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# NEW HAMPSHIRE

# COURT SYSTEM

# STANDARDS AND GOALS

NCJRS

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ACQUISITIONS

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Prepared

for

New Hampshire

Supreme Court

by

National Center

for

State Courts

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THE STATE OF NEW HAMPSHIRE
SUPREME COURT

FRANK R KENISON
CHIEF JUSTICE

SUPREME COURT BUILDING
CONCORD, N. H. 03301

February 1, 1977

Dear New Hampshire Citizen:

The New Hampshire Court System Survey represents a significant effort to establish meaningful guidelines under which our judicial system can operate and measure its performance. More than one hundred individual standards covering all aspects of the court system were developed by people throughout the state. These standards define many of the results we should expect from our justice system.

The scope of this study is extraordinarily broad and consequently, unanimous agreement on all standards (guidelines) is unlikely; however, I am confident that we share a mutual concern for the fair and efficient administration of justice in New Hampshire.

The Supreme Court has taken under advisement all of the standards suggested in this report. This is not to say that all will or should be implemented, or that the standards necessarily reflect your particular viewpoint; however, the methodology used to formulate the standards did involve a large cross section of the citizenry. We invite and welcome your comments and participation in the development of standards to maintain and improve our judicial system.

Very truly yours,

Frank R Kenison

Frank R. Kenison

FRK/T

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Arthur E. Bean, Esq., Hon. Maurice P. Bois, Donald R. Bryant, Esq., Hon. Robert F. Griffith, Joseph A. Millimet, Esq., Hon. William J. O'Neil and Hon. William W. Treat served as the adivsory committee for the survey and participated in the regional and task force groups which met during the survey.

As project administrator, Samuel L. Hays monitored each stage of the project and served as a constant information resource for the staff. Mrs. Dorianne Filipowicz played a major role in coordinating the logistics of the survey and production of this report.

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# INTRODUCTION

During the past sixteen months judges, lawyers, probation officers, legislators, corrections officials, prosecutors, law enforcement officials and representatives of the general public have been involved in the process of developing standards and goals for the New Hampshire Court System. As used in this report, "standards" are results or measurements against which the system can be evaluated. "Goals" refer to intermediate objectives which need to be accomplished if the standard is to be realized. The purpose of this study is

- to define the results residents of New Hampshire expect from their court system;
- to establish a group of public and explicit standards which may be used to evaluate the performance of the court system;
- to describe some alternative approaches for accomplishing the standards.

In contrast to proposals to accept, without revision, existing national standards, the effort in New Hampshire was designed and conducted to insure that the standards developed would respond to New Hampshire's needs. In setting standards, the citizens of the state define what they expect from the court system and make their expectations public and explicit. Only then can the public, system participants, and the judiciary evaluate the system's performance. The standards also spell out the purposes of the court system for public scrutiny and review.

The process of defining the standards and setting objectives is dynamic. It requires ongoing review and monitoring to insure that present methods and strategies are accomplishing the purposes of the court system. In setting standards, though, it is vital to keep in mind that, while methods

or strategies must be flexible and subject to modification, the standards themselves should serve as fixed targets. Too often, when an objective is not being attained, people change their original standard instead of a particular strategy chosen to get the job done.

The standards included in this report were developed by more than 120 residents from throughout the state. A wide cross-section of justice system participants and the public were involved in generating the standards. While the diversity of participants made it difficult to reach consensus on all standards, the opinions of all were considered in developing the standards.

The importance of the involvement of justice system participants and citizens cannot be overstated. Too often goals and objectives are developed irrespective of the impact such policies have on other system participants. One of the major concerns in the development of these standards was to insure the broadest possible insight to avoid an isolated or insular view of the courts' objectives. The process used to develop these standards attempted to dispell any mystery associated with the court system by soliciting a wide range of opinions. While not a consensus statement, the standards that resulted do represent a synthesis of opinions from throughout the state.

## How The Standards Were Developed

In contrast to processes which begin by defining present problems and needs and proceed to establish lists of objectives, alternatives and plans, the development of these standards started with emphasis on results: what is expected from the court system. One result, for example, stressed

initially, was fair, prompt, and equal access to the courts. These concepts were further refined to determine how each could be measured within the court system. Six regional groups and one statewide group undertook the task of defining what the court system would be doing if it were administering justice in the best possible manner.

The comments of the seven groups were synthesized into a list of twenty-one topic areas (major categories, such as defense, prosecution and trial procedure) covering more than 120 individual standards. A second round of meetings was held to review and refine this list of standards. Based upon the synthesized comments from the second round of meetings, the number of topic areas was reduced to sixteen, comprising over 100 standards.

At this stage, a detailed analysis of the court system commenced to determine where the court system stood today in relation to the standards. The analysis included a review of more than 2,000 case files, conduct of 150 interviews and mailing of 1,000 questionnaires. The results of this documentation were added to the commentary developed for each standard to compare specific standards with present performance and practice.

Following the drafting of the initial portion of the standard commentary, a series of nine task force meetings, organized by topic area (subject matter), were held. The purposes of these meetings were: 1) to identify alternative methods for achieving the standards, 2) to evaluate each alternative approach and 3) to establish a priority ranking for the standards within each topic area. In contrast to the previous meetings, which were held regionally, the task force meetings were held on a statewide basis in an attempt to elicit alternative approaches, having statewide applicability, to implementing the standards. While the approaches that were suggested offer a statewide perspective, local modifications or alterations are encouraged.

The commentary which resulted from these meetings thus not only defined the results expected from the court system and where the system stands currently, but also presented a series of approaches to accomplish the standards. Each section or topic area addresses the issues most frequently identified as requiring improvement and discusses various methods for achieving the standard.

All of this information was incorporated into a final listing of standards which were reviewed by the regional group members and discussed at public meetings throughout the state. Comments received at these meetings and at a final review by the statewide panel are included in an appendix to the final document to aid the Supreme Court in deciding which standards should be implemented immediately and which require additional time or further consideration.

## How To Use This Report

This report is intended to be a working paper which should be supplemented as new information becomes available; it can thus serve as a barometer of court system performance.

Each of the sixteen topic areas includes an introduction, statement of standards, commentary to each standard, a discussion of alternative approaches, and a bibliography. While each section can be read independently, it should be considered as one of the sixteen elements most affecting the court system.

The introduction describes: 1) the purposes to be achieved by the topic area, 2) an historical perspective and 3) the major national trends

in the area. The discussion of purpose provides the major objectives in the area; the historic review gives a general background; and the discussion of current trends offers a brief overview of national strategies. The introduction provides background against which to assess the specific standards and commentary.

The commentary following each standard can be divided into three major parts: 1) results desired from the standard, 2) description of present practice and status in New Hampshire in relation to the standard and 3) a review of alternative approaches for accomplishing the standard. The discussion of results includes the comments made by the regional and state groups regarding what they expected from the court system and why. As previously mentioned, this is a synthesized rather than consensus statement, as some group members disagreed with certain standards. The succeeding portion of the commentary discusses where the court system stands today in relation to the standard. These comments are a result of case file, interview, legal and questionnaire analysis. A more detailed discussion of the methodology used to collect and analyze this information is included in Appendix A.

The final element of the commentary discusses various alternative approaches to implementation. While some suggestions were offered to stimulate discussion, the alternative approaches included in the commentary sections were suggested by task force members and represent their assessment of approaches that would be realistic for New Hampshire. Each of the approaches was evaluated using three criteria: 1) time, 2) cost and 3) feasibility. The following chart and definitions were used by task force members to assign weights to each factor.

WEIGHTING SCALE FOR SETTING PRIORITIES FOR STANDARDS/ALTERNATIVES

| Rating | Time | Cost | Feasibility |
|---|---|---|---|
| 1 | No Time | No Cost | 80-100% |
| 2 | 0-6 months | $ 50,000 | 60-80% |
| 3 | 6-12 months | $ 50,000 to $250,000 | 30-60% |
| 4 | 12 months | $250,000 | 0-30% |
| 5 | Undetermined | Undetermined | Undetermined |

(Priority ranking based on lowest cumulative score)

DEFINITIONS

TIME - Amount of time to complete implementation

COST - Potential financial costs for: (A) Initial Investment
(B) Operating Cost

FEASIBILITY - Expectation of success based on: political environment; social impact; available resources; organizational impact (personnel, facilities, skills).

(Note: The ranges for each item were established by the staff, application of the scale was applied uniformly throughout the document.)

"Importance" was assigned for those standards in which a clear priority was established. The reader will note that several sections do not include statements of importance, since the task force chose not to assign a priority rating.

In summary, the commentary sections provide a general background in the topic area, a review of the results anticipated from the standard, a statement of where the court is today in relation to the standard, and a review of approaches which may be employed to effect change in the present situation. Rather than a series of problem statements and conclusions, the report is a systematic appraisal of where the court system should be, where it is currently, and how gaps between the two points can be bridged.

# GROUP PARTICIPANTS

The following individuals were members of the regional, statewide and task force groups described in the introduction. Without their participation and support the survey would not have been possible.

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Honorable William W. Treat, Rockingham County Probate Court
Frederic K. Upton, Esq., Concord

# LIST OF STANDARDS

## 1.0 PRE-TRIAL RELEASE

1.1 AS LONG AS PROFESSIONAL SURETIES ARE INCLUDED IN NEW HAMPSHIRE'S SYSTEM OF PRE-TRIAL RELEASE, REGULATORY AUTHORITY OVER THEM SHOULD BE EXERCISED BY THE STATE INSURANCE COMMISSION.

1.2 ESTABLISH PROCEDURE TO GATHER AND VERIFY INFORMATION PERTINENT TO RELEASE DECISIONS AND IDENTIFY CRITERIA GOVERNING ELIGIBILITY FOR PERSONAL RECOGNIZANCE, BAIL, AND BAIL RECONSIDERATION.

1.3 INTRODUCE PROCESS OF WEEKLY REVIEW AND BAIL RECONSIDERATION BY THE COURT FOR INCARCERATED DEFENDANTS.

1.4 MAINTAIN EMPHASIS ON USE OF PERSONAL RECOGNIZANCE UNLESS CLEAR BASIS FOR BOND IS SHOWN.

1.5 INCREASE USE OF SUMMONS IN LIEU OF ARREST BY IDENTIFYING SPECIFIC OFFENSES FOR WHICH USE OF SUMMONS IS PREFERABLE (AND ELIMINATE ARRESTS) IN VIOLATION CASES.

1.6 MAINTAIN IMMEDIATE BAIL DECISION BY EMPOWERING SUFFICIENT IMPARTIAL JUDICIAL OFFICERS TO SET BAIL.

1.7 REQUIRE A COURT ORDER TO DETAIN A JUVENILE FOR MORE THAN FOUR HOURS AND INSURE THAT A COURT HEARING OCCURS WITHIN 24 HOURS OF ARREST.

1.8 PROVIDE SUITABLE AND SEPARATE FACILITIES FOR JUVENILES AND ADULT FEMALE DEFENDANTS FOR EACH REGION, COUNTY OR MUNICIPALITY.

1.9 MAINTAIN SUPPORT FOR THE COURTS' USE OF CONDITIONS ON RECOGNIZANCE TO EMPHASIZE THE USE OF NON-MONETARY FORMS OF RELEASE.

1.10 INFORM DEFENDANT OF SANCTIONS WHICH MAY BE IMPOSED IF DEFENDANT FAILS TO APPEAR.

1.11 PROVIDE PROCEDURES TO PERMIT RELEASE OF DEFENDANTS ON BOND SUBSEQUENT TO DETERMINATION OF GUILT BUT PRIOR TO SENTENCING.

## 2.0 SCREENING AND DIVERSION

2.1 COURT-DIRECTED SCREENING CAPABILITIES, WITH SANCTIONED GUIDELINES, SHOULD BE ESTABLISHED IN EACH COUNTY AND MUNICIPALITY IN THE STATE.

2.2 A MAXIMUM EFFORT SHOULD BE MADE BY THE COURTS, THE COMMUNITY AND LAW ENFORCEMENT OFFICIALS TO DIVERT, WHEN APPROPRIATE, OFFENDERS FROM THE FORMAL CRIMINAL JUSTICE SYSTEM.

2.3 THE NUMBER AND TYPES OF DIVERSION PROGRAM ALTERNATIVES SHOULD BE EXPANDED IN EACH COUNTY.

a. Juveniles (status offenders, delinquents)
b. Adults and specifically youthful offenders
c. Mental retardation, child abuse or neglect

3.0 PROSECUTION

3.1 INCREASE PROVISION OF PROFESSIONAL PROSECUTION IN EACH COUNTY:

a. EXTEND TERM OF OFFICE TO A MINIMUM OF FOUR YEARS TO INCREASE CONTINUITY.
b. MAKE PROSECUTORIAL POSTS FULL-TIME POSITIONS.
c. ORGANIZE PROSECUTORIAL OFFICES TO INCREASE AVAILABILITY OR ASSISTANCE OF LEGALLY TRAINED PROSECUTORS IN ALL TRIAL COURTS SO THAT LAY PROSECUTION MAY BE ELIMINATED AND POLICE PROSECUTION MINIMIZED.
d. COMPENSATE PROSECUTORIAL STAFF SO AS TO ESTABLISH AN EXPERIENCED OFFICE.

3.2 CASELOAD STATISTICS SHOULD BE UTILIZED TO DETERMINE PROSECUTORIAL STAFF SIZE.

3.3 PROSECUTORS SHOULD BE PROVIDED AN INVESTIGATIVE CAPABILITY FOR SCREENING ALL CASES FOR ACCURACY OF CHARGE AND PARTICULARLY IN JUVENILE MATTERS, APPROPRIATENESS OF COURT REFERRAL.

4.0 DEFENSE

4.1 DETERMINE AND APPLY CLEAR STANDARDS OF ELIGIBILITY TO CONTROL PROVISION OF COUNSEL BY THE COURT, INCLUDING RULES GOVERNING PARTIAL ELIGIBILITY.

4.2 MAINTAIN ACCESS TO COUNSEL IN ALL INDIGENT DEFENDANT CASES WHERE THE CRIME OR OFFENSE CHARGED IS PUNISHABLE BY IMPRISONMENT.

4.3 INSURE AVAILABILITY OF COUNSEL AT EARLIEST STAGE OF CRIMINAL PROCESS (TIME OF ARREST) THROUGH POST-CONVICTION REVIEW.

4.4 REQUIRE MOTIONS FOR WITHDRAWAL IN WRITING.

4.5 PROVIDE DEFENSE SERVICES TO INDIGENTS THROUGH PUBLIC DEFENDER OR ROTATING ASSIGNED COUNSEL SYSTEMS AS DETERMINED APPROPRIATE BY EACH LOCALITY.

4.6 INCREASE SUPERVISION OF INDIGENT DEFENDANTS DETERMINED TO BE CAPABLE OF REPAYING THE COSTS OF THEIR DEFENSE.

4.7 ESTABLISH SYSTEM FOR APPOINTING COUNSEL TO INSURE ADEQUATE EXPERIENCE IN AREA OF ASSIGNMENT AND PARTICIPATION IN ROTATING ASSIGNED COUNSEL SYSTEM BY ALL QUALIFIED ATTORNEYS.

4.8 SET MAXIMUM CASELOAD LEVEL FOR INDIVIDUAL PUBLIC DEFENDERS AND ASSIGNED COUNSEL.

4.9 REQUIRE A WRITTEN WAIVER OF COUNSEL IN ALL COURTS.

4.10 INSULATE PUBLIC DEFENDER SYSTEM FROM POLITICAL CONTROL.

4.11 RECOGNIZE EXPANDED ROLE OF COUNSEL IN JUVENILE PROCEEDINGS AND ASSURE ASSISTANCE OF COUNSEL FAMILIAR WITH JUVENILE PROCESS.

4.12 MAINTAIN PROVISION OF COUNSEL TO INDIGENTS IN INVOLUNTARY COMMITMENT AND SEXUAL PSYCHOPATH HEARINGS.

4.13 PROVIDE DEFENSE SERVICES FOR INDIGENTS IN CIVIL CASES.

4.14 ESTABLISH ADEQUATE COMPENSATION FOR ASSIGNED COUNSEL IN INDIGENT CASES, INCLUDING SPECIFIED RATES, DETERMINED BY THE DIFFICULTY OF THE CASE, AND A FINANCING SYSTEM.

## 5.0 GRAND JURY

5.1 PERSONS SELECTED FOR GRAND JURY DUTY WILL RECEIVE THOROUGH ORIENTATION BY THE COURT. JURORS WILL BE INFORMED OF THEIR DUTIES AND RESPONSIBILITIES, COURT PROCEDURES AND LEGAL TERMINOLOGY.

5.2 GRAND JURIES SHOULD, AT THE DISCRETION OF THE COURT, BE SUBJECT TO RECALL UNTIL SUCH TIME AS A NEW GRAND JURY IS IMPANELED AT THE NEXT TERM OF COURT, OR IN THE ALTERNATIVE, VENUE SHOULD BE SHIFTED TO AN ADJACENT COUNTY WHERE A GRAND JURY IS AVAILABLE WHEN SPEEDY TRIAL IS DEMANDED.

5.3 GRAND JURY SERVICE SHOULD BE LIMITED TO THE TERM OF COURT FOR WHICH THAT GRAND JURY HAS BEEN IMPANELED.

## 6.0 PLEA BARGAINING

6.1 INFORM DEFENDANT PRIOR TO THE ACCEPTANCE OF PLEA THAT IF PROSECUTION SENTENCE RECOMMENDATIONS ARE NOT FOLLOWED THE PLEA MAY BE WITHDRAWN.

6.2 EXCLUDE TRIAL JUDGE FROM PLEA NEGOTIATION PROCESS, BUT INFORM THE JUDGE OF THE REASONS FOR A REQUESTED DISPOSITION.

6.3 REVIEW OF SENTENCES BY SENTENCE REVIEW DIVISION SHOULD BE DIRECTED TOWARD REDUCING DRASTIC ABUSES CAUSED BY PLEA BARGAINING.

6.4 INSTITUTE CHANGES IN PROCESSING OF CASES AIMED AT REDUCING NEED FOR PLEA BARGAINING.

## 7.0 TRIAL PROCEDURES

7.1 REQUIRE PROBABLE-CAUSE HEARINGS IN ALL FELONY CASES AS AN EARLY SCREENING STAGE.

7.2 USE OF COURT-ORDERED, IMMEDIATE, VIDEOTAPE DEPOSITIONS TO MAINTAIN COOPERATION AND PROTECTION OF WITNESSES AND EXPAND CAPABILITY OF COURTS TO VIDEOTAPE TRIAL SEGMENTS AND DEPOSITIONS AT INITIATION OF COUNSEL.

7.3 EMPHASIZE AND INCREASE AVAILABILITY OF ARBITRATORS AND MEDIATORS TO RESOLVE DISPUTES WHERE PARTIES AGREE TO THEIR USE.

7.4 USE OMNIBUS HEARINGS TO EXPEDITE CRIMINAL PRE-TRIAL PROCESS.

7.5 EMPLOY PRE-TRIAL PROCEDURES AND CONFERENCES AS NEEDED TO:

a. MONITOR AND EXPEDITE DISCOVERY PROCESS;
b. OUTLINE MATTERS TO BE TRIED; AND
c. STIMULATE SETTLEMENT WHERE POSSIBLE THROUGH SCHEDULING OF CONFERENCE SHORTLY BEFORE TRIAL.

7.6 ASSIGN APPROPRIATE COMPLEX CASES AND FAMILY-RELATED MATTERS TO MEDIATORS OR MASTERS IN THE FIRST INSTANCE. IN SOME CASES, A SINGLE JUDGE SHOULD MONITOR A COMPLEX PROCEEDING.

7.7 CONDUCT ALL TRIALS IN THE STATE IN ADHERENCE TO UNIFORM RULES AND PROCEDURES APPLICABLE IN ALL TRIAL COURTS.

7.8 ADOPT RULES FOR EFFECTIVE PROCESSING OF CASES. THESE SHOULD BE DRAFTED IN THE FIRST INSTANCE BY COMMITTEES COMPRISED OF JUDGES AND ATTORNEYS. DRAFTS SHOULD BE WIDELY DISTRIBUTED, WITH SUFFICIENT TIME PERMITTED FOR COMMENT PRIOR TO ADOPTION AND THOROUGH DISSEMINATION UPON EXAMINATION.

7.9 MINIMIZE CONFLICTS IN CASE SCHEDULING BETWEEN DIFFERENT TRIAL COURTS AND SESSIONS IN THE SAME AND ADJACENT COUNTIES.

7.10 RESERVE TRIAL BY JURY, IN CIVIL CASES, FOR MATTERS IN WHICH IT IS MOST NEEDED TO RESOLVE ISSUES OF FACT. NO CASE SHOULD BE TRIED BY JURY UNLESS THE AMOUNT IN CONTROVERSY EXCEEDS $3,000.

7.11 SEPARATE ADULT CRIMINAL TRIAL CALENDARS FROM JUVENILE HEARINGS SO THAT, IN CONFORMITY WITH EXISTING LAW, JUVENILES ARE NOT PRESENT IN COURTROOMS WHEN ADULT DEFENDANTS ARE THERE.

7.12 PROVIDE FOR FULL AND OPEN DISCOVERY IN ALL CASES, RESTRICTED ONLY BY PRIVILEGES, CONSTITUTIONAL BARS AGAINST SELF-INCRIMINATION, AND SERIOUS DANGER TO WITNESSES.

7.13 INSTITUTE USE OF STANDARD FORM OF POLICE REPORT TO EXPEDITE DISCOVERY IN CRIMINAL CASES.

7.14 LIMIT CONTINUANCES IN ALL CASES TO EMERGENCY SITUATIONS, ESPECIALLY WHERE A DEFENDANT IS INCARCERATED BEFORE TRIAL. ADVANCE APPLICATION IN WRITING SIGNED BY A PARTY SHOULD BE REQUIRED FOR CONTINUANCES.

7.15 SESSIONS FOR MOTION HEARINGS SHOULD BE SCHEDULED REGULARLY, BUT NOT LESS OFTEN THAN MONTHLY.

8.0 SENTENCING

8.1 DETERMINATION OF WHERE A SENTENCE IS SERVED SHOULD DEPEND ON WHAT RESULTS THE SENTENCING COURT INTENDS TO PRODUCE, RATHER THAN UPON THE LENGTH OF THE SENTENCE OR THE AGE OF THE DEFENDANT.

8.2 OVERALL CONSISTENCY IN SENTENCING SHOULD BE ACHIEVED THROUGH MECHANISMS SUCH AS A SENTENCING REVIEW BOARD.

8.3 OFFENDERS SHOULD NOT BE SUBJECT TO HABITUAL OFFENDER IMPRISONMENT AFTER FIVE YEARS HAVE PASSED FROM THE DATE OF THE EARLIER OFFENSE.

