Only 10 of the 70 respondents felt the trial itself had not "proceeded efficiently."

The Group noted that the amendment of Rule 32 of the Federal Rules of Civil Procedure, which would eliminate unavailability of a witness as a requirement for deposition use, will put the burden on the party desiring the presence of the witness to call that witness.

The jurors' perceptions confirm the observations of the judges and the sense of the members of the Group that expense and delay of trial can be reduced only marginally. From January 1992 through July 1993, only 37 of 1335 reported closed cases were tried through verdict. Efforts focused on the trial itself will not play a major role in achieving our goals.

A comparison of the data from the Litigant Questionnaire supports our emphasis on prompt, rather than less expensive, resolution of disputes. Litigants were asked two questions. First, "[w]ere the costs incurred by you on this matter. . ."

Much Too High	22
Slightly Too High	8
About Right	24
Slightly Too Low	0
Much Too Low	1

Second, "[w]as the time that it took to resolve this matter. . ."

Much Too Long	33
Slightly Too Long	14
About Right	16
Slightly Too Slow	0
Much Too Slow	1

It should be noted in retrospect that neither the Attorney nor the Litigant Questionnaire contained <u>any</u> questions geared to trial. In this respect, our surveys parallel the Act itself. CJRA critic Professor Judith Resnik points out that the Act only mentions trial once. Although Professor Resnik decries this development, the Group believes it may represent a view that traditional trials, aided and accelerated by modern technology, are, with the usual exceptions, still the best way for resolving

many disputes where agreement is impossible. The problem is that most cases do not end in a verdict but in settlement (or dismissal) after more time and expense than is necessary. Accordingly, the recommendations in the next section address reduction of that delay rather than reform of the trial.

C. CONTENT OF CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN

The Act identifies six "principles and guidelines of litigation management and cost and delay reduction."[13] Each district court, in consultation with its Advisory Group, "shall consider and may include" in its plan each of those principles.[14]

This part of the report analyzes each of the statutory principles and offers recommendations concerning how these principles should be implemented in this District.

I. SYSTEMATIC, DIFFERENTIAL TREATMENT OF CIVIL CASES FOR PURPOSES OF CASE-SPECIFIC MANAGEMENT

The Act directs this Court, in consultation with its Advisory Group, to consider "systematic, differential treatment of civil cases."[15]

The Group believes that several compatible goals can be achieved by building upon, and expanding, the current differential treatment of cases. First, **those cases that are currently handled in an established and satisfactory manner--Social Security cases, the asbestos cases, bankruptcy appeals, student loan defaults, and others at the discretion of the court ("existing track cases")--should be handled no differently.**

In other cases, with the availability of five judges, ADR, and the Act, **all other cases will gradually be slotted into one of three tracks--a voluntary six-month "rocket docket," a one-year track from complaint to trial for most**

[13] 28 U.S.C. § 473(a).

[14] *Id.*

[15] 28 U.S.C. § 473(a).(1). This section provides for "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."

cases, and a two-year track for complex litigation. The Group recommends phasing in the tracks.

The Group believes that the principle of differential case treatment can also serve a slightly different goal: to distinguish the cases that require more intensive, individual management by the Court from those which can be handled in a more standard manner. In this way, scarce judicial time can be allocated to those cases in which judicial involvement is most necessary. This should have the effect of reducing costs by identifying those cases which do not require time-consuming management techniques.

The Court's judicial resources are still sufficiently limited so that the judges' time cannot be wasted. Firm trial dates and a degree of control over discovery will complement docket management without taxing the Clerk's Office, which will not have its full allotment of staff for the foreseeable future.

Most existing programs have three tracks which distinguish among simple cases, complex cases, and all others. None of the programs appears to have attempted to track cases by subject matter. Because cases of similar subject matter can be complex or simple, depending upon the facts, the legal issues, or the number of parties involved, the Group agrees that such an effort would not reduce expense or delay.

We rejected reports which recommended five tracks. In a small district like New Hampshire, five tracks would appear to be overmanagement, running the risk of improper use of staff time and the loss of the simplicity and certainty that are the underpinnings of differential case management.

The two-year complex track should be designed for cases needing special or intense management by the Court due to one or more of the following factors: multiple parties, multiple claims or defenses, complex factual issues, voluminous evidence,

evidentiary problems, extensive discovery, exceptionally long time needed to prepare for trial or disposition, and/or the need to bifurcate preliminary issues before final disposition. The standard one-year track would include all other cases, excluding those cases that are either voluntarily placed on the "rocket docket" or are currently handled by the existing tracks.

In cases other than the existing track cases, the preliminary pretrial conference is where the track for each case will be determined. We rejected designation by a court administrator or by completion of a separate form at filing. With judges handling the preliminary pretrial conference, the tracking decision should be made at that time, with the burden on counsel to justify why the case requires special management.

These recommendations are consistent with our analysis of the Litigant and Attorney Questionnaires. By a count of 39 to 23, litigants were satisfied or very satisfied with the process, but 33 litigants believed it took "much too long," which was twice as many as thought the length of litigation "about right,"[16] evidencing litigants' aversion to delay. We believe delay can best be reduced by setting simple, realistic expectations and not by creating a complex structure which buries that goal in confusion and paperwork. Although more lawyers (41 to 30) thought litigation "unnecessarily costly" than thought there were "unreasonable delays," the bar's responses to our survey support some of our principal recommendations. For instance, 60 lawyers thought "earlier intervention by district judges," e.g., at the pretrial conference, would have positive effect on delays and costs; none thought it would have a negative effect. *See* Attorney Questionnaire #39.

More controversial with members of the bar is our recommendation for a one-year track for most cases which will be a "shorter time limit for completing the various

[16] 14 "slightly too long"
16 "about right"
1 "much too short"
9 "no response"

stages of litigation." *See* Attorney Questionnaire #17. Forty lawyers believed a shorter track would have a substantial or moderate effect on reducing costs, while 28 indicated a negative effect. For this reason, we rejected a mandatory "rocket docket" as presently utilized in the Eastern District of Virginia and the Western District of Texas. However, we believe that with reasonable judicial management, ADR, firm trial dates, and modified lawyer behavior, a trial within one year from the filing of the complaint will not add expense to the "normal case."

By a count of 77 to 15, lawyers believed that "the court should create tracks for litigation." *See* Attorney Questionnaire #49. Although our questionnaire suggested "identifying cases that should be completed in 18 months, those in 19-36 months, complex cases taking more than 36 months," we have come to realize that faster tracks are both feasible and advisable.

Therefore, **we recommend that the Court adopt a plan to distinguish among cases which require different levels of case management and to set the parameters for each track.**

After issuing its Draft Report, the Group received several thoughtful written and oral comments about the potential disadvantages of speeding up litigation. These included:

1.) Reduced civility.

2.) Increased motions to compel.

3.) More stressful lifestyle for litigators.

4.) Denial of counsel of choice by clients.

5). Penalization of skilled lawyers for building up a thriving practice.

We carefully considered these thoughtful objections and are concerned that reforms may have negative consequences. However, we decided not to change our recommendations because:

1.) The standard track will be phased in only after two years; regular cases will be scheduled from complaint within 18 months during the first two years of the plan and only after careful review will the track be shortened to a one-year time frame. The phasing in will allow the bar to adjust to these changes.

2.) The review in two years focusing on whether and to what extent negative consequences resulted will enable the Group and the Court to measure if we, or the commentators, are correct.

3.) Civility will still be possible; continuances and extensions for compelling circumstances will never be denied. But if the expectation is for cases to be tried (or settled) within a set time frame, skilled lawyers will make the necessary adjustments in their practice without significantly reducing their income, adding stress to their lives, or having clients represented by counsel with whom they are uncomfortable or unfamiliar.

4.) The presence of five judges will speed up civil litigation without our recommendations. We have designed our recommendations to have the reduction in delay accompanied by the fewest negative consequences.

II. INVOLVEMENT OF JUDICIAL OFFICERS IN PRETRIAL PROCESS

Underlying many of the Act's provisions is the assumption that cost and delay in civil litigation will be reduced with increased judicial involvement in the pretrial process. Thus, the Act requires the Court, with its Group, to consider and to include in its plan a program of "early and ongoing control of the pretrial process through involvement of a judicial officer" in planning the progress of a case, setting early and firm trial dates, controlling discovery, and setting deadlines for motions and schedule for their disposition.[17]

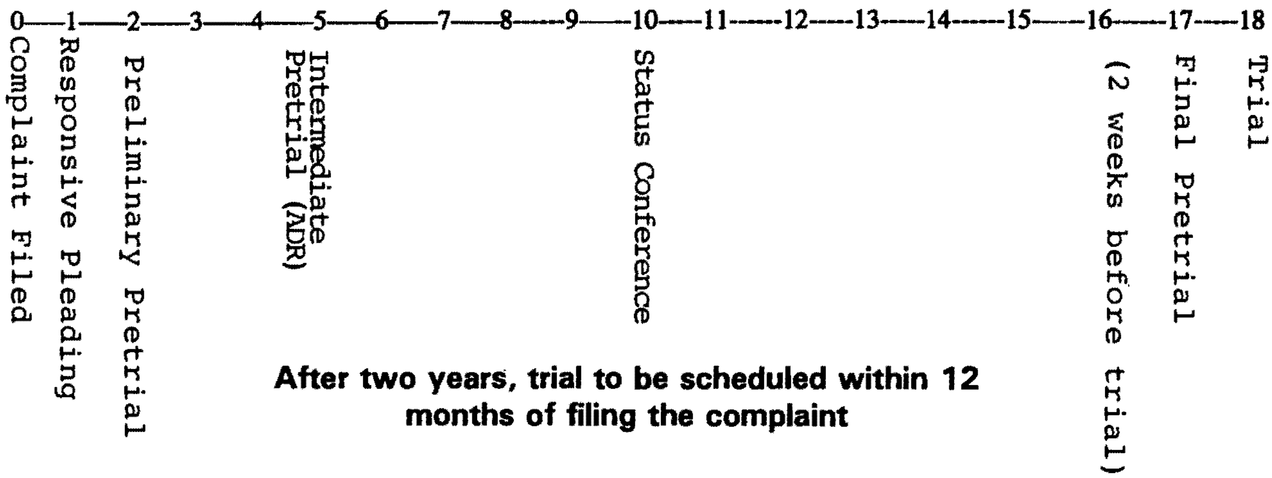
[17] 28 U.S.C. 473 (a) (2).

The Group believes that the establishment of an early, firm trial date at a meaningful and early pretrial conference conducted by a judge is essential to achieving the Act's goals, but case management must be tempered by judicial recognition that it is still the responsibility of lawyers to plan their clients' cases, to meet their clients' goals and objectives, and to practice their craft to meet their clients' needs. Blanket limits on discovery, restraints on case presentation, and judicial micromanagement of all aspects of litigation are not consistent with the adversary system. Thus, we seek a balance between the Court's role in expediting litigation and controlling costs and the lawyer's role in protecting his or her client's interests in a professional manner.

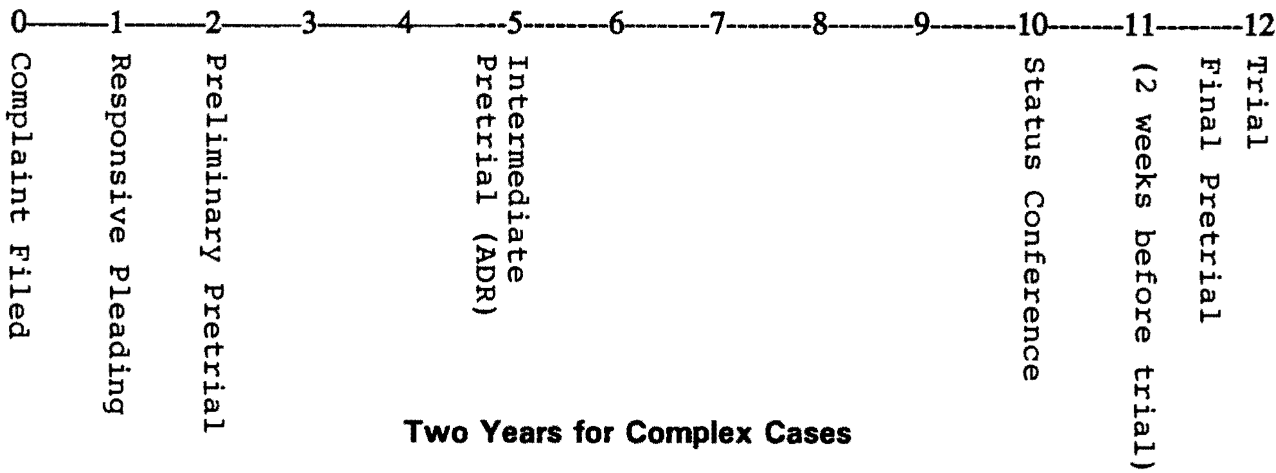
In certain instances judicial control is appropriate and will effectively reduce cost and delay. The Group concluded that complex cases often do require sustained and ongoing judicial management. **The Group therefore recommends that complex cases be segregated from other cases.** The other specific points at which we recommend judicial involvement are set forth below and are summarized in the following trial time line.

