

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF NEW JERSEY



FOURTH ANNUAL ASSESSMENT  
OF THE  
CIVIL JUSTICE EXPENSE & DELAY REDUCTION PLAN  
FOR THE IMPLEMENTATION OF THE  
CIVIL JUSTICE REFORM ACT OF 1990

Adopted: May 28, 1996

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**FOURTH ANNUAL ASSESSMENT OF THE PLAN FOR IMPLEMENTATION OF THE  
CIVIL JUSTICE REFORM ACT OF 1990 IN THE  
DISTRICT OF NEW JERSEY**

**I. INTRODUCTION AND METHODOLOGY**

This is the fourth annual review of the Civil Justice Expense and Delay Reduction Plan ("the Plan") adopted by the United States District Court for the District of New Jersey on December 12, 1991. Prior annual assessments were adopted on December 22, 1992, April 29, 1994, and April 28, 1995.

The Court has again relied on the advice of the Civil Justice Expense and Delay Reduction Advisory Committee for the United States District Court for the District of New Jersey ("the Advisory Committee"). The Court also continued to rely on the full-time magistrate judges in the District. The recommendations set forth herein, as well as the results of a survey of attorneys described below, have been carefully considered by the Board of Judges.

The format of this Fourth Annual Assessment follows that of its immediate predecessor. See Third Annual Assessment at 2. Following this "Introduction and Methodology" there is an "Assessment of the Dockets." The annual review then focuses on programs or proposals intended to reduce cost and delay.

## II. ASSESSMENT OF THE DOCKETS

### A. CONDITION OF THE CIVIL AND CRIMINAL DOCKETS<sup>1</sup>

#### 1. Civil<sup>2</sup>

(a) During the twelve-month period ending September 30, 1995, civil case filings increased 7.8% from 6,392 to 6,892. Of this total number, civil filings involving the United States numbered 1,114 cases (16% of the civil docket). The remainder were private in nature.

(b) As of September 30, 1995, 6,078 civil cases were pending. Of this total, 928 were cases in which the United States was a party, prisoner cases numbered 1,018, and the remainder were private in nature.

(c) During the twelve-month period ending September 30, 1995, 6,504 civil cases were terminated. Of this total, 1,227 civil cases involved the United States, prisoner cases numbered 1,124, and the remainder were private in nature. Civil case terminations rose 7.1% over 1994, 0.7% less than the increase in civil filings.

(d) For 1993, 1994 and 1995, the disposition rate of non-prisoner civil cases, from the date of filing of the complaint, was as follows:

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<sup>1</sup> Civil and criminal caseload statistics are for the statistical year which ended September 30, 1995. 1994 statistics are for the statistical year which ended September 30, 1994. 1993 statistics are for the statistical year which ended on September 30, 1993.

<sup>2</sup> Civil caseload statistics for the District are graphed in the Appendix at 1a-11a.



	1993	1994	1995
Total Number of Cases Disposed of	4,818 (100%)	5,121 (100%)	5,380 (100%)
Number of Cases Disposed of Before Any Court Action	623 (12.9%)	661 (12.9%)	805 (15.0%)
Number of Cases Disposed of Before Pretrial	2,184 (45.3%)	2,410 (47.1%)	2,540 (47.2%)
Number of Cases Disposed of During or After Pretrial	1,834 (38.1%)	1,905 (37.2%)	1,885 (35.0%)
Number of Cases Tried to Disposition	177 (3.6%)	145 (2.8%)	150 (2.8%)

During the operation of the Plan there has been an overall decrease in the percentage of civil cases disposed of at trial.

(e) Consistent with (d) above, the median time intervals from filing to disposition of non-prisoner civil cases from the filing of the complaint for 1993, 1994 and 1995 were as follows:

	1993		1994		1995	
	Filings	Months	Filings	Months	Filings	Months
All Civil Cases	(4,818)	7	(5,121)	7	(5,380)	7
Cases Disposed of Before Any Court Action	( 623)	4	( 661)	3	( 805)	3
Cases Disposed of Before Pretrial	(2,184)	5	(2,410)	5	(2,540)	4
Cases Disposed of During or After Pretrial	(1,834)	13	(1,905)	13	(1,885)	13
Cases Disposed of by Trial to Completion	( 177)	25	( 145)	25	( 150)	23

In 1995 97.2% of all non-prisoner civil cases terminated were disposed of within 13 months of filing, well within the eighteen-month period suggested by the Civil

Justice Reform Act (28 U.S.C. § 473(a)(2)(B)) within which a case should be tried.

(f) The median disposition time of 7 months for all civil cases terminated in 1995 ranked the District behind only eleven others nationwide out of 94 (the nationwide average remained at 8 months). The District ranked 72nd nationally in the median disposition time of 23 months for cases tried to completion.<sup>3</sup> However, only 2.8% (150 cases) of all terminated non-prisoner civil cases fell into this category.

(g) The arbitration program (governed by General Rule 47) was responsible for the disposition of 1,254 (or 19.3%) of the 6,504 civil cases disposed of in 1995. The success of the arbitration program is reflected by the following:

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<sup>3</sup> Why did the median disposition time average 23 months in 1995? Several factors may be responsible.

Judgeship vacancy months in the District as of September 30, 1995 totalled 36.4 months. This is the equivalent of the absence of more than three judges during a period when the District's civil and criminal caseloads continued to increase. This has also been the first time in the District's history that three judicial vacancies remained open for more than one year.

A second factor was the increase in weighted filings. Products liability filings increased substantially over 1994 (127%) as did property fraud (103%), labor (26%), environmental (25.6%) and drug-related property forfeitures (15.7%). These time-consuming cases again impacted heavily on the District's median time disposition time.

Finally, the amount of judges' time in terms of hours on the bench presiding over criminal trials increased 17.3% over 1994 in the face of three judgeship vacancies. Criminal trials consumed over 35% of all judges' time on the bench. This percentage (up from 30.7% in 1994) does not include bench time for criminal arraignments, motions, sentencings, etc. The availability of judges to dispose of civil cases (complex or not) is subject to the demands of their criminal calendars.

	1993	1994	1995
Number of Cases Placed in Arbitration	1,593	1,646	1,583
Total Cases Pending in Arbitration	1,237	1,472	1,260
Cases Closed Prior to Appointment of Arbitrator	1,145	1,088	983
Cases Arbitrated or Settled After Arbitrator Appointed	262	290	271
Requests for Trial <u>De Novo</u>	142	173	146
<u>De Novo</u> Requests Closed Before Trial	128	115	106
Cases Left for Trial or Tried to Completion	14	58	48

The number of cases placed in arbitration in 1995 remain consistent with prior years and has increased by 37% since adoption of the Plan. There has also been an increase over the past several years in the number of cases closed before the appointment of an arbitrator or an arbitration hearing.

(h) As of September 30, 1995, 284 three-year or older civil cases were pending. This represents 4.7% of the pending civil caseload.<sup>4</sup> Examples of three-year or older civil cases, by nature of statistical category, are as follows:

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<sup>4</sup> The District's figure of 4.7% remains below the nationwide level of 5.6%.

Pending Civil Cases That Were Three-Years Old on 6/30/91

	<u>Prsnr</u> <u>Civ</u> <u>Rgt</u>	<u>Oth</u> <u>Civ</u> <u>Rgt</u>	<u>P.I.</u>	<u>Cntrct</u>
Newark (127)	13	18	10	24
Trenton (51)	14	8	11	8
Camden (59)	16	11	5	11
Total (237)	43 (18.1%)	37 (15.6%)	26 (11.0%)	43 (18.1%)

Pending Civil Cases That Were Three-Years Old on 9/30/95

	<u>Prsnr</u> <u>Civ</u> <u>Rgt</u>	<u>Oth</u> <u>Civ</u> <u>Rgt</u>	<u>P.I.</u>	<u>Cntrct</u>
Newark (199)	27	32	30	48
Trenton (36)	5	4	10	7
Camden (49)	4	11	2	12
Total (284)	36 (12.7%)	47 (16.5%)	42 (14.8%)	67 (23.6%)

2. Criminal<sup>5</sup>

(a) During the twelve-month period ending September 30, 1995, 831 criminal cases were filed in the District, 726 were terminated and 708 were pending as of September 30, 1995. Of the cases filed, 613 were felonies and 218 were misdemeanors.

(b) In 1995, criminal cases were instituted against 1,099 defendants. Of this number, 880 defendants were charged with felonies and 219 with misdemeanor offenses.

(c) The criminal statistics set forth above may be summarized as follows:

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<sup>5</sup> Criminal caseload statistics for the District are graphed in the Appendix at 12a-14a.

CRIMINAL CASES

	1993	1994	1995
Criminal Cases Filed	818	798	831
Criminal Cases Terminated	775	717	726
Felony Cases Filed	634	586	613
Misdemeanor Cases Filed	184	212	218
Number of Defendants	1,087	1,068	1,099
Number of Defendants (Felony)	898	845	880
Number of Defendants (Misdemeanor)	189	223	219
Criminal Cases Pending Year End	628	710	708

3. Ranking of the District

For the twelve-month period ending September 30, 1995 the District ranked 7th nationwide in total case filings (6,892 civil and 831 criminal) with a total of 7,723.<sup>6</sup>

B. TRENDS IN CASE FILINGS AND DEMANDS BEING PLACED ON THE RESOURCES OF THE DISTRICT

1. Civil

(a) Civil case filings rose 7.8% in 1995. Nationally, civil filings rose 5.1%.

(b) 1995 saw the highest civil filings (6,892) in the history of the District for the second consecutive year.<sup>7</sup> This continued

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<sup>6</sup> Civil and criminal caseloads for the District are summarized in the Appendix at 15a.

<sup>7</sup> Previously, the highest filings were in 1994 (6,386) and 1985 (6,366).

a five-year trend (1990-95) of increased civil filings. The 1995 increase appears to be attributable in large measure to the removal to this Court from the Superior Court of New Jersey of some 500 silicon gel breast implant products liability cases.

2. Criminal

The District's progress with its civil calendar continues to be hampered by criminal filings and trials, especially those drug- and bank-related. Criminal filings increased less than 1% nationwide (0.7%) in 1995. In the District criminal filings increased 4.1%. Felony filings in 1995 increased by 4.6%, somewhat higher than the nationwide percentage.<sup>8</sup> This percentage increase is a reversal of last year's decrease in criminal filings of -2.4%.

There are currently 1,018 defendants pending in criminal cases (869 felony, 130 misdemeanor and 19 others). Since 1990, the number of defendants charged rose from 912 to 1,099 -- a workload increase of 20.5%.

A review of criminal case filing trends also reflects that 1995 filings in drug-related offenses increased 31%, weapons and firearms cases 27% and counterfeiting 9.5%, while postal and tax offenses decreased by -15% and banking law cases fell -11%. These categories represent 72% of the 1995 criminal caseload. Drug and banking cases continue to dominate the criminal calendar and represent 43.7% of the felony cases filed in 1995. There were 434

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<sup>8</sup> Felony filings increased nationwide by approximately 3%.

defendants prosecuted for drug and banking law violations, which defendants represent 49% of all felony defendants.

### III. THE STATE OF THE PLAN IN 1996

The Plan has been in effect for over four years. The Advisory Committee and the Court again deem it appropriate to focus on developments over the past year which involved specific portions of the Plan. These are discussed below.

#### A. CASE MANAGEMENT

The Third Annual Assessment made note of substantial changes in case management and discovery practice resulting from the amended Federal Rules of Civil Procedure. Third Annual Assessment at 11-12. In the fall of 1995 the Advisory Committee conducted a survey of attorneys to ascertain their knowledge of these changes. The district-wide survey results appear in the Appendix at 16a-18a.<sup>9</sup>

The survey demonstrated that a number of attorneys had experienced problems with the automatic disclosure of information required by Civil Rule 26(a)(1). The sense of the Advisory Committee, however, was that attorneys appeared to be conferring and resolving some of these problems. The Advisory Committee also observed the near-universal recognition of the obligation to confer with an attorney in an attempt to resolve a discovery dispute and

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<sup>9</sup> The survey was conducted over a period of several weeks. The attorneys surveyed were those who appeared for initial conferences conducted pursuant to Civil Rule 16(b) in Camden, Newark and Trenton. One magistrate judge at each location distributed the survey questionnaire, which was completed at the time of the initial conference.



concluded that, over time, the changes in case management and discovery set forth in the amended Federal Rules will become familiar to all attorneys. The Court concurs in this observation.

Having noted the number of newly-admitted attorneys appearing at initial conferences, the Advisory Committee considered whether trial counsel should be required to attend. The Advisory Committee rejected such a requirement, observing that it was cost-effective for newly-admitted attorneys to attend, that it was a learning experience for them to do so, and that no particular attorney should be required to attend but that the attorney must have binding authority.

Civil Rule 26(f) requires that parties meet and prepare a discovery plan before an initial conference is conducted. The Advisory Committee was of the opinion that a uniform discovery plan should be developed for use throughout the District. This would ensure that attorneys are on notice of every item that they are expected to address at their meeting and would promote standardization. A uniform plan could also require that attorneys consider consent to trial before a magistrate judge and use of alternative dispute resolution ("ADR"), including mediation. With the approval of the Court, development of a uniform plan remains under consideration by the Advisory Committee.

#### B. MEDIATION

This District has now had a functioning mediation program since the spring of 1992. The Advisory Committee and the Court

remain pleased with the program, which has a settlement rate of 58%.<sup>10</sup>

In the Third Annual Assessment, the Advisory Committee made several recommendations to the Court regarding amendment of General Rule 49 (pursuant to which the mediation program operates) and the accompanying Guidelines for Mediation. Third Annual Assessment at 13-14. These recommendations included, among other things, abandonment of a restriction on the number of cases which a judicial officer could refer to mediation at one time and expansion of the mediation program to permit any civil case (rather than the most difficult ones) to be referred to mediation. All of the proposed amendments have been adopted by the Court.

During the past year the Advisory Committee also considered additional amendments to General Rule 49.<sup>11</sup> General Rule 49A.2(a) provides that, "[a]n individual may be designated to serve as a mediator if he or she ... has been for at least five years a member of the bar of the highest court of this State." This is inconsistent with General Rule 47A.2(a), which provides that, "[a]n individual may be certified to serve as an arbitrator if he or she ... has been for at least five years a member of the bar of the

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<sup>10</sup> Since the commencement of the program, 201 cases have been referred to mediation. Forty-eight (48) of these cases remain in mediation. At present, of the 153 cases no longer in mediation, 88 were settled.

<sup>11</sup> The Advisory Committee also agreed that the form of order used to designate mediators should be amended to remind counsel and the parties of their obligation to attend mediation sessions and also of their obligation to submit to the mediator short position papers on a confidential and ex parte basis.

highest court of a state or the District of Columbia." The intent of General Rule 49A.2(a), when initially adopted, was to impose a higher eligibility requirement for mediators than arbitrators. The sense of the Advisory Committee was that this was not consistent with the expansion of the mediation program and the expanded number of certified mediators available to the Court.<sup>12</sup> Accordingly, the Advisory Committee has recommended that General Rule 49A.2(a) be amended as follows:

An individual may be designated to serve as a mediator if he or she \*\*\* has been for at least five years a member of the bar of the highest court of a state or the District Columbia.

The Advisory Committee has also recommended that General Rule 49E.3 be amended as follows:

Counsel and the parties (including individuals with settlement authority for specific individuals) shall attend all mediation sessions unless directed otherwise by the mediator.

The sense of the Advisory Committee was that there should be a presumption that attorneys and clients attend mediation sessions to impress on them the importance of the mediation process. The proposed amendment to General Rule 49E.3 would accomplish this objective and, at the same time, provide the mediator with discretion not to require attendance as he or she deems appropriate.

Finally, the Advisory Committee has proposed that General Rule 49E.4 be amended. The second sentence of this subsection currently

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<sup>12</sup> Additional mediators underwent training on April 16 and 17, 1996.

provides that, "[a]ll information presented to the mediator shall, on request, be deemed confidential and shall not be disclosed by anyone, including the mediator, without consent, except as necessary to advise the Court of an apparent failure to participate." The sense of the Advisory Committee was that all information presented to the mediator should be deemed confidential in the first instance, again to impress on the attorneys and the parties the seriousness of the mediation process and the need for confidentiality. Accordingly, the Advisory Committee has recommended that the above sentence be amended to read:

All information presented to the mediator shall be deemed confidential unless requested otherwise and shall not be disclosed by anyone, including the mediator, without consent, except as necessary to advise the Court of an apparent failure to participate.

The Court directs the Clerk to give public notice of the three proposed amendments pursuant to 28 U.S.C. § 2071. These will be subject to notice and comment. The Court will consider whether to adopt any and all of the proposed amendments after notice is given and comments received.

Over the past year there was discussion within the Advisory Committee of the best type of civil case to put into mediation. The mediation program is now structured such that any civil action may be referred. It was noted that certain categories of cases (for example, civil rights actions) may present a litigant with unreasonably high expectations and/or some emotional overlay. The sense of the Advisory Committee was that these were not the best cases to mediate. The Advisory Committee agreed -- and the Court

concur -- that commercial cases (and specifically commercial cases with continuing business relationships between the parties) present the best case to mediate.

The attorney survey (referred to in Section IIIA above) included a section addressed to mediation. The results of the survey demonstrated to the Advisory Committee the need for continued education of attorneys about the mediation program. Both the Advisory Committee and the Court remain concerned about possible underutilization of the program.

The Advisory Committee recommended to the Court that seminars be offered to new attorneys on practice in the District and that these seminars include a strong mediation component. Seminars had been conducted in Camden and Newark in the spring of 1995 under the co-sponsorship of the Federal Practice and Procedure Section of the State Bar Association, the Association of the Federal Bar, and the Court. These 1995 seminars, which were fully enrolled, were deemed to be successful by all involved. The Court has approved the continuation of the seminars under the co-sponsorship of the above organizations as well as an expansion of the seminars to include Trenton. The seminars will be conducted in the spring of 1996.

The Advisory Committee also recommended that the Association of the Federal Bar be asked to include a discussion of mediation at its next annual meeting. The intent of such a discussion was to reach senior partners or others who make decisions to mediate. The discussion would also help to refresh judicial officers on the

availability of mediation. The Association agreed to sponsor that discussion, which took place on April 11, 1996.

Finally, the sense of the Advisory Committee was that it would be worthwhile to assemble a group of attorneys who had participated in the mediation program and discuss with them what, if anything, could be done to improve the program and the mediation process itself. Several mediators would also be invited to any such discussion for their thoughts. Planning for this meeting remains in progress with the Advisory Committee.

C. CRIMINAL CASELOAD

The Advisory Committee and the Court remain concerned with the substantial impact of the criminal caseload on civil justice reform in the District. During the past year a subcommittee of the Advisory Committee reported on possible means to lessen the impact of the criminal caseload. These means -- and the determination of the Advisory Committee with regard thereto -- are described below.

It had been proposed that a cut-off date be imposed for acceptance of guilty pleas after which date a defendant would be required to go to trial. This proposal was in response to difficulties faced by Assistant United States Attorneys who must prepare for trial although uncertain as to whether there will be a plea. The Advisory Committee rejected the proposal. The sense of the Advisory Committee was that imposition of a cut-off date would be unworkable. First, it was assumed that judicial officers would, in any event, accept "late" pleas rather than proceed to trial.

Second, giving the varying nature and complexity of criminal cases, there was a sense of the Advisory Committee that cut-off dates must be arrived at on an ad hoc basis for each criminal case.<sup>13</sup>

The Advisory Committee also considered the management of criminal cases. The sense of the Advisory Committee was that case management conferences are unnecessary in misdemeanor cases and in some felony cases. However, it was also the sense of the Advisory Committee that it might be advantageous to conduct conferences after arraignments in certain categories of criminal cases. These post-arraignment conferences might permit the Government and defendants to avoid motion practice and might also facilitate pleas. Concern was expressed, however, that a judicial officer might express an opinion as to the outcome of a prosecution during the conference and that plea discussions not violate Criminal Rule 11(e)(1).

The question arose to which judicial officer might conduct the conference. If a magistrate judge were to be utilized, the conference might have to be defined as an "additional duty" which might be referred by a district judge under 28 U.S.C. § 636(b)(3). If so, a Report and Recommendation to the district judge might be

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<sup>13</sup> Plea cut-off dates have been established in the State of New Jersey. Informal advice from the New Jersey Administrative Office of the Courts to the Advisory Committee is that it is difficult to study empirically the effect of plea cut-offs as this is only one of a package of reforms in the area of criminal case management. Informal advice has also been that the most important part of this package is differentiated case management (with most criminal cases being assigned to specific teams to manage). The information available appears to be that plea cut-offs work best when a State judge can ensure that a criminal case has been prepared and is ready for trial.

a necessary outcome of the conference. This was rejected by the Advisory Committee as creating an additional burden for the parties and for the Court. In the alternative, the Advisory Committee agreed that any post-arraignment conference should be by consent of the Government and the defendant and be informal in nature. The Advisory Committee also agreed to recommend to the Court that, on an experimental basis, either one district judge conference another's cases or one magistrate judge conference one district judge's cases. This recommendation has not yet been presented to the Court. The recommendation was brought before the magistrate judges, who asked that it be considered by the Criminal Advisory Board.