8.4 JUVENILE STATUS OFFENDERS SHOULD NOT BE INCARCERATED.

8.5 ADULT AND JUVENILE CLASSIFICATION AND DIAGNOSTIC UNITS SHOULD BE ESTABLISHED FOR PRE- AND POST-SENTENCING REVIEW.

8.6 JUSTIFICATION SHOULD BE REQUIRED BY THE SENTENCE REVIEW DIVISION IN ALL INSTANCES WHERE CONSECUTIVE SENTENCES ARE IMPOSED.

9.0 PROBATION

9.1 INVESTIGATION AND SUPERVISION FUNCTIONS SHOULD BE ORGANIZED TO INSURE CONSISTENT LEVELS OF PERFORMANCE.

9.2 SEPARATE REGULAR PROBATION PERSONNEL FROM ALL DOMESTIC RELATIONS COLLECTIONS RESPONSIBILITIES.

9.3 ESTABLISH PROBATION SERVICES ADEQUATE TO MEET THE SPECIAL NEEDS OF ALL PROBATIONERS, DEVOTING SPECIFIC ATTENTION TO THE NEEDS OF JUVENILE AND FEMALE PROBATIONERS.

9.4 ORGANIZE PROBATION SERVICES UNDER AN ADMINISTRATIVE STRUCTURE WHICH FOSTERS THE MOST EFFECTIVE PROVISION OF SERVICES TO THE COURT AND PROBATIONER.

9.5 PRE-SENTENCE INVESTIGATION REPORTS SHOULD BE INITIATED ONLY AFTER A PLEA OR CONVICTION UNLESS (A) AUTHORIZED BY DEFENDANT, OR (B) SPECIFICALLY REQUESTED BY THE COURT.

9.6 INSULATE THE RATIONALE FOR TREATMENT PLAN (BUT NOT FACTUAL MATERIAL OR RECOMMENDATIONS) IN PRE-SENTENCE REPORTS FROM VIEW OF ALL EXCEPT THE TRIAL JUDGE AND THE SENTENCE REVIEW DIVISION.

9.7 INCREASE INVOLVEMENT OF PROBATION PERSONNEL IN PRE-TRIAL SCREENING AND CONDITIONAL RELEASE-SUPERVISION.

10.0 APPELLATE PROCEDURE

10.1 RESOLVE ISSUES OF FACT AT A SINGLE TRIAL BEFORE A LEGALLY TRAINED JUDGE, INSTEAD OF CONTINUING TO USE THE REPETITIOUS APPEAL DE NOVO WHICH RESULTS IN EVIDENCE LOSS, WITNESS ABSENCE, AND INEVITABLY UNSPEEDY TRIALS. ALTERNATIVELY, DECRIMINALIZE SELECTED OFFENSES WHICH NOW REQUIRE APPEALS DE NOVO.

10.2 IMPROVE MONITORING OF SUPREME COURT CASES BY REQUIRING ADEQUATE NOTICE TO THE COURT AT THE START OF AN APPEAL, AND INCREASING SUPERVISION OF TRANSCRIPT PREPARATION IN ORDER TO BE ABLE TO ASSESS REGULARLY WHETHER THE IMPACT OF AN INCREASING CASELOAD REQUIRES MECHANISMS SUCH AS SCREENING, CERTIORARI, SUMMARY DISPOSITION, OR AN INTERMEDIATE APPELLATE COURT TO DISPOSE OF APPEALS.

11.0 SPEEDY TRIAL

11.1 CRIMINAL OFFENSES SHOULD BE TRIED WITHIN THE FOLLOWING TIME LIMITS, WITHOUT DEMAND BY THE DEFENDANT:

(A) FELONY CASES IN WHICH THE ACCUSED IS NOT INCARCERATED SHOULD BE TRIED WITHIN 120 DAYS FROM THE DATE OF ARREST OR INDICTMENT:

(B) WHERE THE ACCUSED IS INCARCERATED, A FELONY CASE SHOULD BE TRIED WITHIN 60 DAYS OF ARREST:

(C) MISDEMEANORS AND VIOLATIONS SHOULD BE TRIED WITHIN 60 DAYS OF SUMMONS OR ARREST; WHERE THE ACCUSED IS INCARCERATED, THE PROCESS SHOULD BE COMPLETED IN 30 DAYS; AND

(D) ARRAIGNMENT ON ANY CHARGE SHOULD BE COMPLETED WITHIN 24 HOURS OF THE TIME OF ARREST.

11.2 PETITIONS INVOLVING JUVENILES -- EITHER PERSONS IN NEED OF SUPERVISION (PINS) OR DELINQUENTS -- SHOULD BE COMPLETED (A) WITHIN THIRTY (30) DAYS FROM FILING OF PETITION IF THE JUVENILE IS NOT INCARCERATED. (B) IF INCARCERATED, PROCEEDINGS SHOULD BE COMPLETED AS QUICKLY AS POSSIBLE, BUT WITHIN (30) DAYS.

11.3 CIVIL CASES SHOULD GENERALLY BE DISPOSED OF WITHIN NINE MONTHS OF ENTRY OF APPEARANCE (OR THE EXPIRATION OF THE TIME FOR SPECIAL PLEAS) AND A PRE-TRIAL CONFERENCE SHOULD BE REQUIRED WITHIN SIX MONTHS OF THAT DATE.

11.4 SMALL CLAIMS CASES SHOULD BE DISPOSED OF ON THE RETURN DATE, NO LATER THAN 60 DAYS FROM THE INITIATION OF THE CASE.

11.5 UNCONTESTED PROBATE AND UNCONTESTED DOMESTIC RELATIONS CASES SHOULD BE DISPOSED OF WITHIN SIXTY (60) DAYS: IF CONTESTED, THE STANDARD SET FOR CIVIL MATTER (11.3) SHOULD APPLY.

11.6 ADOPT AND ENFORCE REASONABLE TIME PERIODS IN THE TRIAL COURTS FOR COMPLETION OF EACH PHASE OF THE LITIGATION PROCESS.

11.7 DECISIONS IN MATTERS TRIED TO A JUDGE SHOULD BE RENDERED WITHIN THIRTY (30) DAYS FROM SUBMISSION TO THE COURT.

11.8 APPEALS SHOULD BE PROCESSED ACCORDING TO THE FOLLOWING TIME PERIODS:

1) transcripts should be provided within 30 days of request;
2) appeals should be submitted for decision or argued within 120 days from the taking of the appeal;
3) decisions should be completed within 60 days from argument or submission.

12.0 JUDICIAL SELECTION AND CONDUCT

12.1 A MERIT SELECTION PLAN FOR THE SELECTION OF JUDGES SHOULD BE DESIGNED AND ADOPTED IN NEW HAMPSHIRE.

12.2 MASTERS OR ARBITRATORS WHO AID THE COURTS AS FINDERS OF FACT SHOULD BE SELECTED BY THE CHIEF JUSTICE FROM NOMINATIONS PROVIDED BY A COMMISSION.

12.3 ESTABLISH A JUDICIAL CONDUCT COMMISSION TO REVIEW AND SCREEN COMPLAINTS AGAINST JUDGES WITH POWER TO DISCIPLINE OR REMOVE JUDGES.

13.0 CONTINUING EDUCATION

13.1 THE SUPREME COURT SHOULD ESTABLISH MINIMUM CONTINUING EDUCATION REQUIREMENTS FOR JUDGES, LAWYERS, AND COURT PERSONNEL. THE COURT WITH THE COOPERATION OF THE NEW HAMPSHIRE BAR ASSOCIATION SHOULD CERTIFY AND, IF NECESSARY, ORGANIZE IN-STATE PROGRAMS FOR CONTINUING EDUCATION.

13.2 SPECIALIZED TRAINING SHOULD BE REQUIRED FOR ALL JUDGES, INCLUDING MASTERS, IN ALL COURTS; IF THE TRAINING IS ONLY AVAILABLE OUT OF STATE, THE COURT SYSTEM SHOULD INCUR THE COST OF ATTENDANCE.

13.3 SPECIALIZED TRAINING SHOULD BE PROVIDED FOR NON-JUDICIAL COURT PERSONNEL, INCLUDING COURT OFFICERS, COURT REPORTERS, CLERKS, PROBATION AND POLICY PERSONNEL.

14.0 PUBLIC EDUCATION AND NEWS COVERAGE

14.1 INFORM THE PUBLIC OF THE GOALS, METHODS AND PROCEDURES OF THE COURTS AND THE REASONS FOR EACH, IN ORDER TO PREPARE MEMBERS OF THE PUBLIC FOR SERVICE AS JURORS, PRESENCE AS WITNESSES, AND RIGHTS AS PARTIES.

14.2 SPECIFY THOSE ASPECTS OF CRIMINAL CASES WHICH ATTORNEYS, JUDGES, LAW ENFORCEMENT OFFICERS, COURT EMPLOYEES, PARTIES AND WITNESSES ARE FORBIDDEN TO DISCLOSE TO THE PRESS OR PUBLIC IN ORDER TO PRESERVE AN ACCUSED'S RIGHT TO A FAIR TRIAL.

14.3 INSURE FAIR TRIALS BY PROVIDING TRIAL JUDGES WITH A RANGE OF MEASURES TO USE WHEN PREJUDICIAL PUBLICITY THREATENS AN ACCUSED PERSON'S RIGHTS: CHANGE OF VENUE, CONTINUANCE, SEQUESTRATION OF JURORS AND WITNESSES, EXAMINATION AND SPECIAL CAUTIONING OF JURORS, EXCLUSION OF PUBLIC FROM PRE-TRIAL HEARINGS, AND SETTING ASIDE VERDICTS IN CASES WHERE EARLIER STEPS HAVE PROVEN INSUFFICIENT.

14.4 THE CLERK SHOULD PROVIDE THE PUBLIC AND THE PRESS WITH RAPID ACCESS TO ALL ACCURATE INFORMATION ABOUT THE WORK OF THE COURTS WHICH IS PART OF THE PUBLIC RECORD.

15.0 COURT FACILITIES

15.1 PROVIDE ADEQUATE AND APPROPRIATE COURTHOUSE FACILITIES TO SUIT NEEDS OF COURTS AND COMMUNITIES THROUGH ENFORCEMENT OF THE ACCREDITATION COMMISSION STANDARDS. PREPARE A STATE-WIDE SCHEDULE OF NEEDS EMPHASIZING MODERNIZATION OF NONACCREDITED FACILITIES.

15.2 PROVIDE SUFFICIENT SEPARATION OF COURT FACILITIES FROM LAW ENFORCEMENT OR OTHER GOVERNMENT AGENCIES HOUSED IN THE SAME BUILDING TO MAINTAIN AN ATMOSPHERE CONDUCIVE TO JUSTICE.

16.0 COURT ORGANIZATION AND ADMINISTRATION

16.1 REQUIRE ALL JUDGES TO SERVE ON A FULL-TIME BASIS. USE OF A ROTATING CIRCUIT SYSTEM CAN INCREASE ACCESS TO COURTS IN ALL COMMUNITIES IF MAKING ALL JUDGES FULL TIME REDUCES THE TOTAL NUMBER OF JUDGES.

16.2 DEVELOP A SYSTEM OF COURT FINANCING WHICH PROVIDES GREATER UNIFORMITY AND CONSISTENCY OF FUNDING THROUGH A CLEARLY DEFINED BUDGET PROCESS WHICH INVOLVES ALL LEVELS OF COURT. EXERCISE GREATER COURT CONTROL OVER FINANCIAL MANAGEMENT, MOST NOTABLY THE PROCESSING OF EXPENDITURES AND REVENUES. AUTHORIZE LINE-ITEM TRANSFERS BY THE COURT NOT SUBJECT TO EXECUTIVE BRANCH APPROVAL. VEST GENERAL FINANCIAL MANAGEMENT CONTROL IN THE SUPREME COURT TO FOSTER CONSISTENT COMPREHENSIVE ALLOCATION OF JUDICIAL RESOURCES AND FINANCIAL PLANNING.

16.3 ORGANIZE A PERSONNEL SYSTEM TO INCLUDE ALL COURT EMPLOYEES OF THE STATE.

16.4 MAKE THE POSITION OF PROBATE JUDGE A FULL-TIME POST BY EXPANDING THE COURT'S JURISDICTION OR ASSIGNING PROBATE JUDGES TO OTHER COURTS BASED ON AVAILABILITY. THIS COURT SHOULD END USE OF FEE SYSTEM TO FINANCE COURT OPERATIONS.

16.5 BASE THE NUMBER OF JUDGES NEEDED ON SIZE AND CHARACTER OF CASELOAD IN ADDITION TO POPULATION.

16.6 REDUCE WAITING TIME FOR WITNESSES INCLUDING POLICE OFFICERS, BY INTRODUCING PROCEDURES TO NOTIFY WITNESSES WHEN ACTUALLY NEEDED.

16.7 PROVIDE EFFICIENT ADMINISTRATIVE SERVICES AT ALL LEVELS OF COURT AND WHERE FEASIBLE, CENTRALIZE ADMINISTRATIVE FUNCTIONS.

# SUMMARY

## PRE-TRIAL RELEASE

Pre-trial release is based upon the fundamental precept of our justice system that the defendant is presumed innocent until proven guilty. A pre-trial release system determines which defendants can remain free while awaiting trial by assessing the likelihood that they will return on the day of trial. The purposes of a pre-trial release system are: (1) to insure that the defendant will appear for trial; (2) to provide defendants and their counsel with the greater opportunity to prepare for trial; (3) to prevent unnecessary incarceration of defendants who pose no danger and (4) to reduce the costs, both financial and social, of incarcerating defendants.

Bail is one of the most widely used forms of pre-trial release. Under a bail system, accused persons post money with the court for their release. The expectation is that these defendants will appear for trial rather than risk the loss of their money should they fail to appear. This system clearly poses a problem for defendants who do not have and cannot raise the money necessary for bail and must therefore await trial in jail.

Another form of pre-trial release which has proven effective, in appropriate cases, in assuring that the defendant will be present at trial involves releasing the accused "on personal recognizance," that is, on the promise that the defendant will appear. This form of pre-trial release is most often successful when the defendant has family and community ties, is employed in the community, and in other ways shows that he is unlikely to flee.

The standards in this section are designed to strengthen the present money bail system in New Hampshire while encouraging the court to explore other forms of pre-trial release. In addition, the standards address such issues as regulating the activities of professional bondsmen, providing proper facilities for those who must be held to await trial, insuring that the accused knows the consequences of failure to appear, and providing release of certain defendants following adjudication but prior to sentencing.

## SCREENING AND DIVERSION

One of the most pressing problems facing the courts today involves processing cases swiftly and effectively in light of ever increasing caseloads. While sheer volume of cases accounts for much of the problem, many complaints filed could be handled better and more appropriately elsewhere. Numerous programs have demonstrated the short and long term benefits of processing minor complaints involving first-time offenders, especially juveniles, outside the formal criminal justice system. By screening and diverting certain types of cases, court time may be used for hearing more serious matters, thereby reducing case backlogs, processing time and costs.

The purpose of screening and diversion then is to remove from the formal criminal justice process those individuals who can best be served by other agencies. The terms screening and diversion are frequently associated with processing juvenile complaints but may also apply to youthful offenders (ages 18-23) or adults. Screening is the process by which complaints are reviewed to determine the best method of proceeding. Diversion may be employed after screening and refers to the specific action taken when it is decided to remove a case from the formal criminal justice process, that is, the courts.

Negative consequences of processing certain juveniles and adults through the formal criminal justice system have been well documented. This is especially true of juvenile status offenders, the naive offender and first-time youthful offenders (ages 18-23). The juvenile's experience with the formal criminal justice process often reinforces negative behavior, labels the youth for life, and causes the youth to seek out friends, who have been similarly labeled, for recognition and approval.

Screening of complaints by law enforcement personnel has occurred informally for many years without the use of uniform, court-directed criteria. To insure fairness, screening should be conducted according to uniform criteria and should occur under the court's direction. However, the effectiveness of screening is dependent on the availability of alternative referral resources. Community-based programs offer the greatest potential for meeting the needs of the individual at a reasonable cost. Community programs offer greater potential for continuity, coordination and accessibility of services.

If screening and diversion efforts are to be effective, clearly defined screening procedures and criteria, approved by the court, must be established and sufficient diversion resources, specifically community-based programs, must be available in all areas of the state.

## PROSECUTION

By deciding what criminal cases are brought to court, the public prosecutor exercises perhaps the greatest impact on the criminal justice system. In New Hampshire, each county elects a county attorney, whose primary responsibility is to represent the state in criminal matters. The prosecutor seeks justice, not merely convictions. To fulfill this role, the county prosecutor must select for prosecution those cases which are most important to maintaining justice. Since many cases are disposed of before trial, the prosecutor directly affects the scheduling of cases, the selection of cases and the fair application of justice in the county. Given the importance of this position, the prosecutor should be a highly qualified professional of unquestioned integrity. Additionally, the responsibilities of the position are sufficiently demanding to require that it be full-time, thereby eliminating the potential for conflict while expanding the availability of professional prosecution to all courts.

The standards in this section are directed toward professionalizing the office of prosecutor through extending the term, increasing the legal and investigative staff and adjusting compensation scales; and providing professional prosecutors in as many cases at all levels of court as possible.

## DEFENSE

Our system of justice guarantees individuals accused of a crime, regardless of personal wealth, the opportunity to have assistance in preparing their defense if their conviction could result in a prison sentence. While some Americans can afford the cost of retaining private legal counsel, many cannot.

There are two basic methods of providing defense services to indigent (without sufficient funds for counsel) defendants. The most widely used method is assigned counsel, in which lawyers in private practice are appointed by the court to represent the defendant. Attorneys who are assigned by the court may be paid by the state, as in New Hampshire, or by the county. The second method of providing counsel to indigents is the public defender system, in which salaried attorneys devote all or part of their time to representing indigent defendants. State funded public defender offices are provided in Hillsborough and Merrimack Counties.

In assuring that defense services are provided to indigents, the courts face many difficult problems. The court must first determine which defendants cannot afford counsel. For the rights of the defendant to be protected and the adversary system to function properly, the courts must develop a mechanism to assure that effective counsel is provided early in the proceedings.

The standards presented in this section address issues of eligibility, access, availability, and supervision of repayment. Additional standards concern the rights of juveniles, the mentally ill, and indigents who may be involved in civil disputes.

## GRAND JURY

The grand jury is composed of twenty-three citizens, randomly selected, to screen cases presented by the prosecutor's office and to decide whether there is enough basis to the state's case for a trial to be held. The purposes of the grand jury include protecting innocent persons from unfounded prosecution, investigating corruption in government and reflecting the community point of view regarding enforcement of laws.

Many critics of the grand jury system feel that it has become simply a "rubber stamp" for the prosecution and that the jury no longer protects the innocent from unjust prosecution. This criticism is bolstered by the fact that many grand juries, including those surveyed in New Hampshire, vote to indict in over 90 percent of the cases presented by the prosecution. While this may reflect exceptional performance by the prosecutor's office it may also indicate that grand jurors are not knowledgeable concerning their role in the process. Therefore, Standard 5.1 calls for improving the information given grand jurors regarding their duties, responsibilities and role in the criminal justice process.

Another criticism of the grand jury system is that it causes unnecessary delays in processing criminal cases resulting in lengthy periods of pre-trial incarceration for some defendants. This criticism is largely based on the fact that the grand jury is not always in session and therefore is unavailable to hear cases. Standard 5.2 addresses this issue by providing for regular recall of grand jurors during their term of service.

Finally, grand jury service can pose a hardship on those who serve and in doing so may contribute to biased action on the part of jury members. Standard 5.3 addresses this problem by limiting the time that grand jurors must serve.

## PLEA BARGAINING

Plea bargaining is an arrangement between the prosecutor and the defendant or his lawyer, in which the defendant pleads guilty to a less serious charge than might be proven at trial (charge bargaining) or pleads guilty based on the prosecutor's promise to recommend a lighter-than-usual sentence for the offense charged (sentence bargaining).

The practice causes great public concern because many people feel defendants escape just punishment and justice is forgotten. At the same time, supporters of plea bargaining point out that it permits cases to be disposed of faster, with less drain on the state's resources than would be the situation if all cases were brought to trial. Most important, proponents of plea bargaining contend that the courts could not dispose of the tremendous volume of cases which would require trial if plea bargaining were abolished.

One compromise position on plea bargaining would retain the procedure but enable the court to assert more control over its application. The standards in this section reflect that position and recommend that specific controls and procedures be followed prior to and during plea negotiations. At the same time, Standard 3.4 and those of several other sections call for instituting changes in case processing in order to reduce the need for plea bargaining.

## TRIAL PROCEDURE

Trial procedures should enable legal proceedings to be completed fairly and as speedily as possible. The purpose of standards in this area is to involve the court directly in expediting the conduct of cases.

Procedures recommended in this section increase the role of the court in supervising litigation through (1) use of pre-trial conferences, (2) omnibus hearings, (3) uniform rules, (4) full discovery, (5) calendar coordination among courts, (6) limitations on continuances, (7) regular motion hearings, (8) videotaped depositions, and (9) monitoring of complex cases by a single judge or special master.

In expediting criminal cases, more meaningful use of probable-cause hearings and standardized police reports geared to discovery needs are urged.

All these steps require the court to act affirmatively in shaping the legal process rather than remaining in the background while lawyers prepare cases for trial at their own pace. These standards recognize that litigants may not share the delaying tendencies of their own attorneys and that the court has a positive interest in assuring high-quality service by overseeing all aspects of the process to insure fairness and efficiency.

## SENTENCING

Sentencing has become one of the most controversial areas of the criminal justice process. Many believe the courts are too lenient and that severe sentences help to prevent crime. Others, however, see the primary goal of sentencing to be the rehabilitation of criminals and are therefore critical of the courts if the sentencing decision appears to place greater emphasis on punishment, retribution or deterrence rather than rehabilitation. The oft-conflicting goals of sentencing thus include: (1) punishing those guilty of a criminal act, (2) rehabilitating the criminal, (3) protecting the community from dangerous offenders and (4) deterring others from committing similar crimes. Because these goals frequently conflict, and as one or another rises or falls in public esteem, sentencing becomes a highly controversial issue.

The sentencing judge must determine the most appropriate sentence on the basis of the seriousness of the crime and the offender's background and character. In a sense, the judge must try to predict the future behavior of the individual. Sentences must be fair in relation to the seriousness of the offense and must be consistent, that is, equally applied. Additionally, sentencing of juveniles requires special skills and knowledge, as interceding in juvenile cases in which life styles have yet to be defined, represents the court's greatest opportunity to prevent future criminal behavior.

The standards in this section are designed to help the courts deal more effectively with sentencing by addressing problems created by statutory sentences, constructing mechanisms for achieving greater uniformity in sentencing, and meeting the special needs of juvenile offenders, particularly "status offenders."

## PROBATION

Probation has rapidly become the preferred sentence in many criminal cases because it presents a workable alternative to imprisonment: while remaining under supervision, offenders are given an opportunity to modify their behavior and avoid future criminal activity. Additionally, the community realizes economic savings since supporting incarcerated offenders is very costly. Probation services grew as people realized that prisons were ineffective in rehabilitating offenders, were filled to capacity, and that the goals of the criminal justice system generally were not being met.

