Guidance to Advisory Groups Created Under the Civil Justice Reform Act of 1990

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Prepared for the United States District Court for the District of Maine

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Guidance to Advisory Groups

Introduction

This document provides guidance to the advisory groups appointed pursuant to the Civil Justice Reform Act of 1990 (see Appendix A). The Act seeks reductions in the cost and delay of civil litigation in the U.S. district courts through "significant contributions by the courts, the litigants, the litigants' attorneys, and by the Congress and the executive branch" (28 U.S.C. § 102.3). The Act thus contemplates a community effort, and it requires each district court to develop and adopt a civil justice expense and delay reduction plan as the primary means of mobilizing that effort. The purpose of each plan must be "to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes" (28 U.S.C. § 471). The advisory group has been appointed to assist in developing this plan.

Each advisory group is required initially to conduct a prompt assessment of the court's workload and then to prepare a report recommending adoption of specified measures, rules, and programs that would constitute the court's plan or adoption of a model plan (to be developed by the Judicial Conference of the United States). The Act does not specify when the advisory group is to submit its report to the court, but it does require the group to "promptly complete" its assessment of the docket (§ 472(c)(1)). Although the court must consider the group's recommendations, the plan will be determined by the court itself. Copies of the court's plan are to be distributed to the judicial council of the circuit, all chief district judges in the circuit, and the director of the Administrative Office of the U.S. Courts. The chief district judges and the chief judge of the circuit then serve as a committee to review each court's plan and suggest revisions. Each plan must be reviewed by the Judicial Conference, which may request the district court to make additional revisions.

The following materials have been prepared to meet the Act's March 1, 1991, deadline for appointment of advisory groups. The Judicial Conference, Federal Judicial Center, and Administrative Office expect to provide further assistance to the advisory groups and to respond to specific requests for assistance.

Implementation of the Act

The Act imposes implementation duties on the courts, the Judicial Conference, the Administrative Office, and the Federal Judicial Center. Implementation duties in some districts will be different from those in others. Districts that develop and implement a plan by Dec. 31, 1991, will be designated by the Judicial Conference as Early Implementation Districts (§ 103(c)). If funds for implementation of the Act are appropriated by Congress, these districts will become eligible to apply for additional resources necessary to implement the court's plan, such as technological and personnel support. In addition, the Act requires the Judicial Conference to conduct a pilot program in ten districts to be designated by the Conference (§ 105). The ten pilot districts must implement plans by Dec. 31, 1991, and must include in their plans the six principles of litigation management and cost and delay reduction set forth in § 473(a) of the Act. All other courts must implement plans by Dec. 1, 1993.

The Act also designates five district courts as demonstration districts (§ 104). The Western District of Michigan and the Northern District of Ohio are to experiment with assignment of cases to appropriate processing tracks. The Northern District of California, the Northern District of West Virginia, and the Western District of Missouri must experiment with various methods of reducing cost and delay, including alternative dispute resolution procedures. These five courts may become Early Implementation Districts if they elect.

The Act requires that an independent organization with expertise in the area of federal court management compare the results from the ten pilot courts with ten comparable districts that were not required to adhere to the six litigation management principles specified in § 473(a). The Judicial Conference must present the results of this independent study to Congress by Dec. 31, 1995, along with recommendations whether some or all courts should be required to incorporate the six principles. If the principles do not prove effective, the Judicial Conference must adopt and implement alternative cost and delay reduction programs.

Although the Act is silent on whether it is intended to apply to bankruptcy courts, the Report of the Senate Judiciary Committee states that it is not (S. Rep. No. 101-416 on S. 2648, Aug. 3, 1990, Senate Report, p. 51).

Overview of Advisory Group Functions

The group's statutory functions fall into these general categories:

- assess the court's docket, the litigation practices and procedures in the district, and the impact of new legislation, in order to identify causes of cost and delay in civil litigation (§ 472(c));
- prepare a report recommending the adoption of a civil justice expense and delay reduction plan, which should include measures, rules, and programs to reduce cost and delay and which should state the basis for the recommendations (§ 472(b)); and
- consult with the court in the annual post-plan assessment of the civil and criminal dockets (§ 475).

These are daunting tasks—nothing on this scale has ever been attempted in the federal court system. Congress has made it clear that the courts and their advisory groups should carry them out in a meaningful manner to try to achieve concrete results, and it is in the interests of the courts and the public that this be done. Because the time and resources available are limited, the tasks must also be carried out in a practical and realistic manner so that they may be accomplished within those limits. Below is a brief introduction to each of the major functions of the advisory group.

A. Assessing the court's civil and criminal dockets (§ 472(c))

A starting point for determining the condition of the court's dockets is an analysis of court statistics. No one statistical formula can determine whether a district is "good" (or "not so good") in litigation management. Therefore, an analysis will incorporate several statistical methods and will take into consideration the particular circumstances of the district, such as unusual case mix, judgeship vacancies, use of senior or visiting judges, and so on. Section II of these materials is provided to assist the group in this analysis.

To identify trends in case filings and in the demands being placed on the court's resources, the group may use court statistics not only to review general trend data, but also to identify categories of cases creating special burdens (e.g., death penalty, asbestos, prisoner, complex crimi-

nal, and RICO cases). The advisory group may also want to explore the causes underlying filing trends, such as conditions giving rise to particular kinds of civil litigation, including charging decisions by the U.S. attorney. The Senate Report notes that this would also include a determination of whether the court lacks sufficient resources, including judicial personnel and administrative staff or space, facilities, and equipment. (Senate Report at p. 52.) Section II includes an outline that may be helpful in assessing trends in the relationship between demand and resources.

B. Identifying the principal causes of costs and delay

In performing its assessment, the advisory group is required to identify the principal causes of cost and delay in civil litigation. In so doing, it must consider such potential causes as court procedures and the way litigants and attorneys approach and conduct litigation. It will be difficult for the groups to accomplish this task with precision. However, they might undertake a broad review of litigation practices and procedures both in and out of court with a view toward learning how these practices could be modified to reduce cost and delay. To assist the group with this review, Section III presents a list of some of the practices and procedures in civil litigation.

C. Examining the impact of new legislation on the court

The Act also looks to the advisory group to examine the impact of new legislation on the courts. Thus it addresses a role for Congress in reducing civil delay and expense. Among the topics the group might address are procedural reforms that encumber the courts and encourage litigation, failures of Congress to express its intent clearly or to enact legislation that would ease the burden on courts, and the impact of legislation on court dockets. The group should also consider steps that individual courts or the judicial branch as a whole can take to improve their ability to adapt to new legislation. A discussion of this topic can be found in Section IV.

D. Recommendations to the court

The Act requires that the advisory group, in developing its recommendations, "take into account the particular needs and circumstances of the district court, litigants in such court, and the litigants' attorneys" (§ 472(c)(2)). Thus, the recommendations of the group should be more than generalized findings and conclusions. The advisory group's report should state with specificity the assessments made by the group, the findings on which it bases its recommendations, the particular circumstances of the district that affect cost and delay, and recommended changes in litigation procedures, rules, and methods. Section V addresses this advisory group duty.

The discussions, tables, outlines, and other aids presented below are intended to assist the group with its monumental tasks, not by supplying solutions, but by providing starting points for inquiry. This document does not undertake to tell groups what to do or how to do it, nor does it offer normative judgments. Advisory group members will have been selected for their competence, experience, and judgment, and they can be expected to bring these to bear on the task at hand. When they have completed their work, the court will be able to make decisions about its plan and the implementation of a constructive, workable program for the administration of civil justice.

I. Obtaining Guidance from the Court Regarding the Role of Advisory Groups

As the groups prepare to undertake the analyses required by the Civil Justice Reform Act, they may wish to seek further guidance from the court. Following are some questions a group may wish to ask.

1. Does the court wish to be an early implementation district, or has it been designated a pilot or a demonstration district? If either is so, the court must implement an expense and delay reduction plan by Dec. 31, 1991.

2. If the court is neither a pilot nor an early implementation district, what is the deadline by which the court wishes the advisory group to submit its report? The outside limit set by the statute for implementation of a plan is three years from the date of enactment, i.e., Dec. 1, 1993.

3. If a reporter has been appointed, what is to be the reporter's role?

4. Does the court wish to establish any ground rules for the advisory group with respect to such matters as interviewing members of the bar, government officials, or others?

5. What kind of access will the advisory group have to the court? Will the court permit interviews with judges, magistrate judges, and staff? What court records may be consulted by the advisory group? Will the advisory group be expected or permitted to examine the caseload at the level of individual judges?

6. What resources, monetary and otherwise (e.g, assistance from the court through its clerk or clerk's office staff), will be provided to the advisory group? What resources will be available for this purpose?

7. Will the group be expected or permitted to call on experts, such as statisticians or pollsters? Can names be recommended to the advisory group?

8. What role will the advisory group play in the annual review of the plan and the dockets required by the Act?

9. What are the terms of the current advisory group members? How will future appointments to the group be made?

II. Assessing the Court's Dockets (§ 472(c)(1))

Each district compiles certain statistics on workload and case processing. These statistics conform to a uniform national reporting system, maintained by the Administrative Office, and provide certain basic information about the state of a court's dockets. This information is the necessary starting point for any analysis and is presented here for your use. However, because the national reporting system was not specifically designed for identifying and analyzing causes of cost and delay, the advisory groups will find it necessary to seek and analyze supplemental information.