TRIAL TIMELINE

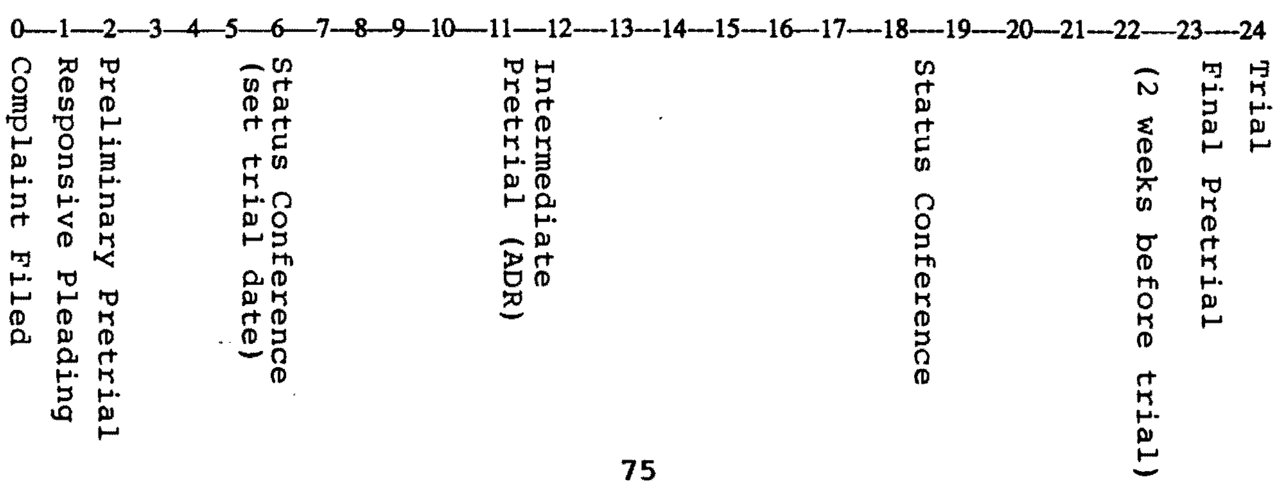
First two years of implementation, trial to be scheduled within 18 months of the complaint



After two years, trial to be scheduled within 12 months of filing the complaint



Two Years for Complex Cases



A. ASSESSING AND PLANNING THE PROGRESS OF THE CASE

The initial scheduling order required by Fed. R. Civ. P. 16 already includes essential elements for efficient management of most cases. Rule 16 requires the Court to enter a scheduling order setting deadlines to join other parties, amend the pleadings, file and hear motions, and complete discovery. The Rule leaves to the discretion of the Court the setting of a trial date and allows the Court to include other matters. The Rule permits, but does not require, a scheduling conference; it allows the order to be issued "after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means."[18] The Rule provides examples of the issues that may be discussed at a conference, if the judge decides to hold one,[19] including ADR.

The Group believes that the existing rule adequately addresses the need for judicial control in most cases and permits the Court to avoid unnecessary cost and delay in cases which do not need intensive management. **We recommend that the Court set the trial date in the scheduling order, except in complex cases.** We believe that in most cases a pretrial conference is useful because it allows the Court and the lawyers to consider, and perhaps resolve, a broader range of issues than those presently required by Rule 16. Thus, **we urge that this Court adopt a policy that in all cases (except in existing track cases) an initial pretrial conference be held before a judge.**

We reject the suggestion that the preliminary pretrial conference be held by telephone, although we recognize the concerns of attorneys who complain of the cost of traveling to Concord for *pro forma* preliminary pretrial conferences. Accordingly, we would reserve the opportunity for counsel to seek to participate by telephone where travel costs or other considerations outweigh the benefits of personal contact.

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[18] Fed.R.Civ.P. 16(b).

[19] Fed.R.Civ.P. 16(c).

The expanded preliminary pretrial conference contemplated in our recommendations; the designation of the case to one of the three tracks; and the expedited scheduling for dispositive motions, discovery, ADR, and trial may be incentive for counsel to resort rarely to telephone participation. The involvement of the trial judge, instead of the magistrate judge, and the judge's participation, even limited, in settlement negotiations, will increase the importance of actual attendance.

B. EARLY, FIRM TRIAL DATES

We are not the first to recognize that:

> The single most effective tool in resolving cases and resolving them quickly is a firm trial date set relatively promptly after the complaint is filed. The trial date works because many lawyers, whether by choice or circumstance, are "fire fighters" who focus their efforts on cases that have a deadline. The firm trial date helps to resolve cases because the prospect of trial is the primary force that focuses the attention of the litigant on the risks they face and thus makes them pursue settlement seriously. A firm date also results most often in cost savings because witnesses and lawyers need only prepare once. And, of course, expert witnesses need not incur costs waiting for trial in courtrooms or incur multiple travel expenses.
>
> The benefits of an early, firm trial date in reducing costs and delays was a theme we heard over and over again from judges, litigants and their lawyers with a unanimity that rarely occurred on other issues. This assessment is reflected in the Act in requiring the plan to include the involvement of a judicial officer in "setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months after the filing of the complaint."[20] Report of the Eastern District of Pennsylvania at 66.

The Group recognized the problems with scheduling firm trial dates. Pressed with conflicting trial schedules of busy litigators, criminal cases which must be tried within the parameters of the Speedy Trial Act, and the certainty that the vast majority of civil cases will settle on the eve of trial, judges who do attempt to set firm trial dates

[20] 28 U.S.C. §473 (2) (B).

have difficulty maintaining them. Our recommendations are geared to minimizing the obstacles to a firm trial date.

We recommend that these timetables be both phased in and be guidelines. There is a fine line between setting a trial date which litigants will believe is firm and informing litigants when the date is not firm so they will not be forced to incur unnecessary costs in travel, time, and preparation.

The recommendation of this Group deals with both aspects of the problem: the need to establish a trial date that does not protract the litigation and the need, once a date is set, to maintain that date. We have concluded that a reasonable guideline in establishing a trial date in most cases is 12 months from the date of filing. We selected 12 months (two years into implementation of the Plan) and not the 18 months recommended by the Act because it is our judgment that for ordinary cases a trial date 18 months from filing would be a self-fulfilling prophesy.

The trial date should be established early in the litigation. In most cases, the date can be set in the initial scheduling order under Fed. R. Civ. P. 16. For complex cases, we recommend that the trial date be set after a settlement conference which would occur approximately six months after the complaint is filed.

C. CONTROL OF DISCOVERY

The Group is aware of various measures used in other districts to reduce the costs and amount of discovery. For instance,

1.) The Eastern District of Pennsylvania "has concluded that the most effective technique to control discovery is one already available through Rule 37 of the Federal Rules of Civil Procedure; that is, the availability of sanctions. . . ." Report of the Eastern District of Pennsylvania at 69.

2.) Limits on the number of interrogatories were imposed in 6 of the first 34 plans adopted in other jurisdictions. Report of the ABA Task Force on the Civil Justice Reform Act at 27.

3.) Fifteen of the first 34 plans "require automatic disclosure by the parties of certain information." *Id.*

We rejected recommending increased use of sanctions for discovery abuse for four reasons:

1.) Our Court already knows when to use its authority under Rule 37.

2.) There is less discovery abuse in New Hampshire than elsewhere.

3.) We do not want to encourage sanction-related litigation.

4.) Our recommendations for case-by-case limitations on discovery and the use of standing orders for disclosures before formal discovery commences are more likely to reduce discovery abuse than increased reliance on sanctions. They will cut down on excess discovery in all cases and not just influence discovery costs when utilized after the fact in the rare cases of sanctionable abuse.

We also rejected recommending across-the-board discovery limitations. We are not convinced that blanket restrictions are feasible in all cases and such limits could lead to more time and money expended seeking waivers or interpretations of the restrictions. The litigators we surveyed shared our skepticism of such limitations:

	[1] Substantial Effect	[2] Moderate Effect	[3] Slight Effect	[4] No Effect At All	[5] Negative Effect
35. Limiting the number of interrogatories presumptively permitted	[7]	[24]	[30]	[15]	[14]
36. Limiting the type of interrogatories (e.g., identification, contention) presumptively permitted at various stages of discovery	[5]	[17]	[29]	[17]	[20]
37. Limiting the number of depositions presumptively permitted	[6]	[22]	[18]	[19]	[26]
38. Limiting the length of depositions presumptively permitted	[8]	[16]	[15]	[22]	[30]

Instead, we recommend increased attention on a case-specific basis to judicial limitation of discovery under Rule 26, which includes the following provisions:

1.) The frequency or extent of use of the discovery methods set forth . . . shall be limited by the court[21] if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

2.) Rule 26(f) allows a "Discovery Conference" at which "(3) any limitations proposed to be placed on discovery" can be discussed.

3.) Rule 26(g) contains an admonition that a lawyer signs every discovery request certifying that it is "not unreasonable or unduly burdensome or expensive, given the needs of the case . . . [and] the amount in controversy."

We recommend that the preliminary pretrial conference form specifically require that discovery limitations are to be discussed at the pretrial conference.

The most controversial issue in controlling discovery is the use of "mandatory voluntary" disclosure. We discuss, *infra*, the Act's mandate that we consider such a measure. We believe that our compromise--standing orders in specific kinds of cases--will provide the advantage of facilitating discovery at a reduced cost and avoid the disadvantages of certain "mandatory voluntary disclosure" provisions, e.g., an increase in the amount of disclosure-related litigation and the requirements that lawyers guess what their adversaries need and deal with clients about which weaknesses to voluntarily reveal.

[21] Fed. R. Civ. P. 26(b)(1) (emphasis added).

This District has had less problems with discovery abuse than elsewhere. *See* Attorney Survey at 6. Yet of litigants surveyed, 22 thought their costs were "much too high," 8 thought "slightly too high," while 24 thought theirs "about right" (and interestingly enough, one "much too low"). Thus, from the perspective of many litigants, there is a problem.

We believe that the problems with discovery can be minimized with the steps outlined above and summarized here:

1.) Preliminary pretrial conferences should focus on whether discovery limits under Rule 26 are appropriate.

2.) Lawyers should adhere to the admonitions of Rule 26(a)(1), and Rule 26(g) with judicial sanctions under Rule 37 for violations of these duties.

3.) The establishment of standing orders, depending on the type of case, requiring certain disclosures before formal discovery.

The Act places some responsibility for reducing costs on litigants themselves. More and more insurance companies and other regular litigants are reducing costs by utilizing ADR and monitoring and performing discovery with in-house counsel. The bar should consider educational programs for its members and joint programs with business groups concerning discovery management. In this way, the virtues of discovery (preventing surprise, narrowing issues, finding truth, weeding out weak claims, promoting settlement) will not be lost in efforts to eradicate its vices.

D. SETTING AT THE EARLIEST PRACTICABLE TIME DEADLINES FOR FILING DISPOSITIVE MOTIONS AND A TIME FRAMEWORK FOR THEIR RESOLUTION

We recommend that the the filing and timing of dispositive motions be discussed and resolved at the preliminary pretrial conference conducted by the judge.

Although we realize that discovery may need to proceed on all issues (e.g., liability as well as damages) before a determination can be made whether a dispositive motion is viable, our recommendation is intended to require counsel and the Court to consider, in every case, the need for any, partial, or complete discovery before the filing of dispositive motions.

The Trial Subcommittee would have preferred a fixed time limit for rulings on dispositive motions, but the Group recognized that the judges' dockets and schedules and the complex nature of some dispositive motions precluded rigid judicial deadlines. **Instead, we recommend:**

1.) **Careful consideration of the timing of filing dispositive motions and the efficacy of oral argument at the preliminary pretrial conference. (For instance, if a statute of limitations is a real issue, discovery could be limited to resolving it.) We recommend that counsel be permitted to request oral argument on any motion with 20 minutes allotted for each side (unless counsel indicates why more time is necessary). The hearing will be based upon facts in the record or offers of proof unless counsel indicates otherwise. The Court is not required to grant the request for oral argument.**

2.) **A guideline of 60 days for ruling on dispositive motions should be adopted, and the Chief Judge should have the discretion to reassign work when one judge's docket makes the guideline difficult to meet. Otherwise, the time lines for litigation will become unrealistic.**

3.) **Careful consideration by counsel of the efficacy of dispositive motions. Some believe that a proportion of such motions are merely dilatory or, if not filed for delay, filed to avoid later second guessing by the client.**

This last recommendation is tempered by the statistics which the Clerk's Office tabulated concerning dispositive motions filed from December 1991 through May 1993. Although the figures are not complete, the Group found that 76 or 54% of

summary judgment motions were granted and 64 or 46% were denied, while 73 or 55% of motions to dismiss were granted and 60 or 45% were denied.

The Group hypothesized that the relatively high success rate of these motions may have been due, in part, to cases involving the federal government in which there are a myriad of jurisdictional prerequisites and/or immunities. The Group believed that the FDIC cases, with the availability of the D'Oench doctrine defense, may have contributed to the success of dispositive motions. However, further analysis of this data showed that dispositive motions in federal government, FDIC, and prisoner cases were not granted in significantly higher percentages than in other cases.

The recommendations above attempt to balance criticism, whether right or wrong, of lawyers for filing too many motions and of judges for ruling on them too slowly, with a recognition of the role of each in the system to accommodate the demands of clients and the Court's docket. The first recommendation specifically comports with the views of the attorneys surveyed--54 of the 95 attorneys responding felt that "requiring pre-motion conference with the court for . . . dispositive motions" would have a substantial or moderate positive effect in reducing costs or delay.

III. MANAGING COMPLEX CASES

28 U.S.C. § 473(a)(3) requires consideration of a variety of devices in complex "and any other appropriate" cases.[22] Our differential case management approach contemplates the use of each of these devices for cases on the two-year track.