While supervision is an important function of probation department personnel, they provide other services which are equally vital. Pre-sentence investigation reports are prepared for the court to help the judge make his sentencing decision. These reports provide valuable information regarding

the offender's background and character. The early preparation of reports helps to reduce the time between the judgment of guilt and sentencing. Additionally, probation personnel are engaged in numerous other activities including screening, diversion, and collection of family support payments.

The standards in this section are designed to improve the quality of probation services and in turn the results of probation as a sentencing alternative. The standards address such issues as the relationship between investigative and supervisory functions, the undesirability of using probation personnel as collection agents in domestic relations support cases, meeting the special needs of juveniles, improving pre-sentence investigation reports and improving the organization and structure of the probation department.

## APPELLATE PROCEDURE

Two kinds of proceedings are called appeals in the New Hampshire legal system. The first are appeals of decisions made in trial courts on questions of law. These appeals are taken to the state's highest court, the Supreme Court, which is primarily responsible for resolving disputed legal questions. A second appellate proceeding occurs when a case in which the defendant possesses a right to jury trial is tried in Superior Court following an initial trial in District or Municipal Court.

With respect to appeals on law to the Supreme Court, appellate courts across the country have been expediting the process by supervising each stage of an appeal from its inception. Supervision involves monitoring of the filing of a notice of appeal, of the preparation of the transcript of proceedings before the trial court and of the submission of briefs and records. A next step sometimes taken by an appellate court after

assuming supervisory responsibility over the process is, when increased caseload requires, the introduction of screening devices. These may require a person who wants to appeal to obtain the permission of either the trial judge or the Supreme Court before filing the appeal, or may require all appeals to be reviewed by a staff attorney, who may separate those deserving full hearing by the court from routine cases which can be decided rapidly.

The second kind of appeals, to the Superior Court from the lower trial courts, are called "appeals de novo" (they are really second trials) and only exist because the jury trial, required if demanded, can only be had in Superior Court. If these appeals were eliminated, either jury trial facilities would be needed in District Court or the burden of Superior Court would be increased drastically. The standard discusses proposed decriminalization of certain minor offenses such as driving while intoxicated, which constitute the majority of de novo appeals and which are often taken solely to delay the effect of penalties imposed at the first trial.

## SPEEDY TRIAL

The New Hampshire Constitution stresses the importance of eliminating delay in trying cases. By speeding up the process, defendants who are ultimately found not guilty suffer less from being accused of a crime, witnesses are available to give accurate testimony, and the public is satisfied that justice is done fairly and swiftly. Courts in many areas have begun to establish specific time periods for processing cases.

The court system has been responsive to public sentiment by assigning priority in case processing to criminal matters. Indeed, the court has gone one step further by giving precedence to those criminal cases in which the defendant is incarcerated. This reduces the costs and the bad effects on defendants who have not been convicted. Unfortunately, one consequence of the

priority assigned to criminal cases is a resulting delay in disposing of civil matters. This delay has increased the pressure on litigants to settle rather than proceed to trial. Whether the frequency of settlements is purely a result of delay is difficult to assess; nevertheless, significant delays are encountered in the processing of civil cases.

The solutions or partial solutions to delay, in both criminal and civil matters, go beyond merely adding personnel and expanding facilities. Delays in case processing are a visible by-product of one or more aspects of the justice system breaking down. For example, delay of criminal cases may be attributable to problems at: (1) the lower court; (2) grand jury; (3) prosecutor's office; (4) clerk's office; (5) the trial court; (6) or the defense attorney or defendant. With all these potential bottlenecks, effective resolution of delay becomes complex. At the least, each aspect of the justice system must be evaluated to determine the extent to which it contributes to delay.

The purpose, then, of establishing specific time frames to evaluate the speed of case processing, or reduction in delay, is to establish a measure against which the performance of the justice system and the extent of delay can be evaluated.

## JUDICIAL SELECTION AND CONDUCT

The quality of justice is closely related to the competency, fairness and effectiveness of our judges. Therefore, judicial selection, the process by which judges (and masters) are chosen to serve on the bench, is one of the most important elements of the justice system.

There are many methods which may be used to select judges; each offers

certain advantages and disadvantages. Whatever method is employed, it is important that objective criteria be used to select the most qualified candidates. Some selection methods involve appointment, others popular election, and still others combine the positive aspects of both appointment and popular election. In this regard many states have adopted judicial selection processes which base selection on merit, are non-partisan in nature and are structured so as to be relatively free of political pressures. Standards 12.1 and 12.2 recommend that New Hampshire adopt a non-partisan merit selection process. Standard 12.3 calls for the creation of a judicial conduct commission which would review complaints against judges and when appropriate, permit disciplinary action to be taken without undue delay.

## CONTINUING EDUCATION

For the court system to provide the best possible service to the citizens, all judges, clerks, probation officers, and other court personnel should regularly refresh and improve their skills by attending training programs in their particular areas of responsibility. New methods and techniques for processing court cases faster and more efficiently continue to be developed. Similarly, changes in the law and in court rules must be clearly understood and complied with if the courts are to perform effectively. Changes in procedure and the application of new technology can often be best understood and utilized by court personnel through attendance at formal training programs.

Several states have established minimum continuing education requirements for judicial and non-judicial personnel. Judges, attorneys, clerks and other court personnel must attend at least one or more court-approved formal training programs each year or be subject to court-imposed sanctions.

The standards presented in this section recommend that the court, in cooperation with the bar, establish minimum continuing educational requirements for judicial and non-judicial court personnel to continue the quality of service provided by the court system.

## PUBLIC EDUCATION AND NEWS COVERAGE

Very few citizens understand the structure and organization of the state's court system. Many participants in the justice system, legislators, witnesses, jurors and litigants have little understanding of what is happening in the courts, how they operate, or what improvements should be made.

If the public is to support the court system and effectively participate in its operation, they must understand their role in the judicial process. The courts can help promote this understanding by informing the public of the court goals, structure, organization and operations through public meetings, informational pamphlets, informative newspaper articles and school programs.

In addition, the public's "right to know" must not make it impossible for a particular case to receive a fair trial. Information provided by the court concerning specific cases should be limited to facts that form the public record in order to protect this right to a fair trial.

The standards prescribed in this section concern informing the public of the court's goals and procedures as well as preparing members of the public for service as jurors, witnesses or litigants. Further, Standards 14.2 and 14.3 provide for an informed public while safeguarding the defendant's right to a fair trial.

## COURT FACILITIES

Consideration must be given to several important features when determining the appropriateness of a court facility. These features include: location of courthouse; number of courtrooms in relation to caseload; space for court records room, probation offices, security, conference rooms, judges' chambers, and detention areas for prisoners. Further, when courts must share space with law enforcement or other governmental agencies, citizens coming to court often form the impression (real or imagined) that the court is simply an extension of the police department or some other agency. While total

separation of such facilities may be financially impractical, the goals of the courts and the agencies sharing the building should be compatible.

Many court facilities in New Hampshire are inadequate to meet the needs of the courts. New Hampshire has a Court Accreditation Commission which has studied court facilities and made recommendations for improving existing structures. However, as the Commission can impose no sanctions, little has been done at the local level to effect these improvements.

The standards in this section underscore the need for adequate court facilities and promote the establishment and enforcement of accreditation standards which will aid improving the adequacy of existing facilities.

## COURT ORGANIZATION AND ADMINISTRATION

"Court organization" is the structure which encompasses all levels of court and is concerned with the relationships which exist between court functions directly related to deciding questions of law and fact and the hearing of cases, and administrative activities such as budgeting, personnel, and case scheduling.

The way in which a court system is organized often determines how efficient and effective its operations are. For example, a "unified court system" may operate under a central administrative office. The non-judicial business at all levels of court is administered by a centralized, well-defined administrative authority. Personnel systems, budgeting practices and case processing procedures are characterized by uniformity. Funding of the system is usually through one source. In contrast, a court system which is not uni-

fied may have many different courts operating independently of each other with administrative authority divided or not exercised at all, resulting in duplication of effort and a lack of uniformity in administrative procedures and policies. Uniformity is valuable not to enforce a rigid pattern in areas with different administrative needs but to assure everyone that the system operates fairly throughout the state.

The intent of New Hampshire legislators to construct a more unified court system for the state was embodied in RSA 490-A-1. Present legislation lacks the specificity necessary for the courts to be effectively administered on a unified basis. The standards in this section address such critical issues as a unified personnel system, state financing of the courts, full-time judges, the functions of the Probate Courts, and delivering efficient administrative services to all levels of court.

# 1.0 PRE-TRIAL RELEASE

## Introduction

A system of pre-trial release enables courts to ensure the appearance of those against whom criminal proceedings have been commenced. Defendants may be released to prepare their cases, maintain their normal livelihoods, and minimize the cost of public maintenance. While the bail system operates to compel the presence of the accused, it has been used as a device to arbitrarily detain individuals.[1] Money bail inevitably discriminates against persons without means by incarcerating them prior to determination of guilt or innocence, the basic premise of the bail system being that risk of financial loss will prevent the defendant's flight. The court, then, must roughly translate the potential for flight into a fixed dollar amount. Nevertheless, bail projects in New York and Washington have shown success in predicting which individuals are prime candidates for release without bail.[2]

A pre-trial release system should recognize that pre-trial detention may have a significant negative effect on those detained. Conditions in detention facilities are often worse than those existing in regular prisons. If a jailed defendant is unavailable for work, the job may be filled. Incarcerated defendants are less able to assist in the preparation of their defense if evidence and witnesses must be obtained. Evidence indicates that a defendant's failure to secure pre-trial release has an adverse effect on the outcome of his case.[3]

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[1] However, in New Hampshire "...the only issue before the court in a hearing on a motion to set bail is insuring that the accused will appear as required." State v. Williams, 115 N. H. 437, 343 A. 2d 29, 33 (1975).

[2] See C. Ares, et al., The Manhattan Bail Project, 38 N. Y. U. L. Rev. 67 (1963), Molleur, Bail Reform in National's Capital (1966), and D. C. Bar Assn., Jr. Bar Section, Bail System of the District of Columbia, (1963).

[3] C. Ares, supra note 2, at 84; C. Foote, The Coming Constitutional Crisis in Bail: II, 113 U. Pa. L. Rev. 1125, 1137-51 (1965).

In terms of the sentence imposed on convicted persons, the defendant already free on bail is far more likely to receive probation; the jailed accused more frequently goes to prison.[4]

Sentence, by Jail Status and Charge (Manhattan Bail Project)

| Charge on Which Guilt Determined | At Liberty Before Trial: Suspended Sentence (Percent) | At Liberty Before Trial: Prison (Percent) | At Liberty Before Trial: Total Cases | Detained Before Trial: Suspended Sentence (Percent) | Detained Before Trial: Prison (Percent | Detained Before Trial: Total Cases |
|---|---|---|---|---|---|---|
| **Felonies** | | | | | | |
| Assault | 42 | 58 | 26 | 6 | 94 | 73 |
| Dangerous Weapons | 30 | 70 | 10 | 9 | 91 | 11 |
| Larceny | 42 | 48 | 40 | 7 | 93 | 107 |
| Narcotics | 41 | 59 | 17 | -- | 100 | 16 |
| Robbery | 22 | 78 | 18 | 3 | 97 | 59 |
| Others | 43 | 56 | 14 | 12 | 88 | 17 |
| **Misdemeanors**[1] | | | | | | |
| Assault | 68 | 32 | 134 | 13 | 87 | 159 |
| Dangerous Weapons | 49 | 51 | 65 | 25 | 75 | 43 |
| Larceny | 72 | 28 | 193 | 14 | 86 | 357 |

[1] Although all charges enter the court as felonies, the charges are often reduced and defendants plead guilty to misdemeanors.

Source: Charles E. Ares, Anne Rankin, and Herbert Sturz, "The Manhattan Bail Project: An Interi Report on the Use of Pretrial Parole," New York University Law Review, 38 (1963), 67, 85.

[4] D. C. Bar Assn., supra note 2 at 40; A. Rankin, Effect of Pretrial Detention, 39 N. Y. U. L. Rev. 641 (1964).

Pre-trial detention represents significant expense to the state, both in boarding defendants and assuming the added cost of welfare payments to the detainee's family when detention is for a lengthy period. These costs to the state, the accused and his family, and the public militate in favor of a pre-trial release system which reserves use of bail for serious cases, where risk of flight is great. In such cases, bail also serves to protect society from the costs of danger which loom more likely if a person accused of a violent crime takes flight.[5]

Our bail system derives from the ancient institution of hostageship, developed in England by the invading Angles and Saxons. As a war tactic, a hostage would be held until another person's promise was fulfilled or some other desired consequence achieved. Eventually, the practice shifted from the battlefield to the courtroom. A third person -- relative, friend or clergyman -- would come to court and vouch for a defendant's trustworthiness. The defendant would be released in the custody of the surety.[6]

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[5] D. Freed & P. Wald, Bail in the United States (1964); Note, Preventive Detention Before Trial, 79 Harv. L. Rev. 1489 (1966).

[6] See analysis in Comment, Bail: An Ancient Practice Reexamined, 70 Yale L. J. 966 (1961) and Natl. Center for State Courts, Evaluation of Policy-Related Research on the Effectiveness of Pre-Trial Release Programs (Pub. No. R0016, 1975), Ch. 2.

A bail system like the one in use in the United States today developed when judges in England began to travel on circuits; their visit to an area could occur at intervals of several years. Until the judges arrived, detainees were held in custody by the local sheriffs. Prison conditions were both primitive and insecure, resulting in escapes. Maintaining the prisons was a financial burden and the sheriffs were eager to have someone else assume the responsibility for maintaining custody of the defendants. They often relinquished defendants into the custody of sureties, usually friends or relatives of the accused.

If the defendant failed to appear for trial, the custodian's liability assumed monetary form in contrast to the bodily liability of hostageship. This liability of the surety for the appearance of the defendant, and the ability to discharge the liability by the payment of money remain the basis of our present system of bail.

The Eighth Amendment to the United States Constitution provides that "excessive bail shall not be required." The historical antecedents of the amendment date to the efforts of the English to implement, beginning with the Bill of Rights of 1689, the promise of the Magna Carta

that "no freeman shall be arrested, or detained in prison ... unless ... by the law of the land."[7]

Although the Supreme Court has not made the Eighth Amendment's prohibition on the imposition of excessive bail specifically applicable to the states,[8] recent bail policy has tended to stress admitting individuals to bail if there is little or no risk that they will not appear for trial and that they pose no danger to society.[9]

The Bail Reform Act facilitated the availability of pre-trial release at the federal level. The practice of relying on the bail bondsman has been severely criticized.[10] Several states have adopted the percentage bail deposit system where the defendant pays into the court 10 percent of the amount of the bail set. Upon his appearance in court, nearly all of the 10 percent is returned. A small sum is retained in order to pay for the administration of the program.[11]

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[7] Comment, supra note 6.

[8] It has been asserted that this application was recognized in the result of Robinson v. California, 370 U.S. 660 (1962). ABA, Standards Relating to Pretrial Release (1968) §5.5 commentary at p. 67.

[9] The Federal Bail Reform Act of 1966, 18 U. S. C. §3146 et seq. exemplifies this approach.

[10] ABA, Standards Relating to Pretrial Release (1968) §5.4 at p. 61 ff.

[11] E.g., Ill. Rev. Stat. c. 38, §110-7 (1963); see Bowman, The Illinois Ten Percent Bail Deposit Provision, 1965 U. Ill. L. F. 35.

Standard 1.1 AS LONG AS PROFESSIONAL SURETIES ARE INCLUDED IN NEW HAMPSHIRE'S SYSTEM OF PRE-TRIAL RELEASE, REGULATORY AUTHORITY OVER THEM SHOULD BE EXERCISED BY THE STATE INSURANCE COMMISSIONER

Commentary

At present "all persons desiring to become professional bondsmen must petition the Superior Court", Super. Ct. R. 92; RSA 598-A:1. The court is charged with the responsibility of monitoring the practices of the bondsmen and has, in fact, established a three-member committee of superior court judges to review the activities of the state's ten licensed bondsmen.[12] The purpose of extracting the Superior Court from its present role of bondsmen review is to reduce the potential for and atmosphere of possible conflict in this regulatory function.

While neither the interviews nor questionnaire responses indicated that the public or practitioners perceived of any abuses or conflicts in the present system, it was the feeling of a majority of judges that responsibility for regulatory control should rest with an agency such as the Insurance Commissioner. Inasmuch as the court sets the type and amount of bail and regulates the activities of bondsmen who collect a 10% fee, the appearance if not the opportunity for conflict exists. The introduction of the Insurance Commission or comparable agency provides a third-party review thereby eliminating or reducing potential allegations of conflicts. Similar regulatory agencies are provided in California, Florida and Washington, D. C.[13] The inclusion of a third party affords the opportunity for both the court and the regulatory agency to review the system for flaws and/or abuses.

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[12]Superior Court regulation began in order to facilitate obtaining of bail by reducing multiple registration requirements and other restrictions. See Doe v. O'Brien, 107 N. H. 79 (1966) and 11th Rep., N. H. Jud. Coun. (1966), at p. 33.

[13]ABA, supra note 10, §5.4, commentary at p. 64; §1.2(c) standard.

Althout the ABA,[14] the National Advisory Commission on Criminal Justice Standards and Goals[15] and Boston University's Center for Criminal Justice analysis for the N.H. Supreme Court Committee to Revise the Criminal Procedural Law[16] recommend the elimination of professional bondsmen entirely, no evidence was revealed from this study that the retention of professional sureties had any significant negative impact. Among the most frequent criticisms of the professional bondsmen system nationally are:

- bondsmen control of the bail system;
- alleged corruption and kickbacks;
- the imposition of unsavory techniques for returning defendants who flee the state; and
- the arbitrary discrimination of release based on financial capability rather than potential for return.

As Federal Judge J. Skelly Wright stated in his concurring opinion in Pannell v. United States, 320 F.2d 698, 699 (D. C. Cir. 1963),

> "The effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety -- who in their judgment is a good risk. The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fees, remain in jail. The court and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail."

In New Hampshire, however, the courts' broad discretionary power for establishing conditions for release, RSA 597:26, provided significant opportunity for non-bail alternatives such as personal recognizance to be employed. In a sample of 284 individuals placed on bail in the Superior Court during 1975, 53% were placed on personal recognizance and of

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[14] Ibid., §5.4.

[15] National Advisory Commission on Criminal Justice Standards and Goals, Corrections, (1973) Standard 4.4, commentary at p. 121.

those placed on bail less than 6% of these involved a professional bondsman. Admittedly, the bondsman does control who is immediately released when cash bail is set; however, the court exercises broad discretionary power in determining which situations require surety or cash bail. RSA 597:2. Additionally, the defendant or his attorney can petition the court to reduce the amount of bail to such terms as may be just. RSA 597:6-b. The stated purpose of high rates of bail is to insure the return of the defendant. High rates also serve to limit the release of "high risk" offenders. As noted by Judge Wright, "the bad risks stay in jail."[16]

Corruption or the appearance of same is often associated with professional bondsmen activities; however, no complaints, either stated or implied, were received in over 150 interviews or in 400 questionnaires. While the Superior Court desires to divest itself of its regulatory review, it has provided sufficient guidance and control to minimize, if not eliminate, the types of abuses experienced in other jurisdictions.

The techniques used by professional bondsmen in returning defendants who have fled the state have been classified as "hardly likely to promote respect for the administration of justice."[17] States such as California have enacted legislation requiring out-of-state bondsmen to secure a warrant authorizing police officials to make arrests to minimize such abuses. Cal. Pen. Code §847.5 (1965 Supp.) While New Hampshire has no such statute, the incidence of flight to avoid prosecution is minimal -- of 284 cases sampled, 17 or slightly less than 6% forfeited bail.[18] This compares favorably to the results of a 1975 study

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[16] Memorandum dated May 9, 1975, "Summary of Findings Concerning Pretrial Release", to N. H. Supreme Court Committee to Revise the Criminal Procedural Law from Boston University School of Law, Center for Criminal Justice, p. 4.

[17] See F. Dill, Bail and Bail Reform: A Sociological Study (Ph. D. dissertation, Univ. of Calif., Berkeley, 1972).

[18] The 6% failure to appear rate is inflated as it only refers to nonappearance in the first instance. It does not account for those individuals who subsequently appeared.

conducted in 20 United States cities in which an average of 9% of the defendants failed to appear.[19]

Although the state has not move as far as California in restricting the practices of bondsmen in regard to extradition, in New Hampshire the reported incidence of failures to appear is statistically very low. (The question of intentional failure to appear requires further study as such failure may be the result of inadequate notice or other mitigating circumstances.)

The release of a defendant based on his ability to pay or secure a professional bondsman is a questionable practice at best. An additional aspect of this question is the setting of excessive bail.

> "Bail must not be set in a prohibitory amount, more than the accused can reasonably be expected under the circumstances to give, for if so it is substantially a denial of bail within the constitutional provision. However, a mere inability to procure bail in a certain amount does not make such amount excessive."[20]

This antique sidestep of the issue of what constitutes excessive bail demonstrates the fine line between judicial discretion and a constitutional violation.

Freedom from excessive bail in New Hampshire is guaranteed by the New Hampshire Constitution, Part I, Article 33:

> "No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."

The New Hampshire court's exercise of its discretionary power appears grounded in a maximum use of non-monetary release where appropriate. In those instances in which the defendant is likely to flee, neither the court nor the bondsmen should risk forfeiture by not imposing sufficient bail to insure return.

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[19] ABA, supra note 10, §5.4, commentary, at p. 63.

[20] Natl. Center for State Courts, Evaluation of Policy-related Research on the Effectiveness of Pretrial Release Programs (Pub. No. R0016, 1975), Ch. 5.

Approach for Implementation

Approach Transfer of Regulatory Authority

Description:

Task force members generally agreed that regulatory authority over professional sureties should be transferred; however, questions were raised concerning the appropriateness of assigning that function to the State Insurance Commissioner. The criteria for selecting a new control agency should include: 1) adequate resources to investigate complaints; 2) regular meetings to monitor and to review new applicants, and 3) ability to administer regulatory duties. Alternatives to the Insurance Commission were the Secretary of State, bank commissioners, board of trust company incorporation, or Judicial Council. Transfer of the regulatory function requires a statutory amendment to Chapter 598-A, designating the new authority. While the task force members agreed that the statutory amendments should be a general delegation or transfer of authority, it was recommended that specific standards for performance and guidelines for granting and revoking licenses be developed by a joint committee of the existing Superior Court Regulatory Committee, and representatives of the new regulatory agency. Such guidelines should be developed concurrent with the legislative drafting, and prior to enactment. The transfer of regulatory authority in no way limits the courts' authority to supervise or remove for cause by petition to the board.

Time:

Drafting, submission and enactment of the legislation and drafting of procedural guidelines is anticipated to take six to twelve months.

Cost:

The initial transfer cost, legislative drafting, is estimated as being nominal. The annual operating cost should be less than $3,000, including part-time secretarial services.