There was also consideration of an apparent problem in the District occasioned by attorneys representing defendants before more than one judicial officer at one time, as a consequence of which the attorney is on trial before one judicial officer and unavailable for trial before the other. This creates scheduling problems both for judicial officers and for the United States Attorney. The Advisory Committee considered -- and rejected -- a proposed amendment to the General Rules which would provide specific authority for a judicial officer to force an attorney to either proceed to trial at a specific date or withdraw from representation of the client. The opinion of the Advisory Committee was that no formal action need be taken but that, instead, any problem be left to judicial officers to deal with on an ad hoc basis.



D. PRISONER PRO SE LITIGATION

The Third Annual Assessment reported, at pages 16 and 17, on the disproportionate impact of prisoner pro se litigation. Over the past year, the Advisory Committee, with the benefit of the advice of a subcommittee established to address the impact of prisoner pro se litigation, considered a number of proposals to lessen the impact of that litigation on the Court.<sup>14</sup>

It was reported to the Advisory Committee that the State of New Jersey might have been willing to establish an administrative alternative to civil rights litigation in cases alleging ineffective medical treatment. Such an administrative alternative would be pursuant to 42 U.S.C. § 1997(e) and would require the State to establish an appropriate administrative hearing/appeals mechanism. Medical treatment cases had been selected by the State because of the difficulty in securing complete medical records of prisoner litigants (which might preclude dispositive motions) and because the State had expressed a willingness to entertain settlement of cases within this category. However, in the interim, the State enacted legislation which, as of April 1, 1996, imposed a co-payment obligation on prisoners for medical services and which, as of April 27, 1996, "privatized" medical services within State prison facilities. Given these initiatives, the New Jersey Department of Corrections deemed it inappropriate to establish any administrative mechanism at this time.

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<sup>14</sup> The Advisory Committee wishes to express its appreciation to Tara A. Dunican and Mary Louise Zandoni, the District's pro se law clerks, who assisted in this area.

The Advisory Committee noted that there was no limit on the number of defendants a pro se plaintiff could name and that, if the plaintiff was declared indigent, the United States Marshal would have to effect service on all of the defendants. It was also noted that service might be made at different times such that all dispositive motions on behalf of all defendants could not be brought at once. It was reported to the Advisory Committee that in some judicial districts the Attorney General agreed to waive service for all defendants employed by a corrections department. It was also reported that the New Jersey Department of Corrections and the Marshal had agreed that the latter could make service on a specific person at each institutional facility for all corrections employees employed at that facility. It was also noted that service is often made by mail and that the Marshal has one employee at each courthouse to do this. The sense of the Advisory Committee was that nothing else could be done to improve service on defendants in prisoner pro se litigation.

The Advisory Committee had earlier rejected imposition of a partial filing fee on prisoner pro se litigants. It had done so after having been advised by the Department of Corrections that accurate information on prisoners' accounts was unavailable. However, the Attorney General of New Jersey revisited the issue of prisoners' accounts and thereafter reported to the Advisory Committee that accurate information should be available on a computerized basis such that a partial filing fee could again be considered. The Advisory Committee was similarly advised by the

United States Attorney that the United States Bureau of Prisons had accurate information available. Accordingly, the Advisory Committee again turned to imposition of a partial filing fee.

A partial filing fee requirement would not be unique. "A recent study by the Federal Judicial Center found that forty federal district courts require partial filing fees. Seventeen of these forty districts (18% of all districts) have a local rule or standing order that permits or requires judges to assess partial filing fees." Outline of Resource Guide for Managing Prisoner Civil Rights Litigation 17-18 (Federal Judicial Center: draft ed. 1995) ("Outline") (footnotes omitted). It should also be noted in this regard that, "[m]ore than 95% of prisoner suits are filed in forma pauperis. With rare exceptions, all such cases are filed pro se." Outline at 1 (quoting Eisenberg, "Rethinking Prisoner Civil Rights Cases and the Provision of Counsel," 17 Southern Illinois Univ. L.J. 417, 420 n.8. (1993).

The Third Circuit Court of Appeals approved the concept of a partial filing fee in Bullock v. Suomela, 710 F.2d 102 (3d Cir. 1983) and Jones v. Zimmerman, 752 F.2d 76 (3d Cir. 1985). The Court of Appeals itself recognized in Deutsch v. United States, 67 F.3d 1080 (3d Cir. 1995), that, "[t]he absence of an economic disincentive has developed into a major concern for the federal courts since the explosion of in forma pauperis prisoner litigation began almost thirty years ago." 67 F.3d at 1088. Moreover, although Section 1915 of Title 28 of the United States Code "does contemplate providing access to indigent persons \*\*\* 'cost-free' is

a misnomer, because the taxpayers must pay to support the system, both with money and in the sense that they receive diminished services from the courts." 67 F.3d at 1089. Deutsch commented on a partial filing fee requirement in dicta:

Courts sometimes require in forma pauperis plaintiffs to pay a portion of court costs and filing fees. \*\*\*. We commend such procedures. Although we believe that requiring partial payment remains a sound practice, it is not necessary that district courts rely exclusively on partial payment, particularly when § 1915(d) authorizes the dismissal of claims that are filed because there is no economic disincentive. [67 F.3d at 1089 n.9 (emphasis added) (citations omitted)].

It appears that, to withstand judicial review, a partial filing fee should have the following elements: (1) published procedures; (2) uniform application; (3) a reasonable fee; (4) a clear method of fee computation; (5) availability of installment payments of the partial fee; and (6) a waiver provision. Outline at 18-23.<sup>15</sup>

The Advisory Committee asked the Attorney General of New Jersey to draft a partial filing fee requirement. Correspondence dated February 13, 1996, which sets forth the recommendation of the Attorney General, appears in the Appendix at 51a-54a. The Advisory Committee also received comments on the draft from the Court's pro se clerks, which comments appear in a memorandum dated March 13, 1996. Appendix at 55a-58a.

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<sup>15</sup> The Outline consists of 60 pages of text as well as appendices. Pages 18-23 of the Outline appear in the Appendix at 19a-29a.

The Federal Judicial Center study referred to above appears in the Appendix at 30a-50a.

The Advisory Committee has recommended to the Court that the General Rules be amended to impose a partial filing fee requirement on prisoner pro se litigants. This could be imposed in any civil action brought by a prisoner as well as habeas petitions under 28 U.S.C. § 2254 or motions to vacate, set aside or correct sentences under 28 U.S.C. § 2255.<sup>16</sup>

In making this recommendation, the Advisory Committee was aware that no empirical evidence is available to demonstrate the effect of a partial filing fee on the civil caseload. The Advisory Committee was also aware that some judicial districts which had imposed a partial filing fee abandoned it, having concluded that the administrative burden outweighed any benefit. On the other hand, the Advisory Committee was aware that the New Jersey Legislature had approved -- and sent to the Governor on February 29, 1996 -- a bill which would, among other things, require a prisoner to pay a partial filing fee. New Jersey Assembly Bill No. 879. This legislation was signed into law on March 28, 1996, as Public Law 1996, Chapter 11.

At the request of the Advisory Committee, the Attorney General provided the following description of prisoners' accounts:

There are a number of ways in which funds can be deposited into an inmate's account. The primary and most consistent manner is from monthly inmate wages. All inmates in the New Jersey State Prison System are afforded the opportunity to work. This would include inmates who are in close custody units (Administrative

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<sup>16</sup> Thus, an indigent who instituted a civil rights action against State officers could be required to pay a partial fee as could a plaintiff who instituted an action against the United States under (for example) the Federal Tort Claims Act.

Segregation) and in the hospital. The minimum pay an inmate can receive per month is \$26. However, the average inmate earns \$36.60 per month. Last year alone the Department of Corrections (DOC) paid out 11 million dollars in inmate wages. In addition to inmate wages, inmate accounts can be supplemented by money gifts from friends or relatives. The DOC reports that 35% of inmates regularly receive money into their accounts from friends or relatives. Inmates may also maintain outside accounts and have monies deposited to their accounts on a monthly basis. The average inmate, who does not refuse to work will have his account accredited on a monthly basis with \$36. In no case would the monthly amount be less than \$26.

Inmates may use the money in their accounts for any purpose that does not conflict with the orderly running or security of the institution. They may purchase items from the commissary or from outside vendors. The items run the gamut from toothbrushes to color televisions. Inmates may send money out to relatives, friends, charities, political organizations, etc.; as long as they follow the procedures set up by the prison.

The Advisory Committee deemed it appropriate that this Court and the State of New Jersey adopt the same position with regard to a partial filing fee to discourage prisoners from attempting to "forum shop." The Advisory Committee also recognized that both the burdens and benefits of a partial filing fee should be measured over time and that the Court could reassess whether the fee was appropriate.

Finally, with regard to any administrative burden, the Advisory Committee was advised that the Court had recently authorized a third pro se clerk and was satisfied that, with the assistance of the Clerk of the Court, any administrative burden could be minimized and that the pro se clerks might assist the Clerk and the Court in this regard.

The recommendation of the Advisory Committee is as follows:

- (1) Delete General Rule 29B;
- (2) Delete General Rule 29C;
- (3) Expand General Rule 10 to incorporate the following:

C. Upon receipt of a complaint, petition or motion and an application to proceed in forma pauperis and supporting documentation as required for prisoner litigants, the Clerk shall promptly forward these papers to the Court for a determination of whether the applicant shall be granted leave to proceed in forma pauperis and whether the complaint shall be served by the Marshal. Prior to service of process by the Marshal, the Court shall determine whether sua sponte dismissal is appropriate under 28 U.S.C. § 1915(d).

D. Whenever a federal, state, or local prisoner submits for filing a civil complaint, petition for writ of habeas corpus or motion under 28 U.S.C. § 2255, and applies for leave to proceed in forma pauperis, the prisoner shall also submit a certified copy of his or her trust fund account statement or equivalent declaration thereof under 28 U.S.C. § 1746 for the six-month period directly preceding submission of the complaint, petition or motion. The statement or declaration shall be requested from the appropriate official at the institution where the prisoner is confined. If the prisoner has been confined at the institution for less than six months, additional information shall be furnished by the prisoner as follows:

1. In the case where the prisoner has transferred from another State institution, he or she shall request a statement of the account for the six-month period from the Central Office of the Department of Corrections in Trenton, New Jersey.

2. In the case of a State prisoner who is newly incarcerated or has recently transferred to or from a county jail or a federal institution, the prisoner shall provide the Court with the name of the institution transferred from and any account statements currently available from the present place of incarceration. The Court

may, in its discretion, seek further information from the prior or current institution.

E. Should sua sponte dismissal be inappropriate under 28 U.S.C. § 1915(d), a partial filing fee shall be required by the Court and submitted by the prisoner in an amount equal to twenty percent (20%) of the average monthly balances of, or deposits to, the prisoner's account for the six (6) months prior to the submission of the complaint, petition or motion. In no event shall the fee exceed that set by the Judicial Conference of the United States.

F. If a prisoner claims exceptional circumstances that render him or her unable to pay the partial filing fee, in addition to the papers required under paragraphs C, D, or E of this Rule, the prisoner shall submit an affidavit to the Court with the application for leave to proceed in forma pauperis. This affidavit shall outline the circumstances that justify a different payment or relief from the partial filing fee. The affidavit shall be examined by the Court, which shall have the discretion to grant or deny relief from the partial filing fee.

G. The plaintiff shall have thirty (30) days within which to pay the partial filing fee. If the plaintiff has not paid the partial filing fee, the action shall be dismissed without prejudice by the Court on its own initiative.

H. If the prison account of any prisoner exceeds \$200.00, he or she shall not be considered eligible to proceed in forma pauperis.

The Court deems it appropriate to defer public notice of the proposed amendments until these are considered at the next meeting of the Board of Judges. The Court deems further consideration of the proposed amendments to be appropriate for several reasons, including the enactment into law on April 26, 1996, of the Prison



Litigation Reform Act (Pub. L. No. 104-134, 110 Stat. 1321) which, among other things, imposes a partial filing fee requirement and which might render superfluous, or be inconsistent with, the proposed amendment.

The Advisory Committee has also proposed that the form of prisoner complaint be revised. The form complaint now in use was prepared over 10 years ago based on a model drafted by the Federal Judicial Center and is made available to prisoners in facilities throughout the State. The revision is intended to clarify and update instructions to the prisoner plaintiff, provide additional space for information to be inserted and "capture" address and other information about defendants. The revision also deletes information on prisoner use of any administrative grievance procedure and included a provision by which a prisoner plaintiff could request a jury or bench trial. The revision is derived from suggestions from the Office of the Attorney General, the pro se clerks, the Clerk of the Court and the Advisory Committee. The revised form of prisoner complaint appears in the Appendix at 59a-63a. The Court has adopted the revised form subject to incorporation of any appropriate language with regard to the Prison Litigation Reform Act.

E. CERTIFICATION TO THE NEW JERSEY SUPREME COURT

Over the past year the Advisory Committee reviewed the Proposed Long Range Plan for the Federal Courts. One recommendation on which the Advisory Committee deemed it appropriate to act called for states to "adopt certification procedures, where they do not currently exist, under which federal courts (both trial and appellate) could submit novel or difficult state law questions to state supreme courts." This recommendation has been adopted by the Judicial Conference of the United States. Report of the Proceedings of the Judicial Conference of the United States at 42 (Sept. 19, 1995). The commentary on this recommendation is as follows:

State court certification procedures benefit the federal courts by occasionally relieving them of the time-consuming task of deciding questions of law more wisely left -- on federalism principles -- to the states. In 43 states, the District of Columbia, and Puerto Rico, the court of last resort has either mandatory or discretionary jurisdiction to consider state-law issues upon certification from a federal court. Some, but not all, of these states permit consideration of questions certified by any Article III court. All 50 states should authorize the federal courts, both trial and appellate, to employ these procedures for obtaining authoritative interpretations of state law.

Criticism has been levied that certification procedures engender long delays in the federal appellate process and hence that 'the game is not worth the candle.' Certification procedures should be attentive to this problem, and federal judges should be alerted to the advisability of exercising restraint. [Long Range Plan for the Federal Courts at 32-33 (Dec. 1995)].

Certification of this nature is not available in New Jersey.

The Advisory Committee was of the opinion that the New Jersey Supreme Court should be encouraged to adopt a procedure by which,

rather than predict how a novel or difficult State law question would be resolved by that court, the District Court or the Third Circuit Court of Appeals could certify the question to the New Jersey Supreme Court. The Court adopts this recommendation and requests that the New Jersey Supreme Court consider adoption of a certification procedure.

IV. CONCLUSION

Annual assessments such as this are to be prepared through 1997 for each of the 94 district courts in the United States. The final report of the Rand Corporation on the experimentation engendered by the Civil Justice Reform Act across the United States is due in 1996.

As we approach these milestones in civil justice reform, the United States District Court for the District of New Jersey remains committed to reform tailored to the needs of the Court and the public. With an eye toward past reform, we look to the future of providing an essential service to the Nation.

Respectfully submitted,

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

By:   
ANNE E. THOMPSON, Chief Judge

[INDEX TO APPENDIX and APPENDIX follows]

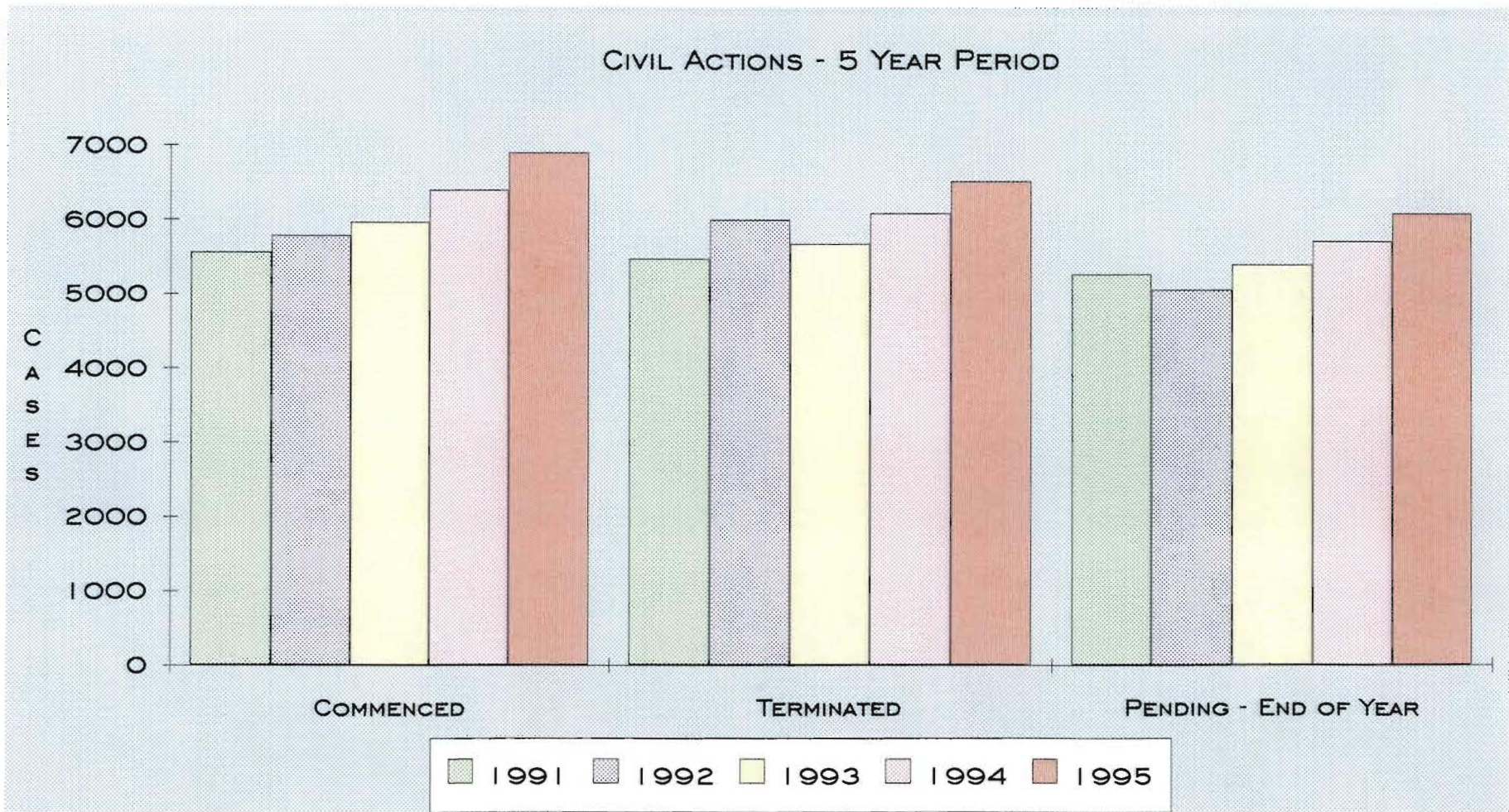
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Civil Actions  
5 Year Period

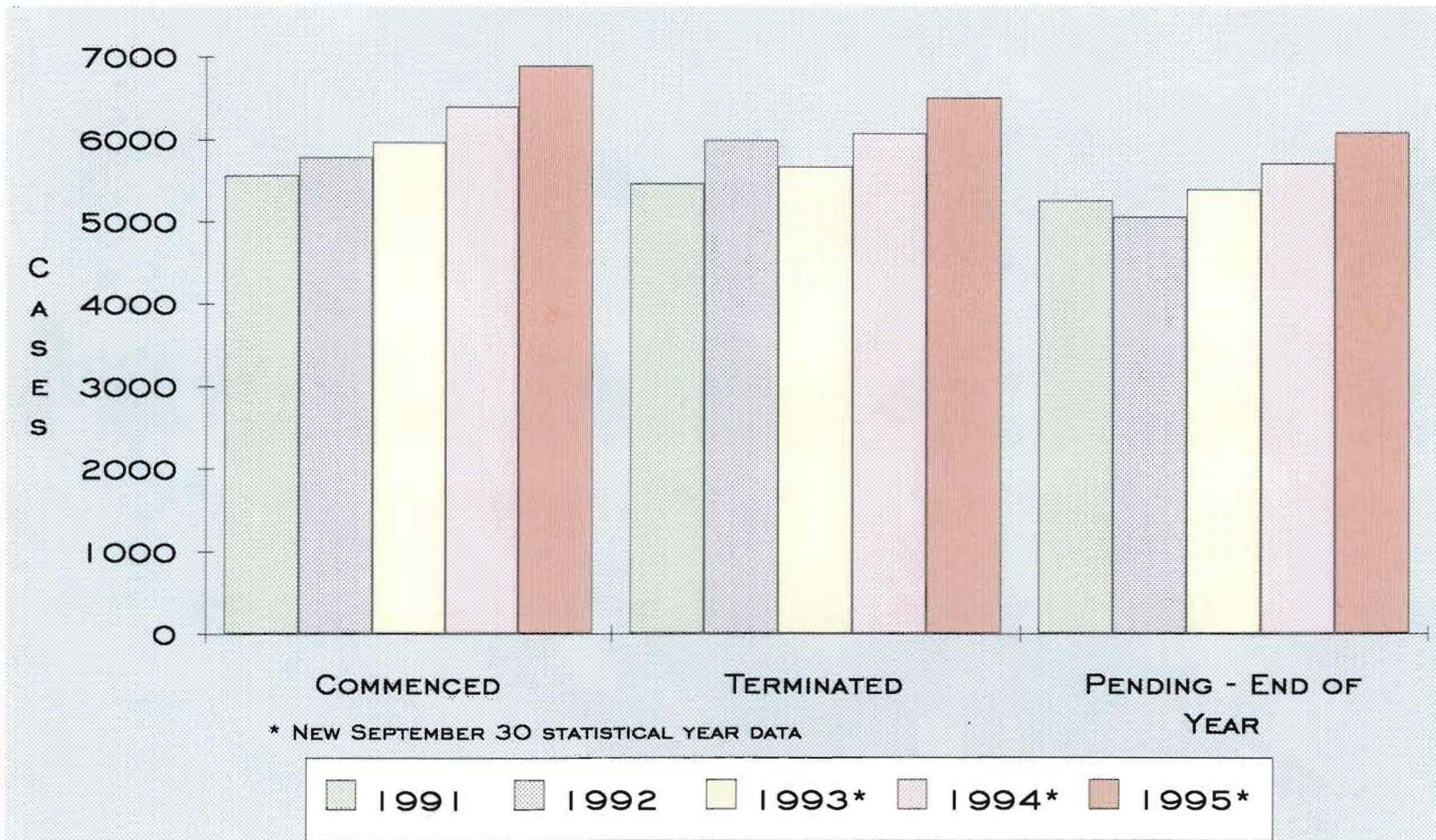
Civil Actions	Commenced	Terminated	Pending - End of Year
1991	5560	5466	5255
1992	5780	5992	5052
1993	5960	5668	5386
1994	6392	6074	5703
1995	6892	6504	6078