[22] 28 U.S.C. § 473(a)(3) states that "[i]n formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group . . . shall consider and include the following principles and guidelines of litigation management and cost and delay reduction . . .(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."

As the Time Limit Chart for Complex Cases on page 75 and our other recommendations indicate:

1.) Judges would hold preliminary pretrial conferences with the parties at which settlement would be explored.

2.) Up to five status and pretrial conferences would be held in the two-year period, reflecting the Group's belief that judicial involvement is necessary in complex cases.

3.) A case management order should issue as a result of the preliminary pretrial conference and be followed or revised but only if absolutely necessary.

4.) Appropriate limitations on, and sequencing of, discovery will be considered.

The Group rejected rigid requirements or artificial devices to force each and every case into a single mold. Case management must be flexible or it will cause the inefficiency and expense it was designed to reduce. We rely instead on our broad recommendations, the judge's involvement and interest in speeding up litigation, the increase in judicial resources, and the trial bar's adjustment to these changes by changing its attitudes and practices.

Before filing particularly complex litigation, lawyers should consider discussing a case management order with the Clerk. Lawyers should be aware of the tools in the Manual for Complex Litigation which are available to reduce costs and suggest their use in appropriate circumstances.

IV. VOLUNTARY EXCHANGE OF INFORMATION

On April 22, 1993, the United States Supreme Court transmitted to Congress proposed new Federal Rules of Civil Procedure. These included proposed Rule 26(a)(1), which states:

(a) Required Disclosures: Methods to Discover Additional Matter.

(1) Initial Disclosures. Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request,[23] provide to other parties:

(A) The name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) A copy of, or a description by category and location of, all documents, data compilation, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) A computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) For inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

[23] (Emphasis added.)

This proposed Rule would require the voluntary disclosure the Group is required to consider under 28 U.S.C. § 473(a)(4). Whether or not Congress rejects this proposed Rule, we reject the concept at this time. **Accordingly, if Congress allows the Rule to be adopted, we recommend that New Hampshire adopt a local rule opting out of such broad voluntary disclosure.** We support our recommendation with the dissent of Justices Scalia and Thomas, joined by New Hampshire's Justice Souter:

> The proposed radical reforms to the discovery process are potentially disastrous and certainly premature--particularly the imposition on litigants of a continuing duty to disclose to opposing counsel, without awaiting any request, various information "relevant to disputed facts alleged with particularity." See Proposed Rule 26(a)(1)(A), (a)(1)(B), (e)(1). This proposal is promoted as a means of reducing the unnecessary expense and delay that occur in the present discovery regime. But the duty-to-disclose regime does not replace the current, much-criticized discovery process; rather it *adds a further layer of discovery*. It will likely *increase* the discovery burdens on district judges, as parties litigate about what is "relevant" to "disputed facts," whether those facts have been alleged with sufficient particularity, whether the opposing side has adequately disclosed the required information, and whether it has fulfilled its continuing obligation to supplement the initial disclosure. Documents will be produced that turn out to be irrelevant to the litigation, because of the early inception of the duty to disclose and the severe penalties on a party who fails to disgorge in a manner consistent with the duty. See Proposed Rule 37(c) (prohibiting, in some circumstances, use of witnesses or information not voluntarily disclosed pursuant to the disclosure duty, and authorizing divulgement to the jury of the failure to disclose).
>
> The proposed new regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decision maker. By placing upon lawyers the obligation to disclose information damaging to their clients--on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment--the new Rule would

place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side. Requiring a lawyer to make a judgment as to what information is "relevant to disputed facts" plainly requires him to use his professional skills in the service of the adversary (citation omitted).

It seems to me most imprudent to embrace such a radical alteration that has not . . . been subjected to any significant testing on a local level. Two early proponents of the duty-to-disclose regime (both of whom had substantial roles in the development of the proposed rule--one as Director of the Federal Judicial Center and one as a member of the advisory committee) at one time noted the need for such study prior to adoption of a national rule (citation omitted). More importantly, Congress itself reached the same conclusion that local experiments to reduce discovery costs and abuse are essential *before* major revision, and in the Civil Justice Reform Act of 1990, Pub. L. 101-650, §§ 104, 105, 104 Stat. 5097-5098, mandated an extensive pilot program for district courts. See also 28 U.S.C. §§ 471, 473(a)(2)(C). Under that legislation, short-term experiments relating to discovery and case management are to last at least three years, and the Judicial Conference is to report the results of these experiments to Congress, along with recommendations, by the end of 1995 (citation omitted). Apparently, the advisory committee considered this timetable schedule too prolonged . . . . preferring instead to subject the entire federal judicial system at once to an extreme, costly, and essentially untested revision of a major component of civil litigation. That seems to me unwise. Any major reform of the discovery rules should await completion of the pilot programs authorized by Congress, especially since courts already have substantial discretion to control discovery."[2] *See* Fed. Rule Civ. Proc. 26.

I am also concerned that this revision has been recommended in the face of nearly universal criticism from every conceivable sector of our judicial system, including judges, practitioners, litigants, academics, public interest groups, and national, state and local bar and professional associations (citation omitted). Indeed, after the proposed rule in essentially its present form was published to comply with the notice-and-comment requirement of 28 U.S.C. § 2071(b), public criticism was so

[2] For the same reason, the proposed presumptive limits on depositions and interrogatories, see Proposed Rules 30, 31, and 33, should not be implemented.

severe that the advisory committee announced abandonment of its duty-to-disclose regime (in favor of limited pilot experiments), but then, without further public comment or explanation, decided six weeks later to recommend the rule (citation omitted).

For these reasons, we recommend that:

1.) **By local rule, the Court opt out of the proposed changes to Rule 26(a).**

2.) **The Court develop a series of standing discovery orders, for certain types of cases, to be considered at the preliminary pretrial.**

3.) **The Court reevaluate its decision to opt out of Rule 26(a) after consideration of experience in other districts with full voluntary disclosure and experience here with the proposed standing orders.**

V. ATTEMPTING TO REACH AGREEMENT BEFORE FILING DISCOVERY MOTIONS

28 U.S.C. § 473(a)(5) requires the Group to consider adopting for discovery motions the current practice mandated for all motions by Local Rule 11(b) and reinforced by Judge Devine's opinion in *Perkins v. HHS*, Civil No. 88-43-D, (D.N.H. 1988).

The Group recommends that the practice outlined in Local Rule 11(b) be continued.

VI. ALTERNATIVE DISPUTE RESOLUTION (ADR)

Under 28 U.S.C. §473(a)(6) the Court is to consider whether "to refer appropriate cases to alternative dispute resolution programs." For the reasons discussed in the ADR Section, *supra*, **the Group recommends that the Court should utilize ADR.**

To summarize the recommendations previously discussed, the Court should:

1.) Utilize ADR on a case-by-case basis where appropriate.

2.) Have the parties fill out in advance of the preliminary pretrial conference a simple ADR form so that the issue will be discussed at the preliminary pretrial conference and a referral can be made to an agreed-on neutral, unless the court orders otherwise.

3.) Refer parties to "approved" neutrals from a list kept by the Clerk's Office based upon experience and such other criteria as may be adopted.

4.) Have the parties each pay the neutrals one-half of their regular fee (with a reasonable cap), provided that the neutral agrees to take a small number of cases annually for no or half fee.

5.) By rule, make it clear that ADR results are confidential and inadmissible (with any relevant exception required by law).

6.) Arrange for ADR in the courthouse if possible.

7.) Evaluate ADR closely after 18 months of data is compiled and annually thereafter.

8.) Allow the parties or the court to make referrals to ADR.

9.) Consider having an intermediate pretrial to schedule ADR if it is not feasible to do so at the preliminary pretrial conference.

10.) Be careful of the appearance of conflict between the judge's role as case manager and the judge's role as fact finder.

VII. LITIGATION MANAGEMENT TECHNIQUES IN 28 U.S.C. § 473(b)

28 U.S.C. § 473(b) lists five specific "litigation management and cost and delay reduction techniques" which we discuss here briefly.

1.) Joint Presentation of Discovery Case Management Plans: One of the closest questions for the Group was whether to adopt the suggested technique that joint discovery case management plans be submitted by counsel 10 days before the preliminary pretrial conference. The advantages include: (a) forcing counsel to plan their case at a very early stage; (b) requiring counsel to come together at an early point and resolve some issues without judicial involvement; and (c) freeing up the preliminary pretrial conference for more serious consideration of issues upon which counsel cannot agree. The disadvantages are equally obvious and, in the Group's opinion, slightly more compelling. These include the expense and inconvenience of a meeting of counsel in every case and the possibility that counsel may propose scheduling agreements unacceptable to the Court, which would render the time spent wasted. Because the advantages were not clear, we also rejected having each party prepare a discovery case management schedule for consideration at the preliminary pretrial conference.

Instead, we encourage the use of joint discovery case management plans and, after the Plan has been implemented and more judicial pretrials conferences have been conducted, that the requirement of joint case management plans be reevaluated. We note that proposed Rule 26(f), "Meeting of Parties; Planning for Discovery" embodies such a requirement. **Should Congress adopt this proposed rule, it is our recommendation that the Court exercise its prerogative to opt out of this requirement at this time.**

2.) Representation at Each Pretrial Conference by a Lawyer with Authority: Local Rule 10(a) requires that the "attorney in charge of the case, or one with the same

authority, shall be present at the [preliminary pretrial] conference." Local Rule 10(b), which governs the final pretrial conference, does not explicitly contain this requirement. Because we agree with the importance of having "at each pretrial conference. . . an attorney who has authority to bind that party," 28 U.S.C. § 473(b)(2), **we recommend that Local Rule 10(a) be amended to include the language "at the preliminary pretrial conference and each and every pretrial and status conference thereafter."** This recommendation will be moot if proposed Rule 16(c) survives Congressional review as it requires that "at least one of the attorneys for each party [who] participates in any conference . . . shall have authority to enter into stipulations . . . regarding all matters that the participants may reasonably anticipate. . . ."

The Group recognized that for the United States and for the State of New Hampshire, this requirement presents a special problem in certain cases, and we addressed the issue *supra*. We also recognize that this recommended rule change may present logistical problems for both small and large firms. We believe, however, the relatively small changes that strict enforcement of the amended rule would require in lawyer and law firm behavior are justified.

3.) All Extensions Signed by Attorney and Party: We considered having a party sign requests for extensions of deadlines but rejected the idea as resulting in unnecessary expense, except for trial continuances. We believe a modification of Superior Court Rule 49 properly balances the need to have clients informed of extensions and the reasons for them with the difficulty and expense of obtaining client approval for routine or unexpected reasons for extensions. **Accordingly, we recommend the adoption of a local rule that reads as follows:**

> **All motions for continuances or postponement or extension of deadlines in any civil action shall be signed and dated by counsel. Each motion, except in cases involving the federal or state government,**

shall contain a certificate by counsel that the client has been notified of the reasons for the continuance or postponement or extension and, in the case of continuances of trial, has assented thereto either orally or in writing and, with all motions for extensions of deadlines, has been forwarded a copy of the motion. In short or routine extensions, the motion to the Court can serve as the notification.

4.) Neutral Evaluation Program: Our ADR section recommends that neutral case evaluation be one of the ADR techniques specifically considered by the parties at the preliminary pretrial conference (and, if appropriate, at subsequent conferences). As lawyers become more familiar with the Superior Court's Rule 170 program, where neutral case evaluation is one of the more popular techniques, we will likely see more use of this technique in federal court.

28 U.S.C. § 473(b)(5) suggests the use of "a neutral court representative selected by the court." We have recommended that the parties be referred to a paid neutral from lists maintained by the Clerk's Office of experienced attorneys and hope that the parties will be able to agree on the neutral.

5.) Availability of Parties with Authority to Bind at Settlement Conferences: We have already recommended that parties be present at both the preliminary and final pretrial conferences. If the Court believes it needs explicit authority to order parties to attend a "settlement" conference at another time, we believe it has the authority to do so now. If there is any question, proposed Rule 16(c) now before Congress contains explicit authority to "require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement."

D. CONCLUSION

After analysis and discussion of the results of the considerable data gathered, this Group concluded that the Court was doing a good job with the resources allocated to it. With the additional resources now available and with these recommendations being adopted and followed by the judges, the Clerk's Office, litigants, attorneys, and the government, the United States District Court for the District of New Hampshire will do an even better job of dispensing justice.

APPENDIX A

BIOGRAPHICAL SKETCHES[1]

MARK A. ABRAMSON, born Dallas, Texas, July 3, 1949; admitted to bar, 1975, New Hampshire. Education: Baldwin-Wallace College (B.A., 1971); University of Toledo (J.D., 1975). Law Clerk, New Hampshire Superior Court, 1975-1976. Assistant County Attorney, Hillsborough County, 1976-1977. Member, U.S. District Court, Civil Justice Advisory Act Committee. Member: Manchester, New Hampshire (Member: Medical Malpractice and Products Liability Committee, 1982 --; Ethics Committee, 1988--) and American Bar Associations; The Association of Trial Lawyers of America; New Hampshire Trial Lawyers Association (Member, Board of Governors, 1984 --). CONCENTRATION: Plaintiff's Personal Injury; Medical Negligence.

ERNEST L. BELL, III, Bell, Falk & Norton. A.B. (Cum Laude) Harvard College 1949; J.D. University of Michigan Law School 1952. General trial practice in New Hampshire state and federal courts since 1952. President New Hampshire Bar. Chairman New Hampshire Bar Foundation. New Hampshire Judicial Council. New Hampshire State Aeronautics Commission. Delegate two constitutional conventions.