Feasibility: 80-100 percent

Due to the minimal disruption caused by such a change and given the courts' support for it, the feasibility of affecting the transfer is considered 80-100 percent.

Standard 1.2 ESTABLISH PROCEDURE TO GATHER AND VERIFY INFORMATION PERTINENT TO RELEASE DECISIONS AND IDENTIFY CRITERIA GOVERNING ELIGIBILITY FOR PERSONAL RECOGNIZANCE, BAIL, AND BAIL RECONSIDERATION.

Commentary

If decisions regarding eligibility and amount of bail are to result in the equitable treatment of all defendants, a procedure must be developed and implemented for obtaining information pertinent to each case. Provision must be made for indepth background inquiry and verification of facts as they relate to the individual bail decision.

In addition to a systematic approach for gathering background information, decisions on eligibility and amount of bail require that an objective set of criteria be established to prevent undue emphasis on one particular

criterion: e.g., prior record, family ties, employment, residence, time in area, etc. Factors upon which the amount of bail is determined should be assigned various weights thus reducing, to the extent possible, subjectivity in setting bail amounts.

In New Hampshire the present procedure for setting bail is governed by RSA 597; however, the statute does not define a procedure for obtaining or verifying background information as it relates to each individual bail decision, nor are the criteria used to determine eligibility for bail defined by statute, as the criteria for release on personal recognizance are in RSA 597:6-a (see Standard 1.4, commentary, infra). The criteria being used include such factors as: likelihood of appearance at hearing, residence, community and family ties, past record, seriousness of offense and employment status. While the criteria are certainly appropriate, there is no uniform interpretation nor application of the criteria. The weight given to any particular criterion is a function of the importance attached to that criterion by the individual judge or bail commissioner.

While no systematic approach exists for obtaining and verifying background information, certain background information is currently obtained through interviews with the defendant and others. The extent to which this information is judged adequate largely depends upon the criteria established and followed when making bail decisions.

Approach for Implementation

Approach Establish Criteria for Pretrial Release

Description:

The decision to release a defendant on personal recognizance or the amount of bail to be required should be based on factors including: 1) the seriousness of the offense, 2) pending charges,

3) prior record, 4) residence, 5) family ties and 6) individual credibility. A weighting scale, similar to that used in Des Moines or Washington, D. C. [21] should be established to provide an objective framework for making release decisions based upon the above criteria. Police booking reports should be standardized to allow greater continuity and uniformity of information available from the time of arrest. Bail commissioners would be responsible for interviewing each defendant with a standardized form designed to cross-check information gathered in the police report. Bail commissioners would use as a guide a court-approved bail schedule in determining the amount of bail to be charged, to aid in making a decision based on the information available from the interview and police report. At arraignment the judge should use an interview schedule and weighting scale similar to those used by the bail commissioners in setting conditions for release or the amount of bail. If the judge has any questions concerning the accuracy of information provided by the police report, bail commissioner or defendant, a probation officer should be assigned responsibility for verification.

Time:

The time required to develop a weight scale for New Hampshire, interview formats for bail commissioners and judges, and standardize police reports was estimated to be 6 months. Insuring the availability of a probation officer to verify data was considered a more complex problem requiring the addition of several probation officers. The amount of time required to add several new officers was undetermined.

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[21] See generally, supra note 2.

Cost:

The cost of developing a weighting scale, interview format and standardized police reports should be minimal, less than $1,000. The cost of additional probation officers was considered approximately $50,000.

Feasibility: 60-80 percent

Although increasing the workload of already overextended probation officers was considered inadvisable, task force members felt bail commissioners, police and the court would be supportive of the approach, ranking the approach in the 60-80 percent range. As no statutory prohibition exists, implementation could be affected through an administrative order.

Standard 1.3 INTRODUCE PROCESS OF WEEKLY REVIEW AND BAIL RECONSIDERATION BY THE COURT FOR INCARCERATED DEFENDANTS.

Commentary

By introducing weekly review and reconsideration of bail, speedy trial will be encouraged and revised circumstances in a defendant's eligibility for release may be expeditiously brought to the court's attention when these may improve the "profile" as depicted by the criteria for bail. A regular process eliminates the present procedural steps which tend to restrict use of motions to reduce bail and habeas corpus to exceptional situations.

Bail reconsideration can occur at present at any time prior to conviction. RSA 597:1. However, survey results indicate that reconsideration occurs in approximately 10 percent or less of all bail cases. In one county, regular review of cases of incarcerated defendants for bail eligibility or speedy trial occurs every two weeks; however, most courts provide for reconsideration hearings less regularly.

Although regarded with some concern at regional meetings, task force members accorded this standard minimal interest and considered changes in the present practice unnecessary. Most agreed that procedures authorized by RSA 597:6-b are sufficient to provide for bail reconsideration. While the availability of judges to review bail in the northern part of the state was considered a potential problem, the presiding justice of each county is generally available for motion hearings.

Approach for Implementation

Approach Provision of Jail Lists

Description:

Clearly, the frequency of reconsideration hearings is being addressed; however, availability of weekly or bi-weekly "jail lists" to the presiding justice was deemed necessary by task force members. Such a document keeps the court apprised of the status of pending criminal cases in which the defendant is incarcerated. This type of information provided on a regular basis would reduce, if not eliminate, the potential for cases being overlooked. The county jailer would prepare the list indicating the defendants' names, docket numbers, and days incarcerated. The report would be forwarded to the clerk of court for comment as to status and then forwarded to the presiding justice.

Time:

Little time would be required to implement such a program as RSA 619:11 currently requires the preparation of similar lists by the jailer at the beginning and end of each term of court. The only time requirement is for the generation of new report forms and informing all concerned as to how the procedure will operate.

Cost:

The cost for such a manual reporting system would be minimal as jailers currently prepare similar reports and the clerks could indicate case status in a nominal amount of time. Although little cost or time would be required to implement a "jail list" the benefits for the court and defendants would be significant.

Feasibility:

Given the lack of cost and positive benefits accrued from the approach, the feasibility was rated at 80-100%.

Standard 1.4 MAINTAIN EMPHASIS ON USE OF PERSONAL RECOGNIZANCE UNLESS CLEAR BASIS FOR BOND IS SHOWN.

Commentary

This standard, based on the aim of avoiding the costs of bail discussed earlier except where shown affirmatively to be required, places the burden on the state to indicate the specific justification for imposition of bond or any other condition. By establishing release on recognizance as the starting point in determining the form of pre-trial release, the court will of necessity make at least a quick but careful inquiry leading to a decision likely to prove more rational when requiring bond is proposed by the state. The statute, RSA 597:6-a, sets four conditions as to which the court or bail commissioner must be satisfied in releasing a defendant on personal recognizance: 1) physical and mental condition will not jeopardize self or the public if released; 2) employment, ties and residence in the state, or other connections, make failure to appear unlikely; 3) no prior failure to appear in court when required to do so; and 4) no other circumstances exist creating a likelihood that he would fail to appear.

Although the applicable statute (RSA 597:1) establishes no preference or presumption favoring personal recognizance or bail, survey results of Superior Court cases indicate that 53 percent of defendants in cases where bond or recognizance was fixed were released on personal recognizance. Of those released on personal recognizance, less than three percent failed to appear. In comparison, of the 47 percent of surveyed cases in which release was on bond, forfeitures occurred in five percent of the cases.

In addition, the court may release a defendant on "such terms as may be deemed just" if a surety cannot be obtained (RSA 597:39). Recent case law supports the concept of bail as a right before conviction. Petition of Streeter, 112 N. H. 305 (1972); State v. Hutton, 107 N. H. 426 (1966). See also State v. Williams, supra note 1.

Approach for Implementation

Approach Personal Recognizance

Description:

Implementation of Standard 1.4 merely requires a continuation of present practice (RSA 597:6-a), possibly supported by an administrative order of the court indicating that personal recognizance should be considered the preferred form of pre-trial release. This standard in no way anticipates a reduction of judicial discretion in determining the appropriate form or conditions of pre-trial release. Rather, it is intended to serve to reinforce present practice and as such requires no time or cost to be implemented. The feasibility of extending the use of personal recognizance is limited, given public

sentiment favoring incarceration However, given court discretion in this matter, the likelihood of continued use was considered at about 80-90 percent.

Standard 1.5 INCREASE USE OF SUMMONS IN LIEU OF ARREST BY IDENTIFYING SPECIFIC OFFENSES FOR WHICH USE OF SUMMONS IS PREFERABLE (AND ELIMINATE ARRESTS) IN VIOLATION CASES.

Commentary

The use of a summons is preferable to arrest in specific instances involving offenses of a minor nature, e.g., certain misdemeanors and especially violations. Limiting the use of arrest to more serious crimes not only decreases the burden on the police department, but more importantly, protects individuals from unnecessary arrest and detention. While the consequences of a misdemeanant's failure to appear are not insignificant, they do not warrant use of arrest power in every instance to ensure the defendant's appearance in court. Failure to answer a summons would then result in a warrant of arrest.

RSA 502-A:34 and 592-A:14 authorize the use of a summons by the district and municipal courts, respectively, when approved by a justice, deeming an arrest unnecessary. Upon complaint for an offense of which the court has final jurisdiction, the justice to whom the complaint is made, if he should deem an arrest unnecessary, may issue a summons requiring the party to appear at a certain time and place to answer to the complaint.

RSA 594:14 permits an officer to issue a summons in any case when the offender could lawfully be arrested without a warrant (RSA 594:10) for a misdemeanor. If one who is summoned fails to appear, an arrest warrant is issued. A lawful arrest is predicated on "reasonable ground," equated by the New Hampshire Supreme Court with "probable cause" in State v. Hutton, 108 N.H. 279 (1967). Investigative "stops" are permitted by RSA 594:2 for up to four hours.

The results of a statistical analysis of some 385 District Court cases shows that a summons was used in lieu of a warrant in 90 percent of the cases sampled. In the 35 cases where arrest was used, 10 warrants were issued for violations and 25 for misdemeanors.

The potential for abuse in the arrest process exists, especially as to frequency and justification. Although specific examples of alleged abuses were cited by some interviewees, the factors associated with such cases were often unclear; leading the project team to the conclusion that present practice conforms to the standard. The inclusion of a standard addressing the "use of summons" was considered valuable in underscoring the importance of such procedures but not of particular merit in further limiting the discretionary authority of the law enforcement community.

Consequently, further expansion of the use of summons in misdemeanor cases was considered inadvisable. Rather, alternative approaches to its application for violations were considered.

Alternative Approaches for Implementation

Approach #1 Rule Authority for Summons

Description:

The first approach suggested requires the promulgation of a rule of court expanding the use of summons in lieu of arrest for all violations and offenses which are violations in the first instance. Misdemeanors would continue to be handled at the discretion of the law enforcement officer and court. Such a rule would serve to clarify the discretionary power provided by statute and carry out the Supreme Court of New Hampshire's holding that "ordinarily it is expected a summons will be issued in lieu of an arrest for a violation." State v. Miller, 115 N. H. 662 at 664 (1975).

Time:

The time required to implement this approach was estimated to be six months based on the need for holding informational meetings throughout the state to discuss the impact of the new rule.

Cost:

Little if any increased cost was projected in issuing such a rule.

Feasibility:

The feasibility of this approach was rated at 80 to 100 percent. The only opposition anticipated was from some segments of the law enforcement community concerned with traffic violations.

Approach #2 Exception of Motor Vehicle Violations

Description:

A second alternative was suggested to address the motor vehicle concern mentioned above. Given that neither the public nor criminal justice system is interested in creating a group of "scoff-laws" (specifically out-of-state drivers charged with violations from states not having a reciprocal agreement with New Hampshire), the promulgation of a rule of court excepting motor vehicle violations was suggested for this standard. Since the enactment of a statute excluding out-of-state drivers would be questionable, continuing the present practice of law enforcement discretion in motor vehicle cases was considered an effective approach.

Time:

As with the previous approach, the time required to implement this alternative was estimated at six months.

Cost:

No cost was anticipated for such a rule.

Feasibility:

Given that such an approach actually represents little change from the present system, the feasibility was again rated 80 to 100 percent.

Standard 1.6 MAINTAIN IMMEDIATE BAIL DECISION BY EMPOWERING SUFFICIENT IMPARTIAL JUDICIAL OFFICERS TO SET BAIL.

Commentary

Bail commissioners are appointed as judicial officers to fix and receive bail pursuant to RSA 597:15-a. Their power to prescribe bail is authorized by RSA 597:18: "On application of a person who is arrested for a bailable offense, at any time before his arraignment, therefore, any commissioner may fix the amount and receive bail in the same manner as the court might do, except in murder cases as provided for by RSA 597:4." Persons accused of a criminal offense may petition Superior Court for a bail hearing, requesting a reduction in bail or release on personal recognizance. RSA 597:6-b (supp.). Fees for bail commissioners are fixed by statute (RSA 597:20) at $4.00 when called between 9:00 AM and 5:00 PM Monday through Friday; $6.00 when called at any other time.

The purpose of having bail commissioners is to expedite the process of fixing bail. By empowering a sufficient number of impartial judicial officers to set bail, an accused is not needlessly detained due to the unavailability of an authorized bail officer. Information regarding the number of bail commissioners in New Hampshire was not available. Additionally, statistical information regarding the elapsed time from

arrest to the setting of bail was also unavailable. It was therefore not determined by this survey whether or not there are a sufficient number of bail commissioners in New Hampshire to provide immediate response to requests for bail decisions or whether bail decisions are on a timely basis. However, RSA 597:15; 15-a and 16 clearly provide flexibility for the appointment of additional officers should the need arise.

Approach for Implementation

Note: The extent to which this standard is being met cannot be determined at this time. The survey produced no evidence that there are substantial delays in obtaining bail decisions. Consideration however should be given by the court to several other factors raised by system participants regarding the use of bail commissioners.

(A) Are existing fees sufficient to stimulate immediate bail decisions by commissioners?

(B) Residents of New Hampshire accused of misdemeanors should be released on personal recognizance except in aggravated cases.

(C) More misdemeanors should be handled by summons, as in minor traffic cases, and not by complaint and the setting of bail.

(D) More information concerning the accused should be made available to the bail commissioner at the time of the initial phone call.

(E) Personal recognizance should be utilized to a greater extent than at present as authorized by RSA 597:6-a.

(F) Only one bail commissioner's fee should be collected where a person is charged with more than one offense.

(G) Increased bail (indemnification) should be set when a person is released on personal recognizance.

(H) The present practice of requiring the accused to pay the bail commissioner's fee should be eliminated and some other system be substituted for payment of these services.

(I) Uniform instructions or rules of procedure should be issued for the guidance of bail commissioners. 22

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22 Pre-trial Release Survey Concerning Persons Incarcerated Awaiting Trial on Misdemeanor Charges, April 28, 1976 M. D. Wiviott.

Standard 1.7 REQUIRE A COURT ORDER TO DETAIN A JUVENILE FOR MORE THAN FOUR HOURS AND INSURE THAT A COURT HEARING OCCURS WITHIN 24 HOURS OF ARREST.

Commentary

Detention should be prescribed only when the safety of the community or juveniles requires physical restraint.[23] Placement in detention or shelter care facilities should be under the direct supervision of the court, subject to review within 24 hours.[24] As noted in the 1967 President's Commission task force report on corrections

> "There is increasing evidence, ... that for many lesser and first offenders, full exposure to criminal justice processes and formal correctional treatment may only contribute to the possibility of recidivism. Labeled as delinquents or criminals, cast among hardened offenders in jails and prisons, separated in many cases for weeks or months from jobs, school, and other important institutions in the community, persons may be confirmed in crime who would otherwise have returned to law-abiding ways."[25]

While most juveniles are diverted from the criminal justice system, a significant number are held in a detention facility pending formal adjudication.[26] The consequence of such detention can have a significant impact on the future behavior of the individual. Given the potential impact of the detention decision, it should be made by a third party, the court, rather than the local patrolman or juvenile officer who may have a vested interest to protect by incarcerating the juvenile. The establishment of a specific time limit for holding the juvenile serves as a protection for the youth and the police and, if the thesis of stigmatization and differential association[27] are correct, the community.

[23] National Advisory Commission on Criminal Justice Standards and Goals, Courts (1973) Standard 14.2, commentary at p. 297.

[24] Ibid., p. 297.

[25] The President's Commission on Law Enforcement and Administration of Justice. Task Force Report: Corrections, (1967), p.22; see also R. Cavan, Readings in Juvenile Delinquency, (New York, 1964), sections VII and VIII.

[26] Paul Nejelski, "The Missing Links", 7 Trial (No. 5, 1971), p. 17.

[27] See D. R. Cressey, "The Development of a Theory: Differential Association" in M. Wolfgang, et al., The Sociology of Crime and Delinquency. (N. Y.: Wiley, 1962), pp. 81-95.

Although RSA 169:7 III requires a court order to detain a juvenile, a significant number of interviewees indicated that court authorization for juvenile detention was not always secured prior to a detention decision. Additionally, several judges questioned the quality of information provided when a detention decision was made.

The twenty-four district court judges questioned concerning juvenile detention estimated that 6 to 10 percent of the juveniles charged with delinquent acts appearing before them were placed in a detention facility prior to an initial appearance. Additionally, 5 percent of the status offenders, PINS, required detention or shelter care. The estimated length of time for detention ranged from less than 24 hours to several days. The state's juvenile institution, the Youth Development Center, estimated the length of time between the initial detention and the first appearance in court was greater than two weeks. While the major issue is the length of time between detention and first court appearance, a secondary concern is the financial cost of such practices.

The survey revealed an average daily cost of $18.30 for individuals detained at the county houses of corrections and $35.00 per day at the Youth Development Center. An estimated $189,700 was expended in 1975 to detain juveniles at the YDC prior to their first court appearance.

Not only is the cost to the juvenile great in terms of labeling, but the direct financial costs to the state are equally significant.

While RSA 594:20-a provides that an arrested person must be presented to the court within twenty-four hours (Sundays and holidays excepted) as does District Court Rule 2.6B for individuals charged with felonies, this same standard of promptness has not been applied in all instances to juveniles. In refusing to permit imposition of a fine not authorized by statute but where state discretion with respect to juveniles was advanced as a justification, the New Hampshire Supreme Court stated that a court was only authorized, in disposing of juvenile cases "to exercise its discretion within specified limits established by the legislature to provide specialized treatment and protection for delinquent and neglected children." In re Molloy, 114 N. H. 771, 329 A.2d 150 (1974), citing State v. Scoville, 113 N. H. 161 (1973). A defined procedure does not exist in all areas of the state to insure court involvement in the initial detention of juveniles prior to court appearance.

The most often cited problem as regards holding initial juvenile hearings is the frequency with which district courts are open. In areas like Nashua, Manchester and Concord, the availability of court time for juvenile, or other matters, is not a problem; however, in the less populated areas of the state in which the district and court may only meet one day or evening per week, the prompt scheduling of cases does represent a significant problem.

Examples of District Court Operating Hours

1. Mon. 9:00 AM; 1st Wed. 7:30 PM
2. Thurs., 9:30 AM
3. Mon. & Thurs., 9:00 AM
4. Fri. 9:00 AM; 2nd & 4th Tues. 9:00 AM
5. Tues. 7:30 PM; Fri. 9:00 AM

The major issues to be addressed then under any alternative approach are: 1) the involvement of the court in issuing all detention orders; 2) prompt action in making a detention decision (within four hours); and 3) holding initial hearings within 24 hours of arrest.

The common result recognized by task force members as central to the resolution of these issues was the greater availability of district court judges. Alternatives including a unified court system, full-time district courts, and regional and/or county-wide district court systems were suggested as possible approaches for affecting greater availability of the judiciary.

For a discussion of alternatives affecting the organization of the court, refer to Standard 16.7.

Standard 1.8 PROVIDE SUITABLE AND SEPARATE FACILITIES FOR JUVENILES AND ADULT FEMALE DEFENDANTS FOR EACH REGION, COUNTY OR MUNICIPALITY.

Commentary

Persons detained awaiting trial should be presumed legally innocent, should not be considered in a class with those sentenced and are entitled to the same rights, except for physical restrictions, as persons admitted to diversionary forms of pre-trial release.[28] In addition, juvenile and female adult detainees should be segregated from the adult male population.[29] Separate and suitable detention facilities for juveniles comply with existing New Hampshire statutory requirements (RSA 169:8), avoid the potentially negative influence adults may have on juveniles, reduce hostile encounters and possible sexual assaults, and preserve the dignity of the individual. However, similar statutory authority does not exist for separating male and female adult detainees.

In general, facilities considered suitable for juveniles are located in a residential area of the community near court and community resources; provide, to the extent possible, a homelike environment; are coeducational and provide detainees

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[28]National Advisory Commission, supra note 15, Standard 4.8, commentary at p. 134. See also Feeley v. Sampson, USDC, D.N.H. (1976).

[29]Ibid., p. 286.

with recreational and education opportunities.[30] Locally or regionally-based detention facilities also allow for increased contact with family, counsel and the community.

At present in New Hampshire, juveniles are detained at the Youth Development Center, county jails or local jails. The results of a telephone survey show that of the county jails only six of the ten have some capability to separate juveniles from adults. The average juvenile capacity of the six facilities is four. The majority of those surveyed considered this capacity inadequate. Adult female detainees are also held at county or local jails. The average capacity for adult female detainees is six at the county jails. Only 40 percent considered the current capacity adequate.

Of the ten county jails contacted only two were aware of any local police facilities capable of providing separate facilities for juveniles and/or females.

One jail provides education programs and three had some form of recreational resource. In commenting about counseling and/or educational programs, most of those interviewed felt the average length of stay was too short to allow such programs. The suitability of detention facilities for both juveniles and female adults in New Hampshire is difficult to ascertain without visitations to each facility; however, these comments suggest the need for further examination and improvement of present facilities.

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[30] Ibid., p. 269.

"The use of jails for children has been universally condemned by responsible law enforcement organizations, social scientists and correctional officials for many years. Such condemnation is based not only on theories of criminality, but on humanitarian grounds as well, because of the deplorable results which have been associated with this practice over the years...

Excellent juvenile facilities in a number of jurisdictions in the United States provide models which can be employed in almost any community. These facilities are relatively small. They are used sparingly and only for delinquent youngsters who need them. They have sufficient staff to carry out the tests of diagnosis and short term programs which are needed. Every community must have access to such services." [31]

Approach for Implementation

Note:

Existing New Hampshire statutes RSA 169:8 and RSA 622:33 call for the separation of juveniles from adult detainees and females from convicted males, respectively. At present, no statute exists which requires the provision of separate facilities for female (adult or juvenile) detainees. The issue to be addressed by this standard is the provision of adequate facilities in each region, county or municipality in the state. While the scope of this court survey did not permit actual visitations to detention facilities, the survey did disclose, on the basis of opinion only, that present facilities are considered inadequate to meet existing statutory requirements.