In Section A we present some of the routinely collected statistics along with several additional measures for assessing the condition of the dockets and for analyzing trends in case filings. (Note that all measures presented in Section A are specific to your district.) In Section B we list some measures the group may wish to seek or develop to aid their assessment of trends in the demands placed on court resources.

A. Determining the condition of the civil and criminal dockets and identifying trends in case filings (§ 472(c)(1)(A) & (1)(B))

A major source of information about the caseloads of the district courts is the statistical data regularly collected and published in the *Federal Court Management Statistics (MgmtRep),* which provides a six-year picture for each district, and in the *Annual Report of the Director of the Administrative Office of the United States Courts (AORep).*

The published tables are prepared from individual case data regularly reported to the Administrative Office by the courts. A report is provided when a case is filed, with a follow-up when the case is terminated. As in any massive reporting process, there are many opportunities for error and inconsistencies to enter the system, but there is no reason to expect systematic error that would affect specific locations or specific activities.

The published data are the basis of the assessments of court activity that are currently made by the courts, by the judicial system, and by Congress. Consequently, a thorough grasp of those data will be helpful for understanding the assessments others will be making and for communications both between the advisory group, the courts, and the Judicial Conference and among advisory groups.

1. Measures for Determining the Condition of the Civil Docket

a. Caseload volume. *MgmtRep* for 1990 shows the number of civil and criminal cases filed, terminated, and pending for statistical years (years ended June 30) 1985-1990. A copy of the table for the District of Maine appears on the following page. The table also shows the number of authorized judgeships and the months of judgeship vacancy. The authorized judgeships—not the available judge power—is used in calculating the number of actions per judgeship reported in this table.

The table does not report the number of actions per magistrate judge. In some districts, these judicial officers handle a substantial volume of pretrial proceedings in civil cases. In most districts, magistrate judges also have responsibility for misdemeanor cases and for preliminary proceedings in felony cases. Statistics on the workload of magistrate judges may be obtained from the Magistrates' Division of the Administrative Office.

U.S. DISTRICT COURT -- JUDICIAL WORKLOAD PROFILE

MAINE

			TWELVE MONTH PERIOD ENDED JUNE 30						NUMERICAL STANDING WITHIN	
			1990	1989	1988	1987	1986	1985	U.S.	CIRCUIT
OVERALL WORKLOAD STATISTICS	Filings*		786	708	864	990	1,018	972		
	Terminations		782	805	970	1,086	1,054	1,037		
	Pending		627	660	758	864	960	996		
	Percent Change In Total Filings Current Year	Over Last Year. . .		11.0					9	2
		Over Earlier Years. .			-9.0	-20.6	-22.8	-19.1	55	2
	Number of Judgeships		2	2	2	2	2	2		
	Vacant Judgeship Months		6.5	.0	.0	.0	.0	.0		
ACTIONS PER JUDGESHIP	FILINGS	Total	393	354	432	495	509	486	63	1
		Civil	331	304	368	429	446	444	63	2
		Criminal Felony	62	50	64	66	63	42	37	1
	Pending Cases		314	330	379	432	480	498	77	3
	Weighted Filings**		403	334	396	420	379	376	52	3
	Terminations		391	403	485	543	527	519	64	1
	Trials Completed		28	31	26	30	32	29	72	4
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal Felony	7.1	8.7	5.7	5.7	5.4	7.1	87	4
		Civil	9	9	10	11	9	9	27	2
	From Issue to Trial (Civil Only)		14	16	17	9	16	29	36	2
OTHER	Number (and %) of Civil Cases Over 3 Years Old		19 3.5	20 3.5	17 2.7	51 6.9	181 21.3	159 17.5	25	2
	Triable Defendants** in Pending Criminal Cases Number (and %)		25 (21.4)	53 (38.1)	57 (35.2)	82 (41.6)	62 (32.0)	56 (29.2)		
	Jurors**	Avg. Present for Jury Selection	22.56	26.23	23.62	28.54	21.96	30.33	16	2
		Percent Not Selected or Challenged	19.6	24.5	18.0	26.7	25.2	30.6	18	2

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

1990 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE													
Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	661	15	48	137	34	46	17	79	141	10	56	2	76
Criminal*	124	5	2	5	1	1	20	64	2	6	2	5	11

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

**See Page 167.

Key To Table At Left

Weighted filings

To assess how much work a case will impose on the court, the Judicial Conference uses a system of case weights based on measurements of judge time. The weighted filings figures presented in the table are based on weights developed from the 1979 Time Study conducted by the Federal Judicial Center. A detailed discussion of that project can be found in the 1979 *Federal District Court Time Study*, published by the Center in October 1980. Also, a historical statement about weighted caseload studies completed in the U.S. district courts appears in the 1980 *AORep*, pages 290 through 298.

Civil median time

Civil median times shown for all six years on the profile pages exclude not only land condemnation, prisoner petitions, and deportation reviews, but also all recovery of overpayments and enforcement of judgments cases. The large number of these recovery/enforcement cases (primarily student loan and VA overpayments) are quickly processed by the courts and would shorten the median times in most courts. Excluding these cases gives a more accurate picture of the time it takes for a case to be processed in the federal courts.

Triable felony defendants in pending criminal cases

Triable defendants include defendants in all pending felony cases who were available for plea or trial on June 30, as well as those who were in certain periods of excludable delay under the Speedy Trial Act. Excluded from this figure are defendants who were fugitives on June 30, awaiting sentence after conviction, committed for observation and study, awaiting trial on state or other federal charges, mentally incompetent to stand trial, as well as defendants for whom the U.S. Attorney had requested an authorization of dismissal from the Department of Justice.

Key to nature of suit and offense

	Civil Cases		Criminal Cases
A	Social Security	A	Immigration
B	Recovery of Overpayments and Enforcement of Judgments	B	Embezzlement
C	Prisoner Petitions	C	Weapons and Firearms
D	Forfeitures and Penalties and Tax Suits	D	Escape
E	Real Property	E	Burglary and Larceny
F	Labor Suits	F	Marijuana and Controlled Substances
G	Contracts	G	Narcotics
H	Torts	H	Forgery and Counterfeiting
I	Copyright, Patent, and Trademark	I	Fraud
J	Civil Rights	J	Homicide and Assault
K	Antitrust	K	Robbery
L	All Other Civil	L	All Other Criminal Felony Cases

b. Caseload mix and filing trends. The variety of cases making up the caseload in most district courts will be surprising to many who study them for the first time. That variety may be important to advisory groups in assessing the docket and in considering what groups of cases, if any, should be treated differently in management plans. Different types of cases tend to move through the courts in different ways. For example, some are almost always disposed of by default judgment (student loan); some are in the nature of an appeal (bankruptcy); some are a unique subset of another category (asbestos cases in the personal injury category). From readily available data we cannot discern how a specific case moved through the system nor how a future case may move. Some types of cases, however, may move through the system in distinctive ways often enough to warrant your special attention. Do they affect court performance distinctively? Do they consume court resources distinctively?

We have sorted case types into two categories to illustrate the point of distinctive paths. Type I case types are distinctive because within each case type the vast majority of the cases are handled the same way; for example, most Social Security cases are disposed of by summary judgment. Type II case types, in contrast, are disposed of by a greater variety of methods and follow more varied paths to disposition; for example, one contract action may settle, another go to trial, another end in summary judgment, and so on. (See the table in Appendix B for a complete definition of the case types.)

Type I includes the following case types, which over the past ten years account for about 40% of civil filings in all districts:

- student loan collection cases
- cases seeking recovery of overpayment of veterans' benefits
- appeals of Social Security Administration benefit denials
- condition-of-confinement cases brought by state prisoners
- habeas corpus petitions
- appeals from bankruptcy court decisions
- land condemnation cases
- asbestos product liability cases

The advisory group may wish to consider whether, in this district, these categories or any others identified by the group are distinctive enough to warrant special attention in assessing the condition of the docket or in recommending future actions. Careful documentation of analyses and decisions of this kind will contribute significantly to the final report the Judicial Conference must make to Congress.

Type II includes the remainder of the case types, which collectively account for about 60% of national civil filings over the past ten years. Case types with the largest number of national filings were:

- contract actions other than student loan, veterans' benefits, and collection of judgment cases
- personal injury cases other than asbestos
- non-prisoner civil rights cases
- patent and copyright cases
- ERISA cases
- labor law cases
- tax cases

• securities cases
• other actions under federal statutes; e.g., FOIA, RICO, and banking laws

Chart 1 shows the percentage distribution among types of civil cases filed in your district for the past three years.