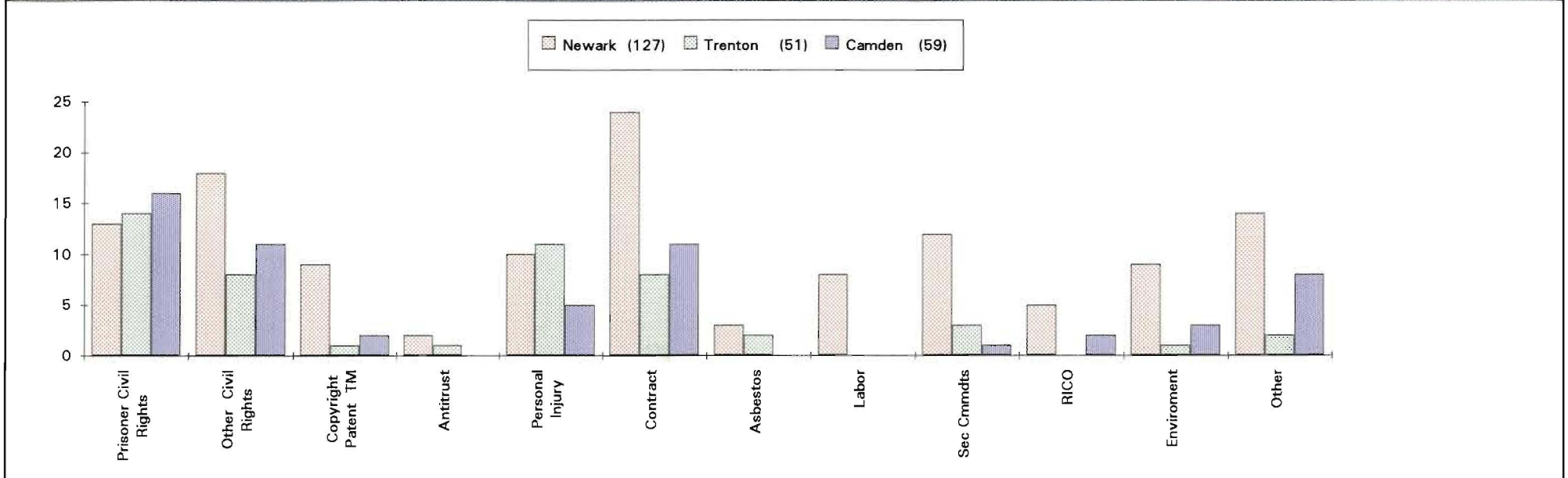
CIVIL ACTIONS	COMMENCED	TERMINATED	PENDING - END OF YEAR
1991	5560	5466	5255
1992	5780	5992	5052
1993*	5960	5668	5386
1994*	6392	6074	5703
1995*	6892	6504	6078





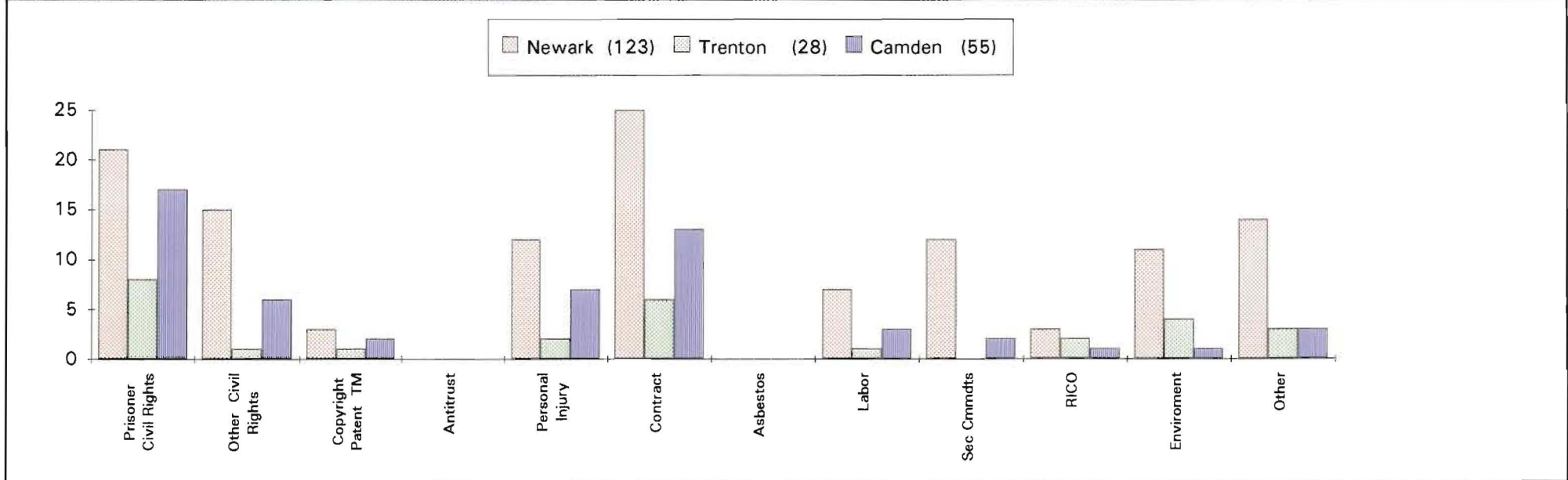
Pending Civil Cases  
Three Years or Older  
June 30, 1991

1991	Prisoner Civil Rights	Other Civil Rights	Copyright Patent TM	Antitrust	Personal Injury	Contract	Asbestos	Labor	Sec Cmmndts	RICO	Enviroment	Other
<b>Vicinage</b>												
Newark (127)	13	18	9	2	10	24	3	8	12	5	9	14
Trenton (51)	14	8	1	1	11	8	2	0	3	0	1	2
Camden (59)	16	11	2	0	5	11	0	0	1	2	3	8
<b>Totals (237)</b>	<b>43</b>	<b>37</b>	<b>12</b>	<b>3</b>	<b>26</b>	<b>43</b>	<b>5</b>	<b>8</b>	<b>16</b>	<b>7</b>	<b>13</b>	<b>24</b>
<b>% Of Caseload</b>	<b>18.14%</b>	<b>15.61%</b>	<b>5.06%</b>	<b>1.27%</b>	<b>10.97%</b>	<b>18.14%</b>	<b>2.11%</b>	<b>3.38%</b>	<b>6.75%</b>	<b>2.95%</b>	<b>5.49%</b>	<b>10.13%</b>



Pending Civil Cases  
Three Years or Older  
June 30, 1992

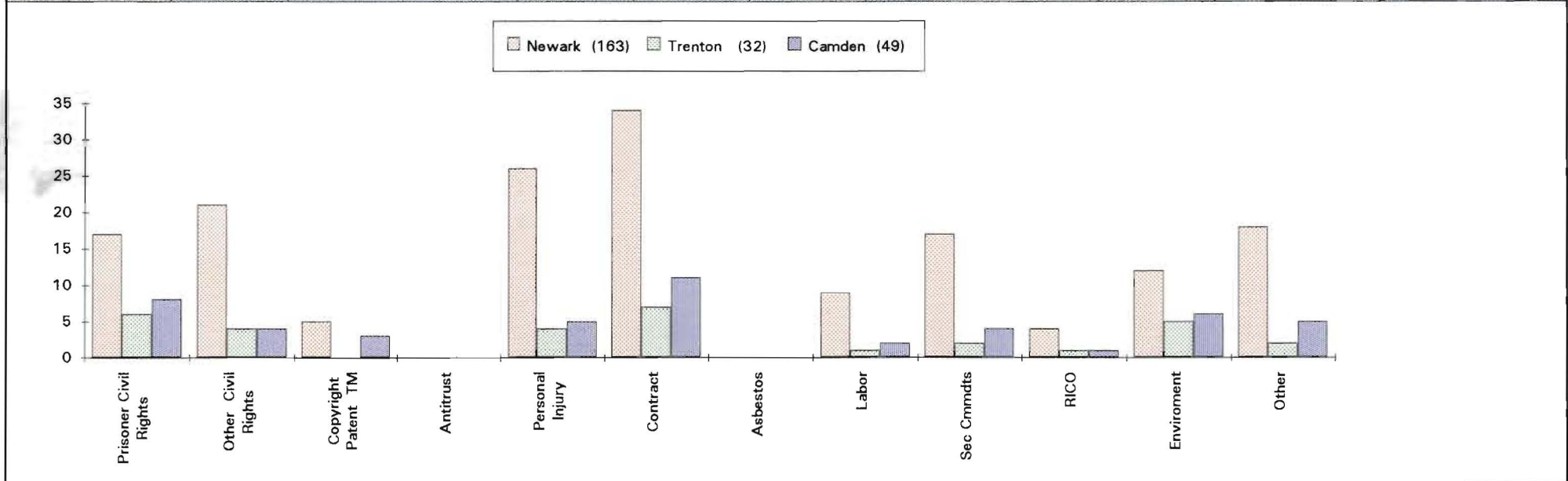
1992	Prisoner Civil Rights	Other Civil Rights	Copyright Patent TM	Antitrust	Personal Injury	Contract	Asbestos	Labor	Sec Cmndts	RICO	Enviroment	Other
<i>Vicinage</i>												
Newark (123)	21	15	3	0	12	25	0	7	12	3	11	14
Trenton (28)	8	1	1	0	2	6	0	1	0	2	4	3
Camden (55)	17	6	2	0	7	13	0	3	2	1	1	3
<b>Totals (206)</b>	<b>46</b>	<b>22</b>	<b>6</b>	<b>0</b>	<b>21</b>	<b>44</b>	<b>0</b>	<b>11</b>	<b>14</b>	<b>6</b>	<b>16</b>	<b>20</b>
% Of Caseload	22.33%	10.68%	2.91%	0.00%	10.19%	21.36%	0.00%	5.34%	6.80%	2.91%	7.77%	9.71%





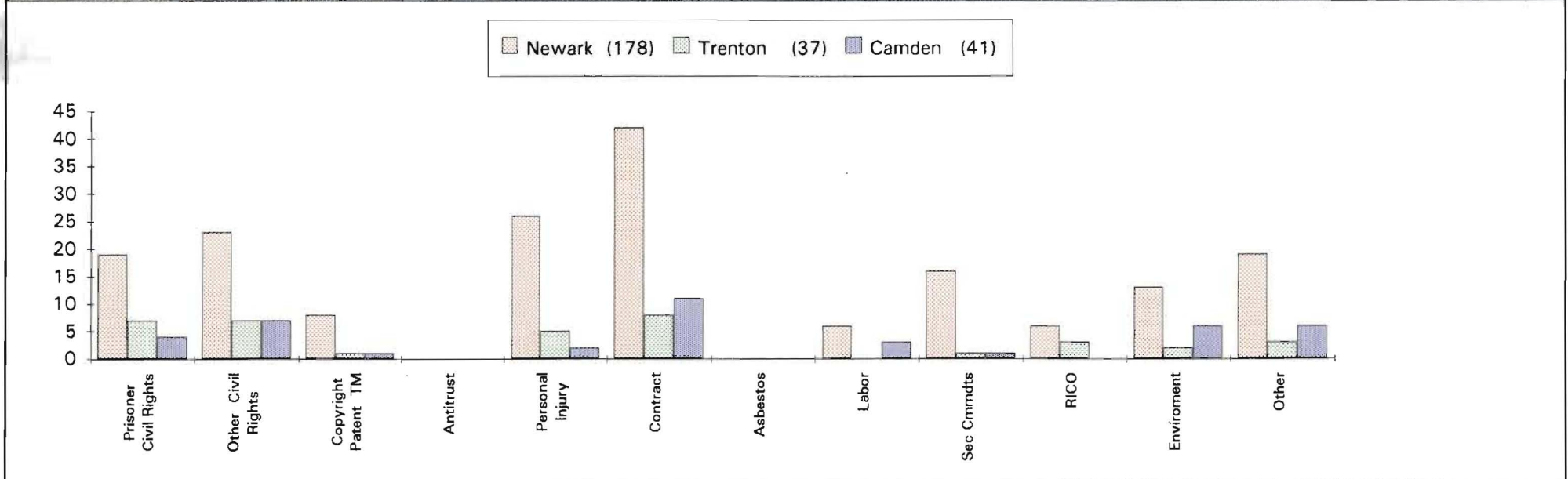
Pending Civil Cases  
Three Years or Older  
June 30, 1993

1993	Prisoner Civil Rights	Other Civil Rights	Copyright Patent TM	Antitrust	Personal Injury	Contract	Asbestos	Labor	Sec Cmmdts	RICO	Enviroment	Other
<i>Vicinage</i>												
Newark (163)	17	21	5	0	26	34	0	9	17	4	12	18
Trenton (32)	6	4	0	0	4	7	0	1	2	1	5	2
Camden (49)	8	4	3	0	5	11	0	2	4	1	6	5
<b>Totals (244)</b>	<b>31</b>	<b>29</b>	<b>8</b>	<b>0</b>	<b>35</b>	<b>52</b>	<b>0</b>	<b>12</b>	<b>23</b>	<b>6</b>	<b>23</b>	<b>25</b>
<b>% Of Caseload</b>	<b>12.70%</b>	<b>11.89%</b>	<b>3.28%</b>	<b>0.00%</b>	<b>14.34%</b>	<b>21.31%</b>	<b>0.00%</b>	<b>4.92%</b>	<b>9.43%</b>	<b>2.46%</b>	<b>9.43%</b>	<b>10.25%</b>



Pending Civil Cases  
Three Years or Older  
September 30, 1994

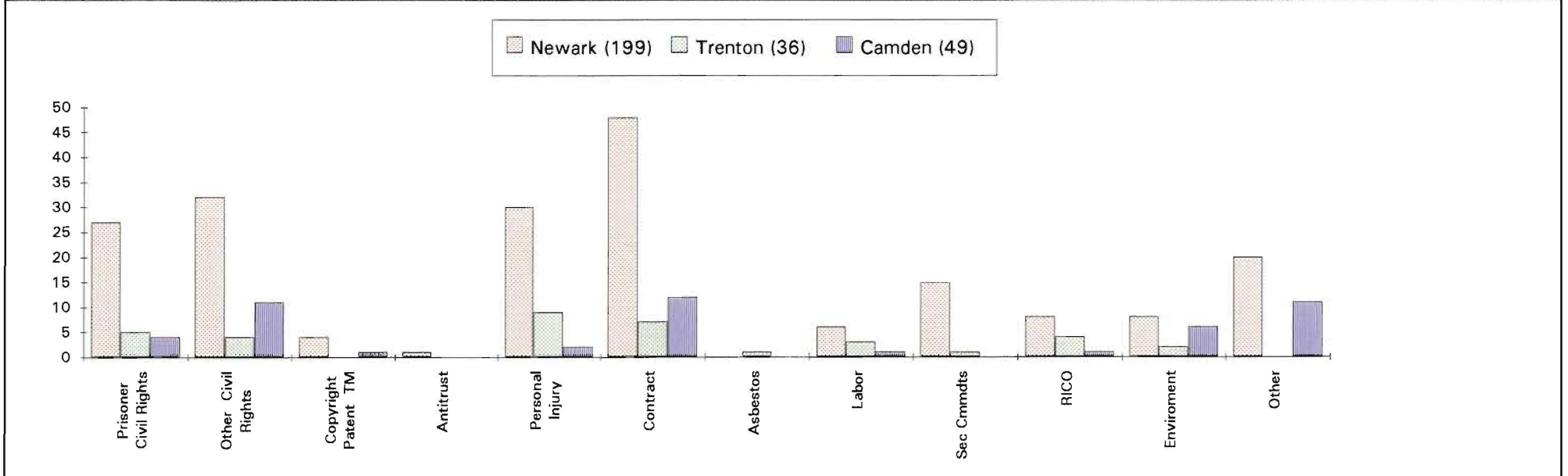
1994	Prisoner Civil Rights	Other Civil Rights	Copyright Patent TM	Antitrust	Personal Injury	Contract	Asbestos	Labor	Sec Cmmdts	RICO	Enviroment	Other
<b>Vicinage</b>												
Newark (178)	19	23	8	0	26	42	0	6	16	6	13	19
Trenton (37)	7	7	1	0	5	8	0	0	1	3	2	3
Camden (41)	4	7	1	0	2	11	0	3	1	0	6	6
<b>Totals (256)</b>	<b>30</b>	<b>37</b>	<b>10</b>	<b>0</b>	<b>33</b>	<b>61</b>	<b>0</b>	<b>9</b>	<b>18</b>	<b>9</b>	<b>21</b>	<b>28</b>
<b>% Of Caseload</b>	<b>11.72%</b>	<b>14.45%</b>	<b>3.91%</b>	<b>0.00%</b>	<b>12.89%</b>	<b>23.83%</b>	<b>0.00%</b>	<b>3.52%</b>	<b>7.03%</b>	<b>3.52%</b>	<b>8.20%</b>	<b>10.94%</b>





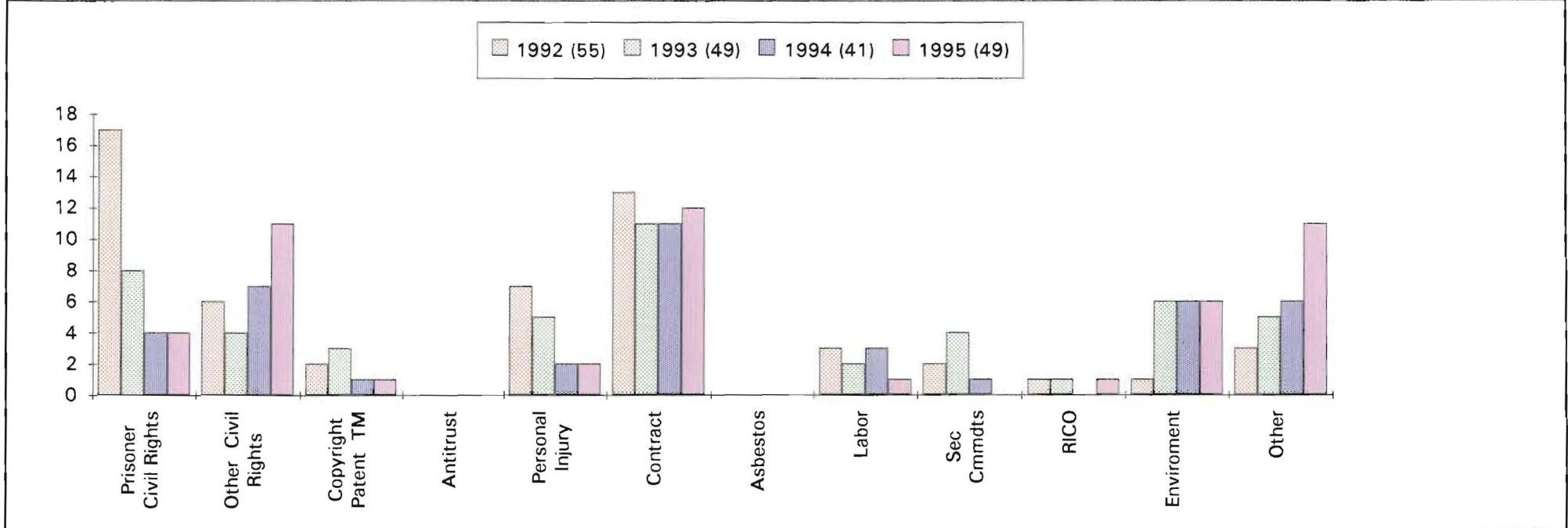
Pending Civil Cases  
Three Years or Older  
September 30, 1995

1995	Prisoner Civil Rights	Other Civil Rights	Copyright Patent TM	Antitrust	Personal Injury	Contract	Asbestos	Labor	Sec Cmmdts	RICO	Enviroment	Other
<b>Vicinage</b>												
Newark (199)	27	32	4	1	30	48	0	6	15	8	8	20
Trenton (36)	5	4	0	0	9	7	1	3	1	4	2	0
Camden (49)	4	11	1	0	2	12	0	1	0	1	6	11
<b>Totals (284)</b>	36	47	5	1	41	67	1	10	16	13	16	31
<b>% Of Caseload</b>	12.68%	16.55%	1.76%	0.35%	14.44%	23.59%	0.35%	3.52%	5.63%	4.58%	5.63%	10.92%