Approach Conduct Statewide Evaluation of Detention Facilities

Description:

A statewide evaluation of all detention facilities should be conducted to determine current capacity, suitability of facilities or detention centers, projected capacity and needs, and renovation

[31] President's Commission on Law Enforcement and Administration of Justice, supra note 23, (1967) at p. 24.

or new construction requirements including time and construction costs. On the basis of this evaluation, accurate projections as to the time, cost and feasibility of providing suitable facilities could be made.

Standard 1.9 MAINTAIN SUPPORT FOR THE COURTS' USE OF CONDITIONS ON RECOGNIZANCE TO EMPHASIZE THE USE OF NON-MONETARY FORMS OF RELEASE.

Commentary

As noted in the introduction to this section, the use of bail as the primary vehicle for providing pre-trial release creates the potential for establishing a discriminatory system of release. While bail is still used extensively throughout the United States, projects such as the Manhattan Bail Project and D. C. Bail Project have demonstrated the effectiveness of alternative methods for releasing defendants, such as conditional release which reduce present reliance on monetary forms of release.

The use of personal recognizance serves as a logical alternative to a bail system; however, it is but one alternative and in many instances the court may recognize a need to impose additional conditions for release to enhance the probability of the defendant's appearance. In certain instances the defendant may not be able to meet these conditions and consequently must stay in jail; however, the incidence of this should be minimal in comparison to a monetary system, and the reasons for such incarceration predicated on more than an individual's financial ability. Available research data indicates that the probability of court appearance is not decreased when non-monetary conditions for release are imposed in favor

of a bail system.[32] The emphasis of this standard, then, is to aid in the development of alternative methods of pre-trial release which set sufficient conditions to insure the defendant's appearance in court without resorting to a monetary system.

New Hampshire's courts currently have sufficient authority under RSA 597:26 to set recognizance in such form, considering the circumstances of the case, as may be required. While personal recognizance was used in 53 percent of the sampled cases, 40 percent of the cases required some type of bail, either cash or surety.[33] Very little evidence was gathered from case analysis or through interview to indicate that the use of conditions for release in favor of bail was occurring with any regularity.

The intent of a bail system is to insure the defendant's appearance in court. The Federal Bail Reform Act of 1966 (18 U.S.C. §3146 et seq.) restricts the defendant (beyond requiring appearance) by authorizing conditions of release including custody of the defendant by another individual, restrictions on movement, associations or abode.[34] Clearly, New Hampshire's courts have sufficient authority to expand their use of conditions for release in lieu of a cash bail system thereby reducing the high economic and personal costs and discriminatory nature of a cash bail system.

As noted under Standard 1.2 the most crucial aspect to expanding the use of either personal recognizance or non-monetary conditions for release is the creation of a screening system to provide the court with timely and

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[32]See generally Natl. Center for State Courts, Pretrial Release and Diversion (1975).

[33]The remaining 7% could not be accurately categorized due to present records keeping procedures.

[34]ABA, supra note 8, Pre-trial Release, at p.26.

specific information regarding the offense and defendant upon which to make a release decision. Without such information, the use of personal recognizance or conditional release is questionable, and the continued reliance on bail leaves the system open to the criticism that "the process operates in such a way as to thwart the policy favoring release."[35]

Given the similarity of methods proposed for implementing conditional release alternatives and personal recognizance, and reliance on effective case screening, the discussion of alternative approaches for this section is included under Standard 1.2, supra.

Standard 1.10 INFORM DEFENDANT OF SANCTIONS WHICH MAY BE IMPOSED IF DEFENDANT FAILS TO APPEAR.

Commentary

The purpose of this standard is to insure that a released defendant recognizes the gravity of the requirement that he appear for trial. Many defendants may be unaware of specific sanctions to which they are subject for failing to appear. Establishing a consistent policy of clearly informing a defendant of the consequences of flight is a relatively easy way to increase the effectiveness of both release on recognizance and on bond in that it adds one more expression of the requirement to appear. To the extent that proceedings are currently accelerated such that rights and an explanation of sanctions given hastily, if at all, charges may be viewed less seriously than warranted. This standard is important for individualized justice.[36]

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[35] Ibid., p. 26.

[36] See ABA, supra note 10, §4.3, (a), commentary at pp. 46-47.

Survey results show that in New Hampshire, there is no regular process or formal procedure for informing defendants of the likely consequences of a failure to appear. In many instances if any warning is given at all, counsel or the police deliver the warning instead of the judge or bail commissioner.

Approach for Implementation

Approach Statement of Sanctions

Description:

Prior to any form of pre-trial release being granted by either the court or a bail commissioner, the defendant should be read a statement describing the consequences, sanctions which could be imposed, should he fail to appear in court. In addition to the verbal instruction, a list of sanctions should be included on the release bond, a copy of which is retained by the defendant. Although such a procedure could be affected by administrative policy, a revision of District Court Rules 2.2(A) and (B) is recommended by the task force to insure greater uniformity in application.

Time:

Aside from a series of general information sessions to discuss the procedures to be followed and the time required to draft and print a revision of the court rule, no significant passage of time was anticipated to implement the approach.

Cost:

No appreciable cost was projected to implement the alternative.

Feasibility:

Given the lack of cost, minimal system disruption anticipated, and the non-controversial nature of the standard, the approach was rated 100 percent feasible. It should be noted that while the task force members recognized the value of the standard, it was given a relatively low rating as to overall importance in improving the pre-trial system.

Standard 1.11 PROVIDE PROCEDURES TO PERMIT RELEASE OF DEFENDANTS ON BOND SUBSEQUENT TO DETERMINATION OF GUILT BUT PRIOR TO SENTENCING.

Commentary

In order that a court may make full use of services available to perform diagnostic or other examinations prior to sentencing, a procedure is needed to permit, in appropriate cases such as instances in which incarceration is unlikely to be imposed as the sentence, supervised release of defendants who have been found guilty but not yet been sentenced. "The sentencing decision is of such complexity that each sentencing court must have available to it a broad range of services and facilities from which it can obtain more complete information about the defendant's mental, emotional and physical condition than can be afforded in the presentence report."[37]

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[37]ABA, Standards Relating to Sentencing Alternatives and Procedures (1968), §4.6 at p. 228.

New Hampshire practice tends to minimize delay between determination of guilt and sentencing. The average elapsed time between finding and sentence for 384 Superior Court criminal cases sampled was 1.7 days and 3.38 days for a similar number of criminal cases processed at the District Court level. The averages are misleading due to the inordinate amount of time, 168 days in one instance, taken for a small percentage of cases. 63 percent of those interviewed felt that in most cases sentence is imposed almost immediately.

The immediacy of sentencing, normally directed upon receipt of finding, may limit the usefulness of diagnostic services or the provision of information withheld from a presentence report which was prepared prior to the end of the trial. If Standards 9.5 and 9.6 in the Probation topic area are followed, it will be necessary to establish a period of time, following a finding, in which the probation officers or other court-directed parties may complete necessary diagnostic or evaluative research. For these reasons, both delay in sentencing and provision for release pending sentence, subject to appropriate controls or supervision, limit the extent of unnecessary incarceration. (Refer to Standards 9.5 and 9.6 for a more complete discussion of the rationale for completing presentence reports following conviction or plea.)

Approach for Implementation

Approach Post-Judgment Release

Description:

Under RSA 597:1a, the court has sufficient authority to continue bail pending appeal. Given the latitude provided the court under this statute, continuation of bail or other form of release following

adjudication but prior to sentence, is within the courts power. As with the initial decision for release, post judgment release should be predicated on a set of specific criteria to assure the defendant's appearance for sentencing, and to insure that the defendant is not likely to commit a serious crime or otherwise obstruct the administration of justice. As with Standard 1.2, developing specific criteria with which to evaluate individual cases on a consistent and objective basis is essential for any system of release to operate effectively.

Time:

Given the present statutory authority, the time required to implement this approach is minimal. The largest factor affecting implementation is the development of criteria for making a release decision. Time required is estimated at 3 to 4 months.

Cost:

The costs for implementing this approach are below $1,000, and include the development of criteria and the printing and distribution of revised release forms.

Feasibility:

While few task force members of interviewees had specific objections to the concept of post judgment release in selected cases, most felt such an approach would be used infrequently. Based on the perceived need and public opposition, the feasibility was rated at 30 to 60 percent.

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## 2.0 SCREENING AND DIVERSION

### Introduction

The terms "screening" and "diversion" have been used with increased frequency during the past ten years. Diversion became popular in 1966 from recommendations made by the President's Commission on Law Enforcement and the Administration of Justice. Use of the term screening became prevalent in 1973 with the publication of the National Advisory Commission on Standards and Goals volume entitled Courts. Since their introduction into the jargon of the criminal justice and social science communities, each term has been applied to a wide variety of activities and objectives. A recent study described diversion as applying to almost any discretionary action available to a public or private agency dealing with youth.[1]

Although not entirely consistent with the definitions provided by the National Advisory or President's Commissions, for the purposes of this and subsequent discussions the terms will be defined as follows:

- screening -- the process by which complaints are reviewed to determine the most appropriate method of proceeding with the complaint, either conventionally through the justice system or on an extra system basis;[2]
- diversion -- one alternative which can be employed after screening. Diversion refers to the halting or suspension of formal criminal, juvenile, or civil proceedings against a person who has violated a statute or ordinance (or falls within the purview of a protective statute, such as a neglected child), in favor of processing through a non-criminal disposition.[3]

[1] Youth Development and Delinquency Prevention Administration, U. S. Department of Health Education and Welfare, The Challenge of Youth Service Bureaus (1973) DHEW Publication No. 73-26024, p. 15.

[2] The reader is cautioned that this definition is significantly different from that found in the National Advisory Commission volume Courts. While NAC draws a distinction between screening and diversion the attributes of each are not considered sufficiently clear to eliminate confusion. Although not consistent with NAC, the above definition provides a useful and necessary qualification.

[3] See generally, President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Courts, Washington, D. C. GPO (1967), pp.5-6.

Although popularized within the past ten years, screening and diversion have for years been an integral part of the justice system. Informal screening of complaints, especially those involving juveniles, has long been practiced by law enforcement and judicial personnel as well as others. For example, in Rhode Island the number of juveniles processed through the juvenile system in 1971 represented less than 3 percent of those individuals who were known to youth service agencies as potential court referrals.[4] The total number of individuals who potentially could have been referred to the court were screened by juvenile officers, school officials, or others. 90 per cent of the juveniles screened were diverted to a non-criminal justice agency or program for counseling, supervision, or other forms of assistance. The purpose of screening and diversion, then, is to remove from the formal criminal justice process those individuals for whom there is an appropriate alternative.

Although generally used when referring to juveniles, screening and diversion, as used in this section, apply to juveniles (status offenders and delinquents), adults (with special emphasis on first-time youthful offenders, age 18-23), persons involved in child abuse or neglect cases, and the "naive offender" (individuals charged with a statutory violation who are classified as retarded or suffer from a mental disorder).

The consequences of juvenile and adult involvement in the criminal justice system have been frequently described. One assessment of the effect of formal delinquency proceedings on a juvenile is:

> The delinquent label accomplishes four major changes in the life of the child to whom it is attached. First, as a self-fulfilling prophecy, it encourages the child to identify himself as a delinquent and bad. He organizes his behavior, attitudes and ambitions accordingly.

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[4] Rhode Island Governor's Committee on Crime and Delinquency, Comprehensive Law Enforcement Plan 1971-1976 (1971), Appendix B.

> Secondly, the label acts to strip the youth's community of the positive means of control it normally employs to hold the behavior of its youth in line with its values. By rejecting the child who has acquired a delinquent label, society withdraws its recognition and affirmation.
>
> Third, the label serves effectively to cut off legitimate opportunities for success and recognition. The most significant people in a child's life - his peers, family, neighbors and authority figures - react to the child labeled delinquent with mistrust, suspicion and caution.
>
> The fourth and most critical result of the delinquent label is that it opens the door to illegitimate opportunities to the child. If a youth accepts its delinquent label and seeks out friends who have also been labeled, his behavior will tend to conform to the standards of those friends from whom he is forced to seek recognition and approval.[5]

Historically, law enforcement agencies screened youthful offenders to an even greater extent than other offenders who came to their attention. It has been estimated that for every 500 possible juvenile arrests, only 100 arrests occur. Of these, only 40 youths reach the intake stage and only 20 have an adjudicatory hearing.[6] However, such screening procedures and criteria have usually not been established by law, but have instead reflected either local procedures, which vary widely in both sophistication and specificity, or the personal view of the officer.[7] As a result, consistent, uniform, sanctioned screening and diversion guidelines and criteria are rarely developed or applied. The inevitable consequence of this situation is that many individuals are unnecessarily processed through the formal justice system. The individual, courts, and society may have benefited, had the process guided the offenders into non-judicial community-based alternatives.

> The formal sanctioning system and pronouncement of delinquency should be used only as a last resort.
>
> In place of the formal system, dispositional alternatives to adjudication must be developed for dealing with juveniles, including

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[5] D. F. Duncan, "Stigma and Delinquency", 4 Cornell Journal of Social Relations, (1969), pp. 41-45.

[6] Paul Nejelski, "The Missing Links", 7 Trial (1971), p. 17.

[7] See William J. Chambliss and John T. Liell, "The Legal Process in the Community Setting, 12 Crime and Delinquency (1966), pp. 310-317.

> agencies to provide and coordinate services to achieve necessary control without unnecessary stigma. Alternatives already available, such as those related to court intake, should be more fully exploited.
>
> The range of conduct for which court intervention is authorized should be narrowed, with greater emphasis upon consensual and informal means of meeting the problems of difficult children.[8]

Improved screening procedures are necessary if this recommendation by the Task Force is to be accomplished. There is growing public concern that traditional approaches of handling the problems of all offenders have not provided a satisfactory return on investment, both in the financial sense and in the reclamation of offenders as productive citizens.[9] New programs to meet the special needs of first-time offenders are being implemented throughout the country. They include the development of community/court screening capabilities and the expansion of community-based non-judicial services. These programs reflect continuing efforts to screen and divert offenders from the formal criminal justice system.

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[8] President's Commission on Law Enforcement and Administration of Justice, Task Force Report on Juvenile Delinquency and Youth Crime, Washington: Government Printing Off., 1967), p. 2.

[9] Some assert that full enforcement, assuming adequate resources, should eliminate the need for screening. The National Advisory Commission, while recognizing "that careful and deliberate drafting of criminal statutes is desirable, ... does not believe that such care and deliberation can or should replace the process of screening. No matter what degree of care is used in drafting criminal legislation, ...there will be some individuals whose conduct comes within the definition of a criminal offense, but whom the legislature, had it considered the merits of the case, would not have desired to include within it." NAC, supra note 2, at p. 18.

Standards 2.1 COURT-DIRECTED SCREENING CAPABILITIES, WITH SANCTIONED GUIDELINES SHOULD BE ESTABLISHED IN EACH COUNTY AND MUNICIPALITY IN THE STATE.

2.2 A MAXIMUM EFFORT SHOULD BE MADE BY THE COURTS, THE COMMUNITY AND LAW ENFORCEMENT OFFICIALS TO DIVERT, WHEN APPROPRIATE, OFFENDERS FROM THE FORMAL CRIMINAL JUSTICE SYSTEM.

Commentary

Juvenile and criminal cases (violations and selected misdemeanors) committed by first-time offenders can often be processed with better long and short term results outside the formal criminal justice system.[10] Similarly, child abuse or neglect cases are often more effectively processed through non-judicial channels. Court caseloads and costs associated with processing cases can be dramatically reduced by screening unnecessary complaints from the courts. Alternative programs for the disposition of such cases can result in more efficient utilization of court resources, enhance the rehabilitative process and often reduce rates of recidivism.

Judicial control should exist over the screening mechanism, the criteria for screening, and over pretrial detention decisions. This is particularly true in juvenile cases since such control by the court can ensure that sanctioned, uniform criteria are used to ensure fairness, determine which cases should be diverted from the court and identify juveniles requiring pretrial detention. Without such control and court-established guidelines, juveniles may be unnecessarily detained to await court action.

The screening unit can also serve an investigative function to provide complete and timely information regarding each case. In addition, the unit serves as a source of information for complainants, parents, members of the community and juveniles to

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[10] Drawing a precise separation should be the community's decision. "Victimless" and status offenders clearly fall within diversionary limits: "More communities than every before are adopting a policy of diversion of such cases - sometimes before appearance in court, sometimes after arraignment - with no discernible loss in deterrence and no damage to those persons' chances of successful readjustment." 21 Crime & Delinquency (Oct. 1975) at p. 319 (NCCD Policy Statement).

ensure that the interests of all are protected. As the focal point of community-based assistance programs, the unit would help improve communication and relationships between the police, community, social service agencies and the courts.

At the present time there appears to be no jurisdiction in New Hampshire which has developed court-directed juvenile (or adult) screening capabilities for diverting youthful offenders from the formal justice system. Although complaints are reviewed in most jurisdictions, the review is highly informal and controlled by the police (juvenile officers) or the local probation officer. The criteria for screening are neither uniform nor sanctioned by the court.

In several jurisdictions (e. g., Newport, Keene, Manchester, Claremont, Lebanon, Colebrook, Ossipee, and Plainfield) Diversionary Committees have been established as an alternative to formal processing through the courts. However, determination of which complaints go to the Diversionary Committees (screening) is by the police department (juvenile officer). Again, screening criteria are neither uniform nor sanctioned by the court.

Diversionary Committees usually consist of 8 to 10 members from the local community and function under the control of the local police department. The juvenile must admit guilt before his or her case will be disposed of by the committee. In some instances, a formal petition is filed with the court, while at other times, no formal petition is filed. Diversionary Committees often direct the juvenile to other social service agencies, instruct the juvenile to make restitution or take other actions not formally sanctioned by the court.

Court participation in screening and in the resulting diversionary program is, therefore, minimal. It should be increased substantially in order to insure regular court supervision of what might otherwise become a wholly discretionary activity with scant resemblance to the justice system it serves.[11]

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[11] Court participation also helps to assure that services provided are not reduced. See L. Martin & P. Snyder, Jurisdiction Over Status Offenses Should Not Be Removed From the Juvenile Court. 22 Crime & Delinquency (Jan. 1976), p. 44.

A statistical sampling of District Court criminal cases showed that 40 percent of the defendants were of the 18-23 age group or otherwise classified as youthful offenders. These defendants represent a significant percentage of the courts' caseload. Therefore, utilization of screening and diversion programs for youthful offenders could have a significant impact on the total criminal caseload in the courts.

Alternative Approaches for Implementation

Approach #1 Intake Units

Description.

Establish intake units operating under court-sanctioned guidelines and criteria.[12] Juvenile complaints would be screened by a committee consisting of a juvenile officer (police department), probation officer (court), and perhaps a volunteer from the community. A secretary for the intake unit (part time or full time) would be necessary to assist with paper work. A similar intake unit may be established to screen complaints involving youthful offenders (ages 18-23), first-time offenders accused of misdemeanors or violations, the mentally retarded, naive offenders and child abuse or neglect cases.

Screening criteria (especially juvenile complaints) should include:

(a) seriousness of the offense

(b) age and sex of offender

(c) previous history and/or record

(d) attitude of youth, parents, victim

(e) availability of community based non-judicial alternatives.

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[12]See generally, National Center for State Courts, Juvenile Intake Service: York County Pilot Project (1974); see also NCSC, York County Juvenile Intake Services Evaluation (1975).

The Task Force identified and recommended four major factors which should govern all diversionary programs:

(A) Juvenile/Adult should not have to admit guilt in order to qualify for diversion from the formal criminal justice system.

(B) Juvenile/Adult should have the option at any stage of the diversionary program to transfer his case to court. (All persons diverted from the court should be so advised.)

(C) A specific time limit should be established after diversion beyond which no further prosecution could occur (30 days).

(D) Juvenile/Adult should have the right to appeal to the court dispositions and/or sanctions imposed by Diversionary Committees.

This alternative may be effected by having district court judges convene a meeting with the local police and probation personnel to establish procedure and criteria. It was recommended that a monthly report be submitted to the judge describing the intake units' activities, i.e., statistics regarding dispositions, number of complaints screened, etc.

Time:

The critical element to effecting this standard involves the formation of the committee to screen complaints under the guidance of the court. Composition of screening committees may vary between jurisdictions depending upon the availability of appropriate personnel. Estimated time to implement this approach is 6 months. (Additional time may be required in some jurisdictions if personnel are not readily available.)

Cost:

Additional probation officers may be required in some jurisdictions; however, many communities may already have the necessary personnel. Maximum cost to implement this alternative is estimated at $100,000, which would be borne by the locality (RSA 504:123).

Feasibility:

Feasibility of this approach was thought to be 60 - 80 percent since (a) some informal screening is already underway in many jurisdictions, (b) it should cause minimal disruption to the present system and (c) it is critical to the justice system and will have a favorable impact upon court caseloads and court costs.

The Task Force, however, felt that screening individuals other than juveniles would be less feasible due to possible adverse reaction from local police departments and the public. Since the volume of cases involving mentally retarded or naive offenders may be low, it was suggested that judges handle these cases on an ad hoc basis.

Approach #2 Training of law enforcement personnel

Description:

Greater emphasis may be placed upon training law enforcement personnel to screen cases prior to filing of a complaint or summons, i.e., establish more uniform criteria in making the judgment to arrest or initiate a complaint. It was suggested that the court could do more to influence this decision in working with the Police Standards and Training Council.

Time:

It was estimated that 6 - 12 months would be necessary to initiate a program and identify criteria.

Cost:

Cost of training was estimated as minimal if incorporated into the Police Standards and Training Council's curriculum.

Feasibility:

Estimate at 30 - 60% - at least one task force member felt this approach was totally unfeasible since the court should not be involved at this stage.

Standard 2.3 THE NUMBER AND TYPES OF DIVERSION PROGRAM ALTERNATIVES SHOULD BE EXPANDED IN EACH COUNTY.

a. Juveniles (status offenders, delinquents)

b. Adults and specifically youthful offenders

c. Mental retardation, child abuse or neglect.

Commentary

The creation of diversionary capabilities for processing appropriate cases outside the formal criminal justice system requires the availability of numerous non-judicial community-based service programs in each county of the state. Such programs would reduce the courts' criminal and juvenile caseload, maximize the use of judges' time for hearing the more serious criminal cases, reduce court costs associated with case processing and expand the range of alternatives for effectively disposing of minor criminal cases. Juveniles (under age 18), young adults (18-23) and adults (over age 18) would be given the opportunity to avoid a criminal record and would not be exposed to hard-core criminal elements whose negative influence could impact heavily upon future behavior. Opportunities for rehabilitation would increase while recidivism could be expected to decrease.

In addition to Diversionary Committees (see Commentary, Standard 2.1), all jurisdictions currently have at their disposal some diversionary alternatives to formal

case processing. In many counties, however, these services and the range of alternative programs are inadequate for the volume and types of cases handled by the courts.

The National Center for State Courts recently compiled a listing of diversionary programs of non-residential, diagnostic and residential nature, organized by county, available to District and Municipal Courts in New Hampshire (see Table 2.3A). What is needed in addition to these services are more community-based programs, similar in nature to the Diversionary Committees.