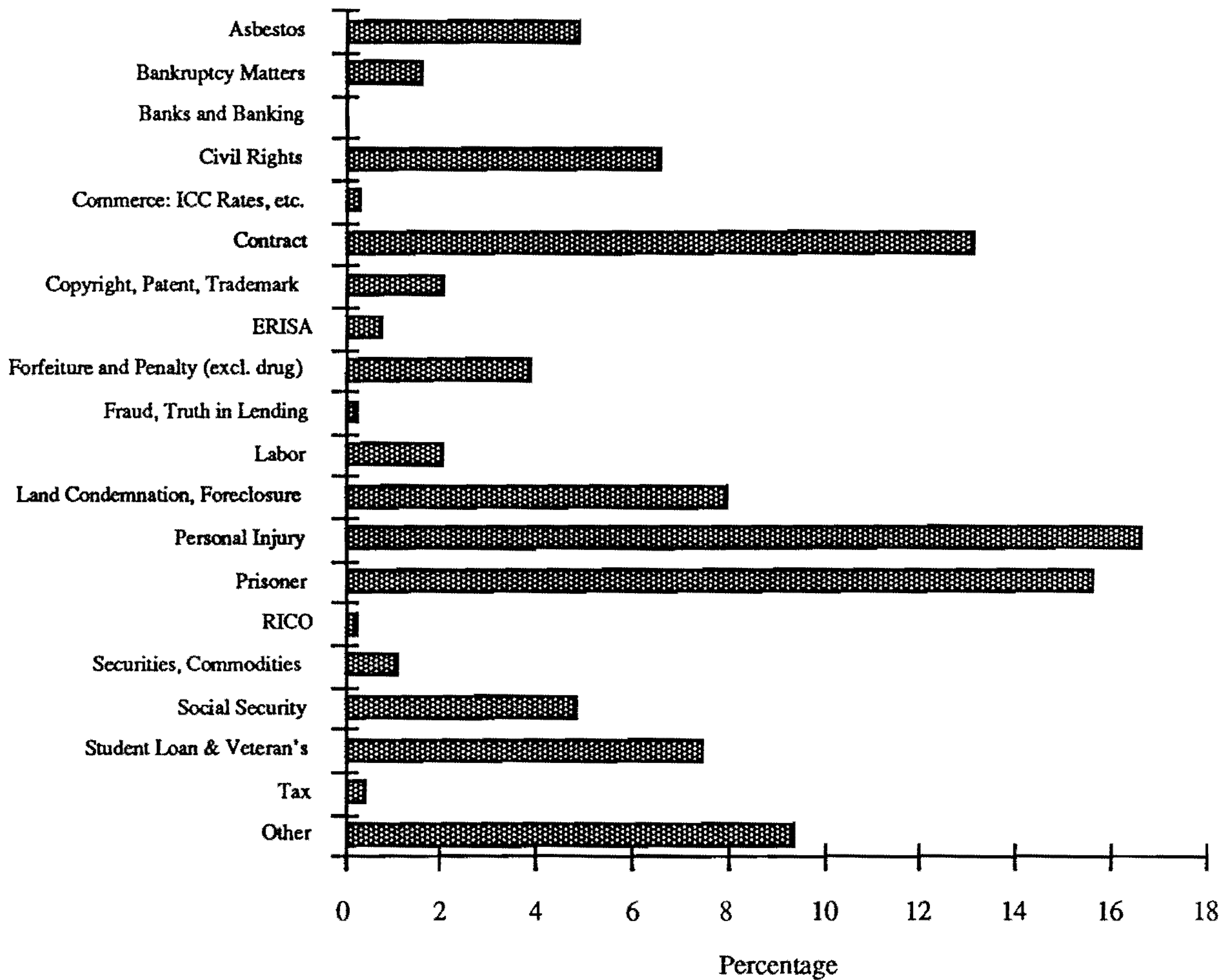


Chart 2 shows the trend of case filings over the past ten years for the Type I and Type II categories. Table 1 shows filing trends for the more detailed taxonomy of case types.

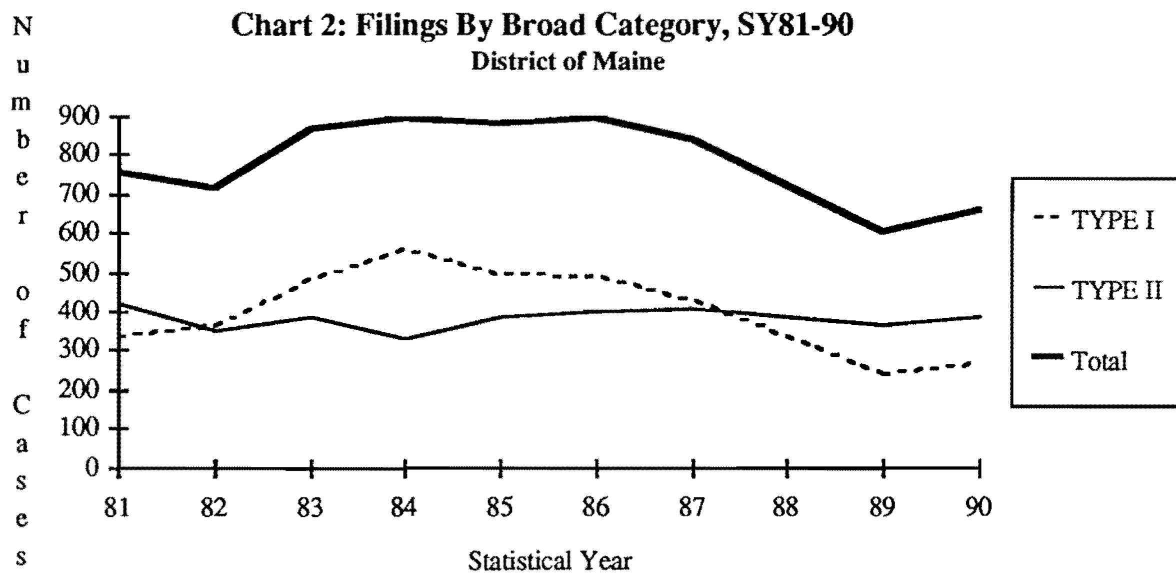
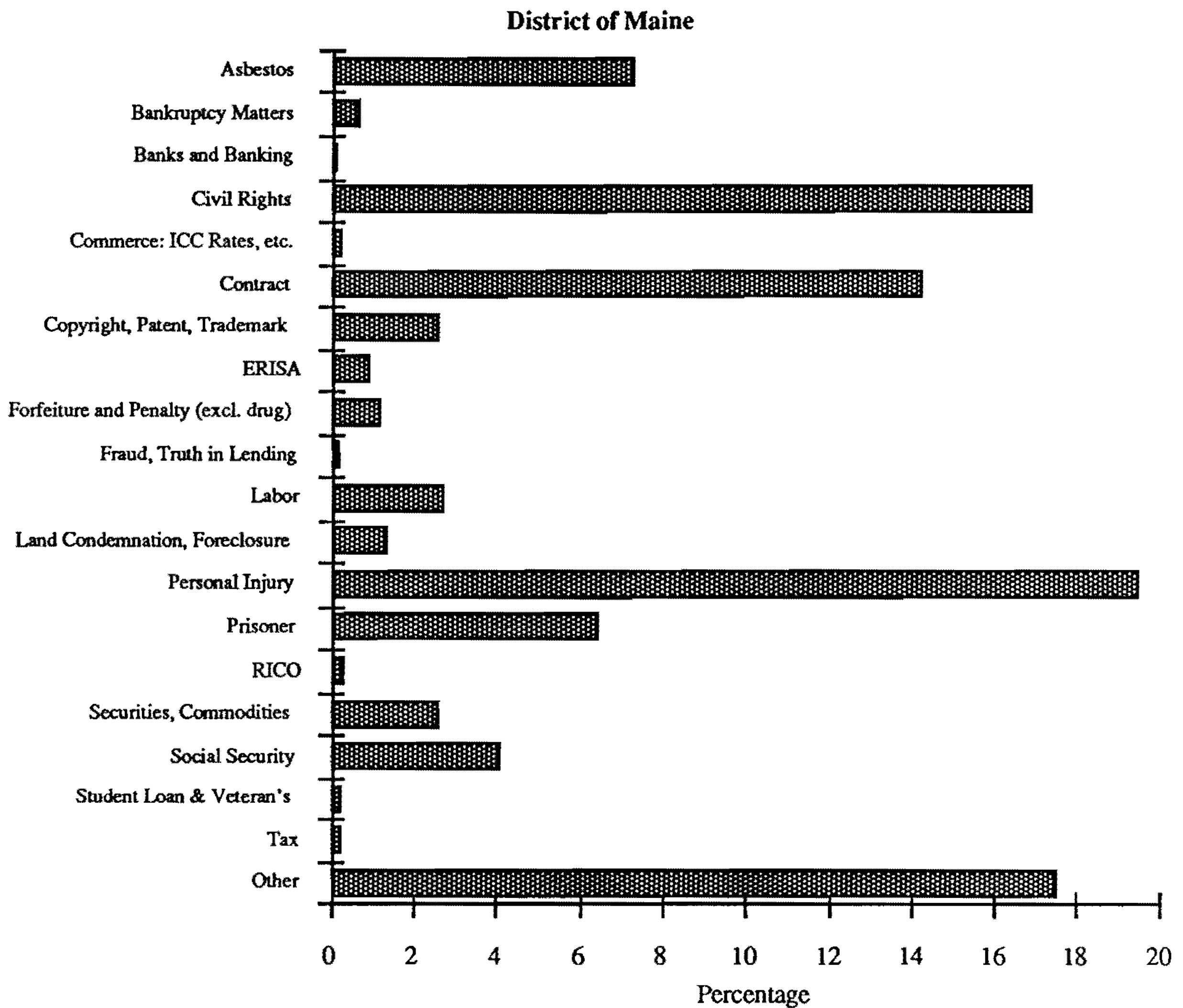