Pending Civil Cases  
Three Years or Older  
Camden Vicinage

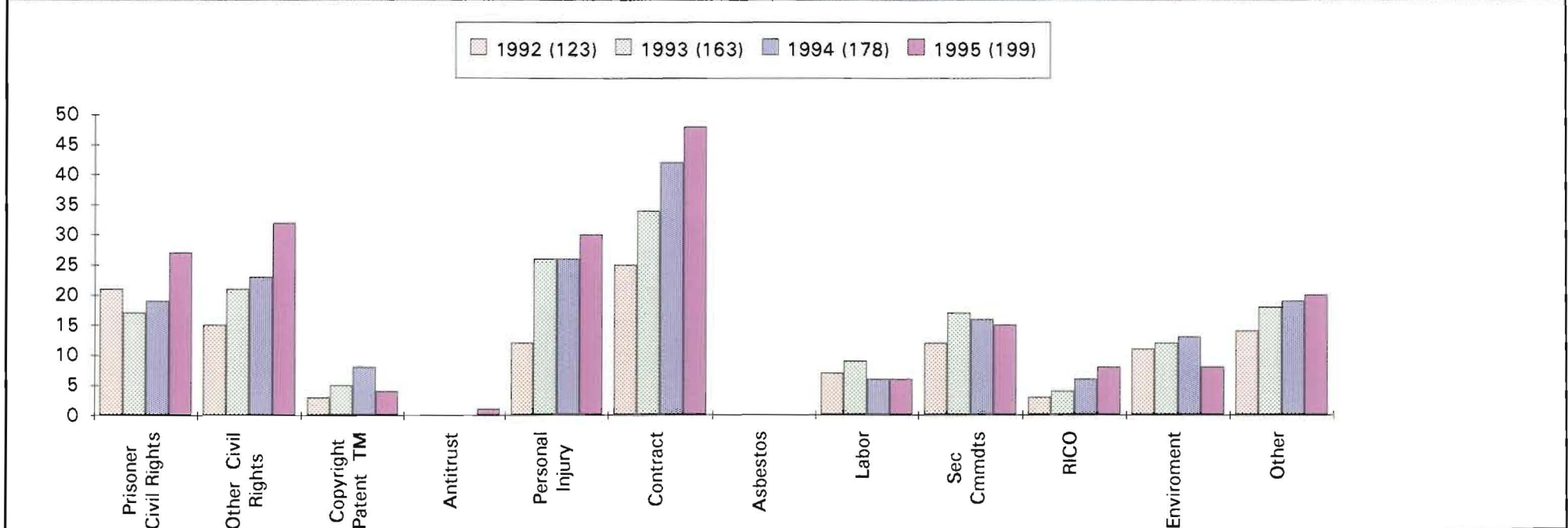
<i>Camden:</i>	<i>Prisoner Civil Rights</i>	<i>Other Civil Rights</i>	<i>Copyright Patent TM</i>	<i>Antitrust</i>	<i>Personal Injury</i>	<i>Contract</i>	<i>Asbestos</i>	<i>Labor</i>	<i>Sec Cmmdts</i>	<i>RICO</i>	<i>Enviroment</i>	<i>Other</i>
<b>1992 (55)</b>	17	6	2	0	7	13	0	3	2	1	1	3
<b>1993 (49)</b>	8	4	3	0	5	11	0	2	4	1	6	5
<b>1994 (41)</b>	4	7	1	0	2	11	0	3	1	0	6	6
<b>1995 (49)</b>	4	11	1	0	2	12	0	1	0	1	6	11
<b>Totals (194)</b>	<b>33</b>	<b>28</b>	<b>7</b>	<b>0</b>	<b>16</b>	<b>47</b>	<b>0</b>	<b>9</b>	<b>7</b>	<b>3</b>	<b>19</b>	<b>25</b>
<b>% Of Caseload</b>	<b>17.01%</b>	<b>14.43%</b>	<b>3.61%</b>	<b>0.00%</b>	<b>8.25%</b>	<b>24.23%</b>	<b>0.00%</b>	<b>4.64%</b>	<b>3.61%</b>	<b>1.55%</b>	<b>9.79%</b>	<b>12.89%</b>





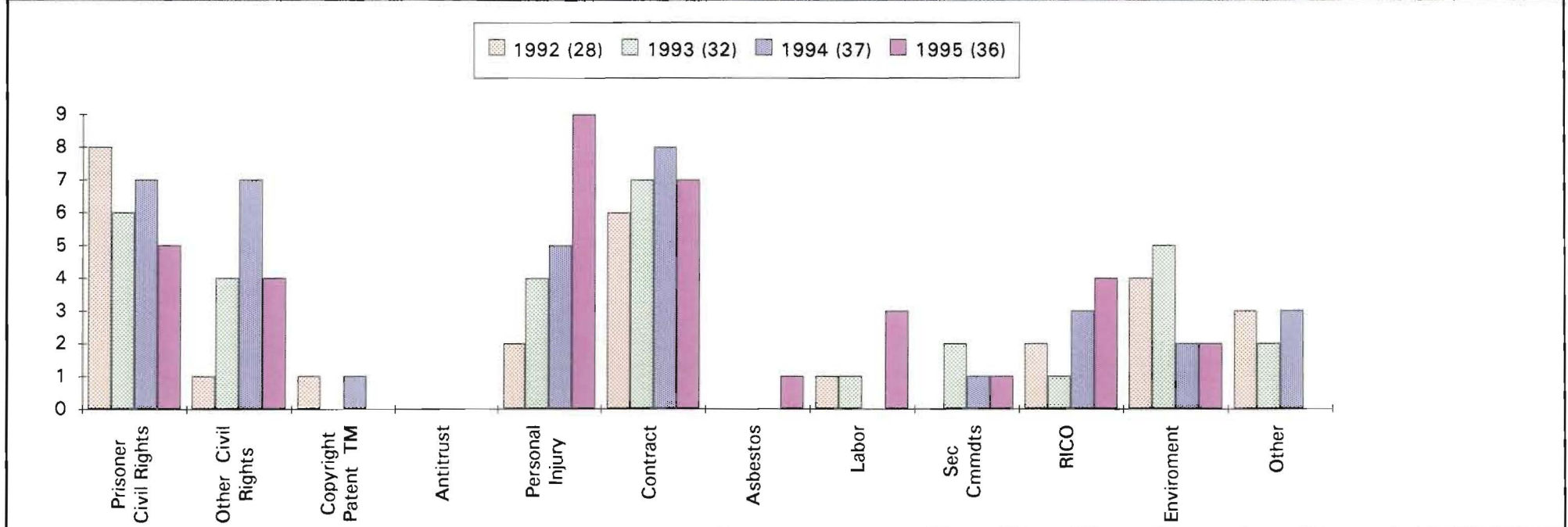
Pending Civil Cases  
Three Years or Older  
Newark Vicinage

Newark	Prisoner Civil Rights	Other Civil Rights	Copyright Patent TM	Antitrust	Personal Injury	Contract	Asbestos	Labor	Sec Cmmdts	RICO	Enviroment	Other
1992 (123)	21	15	3	0	12	25	0	7	12	3	11	14
1993 (163)	17	21	5	0	26	34	0	9	17	4	12	18
1994 (178)	19	23	8	0	26	42	0	6	16	6	13	19
1995 (199)	27	32	4	1	30	48	0	6	15	8	8	20
<b>Totals (663)</b>	<b>84</b>	<b>91</b>	<b>20</b>	<b>1</b>	<b>94</b>	<b>149</b>	<b>0</b>	<b>28</b>	<b>60</b>	<b>21</b>	<b>44</b>	<b>71</b>
% Of Caseload	12.67%	13.73%	3.02%	0.15%	14.18%	22.47%	0.00%	4.22%	9.05%	3.17%	6.64%	10.71%



Pending Civil Cases  
Three Years or Older  
Trenton Vicinage

<i>Trenton</i>	<i>Prisoner Civil Rights</i>	<i>Other Civil Rights</i>	<i>Copyright Patent TM</i>	<i>Antitrust</i>	<i>Personal Injury</i>	<i>Contract</i>	<i>Asbestos</i>	<i>Labor</i>	<i>Sec Cmmdts</i>	<i>RICO</i>	<i>Enviroment</i>	<i>Other</i>
<b>1992 (28)</b>	8	1	1	0	2	6	0	1	0	2	4	3
<b>1993 (32)</b>	6	4	0	0	4	7	0	1	2	1	5	2
<b>1994 (37)</b>	7	7	1	0	5	8	0	0	1	3	2	3
<b>1995 (36)</b>	5	4	0	0	9	7	1	3	1	4	2	0
<b>Totals (133)</b>	<b>26</b>	<b>16</b>	<b>2</b>	<b>0</b>	<b>20</b>	<b>28</b>	<b>1</b>	<b>5</b>	<b>4</b>	<b>10</b>	<b>13</b>	<b>8</b>
<b>% Of Caseload</b>	<b>19.55%</b>	<b>12.03%</b>	<b>1.50%</b>	<b>0.00%</b>	<b>15.04%</b>	<b>21.05%</b>	<b>0.75%</b>	<b>3.76%</b>	<b>3.01%</b>	<b>7.52%</b>	<b>9.77%</b>	<b>6.02%</b>

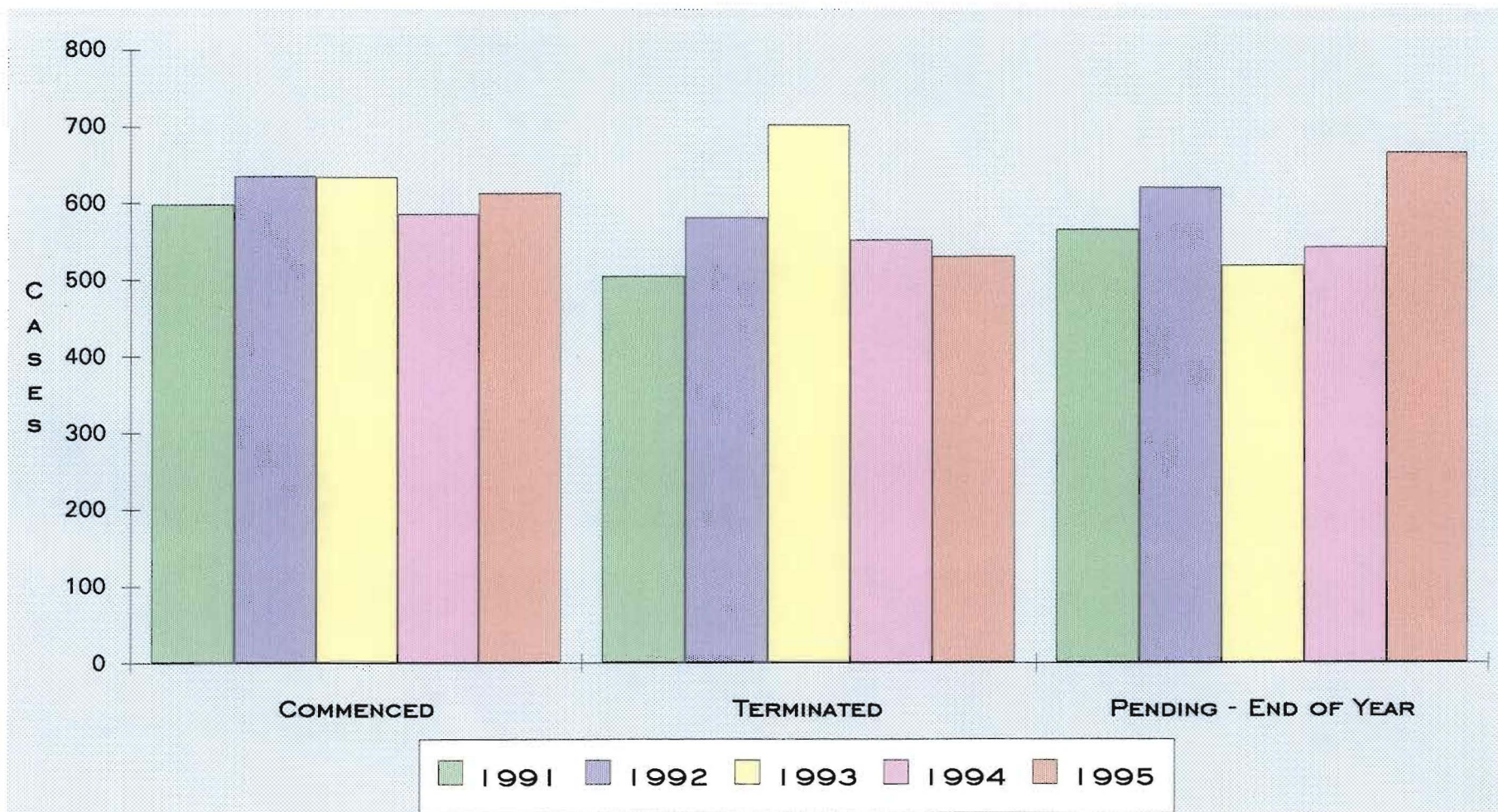




Felony Criminal Actions  
5 Year Period

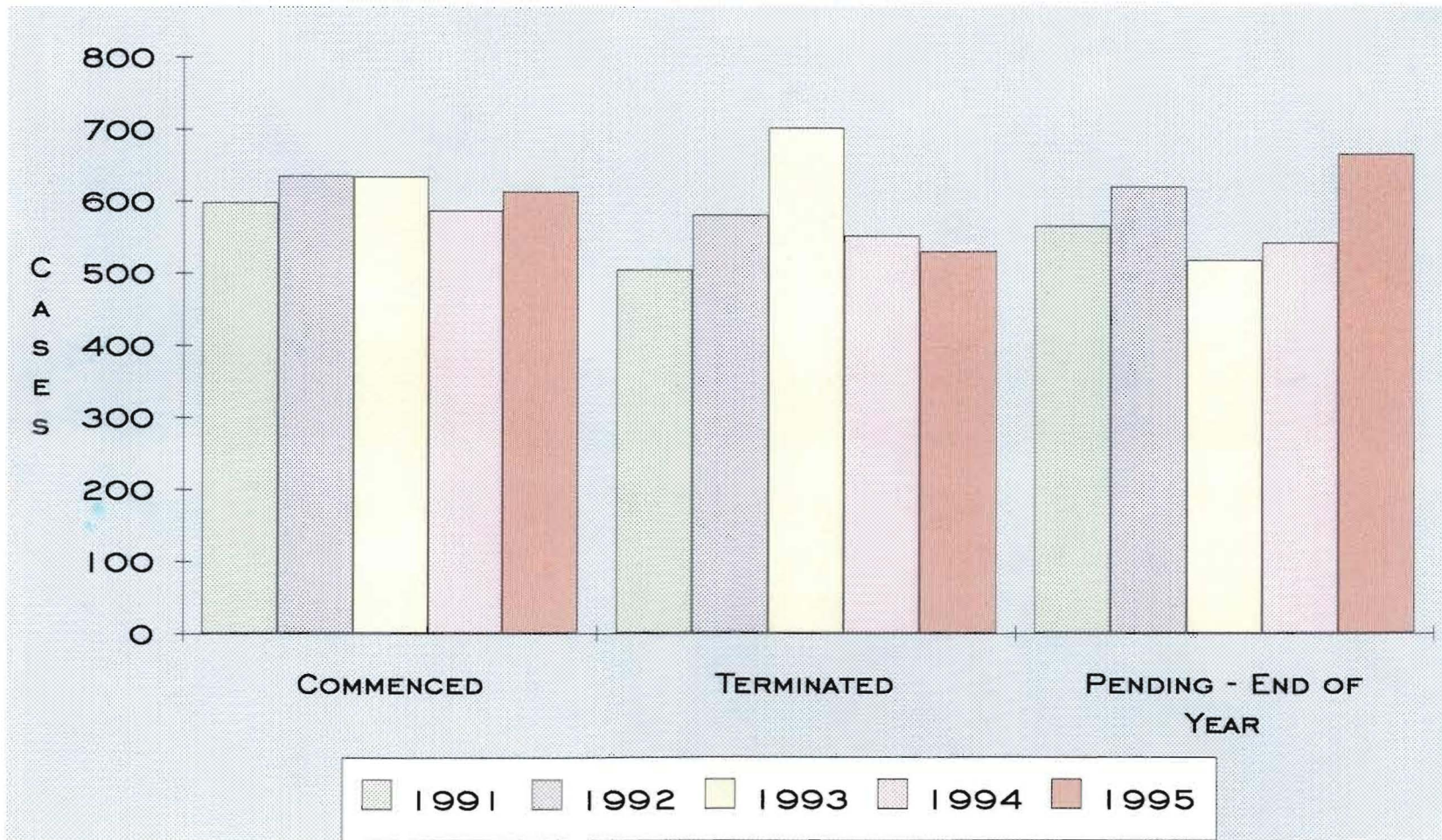
<b>Criminal Actions</b>	<b>Commenced</b>	<b>Terminated</b>	<b>Pending - End of Year</b>
1991	598	504	565
1992	635	581	620
1993	634	702	518
1994	586	552	542
1995	613	530	665







CRIMINAL ACTIONS	COMMENCED	TERMINATED	PENDING - END OF YEAR
1991	598	504	565
1992	635	581	620
1993	634	702	518
1994	586	552	542
1995	613	530	665





Civil/\*Criminal Caseload Summary

New Jersey	Civil				Criminal				Total			
	1992	1993	1994	1995	1992	1993	1994	1995	1992	1993	1994	1995
Total Filings	5,692	5,959	6,392	6,892	804	818	798	831	6,496	6,777	7,190	7,723
Per Judgeship	334	351	376	405	47	48	47	49	382	399	423	454
% Change	-1%	4.6%	7.3%	7.8%	6%	1.7%	-2.4%	4.1%	-0.30%	4.30%	6.10%	7.4%
Total Termination	6,022	5,668	6,074	6,504	720	886	717	727	6,742	6,554	6,791	7,231
Per Judgeship	354	333	357	383	42	52	42	43	397	386	399	425
%Change	10%	-6%	7.2%	7.1%	11%	23%	-19.1%	1.4%	10%	-2.8%	3.6%	6.5%
Pending Caseload	5,098	5,385	5,703	6,078	794	628	710	733	5,892	6,013	6,413	6,811
Per Judgeship	300	317	335	357	47	37	42	43	347	354	377	401
%Change	-6%	5.6%	5.9%	6.6%	12%	-21%	13%	3%	-4%	2%	7%	6.2%

\* CRIMINAL FILINGS INCLUDE MISDEMEANOR CASES

## TOTAL RESULTS

# ATTORNEY QUESTIONNAIRE

This questionnaire is intended to provide information to the Court. Please take several minutes to complete it. All responses will be compiled. Your individual response will be anonymous.

Please do not complete this questionnaire more than once. Each attorney who participates in a conference should complete it.

### BIOGRAPHICAL INFORMATION

What year were you admitted to practice in your home state? SEE ATTACHED

Are you admitted here pro hac? NO: 96 YES: 16 N/A: 13

Are you --

- 19 sole practitioner?
- 45 in firm with 2-10 attorneys?
- 17 in firm with 11-20 attorneys?
- 16 in firm with 21-50 attorneys?
- 25 in firm with 50+ attorneys?
- 1 in-house corporate counsel?
- 1 employed by U.S. Government?
- 1 employed by State or local Government?
- other (please specify)? \_\_\_\_\_

Is this the first conference in which you have participated in this Court?

YES: 39 NO: 78 N/A: 8

CASE MANAGEMENT (please answer all questions based on your knowledge before this conference was conducted)

<u>YES</u>	<u>NO</u>	
118	6	Did you know that you were to meet with all parties and develop a discovery plan?
N/A:	1	
87	37	Did you know that no written discovery was to issue before your meeting with all parties?
N/A:	1	
116	8	Did you know that you were to disclose certain information "automatically"?
N/A:	1	
98	26	Did you know that you were limited to serving 25 discrete interrogatories?
N/A:	1	
37	84	Have you ever experienced a problem with your adversary's automatic disclosure?
N/A:	4	
31	42	Did you bring this problem to the attention of the magistrate judge?
N/A:	48	NO RESPONSES: 4
121	2	Did you know that you must confer with your adversary in an attempt to resolve any discovery dispute before you seek judicial intervention?
N/A:	2	
102	22	Did you know that magistrate judges would entertain discovery disputes by telephone conference call?
N/A:	1	

## ATTORNEY QUESTIONNAIRE - PAGE 2

**MEDIATION** (please answer all questions based on your knowledge before this conference was conducted)

**YES**   **NO**

- |      |     |   |
|------|-----|---|
| 76   | 49  | Did you know that the Court has established a permanent mediation program?                          |
| 93   | 31  | Did you know that parties may consent to participate in mediation?                                  |
| N/A: | 1   |   |
| 36   | 89  | Did you know that all proceedings would be stayed for 60 days when a case is referred to mediation? |
| 23   | 203 | Did you know that the first six hours of a mediator's time is <u>pro bono</u> ?                     |
| 70   | 55  | Did you know that information disclosed in mediation may be deemed confidential?                    |
| 59   | 66  | Have you ever participated in a mediation?  |
| 42   | 83  | Have you ever attended a seminar the topic of which included mediation?                             |
| 81   | 41  | Would be interested in attending such a seminar?  |
| N/A: | 3   |   |

Thank you for your cooperation.