In the area of adult diversion, certain types of appropriate cases receive mor attention from the "[J]udges and probation officers [who in] dealing with white middle-and upper-income offenders from 'good families' very often exercise considerable ingenuity in locating or creating community alternatives to imprisonment. They may not have the time to serve similarily as advocates for all low-income non-dangerous offenders from 'bad families' that come before them, but with a little effort they can recruit volunteer advocates from the community. The involvement of such volunteers would enhance community support for a wide variety of alternative sentences."[12] The argument for diversion since it affects persons deemed sufficiently susceptible to treatment to be able to remain outside the courts entirely, appears even stronger than the case for alternative sentencing.

Alternative Approaches for Implementation

Approach #1 Community Based Programs

Description:

Community-based work programs designed for unemployed and unskilled

[12] M. Rector, The Extravagance of Imprisonment, 21 Crime & Delinquency (Oct. 1975), pp. 323, 328-29.

individuals capable of working, but unable to find employment (i.e., Civilian Conservation Corps.). Work projects could include development of local parks, recreation areas and renovation or improvement of public facilities. In addition to federal support, funds may be available and applied for from private sources such as foundations, churches, c ubs, etc. Volunteers from the community could be used to organize and superivse these programs.

Time:

Due to the major effort required to initiate this type of program, the time factor could not be determined.

Cost:

Substantial start-up and operating cost could be involved in this approach, probably in excess of $250,000.

Feasibility:

Feasibility was estimated to be low (0 - 30%) largely due to cost and time. The desirability of this approach, however, was considered high.

Approach #2 Community Based Release Facilities

Description:

Community-based programs designed to assist juveniles, who are released from the Youth Development Center, to find jobs, housing and friendship. Nashua currently has such a program, the New Leaf Club. In addition to the above-mentioned activities, the Nashua program provides small amounts of money and guidance to juveniles until they are established in the community. This type of program lends itself to sponsorship by local community groups, i.e., churches, Lions Clubs, etc.

Time:

6 - 12 months to initiate.

Cost:

Estimated to be $50 - $250,000 (statewide).

Feasibility:

High -- 60 - 80% -- very desirable and should be accepted well by the community. Cost in most communities would not be that great.

Approach #3 Diversionary Committees

Description:

Diversionary Committees, consisting of volunteer members from law law enforcement agencies, the community and the court, may be organized to provide an alternative to formal processing through the court. These committees would conduct an informal hearing on juvenile complaints which had been referred by the intake unit and would dispose of these cases under the overall guidance of the court. The court should, however, establish guidelines regarding appropriate action which may be taken by the committees. These committees may be organized by judges at the district or municipal court level, in conformance with statewide court approved standards pursuant to RSA 502-A:19-a.

Time:

Minimal time required to initiate program (0 - 6 months).

Cost:

Since all personnel would be voluntary and appropriate facilities available in most communities, there is negligible cost associated with this approach, except for guideline development.

Feasibility:

Estimated to be 60 - 80% -- community should favor initiating such a program. (Exists in some New Hampshire communities today; however, court is not involved.)

Approach #4 Volunteer Services

Description:

Donated medical and dental services may be made available for individuals in need who come to the attention of the court. In Nashua, for example, a judge has approached physicians and dentists in the community and asked if they would be willing to take one patient each year (at no cost) upon referral from the court. The response has been most favorable. Teachers, psychologists, businesses and others may be approached on the same basis.

Time:

Minimal time (0 - 6 months) -- judge may initiate such a program by telephone.

Cost:

No cost.

Feasibility:

High (60 - 80%) since most people will volunteer their skills if not too many demands are made of them. This program could easily be initiated in every jurisdiction.

## JUVENILE DIVERSION AND TREATMENT

## PROGRAMS IN NEW HAMPSHIRE

Table 2.3(A)

*The following list of diversion and treatment programs was taken from the Juvenile Resources Manual, prepared by the National Center for State Courts in conjunction with The American University Law School Criminal Courts Technical Assistance Projects, under a contract with the Law Enforcement Assistance Administration of the U.S. Department of Justice.*

### DIVERSION PROGRAMS

#### Belknap County

Spaulding Youth Center

#### Cheshire County

Marathon House

#### Hillsborough County

Caritas
Greenhouse
Manchester-YWCA Intervention Project
Nashua Community Council (Special Services)
Nashua Youth Council
Office of Youth Services
Program on Alcohol and Drug Abuse
Therapeutic Learning Center

#### Merrimack County

Child and Family Services
Friends Program
Youth Services Day Treatment Program

#### Rockingham County

Child and Family Services of New Hampshire
The Junction
Portsmouth-YWCA Intervention Project

#### Strafford County

Dover Family Pastorial Counseling Service
Dover Youth Resources
Teenage ABE
Trio Program

## DIAGNOSTIC SERVICES

### Belknap County

Lakes Region Mental Health Center
Spaulding Youth Center

### Carroll County

Carroll County Mental Health Services

### Cheshire County

Monadnock Children's Special Services
Manadncck Family and Mental Health Services

### Coos County

North Country Community Services, Inc.
Upper Connecticut Valley Mental Health Service

### Grafton County

Dartmouth-Hitchcock Mental Health Center
White Mountain Community Services

### Hillsborough County

Greater Manchester Mental Health Center
Greater Nashua Council on Drug Abuse
Nashua Community Council (Special Services)
Program on Alcohol and Drug Abuse - Manchester

### Merrimack County

Central New Hampshire Community Mental Health Service
Contoocook Valley Mental Health Center
Twin River Mental Health Clinic

### Rockingham County

Greater Salem Mental Health Association
Seacoast Regional Counseling Center
Seacoast Regional Counseling Center - Exeter Office

### Strafford County

Strafford Guidance Center

### Sullivan County

Counseling Center of Sullivan County

CONTINUED

1 OF 6

## NON-RESIDENTIAL ALTERNATIVES

### Belknap County

Lakes Region Mental Health Center
Spaulding Youth Center

### Carroll County

Carroll County Mental Health Services

### Cheshire County

Monadnock Family and Mental Health Service

### Coos County

North Country Community Services, Inc.

### Grafton County

Dartmouth-Hitchcock Mental Health Center
White Mountain Community Services

### Hillsborough County

Caritas
Greenhouse
Greater Manchester Mental Health Center
Greater Nashua Council on Drug Abuse
Nashua Community Council (Special Services)
Nashua Youth Council
Office of Youth Services
Program on Alcohol and Drug Abuse/Manchester Clinic
Therapeutic Learning Center

### Merrimack County

Central New Hampshire Community Mental Health Service
Child and Family Services
Contoocook Valley Mental Health Center
Friends Program
Youth Services Day Treatment Program

NON-RESIDENTIAL ALTERNATIVES (continued)

Rockingham County

Child and Family Services of New Hampshire
Greater Salem Mental Health Association
Seacoast Regional Counseling Center
Seacoast Regional Counseling Center - Exeter Office
The Junction

Strafford County

Dover Family Pastorial Counseling Service
Strafford Guidance Center
Teenage ABE
Trio Program

Sullivan County

Counseling Center of Sullivan County

RESIDENTIAL ALTERNATIVES

Group Homes

Belknap County

Living Water Ranch
The Community Cottage

Cheshire County

Teenage Foster Families, Inc.

Coos County

Alpha House

Grafton County

Youth House Association

Hillsborough County

Boyleston House
St. Patrick's Home

RESIDENTIAL ALTERNATIVES (continued)

Merrimack County

Bull Run
Hassle House
Stepping Stone

Rockingham County

Greater Exeter Area Youth Project
Port House, Inc.
Salem Group Living Home

Strafford County

Teen Haven

Institutions

Belknap County

Spaulding Youth Center

Cheshire County

Beech Hill Farm Hospital
Marathon House, Inc.

Hillsborough County

Friendship House
Manchester Children's Home
Nashua Children's Home
Nashua-YWCA

Merrimack County

Pine Haven Boys Center
Rolfe and Rumford Home

Rockingham County

Chase Home for Children
Odyssey House

Strafford County

Dover Children's Home
St. Charles Children's Home

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## 3.0 PROSECUTION

### Introduction

Much of what the criminal justice system seeks to accomplish depends on the public prosecutor's office, because of the active role of the prosecutor in processing cases through the criminal system.

"The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."[1] While the prosecutors have almost entirely supplanted private prosecutions brought by citizens (which still occur in New Hampshire and England, the prosecutor's role has acquired during its development a large measure of discretion, recognizing that a prime duty of the office is to select for full prosecution those cases most important to the maintenance of justice. In addition, "The idea that the criminal law, unlike other branches ... such as contract and property, is designed to vindicate public rather than private interests is now firmly established."[2]

Promptness of disposition depends not only on the prosecutor's role as an advocate in the adversary process, but on formal and informal control prosecutors frequently exercise over the calendar. The prosecutor must reconcile the often conflicting demands of the public, defendants and victims. In this aim, the prosecutor can direct the law enforcement

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[1]ABA, Code of Professional Responsibility, Ethical Consideration 7-13 (1969). See also ABA, Standards Relating to the Prosecution Function (1971), §1.1(c) at p. 25.

[2]ABA, supra note 1, §2.1, commentary, at p. 49.

effort, exercise discretion to select, reduce, or drop charges, and may seek alternatives to criminal disposition. In addition to control of the administration and planning of the prosecutorial office, in which much of the processing of cases takes place, the prosecutor's role in shaping law enforcement and as one of the most visible public spokesman for the system provides substantial influence in determining how the system will be made to operate efficiently. Finally, since an overwhelming number of cases are disposed of prior to trial as a result of the exercise of prosecutorial discretion or negotiation, fundamental responsibility for the impartial dispensation of justice in practice falls on the prosecutor.

The position of prosecutor should, therefore, attract a professional of unquestioned integrity, with the combined experience of an administrator, a trial lawyer, and even a sociologist. In addition, the increased professionalization of prosecution includes upgrading of professional and supporting staff, as well as increased investigative capacity.[3]

In considering how the role of the prosecutor has been performed in the past, many conflicts and problems which have rarely been resolved require consideration. First, prosecutors in many states are elected, a status which assures a certain degree of responsiveness to

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[3]See Natl. Advisory Comm. on Crim. Justice Standards & Goals, Courts (1973), Standards 12.1, 12.2, 12.3 and 12.8 at p. 229 ff.; ABA, supra note 1, §2.3 at p. 57.

the public but which provides only slight insulation to the prosecutor who is expected to act as a quasi-judicial officer.[4] Second, prosecution in many localities is only now becoming a full-time job. When the post is part-time, conflicts between the private legal practice of a prosecutor and his official duties are inevitable, even if only through the presence of prosecutorial power in any negotiations with fellow attorneys. The time commitments demanded by each area of his practice may present more clearly visible conflicts to the prosecutor. Tied to the problem of a part-time prosecutorial post is the low pay common to part-time positions. This aspect of the job may limit the number of cases or courts in which a professional prosecutor may function, requiring use of police or lay personnel to fill the gap.

Public awareness of the key role that the prosecutor's office plays in the courts' processing logjam has led to increased recognition that the position requires a full-time, highly-motivated professional with administrative capabilities and adequate support resources.[5] However, movement in this direction has been slow in the more sparsely-populated states and counties. Some states, where size and population

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[4]Appointive and career prosecutors are somewhat more insulated but do not satisfy "the deep concern that the enormous power of a prosecutor be vested in a public officer who is responsive directly to the electors." ABA, supra note 1, Intro., p. 19. The practice of appointment of prosecutors by the court, as is done in Connecticut, may pose even more difficult conflicts.

[5]It should be noted that in Britain, where barristers frequently represent alternately the prosecution and the defense, more central responsibility for supervision throughout the country is being assumed by the Director of Public Prosecutions. ABA, supra note 1, Intro., p. 17.

density permit, have experimented with creating larger prosecutorial districts. Alaska, Delaware and Rhode Island each have a statewide system.[6] In many states, the supervisory role of the state attorney-general permits that officer to force upgrading of offices and procedures. See e g. RSA 7:6.

Some of the current efforts being undertaken in the prosecution area include use of modern record-keeping systems such as automated data processing and microfilm. In some jurisdictions, prosecutors work closely with successful diversion programs which have been implemented. Organizations such as the National District Attorneys Association and the National Center for Prosecution Management encourage greater communication between local prosecutors and have taken an active role in such programs as continuing training institutes for prosecutors.

Standard 3.1 INCREASE PROVISION OF PROFESSIONAL PROSECUTION IN EACH COUNTY:

a. EXTEND TERM OF OFFICE TO A MINIMUM OF FOUR YEARS TO INCREASE CONTINUITY.

Commentary

Extending the prosecutor's term serves two ends: the longer term should lead to more experienced, professional prosecution, and the prosecutor's commitment to his office will not be diverted to the demands of obtaining and retaining the office. Priorities of the office could be ordered toward other goals in addition to a high conviction rate, such as the prompt disposition of specific types of cases in an effort to lower recidivism over time but without immediate impact on the voting public's mind.

Recently-issued national standards urge continuity in office for prosecutors. While the American Bar Association prefers prosecutorial

[6] See e. g., Rhode Island General Laws Annotated, 42-9-2, 4, 5.

continuity through indefinite-term appointment or nonpartisan election, the National Advisory Commission on Criminal Justice Standards and Goals expressed no preference for a selection process but firmly endorsed a minimum term of four years.[7] The present New Hampshire term for county attorneys, who prosecute generally in the Superior Court only, is two years.[8] Election is required by constitutional mandate,[9] few incumbents experience difficulty in being reelected. For example, the majority of county attorneys holding office in 1977 have occupied their positions for multiple terms, the average being slightly over two terms. Although historical experience indicates that prosecutors are retained for an average of two to three terms, thereby increasing the potential for quality prosecutorial service, the biennial pressures of being reelected often reduce a prosecutor's ability to effect an even-handed administration of justice, and rather require a politically expedient posture which may be contra to the overall improvement of the justice system.

Alternative Approaches for Implementation

Approach #1 Partisan Election for Four-Year Term

Description:

Given the constitutional requirement for elected county attorneys and the tradition of partisan elections in New Hampshire, retention of the present election system and extension of the term of office to four years has been suggested. Such an approach

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[7] ABA, supra note 1, § 2.3 at pp. 57-58; NAC, supra note 3 (1973), Standard 12.1 at p. 229.

[8] RSA 7:33.

[9] N. H. Const., Pt. 2, Art. 71.

requires amendment of RSA 7:33 to extend the present term to four years. The National District Attorneys Association standards support the concept of a four-year term as did the National Advisory Commission.

Time:

Passage of a legislative amendment is estimated as taking six months.

Cost:

No additional annual costs are anticipated by extending the term of office to four years.

Feasibility:

This approach was accorded a 60-80 percent feasibility rating since it does not alter present election practices, other than the number of years per term. The only drawback to the approach was the general lack of understanding by the public of the county prosecutor's functions, and the feeling that until four-year terms are mandated for more prominent governmental officials, e.g., the governor, legislative changes in the county prosecutors' terms might be difficult to enact.

Approach #2 Non-Partisan Elections Every Four Years

Description:

As in the previous approach, a statutory amendment of RSA 7:33 is required. The major difference between Approach #1 and #2 is the non-partisan nature of the second alternative. This is supported by the National District Attorneys Association.

Time:

Same as Approach #1: minimum (6 mos.)

Cost

Same as ; however, the candidates, not the party, would bear campaign costs.

Feasibility:

New Hampshire's strong tradition of partisan elections, the public's general lack of understanding of the function of county prosecutors, the election modifications required of the Ballot Law Commission, and confusion with regular party campaigning and voting reduce the feasibility of this approach to 0-30 percent.

Approach #3 Off-Year Non-Partisan Elections

Description:

A third approach modifies Approach #2 to create off-year elections. The basis for such a change is to reduce confusion during regular election years.

Time:

As in Approach #2, a minimum of six months is considered necessary.

Cost:

The anticipated cost of this alternative is the highest of the three approaches -- between $50 and $100,000 - due to the added cost of opening polling places, printing ballots, and supervising election returns.

Feasibility:

Given the cost and dramatic break with tradition, this approach was rated at 0-30 percent feasibility.

Importance:

Standards 3.1a, b, c and d, as a group were considered the the most important for affecting positive change in the provision of prosecutorial services in the state.

Standard 5.1 b. MAKE PROSECUTORIAL POSTS FULL-TIME POSITIONS.

Commentary

While it is surely accurate that the "complexity of today's criminal law practice requires that all prosecutors devote their full efforts to their roles as prosecuting attorneys,"[10] conflicts of several kinds actually pose the greatest problems to successful operation of a part-time office. First, substantive conflicts between public and private practice (and between public duty and private clients) are likely: "The attorneys he deals with as a public officer are the same ones with whom he is expected to maintain a less formal and more accommodating relationship as counsel to private clients."[11] Second, the demands of a part-time law practice create the opportunity for time conflicts for part-time prosecutors obliged to attend to private practices thereby limiting potential service to police and the lower courts. Full-time prosecutor posts have been firmly recommended by national standard-setting bodies.[12]

However, present county jurisdictions may not always require full-time prosecutors. "There may be some areas...in which geographical considerations make it impractical to establish prosecution offices on a scale which would require a full-time attorney, but in most areas of the country it can be done by enlarging the area he serves so as to support and warrant the services of a full-time prosecutor."[13]

Survey results disclose strong sentiment throughout New Hampshire favoring the step of making prosecutorial posts full-time positions. A substantial minority (35 percent) favored retention of part-time county attorneys

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[10] NAC, supra note 3, Standard 12.1 at p. 229.

[11] President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts, p. 73 (1967).

[12] ABA, supra note 1, §2.3(b) at p. 58: NAC, supra note 3, Standard 12.1 at p. 229.

[13] ABA, supra note 1, §2.3(b), commentary at p. 60.

or use of full-time officials only in larger counties. The sole objection to making county attorneys full-time was whether the size of present caseloads justified this step. The most frequently cited rebuttal to this argument was the need for expansion of professional prosecution to the District and Municipal Courts of the county and provision of case screening and training for local police departments. Whether full-time offices in more sparsely populated counties are feasible through extension of professional prosecution to District and Municipal Courts is considered infra in connection with the use of lay and police prosecutors. However, this approach avoids the loss of local understanding and familiarity regarded as a highly desirable quality in any county prosecutorial office.

Alternative Appraoches for Implementation

Approach #1 Full-Time County Attorneys

Description:

Mandating county attorneys to serve full-time requires legislation. Although it was suggested that each county determine whether full-time status was necessary, the consensus of the task force was that any legislation should require full-time service.

Time:

The time required to implement the approach was estimated at two years, given the time to pass legislation and allow incumberts to complete their present terms.

Cost:

The cost of effecting the legislative change is minimal; however, an additional salary burden would result. (The salary approaches are discussed under Standard 3.1(d).)

Feasibility:

National attention and public recognition of the need for expanded prosecutorial service enhances the feasibility of full-time

prosecution. The greatest drawback to implementation is the requirement full-time status places on county financing. The feasibility of this approach was rated at 60-80 percent.

Approach #2 Part-Time Prosecutor and Full-Time Assistant(s)

Description:

This approach basically continues the existing system of providing prosecution. It requires no statutory changes as RSA 7:33(b) authorizes the addition of special assistants.

Time:

The only factor impeding immediate implementation is the difficulty of increasing county appropriations for special assistants. The estimated time to appropriate such funds is six to nine months.

Cost:

Refer to Standard 3.1(d).

Feasibility:

While it would not be necessary to introduce legislation, the cost for maintaining both a county attorney and full-time assistant is higher than the estimated cost of support for a full-time county attorney. Additionally, the provision of a full-time assistant does not reduce the political nature of the position or potential for conflict. The feasibility of this approach was rated at 30-60 percent.

Approach #3 County-by-County Choice of Full-Time Status

Description:

The last approach suggested was leaving the decision to each county. Given present statutes, it is not clear whether counties now have sufficient authority to mandate full-time status. In the event that such power is not present, legislation would have to be enacted.

Time:

Implementation of this approach hinges on the time required to enact legislation, if needed, and securing appropriations from county delegations. Six to nine months were considered minimal to implement this standard. Additionally, incumbent county attorneys would have to complete their terms. A total of two years, then, was considered necessary to effect this approach.

Cost:

Refer to Standard 3.1(d)

Feasibility:

The feasibility of this approach was rated at 60-80 percent. The basis for this rating is local control over the initiation of full-time prosecution. This approach could be considered as a first step in moving toward more uniform provisions for full-time county prosecution.

Importance:

Same as Standard 3.1(a)

Standard 3.1 c. ORGANIZE PROSECUTORIAL OFFICES TO INCREASE AVAILABILITY OR ASSISTANCE OF LEGALLY-TRAINED PROSECUTORS IN ALL TRIAL COURTS SO THAT LAY PROSECUTION MAY BE ELIMINATED AND POLICE PROSECUTION MINIMIZED.

Commentary

The desirability of professional prosecution at all court levels has rarely been opposed on grounds that improved performance would not result. Generally, the main criterion has been cost. "The absence of a trained prosecution official risks abuse or casual and unauthorized administrative practices and dispositions which are not consonant with our traditions of justice."[14]

14 ABA, supra note 1, §2.1, commentary, at p. 49.

Where professional prosecution has been regarded as not always vital, however, removal of certain offenses from the realm of the criminal law to an administrative process has been suggested. This category of offenses may include drunkenness and minor traffic violations. "Even where this has not yet been done, such matters often can be prosecuted without the aid of a professional public prosecutor."[15] In complicated cases, presence of police prosecutors may of itself cause other difficulties. Many local, limited-jurisdiction courts are still endeavoring to shed the image of "police courts". Uniformed policemen who in fact depend on the judge for professional aid on legal questions do little to dissipate this image. Moreover, police prosecutors are, by training and orientation, much less able to perform the critical screening and sifting function of the prosecutor who must determine whether a case is appropriate for prosecution: "... the need for law-trained judgment to guide the exercise of the great power to charge a citizen with a criminal act and put him under the heavy burden of defending himself."[16] Indeed, it has been recommended that the decision to proceed should be entrusted where possible to specialized units within a prosecutorial office.[17] Private prosecution is an uncommon occurrence in this country and is subject to supervision in any event by the Attorney General's office.[18] New Hampshire still permits private prosecution of criminal complaints. State v. Merski, 115 N.H. 48 (1975).

Cost is the major factor in determining how much work professional prosecutors in New Hampshire can assume. Of course, the cost of police

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[15] Ibid., p. 50. See also ABA Committee on the Traffic Court System, Standards for Traffic Justice (Rev. draft, 1974).

[16] Ibid., §3.4(a), commentary, at p. 84.

[17] Ibid., §3.4(b), commentary, at p. 84.

[18] RSA 7:6.

officers spending time prosecuting must be considered as well. Prosecution training for police personnel can improve performance. Probably more effective would be institution of a screening unit to review all criminal cases to determine (a) whether anyone should prosecute them, and (b) if they should be prosecuted, whether a non-legally-trained officer can capably assume the task.

