

M E M O R A N D U M



Date: March 22, 1993
From: Ronald J. Hedges, U.S.M.J.
Re: March 16th Advisory Committee Meeting
To: ALL MEMBERS OF THE ADVISORY COMMITTEE

Attached are minutes of the March 16th meeting of the Advisory Committee.

cc: (w/encl.)
Honorable John F. Gerry, Chief Judge
William T. Walsh

MINUTES OF THE MARCH 16, 1993 MEETING
OF THE ADVISORY COMMITTEE ON
CIVIL JUSTICE EXPENSE AND DELAY REDUCTION

The March 16th meeting of the Advisory Committee was convened in Newark at 12:30 p.m. Messrs. Chertoff, McGuire, Sabatino and Walder were present, as was Ms. Jacob and Magistrate Judge Hedges. Mr. McMahon, the Federal Public Defender, and Ms. Mansier of the Division of Law were present at the invitation of the Committee. The purpose of the March 16th meeting was to consider the items reflected in the minutes of the February 17th meeting of the Oversight Subcommittee.

During the February 17th Oversight Subcommittee meeting a number of items were discussed as possible means to lessen the impact of the criminal docket. These were responded to by Mr. Chertoff in his letter of March 4, 1993 (attached).

The effect of a possible expansion of discovery on the criminal docket was discussed. Mr. Chertoff observed that over 90% of all criminal cases in the District are disposed of by guilty pleas and that the District has one of the highest guilty plea rates. He also expressed the opinion that the standard discovery order now in use provides a great deal of information to defendants and their attorneys.

Mr. Chertoff suggested that expansion of discovery would not lead to "earlier" pleas. Instead, he suggested that the plea bargaining process could be accelerated in two ways: (1) judges could set early dates for filing of pretrial motions, with the understanding that early disposition of such motions could remove issues which are barriers to pleas; and (2) he could institute a policy which sets a firm cut-off date for pleas. This would force a defendant to enter a plea at an early date. Mr. Chertoff observed, however, that such a policy would not be successful unless all judicial officers supported it. Mr. Chertoff commented that in the short run this policy would likely lead to more trials but that, as attorneys accepted the seriousness of the cut-off date, there would be earlier pleas.

Mr. McMahon noted that securing guilty pleas is difficult in two areas: (1) in multi-defendant cases, when the question arises as to which defendant will plead first and what the effect of that plea (and any cooperation) will be on the remaining defendants; and (2) when a defendant (or attorney) is new to the federal criminal justice system and does not appreciate the distinction between it and the state system. Mr. McMahon suggested as a means to reduce "wasted" time of judicial officers and attorneys that deputy clerks be directed to arrange for the production of defendants. Such a policy would avoid confusion between the United States Attorney and the Federal Public Defender as to who is responsible for assuring

the presence of a particular defendant.

It was observed that the critical factors in the size of the criminal docket are the number of Assistant United States Attorneys and the number of crimes. As to the former, concern was expressed that the number of AUSAs may decrease by attrition or otherwise due to budgetary constraints. As to the number of crimes, it was observed that Congress may be "federalizing" a number of traditional State offenses and that the prosecution of these offenses may increase the criminal caseload.

With regard to the deferral of prosecution of certain types of criminal cases to the State criminal justice system, Messrs. Chertoff and Sabatino observed that there has been good cooperation between the United States Attorney and the Division of Criminal Justice. However, deferral of certain types of cases is dependent on directives from the Department of Justice.

Mr. McMahon raised the possibility of conditional pleas. He suggested that the current policy of the United States Attorney, which is to not negotiate conditional pleas, has led to a relatively small number of criminal cases proceeding to trial. Mr. Chertoff commented that, from an institutional viewpoint, the benefit of a plea is to close a file completely (which a conditional plea would not do) and that a conditional plea would merely shift the burden of judicial resolution of an issue from the District Court to the Third Circuit.

Mr. McMahon also raised the possibility of pretrial diversion of various offenses, especially "obstruction of mail" charges against Postal Service employees. It appears that the Postal Service insists that such defendants be prosecuted and that they plead guilty since, absent a guilty plea, they cannot be discharged from employment. Mr. Chertoff agreed to bring the issue of pretrial diversion of these defendants up with the Postal Service again.

With regard to possible means to lessen the impact of the criminal docket, the consensus of the Advisory Committee was as follows:

1. Any modification of current criminal discovery practices would have no discernable effect on the criminal docket. Accordingly, there is no need to explore such modification at present.
2. Judicial officers should be encouraged to set early dates for filing/disposition of pretrial motions in criminal cases.
3. Judicial officers should require their deputy clerks to

make all necessary arrangements to secure the presence of defendants in court.

Turning to prisoner cases (which was another topic for discussion at the February 17th meeting of the Oversight Subcommittee), Magistrate Hedges reported that what will eventually be the largest federal correctional institution is now being established at Fort Dix. He expressed concern that this facility could lead to a significant expansion in the number of prisoner civil cases filed in the District.

Magistrate Hedges reported that Chief Judge Gerry was attempting to secure CJRA funding for two staff attorney positions. These staff attorneys would be utilized as "pro se clerks" to screen civil rights complaints filed by indigents. Magistrate Hedges noted his suggestion that one staff attorney administer the mediation program.

Ms. Jacob questioned whether staff attorneys could also deal with habeas petitions and Social Security appeals. Magistrate Hedges noted the desire of a number of judges to have these dealt with by interns. He also commented that the fact-sensitive nature of Social Security appeals would militate against these being turned over to staff attorneys. Ms. Jacob suggested screening of habeas petitions to determine whether State remedies have been exhausted as an appropriate task for staff attorneys.

Mr. Sabatino advised that the Division of Law will draft a manual on civil rights caselaw for use by the Court. This manual will be developed over the summer.

At the February 17th Oversight Subcommittee meeting a suggestion was made that discovery be stayed in prisoner cases when a dispositive motion is pending. Ms. Mansier presented the Advisory Committee with a draft letter application and order for a stay (both attached). Magistrate Hedges agreed to present these to the magistrates for their consideration.

Finally, the Advisory Committee again turned to the question of a partial filing fee. Ms. Mansier reported that New Jersey Commissioner of Corrections Fauver was not in favor of a partial filing fee as suggested at the Oversight Subcommittee meeting but that he looked favorably on the concept of a reduced "across-the-board" fee for all prisoners. Ms. Mansier advised that each State prisoner earns a work credit of approximately \$20 per month for cleaning his cell. It was uncertain whether this was earned automatically by a prisoner. Mr. Sabatino and Ms. Mansier suggested that a flat filing fee of \$5.00 would be an appropriate charge against this minimum income and might discourage filing of some suits. A fee of \$10.00 was also discussed.

The consensus of the Advisory Committee was that the partial filing fee concept should be rejected. First, concern was expressed that a prisoner might not earn the work credit automatically. Absent this credit being earned automatically, it was uncertain whether the Department of Corrections maintained appropriate and accessible records of prisoners' individual accounts. Concern was also expressed that a prisoner would be unable to send a check to the Clerk but that, instead, the Clerk would be required to accept cash. The concept of a partial filing fee carried administrative burdens and there was a question of the fairness of imposing such a fee.

The consensus of the Advisory Committee with regard to prisoner civil cases was that the Court should continue in its efforts to secure two staff attorney positions. These staff attorneys should review civil rights complaints submitted by indigents and should also review habeas petitions for exhaustion. One staff attorney should administer the mediation program.

The meeting adjourned at 1:45 p.m.