DEBORAH J. COOPER, Daschbach, Kelly & Cooper, P.A. B.A. Wellesley College, 1973; J.D. Boston University School of Law, 1976. Director and shareholder of Daschbach, Kelly & Cooper, P.A., engaged in general practice, with emphasis on civil litigation and business and corporate issues. Practiced as an attorney for the Office of the N.H. Attorney General, 1976-1983; Deputy Attorney General, 1981-1983. Currently a member of the Evidence Committee of the N.H. Bar Association. Former member of the N.H. Bar Examiners and Continuing Legal Education, Legislative, and Ethics Committees of the N.H. Bar Association.

E. DONALD DUFRESNE, Devine, Millimet & Branch Professional Association. B.A. Clark University (Cum Laude) 1963. He has concentrated in trial practice in the areas of medical malpractice, products liability and business litigation and has represented clients on various issues at trial and all appellate levels in federal and state courts. He is a Fellow of the American College of Trial Lawyers (N.H. Chairman 1987-89); Vice Chairman, New Hampshire Supreme Court, Long Range Task Force, former President and current member of the Northern New England Defense Council; and a former member of the N.H. Board Examiners. He is also a member of the Manchester, New Hampshire and American Bar Associations.

WILBUR A. GLAHN, III, McLane, Graf, Raulerson & Middleton, Professional Association. B.A. Trinity College, 1969. J.D. University of Chicago School of Law, 1972. Mr. Glahn began his practice with Hernek & Smith in Boston, Massachusetts. He became a member of the Office of the Attorney General of New Hampshire in 1975 and from 1977 to 1981 was the Chief of the Civil Division of that office. In 1981 he joined the McLane firm where he is a director and Vice Chair of the Trial Practice Department. In his trial and appellate practice he has largely represented corporate clients in civil litigation including commercial matters, securities and government related cases. He has been a member of the Continuing Legal Education and Committee on Rules of Civil Procedure of the New Hampshire Bar Association.

[1] Other biographical data unavailable.

MARTHA V. GORDON is a Director of Nelson, Kinder, Mosseau & Gordon, P.C. Her practice emphasizes commercial litigation, professional liability defense, and employment law. She graduated from Middlebury College magna cum laude in 1973, and received her J.D. from Northeastern University School of Law in 1978. Prior to entering private practice in 1983, she served as an Assistant Attorney General for the State of New Hampshire, first as a prosecutor in the Criminal Division, then as Chief of the Civil Division. Ms. Gordon is currently a member of the New Hampshire Board of Bar Examiners and is Vice-Chairman of the New Hampshire Bar Association's Committee on Cooperation with the Courts. She is also a member of the Manchester (President, 1987) and American Bar Associations.

STEVEN M. GORDON, born Boston, Massachusetts, September 7, 1949; admitted to bar, 1974, New Hampshire; 1975, U.S. Court of Appeals, First Circuit; 1986, U.S. Supreme Court. Education: American University (B.A., 1971; J.D., 1974). Recipient, American Jurisprudence Award in Criminal Law and Evidence. Law Clerk to Honorable Hugh H. Bownes, U.S. District Court for New Hampshire, 1974-1976. Legal Counsel to: U.S. Senator John Durkin, 1976-1977; N.H. Chapter of American Civil Liberties Union, 1989 - . Assistant U.S. Attorney, 1977-1980. Lecturer, New Hampshire Continuing Legal Education, 1984. National Association of Criminal Defense Lawyers, 1988. Listed in Best Lawyers in America, Criminal Defense, and First Amendment, 1991. Member: New Hampshire Bar Association; New Hampshire Trial Lawyers Association of Criminal Defense Lawyers.

RUSSELL A. HOLDEN, Retired Executive, New England Electric System. B.S. in Electrical Engineering, Tufts University 1946, Professional Engineer. Mr. Holden has been active in State Government as a member of the State Highway Board and Commissioner of Highways in the State of Vermont. As an executive with the New England Electric System he was involved in hydro electric production, transmission, and retail management.

JEFFREY B. OSBURN, born Tecumseh, Michigan, January 27, 1947; admitted to bar, 1973, New Hampshire. Education: General Motors Institute (B.M.E., 1970); University of Michigan (J.D., cum laude, 1973). Member: New Hampshire and American Bar Associations; Federation of Insurance Counsel.

EMILY GRAY RICE, admitted to bar 1985, New Hampshire. Education: Boston University (A.B., Cum Laude, 1977; M.A., 1979); Northeastern University Law School (J.D., 1984). Employment: New Hampshire Office of the Attorney General, Bureau of Civil Law, 1984-1993, Senior Assistant Attorney General and Bureau Chief, 1989-1993. Broderick & Dean, P.A. 1993-present. Member: Merrimack County (President, 1992-present) and New Hampshire Bar Associations (Member, Supreme Court Rule 53 Mandatory Continuing Legal Education Committee).

ARPIAR G. SAUNDERS, JR., Franklin Pierce Law Center. B.A. St. Lawrence University, 1965; LL.B. Boston University, 1968. Mr. Saunders served as a trial and appellate lawyer with the U.S. Army Judge Advocate General Corps; was a staff attorney with the National Prison Project, Washington D.C.; was Director of Litigation for New Hampshire Legal Assistance; and has been a Professor of Law at the Franklin Pierce Law Center since 1978. He teaches federal jurisdiction, constitutional law--civil rights and trial advocacy classes. In addition, Mr. Saunders is Of Counsel to the law firm of Shaheen, Cappiello, Stein & Gordon, concentrating on civil litigation, focusing on federal and state constitutional issues.

EUGENE A. SAVAGE. Education: B.Ed., Plymouth State College, 1958; M.Ed., Boston University, 1963; Doctor of Humane Letters, Franklin Pierce College, 1963. Professional Experience: 1967-78; Dean of Admissions, University of New Hampshire, 1978-80; Vice President for University Relations, University of New Hampshire, 1980-81; Vice Chancellor for University System Relations, University System of New Hampshire; Consultant to the Chancellor of the University System of New Hampshire, 1992-present. Professional Organizations: The Overseas School Project, Office of International Education of The College Board, United States Department of State, 1981-present; Regional Student Program Advisory Council, New England Board of Higher Education, 1978-present, Chairman, 1987-present.

JAMES R. STARR, Clerk, U.S. District Court, District of New Hampshire. B.B.A. University of Iowa, 1973; J.D. Drake University School of Law, 1978. Law Clerk, New Hampshire Superior Court, 1978-79. Deputy Clerk, Hillsborough County Superior Court, 1979-80. Deputy Clerk, Merrimack County Superior Court, 1980-83. Clerk of Court, Merrimack County Superior Court, 1983-84. Clerk of Court, U.S. District Court, District of New Hampshire, 1984-present. He also serves on the New Hampshire Bar Association's Committee on Cooperation with the Courts. On a national level, he serves on the U.S. District Court Clerks Advisory Committee, the Court Administration Advisory Council, and the Executive Board of the Federal Court Clerks Association's Clerks Council.

JAMES C. WHEAT. B.A. University of Massachusetts, Amherst, 1968; J.D. Boston University School of Law, 1971; Law Clerk, New Hampshire Supreme Court, 1971-1972. Mr. Wheat is the former Chairperson of the New Hampshire Bar Association's Committee on Cooperation with the Federal District Court for New Hampshire. He has concentrated his trial and appellate practice in civil litigation before state and federal courts and has served as an instructor on New Hampshire Bar Association trial practice, evidence and product liability seminars.

GRETCHEN LEAH WITT, United States Attorney's Office, District of New Hampshire. B.A. Middlebury College, 1977; J.D. Boston University, 1981. After practicing at the law firm of Bracewell & Patterson, Ms. Witt joined the U.S. Department of Justice in 1982. As a Trial Attorney in the Torts Branch, Civil Division, she served as second chair and managing counsel for the U.S. trial team in In re "Agent Orange" Products Liability Litigation, MDL No. 381. She subsequently joined the Civil Division of the U.S. Attorney's Office in New Hampshire as an Assistant U.S. Attorney, becoming Chief of the Civil Division in 1991 and First Assistant in 1993. She has served on the New Hampshire Bar Association's Task Force on Professionalism's Subcommittee on Minimum Continuing Legal Education, the CLE Committee, and the Committee on Women in the Profession.

APPENDIX B

WHAT IS NOT IN OUR REPORT

We note in this Appendix several matters not found in our Report but which are worthy of mention.

1.) Issues of Race, Gender and Class: Professor Judith Resnik indicated that notwithstanding the dramatic findings and conclusions of some gender-bias task forces, none of the Civil Justice Reform Advisory Group Reports have addressed issues of race, gender, and class. We specifically discussed the impact of our proposed changes on those who have often been excluded from power. We conclude that making litigation less costly and less time consuming can only benefit those not in power even though that is not the primary reason for any of our recommendations. (We did discuss setting the experience level for ADR neutrals at a reasonable level, *e.g.*, five to 10 years, so that women will not disproportionately be excluded.) We believe that having parties at all conferences will also empower many poorer litigants, but such byproducts of our recommendations merely prove our point that fair and efficient litigation is an important goal with benefits for many individuals and groups.

2.) Remarks by Abigail Turner, Litigation Director, New Hampshire Legal Assistance: Ms. Turner was the only witness (except one who came late) at our June 1992 public hearing. In the interest of space, we have not included her eloquent remarks. Copies are available from the Reporter. Suffice it to say, we heeded most of the warnings she gave us about potential changes.

3.) Patents: The Advisory Committee on Patent Law Reform was kind enough to send us its lengthy report to improve the United States patent system. After consulting experts at the Franklin Pierce Law Center and considering the infrequency of patent litigation in this District, the Group decided to neither endorse nor reject the Committee's recommendations. Our Report would lead to the moderation of discovery

on a case-by-case basis consistent with the Committee's recommendations. Similarly, our ADR program would have neutrals listed by specialty; a required disclosure list for patents or other intellectual property cases could also be developed in conjunction with our rejection of "mandatory voluntary" disclosure.

4.) Bankruptcy: With the physical and docket separation of the Bankruptcy Court from the District Court, we did not consider in depth its operation, except to the extent of the impact of appeals on the Court's docket. We know from our practice, our colleagues who concentrate in bankruptcy, and the press that the District has had record-breaking increases in bankruptcy filings. We praise the Bankruptcy Court for its struggle to remain current.

5.) Trial Lists: Our Report does not reflect the depth of our discussions about various systems for balancing the harms of overscheduling with the risks that all scheduled cases will settle. We considered, *inter alia*, different scheduling schemes from the districts of Maine, Massachusetts, Eastem Virginia, and Western Texas. We believe that the annual reassessment of the Plan should focus in part on this controversial aspect. This additional time will allow the Court to gain some experience in scheduling for five judges.

6.) Second Magistrate Judge: The District has asked for a second magistrate judge. Should one be forthcoming, our successors should make an effort to focus on a recommendation regarding the most efficient use of a second magistrate judge.

7.) Mandatory Discussion of ADR: Published too late for our thorough consideration was the thought-provoking article by Stuart M. Widman, *Attorneys' Ethical Duties to Know and Advise Clients About Alternative Dispute Resolution*, p. 18 of the 1993 Symposium Issue of The Professional Lawyer, A.B.A. Center for

Professional Responsibility. He points out that some local Rules of Professional Conduct (*e.g.*, Northern District of Illinois) would require lawyers to discuss ADR alternatives with clients. We recommend this article to the appropriate New Hampshire Bar Association Committee and to those who analyze our District's performance in the future.

APPENDIX C

U.S. DISTRICT COURT -- JUDICIAL WORKLOAD PROFILE

NEW HAMPSHIRE			1992	1991	1990	1989	1988	1987	NUMERICAL STANDING U.S.	NUMERICAL STANDING WITHIN CIRCUIT
			TWELVE MONTH PERIOD ENDED SEPTEMBER 30							
OVERALL WORKLOAD STATISTICS	Filings*		980	680	693	666	646	587		
	Terminations		832	651	605	582	631	672		
	Pending		1,015	866	869	766	688	673		
	Percent Change In Total Filings Current Year	Over Last Year. . .		44.1					2	1
		Over Earlier Years. . .			41.4	47.1	51.7	67.0	1	1
	Number of Judgeships		3	3	2	2	2	2		
	Vacant Judgeship Months**		13.5	10.0	10.2	1.5	.0	.0		
ACTIONS PER JUDGESHIP	FILINGS	Total	327	227	347	333	323	294	73	1
		Civil	301	203	298	311	305	276	68	1
		Criminal Felony	26	24	49	22	18	18	89	4
	Pending Cases		338	289	435	383	344	337	63	2
	Weighted Filings**		426	266	420	406	345	323	36	1
	Terminations		277	217	303	291	316	336	84	5
	Trials Completed		17	29	42	31	38	30	89	5
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal Felony	7.1	6.5	5.1	5.0	3.6	3.7	74	4
		Civil**	8	13	13	11	9	11	16	2
	From Issue to Trial (Civil Only)		23	26	27	20	27	30	75	4
OTHER	Number (and %) of Civil Cases Over 3 Years Old		57 6.0	54 6.7	70 8.7	82 11.1	75 11.1	75 11.5	55	3
	Average Number of Felony Defendants Filed per Case		1.7	1.9	1.5	2.1	1.5	1.4		
	Jurors	Avg. Present for Jury Selection**	43.48	37.88	31.04	29.03	24.21	21.34	75	4
		Percent Not Selected or Challenged**	31.4	18.6	15.0	18.8	21.7	16.8	48	4

FOR NATIONAL PROFILE AND NATURE OF SUIT AND OFFENSE CLASSIFICATIONS SHOWN BELOW -- OPEN FOLDOUT AT BACK COVER

1992 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE													
Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	903	41	22	125	10	26	32	206	175	22	86	-	158
Criminal*	77	1	7	14	1	2	7	5	7	23	1	3	6

* Filings in the "Overall Workload Statistics" section include criminal transfers, while filings "by nature of offense" do not.
**See Page 167.