Table 1: Filings by Case Types, SY81-90

District of Maine	YEAR									
	81	82	83	84	85	86	87	88	89	90
Asbestos	95	38	30	87	52	26	44	38	29	31
Bankruptcy Matters	4	3	15	37	9	12	9	2	16	14
Banks and Banking	1	0	1	1	1	1	0	0	0	1
Civil Rights	39	31	49	51	49	38	48	42	33	56
Commerce: ICC Rates, etc.	2	1	0	0	2	0	1	1	1	5
Contract	107	64	100	81	97	99	75	94	89	78
Copyright, Patent, Trademark	4	18	21	19	11	15	10	15	16	10
ERISA	0	2	5	1	2	4	3	3	5	8
Forfeiture and Penalty (excl. drug)	12	9	4	10	14	14	31	27	18	33
Fraud, Truth in Lending	14	3	3	2	4	5	4	1	4	1
Labor	19	14	26	15	28	24	28	18	14	9
Land Condemnation, Foreclosure	156	109	145	87	88	90	116	78	40	41
Personal Injury	66	71	117	92	110	119	140	108	122	101
Prisoner	36	44	19	32	38	75	76	103	84	124
RICO	0	0	0	0	0	0	0	0	3	3
Securities, Commodities	1	3	4	2	5	5	5	10	1	12
Social Security	43	39	132	143	109	65	89	54	28	15
Student Loan and Veteran's	0	130	140	175	200	224	92	61	42	46
Tax	3	1	6	11	7	6	4	4	4	1
All Other	152	132	50	46	56	68	61	63	54	70
All Civil Cases	754	712	867	892	882	890	836	722	603	659

c. Burden. While total number of cases filed is an important figure, it does not provide much information about the work the cases will impose on the court. For this reason, the Judicial Conference uses a system of case weights based on measurements of judge time devoted to different types of cases. Chart 3 employs the current case weights to show the approximate distribution of demands on judge time among the case types accounting for the past three years' filings in this district. The chart does not reflect the demand placed on magistrates.

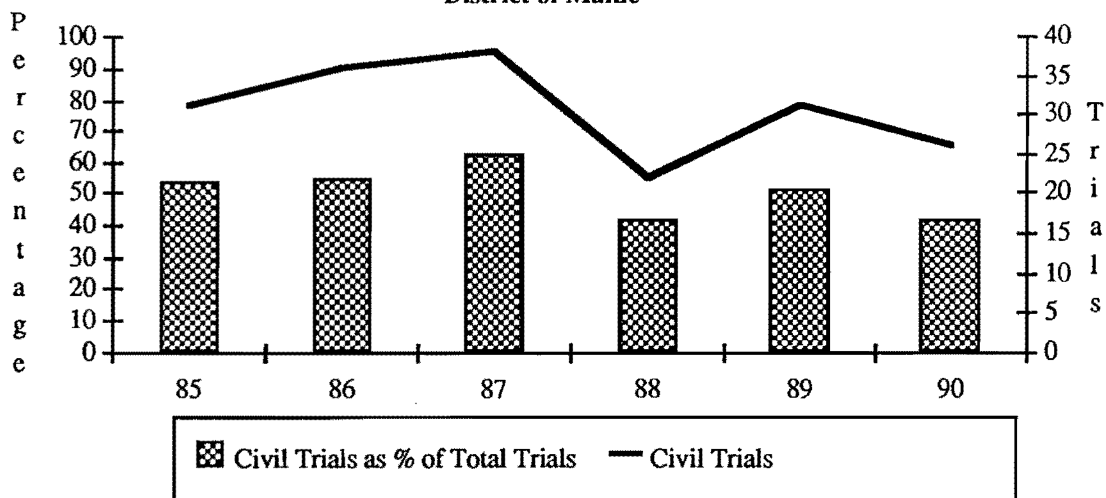
Chart 3: Distribution of Weighted Civil Case Filings, SY88-90



Another indicator of burden is the incidence of civil trials. Chart 4 shows the number of civil trials completed and the percentage of all trials accounted for by civil cases during the last six years.

Chart 4: Number of Civil Trials and Civil Trials as a Percentage of Total Trials, SY85-90

District of Maine



d. Time to disposition. This section is intended to assist in assessments of "delay" in civil litigation in this district. We first look at conventional data on the pace of litigation and then suggest some alternative ways of examining data to estimate the time that will be required to dispose of newly filed cases. The *MgmtRep* table shows the median time from filing to disposition for civil cases and for felonies. Time from issue to trial is also reported for civil cases that reached trial. These data are commonly used to assess the dispatch with which cases have moved through a court in the past. When enough years are shown and the data for those years are looked at collectively, reasonable assessments of a court's pace might be made.

Data for a single year or two or three may not, however, provide a reliable predictor of the time that will be required for new cases to move from filing to termination. An obvious example of the problem arises in a year when a court terminates an unusually small portion of its oldest cases. Both average and median time to disposition in that year will show a decrease. The tempting conclusion is that the court is getting faster when the opposite is actually the case. Conversely, when a court succeeds in a major effort to clean up a backlog of difficult-to-move cases, the age of cases terminated in that year may suggest that the court is losing ground rather than gaining.

Since age of cases terminated in the most recent years is not a reliable predictor of next year's prospects, we offer other approaches believed to be more helpful. *Life expectancy* is a familiar way of answering the question: "How long is a newborn likely to live?" Life expectancy can be applied to anything that has an identifiable beginning and end. It is readily applied to cases filed in courts.

A second measure, *Indexed Average Lifespan* (IAL), permits comparison of the characteristic lifespan of this court's cases to that of all district courts over the past decade. The IAL is indexed at a value of 12 (in the same sense that the Consumer Price Index is indexed at 100) because the national average for time to disposition is about 12 months. A value of 12 thus represents an average speed of case disposition, shown on the charts below as IAL Reference. Values below 12

indicate that the court disposes of its cases faster than the average, and values above 12 indicate that the court disposes of its cases more slowly than the average. (The calculation of these measures is explained in Appendix B.)

Note that these measures serve different purposes. Life expectancy is used to assess change in the trend of actual case lifespan; it is a timeliness measure, corrected for changes in the filing rate but not for changes in case mix. IAL is used for comparison between districts; it is corrected for changes in the case mix but not for changes in the filing rate. Charts 5 and 6 display calculations we have made for this district using these measures.

Chart 5: Life Expectancy and Indexed Average Lifespan, All Civil Cases SY81-90

District of Maine

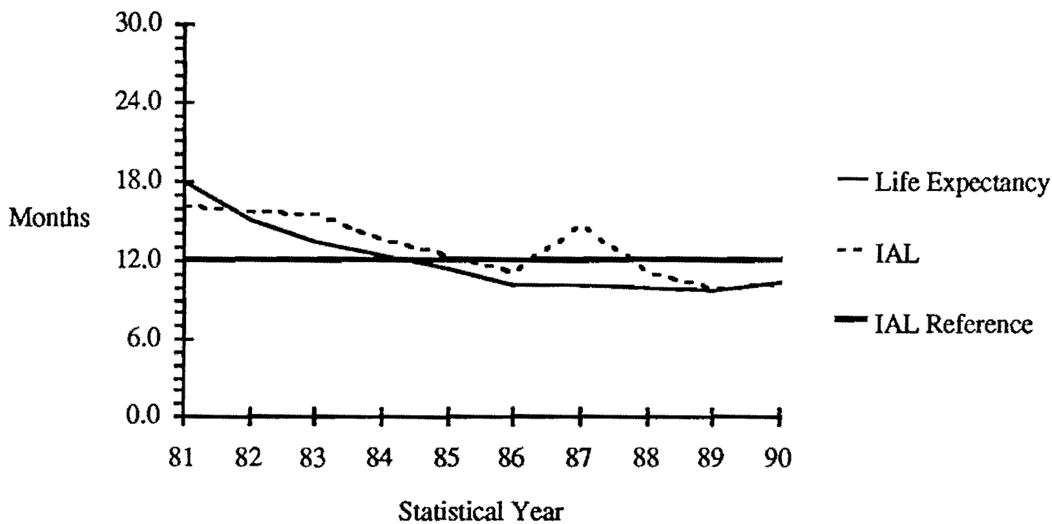
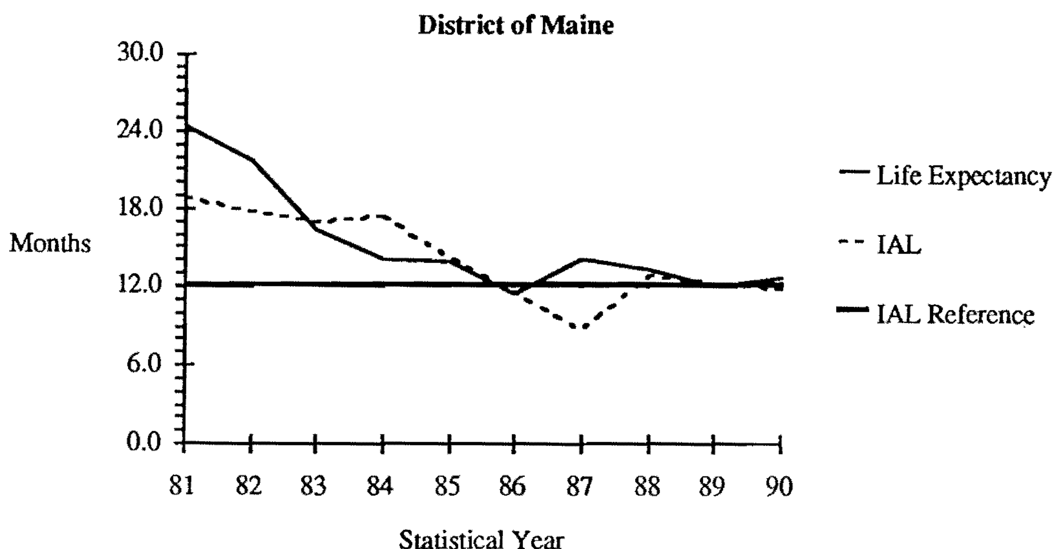