**SURVEY OF ATTORNEYS  
YEAR OF ADMISSION**

1995 - 3	1975 - 2
1994 - 8	1974 - 2
1993 - 4	1973 - 6
1992 - 6	1972 - 2
1991 - 5	1971 - 1
1990 - 10	1970 - 5
1989 - 5	1969 - 2
1988 - 9	1968 - 1
1987 - 8	1967 - 1
1986 - 3	1966 - 1
1985 - 7	1965 - 0
1984 - 3	1964 - 2
1983 - 3	1963 - 0
1982 - 1	1962 - 0
1981 - 3	1961 - 0
1980 - 2	1960 - 0
1979 - 4	1959 - 0
1978 - 4	1958 - 2
1977 - 6	1957 - 0
1976 - 3	1956 - 0

1955 - 0

1954 - 0

1953 - 1

**NOT YET ADMITTED: 2**

*OUTLINE*  
*of*  
RESOURCE GUIDE  
for  
Special Emphasis Workshop  
MANAGING  
PRISONER CIVIL RIGHTS  
LITIGATION

St. Louis, Missouri  
March 29-31, 1995

Federal Judicial Center

This document has been prepared for an upcoming FJC seminar. *It should be viewed as a work in progress.* It is included in these materials to elicit further comments, suggestions, and ideas for improving what will ultimately become a manual for managing prisoner civil rights litigation in the federal courts.

Please direct any comments or suggestions to:

The Federal Judicial Center,  
Research Division,  
Attn. Prisoner Civil Rights Case Management Work Group  
Thurgood Marshall Federal Judiciary Building  
One Columbus Circle, NE Washington, D.C. 20002-8003  
FAX (202)273-4021



determines whether the complaint is frivolous before it decides on IFP status.<sup>36</sup> Because this procedure merges the determinations of financial eligibility under § 1915(a) and frivolousness under § 1915(d), a dismissal without a statement of reasons leaves unclear which test the plaintiff failed.

- 2) Under Fed. R. App. P. 24(a), a party who did not proceed IFP in district court, but who desires to do so on appeal, must first make a motion to the trial judge. If the motion is granted, the party can file the appeal with IFP status without further approval from the court of appeals. If the district court denies the motion, the party can renew it in the court of appeals. Rule 24(a) requires that the party attach to the motion "a copy of the statement of reasons given by the district court for its action."<sup>37</sup> In addition, if the party was granted leave to proceed IFP in the district court and desires to do so on appeal, if the district court denies the motion and certifies that the appeal would not be taken in good faith, Rule 24(a) requires that "the district court shall state in writing the reasons for such certification or finding."<sup>38</sup>

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### 3. Conditioning IFP on Partial Payment of Fees

#### a. Authority

To effectuate the purposes of § 1915 and to "curb the indiscriminate filing of frivolous lawsuits by weeding out actions where the IFP plaintiff does not believe the case justifies even the payment of a reasonable filing fee"<sup>39</sup> courts have construed the language of § 1915(a) that allows them to waive costs entirely for indigent litigants to allow them as well to waive a portion of those costs.<sup>40</sup> In

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Bureau of Prisons, 761 F.2d 792 (D.C. Cir. 1985). Cf. *Collins v. Cundy*, 603 F.2d 825, 828 (10th Cir. 1979) (requiring a statement of reasons in every § 1915(d) dismissal).

<sup>36</sup>*Wartman v. Branch 7, Civil Division, County Court*, 510 F.2d 130, 132-34 (7th Cir. 1975). See also *In re Green*, 598 F.2d 1126 (8th Cir. 1979); *Neal v. Miller*, 542 F. Supp. 79 (S.D. Ill. 1982).

<sup>37</sup>Fed. R. App. P. 24(a). See *Sills*, 761 F.2d at 795 (The required statement of reasons under Fed. R. App. P. 24(a) must present more than simple conclusions.)

<sup>38</sup>Fed. R. App. P. 24(a).

<sup>39</sup>*Mary Van Vort, Controlling and Detering Frivolous In Forma Pauperis Complaints*, 55 *Fordham L. Rev.* 1165, 1179 (1987).

<sup>40</sup>The following courts of appeals have upheld the authority of district courts to require prisoners to pay partial filing fees: *In re Stump*, 449 F.2d 1297 (1st Cir. 1971); *In re Epps*, 888 F.2d 964 (2d Cir. 1984); *Bullock v. Suomela*, 710 F.2d 102 (3d Cir. 1983); *Evans v. Croom*, 650 F.2d 521 (4th Cir. 1981), *cert. denied*, 454 U.S. 1153 (1982); *Smith v. Martinez*, 706 F.2d 572 (5th Cir. 1983); *Lumbert v. Illinois Dep't of Corrections*, 827 F.2d 257 (7th Cir. 1987); *In re Williamson*, 786 F.2d 1336 (8th Cir.

*Branden v. Estelle*,<sup>41</sup> the court upheld the legality of a partial fee waiver plan, analogizing the plan to the partial payment for legal representation of indigent criminal defendants who can afford a portion of the costs, authorized under the Criminal Justice Act.<sup>42</sup> The *Branden* court reasoned that if Congress did not adopt an "all or nothing" approach for indigent criminal defendants, then it should not be required for civil plaintiffs.<sup>43</sup> The court stated that "[i]f the court may grant a waiver of 100% of the costs ... the court also is vested with the discretion to waive a lesser percentage of such costs."<sup>44</sup>

A partial payment plan in the Seventh Circuit has withstood challenges that it is an unconstitutional burden on a plaintiff's right of access to the courts,<sup>45</sup> a violation of the guarantee of equal protection (because the plan applied only to inmates and no other IFP petitioners),<sup>46</sup> and in conflict with the Supreme Court's interpretation of § 1915(a)'s indigence requirement in *Adkins v. E.I. DuPont de Nemours*.<sup>47</sup>

- b Procedure for implementing requirement: ad hoc vs. general order or local rule

A recent study by the Federal Judicial Center found that forty federal district courts require partial filing fees.<sup>48</sup>

Seventeen of these forty districts (18% of all districts) have a local rule or standing order<sup>49</sup> that permits or requires judges to assess

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1986). *Sellers v. United States*, 881 F.2d 1061 (11th Cir. 1989). Cf. *Zaun v. Dobbin*, 628 F.2d 990 (7th Cir. 1980) (non-prisoner, *pro se* litigants).

<sup>41</sup>428 F. Supp. 595 (S.D. Tex. 1977).

<sup>42</sup>18 U.S.C. § 3006 A (1982).

<sup>43</sup>428 F. Supp. at 599.

<sup>44</sup>*Id.* at 598-99.

<sup>45</sup>*Lumbert v. Illinois Dep't of Corrections*, 827 F.2d 257, 259 (7th Cir. 1987); *Bryan v. Johnson*, 821 F.2d 455, 457 (7th Cir. 1987). Local Rule 32 in the Central District of Illinois required the court to assess a partial filing fee (if a prisoner was granted *in forma pauperis* status) which could not exceed 50% of the inmate's average monthly income for the 6 months prior to the petition. *Martin v. Mueller*, No 90-2746, 1992 U.S. App. LEXIS 30922, at \*3 n.2 (7th Cir. Nov. 2, 1992) (unpublished disposition available in table case format at 1992 U.S. App. LEXIS 34961).

<sup>46</sup>*Martin*, 1992 U.S. App. LEXIS 30922, at \*7.

<sup>47</sup>*Id.* at \*9.

<sup>48</sup>Partial Payment of Filing Fees in *In Forma Pauperis* Cases: Current Practices of Federal District Courts (Federal Judicial Center 1994)(unpublished memorandum and table containing results of data collected on partial payment plans in each federal district court)[hereinafter Current Partial Payment Practices & Partial Payment Table].

<sup>49</sup>The following districts have a local rule permitting or requiring partial filing fees: M.D. Fla., C.D. Ill., N.D. Ind., W.D. Mich., W.D. Mo., D. NB., D. Nev., N.D. N.Y., E.D. Tenn., E. D. Va. The

partial filing fees. The majority of these rules or orders detail the types of cases to which they apply and the procedure by which the fee is calculated. All of them require payment of the fee before a prisoner may be granted leave to proceed IFP, but they differ as to the types of prisoner cases to which they apply,<sup>50</sup> and the method by which the partial fee is calculated.<sup>51</sup>

The remaining twenty-three districts that either permit or require judges to impose partial filing fees have no published plan or guidelines.<sup>52</sup> In these districts, partial filing fee decisions are made on a case-by-case basis after reviewing the prisoner's financial affidavit. The amount of the fee is totally in the decision maker's discretion.<sup>53</sup> Procedures for determining whether to require a fee, calculating the fee, and collecting the fee vary widely among divisions within a district, and among the district judges, magistrate judges, and pro se law clerks within a single district.

c. Criteria for plans

All circuits that have considered the issue have upheld the validity of partial filing fees, but they have imposed conditions on their use.<sup>54</sup> The following features have been recommended or required by various courts<sup>55</sup> and suggested in a study conducted in 1984 by the Federal Judicial Center<sup>56</sup> as minimum elements of any partial payment plan:

- 1) *Published procedures.* Partial payment plan procedures should be widely disseminated, preferably as a local rule or, in the alternative, as a standing order. Standard forms for IFP petitions and affidavits should be available to prisoners. These forms should include the charts or formulas the court uses to calculate

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following districts have a standing order M D Ala., E.D. La., E.D. N.C., S.D. Ohio, E.D. Tex., S. D. Tex. See Partial Payment Table, *supra* note 48

<sup>50</sup>Some local rules or orders only require partial filing fees for prisoner petitions to proceed *in forma pauperis* under 42 U.S.C. § 1983. See, e.g., C.D. Ill., Local Rule 2.12. Some require partial filing fees for prisoners bringing either a civil rights action or a habeas corpus petition. See, e.g., N.D. N.Y., Local Rule 5.4. And some require it for all petitions seeking leave to proceed *in forma pauperis*. See, e.g., S.D. Tex., General Order No. 88-20.

<sup>51</sup>See discussion on calculating the partial filing fee *infra*.

<sup>52</sup>Current Partial Payment Practices, *supra* note 48, at 5-6.

<sup>53</sup>*Id.*

<sup>54</sup>*In re Williamson*, 786 F.2d 1336, 1340 (8th Cir. 1986) ("[T]he district courts' discretion in implementing a partial payment plan is not unbridled.")

<sup>55</sup>*Id.* at 1340-41; *Wüdeman v. Harper*, 754 F. Supp. 808 (D. Nev. 1990).

<sup>56</sup>Thomas Willging, *Partial Payment of Filing Fees in Prisoner In Forma Pauperis Cases in Federal Courts: A Preliminary Report* (Federal Judicial Center 1984) [hereinafter Preliminary Report].

filing fees, and the method of collection, so the prisoner will be on notice that a partial filing fee may be required.<sup>57</sup> The district's partial payment plan should be posted in the law library of each penal institution within the district.<sup>58</sup>

- 2) *Uniform application.* Each judge in the district should apply the procedures uniformly to all IFP applications in prisoner civil rights actions.<sup>59</sup>
- 3) *Reasonable fee.* The amount of the partial filing fee should be a reasonable percentage of either the inmate's current account balance or average monthly balance for a specified period of time prior to submitting the IFP application.<sup>60</sup>
  - (a) Based upon decisions that had deemed a fee too high at that time, the Federal Judicial Center's first study on partial filing fees recommended that a partial fee should never exceed one-third of a prisoner's income or assets.<sup>61</sup>
  - (b) Although courts have stated that the amount required from the prisoner as a partial payment should be "reasonable," they have disagreed over the reasonableness of particular fee amounts.<sup>62</sup> For example, the Seventh Circuit has upheld a

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<sup>57</sup>*Id.*

<sup>58</sup>*In re Williamson*, 786 F.2d 1336, 1341 (8th Cir. 1986); Preliminary Report, *supra* note 56, at 27.

<sup>59</sup>Preliminary Report, *supra* note 56, at 26; *In re Williamson*, 786 F.2d at 1340; *Wiideman*, 754 F. Supp. at 811.

<sup>60</sup>Preliminary Report, *supra* note 56, at 25-26; *In re Williamson*, 786 F.2d at 1340.

<sup>61</sup>Preliminary Report, *supra* note 56, at 25-26.

<sup>62</sup>*In re Epps*, 888 F.2d at 968, has collected cases that found the requested fee to be too high (ranked by amount): \$20 fee with \$5 in prison account (400%) and average monthly balance of \$13 (153%), *Johnson v. Kemp*, 781 F.2d 1570 (11th Cir. 1986); \$15 fee with less than \$50 in prison account (30%), *In re Smith*, 600 F.2d 714, 714-15 (8th Cir. 1979); \$12 fee with \$30 in prison account (40%) and \$40 in deposits during two prior months (30%), *Green v. Estelle*, 649 F.2d 298 (5th Cir. Unit A 1981); \$5 fee (for habeas corpus petition) with \$17 in prison account (29%) and monthly income of \$31 (26%), *Jones v. Zimmerman*, 752 F.2d 76 (3d Cir. 1985); \$5 fee (for habeas corpus petition) with \$50 in prison account (10%) and \$30 in average monthly income (16%), *Souder v. McGuire*, 516 F.2d 820 (3d Cir. 1975); \$4 fee with \$4.76 in prison account (84%) and \$24 in average monthly deposits (16%), *Bullock v. Suomela*, 710 F.2d 102, 103 (3d Cir. 1983). And cases where the partial fee was deemed to be reasonable (also ranked by amount): \$15 fee in each of four cases with \$140 in prison account (10%) (though account subsequently drawn down to 30 cents), *Collier v. Tatum*, 722 F.2d 653, 655 (11th Cir. 1983); \$15 fee with prison account conceded to contain \$78 and claimed by prison to contain \$218 (6.8%), *In re Stump*, 449 F.2d 1297, 1298 (1st Cir. 1971); \$8 fee with \$27 in prison account (29%) and \$30 in monthly income (27%), *Williams v. Estelle*, 681 F.2d 946 (5th Cir. 1982); \$7.20 fee was upheld where inmate refused to pay it and the court assumed it was because he wanted to use the money to buy other things, *Lumbert v. Illinois Dep't of Corrections*, 827 F.2d 257 (7th Cir. 1987); \$3 fee with 3 cents in prison account (100%) and

fee imposed pursuant to the partial payment plan adopted by the Central District of Illinois.<sup>63</sup> That plan allows courts to require partial payments as high as 50% of the inmate's average monthly income.<sup>64</sup> In that case, the court opined that if a prisoner is able to pay a partial filing fee, it is reasonable to require one even if the prisoner has to forfeit small commissary purchases such as "peanuts and candy" to file the claim. The Second Circuit rejected this rationale, stating that "[t]o require the prisoner to part with a substantial portion of meager monthly income does more than prompt a second thought, it creates a deterrence to litigation incompatible with at least the spirit of the *in forma pauperis* statute."<sup>65</sup> In that case the court held that 30% of the inmate's average monthly income was too high, but that a partial filing fee of 10% of the inmate's average monthly income was reasonable.<sup>66</sup>

4) *Clear methods of fee computation.* A partial payment plan should detail the process that the court uses to calculate an appropriate fee and use the same "formula" consistently to calculate a partial fee for every prisoner who submits an application to proceed IFP in the district court. The recent Federal Judicial Center study on current practices in the federal district courts shows that the formulas by which the districts calculate an appropriate filing fee differ.<sup>67</sup> In general, there are two approaches.

(a) The percentage-based system calculates a partial filing fee equal to a certain percentage of either the inmate's current account balance or average monthly balance.<sup>68</sup> Some districts condition IFP status on partial payment and give no further guidance except a warning that the fee is never to exceed a

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<sup>63</sup>\$35 received in prior three months and \$20 received monthly from family, *Smith v. Martinez*, 706 F.2d 572 (5th Cir. 1983).

<sup>64</sup>*Lumbert v. Illinois Department of Corrections*, 827 F.2d 257, 260 (7th Cir. 1987) (Court upheld a General Order adopted by the Central District of Illinois requiring partial payment of filing fees "in an amount not to exceed ... (50%) of the inmate's average monthly income for the six (6) months immediately preceding the submission of the petition.").

<sup>65</sup>The general order was adopted as Local Rule 2.12 by the C.D. Ill. on Jan. 15, 1992. See Partial Payment Table, *supra* note 48.

<sup>66</sup>*In re Epps*, 888 F.2d at 968. The court reduced the required fee from \$18.47 (30% of the inmate's average monthly income of \$61.53) to \$6 (10% of inmate's average monthly income). *Id.*

<sup>67</sup>The 10% figure was imposed by a standing order in the Northern District of New York, adopted as Local Rule 5.4 on July 1, 1994. See Partial Payment Table, *supra* note 47.

<sup>68</sup>Partial Payment Table, *supra* note 48.

<sup>69</sup>U.S. Dist. Ct. for the N.D. N.Y., Local Rule 8.4 (a partial filing fee is required equal to 10% of the average monthly deposits to prisoner's account for 3 months prior to filing complaint).

certain maximum percentage of income.<sup>69</sup> Problems with the percentage-based system may arise because such formulas fail to establish a minimum filing fee and force the court to deal with less than whole dollar amounts.

- (b) Under the sliding scale formula with "advisory criteria," districts use a table based on court-developed guidelines to compute an appropriate partial filing fee. The guidelines do not preclude consideration of other variables inherent in a § 1915 determination. The filing fee increases incrementally as the prisoner's income increases (e.g., \$40 increments); prisoners with an income above a certain level must pay the full filing fee.<sup>70</sup> A sliding scale formula that assigns a definite filing fee to a certain range of the prisoner's income<sup>71</sup> is preferable to a sliding scale formula that establishes minimum and maximum filing fees chargeable to prisoners whose current assets fall within a certain range.<sup>72</sup>
- (c) For computing the average monthly balance, courts have approved periods of three months and six months,<sup>73</sup> and these appear to be the most popular time periods according to the local rules and orders gathered for the recent Federal Judicial Center study on partial filing fees.<sup>74</sup>

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<sup>69</sup>U.S. Dist. Ct. for the E.D. N.C., Order Adopted April 30, 1990 & July 21, 1991 (*in forma pauperis* status for prisoner is conditioned on payment of a partial filing fee based on income received within 6 month period prior to filing complaint; the partial filing fee shall never exceed 15% of the income prisoner received within preceding 6 months). See Partial Payment Table, *supra* note 48 for more examples of these percentage-based formulas.

<sup>70</sup>U.S. Dist. Ct. for M.D. La., General Order No. 93-3 (In petitions to proceed *in forma pauperis*, partial filing costs are to be determined using advisory criteria based upon prisoner's present economic status. A table lists minimum and maximum filing fees that can be imposed when the prisoner's present assets fall between \$40 increments, with \$450 being the level at which the prisoner must pay the full fee.)

<sup>71</sup>See description of the Partial Filing Fee Chart for the U.S. Dist. Ct. for the Dis. of Nevada *in* Partial Payments Table, *supra* note 48. For example, in this sliding scale formula if the inmate's income falls between \$26 and \$250 the court will require a \$5 partial filing fee. Recently, this chart has been revised to allow the court to assess partial filing fees for prisoners with less than \$25 in their account and to make the partial filing fee progressive. In the new chart, a prisoner with \$5 to \$9 in an account would pay a \$1 partial filing fee; from \$10 to \$19, a \$2 filing fee; \$20 to \$29, a \$5 filing fee, and so on. A prisoner with \$250 or more will be required to pay the full filing fee. See U.S. Dis. Ct. for the Dis. Nev., Application to Proceed *In Forma Pauperis* (revised Jan. 1995).

<sup>72</sup>See *supra* note 70.

<sup>73</sup>*Evans v. Croom*, 650 F.2d 521 (4th Cir. 1981), *cert. denied*, 454 U.S. 1153 (1982) (approving use of prior 6 months' deposits as base for calculating reasonable partial filing fee); *In re Epps*, 888 F.2d 964, 967 (2d Cir. 1989) (approving use of prior 3 months' deposits to prisoners trust account).

<sup>74</sup>Partial Payment Table, *supra* note 48.



- (d) In computing inmate balances courts should look at *net* deposits—what an inmate had available to spend during the applicable period—not just what remained in the account at the end of the month. By looking at total deposits from all sources of income a court can avoid the need to determine whether the inmate purposefully spent down the account to avoid paying a fee. Looking at total expenditures allows the court to see whether the inmate's money was spent on nonessential items.
- (e) The net balance should be calculated after subtracting any amount the penal institution requires the inmate to keep in a trust fund. The calculation should exclude small holiday gifts to the prisoner as well as any mandatory impounds or withdrawals such as child support, restitution, or room and board.
- 5) *Availability of installment payments of partial fee.* The courts of appeals have diverged on whether partial fees must be paid in their entirety before the action may proceed, or whether the fees can be paid in installments. The Eighth Circuit approved installment payments in *In re Williamson*,<sup>75</sup> but the Seventh Circuit has rejected them because § 1915 does not provide for the payment of fees in installments.<sup>76</sup> Although the issue of authority to permit installment payments is unresolved, the administrative burden of keeping track of installment payments may in any event outweigh whatever benefit there is to imposing a small, periodic sacrifice on the litigant rather than waiving the filing fee entirely or lowering the partial fee to an amount payable in a lump sum.
- 6) *Waiver provisions.* A partial filing fee plan should allow an inmate ordered to pay a partial filing fee to explain special circumstances that would justify a lower fee<sup>77</sup> and allow the inmate to correct misinformation or incorrect inferences the court may have drawn.<sup>78</sup> Waiver provisions add flexibility in

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<sup>75</sup>786 F.2d 1336 (8th Cir. 1986)

<sup>76</sup>*Caldwell v. United States*, 682 F.2d 142, 143 (7th Cir. 1982).

<sup>77</sup>*Evans v. Croom*, 650 F.2d 521, 526 (4th Cir. 1981), *cert. denied*, 454 U.S. 1153 (1982).