A majority of judges, police, and prosecutors surveyed favored increasing the availability of professional prosecutors. Fourteen percent of those queried felt a legally-trained prosecutor was required in all cases. Separating case categories which the majority regarded as requiring professional prosecution included: crimes of violence, felonies, probable cause hearings, cases involving possible imprisonment, cases where a police prosecutor is a needed witness, and cases where subsequent convictions are significantly serious, e.g., drug matters. While the prosecutor may be a witness, it is not encouraged. (State v. Aberizk, 115 N.H. 535 (1975).

A survey of prosecution at probable cause hearings in District Court felony cases disclosed that in roughly half these cases, the professional prosecutor, viz., the county attorney or a staff member, represented the state, with local police performing the prosecution function in the remainder. In Superior Court, all prosecutions were handled by the county attorneys or the Attorney General's office. In District Court juvenile and criminal proceedings, exclusive of probable cause hearings, about 86 percent of the juvenile cases were prosecuted by local police, who handled about 75 percent of the criminal cases (most of the remaining criminal cases were state police prosecutions; 5 percent of the cases involved the county attorney or staff).

Whatever the course adopted, establishing closer links between prosecutors and police through provision by county attorneys of a source for ready advice to police, training of police, or guidelines (possibly standing orders) to govern charging and screening procedures (see Standard 6.4, Approach #1), are likely to improve the provision of prosecution services generally.

Approach for Implementation

Approach Limitation of Lay Prosecution to Specific Types of Offenses

Description:

The enactment of a statutory amendment to restrict the extent of lay prosecution, and police prosecution, is required to implement this approach. While agreement as to which types of offenses should be eliminated was not reached, most task force members agreed that felonies and most misdemeanors require professional prosecution.

Time:

The legislative process is estimated as taking six months; however, given the transitional problems associated with providing professional prosecution, eighteen months was considered minimal to effect complete implementation.

Cost:

The cost of increased professional prosecution is estimated at $250,000. This cost is somewhat offset by a reduction in direct and indirect costs of police service as prosecutors.

Feasibility:

Agreement was reached regarding both public and practitioner support for professional prosecution; however, the probable cost of such a modification lowers the feasibility to 30-60 percent.

Standard 3.1 d. COMPENSATE PROSECUTORIAL STAFF SO AS TO ESTABLISH AN EXPERIENCED OFFICE.

Commentary

In order to attract and retain capable attorneys to fill prosecutorial posts, sufficient compensation must be provided. "We should expect the compensation of those whom we entrust with high responsibilities and authority in government to bear some reasonable relationship to that received by their peers in private life."[19] The National Advisory Commission recommended that the salary of a prosecutor be "no less than that of the presiding judge of the trial court of general jurisdiction."[20]

Increased compensation is difficult to implement unless joined with the move to full-time prosecutors called for by Standard 3.1(b), supra. While the survey of system participants indicates that more attorneys have been motivated by increases in county attorney salaries to run for the positions, it remains doubtful that county attorneys will desire extended service even at improved pay levels. The pay scales for assistants offer even less inducement for experienced aides.

Alternative Approaches for Implementation

Approach #1 Full-Time Prosecution

Description:

An amendment to RSA 7:35a- must be effected to increase the rates of compensation for the county attorneys. Compensation rates should be comparable to those set for general, given the similarity in trial work and requisite experience for the position.

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19 ABA, supra note 1, §2.3, commentary at p. 62, quoting "Kappel Report on Executive, Legislative and Judicial Salaries," p. 1.

20 NAC, supra note 3, Standard 12.1 at p. 229.

Time:

The legislation only requires six months but increasing present county appropriations and waiting for the incumbent county attorneys to complete the present term of office increases the time for this approach to two years.

Cost:

The anticipated cost of implementing this approach is $100,000 to $150,000.

Feasibility:

Given greater public acceptance of the need for full-time prosecution and the expanded service possible from the provision of such service, the feasibility was rated at 60-80 percent.

Approach #2 Part-Time Prosecutors and Full-Time Assistant(s)

Description:

The sole requirement for implementing this approach is authorization and appropriation by the county delegation for a special assistant(s). RSA 7:33(b)

Time:

The time required to effect this approach depends on county appropriations -- estimated six to 12 months.

Cost:

The total annual cost of providing one full-time assistant for each county attorney (at an annual salary of $18,000/yr.) plus operating expenses was estimated at less than $250,000.

Feasibility:

The feasibility of this approach is low, 30-60 percent, given the requirement it places on the county to maintain present county attorney salaries and to add the salaries of special assistants.

Approach #3 Per Diem Reimbursement for Assistants

This approach continues existing practice and as such requires no time or additional cost to implement. The feasibility of such an approach is 100 percent.

Standard 3.2 CASELOAD STATISTICS SHOULD BE UTILIZED TO DETERMINE PROSECUTORIAL STAFF SIZE.

Commentary

The important responsibilities of the prosecutor cannot be exercised without adequate, nighly skilled staff.[21] One significant means of assessing prosecutorial workload involves the collection and analysis of caseload statistics. The relationship between caseload and prosecutorial staff size can be a meaningful indicator of personnel needs in the prosecutor's office.

Since the flow of work through the prosecutor's office does not remain constant at all times, it is essential that the prosecutor be given some flexibility to meet increasing workload demands. This flexibility may be achieved by employing qualified assistants on an ad hoc basis. Caseload statistics can be used not only to reflect current needs for temporary staff -- they can also be used to predict future personnel needs by identifying caseload trends and cyclical patterns.

Results of the Survey showed that there are significant differences between counties as regards number of cases prosecuted and prosecutorial staff size. While no office has a full-time county attorney, several counties, including Hillsborough and Rockingham, employ full-time assistants. The average number of felony indictments per staff member ranges from a low of 150 to a high of 476. In addition, some if not all offices are involved in

[21] ABA, supra note 1, §1.4, commentary, at p. 48.

other cases as advisors to local and state police, investigators, or handling petitions for support.

Approach for Implementation

Approach Staff Size Criteria

Description:

Although the task force recognized the importance of establishing objective criteria for assessing the need for additional prosecutorial staff, determination of those criteria was not agreed upon. Consequently, the task force recommended the conduct of a survey to assess factors applied nationally and those which could be used in New Hampshire.

Time:

Twelve months was considered minimal to complete a survey of this type and to promulgate guidelines.

Cost:

The cost of the survey and promulgation of guidelines was estimated as $30,000.

Feasibility:

The feasibility of this approach was rated at 60-80 percent given the present lack of specific guidelines.

Standard 3.3 PROSECUTORS SHOULD BE PROVIDED AN INVESTIGATIVE CAPABILITY FOR SCREENING ALL CASES FOR ACCURACY OF CHARGE AND PARTICULARLY IN JUVENILE MATTERS, APPROPRIATENESS OF COURT REFERRAL.

Commentary

Police and other investigative agencies usually provide the prosecutor with a capability to investigate alleged criminal acts. It is, however, the responsibility of the prosecutor to investigate suspected illegal activity when the police or other agencies fail to do so.[22] Therefore, each prosecutor should

[22] ABA, supra note 1, §3.1(c) at p. 30.

have investigatorial resources at his disposal to supplement police investigations and, in limited situations, to undertake the initial investigation into alleged criminal activity.[23]

Survey results indicate that additional investigative capabilities are needed by many of the county prosecutors' offices in New Hampshire. The majority of interviewees suggested that "many" investigators are needed. Since investigation is a major activity of the county prosecutor's office, development of additional capabilities in this area should be viewed in light of prosecutorial caseload.

Alternative Approaches to Implementation

Approach #1 Local Police or Sheriff(s) Investigation

Description:

This approach anticipates the assignment on an as-needed basis of a local police detective or sheriff's detective to the county prosecutor's office as is done in Carroll County. County or local forensic resources would be utilized to aid the investigator.

Time:

Given adequate manpower and financing, such an approach could be effected immediately.

Cost:

Financing of this approach should be based on a per diem payment. The total cost of this approach was undetermined.

Feasibility:

The feasibility of this approach was rated at 60-80 percent, the sole objection arising: added cost to the county.

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[23] NAC, supra note 3.

Approach #2 State Police Investigator

Description:

This approach mirrors Approach #1 with the use of state police detectives.

Time:

Same as Approach #1.

Cost:

Same as #1 -- undetermined.

Feasibility:

The feasibility of this approach was rated at 60-80 percent based on the anticipated reluctance of county financing. This approach incorporates the distinct advantage of utilizing detectives who could be assigned throughout the state, and insures utilization of state BCI resources. These additional attributes make this the preferred option.

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## 4.0 DEFENSE

### Introduction

> "The right of a criminal defendant to be represented by counsel is a fundamental protection for individual liberty in our system of criminal justice."[1]

The need for defense counsel, guaranteed by the constitutions of the United States and New Hampshire,[2] was eloquently stated in Powell v. Alabama, 287 U.S. 45, 71 (1932).

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissable. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Historically the courts have held that provision or appointment of counsel to criminal defendants does not in itself satisfy "the spirit of the law" as guaranteed by the U.S. Constitution. They have continually advanced the proposition that the right to counsel necessarily means the right to effective counsel.[3] In addition, equal justice for all defendants

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[1] President's Commission on Law Enforcement and Administration of Justice, Courts, GPO, Washington, D.C. (1967), p. 52 (hereafter "Task Force Report: Courts").

[2] U.S. Const., Amend. VI; N.H. Const., Pt. 1, Art. 15 (1966 Amend.).

[3] Powell v. Alabama, 287 U.S. 45, at 71 (1932), Avery v. Alabama, 308 U.S. 444 (1940). Effective assistance of counsel: Glasser v. United States, 315 U.S. 60 (1941); White v. Ragen, 324 U.S. 760 (1944); McMann v. Richardson, 397 U.S. 759 (1970).

requires that effective assistance of counsel, at all critical stages of the process, be available regardless of the individual's financial capacity to retain counsel.[4]

In Gideon v. Wainwright, 371 U.S. 335 (1963), the Supreme Court made the Sixth Amendment right to counsel binding on the states in felony prosecutions, placing substantial new burdens on state criminal justice resources. The decision expanded the class of indigent criminal defendants eligible for state-provided counsel since previously, counsel was provided only when it was shown that absence of counsel would clearly result in injustice to a particular defendant.

Following Gideon, the New Hampshire Legislature, acting on a recommendation from the Judicial Council, enacted legislation to entitle any person charged with a felony to counsel assigned by the court, altering prior New Hampshire law which authorized provision of counsel only in felony cases punishable by imprisonment for at least three years.[5]

In 1966, New Hampshire amended Part 1, Article 15 of the state constitution to extend the right to counsel to anyone charged with a crime or offense punishable by deprivation of liberty. What the state provided by choice, the U.S. Supreme Court six years later, in Argersinger v. Hamlin, 407 U.S. 25 (1972), made mandatory. "Absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[6]

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[4]People v. Witenski, 15 N.Y. 2d 392, 207 N.E. 2d 358 (1965).

[5]RSA 604:2 Supp. (L. 1963, C. 221:1).

[6]407 U.S. at 32.

Although the Supreme Court extended the right to counsel to indigent criminal defendants in any case where imprisonment would result, the court in more recent decisions has retreated from requiring counsel at various stages of the criminal proceeding. In Gerstein v. Pugh, 420 U.S. 103 (1975), counsel was found not to be required at a probable cause hearing because this was not regarded as a "critical stage" of the criminal process. In Gagnon v. Scarpelli, 411 U.S. 778 (1973) the right to counsel in probation revocation hearings was limited to indigent probationers who request assistance and whose cases are inordinately complex. Faretta v. California, 422 U.S. 806 (1975) permitted a defendant to dispense with counsel and represent himself (pro se).

While the class of defendants eligible to receive state-furnished counsel has been expanded, within limits, there is diversity of opinion as to what constitutes effective counsel and how to provide it. Whatever system for providing defense counsel is employed, it is important that "the system for providing counsel and facilities for the defense be as good as the system which society provides for the prosecution."[7]

There are two basic methods by which legal services are provided indigent defendants in the United States; the assigned counsel system and the public defender system. The most prevalent method is the assigned counsel system in which lawyers in private practice are appointed by the court, on a case-by-case basis, to represent defendants who cannot afford retained

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[7]ABA, Standards Relating to Providing Defense Services (1967), at p. 1.

counsel. Compensation for attorneys under the appointed counsel system may be paid by the state or by the county. In many jurisdictions in this country, assigned counsel is the only method used to provide representation for indigent defendants.[8]

The second basic method of providing defense services is the public defender system. Defender systems generally consist of salaried attorneys who devote all or the substantial portion of their time to representing defendants who are unable to retain counsel. Defender offices may be financed solely by the state or local government, or by charitable foundations or other private funds.[9]

While there is substantial debate over the relative merits of these two systems, both methods have desirable elements and may be appropriate given such circumstances as caseload, loc eography, and availability of skilled counsel.

Public defender offices for example are often favored in localities where a high volume of criminal cases make the use of permanent criminal specialists an efficient application of legal manpower. Conversely, a local defender's office may be impractical in rural localities where courts have very light criminal caseloads.

The relative merits of defense systems and in particular their application and appropriateness in New Hampshire are presented in a detailed report prepared by the National Center for State Courts in February, 1976.[10]

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[8]Task Force Report: Courts, 1967, p. 59.

[9]Ibid., p. 59.

[10]NCSC, Defense Services in New Hampshire (February 1976).

This report analyzes the present defense systems in New Hampshire, standards of eligibility and relative costs and benefits. A recent report of national scope has been prepared by the National Legal Aid and Defender Association which surveys the entire range of operations of defense services in the United States.[11]

Standard 4.1 DETERMINE AND APPLY CLEAR STANDARDS OF ELIGIBILITY TO CONTROL PROVISION OF COUNSEL BY THE COURT, INCLUDING RULES GOVERNING PARTIAL ELIGIBILITY.

Commentary

Determination of eligibility should be based upon uniform and fair criteria to assure that assistance of counsel is provided at state expense to those entitled to representation but not to those who are ineligible. Arbitrary determination as to eligibility is eliminated if uniform standards are applied.

The concept of partial eligibility recognizes that defendants who may be capable of financing a part of the costs of their defense should receive assistance to meet the remaining cost. In some instances, resources may have already been depleted in posting bond.

In New Hampshire the applicable law defines generally terms for measurement of financial eligibility for court-appointed counsel. The state constitution, pt. I, art. 15, provides a right to court-appointed counsel if "need" is shown. The express purpose of RSA 604-A:1, which implements this constitutional provision, requires provision of adequate representation for "indigent" criminal defendants. Court appointment of counsel and court authorization for services other than counsel is to be made upon a finding that the defendant is "financially unable" ot obtain them. RSA 604-A:2.

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[11] NLADA Natl. Study Commission on Defense Services, Draft Report and Guidelines for the Defense of Eligible Persons (2 vols., 1976).

These terms have been interpreted relatively broadly in New Hampshire (see, e.g., public welfare provisions of RSA 165). The "substantial hardship" standard advanced by the ABA, Nat'l. Advisory Commission, and the Nat'l. Legal Aid and Defender Assn.[12] appears to be gaining general acceptance.[13] This provision rests on the concept that a defendant should be required to apply all liquid assets to the cost of defense but not so as to make him or his family public charges.

Criteria which are likely to be considered in determining eligibility include liquid assets (cash, securities, accounts, readily convertible property) and financial status (credit rating), income in excess of living expenses and obligations, willingness of a private attorney to accept the case, and the cost of defending a particular case.[14] A prescribed form to be used by an interviewer, acting either for the court or the counsel (whether assigned or public defender), appears the most expeditious means of evaluating eligibility; investigative capacity to check information so gathered is also needed. It has been suggested that income can most readily be considered in determining capability to repay rather than as a criterion for eligibility.[15]

Forms currently in use in the trial courts of New Hampshire indicate that the following questions are asked those seeking publicly appointed counsel (it is not clear exactly how these questions are weighted in a court's determination of eligibility): employment, family status, assets, income, pre-trial release status, amount of money owed, and skills.[16]

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[12]ABA, supra note 7, §6.1 at p. 53; NAC, Courts (1973), Standard 13.2 at p. 257; NLADA, supra note 11 at 155.

[13]See, e.g., Vermont's statute, which uses "undue hardship, 13 V.S.A. §5201(3).

[14]See NCSC, supra note 10 at p. 74 et seq. and pp. 103-119, and NLADA, supra note 11, at pp. 113-163.

[15]NLADA, supra note 11, at 156.

[16]See forms reprinted as Appendix 5, NCSC, supra note 10.

Approach for Implementation

Approach Determination of Eligibility

Description:

Determination of eligibility may be made based upon uniform guidelines and objective standards promulgated by the New Hampshire Supreme Court.[17] In addition, however, the courts must be provided an investigative capability to verify information supplied by the defendant and to conduct independent investigations if necessary.

Time:

Minimal amount of time required for issuance of the policy statement containing guidelines and standards. (Zero to six months.)

Cost:

No cost -- costs to provide investigative capability were undetermined.

Feasibility:

High (60 to 80 percent).

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[17] Supra note 10, recommendation 21 at p. 78. See generally Appendix 3. Factors in Determining Eligibility, pp. 3-1 - 3-15.

Standard 4.2 MAINTAIN ACCESS TO COUNSEL IN ALL INDIGENT DEFENDANT CASES WHERE THE CRIME OR OFFENSE CHARGED IS PUNISHABLE BY IMPRISONMENT.

Commentary

N. H. Const., Pt. 1, Art. 15 guarantees the right to public representation for all criminal defendants, if the crime or offense charged would result in deprivation of liberty. This right is mandated as a result of Argersinger v. Hamlin, 407 U. S. 25 (1972). The right to public representation as guaranteed by the N. H. Constitution Pt. 1, Art. 15 and as developed in constitutional case law when "necessary for the effective operation of a fair system of criminal justice."[18]

The state of New Hampshire provides access to counsel for all indigent defendants through an assigned counsel and public defender system. Thus, Standard 4.2 ensures continued compliance with the N. H. Constitution and mandate of the U. S. Supreme Court.

This standard is in conformance with existing New Hampshire constitutional provisions and practice. The purpose of its inclusion is to emphasize its importance.

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[18] NAC, supra note 12, Standard 13.1, commentary at p. 253.

Standard 4.3 INSURE AVAILABILITY OF COUNSEL AT EARLIEST STAGE OF CRIMINAL PROCESS (TIME OF ARREST) THROUGH POST-CONVICTION REVIEW.

Commentary

For representation to be truly effective, defense counsel should be provided at the earliest possible stage of the criminal process, since representation during the early stage can "forestall the institution of unfounded proceedings through effective use of the preliminary examination and other screening devices."[19]

In White v. Maryland, 373 U.S. 59 (1963), and Hamilton v. Alabama, 368 U.S. 52 (1961) the Supreme Court held that compliance with the constitution requires that counsel be provided at every critical stage of the proceedings. Although the Court has not held that counsel must be provided at time of arrest, it did rule that statements obtained at the time of arrest cannot be admitted at trial if the accused was not advised of his right to counsel or was not allowed to have or be provided counsel if he so requested (Miranda v. Arizona, 384 U.S. 436, 477-78 (1966)). Further, since release pending trial is decided at these early stages of the process, "the immediate liberty of the accused and his opportunity to assist in the preparation of his defense are at stake; providing counsel at the earliest opportunity increases the prospects of effective defense investigation."[20]

While expression of Miranda warnings is in evidence, uniform procedures as to the provision of counsel upon request are not uniform in New Hampshire.

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19 ABA, supra note 7, §5.1, commentary at p.44.

20 Ibid., p. 45.

In those counties without public defender services, the accused is informed of his right to counsel at the misdemeanor arraignment or felony preliminary hearing.[21] Where there is a public defender, the clerk may notify the defender after the first appearance and appointment is formally made at the probable cause hearing.[22]

Not only is it important for the indigent accused to be represented by counsel at the early stages of the proceedings, it is equally important for complete representation that counsel continue to represent the defendant through all stages of the proceedings.

The defendant's attorney should be present at the latter stages of the process to suggest alternative dispositions and mitigating circumstances to the court.[22]

Representation at the initial stages may create problems if court control of the appointment process[23] is not complete. By the time the need is carefully assessed by the court, the need for counsel has frequently already existed for some time. For this reason, the NLADA has recommended that the public defender or assigned lawyer should be "the initial arbiter of eligibility" through interview and affidavit subject to review by the court and, if ineligibility is determined, immediate appeal to the court by the defendant.[24]

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21 NCSC, supra note 10, pp. 16-17.

22 Ibid., p. 16.

23 ABA, supra note 7, §5.2, commentary at p. 46.

24 Recommended by NCSC, supra note 10.

25 NLADA, supra note 11, Rec. 4.b. at p. 160.

Approach for Implementation

Approach Uniform Procedure for Providing Access to Counsel

Description:

All law enforcement agencies in the state should follow a uniform procedure of securing counsel when a defendant, taken into custody, requests representation. This procedure may include supplying a list of available attorneys to all law enforcement agencies from which a defendant might then select counsel.

Time:

Although this procedure might be effected by an administrative directive, a statutory provision may be necessary to ensure compliance by all law enforcement agencies. Therefore, estimated time to institute this procedure is 6-12 months.

Cost:

Minimal cost anticipated.

Feasibility:

Some objection to the procedure may be anticipated by law enforcement agencies. Therefore, feasibility is estimated at 60-70%.

Standard 4.4 REQUIRE MOTIONS FOR WITHDRAWAL IN WRITING.

Commentary

American Bar Association Canon of Professional Ethics 4 states that counsel "ought not to ask to be excused for any trivial reason" from an appointment to defend a needy person in a criminal case.[26]

Requiring motions for withdrawal as counsel to be presented to the court in writing helps to ensure that counsel is withdrawing only on substantial grounds. Such grounds include serious illness, incapacity to render competent representation and circumstances which would compromise the lawyer's professional integrity. Motions for withdrawal should not be granted because counsel believes his client's case lacks merit or because of "press of business."[27] If motions for withdrawal as counsel are presented to the court in writing, counsel is compelled to articulate the reasons for withdrawal which are then subject to judicial scrutiny. This standard therefore would help protect the rights and interests of the defendant and ensure compliance with Canon 4.

The results of this survey indicate that motions for withdrawal are now required to be presented in writing by Superior Court Rule 13 and District and Municipal Court Rule 1.3D - but reasons are not always required.

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[26]ABA supra note 7, §5.3, commentary at p. 49.

[27]Ibid., p. 50.

Approach for Implementation

Approach Withdrawal of Counsel

Description:

Court rule requiring that motions for withdrawal as counsel be submitted in writing to the presiding judge with the reasons for such withdrawal specifically stated.

Time:

Two to three months may be required to promulgate a rule of court.

Cost:

No cost

Feasibility:

High (80-100%) since many courts now maintain written record of request for withdrawal of counsel.

Standard 4.5 PROVIDE DEFENSE SERVICES TO INDIGENTS THROUGH PUBLIC DEFENDER OR ROTATING ASSIGNED COUNSEL SYSTEMS AS DETERMINED APPROPRIATE BY EACH LOCALITY.