Chart 6: Life Expectancy and Indexed Average Lifespan, Type II Civil Cases SY81-90

District of Maine



e. Three-year-old cases. The *MgmtRep* table shows the number and percentage of pending cases that were over three years old at the indicated reporting dates. We have prepared Charts 7 and 8 to provide some additional information on these cases.

Chart 7 shows the distribution of case terminations among a selection of termination stages and shows within each stage the percentage of cases that were three years old or more at termination.

Chart 7: Cases Terminated in SY88-90, By Termination Category and Age

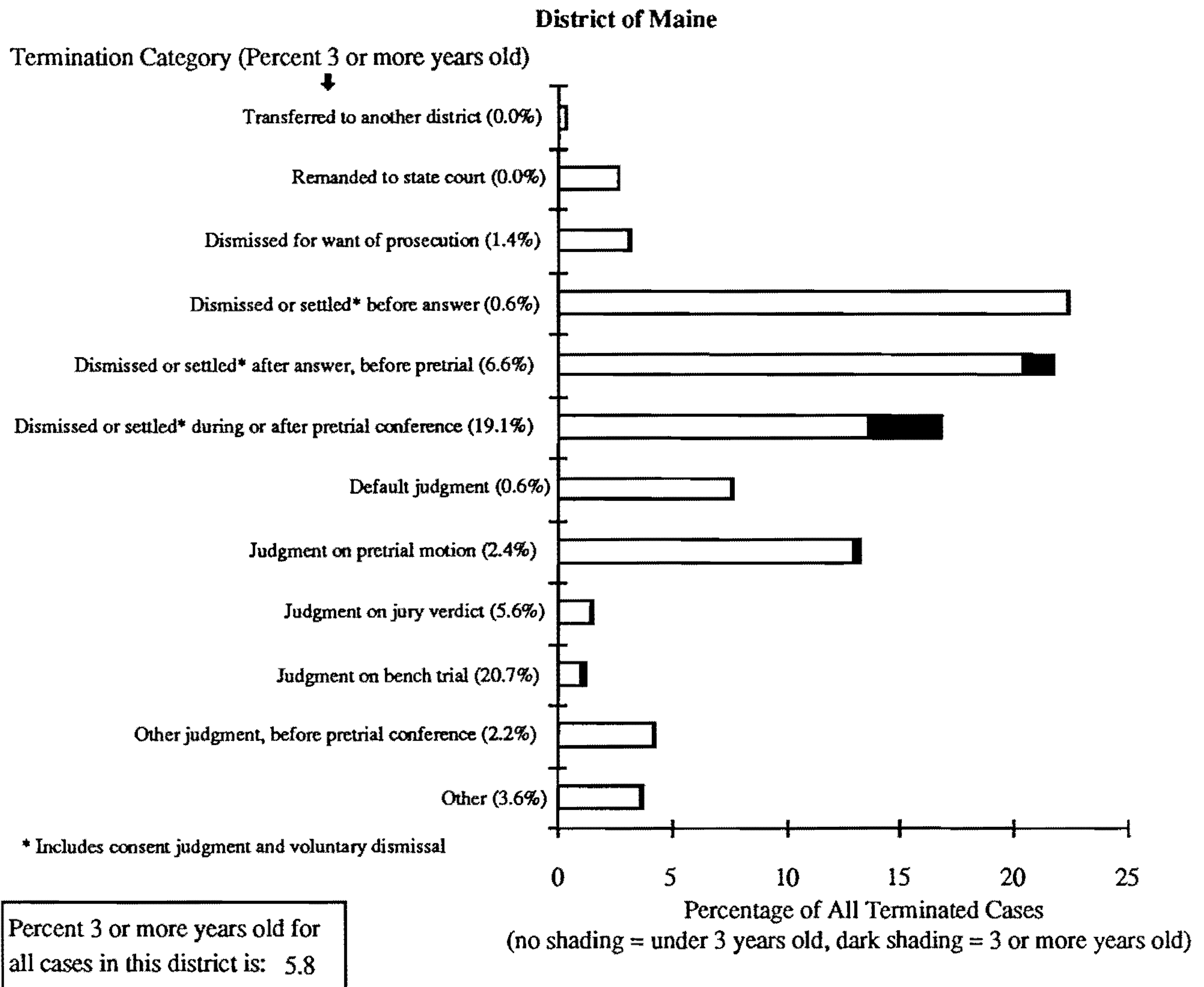
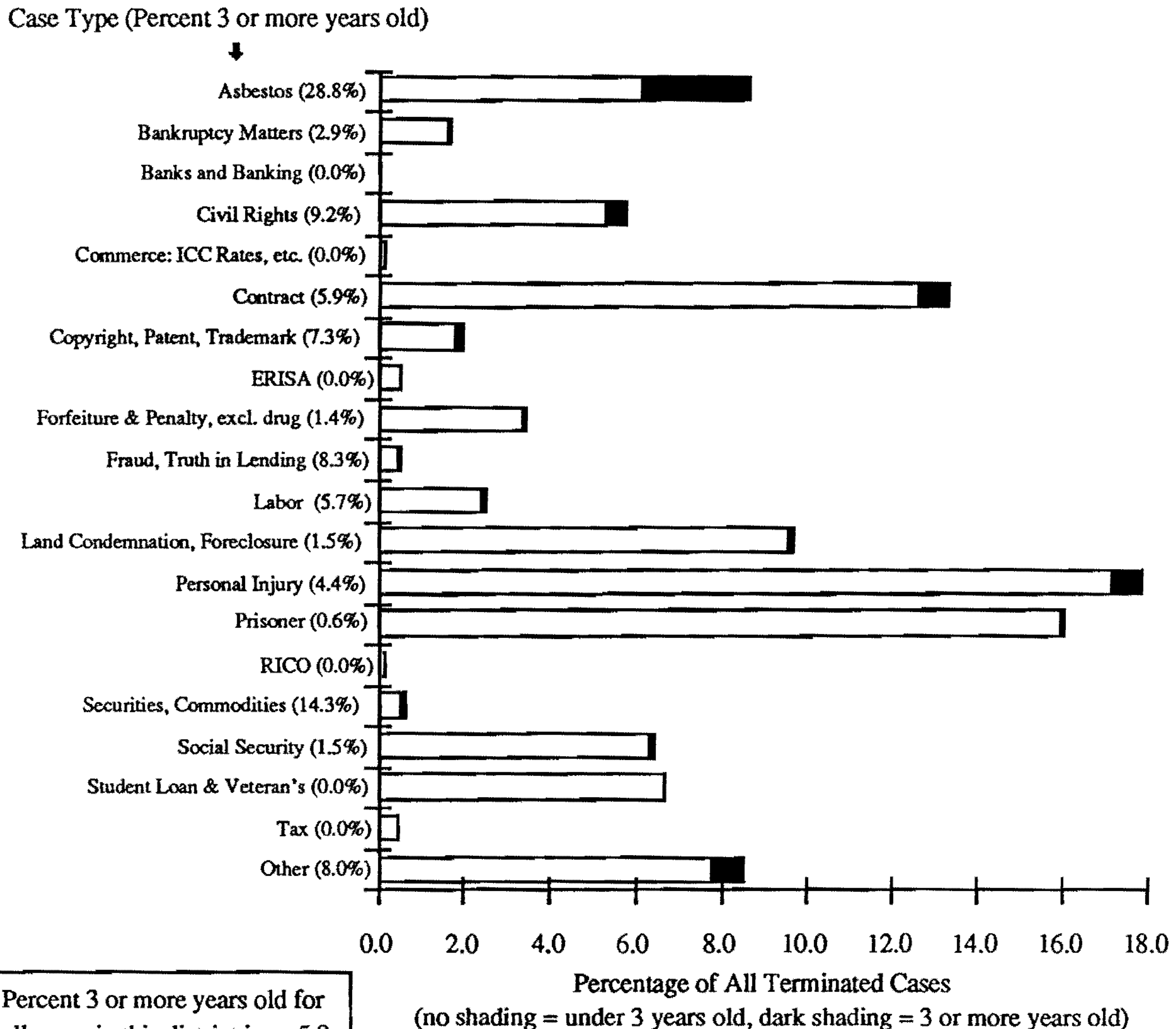


Chart 8 shows the distribution of terminations among the major case types and shows within each type the percentage of cases that were three years old or more at termination.