The Advisory Group is charged with reviewing several areas such as pretrial practices, judicial intervention, settlement methods, local rule development, and differential case management. This survey is intended to solicit input about the system from those that actually use the system and have a vested interest in its efficient administration.

The following questionnaire is divided into four sections. The first part--Items A, B, C, and D--are case specific and should reflect your experience on the procedures, timeliness, and costs associated with the case cited on the original cover letter. This will greatly assist the Group in its docket analysis.

In the second part--Item E--the Advisory Group seeks information about your experience in general as it pertains to all civil litigation in the federal court. This more general information is important to the Advisory Group in its task to recommend general changes.

The third and fourth parts seek general background information and offer an opportunity for comments.

We urge you to expand any answer by citing specific examples or comments (in Section G or on a separate sheet of paper) that you feel would assist the Group in completing its evaluation.

A. INFORMATION ABOUT THIS CASE

1. The case was pending for: (check one)

   1. [**33**] 6-17 months
   2. [**41**] 18-29 months
   3. [**32**] 30 months or more

   No response - 10

2. The nature of the action is best described as: (check one)

   1. [**28**] Contract
   2. [**0**] Real Property
   3. [**41**] Tort, Personal Injury
   4. [**3**] Tort, Personal Property
   5. [**8**] Civil Rights
   6. [**0**] Prisoner Petition
   7. [**0**] Forfeiture/Penalty
   8. [**5**] Labor
   9. [**5**] Bankruptcy
   10. [**3**] Property Rights
   11. [**0**] Social Security
   12. [**1**] Federal Tax Suit
   13. [**14**] Other Statutory Action

   No response - 8

3. Other parties in the case:

   1. [103] Were represented by counsel
   2. [10] Appeared Pro Se

   No response - 9

B. MANAGEMENT OF THIS LITIGATION

"Case management" refers to oversight and supervision of litigation by a judge or magistrate judge or by routine court procedures such as standard scheduling orders.

4. How would you characterize the level of case management by the court in this case? Please check one.

   1. [3] Intensive
   2. [24] High
   3. [46] Moderate
   4. [13] Low
   5. [16] Minimal
   6. [4] None
   7. [2] I'm not sure

   No response - 8

5. Listed below are several case management actions that could have been taken by the court in the litigation of this case. For **each** listed action, please check the <u>one</u> column that reflects the court's action in <u>this</u> case.

	[1] Was Taken	[2] Was Not Taken	[3] Not Sure	[4] N/A	
1. Hold pretrial activities to a firm schedule.	[61]	[20]	[4]	[18]	***N/R 13**
2. Set and enforce time limits on allowable discovery.	[63]	[18]	[5]	[19]	**N/R 12**
3. Narrow issues through conferences or other methods	[39]	[41]	[6]	[18]	**N/R 12**
4. Rule promptly on pretrial motions.	[65]	[18]	[2]	[19]	**N/R 12**

***"N/R" - No response**

(QUESTION #5 CONTINUED ON NEXT PAGE)

QUESTION #5, CONTINUED. Please check one column for **each** listed item to reflect the court's action regarding case management.

	[1] Was Taken	[2] Was Not Taken	[3] Not Sure	[4] N/A	
5. Refer the case to alternative dispute resolution, such as mediation or arbitration.	[7]	[67]	[0]	[30]	**N/R 13**
6. Set an early and firm trial date.	[26]	[46]	[4]	[28]	**N/R 13**
7. Conduct or facilitate settlement discussions.	[39]	[42]	[2]	[21]	**N/R 12**
8. Exercise firm control over trial.	[21]	[16]	[0]	[67]	**N/R 12**
9. Other (please specify):					
______________________	[4]	[2]	[0]	[2]	**N/R 118**
______________________	[ ]	[ ]	[ ]	[ ]	

C. TIMELINESS OF LITIGATION IN THIS CASE

6. In Question #1, you indicated how long the case was pending. How long should this case have taken from filing to disposition under circumstances in which the court, all counsel, and all parties acted reasonably and expeditiously, and there were no obstacles such as a backlog of cases in the court?

______________________ months

Results available for review.

7. If the case actually took longer than you believed reasonable, please indicate what factors contributed to the delay: (check one or more)

1. [**0**] Excessive case management by the court
2. [**8**] Inadequate case management by the court
3. [**15**] Dilatory actions by counsel
4. [**5**] Dilatory actions by the litigants
5. [**7**] Court's failure to rule promptly on motions or the merits
6. [**18**] Backlog of cases on court's calendar
7. [**22**] Other (please specify)

No response - 57

8. In terms of promoting a quicker or less costly resolution in this case, what was or would have been the impact of: (check the appropriate column(s) for **each** method)

	[1] Was tried & failed	[2] Was tried & succeeded	[3] Not tried but could have helped	[4] Not tried but would not have helped	[5] Cost more than worth	
1. Case Evaluations	[2]	[4]	[34]	[52]	[6]	**N/R 18**
2. Mediation	[0]	[8]	[36]	[53]	[4]	**N/R 16**
3. Non-binding Arbitration	[0]	[2]	[30]	[57]	[8]	**N/R 20**
4. Settlement Conference	[10]	[17]	[34]	[39]	[2]	**N/R 15**
5. Summary Jury Trial	[2]	[0]	[30]	[56]	[17]	**N/R 17**

D. COSTS OF LITIGATION IN THIS CASE

9. Please check (and if #1, complete) the appropriate response:

[**88**] 1. Money damages were sought - Estimated settlement figure $____________

Results available for review.

[**18**] 2. Only equitable relief was sought.

No response - 11

10. What type of fee arrangement did you have in this case? (check one)

[**69**] 1. Hourly rate
[**0**] 2. Hourly rate with a maximum
[**2**] 3. Set fee
[**21**] 4. Contingency
[**15**] 5. Other (please describe)
____

No response - 9

11. In your opinion, were the total fees and costs incurred in this case by your client: (check one)

[**10**] 1. Much too high
[**9**] 2. Slightly too high
[**78**] 3. About right
[**0**] 4. Slightly too low
[**5**] 5. Much too low

No response - 14

E. GENERAL QUESTIONS

The following questions pertain to your civil litigation experience in the District of New Hampshire during the past three years in general and not just the case you were asked about earlier.

12. Have you encountered unreasonable delays?

[**30**] 1. Yes (go to Question 12a)

[**69**] 2. No (go to Question 13)

No response - 18

12a. If you experienced unreasonable delays, how much has each of the following contributed to those delays? Check one column for **each** item.

	[1] Substantial Contribution	[2] Moderate Contribution	[3] Slight Contribution	[4] No Contribution	
1. Conduct of own clients	[**0**]	[**4**]	[**11**]	[**13**]	**N/R 3**
2. Tactics of opposing counsel	[**11**]	[**11**]	[**7**]	[**1**]	
3. Conduct of opposing party	[**7**]	[**2**]	[**10**]	[**10**]	**N/R 1**
4. Conduct of insurers	[**3**]	[**2**]	[**4**]	[**19**]	**N/R 2**
5. Counsel's own personal or office practice methods	[**3**]	[**5**]	[**13**]	[**9**]	**N/R 1**
6. Judicial practices	[**8**]	[**10**]	[**7**]	[**5**]	**N/R 1**
7. Clerk's Office/Court rules/procedures	[**1**]	[**4**]	[**8**]	[**15**]	**N/R 3**

13. Have you found litigation to be unnecessarily costly?

[**41**] 1. Yes (go to Question 13a)

[**54**] 2. No (go to Question 17)

No response - 22

13a. If you found such litigation to be unnecessarily costly, how much has each of the following contributed to the unnecessary costs? Check one column for each item.

	[1] Substantial Contribution	[2] Moderate Contribution	[3] Slight Contribution	[4] No Contribution	
1. Conduct of clients	[8]	[11]	[12]	[6]	**N/R 4**
2. Conduct of counsel	[12]	[22]	[4]	[1]	**N/R 2**
3. Conduct of insurers	[10]	[5]	[12]	[10]	**N/R 4**
4. Counsel's own personal or office practice methods	[1]	[6]	[18]	[10]	**N/R 6**
5. Judicial practices	[1]	[15]	[12]	[9]	**N/R 4**
6. Clerk's Office/Court rules/procedures	[2]	[9]	[11]	[16]	**N/R 3**

14. To what extent have tactics and practices of other counsel contributed to unreasonable delays or unnecessary cost?

[**2**] 1. None (go to Question 15)
[**7**] 2. Slight (go to Question 15)
[**23**] 3. Moderate (go to Question 14a)
[**10**] 4. Substantial (go to Question 14a)

14a **If you selected moderate or substantial**, please indicate the extent to which each of the following tactics or practices of other counsel contributed to your assessment. Check one column for **each** listed action.

	[1] Substantial Cause	[2] Moderate Cause	[3] Slight Cause	[4] Not A Cause	
1. Unnecessary use of interrogatories	[5]	[6]	[8]	[10]	**N/R 4**
2. Too many interrogatories	[7]	[11]	[7]	[4]	**N/R 3**
3. Too many depositions	[7]	[7]	[9]	[7]	**N/R 2**
4. Too many deposition questions	[6]	[7]	[7]	[9]	**N/R 3**
5. Overbroad document requests	[12]	[12]	[3]	[3]	**N/R 2**
6. Overbroad responses to document production requests	[4]	[3]	[13]	[9]	**N/R 3**
7. Unavailability of witness or counsel	[1]	[5]	[12]	[10]	**N/R 4**

Question 14a., Continued

If you selected moderate or substantial, please indicate the extent to which each of the following tactics or practices of other counsel contributed to your assessment regarding unnecessary costs or unreasonable delays. Check one column for **each** listed action.

	[1] Substantial Cause	[2] Moderate Cause	[3] Slight Cause	[4] Not A Cause	
8. Raising frivolous objections	[8]	[12]	[8]	[3]	**N/R 1**
9. Failure to attempt in good faith to resolve issues without court intervention	[13]	[11]	[5]	[3]	
10. Unwarranted motions for sanctions	[1]	[6]	[6]	[7]	**N/R 2**
11. Lack of professional courtesy	[7]	[10]	[6]	[7]	**N/R 2**
12. Failure to meet court-ordered deadlines--too many requests for extension	[6]	[12]	[9]	[4]	**N/R 1**
13. Failure to keep court and opposing counsel informed of changes which effect scheduling	[0]	[3]	[9]	[18]	**N/R 2**
14. Last-minute settlements, requests for continuance	[6]	[7]	[7]	[11]	**N/R 1**
15. Failure to provide timely disclosures	[6]	[7]	[10]	[8]	**N/R 1**
16. Counsel unprepared	[2]	[9]	[10]	[10]	**N/R 1**
17. Premature filing of action, pleadings	[3]	[2]	[10]	[15]	**N/R 2**
18. Inarticulate, imprecise pleading	[3]	[7]	[13]	[7]	**N/R 2**
19. Other ____________	[4]	[1]	[0]	[0]	**N/R 27**
Other ____________	[ ]	[ ]	[ ]	[ ]	
Other ____________	[ ]	[ ]	[ ]	[ ]	

15. To what extent have present case management practices by the magistrate judge or by district judges contributed to unnecessary delays or unreasonable costs?

1. [**11**] None (go to Question 17)
2. [**13**] Slight (go to Question 17)
3. [**16**] Moderate (go to Question 15a)
4. [**2**] Substantial (go to Question 15a)

15a. **If you selected moderate or substantial** regarding judicial officers' contribution to unnecessary delays or unreasonable costs, please check the appropriate response for the following court activities:

1. Number of status conferences

   1. [**1**] Far too many
   2. [**1**] Somewhat too many
   3. [**6**] Reasonable number
   4. [**6**] Somewhat too few
   5. [**4**] Far too few

2. Settlement Conferences

   1. [**0**] Far too many
   2. [**1**] Somewhat too many
   3. [**3**] Reasonable number
   4. [**4**] Somewhat too few
   5. [**10**] Far too few

3. Deadlines

   1. [**0**] Far too restrictive
   2. [**2**] Somewhat too restrictive
   3. [**10**] Reasonable
   4. [**4**] Somewhat too permissive
   5. [**2**] Far too permissive

4. Extension of deadlines

   1. [**1**] Far too many
   2. [**3**] Somewhat too many
   3. [**14**] Reasonable number
   4. [**0**] Somewhat too few
   5. [**0**] Far too few

16. Please indicate the extent to which each of the following possible instances of ineffective case management by a magistrate judge or district judge contributed to your assessment of unnecessary delays or unreasonable costs:

	[1] Substantial Cause	[2] Moderate Cause	[3] Slight Cause	[4] Not A Cause
1. Delays in entering scheduling/discovery/ pretrial orders	[2]	[2]	[8]	[6]
2. Excessive time periods provided for in pretrial orders	[2]	[3]	[4]	[9]
3. Failure to resolve discovery disputes promptly	[3]	[12]	[0]	[2] N/R 1
4. Failure to resolve other motions promptly	[7]	[7]	[2]	[2]
5. Failure to tailor discovery to needs of case	[0]	[3]	[8]	[6] N/R 1
6. Failure by magistrate judge or judge to initiate settlement discussions	[2]	[10]	[3]	[2] N/R 1
7. Inadequate supervision of settlement discussions	[4]	[6]	[3]	[4] N/R 1
8. Inadequate judicial preparation for conferences or proceedings	[1]	[2]	[3]	[11] N/R 1
9. Other ______________	[4]	[ ]	[ ]	[ ] N/R 14
10. Other ______________	[ ]	[ ]	[ ]	[ ] N/R 18
11. Other ______________	[ ]	[ ]	[ ]	[ ] N/R 17

The following questions describe solutions which have been implemented in other districts or are under active consideration or used in this or other districts to address concerns regarding delays and costs in federal civil litigation. With respect to **each** possible solution, please indicate your opinion as to its effectiveness in expediting civil litigation or reducing its cost by checking the appropriate column.