<sup>78</sup>*Jones v. Zimmerman*, 752 F.2d 76, 79 (3d Cir. 1985) (fairness requires that the *in forma pauperis* applicant be given an opportunity to see the court's findings and to correct any misinformation). See also Preliminary Report, *supra* note 56, at 21 (Noting that only a small percentage of plaintiffs objected to the amount assessed by the courts, and the administrative outlay necessary to deal with a few objections is insignificant compared to the total number of *in forma pauperis* petitions.); *In re Williamson*, 786 F.2d 1336, 1340 (8th Cir. 1986).

partial filing fee plans, thus ensuring that courts do not unreasonably block a prisoner's access to the federal courts.

PENDING LEGISLATION NOTE. Currently, district courts are free to decide whether or not to adopt a partial payment plan. However, H.R. 667 would amend § 1915 to require district courts to assess prisoners for partial filing fees whenever a prisoner has any ability to pay: "The court shall require full or partial payment of filing fees according to the prisoner's ability to pay."<sup>79</sup>

- d. Effect of partial payment on § 1915(d) determination of frivolousness or maliciousness
  - 1) Several courts of appeals have held that a district court may not sua sponte dismiss an action as frivolous under 28 U.S.C. § 1915(d) after the plaintiff has paid a partial filing fee.<sup>80</sup> These courts reason that dismissal for frivolousness after payment is inconsistent with Fed. R. Civ. P. 4(a), which requires a summons to issue once a complaint is filed (a complaint is considered filed as soon as the plaintiff pays a filing fee<sup>81</sup>), and with Fed. R. Civ. P. 15(a), which requires that the plaintiff be given an opportunity to amend a complaint before the court dismisses the action sua sponte.<sup>82</sup>
  - 2) Several districts have abandoned their partial payment plan partly or wholly because of concern that these decisions will limit their discretion under § 1915(d) to dismiss frivolous claims.<sup>83</sup>
  - 3) Fed. R. Civ. P. 4(a) was amended in 1993. Previously, Rule 4(a) provided that "[u]pon the filing of the complaint the clerk shall forthwith issue a summons."<sup>84</sup> In 1993, the "forthwith"

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<sup>79</sup>H.R. 667, Title II, § 204(b) (Passed by the House of Representatives on February 10, 1995, and currently awaiting a vote in the Senate.)

<sup>80</sup>*Butler v. Leen*, 4 F.3d 772 (9th Cir. 1993); *Clark v. Ocean Brand Tuna*, 974 F.2d 48, 50 (6th Cir. 1992); *Grissom v. Scott*, 934 F.2d 656, 657 (5th Cir. 1991); *Herrick v. Collins*, 914 F.2d 228, 230 (11th Cir. 1990); *In re Funkhouser*, 873 F.2d 1076, 1077 (8th Cir. 1989); *Bryan v. Johnson*, 821 F.2d 455, 458 (7th Cir. 1987).

<sup>81</sup>See, e.g., *Franklin v. State of Oregon, State Welfare Div.*, 662 F.2d 1337, 1340-41 (9th Cir. 1981).

<sup>82</sup>See, e.g., *Clark*, 974 F.2d at 50.

<sup>83</sup>See Partial Payment Table, *supra* note 48 (Comments column indicates that the S.D. Tex., W.D. Tenn., N.D. Ohio, M.D. Tenn., N.D. Iowa, and E.D. Mo. have eliminated their partial payment plan because of appellate decisions limiting dismissal under § 1915(a) after a filing fee has been paid.)

<sup>84</sup>Fed. R. Civ. P. 4(a) (The originally promulgated Rule 4(a) contained the "forthwith" requirement. See Fed. R. Civ. P. 4(a), 308 U.S. 664 (1940). Although Rule 4(a) was amended in 1980 and 1983, the "forthwith" requirement remained in the rule until the 1993 amendments.)



requirement was taken out of the Rule. Now, Fed. R. Civ. P. 4(b) deals with issuance of the summons and it provides that "[u]pon or after filing the complaint, the plaintiff may present a summons to the clerk .... If the summons is in proper form, the clerk shall ... issue it to the plaintiff for service on the defendant."<sup>85</sup> This language seems to indicate that filing the complaint does not require the immediate issuance of service of process and is conditioned upon whether the plaintiff presents a summons to the clerk. If this new provision is interpreted to mean that immediate issuance of service upon filing the complaint is not a guaranteed procedural protection prior to dismissal, then dismissing the complaint after payment of a partial filing fee may not conflict with amended Rule 4(b).

- 4) Once the fee is paid, the complaint is considered to be filed and the plaintiff acquires the same rights to procedural protection from early dismissal that fully-paid litigants have. Whether a sua sponte dismissal under § 1915(d) after payment of a partial filing fee violates Fed. R. Civ. P. 15(a), which gives the plaintiff an opportunity to amend the complaint once before dismissal, remains an unsettled issue.
- 5) Although in some circuits the district court may not dismiss an *action* under § 1915(d) after payment of a partial filing fee, the court may still dismiss certain counts or defendants under § 1915(d) after payment but before service or amendment of the complaint.<sup>86</sup> The *action* survives even if some counts or defendants are dismissed for frivolousness.
- 6) Districts with partial payment plans may avoid the timing problem with respect to § 1915(d) dismissals by structuring their IFP screening procedures so that the court does not actually receive the payment until after it has determined whether the entire complaint is "frivolous" or "malicious" under § 1915(d).
  - (a) More specifically, if the court has determined that the petitioner is financially eligible for IFP status, but that it should be conditioned upon receipt of a partial filing fee, the court should not require the fee to be paid until after it has examined the merits of the complaint. If the entire complaint should be dismissed under § 1915(d), the court should do so without requiring payment of the partial fee. If a § 1915(d)

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<sup>85</sup>Fed. R. Civ. P. 4(b)(1993 Amendment)

<sup>86</sup>See, e.g., *Butler v. Leen*, 4 F.3d 772, 772 (9th Cir. 1993) ("We hold only that the district court should not have dismissed this *action* before service of process.") (emphasis added)

dismissal is not warranted, then the court can order the petitioner to pay the partial filing fee and allow the case to proceed.

(b) This practice is easily adaptable to the one-step screening procedure in which the court examines the merits of the claim before granting IFP status and allowing the complaint to be filed.

(c) The deferred payment approach is also amenable to the two-step procedure. If the court finds that a petitioner is financially eligible under § 1915(a), but also able to pay a partial filing fee, IFP status can still be granted and the complaint filed before the court has received the partial fee. However, it will be a temporary grant of IFP status and a provisional filing conditioned upon whether the court decides to dismiss the case under § 1915(d) before requiring the partial fee to be paid.<sup>87</sup>

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#### 4. Ordering service of process

a. Fed. R. Civ. P. 4(b) requires the clerk to issue summons to the plaintiff for service on the defendant if the plaintiff gives the clerk the summons in proper form.<sup>88</sup> However, IFP plaintiffs are not responsible for service of process. Fed. R. Civ. P. 4(c)(2)<sup>89</sup> and 28 U.S.C. § 1915(c)<sup>90</sup> provide instead that officers of the court, such as United States marshals, shall serve process on the defendant. If a plaintiff pays the district court filing fee and gives the clerk a summons for each defendant in the proper form, issuance and service of process is required.<sup>91</sup> The court can dismiss such an action without following these procedures only when the court

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<sup>87</sup>This practice of not requiring the actual payment of the partial filing fee to the court until the merits of the petitioner's complaint has been examined is currently being followed by the United States District Court for the District of Nevada. Earlier, the District of Nevada had been requiring payment of the fee before it conducted a review of the merits under §1915(d). Later, if the entire complaint warranted dismissal under §1915(d), the court would refund the prisoner the amount he had paid as a partial filing fee, grant the prisoner full *in forma pauperis* status, and then dismiss the complaint under § 1915(d). However, the district stopped this practice after a decision by the Ninth Circuit held that once the prisoner paid the fee and it was received by the court (even if the court had refunded the fee at a later time), the case must proceed like a normal civil action, and refunding the fee doesn't eliminate this holding. See *Klein v. Elliot*, No. 94-15574 (9th Cir. Nov. 22, 1994) (unpublished memorandum disposition).

<sup>88</sup>Fed. R. Civ. P. 4(b).

<sup>89</sup>Fed. R. Civ. P. 4(c)(2).

<sup>90</sup>28 U.S.C. § 1915(c).

<sup>91</sup>See Fed. R. Civ. P. 4(b).

PARTIAL PAYMENT OF FILING FEES IN  
*IN FORMA PAUPERIS* CASES: CURRENT PRACTICES  
OF FEDERAL DISTRICT COURTS

FEDERAL JUDICIAL CENTER  
RESEARCH DIVISION  
MARIE CORDISCO

OCTOBER 17, 1994

Background and Introduction

Federal courts have statutory authority under 28 U.S.C. § 1915(a) to waive fees and costs for an indigent litigant. Federal courts have discretion under 28 U.S.C. § 1915(a) to require indigents to pay a portion of the full fee needed to file a case. This practice has been upheld against a variety of attacks.<sup>1</sup>

Federal district courts use partial filing fees as one way of reducing the number of prisoner civil rights actions filed in its courts.<sup>2</sup> While each district that implements a procedure to assess partial filing fees has its own specific goals tailored to their local conditions, the general goals of this "innovation in administration of prisoner *in forma pauperis* petitions" are to reduce the caseload of federal courts by eliminating frivolous cases and to conserve court resources by reducing the time spent reviewing *in forma pauperis* applications.<sup>3</sup> Thus, although some districts that have a partial filing fee procedure apply the practice to all petitioners seeking to proceed *in forma pauperis* regardless of the type of case, the overwhelming majority of cases where the court has required the petitioner to pay a partial filing fee are prisoner cases. As the attached table reflects, in the majority of the districts that have placed their practice of assessing partial filing fees in their local rules or a standing order, coverage is limited to prisoner cases with some districts further limiting coverage to actions involving civil rights, habeas corpus actions, or post conviction relief.

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<sup>1</sup>See, e.g., *In re Epps*, 888 F.2d 964 (2d Cir. 1989); *Bryan v. Johnson*, 821 F.2d 455, 457-58 (7th Cir. 1987); *In re Williamson*, 786 F.2d 1336, 1339-41 (8th Cir. 1986); *Collier v. Tatum*, 722 F.2d 653, 655 (11th Cir. 1983); *Bullock v. Suomela*, 710 F.2d 102, 103 (3d Cir. 1983); *Smith v. Martincz*, 706 F.2d 572, 574 (5th Cir. 1983); *Evans v. Croom*, 650 F.2d 521, 522-23 (4th Cir. 1981), *cert. denied*, 454 U.S. 1153 (1982).

<sup>2</sup>Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts 8 (Federal Judicial Center 1980).

<sup>3</sup>Thomas E. Willging, Partial Payment of Filing Fees in Prisoner *In Forma Pauperis* Cases in Federal Courts: A Preliminary Report vii (Federal Judicial Center 1984).

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In response to a request from the Judicial Conference Committee on Federal State Jurisdiction for current information about the extent to which partial filing fees are being required in federal judicial districts, the Research Division of the Federal Judicial Center has collected the information displayed in the attached table.

The information was obtained by phone interviews with district court staff familiar with the local rules and practices of the district. Due to the dramatic increase in prisoner litigation where the petitioner is overwhelmingly indigent and proceeding without the assistance of counsel, most districts have one or more pro se law clerks who exclusively deal with prisoner petitions. These pro se law clerks were very helpful and knowledgeable about the current practice in their district. In some districts, prisoner petitions are referred to a magistrate judge. For these districts the information regarding partial filing fee procedures was obtained from either the magistrate judge or the magistrate judge's law clerk.

#### Description of the Attached Table

The attached table shows the current practice in each United States District Court regarding the imposition of partial filing fees.<sup>4</sup> It lists the 94 districts by circuit. The third column records the results of an inquiry posed to the appropriate court personnel in each district: Does your district ever require a plaintiff petitioning to proceed *in forma pauperis* to pay a portion of the required filing fee in lieu of waving the fee completely? If the response was "no", the remaining two columns do not apply as indicated by the abbreviation "N/A" (not applicable) in the appropriate boxes. In districts that do not assess partial filing fees, the appropriate court personnel verified that an *in forma pauperis* petitioner is either granted permission to proceed with a waiver of all costs and fees or required to pay the full filing fee.

For districts that do require partial payment of filing fees, the table distinguishes districts that have a local rule or standing order addressing their practice from districts that have an informal policy to impose partial filing fees that has not been placed in a standing order or the local rules. Thus, if the response to the inquiry in the third column is "yes", then the

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<sup>4</sup>The information in the table is current as of October 1, 1994.

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reader should look to the fourth or fifth column for a description of either the local rule or standing order (fourth column) or the district's informal policy (fifth column). The description of the local rule or standing order in the fourth column is a paraphrasing of the actual language contained in the rule or order, and should not be quoted or cited as legal authority. The "Comments" column indicates whether a copy of the rule or order was obtained. The rule or order should be referred to for a more detailed description of the district's practice.

If a district does have a local rule or standing order governing the district's procedure for assessing partial filing fees, then a "no" will be placed in the fifth column indicating that the district's practice is not informal. This either/or structure assumes that all judges within a district with a local rule or standing order follows the guidelines set out in the rule or order. It does not take into account the possibility that certain judges within a district that has a local rule or standing order may follow an informal policy in addition to or different in some way from the scheme for assessing partial filing fees embodied in the rule or order.

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Summary of Information in Table Regarding United States District Courts that Require Partial Payment of Filing Fees

Method of Assessing Partial Filing Fees	Number of Districts	Percent of All Federal District Courts	Percent of the 40 Districts that Require Partial Filing Fees	Name of District
Local Rules	10	11%	25%	M.D. Fla., C.D. Ill., N.D. Ind., W.D. Mich., W.D. Mo., D. Neb., E. Nev., N.D. N.Y., E.D. Tenn., E.D. Va.
Standing Orders	7	7%	17%	M.D. Ala., E.D. La., M.D. La., E.D. N.C., S.D. Ohio, E.D. Tex., S.D. Tex.
Informal Policy	23	24%	58%	N.D. Ala., S.D. Ala., N.D. Cal., D. Idaho, N.D. Ill., S.D. Ind., E.D. Ky., W.D. Ky., W.D. La., S.D. Miss., E. Mont., M.D. Ga., N.D. Ga., S.D. Ga., M.D. Pa., M.D. N.C., W.D. N.C., D. R.I., D. Utah, W.D. Va., N.D. W.Va., S.D. W.Va., E.D. Wis.
	40	42%		

Discussion of the Information Portrayed by the Table

Forty districts or 42% of federal district courts require partial filing fees in some form. In addition, as indicated in the "Comments" column, six districts are currently considering implementing a partial filing fee system or reinstating revised versions of prior local rules governing partial filing fees that had been rescinded.<sup>5</sup>

<sup>5</sup>See "Comments" column for D. S.C., W.D. Tenn., N.D. Iowa, D. Alaska, E.D. Wash., W.D. Okla.

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Seventeen districts or 18% of federal district courts (42% of the 40 districts that require partial filing fees) have a local rule or order that establishes a procedure for assessing partial filing fees. These local rules and orders differ both by the formula by which the fee is calculated and the scope of application. For example, the local rule in the Northern District of New York requires payment of 10% of the average monthly deposits to prisoner's account for the three months prior to filing of complaint.<sup>6</sup> The Eastern District of North Carolina computes payment based on up to 15% of the income prisoner received for the prior six months and "such other factors as plaintiff may draw to the court's attention."<sup>7</sup> And the local rule in the Western District of Michigan allows a magistrate judge to require a reduced fee equal to the greater of (i) 20 % of the plaintiff's liquid assets, or (ii) 5% of total deposits in prisoner's account for prior six months.<sup>8</sup> A few districts, including the Middle District of Louisiana, use a "sliding scale" to determine the appropriate partial fee. The scale ranges from \$0 to \$120 and is applied to the petitioner's present assets. The \$120 full filing fee is required if the petitioner has assets in excess of \$450.<sup>9</sup> Districts with these sliding scales stress that they are guidelines only and do not preclude consideration of other variables inherent in a § 1915(d) determination.

The rules and orders also differ as to their scope of application. For example, the Northern District of New York and the Eastern District of Virginia apply their rules to all habeas corpus actions and all civil rights actions. As another example, the Western District of Michigan and the Northern District of Indiana apply their rules, and the Middle District of Louisiana applies its sliding scale formula, to all applications to proceed *in forma pauperis* regardless of the nature of the case, while the Central District of Illinois applies its local rule only to cases brought by incarcerated pro se plaintiffs under section 1983.

Twenty-three Districts or 24% of federal district courts (58% of the 40 districts that require partial filing fees) do assess partial filing fees as a

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<sup>6</sup>United States District Court for the Northern District of New York, Local Rule 5.4 Civil Actions Filed in *In Forma Pauperis* (July 1, 1994).

<sup>7</sup>Order Setting the Procedure for Handling of Section 1983 Cases by State Prisoners (E.D.N.C.) (April 30, 1980).

<sup>8</sup>United States District Court for Western District of Michigan, Local Rule 7 Administration of Special Proceedings (Aug. 1, 1991).

<sup>9</sup>United States District Court for the Middle District of Louisiana, General Order No. 93-3 (Nov. 2, 1993).



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matter of informal policy. In almost all of these districts the appropriate court personnel (usually magistrate judges or their clerks) stressed that partial filing fees were assessed on an ad hoc basis in *in forma pauperis* petitions with the amount required left totally to the judge's discretion after a review of the petitioners financial affidavit. In some districts (for example, the Southern District of Alabama, and the Western District of North Carolina), there are flexible guidelines or rules of thumb which may or may not be adhered to by all judges within the district.

Despite these differences, the districts' local rules and orders are fairly similar in how they affect the administrative proceeding of *in forma pauperis* cases. The determination of whether a partial filing fee must be paid is made by court personnel after the petitioner files his or her petition to proceed *in forma pauperis*, and the fee must be paid before the case can proceed further. Some districts, such as the Eastern District of Missouri, have abandoned the practice of assessing partial filing fees because of the outlay in court resources taken up by computing and collecting the fee. The District of Nevada has taken a unique approach by informing the prisoner whether they will have to pay a partial fee and the amount *before* they can proceed with their civil rights complaint.<sup>10</sup> This is accomplished by requiring prisoners to submit a completed financial certificate with their motion for leave to proceed *in forma pauperis*. An authorized officer of the penal institution wherein the prisoner is held completes the financial certificate before returning it to the prisoner by determining the required filing fee from the fee chart set forth in the financial certificate. The required filing fee is based on the greater of either 1) the prisoner's current account balance; or 2) the prisoner's average monthly net deposits for the preceding six-month period. This eliminates the need for court personnel to determine whether a partial filing fee should be assessed, computing the amount of the partial filing fee, and collecting the fee.

Some districts have decided not to continue assessing partial filing fees or to rescind their previous rules in response to appellate court decisions that have held that a district court may not sua sponte dismiss an action as frivolous under §1915(d) after the plaintiff has paid a partial

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<sup>10</sup>See Plan for the Implementation of a Partial Filing Schedule for Civil Rights Complaints Filed Pursuant to 42 U.S.C. §1983 (D. Nev.) (July 1, 1992).

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filing fee.<sup>11</sup> The rationale these courts have followed is that the dismissal of an action as frivolous after the plaintiff has paid a portion of the filing fee is inconsistent with Federal Rule of Civil Procedure 4(a) which requires summons to issue once a complaint is filed (a complaint is considered filed as soon as plaintiff pays a filing fee), and Federal Rule of Civil Procedure 15(a) which requires that plaintiff be given an opportunity to amend a complaint before the court dismisses the action *sua sponte*.<sup>12</sup> Districts adopting this rationale have decided that the benefits of a § 1915(d) frivolity dismissal outweigh the benefits from a partial filing fee system. The District of Nevada is also experimenting with new practices to preserve the ability to dismiss frivolous petitions under § 1915(d). The Research Division will explore further the approach taken by the District of Nevada and make the findings available to all districts at a later date.

The information in this study is intended to help districts considering instituting a partial filing fee system. Although this inquiry was not aimed at discovering how effective partial filing fees were in the districts utilizing the practice, conversations with court personnel in some of these districts did uncover some dissatisfaction with partial filing fee schemes in achieving their goals. The biggest complaint was that partial filing fees were "more trouble than they were worth." In order for partial filing fees to be an effective tool for reducing meritless prisoner civil rights complaints, districts need to find the scheme that eliminates the administrative burdens and imposes a fee that serves as a disincentive to filing meritless complaints. Districts may want to find out why particular schemes are not working and how other districts have found a way to achieve better results.

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<sup>11</sup>*Butler v. Leen*, 4 F.3d 772 (9th Cir. 1993); *Clark v. Ocean Brand Tuna*, 974 F.2d 48, 50 (6th Cir. 1992); *Grissom v. Scott*, 934 F.2d 656, 657 (5th Cir. 1991); *Herrick v. Collins*, 914 F.2d 228, 230 (11th Cir. 1990); *In re Funkhouser*, 873 F.2d 1076, 1077 (8th Cir. 1989); *Bryan v. Johnson*, 821 F.2d 455, 458 (7th Cir. 1987).

<sup>12</sup>*See, e.g., Clark*, 974 F.2d at 50.