Chart 8: Cases Terminated in SY88-90, By Case Type and Age

District of Maine



f. Vacant judgeships. The judgeship data given in *MgmtRep* permit a calculation of available judge power for each reported year. If the table shows any vacant judgeship months for this district, a simple calculation can be used to assess the impact: Multiply the number of judgeships by 12, subtract the number of vacant judgeship months, divide the result by 12, and then divide the result into the number of judgeships. The result is an adjustment factor that may be multiplied by any of the per-judgeship figures in the *MgmtRep* table to show what the figure would be if computed on a per-available-active-judge basis. For instance, if the district has three judgeships and six vacant judgeship months, the adjustment factor would be 1.2 (36 – 6 = 30; 30 / 12 = 2.5; 3 / 2.5 = 1.2). If terminations per judgeship are 400, then terminations per available active judge would be 480 (400 × 1.2). This will overstate the workload of the active judges if

there are senior judges contributing to the work of the district. Because of the varying contributions of senior judges, however, there is no standard by which to take account of their affect on the workload of the active judges.

2. The Criminal Docket

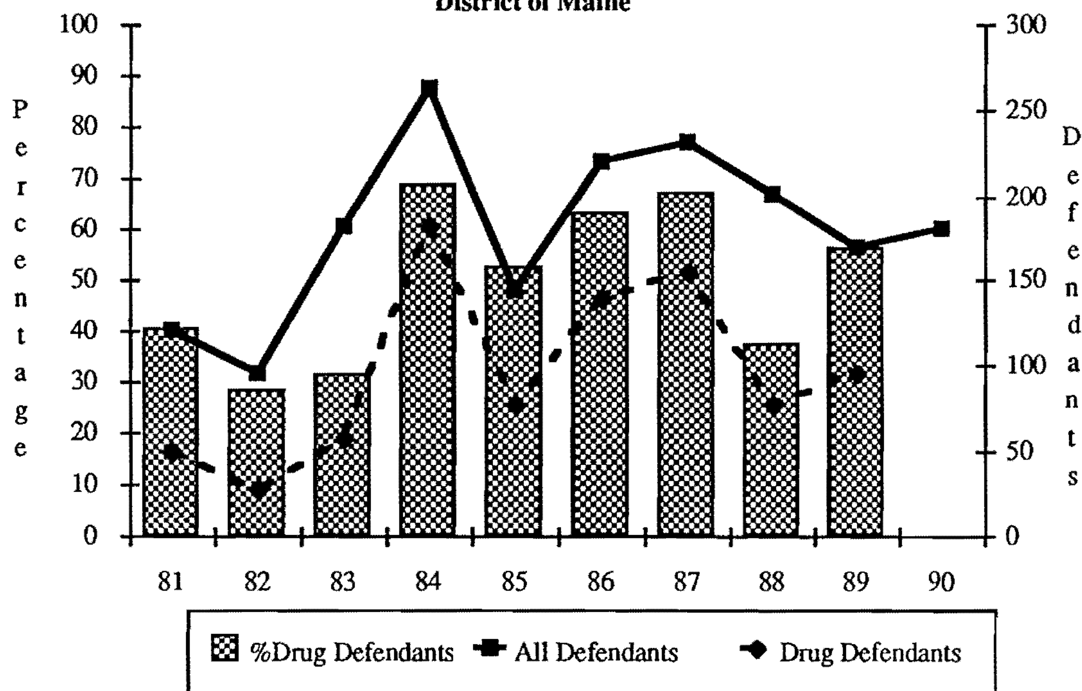
a. The impact of criminal prosecutions. In calling on the advisory group to consider the state of the criminal docket, Congress recognized that the criminal caseload limits the resources available for the court's civil caseload. It is important to recognize that the Speedy Trial Act mandates that criminal proceedings occur within specified time limits, which may interfere with the prompt disposition of civil matters.

The trend of criminal defendant filings for this district is shown in Chart 9. We have counted criminal defendants rather than cases because early results from our current district court time study indicate that burden of a criminal case is proportional to the number of defendants. Because drug prosecutions have in some districts dramatically increased demands on court resources, we have also shown the number and percentage of defendants in drug cases. A detailed breakdown of criminal filings by offense is shown on the last line of the table reproduced on page 6. A more detailed, five-year breakdown of the district's criminal caseload is available from David Cook of the Administrative Office's Statistics Division (FTS/633-6094).

Chart 9: Criminal Defendant Filings SY81-90, With Number and Percentage Accounted for by Drug Defendants, SY81-89

(Drug filings data not available for SY90)

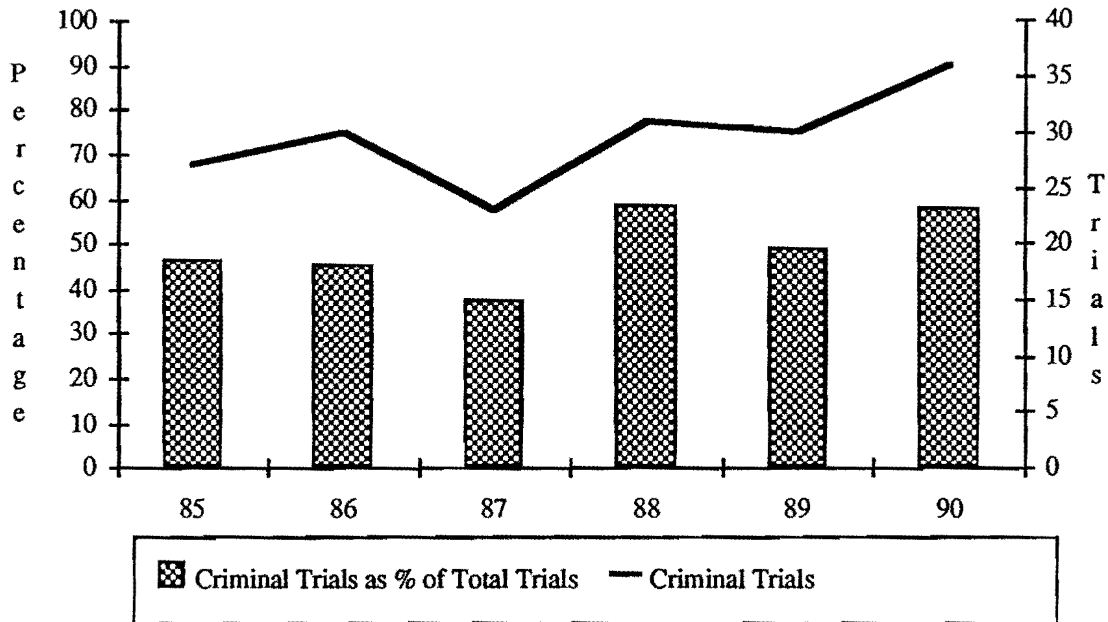
District of Maine



b. The demand on resources from criminal trials. Chart 10 shows the number of criminal trials completed and the percentage of all trials accounted for by criminal cases during the last six years.

Chart 10: Number of Criminal Trials and Criminal Trials as a Percentage of Total Trials, SY85-90

District of Maine



For more information on caseload issues

This section was prepared by John Shapard of the Federal Judicial Center with assistance from David Cook and his staff in the Statistics Division of the Administrative Office of the U.S. Courts. Questions and requests for additional information should be directed to Mr. Shapard at (FTS/202) 633-6326 or Mr. Cook at (FTS/202) 633-6094.

B. Identifying trends in the demands placed on the court's resources (§ 472(c)(1)(B))

While courts maintain some data reflecting trends in the demands on their resources (e.g., the case filing information presented above), these data generally do not provide information about the state of the resources themselves and how these resources relate to demand. The advisory group will want to try to develop information reflecting trends in the relationship between demand and resources. In this section, we suggest some key indicators that may be helpful. Some may be quantifiable. Others will be based on non-numerical information gathered from court personnel.

Court resources may be divided into four categories:

- judicial officers
- supporting personnel
- buildings and facilities
- automation and other technical support.

The following sections provide an outline for assessing trends in the relationship between demand and resources, for each category listed above.