	[1] Substantial Effect	[2] Moderate Effect	[3] Slight Effect	[4] No Effect At All	[5] Negative Effect	[6] No Opinion
17. Shorter time limits for completing the various stages of litigation	[17]	[23]	[19]	[5]	[28]	[1] N/R 23
18. Requiring counsel to attempt to resolve issues before court intervention	[18]	[30]	[30]	[15]	[2]	[0] N/R 21
19. Permitting pre-motion conferences with the court on any motion at the request of any party	[7]	[34]	[18]	[6]	[19]	[11] N/R 21

CONTINUED: With respect to **each** possible solution to address delays and costs, please indicate your opinion as to its effectiveness in expediting civil litigation or reducing its costs by checking the appropriate column.

	[1] Substantial Effect	[2] Moderate Effect	[3] Slight Effect	[4] No Effect At All	[5] Negative Effect	[6] No Opinion
20. Requiring pre-motion conferences with the court for the following categories of motions						
1. Dispositive motions (dismissal, summary judgment)	[27]	[27]	[13]	[10]	[11]	[7] N/R 21
2. Discovery motions	[17]	[28]	[19]	[8]	[14]	[8] N/R 22
3. Other motions	[7]	[20]	[20]	[9]	[15]	[18] N/R 27
21. Permitting the filing of procedural, non-dispositive motions (for example, motions to amend and motions to add parties) by letter rather than formal motion and brief	[14]	[25]	[16]	[23]	[14]	[2] N/R 22
22. Providing a 30-page limitation for memoranda of law, except for good cause shown	[21]	[16]	[32]	[20]	[1]	[5] N/R 21
23. Requiring mandatory, non-binding arbitration of all disputes in which the amount in controversy is less than:						
1. $100,000	[33]	[24]	[15]	[3]	[17]	[1] N/R 23
2. $200,000	[22]	[23]	[14]	[8]	[15]	[2] N/R 32
3. $1,000,000	[17]	[20]	[12]	[15]	[17]	[3] N/R 32
24. Providing court-annexed mediation upon mutual consent of parties for some or all issues in dispute	[30]	[44]	[14]	[4]	[2]	[1] N/R 21
25. Making available attorneys who are experts in the subject matters in dispute to evaluate claims and defenses and to assist parties in settlement negotiations ("early neutral evaluation")	[31]	[34]	[16]	[6]	[4]	[4] N/R 21
26. Requiring attendance of parties and/or their insurers at court settlement conferences	[27]	[26]	[28]	[9]	[4]	[1] N/R 21
27. Requiring Rule 11 sanctions motions to be separately filed and not appended to another motion	[8]	[13]	[25]	[30]	[1]	[15] N/R 24
28. Increased availability of telephone conferences with the court	[24]	[32]	[18]	[10]	[3]	[7] N/R 22
29. Requiring automatic disclosure, by both sides, of the following information shortly after joinder of issue:						
1. The identity of witnesses reasonably likely to have information which bears significantly upon claims, defenses, or damages	[19]	[32]	[27]	[3]	[9]	[5] N/R 21

CONTINUED: With respect to **each** possible solution to address delays and costs, please indicate your opinion as to its effectiveness in expediting civil litigation or reducing its costs by checking the appropriate column.

	[1] Substantial Effect	[2] Moderate Effect	[3] Slight Effect	[4] No Effect At All	[5] Negative Effect	[6] No Opinion
29. Continued--Requiring automatic disclosure, by both sides, of the following information shortly after joinder of issue:						
2. General description of documents relied upon in preparing pleadings or contemplated to be used in support of the parties' allegations or calculation of damages	[17]	[38]	[24]	[4]	[8]	[4] N/R 21
3. Existence and contents of insurance agreements	[23]	[29]	[21]	[9]	[6]	[6] N/R 22
30. Conditioning grants by the court of broader discovery upon the shifting of costs in instances where the burden of responding to such requests appears to be out of proportion to the amounts or issues in dispute.	[20]	[31]	[20]	[3]	[13]	[7] N/R 22
31. Defining the scope of permissible discovery by balancing the burden of expenses of the discovery against its likely benefit	[16]	[29]	[17]	[8]	[20]	[4] N/R 22
32. Assessing the costs of discovery motions on the losing party	[21]	[20]	[19]	[6]	[26]	[2] N/R 22
33. Providing less time for completion of discovery	[8]	[22]	[21]	[8]	[32]	[4] N/R 21
34. Requiring discovery relating to particular issues (e.g., venue, class certification) or a specified stage of the case (e.g., liability) to be completed before permitting discovery respecting other issues or another stage (e.g., damages, experts)	[14]	[28]	[16]	[9]	[20]	[8] N/R 21
35. Limiting the number of interrogatories presumptively permitted	[7]	[24]	[30]	[15]	[14]	[5] N/R 21
36. Limiting the type of interrogatories (e.g., identification, contention) presumptively permitted at various stages of discovery	[5]	[17]	[29]	[17]	[20]	[6] N/R 22
37. Limiting the number of depositions presumptively permitted	[6]	[22]	[18]	[19]	[26]	[4] N/R 21
38. Limiting the length of depositions presumptively permitted	[8]	[16]	[15]	[22]	[30]	[4] N/R 21
39. Earlier intervention by district judges	[25]	[35]	[18]	[9]	[0]	[7] N/R 22

40a. During the past three years, the **cost** required to litigate civil actions has:

[**1**] 1. Substantially Decreased
[**1**] 2. Moderately Decreased
[**19**] 3. Remained Unchanged
[**60**] 4. Moderately Increased
[**9**] 5. Substantially Increased

No response - 26

40b. During the past three years, the **time** it takes to litigate civil actions has:

[**2**] 1. Substantially Decreased
[**7**] 2. Moderately Decreased
[**37**] 3. Remained Unchanged
[**33**] 4. Moderately Increased
[**12**] 5. Substantially Increased

No response - 26

41. During the past three years, how many months (on average) has it taken from the time your civil cases were ready for trial to the time that trial actually commenced?

________ months

Results available for review.

42a. Have you ever consented to trial before a magistrate judge?

[**21**] 1. Yes
[**74**] 2. No

No response - 21

42b. **If not,** why not?

[**11**] 1. Unaware of procedure
[**6**] 2. Resistance of counsel
[**13**] 3. Resistance of client
[**30**] 4. Your own reservations
[**19**] 5. Other

No response - 42

43. Some jurisdictions schedule certain days or weeks when cases are set for settlement conferences with the court or volunteer lawyers. Do you think the US District Court should initiate days or weeks for settlement conferences on its older cases?

[**83**] 1. Yes
[**10**] 2. No

No response - 23

44. Should the court offer non-binding summary jury trials: (check one or more)

[**7**] 1. In all cases scheduled for jury trial
[**43**] 2. Only when counsel agree
[**9**] 3. If one counsel requests
[**26**] 4. If the court believes it will expedite settlement

No response - 24

45. Should judges, rather than a magistrate judge, do preliminary pretrials:

[**7**] 1. In all cases
[**15**] 2. Only when counsel agree
[**10**] 3. At request of one counsel
[**55**] 4. If the court believes it will expedite settlement

No response -25

46. Should the court hold oral argument on motions:

[**26**] 1. Upon request of counsel
[**39**] 2. Upon request of counsel after showing of cause
[**31**] 3. Only when court deems necessary

No response - 22

47. Should the court grant motions for extensions of time:

[**52**] 1. Whenever counsel agree
[**67**] 2. Whenever there is any reasonable cause
[**7**] 3. Only under extraordinary circumstances

No response - 21

The court's local rules were last revised January 1, 1985. Part of the Group's charge is to review them and to revise, add, or delete as necessary.

48a. Does the existence of local rules:

[**41**] 1. Generally enhance counsel's ability to practice effectively
[**13**] 2. Generally hamper counsel's ability to practice effectively
[**38**] 3. No effect on counsel's ability to practice effectively

No response - 24

48b. By checking one response in **each** column, indicate your opinions, given the procedures that now exist, on the number of and content and/or scope of the present local rules:

Number	Content/Scope
[**18**] 1. Too many	[**7**] 4. Too broad/general
[**69**] 2. About right	[**68**] 5. About right
[**3**] 3. Too few	[**11**] 6. Too specific
No response - 26	**No response - 30**

49. Do you believe the court should create tracks for litigation--e.g., identifying cases that should be completed in 18 months, those in 19-36 months, complex cases taking more than 36 months--with different time lines, trial dates, and case management for each track?

[**77**] 1. Yes

[**15**] 2. No

No response - 24

F. BACKGROUND INFORMATION

The following general background information about you will be helpful to the Group in gathering information about who practices before this court and in assessing responses, e.g., do certain practitioners (newer/more experienced, predominantly plaintiff/defendant representatives) favor certain changes or certain procedures.

50. How many years have you been practicing law?

_______ years

Results available for review.

51. What percentage (estimated) of your practice (of time spent) is devoted to civil litigation?

________%

Results available for review.

52. During the past three years, what percentage (estimated) of your civil litigation practice was in the US District Court of New Hampshire?

________%

Results available for review.

53. How would you best describe your practice setting?

[**82**] 1. Private law firm
[**5**] 2. Federal government
[**2**] 3. State government
[**2**] 4. Local government
[**0**] 5. Corporate counsel
[**3**] 6. Independent non-profit organization
[**5**] 7. Other ________________________________

No response - 17

54. How many practicing lawyers are there in your firm or organization?

__________ practicing lawyers

Results available for review.

55. What percentage (estimated) of your civil litigation practice consists of:

    [ ] 1. representing plaintiffs? _____%

    [ ] 2. representing defendants? _____%

    Results available for review.

56. What percentage of your time is spent litigating in Superior Court?

    __________%

    Results available for review.

G. SOUND OFF

In this optional section, the Group encourages you to cite specific examples relating to prior questions, to offer your comments in general about the administration of the federal court system, and to define any areas you would specifically like the Advisory Group to consider. Please feel free to attach additional sheets if you wish.

57. From your experience, how would you compare litigation in terms of cost and delay in the US District Court versus the Superior Courts?

    Results available for review.

58. If **delay** is a problem in the US District Court for the District of NH in disposing of civil cases, what additional suggestions or comments do you have for reducing those delays and/or for scheduling cases.

    Results available for review.

59. If **costs** associated with civil litigation in the US District Court for the District of NH are unreasonably high, what additional suggestions or comments do you have for reducing those costs either before or during trial.

Results available for review.

The Civil Justice Reform Act Advisory Group thanks you again for your time and effort in completing this questionnaire. Your input is appreciated; we are sure it will assist us in discharging our mandated duties. Please return this survey in the enclosed envelope by **May 20, 1992**. It will be forwarded to our reporter (unopened) for tabulation.

CIVIL JUSTICE REFORM ACT ADVISORY G[illegible]
DISTRICT OF NEW HAMPSHIRE

51 Responses Tabulated

QUESTIONNAIRE FOR CRIMINAL DEFENSE ATTORNEYS

A subcommittee is charged with gathering data and commenting on the impact the criminal docket has on civil cases with an eye to recommending changes that would streamline the process without compromising society's interests or defendant's rights.

The following questions relate to your experience in general as a criminal defense attorney in the Federal Court in the past three years. Please feel free to expand on any answer or offer any comments you feel would help the subcommittee in completing its evaluation.

1. How many times have you filed an appearance in a criminal case in the US District Court for the District of New Hampshire?

    ______________ times

    Results available for review.

2. Of those cases, were you:

    1. **[18]** Retained
    2. **[20]** Court-Appointed
    3. **[23]** Some of each

    Results available for review. Some respondents chose more than one answer.

3. Of those cases, how many were:

    1. **[38]** Pre-Sentencing Guidelines cases ________ # of cases
    2. **[47]** Cases to which the Sentencing Guidelines were applicable ________ # of cases

    Results available for review.

4. In how many of those cases were:

    1. **[31]** Suppression motions filed ________ # of cases
    2. **[28]** Suppression hearings held ________ # of cases
    3. **[29]** Detention hearings held ________ # of cases
    4. **[31]** Jury trials held ________ # of cases
    5. **[46]** Negotiated guilty pleas entered ________ # of cases
    6. **[11]** "Naked" guilty pleas entered ________ # of cases

    No response - 2

    Results available for review.