1 A

PARTIAL PAYMENT OF FILING FEES IN *IN FORMA PAUPERIS* CASES IN FEDERAL COURTS<sup>1</sup>

FEDERAL JUDICIAL CENTER

OCTOBER 7, 1994

Marie Cardoso

Circuit	District	Does the District ever require partial payment of filing fees?	Does the District have a local rule or standing order governing the imposition of partial filing fees? (If yes, describe) <sup>2</sup>	Does the District have an informal policy to impose partial filing fees that has not been placed in a standing order or the local rules? (If yes, describe) <sup>3</sup>	Comments
00DC	D. D.C.	no	N/A	N/A	
01	D. Mass.	no	N/A	N/A	
01	D. Me.	no	N/A	N/A	
01	D. N.H.	no	N/A	N/A	
01	D. P.R.	no	N/A	N/A	
01	D. R.I.	yes	no	On all petitions to proceed <i>in forma pauperis</i> , upon review of petitioner's financial affidavit, judge may assess a partial filing fee based upon the funds the petitioner has available; done on a case by case basis, under the judge's discretion, with no guidelines followed.	
02	D. Conn.	no	N/A	N/A	
02	E.D. N.Y.	no	N/A	N/A	
02	N.D. N.Y.	yes	Local Rule 5.4: when a federal, state, or local prisoner files a civil rights complaint or a petition for writ of habeas corpus, and requests leave to proceed <i>in forma pauperis</i> , a partial filing fee is required equal to 10% of average monthly deposits to prisoner's account for 3 months prior to filing of complaint. Fee shall never exceed that set by Judicial Conference of U.S.  Adopted by NY Order 94-25 enacted July 1, 1994.	no	Copy of local rule obtained.
02	S.D. N.Y.	no	N/A	N/A	
02	W.D. N.Y.	no	N/A	N/A	Order of the W.D. N.Y. filed on October 6, 1989 requiring payment of a partial filing fee by state and local prisoners seeking to proceed <i>in forma pauperis</i> in civil rights and habeas corpus actions was withdrawn and canceled by an Order filed on May 7, 1993.
02	D. Vt.	no	N/A	N/A	

03	D. N.J.	no	N/A	N/A	
03	E.D. Pa.	no	N/A	N/A	
03	M.D. Pa.	yes	no	Partial filing fees may be imposed in <i>In forma pauperis</i> proceedings in civil rights and habeas corpus cases in accordance with general policy set out in <i>Janez v. Zimmerman</i> , 752 F.2d 78 (3d Cir. 1985). Partial filing fees may be assessed as long as they never exceed 10% of prisoner's current institutional account at time of filing; done on an ad hoc basis and not done very frequently.	
03	W.D. Pa.	no	N/A	N/A	
03	D. V.I.	no	N/A	N/A	
04	D. Md.	no	N/A	N/A	
04	E.D. N.C.	yes	Order Adopted Jan. 19, 1980 and amended by Order Adopted April 30, 1980 & July 21, 1981; in cases brought by state prisoners under §1983, prisoners will be allowed to proceed <i>In forma pauperis</i> conditional upon payment of a partial filing fee based on the income received within the 6 month period preceding filing of complaint, and such other factors as applicant may draw to court's attention. The partial filing fee shall never exceed 15% of the income prisoner receives within the preceding 6 months.	no	Copy of orders obtained.

1 The information in this table has been obtained from and/or verified by district court clerks or other court staff.  
 2 The description of the local rule or standing order in this column is a paraphrasing of the actual language contained in the rule or order, and should not be quoted or cited as legal authority.  
 3 Note that a "no" in this column assumes that all judges within a district with a local rule or standing order governing the imposition of partial filing fees follow this rule or order. It does not take into account the possibility that certain judges within a district that has a local rule or standing order follow an informal policy in addition to or different in some way from the relevant, for assessing partial filing fees embodied in the rule or order.

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Circuit	District	Does the District ever require partial payment of filing fees?	Does the District have a local rule or standing order governing the imposition of partial filing fees? (If yes, describe)	Does the District have an informal policy to impose partial filing fees that has not been placed in a standing order or the local rules? (If yes, describe)	Comments
04	M.D. N.C.	yes	no	In all petitions to proceed in forma pauperis, the magistrate judge may require petitioner to pay a partial filing fee; this has mostly been done in prisoner petitions for cases brought under § 1983—the magistrate judge will look at the average balances in prisoners trust fund over the past 6 months and assess a fee. Done on an ad hoc basis with no guidelines followed.	
04	W.D. N.C.	yes	no	A partial filing fee may be assessed on an ad hoc basis under magistrate judges discretion. Although there are no hard and fast rules, the rule of thumb in prisoner §1983 cases is to assess a partial filing fee of 15% of the average balance in prisoners account over preceding 6 months; in social security cases, a partial filing fee may only be assessed if each family member has more than \$600 in his account.	
04	D.S.C.	no	N/A	N/A	Local Rule 22.2(c)-(f) which contained D.S.C.'s partial fee plan for prisoners in civil actions was suspended by a 1st Order filed on October 19, 1992 because the administrator cut by introduced it; comparing the fee and declining the fee outweighed any intended benefits. A new rule imposing partial fees will be researched in early 1996 after a district wide study of current plans is undertaken.
04	E.D. Va.	yes	Local Rule 29: in reviewing petitions to proceed in forma pauperis either under 42 USC §1983 or a petition for writ of habeas corpus, court may condition such action upon payment of not in excess of 20% of the aggregate deposits in a prisoners account during a 6 month period, including deposit on account at commencement of the 6 month period. If party desiring to file any proceeding in forma pauperis is not so affirmed to a state or federal prison, court may require filing of an affidavit outlining party's financial ability to pay so it can determine whether party should pay all or any part of required filing fee.	x	Copy of local rules obtained.
04	W.J. Va.	yes	Adopted Fed. 15, 1989, amended March 1, 1991.	no	Court may impose a partial filing fee in accordance with Evans v. Dorn, 550 F.2d

				<p>521 (4th Cir. 1981), case denied, 454 U.S. 1133 (1982) in 28 USC § 1963 cases brought by prisoner petitioners; when petitioning for in forma pauperis status court may assess partial filing fee of 15% of petitioners average monthly income 6 months prior to date of filing action.</p>	
CA	N.D. W.Va.	yes	no	<p>In all cases brought in forma pauperis upon review of petitioners financial affidavit judge may assess a partial filing fee based upon the funds the petitioner has available; done on a case by case basis, under the judges discretion, with no guidelines followed</p>	
04	S.D. W.Va.	yes	no	<p>In all cases brought by prisoner petitioners under 28 USC §§ 1915, 2254, 2255, a magistrate judge may assess a partial filing fee of 15% of the average balance in prisoners account 6 months prior to filing petition to proceed in forma pauperis. Done on an ad hoc basis under magistrate judges discretion.</p>	Copy of order obtained
05	E.D. La.	yes	<p>General Order No. 87-2: In petitions to proceed in forma pauperis under § 1915, guiding criteria are to be determined considering ad hoc criteria based on present economic status, table lists minimum and maximum debt's less which can be imposed when prisoner's present assets fall between \$20 increments, with \$35 being level at which prisoner must pay full filing fee. These are guidelines only and do not preclude consideration of other variables inherent in a § 1915 determination, including the total deposits in prisoner's account for the 3 months preceding the filing of the complaint.</p> <p>Adopted July 27, 1987.</p>	no	Copy of order obtained
05	N.D. La.	yes	<p>General Order No. 93-4: In petitions to proceed in forma pauperis, partial filing costs are to be determined using ad hoc criteria based on prisoners present economic status. Table lists minimum and maximum filing fees which can be imposed when prisoner's present assets fall between \$40 increments, with \$450 being level at which prisoner must pay full filing fee; these are guidelines only and do not preclude consideration of other variables inherent in a § 1915(d) determination.</p> <p>Adopted Nov. 2, 1983.</p>	no	Copy of order obtained

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March 15, 1995



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Circuit	District	Does the District ever require partial payment of filing fees?	Does the District have a local rule or standing order governing the imposition of partial filing fees? (If yes, describe)	Does the District have an informal policy to impose partial filing fees that has not been placed in a standing order or the local rules? (If yes, describe)	Comments
05	W.D. La.	yes	no	Partial filing fees may be assessed in prisoner §1915 cases where the inmate seeks to proceed <i>in forma pauperis</i> . Although W.D. La. does not have a local rule or standing order dealing with partial payment of fees, the court has unpublished guidelines that consist of a fee scale used as a point of reference in determining the partial filing fee; the fee scale does not preclude consideration of other variables inherent in a §1915(d) determination, including total deposits in prisoner's account for 3 months preceding filing of complaint.	Copy of unpublished guidelines obtained.
06	N.D. Miss.	no	N/A	N/A	
05	S.D. Miss.	yes	no	In all petitions to proceed <i>in forma pauperis</i> , upon review of petitioner's financial affidavit, judge may assess a partial filing fee based upon the funds the petitioner has available; done on a case by case basis, under the judge's discretion, with no guidelines followed.	
05	E.D. Tex.	yes	<p>General Order 94-7: in deciding whether a full or partial payment of fees is appropriate in any cause of action submitted by a prisoner with an application to proceed <i>in forma pauperis</i>, this order sets out advisory criteria based on past and present economic status which should serve merely as a point of reference in arriving at a reasonable fee payment. The table establishes guidelines: for civil actions, if inmate's account balance is between \$50 and \$180, inmate will pay a graduated portion of filing fee; in applications for writ of habeas corpus, if inmates account balance over last 6 months is between \$50 and \$100, inmate should pay \$5.</p> <p>Adopted February 11, 1994.</p>	no	Copy of order obtained.
05	N.D. Tex.	no	N/A	N/A	
05	S.D. Tex.	yes	<p>General Order No. 88-20 in the Matter of Applications to Proceed <i>in forma pauperis</i>: for all petitions to proceed <i>in forma pauperis</i>, partial filing costs are to be determined using advisory criteria based on prisoners present economic status; table lists minimum and maximum filing fees which can be imposed when prisoner's present assets fall between \$20 increments, with \$450 being level at which prisoner must pay full filing fee; these are guidelines only and do not preclude</p>	no	<p>Although the S.D. Tex.'s general order is still in effect, as a result of <i>Gissom v. Scott</i>, 934 F.2d 656 (5th Cir. 1991) the S.D. Tex. has decided not to assess partial filing fees on prisoner pro se petitioners seeking to proceed <i>in forma pauperis</i> because the usefulness of a dismissal for frivolity under §1915(c) outweighed the usefulness of the partial filing fee provisions. However, the general order may still be turned to for guidance in assessing a partial filing</p>

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			consideration of other variables inherent in a §1915(d) determination.			Guidance in assessing a parties filing fee for non-prisoner pro se petitioners even though this is done rarely.
05	W.D. Tex.	no	N/A	N/A		W.D. Tex. almost never imposes a partial filing fee on prisoner pro se petitioners seeking to proceed in forma pauperis due to <i>Gillessen v. Scott</i> , 804 F.2d 658 (5th Cir. 1991) because the court does not want to lose its ability to dismiss in forma pauperis cases as frivolous under § 1915(d). In past four years, W.D. Tex. imposed a partial filing fee in 3 cases, and all involved a petitioner not incarcerated, had income but couldn't meet the full filing fee.
06	E.D. Ky.	yes	no	In all petitions to proceed in forma pauperis, upon review of petitioners financial affidavit, judge may assess a partial filing fee based upon the funds the petitioner has available; done on a case by case basis, under the judges discretion, with no guidelines followed.		
06	W.D. Ky.	yes	no	In prisoner cases where petitioners seek to proceed in forma pauperis, judge may impose a partial filing fee; this is done very rarely at this time. As a very loose guideline the amount of the partial fee will be approximately 10% of prisoners average monthly income assessed upon the 6 months preceding the filing date.		
06	E.D. Mich.	no	N/A	N/A		
06	W.D. Mich.	yes	Local Rule 7: a magistrate judge may order a petitioner proceeding in forma pauperis to pay, within a specified period, a reduced fee, determined as the greater of: (i) 20% of the person's liquid assets including any prison account; or (ii) 5% of the total deposits placed in the prison account during the 6 months preceding the signing of the financial affidavit. The magistrate judge has discretion to make any other appropriate order concerning payment of the reduced fee.	no	Copy of local rule obtained.	

Adopted Aug. 1, 1991.

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March 15, 1995

Circuit	District	Does the District ever require partial payment of filing fees?	Does the District have a local rule or standing order governing the imposition of partial filing fees? (If yes, describe)	Does the District have an informal policy to impose partial filing fees that has not been placed in a standing order or the local rules? (If yes, describe)	Comments
06	N.D. Ohio	no	N/A	N/A	Local Rule 5:1.4(b) requiring payment of a partial filing fee by prisoners seeking to proceed <i>in forma pauperis</i> was rescinded on June 9, 1992 after <i>Clark v. Ocean Brand Tuna</i> , 874 F.2d 48 (6th Cir. 1992) (a district court may not sua sponte dismiss an action as a frivolous <i>in forma pauperis</i> action under 28 USC § 1915(d) after the plaintiff has paid a partial filing fee.)
06	S.D. Ohio	yes	Amended General Order No. 1 filed February 26, 1986: any inmate who seeks leave to proceed <i>in forma pauperis</i> in civil rights cases is required to make a partial payment of filing fees equaling 15% of the inmate's average monthly balance in his institutional fund account for the 6 month period immediately preceding the submission of the application. If this amount should be less than \$5, the inmate will be allowed to proceed <i>in forma pauperis</i> .	no	Copy of order obtained.
06	E.D. Tenn.	yes	Local Rule 4.2: Depending on the amount of funds available to petitioner seeking to proceed <i>in forma pauperis</i> , court may require petitioner to pay a portion of the filing fee.  Adopted March 1, 1994.	no	
06	M.D. Tenn.	no	N/A	N/A	M.D. Tenn. discontinued the practice of assessing partial filing fees approximately one year ago in reaction to <i>Clark v. Ocean Brand Tuna</i> , 974 F.2d 48 (6th Cir. 1992) (court could no longer dismiss <i>in forma pauperis</i> petitions where petitioner has paid the partial filing fee under a §1915(d) frivolity review), and a determination that there had been no significant decrease in the number of prison petitions filed.
06	W.D. Tenn.	no	N/A	N/A	W.D. Tenn. is considering implementing a partial filing fee system.
07	C.D. Ill.	yes	Local Rule 2.12: an incarcerated pro se plaintiff seeking leave to proceed <i>in forma pauperis</i> in a §1983 action is required to make a partial prepayment of filing fees in an amount not to exceed 50% of the inmate's average monthly income for the 6 months immediately preceding the submission of the petition; the fee may never exceed the full filing fee.	no	Copy of rule obtained.

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				Adopted Jan. 15, 1992.		
07	N.D. Ill.	yes	no	In every civil case where petitioner proceeds in forma pauperis, the judge may impose a partial filing fee based upon recommendation from the pro se law clerk; an informal sliding scale method is used to arrive at a reasonable dollar figure. For prisoner petitioners, a partial filing fee may be assessed if a prisoner's average trust fund balance for the preceding 6 months exceeds \$30.		
07	S.D. Ill.	no	N/A	N/A		Reasons why S.D. Ill. decided not to adopt the practice of assessing partial filing fees: creates more work in clerk's office; the amount assessed as a partial fee is not significant enough to deter the filing of frivolous suits.
07	N.D. Ind.	yes	Local Rule 4.3: Anyone seeking to proceed in forma pauperis may be required to make partial payment of filing fees in an amount to be determined by the court; applicant has 30 days to show cause as to why he can't make partial payment. Adopted Jan. 1, 1994.	no		Recently, judges have rarely required petitioner to pay a partial filing fee; they will either grant the petition to proceed in forma pauperis or deny it thus requiring payment of the full fee.
07	S.D. Ind.	yes	Although not in writing, the judges may use the following formula to arrive at a reasonable fee in prisoner cases: 50% of an average of the inmates last 6 month trust account balance.	no		
07	E.D. Wis.	yes	no	In all petitions to proceed in forma pauperis, upon review of petitioners financial affidavit, judge may assess a partial filing fee based upon the funds the petitioner has available; done on a case by case basis, under the judges discretion, with no guidelines followed.		
07	E.D. Wis.	no	N/A	In all petitions to proceed in forma pauperis, upon review of petitioners financial affidavit, judge may assess a partial filing fee based upon the funds the petitioner has available; done on a case by case basis, under the judges discretion, with no guidelines followed.		
08	E.D. Ark.	no	N/A	N/A		

Federal Judicial Center

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4B

March 15, 1995

S A

Circuit	District	Does the District ever require partial payment of filing fees?	Does the District have a local rule or standing order governing the imposition of partial filing fees? (If yes, describe)	Does the District have an informal policy to impose partial filing fees that has not been placed in a standing order or the local rules? (If yes, describe)	Comments
08	W.D. Ark.	no	N/A	N/A	
08	N.D. Iowa	no	N/A	N/A	Partial filing fees were assessed in N.D. Iowa in the past, but it is no longer done. Afraid that an 8th Cir. decision controls which will prohibit a district judge from dismissing a suit under a §1915(d) frivolity review once a partial filing fee has been paid. See <i>In re Funkhouser</i> , 873 F.2d 1076, 1077 (8th Cir. 1989). However, the practice is being considered for reinstatement.
08	S.D. Iowa	no	N/A	N/A	
08	D. Minn.	no	N/A	N/A	
08	E.D. Mo.	no	N/A	N/A	In 1989, E.D. Mo. repealed their local rule 9(a) which provided for the assessment of partial filing fees because: (1) there was no decrease in the number of prisoner petitions filed; (2) 99.9% of prisoners qualify to proceed <i>in forma pauperis</i> ; (3) if case is dismissed without prejudice for failing to pay partial filing fee, prisoner can refile the case; (4) created additional administrative work to gather petitioners financial information and calculate the partial fee; (5) afraid that an 8th Cir. decision controls which will prohibit a district judge from dismissing a suit under a §1915(d) frivolity review once a partial filing fee has been paid. See <i>In re Funkhouser</i> , 873 F.2d 1076, 1077 (8th Cir. 1989).
08	W.D. Mo.	yes	Local Rule 9: for all <i>in forma pauperis</i> petitions (except in cases filed under §§ 2254, 2255), if the court concludes the applicant can't pay the full filing fee, the court may require payment of a partial filing fee which should not cause applicant to give up basic life necessities. If applicant is incarcerated, a partial filing fee of 10% of applicant's monthly income for the 6 months immediately preceding filing of complaint may be imposed. A partial filing fee of less than \$1.50 may never be imposed.  Adopted Jan., 1983, amended Nov. 1991.	no	Copy of local rule obtained.
08	D. N.D.	no	N/A	N/A	

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08	D. Neb.	yes	Local Rule 83.11: upon review of an in forma pauper's petition, court may order applicant to pay all or part of the filing fee provided any partial filing fee doesn't exceed 30% of the average monthly income in trust account for 8 months preceding filing of the petition, 30% of the account balance at the time of filing, whichever is greater; the partial filing fee can't be less than \$2.00. If partial filing fee is based on current balance of applicant's trust account, court may require a higher partial filing fee if applicant has withdrawn funds from account to avoid payment of the filing fee.	no		Copy of local rule obtained.
08	J. S.D.	no	N/A	N/A		
08	D. Alaska	no	N/A	N/A		A provision regarding the partial payment of filing fees may be included in the new D. Alaska local rules expected to be enacted in 1995.
08	J. Ariz.	no	N/A	N/A		
08	C.D. Cal.	no	N/A	N/A		
08	E.D. Cal.	no	N/A	N/A		
08	H.D. Cal.	yes	no		In all petitions to proceed in forma pauper's, upon review of petitioner's financial affidavit, judge may assess a partial filing fee based upon the funds the petitioner has available; done on a case by case basis, under the judge's discretion, with no guidelines followed.	
08	S.D. Cal.	no	N/A	N/A		
08	D. Guam	no	N/A	N/A		
08	D. Haw.	no	N/A	N/A		
08	D. Idaho	yes	no		In all prisoner petitions to proceed in forma pauper's upon review of prisoner's financial affidavit, magistrate judge may assess a partial filing fee based upon the funds the prisoner currently has in the account, done on a case by case basis, under the judge's discretion, with no guidelines followed.	D. Idaho is currently working on formulating a set of guidelines to be used in determining the portion of the filing fee the petitioner must pay (e.g., if prisoner has \$5 in his account he will pay x% of the filing fee).