1. Judicial Officers

(a) Article III Judges

The group may want to examine trends over a significant period (five years or more) in the following areas:

- filings and terminations per judgeship and per active judge
- weighted filings per judgeship and per active judge
- raw caseloads per judgeship and per active judge
- weighted caseloads per judgeship and per active judge
- criminal filings and terminations per judgeship and per active judge
- vacant judgeship months
- civil and criminal trials per judge
- participation of senior judges
- participation of visiting judges
- other relevant information

(b) Magistrate Judges

Information may be developed for a similar period in the following areas:

- civil and criminal caseloads per magistrate judge
- civil trials per magistrate judge
- volume of criminal calendars
- vacant magistrate judgeship months
- other relevant information

2. Supporting Personnel

(a) Clerk's Office

Information may be developed for a similar period in the following areas:

- personnel strength and deficiencies in the clerk's office, e.g., percentage of authorized positions permitted to be filled; percentage of positions filled; rate of employee turnover, etc.
- ratio of staff to filings and caseloads
- staff participation in duties related to case management
- other relevant information

(b) Probation/pretrial services department

Information may be developed in the following areas for a period that should take into account the impact of the sentencing guidelines implemented in November 1987:

- personnel strength/deficiencies in the department, e.g., percentage of authorized positions filled, rate of turnover, etc.
- caseloads per officer
- ratio of officers to criminal filings
- other relevant information

3. Buildings and Facilities

Information may be developed for a significant period (five years or more) concerning the adequacy of:

- courtroom facilities
- jury facilities
- prisoner facilities
- library facilities
- support staff facilities

4. Automation and other technical services

Information may be developed for a similar period concerning the adequacy of:

- automation facilities and services
- courtroom reporting services

III. Identifying the Principal Causes of Cost and Delay in Civil Litigation (§ 472(c)(1)(C))

Legislation cannot alter the fact that civil litigation necessarily takes time and costs money. The implementation of the Act can, however, identify causes of avoidable cost and delay, and this is the task on which the group should focus. The group should attempt to arrive at a common understanding of the sense in which it will use those terms. Thus the Act does not specify cost to whom (e.g., the court, the parties, the public) or how much time constitutes delay. The group should define what it means when it uses those terms. So too the group should define other terms and concepts it uses and ensure that its analysis will be as meaningful as possible to the reader. By way of example, to report that "ERISA cases have delayed the resolution of other civil cases" is entirely different from reporting: "As the percentage of ERISA cases on the court's pending civil caseload has grown from __ % in 1986 to __ % in 1990, the life expectancy of all civil cases has grown from __ months to __ months. Six of the seven judges on the court attribute this growth to demands of ERISA cases on their dockets." While the group members' experience and judgment will lend weight to their conclusion, specificity and reference to objective indicia will add greatly to the utility of their report.

The group may begin with a review and analysis of the statistical data assembled in assessing the court's docket and resources (Part II, above). For example (and by way of illustration only), the group may identify a mismatch of demands and resources, illustrated by the emergence of categories of litigation imposing new and substantial burdens on the court's docket, an increasing number of vacant judgeship months, and a decline in the clerk's office personnel. Or the group may find the court's docket to be in a satisfactory state in the sense that it reflects no avoidable cost or delay. Findings such as these should be specific and should not be made in generalities.

Having made its assessment under Part II, the group should proceed to analyze possible causes of cost and delay in "court procedures and the ways in which litigants and their attorneys approach and conduct litigation" (§ 472(c)(1)(C)). The following sections list numerous procedures and practices in civil litigation, although the listing is not intended to be exclusive. The question to be considered is whether the presence, absence, or application of any such procedures or practices appear to cause avoidable cost or delay in civil litigation.

A. Analysis of court procedures to identify problems of cost and delay

The term "court procedures" may refer to court-wide procedures, i.e., those followed by the court as a whole, whether by rule, order, or custom. It may also refer to the procedures or practices followed by individual judges. For example, assignment of cases typically is a court-wide practice—there is no place for individual variation. On the other hand, the conduct of Rule 16 conferences is essentially a matter for individual judges, even though rules or general orders may be in effect. Some procedures may relate to both categories, e.g., calendaring practices and jury management practices. In making its study, the group should recognize this distinction and make as clear as possible in its analysis and report which category of procedure it is addressing.

1. Assignment procedures
   a. Methods for assigning cases at filing
   b. Methods of reassigning cases (to new judges, recusal, disqualification, related cases, illness/disability, backlog, protracted/complex cases)
2. Time limits
   a. Monitoring service of process
   b. Monitoring timing of responses to complaint
   c. Enforcing time limits in rules and orders
   d. Practices regarding extensions of time
3. Rule 16 conferences
   a. Exemptions for categories of cases
   b. Format of conference
   c. Development of scheduling orders (See Rule 16(b))
   d. Timing of conferences
   e. Subject matters of conferences (See Rule 16(c))
   f. Use of magistrate judges
4. Discovery procedures
   a. Use and enforcement of cutoff dates
   b. Control of scope and volume of discovery
   c. Use of Rule 26(f) conferences
   d. Use of voluntary exchanges and disclosure and other alternatives to discovery
   e. Procedures used for resolving discovery disputes
   f. Use of sanctions for discovery abuse
   g. Use of magistrate judges
5. Motion practice
   a. Scheduling of motions
   b. Monitoring the filing of motions, responses, and briefs
   c. Hearing and calendaring practices
   d. Method of ruling on motions
   e. Timing of rulings
   f. Use of proposed orders
   g. Use of magistrate judges
6. Final pretrial conferences

a. Narrowing issues and limiting trial evidence
b. Controlling length of trials
c. Structuring sequence of trial issues
d. Exploring settlement possibilities

7. Jury trials
   a. Method of selection of the venire
   b. Conduct of voir dire
   c. Use of jury selection aids (e.g., pre-screening questionnaires)
   d. Use of juror comprehension aids (e.g., encouraging use of visual aids)
   e. Use of jury deliberation aids (e.g., written instructions and verdict forms)
   f. Assessment of juror costs for late settlement

8. Trial setting
   a. Methods for scheduling trial (e.g., date certain, trailing, combination, etc.)
   b. Timing of setting date for trial
   c. Adherence to trial dates
   d. Priorities (Speedy Trial Act and civil case scheduling--28 U.S.C. § 1657)
   e. Back-ups for multiple settings
   f. System for "clearing the calendar" (e.g., joint trial calendar)

9. Review and dismissal of inactive cases

10. Use of magistrate judges
    a. Pretrial and discovery stages
    b. Settlement conferences
    c. Consent trials
    d. Use as special masters

11. Use of senior and visiting judges

12. Use of courtroom deputy clerks and other personnel to assist judge
    a. Scheduling
    b. Monitoring deadlines
    c. Liaison with attorneys
    d. Preparation of internal statistical reports
    e. Administrative and other functions

13. Use of alternative dispute resolution
    a. Arbitration (voluntary and involuntary)
    b. Early neutral evaluation
    c. Mediation
    d. Mini-trials
    e. Settlement conferences (judicial officer-hosted)
    f. Summary jury trials
    g. Judicial incentives/disincentives to use ADR

14. Efficacy/deficiencies of local rules
    a. Use/non-use of local rules
    b. Alternatives to local rules (e.g., standing orders)
    c. Page limits on briefs
    d. Discovery limits

e. Time limits
f. Rules regarding non-filing of discovery materials
g. Rules on other items from this checklist

15. Use of sanctions
    a. Timing and treatment of motions
    b. Hearings
    c. Control of collateral proceedings
    d. Form and timing of rulings

16. Handling of attorneys' fee petitions
    a. Methods and procedures for setting fees
    b. Hearings, findings, orders

17. Communication and coordination among judges' chambers, magistrate judges' chambers, and clerk's office

18. Other relevant practices of the court or judges

B. Analysis of litigant and attorney practices—privately-represented litigants

1. Pre-filing practices—screening cases
    a. Assessing time available for a case
    b. Screening cases for merit
    c. Prefiling investigation of law and fact
    d. Interviewing fact witnesses
    e. Consulting with expert witnesses
    f. Checking documentary evidence
    g. Contacting opposing party
    h. Evaluating the case
    i. Advising client about availability of ADR procedures

2. Pleading practices
    a. Limiting theories and claims in complaint and answer
    b. Amending to remove unfounded claims or defenses

3. Discovery practices
    a. Voluntary exchange of information
    b. Use of admissions and stipulations
    c. Limiting discovery
    d. Resolving discovery issues with counsel
    e. Use of discovery motions
    f. Compliance with rulings

4. Motion practice
    a. Limiting volume of motions
    b. Use of stipulations or consent
    c. Length of pleadings and briefs
    d. Requests for hearings
    e. Conduct of hearings

5. Trial practice
    a. Preparing and organizing evidence
    b. Narrowing claims
    c. Stipulating facts
    d. Estimating time
    e. Complying with time limits
    f. Jury practices—voir dire, selection
6. Sanctions practice
    a. Timing
    b. Circumstances and reasons for requesting sanctions
    c. Frequency of use
    d. Effects on litigation
7. Private attorneys' fees
    a. Effect of local billing and charging practices as incentives/disincentives to litigate
    b. Asymmetries between defense and plaintiff incentives/disincentives
8. Court-awarded attorneys' fees
    a. Class action practices—incentives/disincentives
    b. Statutory fees—incentives/disincentives
9. Settlement practices
    a. Evaluation and ongoing reevaluation of case
    b. Timing of initial discussions
    c. Plaintiff/defendant practices and asymmetries
    d. Resort to court/judge provided procedures—incentives/disincentives
    e. Timing of settlements
10. Use of alternative dispute resolution methods
    a. Incentives/disincentives for plaintiffs and defendants
    b. Use of binding alternatives
    c. Requests for trial de novo
    d. Demand for alternative programs
    e. Resources to implement alternatives
11. Compliance with time limits and local rules at all stages of the litigation
12. Appeals practices
    a. Interlocutory appeals
    b. Appeals on merits
13. Client participation in litigation events and decision making
    a. Impact of presence/absence of client
    b. Fixing client responsibility