5. Were any cases dismissed without an adjudication?

    1. **[16]** Yes
    2. **[34]** No (skip to Question 6)

    No response - 1

5a. **If yes,** how many were dismissed:

1. [15] By the United States ________ # of cases
2. [1] By the court ________ # of cases
3. [2] As part of the negotiation ________ # of cases

Results available for review. Some respondents chose more than one answer.

5b. **If some were dismissed,** were any reindicted by the United States?

1. [2] Yes ___________ # of cases
2. [15] No

Results available for review. Some respondents chose more than one answer.

Questions 6 and 7 relate to cases that went to trial. If none of your cases went to trial, skip to Question 8.

6. Of the cases that went to trial, how many resulted in:

1. [30] Convictions ___________ # of cases
2. [9] Acquittals ___________ # of cases

No response - 21

Results available for review. Some respondents chose more than one answer.

7. Of the cases that went to trial, did you:

1. [4] Advise your client to plead guilty to the indictment _____ # of cases
2. [22] Advise your client to explore a negotiated plea _____ # of cases
3. [7] Advise your client to cooperate with the Government and thereby seek a reduced sentence _____ # of cases
4. [23] Advise your client to proceed to trial _____ # of cases

Results available for review. Some respondents chose more than one answer.

7a. **If you chose #4 to Question 7** (advised your client to proceed to trial), which of the following contributed to that decision:

1. [14] Your assessment of the strength of the case
2. [13] The potential sentence under the Sentencing Guidelines
3. [11] Your client's desire to proceed to trial
4. [12] Government's plea offer
5. [1] Court's rejection of plea agreement
6. [4] Other (specify) ________________________________

Results available for review. Some respondents chose more than one answer.

8. Prior to indictment, did any of your clients receive a target letter or any other advisory from the United States he/she was the target/subject of an investigation?

1. [18] Yes
2. [33] No (skip to Question 9)

8a. **If yes,** how many clients received such a letter:

_____________ clients

9 - 1 client
1 - 1-2 clients
6 - 2 clients
1 - 3 clients

No response - 1

8b. **If yes,** did you/your client:

1. [11] Respond
2. [9] Seek a meeting with the prosecutor
3. [2] Offer to cooperate against others
4. [8] Attempt to avoid indictment
5. [5] Seek a negotiated disposition
6. [3] All of the above
7. [1] None of the above

No response - 2

Results available for review. Some respondents chose more than one answer.

9. Has the existence of the Sentencing Guidelines encouraged you or any of your clients:

1. [24] To seek a negotiated disposition earlier than you otherwise would have
2. [25] To go to trial
3. [11] To enter a guilty plea and litigate at the sentencing phase

No response - 7

Results available for review. Some respondents chose more than one answer.

9a. Overall, what effect have the Sentencing Guidelines had on decisions to enter guilty pleas or proceed to trial?

____
____
____

No response - 1
Responded - 50

10. Are the time limits for the setting of trial dates under the Speedy Trial Act:

1. [16] Far too restrictive
2. [20] Somewhat restrictive
3. [13] Reasonable

No response - 2

11. Do you engage in extensive motion practice in criminal cases?

1. [34] Yes
2. [17] No (skip to Question 12)

11a. **If yes,** do you:

1. [28] Contact the Assistant US Attorney prior to filing the motions
2. [25] Use informal discovery methods with the Government
3. [22] File some motions so as to avoid ineffective assistance of counsel claims

No response - 1

Results available for review. Some respondents chose more than one answer.

12. Have you ever sought an extension of time within which to:

		(1) Yes	(2) No	If yes, how often
1. [ ] File discovery motions	[31]	[13]		_______ # of times
2. [ ] File suppression motions	[22]	[16]		_______ # of times
3. [ ] File dispositive motions	[25]	[14]		_______ # of times
4. [ ] Proceed to trial	[33]	[9]		_______ # of times

Results available for review. Some respondents have chosen more than one answer.

12a. **If you have sought extensions of time,** on how many occasions has the Government objected?

1. [4] Always
2. [3] Frequently
3. [21] Seldom
4. [18] Never

No response - 5

13. If either you or the Government sought continuances of scheduled deadlines, what were the bases of the requests?

1. **[21]** Delay in receiving discovery material
2. **[36]** Additional time needed to complete investigation of charges
3. **[26]** Plea bargain discussions ongoing
4. [**6**] Other (specify) ____

No response - 3

Results available for review. Some respondents chose more than one answer.

14. Have you found that the Federal Court rules on motions in a reasonable period of time?

1. **[51]** Yes
2. [**1**] No

Results available for review. Some respondents chose more than one answer.

15. Has the Government agreed to provide discovery <u>which was not mandated</u> by the rules?

1. [**2**] Always
2. **[15]** Frequently
3. **[19]** Seldom
4. **[13]** Never (skip to Question 15b)

No response - 2

15a. **If you answered 1, 2, or 3 to Question 15,** the discovery material furnished:

1. **[24]** Caused or contributed to the entry of a guilty plea
2. [**7**] Caused or contributed to a decision to proceed to trial
3. **[10]** Had no effect on the decision to plead guilty or proceed to trial.

Results available for review. Some respondents chose more than one answer.

15b. **If you answered 4 to Question 15,** might such disclosure have:

1. **[11]** Caused or contributed to the entry of a guilty plea
2. [**6**] Caused or contributed to a decision to proceed to trial

Results available for review. Some respondents chose more than one answer.

16. Has the Government agreed to provide discovery <u>earlier in the proceedings</u> than the rules require?

1. [**0**] Always
2. **[18]** Frequently
3. **[19]** Seldom
4. **[13]** Never (skip to Question 16b)

No response - 1

16a. **If you answered 1, 2, or 3 to Question 16**, the discovery material furnished:

1. [23] Caused or contributed to the entry of a guilty plea
2. [7] Caused or contributed to a decision to proceed to trial
3. [13] Had no effect on the decision to plead guilty or proceed to trial.

Results available for review. Some respondents chose more than one answer.

16b. **If you answered 4 to Question 16,** might such disclosure have:

1. [11] Caused or contributed to the entry of a guilty plea
2. [5] Caused or contributed to a decision to proceed to trial

Results available for review. Some respondents chose more than one answer.

17. What has been your experience with the United States Attorney's Office in each the follow areas:

	(1) Always	(2) Frequently	(3) Seldom	(4) Never	**N/R
1. Professionalism in all dealings	[24]	[24]	[3]	[0]	0
2. Assistant US Attorney available	[8]	[31]	[10]	[0]	2
3. Supervisors available	[2]	[15]	[7]	[1]	26
4. Willing to discuss case	[25]	[18]	[6]	[1]	2

Results available for review. Some respondents chose more than one answer.

18. Have you been required to proceed to trial in a case in which your client was prepared to plead guilty because the prosecution was unwilling to enter into negotiations concerning a binding plea agreement pursuant to Rule 11(d):

1. [3] Frequently
2. [11] Occasionally
3. [32] Never

No response - 5

The final questions will give the Group general background information about you as an attorney who practices before this court as either appointed or retained counsel.

19. How long have you been practicing law?

_____________ years

Results available for review.

****N/R - No response**

20. How long have you been admitted to the United States District Court Bar?

_____________ years

No response - 2

Results available for review.

21. How many practicing lawyers are there in your firm or organization?

_____________ practicing lawyers

Results available for review.

22. Have you ever attended a CLE which dealt with criminal subjects as they pertain to federal courts?

1. [**36**] Yes
2. [**14**] No (skip to Question 23)

No response - 1

22a. **If yes**, what subjects were covered?

1. [**24**] Sentencing Guidelines
2. [**18**] White-collar crime
3. [**21**] Federal practice in general
4. [**4**] Appellate practice
5. [**8**] Any other specialized subject matter, i.e., environmental crimes, bank fraud, etc.

No response - 3

Results available for review. Some respondents chose more than one answer.

23. How many CJA appointments from Federal Court have you accepted in the past three years?

_________________ # of cases

Results available for review.

24. How many CJA appointments from Federal Court have you turned down in the past three years?

_________________ # of cases

No response - 2

Results available for review.

24b. **If you turned down any case**, was it due to: (check as many as apply)

1. [2] Lack of knowledge of the subject matter
2. [15] Lack of time
3. [0] Lack of experience
4. [1] Pressure or lack of support from colleagues/superiors
5. [1] Lack of interest
6. [8] Low CJA reimbursement rate
7. [0] Unfamiliarity with Sentencing Guidelines
8. [11] Scheduling conflicts
9. [5] Other (specify) ______________________

Results available for review. Some respondents chose more than one answer.

25. Do you do criminal defense work in Superior Court?

1. [48] Yes
2. [3] No

25a. **If yes**, how would you compare Federal Court and Superior Court practices/procedures?

Results available for review.

No response - 4
Responded - 47

25b. **If yes**, how would you compare State and County prosecutors versus Federal prosecutors?

Results available for review.

No response - 4
Responded - 47

26. Any other comments you wish to make which you feel would assist the subcommittee.

Results available for review.

No response - 25
Responded - 26

The Civil Justice Reform Act Advisory Group thanks you again for your time and effort in completing this questionnaire. Your input is appreciated; we are sure it will assist us in discharging our mandated duties. Please return this survey in the enclosed envelope by **May 22, 1992.**

APPENDIX G

70 Responses Tabulated

UNITED STATES DISTRICT COURT
CIVIL JUSTICE REFORM ACT ADVISORY GROUP
JUROR SURVEY

1. What type of case did you hear?

    1. [**44**] civil
    2. [**36**] criminal

    No response - 2

    Results available for review. Some respondents chose more than one answer.

2. Which judge presided over the trial you heard?

    1. [**32**] Hon. Shane Devine
    2. [**15**] Hon. Norman H. Stahl
    3. [**31**] Hon. Martin F. Loughlin
    4. [**0**] Other (please specify)________________

    No response - 6

3. Please respond to this statement, "The court's juror orientation program and/or the judge's introduction to the case adequately prepared me to perform my duties as a juror."

    1. [**33**] strongly agree
    2. [**34**] agree
    3. [**2**] disagree
    4. [**0**] strongly disagree
    5. [**0**] no opinion

    No response - 1

3a. If you disagree or strongly disagree with the statement in question 3, please identify the causes which contributed to the inadequacy. You may check as many items as apply.

    1. [**0**] the rules of evidence were not sufficiently explained
    2. [**1**] uncertain about the permissible scope of lawyer tactics and arguments
    3. [**1**] role as juror was not sufficiently explained
    4. [**0**] other (please specify)________________________

4. Please respond to this statement, "Overall, the jury selection process was well organized and efficient."

   1. [**21**] strongly agree
   2. [**38**] agree
   3. [**8**] disagree
   4. [**2**] strongly disagree
   5. [**0**] no opinion

   No response - 1

5. How long did it take to try the case that you heard?

   1. [**10**] less than 3 days of trial
   2. [**33**] 3-5 days of trial
   3. [**22**] 6-10 days of trial
   4. [**12**] more than 10 days of trial

   No response - 2

   Results available for review. Some respondents chose more than one answer.

6. What time of the day did trial proceedings usually begin?

   1. [**37**] before 9:30 a.m.
   2. [**30**] after 9:30 a.m.

   No response - 3

7. What time of day did trial proceedings usually end?

   1. [**17**] before 4:00 p.m.
   2. [**43**] 4:00 p.m. to 4:44 p.m.
   3. [**6**] 4:45 p.m. to 5:15 p.m.
   4. [**0**] 5:16 p.m. to 6:00 p.m.
   5. [**0**] after 6:00 p.m.

   No response - 2

   Results available for review. Some respondents chose more than one answer.

8. Please respond to this statement, "As a juror, I understood that I was to refrain from discussing the case with other jurors until we began our deliberations at the end of the case."

1. [**67**] yes
2. [**2**] no

No response - 1

9. Please respond to this statement, "As a juror, I would have found discussions with other jurors concerning the case as trial progressed helpful in deciding the case."

1. [**16**] strongly agree
2. [**22**] agree
3. [**16**] disagree
4. [**4**] strongly disagree
5. [**10**] no opinion

No response - 2

10. A delay is a break in the proceedings (other than a regular lunch, midmorning, or midafternoon break) when no evidence is being introduced, when no argument is being made to the jury, or when no instructions are being given to the jury. During the trial, did you experience at least one extended delay (more than 10 minutes) while the court was in session?

1. [**46**] yes
2. [**21**] no

No response - 3

10a. If your answer to question 10 was 'yes', approximately how many extended delays occurred during the trial?

1. [**29**] 1-2
2. [**11**] 3-5
3. [**2**] 6-8
4. [**4**] more than 8 (please specify)__________

10b. If your answer to question 10 was 'yes', what was the approximate total time consumed by extended delays?

1. [**19**] less than 30 minutes
2. [**15**] 30 to 59 minutes
3. [**6**] 1 to 2 hours
4. [**8**] more than 2 hours (please specify)___________

No response - 1

Results available for review. Some respondents chose more than one answer.

11. Please respond to this statement, "The trial of the case I heard as a juror proceeded efficiently."

1. [**17**] strongly agree
2. [**40**] agree
3. [**10**] disagree
4. [**0**] strongly disagree
5. [**1**] no opinion

No response - 2

12. In the judge's instructions to the jury, how many words, terms or concepts did you have difficulty understanding?

1. [**42**] None
2. [**19**] 1 to 3
3. [**3**] 4 to 6
4. [**3**] 7 to 10
5. [**1**] more than 10

No response - 2

13. Please respond to this statement, "Overall, the judge's instructions to the jury were sufficiently understandable to apply them to our findings of fact."