Federal Judicial Center

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**SRB**

March 15, 1996

6A

Circuit	District	Does the District ever require partial payment of filing fees?	Does the District have a local rule or standing order governing the imposition of partial filing fees? (If yes, describe)	Does the District have an informal policy to impose partial filing fees that has not been placed in a standing order or the local rules? (If yes, describe)	Comments
09	D.N. Mar.I.	no	N/A	N/A	
09	D. Mont.	yes	no	Although partial filing fees are not imposed in the Billings Division, in the Missoula and Helena Divisions (W. Mont.) the judge may require an applicant seeking to proceed <i>in forma pauperis</i> to pay a partial filing fee where applicant is able to pay something; this is rarely done (only two times in the past two in one-half years).	
09	D. Nev.	yes	<p>Local Rule 215(h): leave to proceed <i>in forma pauperis</i> in petitions for habeas corpus pursuant to 28 U.S.C. §§ 2241, 2254, and motions pursuant to § 2255 may be denied if value of accessible money and securities in petitioner's accounts exceeds \$75 or such other amounts as court may determine; leave to proceed <i>in forma pauperis</i> on civil rights complaints pursuant to 42 U.S.C. § 1983 may be denied if value of accessible money and securities in plaintiff's accounts exceeds \$200 or such amount(s) as court may determine. If less than the above amounts are accessible to petitioner, court may in its discretion require payment of a lower filing fee pursuant to a court-approved fee schedule when ordering that a petitioner may proceed <i>in forma pauperis</i>.</p> <p>Adopted February 1, 1992.</p> <p>Plan for the Implementation of a Partial Filing Fee Schedule for Civil Rights Complaints Filed Pursuant to 42 U.S.C. §1983 Adopted July 1, 1992: establishes procedures to implement a partial filing fee schedule to be applied to civil rights complaints filed by both prisoner and non-prisoner plaintiffs. These plaintiffs are required to submit with the civil right complaint a motion for leave to proceed <i>in forma pauperis</i> on a court-provided form. For inmates, the required financial certificate from the institution of confinement: that they must submit with the motion to proceed <i>in forma pauperis</i> will show whether they must pay a partial filing fee. This fee is determined by applying the greater of their current account balance or their average monthly net deposits for the past 6 months to the Partial Filing Fee Chart. Petitioner may submit a waiver from the partial filing fee chart if they believe special circumstances should exempt them from having to pay the filing fee as indicated on the financial certificate.</p>	no	Copies of the local rule, plan for implementing a partial filing fee schedule, filing fee chart, and motion to proceed <i>in forma pauperis</i> have been obtained. Note that the approach taken by D. Nev. is unique and aimed at alleviating the administrative problems other districts have encountered in the implementation of a partial filing fee system. The prisoner is aware of whether or not he will have to pay a partial fee and the amount before he files his civil rights complaint with the court. Nev. is revising its local rules and will be including an improved fee schedule.

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09	D. Or.	no	N/A	N/A	
09	E.D. Wash.	no	N/A	N/A	Enactment of a partial filing fee system is under consideration in E.D. Wash.
09	W.D. Wash.	no	N/A	N/A	
10	D. Colc.	no	N/A	N/A	
10	D. Kan.	no	N/A	N/A	
10	D. N.M.	no	N/A	N/A	
10	E.D. Okla.	no	N/A	N/A	
10	V.D. Okla.	no	N/A	N/A	
10	W.D. Okla.	no	N/A	N/A	W.D. Okla. is considering a provision addressing partial or installment payment of filing fees in the revised rules to be adopted in January of 1995.
10	D. Utah	yes	no	In all petitions to proceed <i>in forma pauperis</i> , upon review of petitioner's financial affidavit, judge may assess a partial filing fee based upon the funds the petitioner has available; done on a case by case basis, under the judge's discretion, with no guidelines followed.	
10	D. Wyo.	no	N/A	N/A	
11	M.D. Ala.	yes	Order filed Sept. 23, 1987; for all petitions to proceed <i>in forma pauperis</i> , court is ordered to ascertain whether a partial payment of filing fees should be required; order sets out advisory criteria based on petitioner's present economic status that court should consider in determining a reasonable payment in 42 U.S.C. §1983 cases; for cases filed pursuant to 28 U.S.C. §2254, the court should consider requiring inmates to pay the \$5 filing fee if they have \$25 or more in their prison accounts; these are guidelines only not precluding consideration of other variables inherent in a §1915 determination.	no	Copy of order obtained.

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Circuit	District	Does the District ever require partial payment of filing fees?	Does the District have a local rule or standing order governing the imposition of partial filing fees? (If yes, describe)	Does the District have an informal policy to impose partial filing fees that has not been placed in a standing order or the local rules? (If yes, describe)	Comments
11	N.D. Ala.	yes	no	The local practice which became prevalent in 1987 is for a magistrate judge in all prisoner petitions proceeding in forma pauperis to assess a partial filing fee approximately equal to the greater of 30% of either 1) the inmate's average monthly balance for the preceding six months, or 2) the amount currently in the inmate's prison account. The fee guidelines are flexible and the judge can take other factors into account. Prisoner is given the opportunity to explain why the assessment of a partial filing fee is not appropriate.	N.D. Ala. does have guidelines for assessing partial filing fees set out in writing in the form of either an order or local rule, but after persistent attempts they were not able to locate them.
11	S.D. Ala.	yes	no	In prisoner § 1983 and § 2254 cases where a motion to proceed in forma pauperis is filed, the district magistrate judges may assess a partial filing fee based upon an informal filing fee formula. Whichever figure is greater, thirty percent (30%) of the average monthly deposit for the past four (4) months in an inmate's account or forty percent (40%) of the account's balance. This formula has not been placed in a standing order or the local rules at this time.	S.D. Ala.'s local rules are being re-written, and it is contemplated that the informal formula will be incorporated in them with a few modifications, one being the application of the formula to all in forma pauperis cases.
11	M.D. Fla.	yes	Local Rule 4.07: court has discretion to order any party seeking to proceed in forma pauperis to pay a portion of the clerk and/or marshal's fees within a prescribed time; if petitioner fails to do so the action may be dismissed without prejudice.  Adopted Nov. 21, 1983.  The court uses the following informal guidelines to arrive at the amount petitioner has to pay as a filing fee in prisoner cases brought under §§ 1983, 2254, & 2255: 30% of the higher of 1) the amount in petitioner's prison account plus any assets possessed just prior to filing complaint; or 2) the total deposits placed in prisoner account or the 3 months preceding filing of complaint, divided by three.	no	Copy of both local rule and internal guidelines obtained.
11	N.D. Fla.	no	N/A	N/A	
11	S.D. Fla.	no	N/A	N/A	
11	M.D. Ga.	yes	no	In all petitions to proceed in forma pauperis, upon review of petitioner's financial affidavit, judge may assess a partial filing fee based upon the funds the petitioner has available done on a case by case basis, under the	

11	N.D. Ga.	yes	no	<p>In all petitions to proceed in forma pauperis, upon review of petitioner's financial affidavit, judge may assess a partial filing fee based upon the funds the petitioner has available; done on a case by case basis, under the judge's total discretion, with no guidelines followed.</p>	
11	S.D. Ga.	yes	no	<p>In prisoner petitions to proceed in forma pauperis in §§ 1963 &amp; 2254 cases, upon review of prisoner's financial affidavit, judge may assess a partial filing fee based upon the funds the prisoner has available; done on a case by case basis, under the judge's discretion, with no guidelines followed.</p>	

Federal Judicial Center

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**7B**

March 15, 1995





State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF LAW  
RICHARD J. HUGHES JUSTICE COMPLEX  
25 MARKET STREET  
CN 112  
TRENTON, NJ 08625-0112

CHRISTINE TODD WHITMAN  
*Governor*

DEBORAH T. PORITZ  
*Attorney General*

(609) 292-4965

February 13, 1996

Honorable Ronald J. Hedges, U.S.M.J.  
3053 M. L. King, Jr. Federal Building  
and Court House  
50 Walnut Street  
Newark, NJ 07101-0999

Re: Amendments to the General Rules For The  
District of New Jersey For Prisoners Filing  
In Forma Pauperis

Dear Judge Hedges:

For discussion purposes, I submit the following amendments to the General Rules for the District of New Jersey for prisoners filing in forma pauperis. I have worked with AAG Jeffrey Miller and DAG Ron Bollheimer and we have reviewed the materials you supplied to us and have incorporated as much of the Local Rule from the Northern District of New York as seems appropriate.

Initially, it should be noted that General Rule 29 currently contains two paragraphs (B&C) which address prisoners filing in forma pauperis habeas petitions and motions under 28 U.S.C. §2255. We suggest deleting those two paragraphs and replacing them with an expanded General Rule 10, which deals with prepayment of fees

which, as amended, would cover all in forma pauperis filings. We suggest that the following paragraphs be added to General Rule 10:

C. Upon receipt of a complaint or petition and an application to proceed in forma pauperis and supporting documentation as required for prisoner litigants, the Clerk shall promptly file the complaint or petition without the payment of fees and assign the action. The complaint, application, and supporting documentation then shall be forwarded to the assigned Judge or Magistrate Judge for a determination of whether the applicant will be granted leave to proceed in forma pauperis and whether the complaint or petition shall be served by the Marshal. Prior to service of process by the Marshal, the Court shall review all actions filed pursuant to 28 U.S.C. §1915 to determine whether sua sponte dismissal is appropriate.

D. Whenever a federal, state, or local prisoner submits for filing a civil rights complaint, petition for writ of habeas corpus or motion under 28 U.S.C. §2255, and requests leave to proceed in forma pauperis, the prisoner shall also submit a certified copy of the prisoner's trust fund account statement for the three-month period directly preceding submission of the complaint or petition. The account statement is to be requested from the appropriate official of the institution at which the prisoner is confined. If the prisoner has been confined at that institution for less than three (3) months, additional information shall be furnished by the prisoner as follows:

1. In the case where the prisoner has transferred from another State institution, the prisoner shall request a statement of the account for the three-month period from the Central Office of the Department of Corrections in Trenton, New Jersey.

2. In the case of a state prisoner who is newly incarcerated or has recently transferred to or from a county jail or a federal penitentiary, the prisoner is to provide the court with the name of the institution transferred from and any account statements currently available from the present place of

incarceration. The Court shall, in its discretion, seek further information from the prior or current institution.

E. A partial filing fee shall be required by the Court and submitted by the plaintiff in an amount equal to twenty percent (20%) of the average monthly deposits to the prisoner's account for the three (3) months prior to the filing of the complaint. In no event shall the fee exceed the fee set by the Judicial Conference of the United States.

F. If a prisoner claims exceptional circumstances that render the prisoner unable to pay the partial filing fee, in addition to the papers required under paragraphs C, D, or E of this Rule, an Affidavit of Special Circumstances shall be submitted to the Court outlining the circumstances that justify a different payment or relief from the partial filing fee. The Affidavit shall be examined by the Judge or Magistrate Judge assigned to this matter who shall have the discretion to grant or deny relief from the partial filing fee. When the Affidavit of Special Circumstances is submitted which, in the opinion of the Judge warrants exemption from the partial filing fee, service by the Marshall may be ordered. If an Affidavit of Special Circumstances is submitted that the Judge or Magistrate Judge finds does not warrant exemption from the partial filing fee, the plaintiff shall have forty-five (45) days within which to comply with the partial filing fee order. If the plaintiff fails to comply with the order within forty-five (45) days and has not been granted an extension of time to comply with the order, the action shall be dismissed without prejudice by order of the Judge either on his or her own initiative or upon a recommendation from a Magistrate Judge.

G. If the prison account of any prisoner exceeds \$200.00, the prisoner shall not be considered eligible to proceed in forma pauperis.

We have diverted from the New York rule in one significant respect -- we raised the percentage of the average monthly deposits in the prisoners' accounts to be charged from 10% to 20%. This change was made because we believe 20% will be a better deterrent to the filing of frivolous complaints. It should be noted, however, that

in the Jones v. Zimmerman case, the Third Circuit found it to be an abuse of discretion to deny leave to proceed in forma pauperis and to require a prisoner to pay a \$5.00 filing fee when he only had \$17.39 in his prison account, his monthly wage was \$15.00, and he had received only \$97.40 in the preceding six months. While the Court did not address a partial filing fee rule based upon a set percentage of a prisoner's account, it should be noted that the \$5.00 filing fee was approximately 29% of the amount actually in the prisoner's account. Accordingly, we may have to assess whether the Third Circuit will find acceptable a 20% filing fee.

I look forward to discussing this matter with you in the near future. I would request that at any meeting to discuss this rule, Jeff Miller or Ron Bollheimer be permitted to accompany me.

Very truly yours,

DEBORAH T. PORITZ  
ATTORNEY GENERAL OF NEW JERSEY

By: Jayne LaVecchia  
Jaynee LaVecchia, Director  
Division of Law

kbt

MEMORANDUM

To: Magistrate Judge Hedges

From: Mary-Louise Zanoni  
Tara A. Dunican

Date: March 13, 1996

Re: Your request for comments on draft Annual Assessment  
and revised form complaint

I. Comments on Revised Form Complaint

We feel that the changes in the form complaint are quite positive. Many of the questions have been phrased more clearly so we feel that the information provided by the pro se litigants will, in turn, be more comprehensible. We think the following changes are particularly beneficial: 1) requirement of information on "where defendants can be found" has been added (p. 1, # 2); 2) the complaint now seeks information on any other suits and not just those involving the same set of facts (p. 2, ¶ 1); 3) addition of the inmate # (p. 4, ¶ 3(a)); 4) the questions in ¶ 3(b) regarding defendants are clearer (p. 4).

We do, however, suggest some further changes with the form of complaint. First, given our experience with the pro se litigants, we feel it may be more efficient to place a sentence at the bottom of the signature page indicating that each plaintiff must sign the complaint.

Next, there does not seem to be any reason to have the information in the complaint regarding the grievance procedures in the institution. Such information is only helpful in those districts that have administrative alternatives. Since we do not have such alternatives, and are not likely to have them in the near future, removing such section from the complaint may eliminate unnecessary information.

It may be helpful to ask in the form complaint whether plaintiff wants a jury trial or bench trial. See attached page from "Model Form 2," Outline of Resource Guide for Managing Prisoner Civil Rights Litigation (draft in progress), Federal Judicial Center, 1995.



Finally, the portion of number 5 in the beginning instructions which states that an inmate is not eligible for in forma pauperis status if the prison account exceeds \$200.00 may be removed from the complaint. Such section is only relevant to habeas corpus petitions where the filing fee is only \$5.00 for pro se litigants and because this is a § 1983 complaint that section is not necessary.

II. Comments on draft Assessment -- proposed partial filing fee.

We suggest that the Committee may wish to revisit its decision to recommend a partial filing fee, because a partial fee would create a lot of extra work for court personnel, with no likely countervailing benefit. Districts that have used such a fee have reported no apparent change in the number or quality of in forma pauperis filings.<sup>1</sup> Consider the amount of complexity for court personnel that is added by the proposed rule -- the complaint goes to a judge for 1915(d) review; if it "passes," it goes back to the clerk's office, someone must calculate the 20% filing fee, and send a bill to the plaintiff; the plaintiff then may submit an "Affidavit of Special Circumstances" (we suggest that nearly all plaintiffs will do so); this then requires an additional ruling by judge or magistrate (with uncertainty as to a possible right of immediate appeal by those plaintiffs who may claim that payment of any fee will foreclose their right of access to the courts); for plaintiffs denied the right to proceed under the "Special Circumstances" exception, the clerk's office must then create a procedure for tracking the 45-day grace period and obtaining the necessary dismissal orders.

The proposed rule would also be vulnerable to challenge on the basis of established case law. When one considers the potential combination of Sinwell v. Shapp, 536 F.2d 15 (3d Cir. 1976), and the various cases from other Circuits that uniformly hold that complaints cannot be dismissed under 1915(d) after

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<sup>1</sup> Partial Payment of Filing Fees in In Forma Pauperis Cases: Current Practices of Federal District Courts, Federal Judicial Center Research Division, October 17, 1994, p. 7 (reporting that court personnel in Districts with partial-fee schemes consider these fees to be "'more trouble than they were worth'"). In the Third Circuit, the potential utility of a partial filing fee has been further reduced by Deutsch v. United States, 67 F.3d 1080 (3d Cir. 1995), which now permits 1915(d) dismissal of those complaints alleging claims for monetary amounts less than a normal filing fee.

payment of a partial fee, there is an inherent conceptual weakness in a scheme of trying to review for 1915(d) dismissal before imposing the partial fee. That is, if one follows Sinwell and determines IFP status as a threshold matter, how does that relate to the fact that under the proposed rule most plaintiffs are entitled to only a reduced fee status rather than "true" IFP status? Further, aside from the uncertain legality of the proposed sequence, there is the practical problem that it may not be long before the plaintiffs figure out that submitting a check for 20% of their account balance along with their complaints will insulate them from 1915(d) dismissals.

The proposed rule would repeal the existing habeas fee structure, now set forth in local rules 29B and 29C. We see no reason to change these, insofar as the full habeas filing fee is only \$5.00 to begin with and collecting "partial" fees could not be cost-effective, given the amount of work needed to collect the fee. Also, the effect of the proposed rule change on habeas petitioners seems very drastic. In effect, whereas habeas petitioners now may proceed IFP if they have less than \$200.00 in their prison accounts and have to pay the full fee of \$5.00 if they have \$200.00 or more, under the proposed rule, any habeas petitioner with more than \$25.00 in his or her prison account will have to pay the full fee. If such a change is desired, it might be much simpler to do it by just reducing the account balance in the existing habeas fee rule.

The effect of a \$200.00 asset cap applied to § 1983 plaintiffs might also be problematic. It would subject prisoners to a much harsher test than free-world IFP plaintiffs, who can own houses and cars without losing their entitlement to IFP status. Further, it would treat very differently the prisoner with \$199.99 in his or her account, whose filing fee would be at most \$40.00, and the prisoner with an additional \$.01, who would have to pay a filing fee of three times as much.

cc: Chief Judge Thompson  
Judge Parell

From: MODEL FORM 2, Outline of Resource Guide for Managing Prisoner Civil Rights Litigation (draft in progress), Federal Judicial Center 1995

III. Relief

[State briefly exactly what you want the Court to do for you. (Make no legal arguments. Do not cite cases or statutes.)]

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IV. Trial

Do you request a Jury Trial [ ] or Nonjury Trial [ ]?

[Check *only one*.]



V. Place of Confinement \_\_\_\_\_

- A. Is there a prisoner grievance procedure in this institution? Yes [ ] No [ ]
- B. Did you present the facts relating to your complaint in the prisoner grievance procedure? Yes [ ] No [ ]
- C. If your answer is YES:
  - 1. What steps did you take?

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**FORM TO BE USED BY A PRISONER IN FILING A COMPLAINT  
UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

\_\_\_\_\_ :  
\_\_\_\_\_ :  
(Enter above the full name of the plaintiff :  
in this action) :  
v. : Civil Action No. \_\_\_\_\_  
\_\_\_\_\_ : (To be supplied by the Clerk of  
\_\_\_\_\_ : the District Court)  
\_\_\_\_\_ :  
\_\_\_\_\_ :  
\_\_\_\_\_ :  
\_\_\_\_\_ :  
\_\_\_\_\_ :  
\_\_\_\_\_ :  
(Enter above the full name of the defendant :  
or defendants in this action.) :

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INSTRUCTIONS -- READ CAREFULLY

1. This complaint must be legibly handwritten or typewritten, signed by the plaintiff and subscribed to under penalty of perjury as being true and correct. All questions must be answered concisely in the proper space on the form. Where more space is needed to answer any question, attach a separate sheet.
2. In accordance with Rule 8 of the Federal Rules of Civil Procedure, the complaint should contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, (2) a short plain statement of the claim showing that you are entitled to relief, and (3) a demand for judgment for the relief which you seek.
3. You must provide the full name of each defendant or defendants and where they can be found.
4. You must send the original and one copy of the complaint to the Clerk of the District Court. You must also send one additional copy of the complaint for each defendant to the

**Form to file under Civil Rights Act, 42 U.S.C. § 1983**

Clerk. Do not send the complaint directly to the defendants.

5. Upon receipt of a fee of \$120.00, your complaint will be filed. You will be responsible for service of a separate summons and copy of the complaint on each defendant. See Rule 4, Federal Rules of Civil Procedure.
6. If you do not have the necessary filing fee, you may request permission to proceed in forma pauperis, in which event you must execute the affidavit on the last page, setting forth information establishing your inability to pre-pay the fees and costs or give security therefor. If you wish to proceed in forma pauperis you must have an authorized officer at the institution in which you are incarcerated complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If the current balance in your prison account exceeds \$200.00, you are not eligible to proceed in forma pauperis.
7. If you are given permission to proceed in forma pauperis, the Clerk will prepare and issue a copy of the summons for each defendant. These copies of summonses and the copies of the complaint which you have submitted shall be forwarded by the Clerk to the United States Marshal, who is responsible for service. The Marshal has USM-285 forms you must complete so that the Marshal can locate and serve each defendant. If the forms are sent to you, you must complete in full and return the forms to the Marshal.
8. Applications for leave to proceed in forma pauperis which do not conform to these instructions will be returned by the Clerk with a notation as to the deficiency.

PRISON FORM

1. Previous Lawsuits

(a) Have you filed any other suits in federal or state court since you were imprisoned? ( ) Yes. ( ) No.

(b) If your answer to (a) is "yes," describe the suit in the spaces below. (If there is more than one suit, describe the additional suits on separate sheet, answering the same question for each suit).



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i. Parties to previous suit:

Plaintiffs: \_\_\_\_\_  
\_\_\_\_\_

Defendants: \_\_\_\_\_  
\_\_\_\_\_

ii. Court (if federal court, name the district; if state court, name the county). \_\_\_\_\_  
\_\_\_\_\_

iii. Docket number: \_\_\_\_\_

iv. Name of Judge to whom case was assigned: \_\_\_\_\_  
\_\_\_\_\_

v. Disposition (for example: Was the suit dismissed? Was there an appeal? Is it still pending?)  
\_\_\_\_\_

vi. Approximate date of filing suit? \_\_\_\_\_

vii. Approximate date of disposition? \_\_\_\_\_

viii. Issue in previous suit? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

2. Place of Present Confinement? \_\_\_\_\_

3. Parties

(In item (a) below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any).

a. Name of plaintiff: \_\_\_\_\_  
Address \_\_\_\_\_

Inmate #: \_\_\_\_\_

b. First defendant -- name: \_\_\_\_\_  
Official position: \_\_\_\_\_  
Place of Employment \_\_\_\_\_  
How is this person involved in the case? \_\_\_\_\_