C. Analysis of special problems relating to pro se litigation

1. Control of filing of pro se litigation
    a. Review by magistrate judge or judge (28 U.S.C § 1915(d))
    b. Assessing partial filing fees
    c. Orders controlling repeated filings

d. Certification of grievance procedures by district court (28 U.S.C. § 1997(e))

2. Use of court resources
   a. Delegation to magistrate judges
   b. Use of pro se law clerks

3. Control of hearings
   a. Screening of claims (e.g., at prison)
   b. Narrowing issues

4. Appointment of counsel
   a. Available resources and procedures
   b. Judicial practices

D. Analysis of special problems relating to U.S. litigation

1. Criminal practices
   a. Charging practices (numbers of charges and defendants, separate incidents combined within single indictment, prosecution of offenses in state jurisdiction, etc.)
   b. Plea negotiation practices
   c. Timing of delivery of Jencks Act statements
   d. Discovery practices (e.g., open file; contested)
   e. Length of trials
   f. Use of cross designations of state prosecutors

2. Civil practices
   a. Selection of cases
   b. Use of removal from state courts
   c. Exercise of settlement authority
   d. Use of alternative, non-adjudicatory procedures
   e. Other practices as listed under Section B above

E. Analysis of special problems relating to state and local government litigation

a. Procedures and practices used by states attorneys in habeas corpus litigation
b. Procedures and practices used by states attorneys in prisoner litigation (including use of non-adjudicatory procedures, resort to grievance procedures, etc.)
c. Others

F. Analysis of special problems relating to complex cases

a. Coordination among court, bar, and litigants
b. Pretrial procedures
c. Discovery procedures
d. Motions practice
e. Trial scheduling

IV. Examining the Impact of New Legislation on the Court (§ 472(c)(1)(D))

The Act directs the advisory groups to "examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts" (§ 472(c)(1)(D)). One approach to making this assessment is to examine the impact of recent legislation on the courts. Another is to consider the lack of legislation that could have improved the civil litigation process. For illustrative purposes only, here are examples of legislative action, or inaction, the group may wish to consider:

A. Criminal legislation
   1. Adoption of guideline sentencing and impact of particular aspects of the sentencing guidelines
   2. Mandatory minimum sentencing statutes
   3. New statutory drug and gun offenses
   4. Expansions of federal criminal jurisdiction

B. Civil legislation
   1. Racketeering Influenced and Corrupt Organizations Act (RICO)—civil and criminal sanctions
   2. Employee Retirement Income Security Act (ERISA)
   3. Financial recoveries from federally insured financial institutions (savings and loans, banks, etc.)
   4. Civil rights acts, including the Americans with Disabilities Act of 1990
   5. Superfund and other environmental legislation
   6. Federal Debt Collection Procedures Act
   7. Immigration Act of 1990

C. Legislative inaction
   1. Implied causes of action in regulatory statutes
   2. Statutes of limitations unspecified
   3. Choice of law issues
   4. Federal common law
   5. Multi-party, multi-forum jurisdiction and procedure
   6. Legislative reconciliation of demands and resources (e.g., asymmetry between "authorization" and "appropriation" for responsibilities placed on judiciary such as this Act)
   7. Approval of nominees for judicial vacancies

V. Making Recommendations to the Court (§ 472(b))

Having completed its assessment under § 472(c)(1), the group should make its findings on the matters covered by that section. Based on the assessments outlined in the preceding parts, the group must submit to the court a report with "its recommendation that the district court develop a plan or select a model plan" (§ 472(b)(2)). The Act authorizes the Judicial Conference to develop one or more "model plans" based on those implemented by the early implementation courts. It is not expected that model plans will be available before the second half of 1992. Moreover, because the Act stresses that plans should be responsive to local needs and circumstances, it is not likely that a model plan, as drafted, will satisfy the needs of a district.

The Act states that the group's report shall:

- include "recommended measures, rules and programs" (§ 472(b)(3));
- include "the basis for its recommendation" (§ 472(b)(2));
- explain "the manner in which the recommended plan complies with section 473" (§ 472(b)(4));
- "take into account the particular needs and circumstances of the district court, litigants in such court, and the litigants' attorneys" (§ 472(c)(2)); and
- "ensure that its recommended actions include significant contributions to be made by the court, the litigants, and the litigants' attorneys toward reducing cost and delay and thereby facilitating access to the courts" (§ 472(c)(3)).

While the Act does not require a plan to incorporate specific provisions (except in pilot districts), Congress clearly expects courts to adopt plans that reflect a significant commitment to bringing about cost and delay reduction. If this effort is to be successful, the commitment must not be limited to the court, but should include the entire legal community, Congress, and the executive branch. Nor need the contributions of these groups be limited to matters touching directly on the processing of litigation. A plan may, for example, call for bar sponsorship of periodic training programs for lawyers in federal practice and for panels to provide representation for pro se litigants.

It is important to understand, as well, that implementation of a plan does not necessarily require a court to change methods and techniques that have been effective in controlling cost and delay. The Act requires the advisory group to assess those methods and techniques to see if they are found wanting in any respect. Even if they are not, the group must still make a report and recommendations to the court. Where the existing methods and techniques are found to be effective, the plan should incorporate them to ensure that they become and remain a part of the court's established procedure. Where they are not, the group should identify specific causes of avoidable cost and delay and make recommendations, within the framework of the Act, that it believes will bring about reductions in cost and delay.

It is also implicit in the Act that the group must report on problems of cost and delay whether or not those problems are susceptible to being remedied by application of the Act's principles and guidelines. Problems identified by the group that are due to causes beyond the control of the courts and the litigants and their attorneys should be so identified and treated in the report in whatever manner the group considers appropriate. This memorandum can provide no guidance on that part of the group's report.

With respect to problems concerning causes of cost and delay that may be subject to being remedied by application of the principles, guidelines, or techniques set out in § 473 (or by other means, see § 473(b)(6)), the group's report must, of course, comply with the five requirements set out on page 31 of this memo. In addition, in formulating its recommendations, the report must specifically show:

- that it has "consider[ed] . . . the . . . principles and guidelines of litigation management and cost and delay reduction" set out in § 473(a) and (b); and
- that it has included in its recommended measures, rules, and programs those of the Act's principles, guidelines, and techniques that, for the reasons stated in the group's report, are considered appropriate for the needs and circumstances of the district.

As this analysis indicates, the groups, and the districts, have discretion to decide whether or not to recommend implementation of a particular principle, guideline, or technique stated in § 473(a) and (b), but they must state the basis on which they have exercised that discretion. Only pilot districts are required to include those measures in their plans; their situation will be addressed below.

In presenting its recommendations to the court, the group should attempt to correlate the particular identified cause(s) of cost or delay to the particular recommendation(s) made in response. The form this takes will, of course, vary from district to district. To be helpful to the court, however, and to the Judicial Conference, the recommendations should go beyond generalities. They should have a demonstrable relationship to the particular identified problems, and they should be specific; they may, for example, take the form of the text of a recommended rule, a recommended order, or the particulars of a recommended procedure.

In making its recommendations, the group should recall that Congress did not intend to displace or restrict judicial discretion. The House Judiciary Committee said in its report that it was "unwilling to impose the Congress' view of proper case management upon an unwilling judiciary" (House Report, p. 14). The group should also keep in mind that its recommended actions shall "include significant contributions to be made [not only] by the court, [but also] by the litigants, and the litigants' attorneys" (§ 472(c)(3)).

The Judicial Conference is charged with reviewing all district reports (§ 474(b)(1)) and preparing a report to Congress (§ 479). The Conference will find it helpful if the reports conform to a general pattern that permits comparison across districts. In addition to greatly facilitating the work of the Conference, such reports may provide the starting point for future research into means of improving the administration of justice in the federal courts. The Conference, in consultation with the Federal Judicial Center and the Administrative Office, will be working with all the courts to explore formats that will best serve these interests.

Finally, a word about the pilot districts. The Act states that the plans implemented by the ten pilot districts "shall include the 6 principles and guidelines of litigation management and cost and delay reduction identified in section 473(a)" (§ 105(b)). In implementing this language, the following considerations may be helpful:

- If the group finds that the state of the court's docket is satisfactory and there are no discernible causes of avoidable cost and delay, it may recommend measures that incorporate the court's existing practices and procedures, adapted to reflect the six principles and guidelines in a manner that will not disrupt an existing satisfactory operation.
- If the group finds the existence of causes of avoidable cost and delay to which some of the stated principles and guidelines may be relevant, it should recommend their adaptation to

"the needs and circumstances" of the court in a pragmatic manner, keeping in mind that the objective is to aid, not impair, the administration of justice. For example, a court already straining under its criminal caseload should not be subjected to procedures imposing additional burdens and demands unless their impact will demonstrably improve the overall ability of that court to process its dockets.

While these considerations are especially relevant to the pilot districts, advisory groups in all districts will want to keep them in mind as they develop their reports and recommendations to the court.