1. [**25**] strongly agree
2. [**36**] agree
3. [**7**] disagree
4. [**0**] strongly disagree
5. [**0**] no opinion

No response - 3

Results available for review. Some respondents chose more than one answer.

13a. If you disagree or strongly disagree with the statement in question 13, please identify which of the following contributed your lack of understanding. Choose as many items as apply.

1. [**3**] the instructions were too lengthy
2. [**2**] the instructions were too complicated
3. [**4**] the instructions contained unexplained or inadequately explained terms or concepts.
4. [**0**] other (please specify)____________________

Results available for review. Some respondents chose more than one answer.

14. Please respond to this statement, "It would have been helpful for each juror to have a copy of the judge's instructions to follow while the judge delivered them."

1. [**21**] strongly agree
2. [**26**] agree
3. [**9**] disagree
4. [**1**] strongly disagree
5. [**11**] no opinion

No response - 3

Results available for review. Some respondents chose more than one answer.

15. Please respond to this statement, "It would have been helpful if the judge's final instructions were given before the evidence was presented in addition to being given afterward."

1. [**9**] strongly agree
2. [**20**] agree
3. [**26**] disagree
4. [**4**] strongly disagree
5. [**8**] no opinion

No response - 3

16. Please respond to this statement, "It would have been helpful if I had been permitted to take notes during trial."

1. [**19**] strongly agree
2. [**31**] agree
3. [**13**] disagree
4. [**0**] strongly disagree
5. [**5**] no opinion

No response - 2

17. Approximately how long did the jury deliberate in your case?

1. [**10**] less than 2 hours
2. [**26**] 2 to 4 hours
3. [**16**] 5 to 8 hours
4. [**16**] more than 8 hours (please specify)______

No response - 3

Results available for review. Some respondents chose more than one answer.

18. Do you believe that your experience as a juror involved unnecessary delay or cost?

1. [**18**] yes
2. [**49**] no

No response - 3

18a. If you answered 'yes' to question 18, please indicate who you believe contributed to the unnecessary delay or cost. You may choose as many as apply.

1. [**2**] judge
2. [**5**] plaintiff's lawyer
3. [**6**] defendant's lawyer
4. [**2**] unknown
5. [**3**] witnesses
6. [**7**] the nature of the case
7. [**2**] the nature of the trial
8. [**5**] other (please specify)______

No response - 1

Results available for review. Some respondents chose more than one answer.

19. Please choose the category that gives your age at the time you were a juror.

1. [**4**] between 18-25
2. [**9**] between 26-35
3. [**21**] between 36-45
4. [**23**] between 46-60
5. [**12**] above 60

No response - 1

20. Please state your gender.

1. [**30**] male
2. [**38**] female

No response - 2

21. If you were employed at the time of jury service, was your employer continuing to pay you your regular wages while you served on jury duty?

1. [**33**] yes
2. [**13**] no
3. [**22**] not applicable, not employed

No response - 2

22. Were you required to make special arrangements for child care because of jury duty?

1. [**11**] yes
2. [**33**] no
3. [**27**] not applicable

No response - 1

Results available for review. Some respondents chose more than one answer.

22a. If your answer to the previous question was 'yes', please indicate the cost of child care that you incurred because of jury service.

1. [**5**] under $10 per day
2. [**5**] $10 to $20 per day
3. [**1**] $21 to $50 per day
4. [**0**] over $50 per day (please specify)____________

23. How much do you estimate that it cost you in lost wages, child care, or other expenses, over and above the amount you received from the court system, for the entire time you served on the jury?

1. [**32**] under $50
2. [**6**] $50 to $100
3. [**3**] $101 to $250
4. [**5**] $251 to $500
5. [**3**] over $500 (please specify) $________

No response - 21

24. Do you have any suggestions or comments on how to speed up the litigation process or how to make it less costly?

No response - 27

Responded - 43

Results available for review.

The Advisory Group appreciates the time you took to complete this questionnaire and thanks you for your comments. Your input will help shape the direction of any future changes in the US District Court.

Please return in the enclosed envelope by **May 20, 1992.**

APPENDIX H

73 Responses Tabulated

QUESTIONS FOR LITIGANTS

1. Were you the plaintiff or defendant in the case noted on the cover letter? (circle one)

   1. [28] Plaintiff
   2. [46] Defendant

   Results available for review. Some respondents chose more than one answer.

2. The case was pending for: (circle one)

   1. [17] 6-17 months
   2. [29] 18-29 months
   3. [25] More than 30 months

   No response - 2

3. The nature of the action is best described as: (circle one)

   1. [14] Contract
   2. [0] Real Property
   3. [30] Tort, Personal Injury
   4. [2] Tort, Personal Property
   5. [7] Civil Rights
   6. [3] Prisoner Petition
   7. [0] Forfeiture/Penalty
   8. [1] Labor
   9. [5] Bankruptcy
   10. [4] Property Rights
   11. [0] Social Security
   12. [0] Federal Tax Suit
   13. [10] Other Statutory Action

   No response - 2

   Results available for review. Some respondents chose more than one answer.

4. If answering on behalf of a company or corporation, your position is:

   1. [11] President
   2. [10] Counsel
   3. [7] Manager
   4. [0] Adjuster
   5. [26] Other - Please specify ________________________

   No response - 19

5. If your case went to trial or was disposed of by the Court, did you: (circle one)

   1. [24] Win
   2. [5] Win something, but less than you sought
   3. [8] Lose

   No response - 37

   Results available for review. Some respondents chose more than one answer.

6. If your case settled, were you: (circle one)

1. **[21]** Satisfied with the result
2. **[11]** Somewhat satisfied with the result
3. [**5**] Somewhat dissatisfied with the result
4. [**9**] Dissatisfied with the result

No response - 27

7. No matter how the case was resolved, at its conclusion, were you: (circle one)

1. **[23]** Satisfied with the process
2. **[16]** Somewhat satisfied with the process
3. [**6**] Somewhat dissatisfied with the process
4. **[17]** Dissatisfied with the process

No response - 11

8. Please indicate the total costs you spent on this case for each of the categories listed below. If you are unable to categorize your costs, please indicate the total costs only.

1.	Attorneys' Fees	$________
2.	Attorneys' Expenses (photocopying, postage, travel expenses, etc.)	$________
3.	Consultants	$________
4.	Expert Witnesses	$________
5.	Depositions	$________
6.	Other (please describe) ________________ ________________	$________
7.	Total Cost of Litigation	$________

Results available for review.

9. Please estimate the amount of money which was at stake in this case.

$__________

Results available for review.

10. How much of your time (or your employees) was spent in preparing for and participating in this litigation (including but not limited to such items as depositions, interrogatories, negotiations, and trial)?

____

Results available for review.

11. In this case, were you represented by:

1. **[10]** In-house counsel
2. **[45]** Retained counsel
3. **[15]** Insurance carrier's counsel

No response - 9

Results available for review. Some respondents chose more than one answer.

12. What type of fee arrangement did you have with your attorney? (circle one)

1. **[40]** Hourly rate
2. **[0]** Hourly rate with a maximum
3. **[1]** Set fee
4. **[8]** Contingency
5. **[15]** Other -- please describe:

____

____

No response - 13

Results available for review. Some respondents chose more than one answer.

13. Did this arrangement, in your opinion, result in reasonable fees being paid to your attorney? (circle one)

1. **[34]** Yes
2. **[9]** No
3. **[14]** Do not know

No response - 16

Comments:________________________________

____

____

14. Were the costs incurred by you on this matter: (circle one)

1. **[22]** Much too high
2. **[8]** Slightly too high
3. **[24]** About right
4. **[0]** Slightly too low
5. **[1]** Much too low

No response - 18

14a. If you believe the cost of litigation was too high, what actions should your attorney or the court have taken to reduce the cost of this matter?

No response - 48
Responded - 25

15. Was the time that it took to resolve this matter: (circle one)

1. [33] Much too long
2. [14] Slightly too long
3. [16] About right
4. [0] Slightly too short
5. [1] Much too short

No response - 9

15a. If you believe that it took too long to resolve your case, what actions should your attorney or the court have taken to resolve your case more quickly?

No response - 34
Responded - 39

Results available for review.

16. Of the following, which did you and your attorney **discuss** as possible in your case: (circle as many as apply)

1. [11] Mediation
2. [6] Arbitration
3. [15] Case Evaluation
4. [29] Settlement Conference
5. [20] Summary Jury Trial

No response - 27

Results available for review. Some respondents chose more than one answer.

17. Which of the following was/were **used** in your case? (circle as many as apply)

1. [**8**] Mediation
2. [**2**] Arbitration
3. [**6**] Case Evaluation
4. [**21**] Settlement Conference
5. [**10**] Summary Jury Trial

No response - 36

Results available for review. Some respondents chose more than one answer.

17a. **For each method used**, please describe the results.

No response - 40
Responded - 33

18. Did you participate in negotiations with the other side present? (circle one)

1. [**14**] Yes
2. [**53**] No

No response - 7

Results available for review. Some respondents chose more than one answer.

18a. Do you have any comments or suggestions about the negotiation process or its timing?

No response - 41
Responded - 32

19. How many times did you go to court?

_____________ times

Results available for review.

19a. How would you describe the number of times you went to court: (circle one)

1. [**6**] Too many
2. [**22**] About right
3. [**5**] Too few

No response - 40

20. Please add any comments or suggestions regarding the time and cost of litigation in the federal courts.

No response - 41
Responded - 32

Results available for review.

The Advisory Group appreciates the time you took to complete this questionnaire and thanks you for your comments. Your input will help shape the direction of any future changes in the US District Court.

Please return in the enclosed envelope by **May 20, 1992**.

24 Responses Tabulated

CIVIL JUSTICE REFORM ACT ADVISORY GROUP
FOR THE DISTRICT OF NEW HAMPSHIRE

SUMMARY JURY TRIAL QUESTIONNAIRE

Questions 1 through 7 deal with your experience in the case cited on the original cover letter. The Group encourages you to expand on these or any other answers by citing specific examples or offering comments that you feel would assist the Subcommittee in completing its evaluation.

1. *Did you represent the plaintiff or defendant?*

   1. [10] Plaintiff
   2. [14] Defendant

2. *How was your case chosen for summary jury trial?*

   1. [3] At one counsel's request
   2. [3] At joint request of counsel
   3. [18] Assigned by court

3. *Did your case settle subsequent to the summary jury proceeding?*

   1. [15] Yes
   2. [9] No

4. *Was the summary jury trial process helpful in resolving your case?*

   1. [15] Yes
   2. [9] No

   No response - 1

   Results available for review. Some respondents chose more than one answer.

5. *How did your client react to the summary jury process?*

   1. [11] Favorably
   2. [9] Neutrally
   3. [4] Unfavorably

   No response - 1

   Results available for review. Some respondents chose more than one answer.

6. *From your perspective was the summary jury trial worth the preparation time and the time for attendance?*

   1. [19] Yes
   2. [6] No

   Results available for review. Some respondents chose more than one answer.

7. *Did you feel the summary jury trial was cost effective from your client's standpoint?*

   1. [20] Yes
   2. [4] No

8. *In your opinion was the summary jury process more or less effective than arbitration or mediation? Please explain why.*

   1. [16] More effective
   2. [7] Less effective

   No response - 2

   Results available for review. Some respondents chose more than one answer.

   Why:

   ____
   ____
   ____

The remainder of the questions solicit your input on the summary jury trial process in general.

9. *What type of cases are appropriate for summary jury proceedings?*

   1. [10] Contract
   2. [20] Tort, Personal Injury
   3. [13] Tort, Personal Property
   4. [8] Civil Rights
   5. [7] Other (specify)________________________

   Results available for review. Some respondents chose more than one answer.

10. (10-1) *What criteria would you recommend for the timing of summary jury trials?*

   1. [2] At some agreed-upon time following preliminary pretrial but before close of discovery
   2. [20] Shortly after close of discovery and filing of pretrial material
   3. [0] Within 60 days prior to trial
   4. [3] Other (specify) ________________________

   No response - 1

   Results available for review. Some respondents chose more than one answer.

10. (10-2) *What criteria would you recommend for selecting summary jury trials?*

   1. [10] Type of case
   2. [3] Estimated length of trial on merits
   3. [13] Settlement possibilities
   4. [11] Realistic amount in controversy
   5. [8] Other (specify) ________________________

   Results available for review. Some respondents chose more than one answer.

11. *Must a firm trial date be set before a summary jury trial is scheduled?*

   1. [3] Yes
   2. [21] No

12. *How should summary jury trials be assigned?*

    1. [5] At request of one counsel
    2. [9] Only with agreement of all counsel
    3. [10] Assigned by court using established criteria

    Results available for review. Some respondents chose more than one answer.

13. *Does the ability to interview summary juries subsequent to the proceeding assist in settlement and/or evaluation?*

    1. [20] Yes
    2. [4] No

    No response - 1

    Results available for review. Some respondents chose more than one answer.

14. *What changes, if any, in the summary jury trial procedure would make the it more effective and why?*

    No response - 10
    "No changes" - 03
    Various responses - 11

    Results available for review.

The Civil Justice Reform Act Advisory Group thanks you again for your time and effort in completing this questionnaire. Your input is appreciated; we are sure it will assist us in discharging our mandated duties. Please return this survey in the enclosed envelope by ***May 20, 1992.***