Commentary

The Criminal Justice Act of 1964, 18 U.S.C. §3006A, suggests that counsel be provided in a systematic fashion and not by ad hoc arrangements made by individual judges.[28] Systems in use in the United States can be broadly classified into four major types; public defender systems, private defender, private-public defender and assigned counsel. None of these systems can be singled out as the most effective since all have value when properly organized and administered.

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[28] ABA supra note 7, §1.2 commentary at p. 15.

The important consideration is that defense services are made available to all indigent defendants. New Hampshire employs both the public defender system and assigned counsel. The present systems and their relative merits are discussed in detail in the NCSC report, Defense Services in New Hampshire (1976); however, it is clear that each is suitable for certain areas of the state. Each must be clearly designed and administered. Operation of the assigned counsel segment of the system should follow the outline contained in Standard 4.7.

This standard is in conformance with existing New Hampshire law and practice. The purpose of its inclusion is to emphasize its importance.

Standard 4.6 INCREASE SUPERVISION OF INDIGENT DEFENDANTS DETERMINED TO BE CAPABLE OF REPAYING THE COSTS OF THEIR DEFENSE.

Commentary

Although the likely return on extensive efforts to enforce reimbursement requirements with respect to defendants who receive the assistance of counsel at public expense has been questioned,[29] and there may be constitutional problems with many repayment statutes, NH RSA 604-A:9 (based on lack of notice, enforced payment for services deemed to be required by law, conditioning probation on such payments may be viewed as imprisonment for debt,[30] or invalid waiver made only because of the prospect of enforced repayment[31]). Many of those interviewed

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[29] NLADA, supra note 11, at p. 183. Several defenders indicated that the time expended was likely to exceed the amount recovered by a substantial difference.

[30] See Silverstein, Defense of the Poor in Criminal Cases in American State Courts, Vol. I at Pg. 113-115 (1965); See Also Kamisar & Choper, The Rights to Counsel in Minnesota - Some Field Findings and Legal Policy Observations, 48 Minn. L. Rev. 26 (1963)

[31] ABA, supra note 7, §6.4 commentary at p. 59.

during this survey favored repayment as a device to supplement appropriations for public defense services. The limitations suggested by the draft report of the National Colloquium on the Future of Defense Services[32] offer a basis for a workable reimbursement system.

Reimbursement should be required upon determination by the court that a defendant will be able to pay all or partial costs of representation. Notice that this step may be taken subsequent to trial should be given to the defendant prior to provision of defense services.[33] Execution of recoupment should occur through civil process rather than contempt[34] (failure to pay counsel by indigents may not result in imprisonment).[35] False statements made in connection with a reimbursement determination should be subject to civil suit brought by the prosecution.[36]

RSA 604-A:9 provides for repayment by certain defendants (those whose sentence is unconditional or conditional discharge, or probation). A specific requirement that all defendants receiving assistance of counsel at public expense be responsible for a portion (10%) of the legal fees was held invalid by the New Hampshire Supreme Court.[37] The repayment which may be ordered pursuant to RSA 604-A:9 has seldom been ordered.[38]

In order to operate effectively, reimbursement provisions for New Hampshire courts should include notice and determination of ability to pay. Ex-

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[32] NLADA, supra note 11, Rec. 5, p. 188 et seq.
[33] Ibid., pp. 188-89.
[34] Ibid., p. 190.
[35] Tate v. Short, 401 U. S. 395 (1971).
[36] NLADA, supra note 11, Rec. 5 at pp. 190-91.
[37] Opinion of the Justices, 109 N. H. 508 (1969).
[38] NCSC, supra note 10, at p. 120.

clusion of defendants found not guilty is recommended by the NLADA but there are no indications that this approach is preferred in New Hampshire.[39]

Approach for Implementation

Approach: Collection by Probation Department

Description:

The task force suggested that the Probation Department might be made responsible for collecting and supervising repayment of counsel fees by indigent defendants. It was felt that this responsibility could be an adjunct to duties already performed by probation officers. It was, however, recognized that existing time constraints on probation officers' schedules would present a hardship in many cases and that many jurisdictions already are in need of additional probation personnel. Additionally, it was pointed out that the time effort and costs expended in trying to collect fees may very well outweigh the amount recovered.

Some task force members suggested investigation of the logistics of collection and determination of the feasibility and/or desirability of establishing a formal collection mechanism.

Time:

Undetermined due to need for further investigation.

Cost:

Undetermined due to need for further investigation.

Feasibility:

Undetermined due to need for further investigation.

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[39] NLADA, supra, note 11, Rec. 5 commentary, at p. 191.

Standard 4.7 ESTABLISH SYSTEM FOR APPOINTING COUNSEL TO INSURE ADEQUATE EXPERIENCE IN AREA OF ASSIGNMENT AND PARTICIPATION IN ROTATING ASSIGNED COUNSEL SYSTEM BY ALL QUALIFIED ATTORNEYS.

Commentary

The basis of an effective counsel system is the compilation and maintenance of an up-to-date list of qualified attorneys who are willing to serve as assigned counsel. Primary responsibility for generating this list may logically rest with the public defender (since that office may be in the best position to seek out qualified candidates) or with the state bar association. The trial judge, however, should reserve the right to add qualified attorneys to the list, especially if very specialized skills or experience are required in a particular case. The public defender may also be given responsibility for providing initial information and training to assigned counsel as well as providing investigatory assistance. Records concerning the performance of various attorneys may also be maintained by the public defender.[40]

Alphabetical rotation of attorneys as used in Merrimack County, is one recognized method of minimizing the impact of assignments on any one individual. However, to ensure quality representation the court should retain the right to select an attorney out of rotation if special skills are required:[41]

> In order to avoid the criticisms that the assignments are not made fairly, the administration should establish an equitable plan that will prevent arbitrary assignments, taking into account the need to balance the caseloads of each attorney and to make certain that no lawyer is assigned a disproportionate number of easy or difficult cases. For most assignments, a rotation system will be most convenient and workable.[42]

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[40] NAC, supra note 12. Standard 13.15, commentary at pp. 282-283.

[41] ABA, supra note 7, §2.3, commentary at p. 29.

[42] NLADA, supra note 11, Rec. 6 commentary at p. 253.

In New Hampshire, the most common method of providing counsel in the eight counties without public defender services is to permit the defendant to select an attorney who is then assigned by the court. The accused is informed of the right to counsel at misdemeanor arraignments and felony preliminary hearings. If unable to retain counsel, the court provides the accused with a petition requesting assignment and an affidavit of indigency.[43]

Some District and Municipal courts do not permit the defendant choice of counsel. In these courts, methods of assigning counsel are as follows:

A. Appointments are made from a list of attorneys compiled by the Bar Association - selected in order by the court.

B. Appointments are made from a list of attorneys compiled by the Bar Association - selected at random by the court.

C. Counsel is appointed by the court without reference to a list.

D. The court appoints an attorney who happens to be in court at that time.

E. The court appoints counsel on a rotating basis from a list of volunteers.

In the Superior Court when secret indictments are returned, no preliminary hearings having been held, the justices usually allow, and the defendants usually elect, counsel of their choice unless a public defender is available.

At present, there are approximately 1,350 attorneys (including judges) in New Hampshire. There is no "criminal bar" as such and interviews disclose that although some lawyers are considered skilled criminal practioners, they represent a small percentage of the bar.[44]

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[43] NCSC, supra note 10, pp. 16-17.

[44] Ibid., pp. 16-18.

## Alternative Approaches for Implementation

### Approach #1 Maintain Present Practice

Description:

Although the procedure for appointing counsel varies between jurisdictions, especially at the district and municipal court level, some task force members suggested that the flexibility of the present "system" is desirable and should be retained.

Time:

None

Cost:

None

Feasibility:

100%

### Approach #2 Use of Bar Lists

Description:

Formalize the process of counsel selection and appointment by having county bar associations provide a list of experienced, qualified attorneys by type of proceeding (i.e. criminal, felony, misdemeanor, or civil) from which the defendant would be allowed to select counsel. The court would have discretion to confirm or reject defendant's choice on the basis of qualifications, experience, caseload or other relevant factors.

Time:

A minimum of six months would be required to implement this approach.

Cost:

None

Feasibility:

A rating of 30-60 was assigned this approach as practioners favored less formal mechanisms for assigning counsel.

Standard 4.8 SET MAXIMUM CASELOAD LEVEL FOR INDIVIDUAL PUBLIC DEFENDERS AND ASSIGNED COUNSEL.

Commentary

The purpose of setting maximum caseload levels for individual public defenders and assigned counsel is to achieve greater counsel effectiveness on a case-by-case basis. If over-burdened counsel cannot devote sufficient time to preparing each case, effectiveness may be reduced.

In establishing workload standards, consideration should be given to physical and geographical factors impacting upon caseload capacity, classification of cases and the work associated with each type of case and finally whether or not the unadjusted number of cases is the best indicator or measurement of workload.[45] Regardless of the specific workload standards which might be established, an effective assigned counsel system can serve as a safeguard against an unmanageable caseload.

A recent survey and analysis estimated that 1976 New Hampshire public counsel costs would range from $755,500 to $1,000,000 (mixed system), $688,500 to $727,700 (public defender), $862,000 to $1,254,000 (assigned counsel). The public defender option was estimated as requiring 21 attorneys to handle the entire caseload.[46] In 1976, $242,000 was appropriated by the General Court for indigent representation.[47]

[45] NAC, supra note 12, Standard 13.12 commentary, p. 276.
[46] NCSC, supra note 10, pp. 155-160.
[47] Ibid., p. 22.

Standard 4.9 REQUIRE A WRITTEN WAIVER OF COUNSEL IN ALL COURTS.

Commentary

To ensure and safeguard the defendant's constitutional right to counsel, waivers should not be encouraged, nor accepted, unless careful inquiry has been made by the court. Further, a record of waiver is essential.

"In the absence of a record of offer and waiver, the presumption is that the offer was not made and that there was no waiver." Carnley v. Cochran, 369 U. S. 506, 513-17 (1962); In re Johnson, 53 Cal. Rptr. 1, 4 (Cal. App. 1966).[48]

In Johnson v. Zerbst, 304 U. S. 458, 464 (1938), the Supreme Court held that "every reasonable presumption will be indulged against the waiver of constitutional rights."[49] Therefore, to minimize post-conviction disputes over the matter of waivers, it should be required that waivers be made in writing and entered in the record.

In New Hampshire District and Municipal Courts an election to waive counsel is signified by completion of Form AC 017, pursuant to District and Municipal Court Criminal Rule 2.9. See State v. Clough, 115 N.H. 7 (1975).

As added protection, Rule 2.9 also requires the judge to certify in writing that the defendant has been informed of his right to counsel prior to accepting the written waiver of that right.

In Superior Court, the defendant is advised of the right to counsel; however, a form is not completed. Consideration should be given to supplementing the verbatim record with a written waiver. See Boykin v. Alabama, 395 U.S. 238 (1969) and State v. Maxwell, 115 N.H. 363 (1975).

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[48] ABA, supra note 7, §7.2 commentary at p. 65.

[49] Ibid., p. 65.

Approach for Implementation

Approach Standard Waiver of Counsel Forms

Description:

The present waiver of counsel form should be revised so as to be uniform for both the Superior and District courts. Further, the information requested on the present form should be expanded to include the minimum/maximum sentence. Responsibility for revision should rest with the Administrative Committee of the District and Municipal Courts and the Superior Court.

Time:

Minimal (0-6 mos.) necessary to revise and print form. Additionally, a court rule should be promulgated to require a written waiver of counsel at both the District and Superior court levels.

Cost:

Virtually no cost for modification, printing and distribution.

Feasibility:

High (80-100%) since a form already exists at District Court level. Further, the practice was deemed desirable and easily implemented by the task force members.

Standard 4.10 INSULATE PUBLIC DEFENDER SYSTEM FROM POLITICAL CONTROL.

Commentary

The public defender system should be free from political control or influence to ensure professional independence and to guarantee "the integrity of the relationship between lawyer and client."[50]

The American Bar Association further recommends that ultimate authority and responsibility for the operation of the public defender and assigned counsel system be placed with a board of trustees. The board, although impowered to establish general operational policy, should be "precluded from interfering in the conduct of particular cases."[51]

Membership of the board should be comprised of individuals who understand the needs and problems of the lawyer's professional function and responsibility. Prosecutors and judges might be excluded from membership to preclude any potential appearances of collusion. The recent study prepared by the NLADA described several alternative administrative structures for mixed systems. These include separate entities (for defender and assigned counsel administration), administration of the assigned counsel panel by the defender, a single entity directing both, and utilization of a defender system from adjacent counties in conflict instances.[52]

In New Hampshire the Hillsborough County Public Defenders Office is supervised by a board consisting of three members of the county bar in conjunction with the Board of Directors of the New Hampshire Legal Assistance Corporation. The Merrimack County defender project is supervised by the New Hampshire Legal Assistance Corporation.

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50 ABA, supra note 7, §1.4, p. 19.

51 Ibid.

52 NLADA, supra note 11, at pp. 233-234.

Note:

There is no evidence that the present supervisory structure of the public defender's office is subject to political control. It may be desirable, however, for these boards to have lay representation as an additional safeguard against political control or accusations thereof.

Standard 4.11 RECOGNIZE EXPANDED ROLE OF COUNSEL IN JUVENILE PROCEEDINGS AND ASSURE ASSISTANCE OF COUNSEL FAMILIAR WITH JUVENILE PROCESS.

Commentary

There is little disagreement that the purpose of the juvenile justice system is to help children who are in trouble and to protect society. However, the intent and nature of the system, under the parens patriae doctrine, has recently been re-examined by the courts and others in light of due process requirements as set forth by the Fourteenth Amendment.

The 1967 Supreme Court decision, In re Gault, 387 U.S. 1, "cut to the heart of the matter by discrediting the parens patriae justification for denying a minor of the right, inter alia, to counsel in a delinquency hearing."[53] The Gault decision, while addressing only the adjudicatory stage of a delinquency proceeding, did offer the rationale for expanding the juvenile's right to counsel during all stages of the proceedings, including pre-hearing and dispositional phases. Earlier the New Hampshire Supreme Court held that counsel for a minor or parent must be permitted to attend juvenile hearings. In re Paulin, 100 N.H. 458 (1957).

[53] NLADA, supra note 11, at pp. 28-29.

The trend therefore is to "expand the availability of the right to counsel in all areas of Juvenile Court proceedings, both to the minor in non-delinquency cases and to the parents in cases in which parental rights are likely to be substantially affected or impaired."[54] Further, the right to court-appointed counsel for indigent parents in neglect or dependency cases involving temporary custody or termination of parental rights, has been upheld in numerous court decisions.[55]

As discussed in the introduction to this section, the issue of providing effective counsel to defendants has been noted in Glasser v. United States, 315 U.S. 60 (1941); White v. Ragen, 324 U.S. 760 (1944) and McMann v. Richardson, 397 U.S. 759 (1970). The responsibilities of defense counsel, particularly as applies to the adjudicatory hearing in delinquency cases include functioning as an advocate for the juvenile, ensuring the juvenile of all rights given a defendant in an adult criminal proceeding, and protecting the wishes of the juvenile should his wishes differ from his parents.[56]

RSA 604-A:1 provides for "adequate representation for indigent defendants ... or any juvenile charged with being delinquent in any court of this state." In addition, RSA 604-A:1-a states that "in cases involving neglected or abused children, legal representation for the children shall be provided."

[54] Ibid., p. 35.

[55] Danforth v. State Department of Health and Welfare, (Maine) 303 A.2d 794 (1973), C. v. Supreme Court for the County of Sacramento, 106 Cal. Rptr., 123 (1973), In re Welfare of Myricks, (Washington) 533 P.2d 841 (1975), Cleaver v. Wilcox, 499 F.2d 940 (9 Cir. 1974).

[56] NAC, supra note 12, Standard 11.4 at p. 301.

## SUGGESTED ALTERNATIVES FOR IMPLEMENTATION

Standard 4.11 is closely allied with Standard 4.7 which addresses the issue of providing all eligible defendants with experienced qualified counsel. An improved assigned counsel system with emphasis on providing experienced counsel to juveniles at each critical stage of the juvenile proceeding would go far to satisfy the requirements of this standard.

Standard 4.12 MAINTAIN PROVISION OF COUNSEL TO INDIGENTS IN INVOLUNTARY COMMITMENT AND SEXUAL PSYCHOPATH HEARINGS.

Commentary

"The Supreme Court has not directly assessed the constitutional requirements of free legal counsel for indigents in civil mental commitment proceedings. Several opinions, however, offer potent reasons to believe that such right is a fundamental aspect of due process to be applied on a per se basis as in criminal proceedings under Gideon and Argersinger."[57]

In cases involving civil mental commitments, the deprivation of liberty which often results may be obscured by the term "civil". The Supreme Court, in Specht v. Patterson, 386 U. S. 605 (1967) stated that "commitment proceedings denominated civil or criminal, are subject both to the equal protection clause of the Fourteenth Amendment ... and to the due process clause."[58]

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[57] NLADA supra note 11 p. 15.

[58] Ibid.

It has been estimated that in 1961 over 250,000 people were committed to mental institutions. This number represented three times as many persons as were sentenced to state or federal prisons that year.[59] Since commitment inevitably results in a loss of liberty and since commitment proceedings are adversarial in nature, these statistics suggest that the rights of those facing involuntary commitment be protected by the presence of effective counsel at the proceedings.

SUGGESTED ALTERNATIVES FOR IMPLEMENTATION

This standard is in conformance with existing New Hampshire practice and statutory provisions such as RSA 135:30-a and 135-B:5.6 and 35. It has been included to emphasize its importance and to ensure continued compliance.

Standard 4.13 PROVIDE DEFENSE SERVICES FOR INDIGENTS IN CIVIL CASES.

Commentary

There is wide disparity between state statutes as to which types of cases require representation and at which stages of the proceedings counsel is provided. While many states have yet to fully implement the United States Supreme Court decisions specifying rights to counsel in criminal cases, such as Argersinger, others provide counsel even in strictly civil proceedings.[60]

Several state statutes specify in succinct terms the types of cases for which counsel may be provided while others provide broad discretion to the defender as to what types of cases may be considered. For example, South Dakota provides, by statute, counsel for restraint of liberty whether the proceeding is criminal or civil.

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[59] The Right to Counsel at Civil Competency Proceedings, 40 Temple L. Q. 381 (1967).

[60] NLADA, supra note 11, p.54.

It is important to look beyond the label given to a proceeding and recognize those factors which make the provision of counsel to defendants essential to the effective operation of our justice system. These factors include provision of counsel in proceedings in which the culpability of an individual is determined as a prerequisite to government action and when loss of liberty or legal disability may be imposed by government. Further, it has been asserted that the indigent defendant seeking avoidance or redress from the deprivation of any right guaranteed by law should similarly be provided counsel. Consideration of these factors goes beyond the labels of civil or criminal which may identify a court proceeding.[61]

In addition, for our adversary system of justice to function, skilled advocacy for all competing interests is required. Although judges seek fair answers to the problems present, they cannot investigate the claims of the plaintiff nor assert claims not advanced by the defense. Thus, even in civil cases, counsel for indigent defendants is essential to ensure due process and access to justice for all persons.[62]

The United States Supreme Court has indicated that a guarantee of access through provision of counsel might be applied to proceedings that deal with rights considered to be "fundamental" although no such determination has been

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[61] Ibid., p.68.

[62] R. McKay & J. Kirklin, Legal Aid to Poor in Civil Cases -- Why Not?, 176 N. Y. L. J. No. 16 (July 23, 1976), p. 1. Compare Boddie v. Conn., 401 U.S. 371 (1971) (State court cannot deny indigents access to divorce courts) with United States v. Kras, 409 U.S. 434 (1973) (denial of access to bankruptcy court upheld because of existence of other remedies).

made.[63] Whether or not the courts require representation in these instances, New Hampshire should assess whether the provision of counsel is desirable in itself. "A general right to counsel can, and perhaps should, be tempered by denying government aid in those cases that can be handled on a contingent fee basis."[64]

Recently, it was estimated that 70 percent of the American people do not or cannot obtain legal services needed.[65] To meet this need about 5,000 plans have been organized to provide these services, usually for civil legal matters, at a relatively low annual fee or premium ranging from $6 to $180.[66] Most plans fall into one of four types: (1) open panel, where for an annual fee, access is obtained to a lawyer of one's choice who is paid by the plan; (2) insured open panel, same as the first type, except that it is organized on an insurance (premium) basis, with no services provided unless needed; (3) closed panel, which is a plan organized by an organization, e.g., a labor union, providing (without fee) legal services through a group of selected or retained participating attorneys; and (4) consumer-sponsored plan, in which an office

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[63] J. Mandell, The Emerging Right of Legal Assistance for The Indigent in Civil Proceedings, 9 U. Mich. J. of L. Reform 554, 570 (1976), see also Douglas, "Statutory Authorization for Attorney's Fees in N. H.," 17 N.H. Bar J. 205 (1976).

[64] Ibid., p. 568.

[65] J. Kenna, Prepaid Legal Services, Ethical Codes, and The Snares of Antitrust, 26 Syr. L. Rev. 754 (1975).

[66] Ibid.

provides services for members or customers at clearly-specified fees.[67]

There has been significant resistance to prepaid legal plans by some of the organized bars which have sought to regulate the plans, with particular emphasis on limiting the closed-panel plan. And although the labor laws have been amended to make legal insurance a permissible subject of collective bargaining,[68] pending efforts are directed at revamping the tax code to exclude legal services rendered from definition as income to a recipient. A final problem facing the plans is public knowledge of how they operate, again pitting the plans against the bar, which until recently has severely restricted advertising. "The major obstacle...is lack of public interest in plans, usually referred to as lack of 'consumer awareness'," writes an opponent.[69]

Nevertheless, as was the case with public medical insurance "medicare," which was organized over the opposition of the medical profession, prepaid legal insurance is not likely either to go away or to be unduly restricted because of bar opposition. The United States Supreme Court has, in several decisions, upheld the concept, including most recently, the closed panel plan.[70] A recent commentator observes, "Unequal restriction on the operation of different plans, if not absolutely necessary for protection of the public or the profession, will likely lead to antitrust violations, as will supplier control of prices and market forces."[71]

Once the legal status of prepaid plans is clarified, it is likely that they will become the most effective way of providing legal services to middle-income persons, who can neither qualify for aid as indigents nor afford

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[67] H. Pitts, Current Trends in Prepaid Legal Services, 11 Forum 18 (1975) at 24.

[68] P. L. 93-95, amending Section 302 of the Labor Management Relations Act of 1947 ("Taft-Hartley" law). See also, Goldfarb v. Virginia State Bar 421 U.S. 773 (1975).

[69] Pitts, supra note 67 at 25.

[70] United Transportation Union v. State Bar, 401 U. S. 576, 580 (1971). Later decisions have indicated that bar restraints on fee-setting, and perhaps advertising, may not be permitted.

[71] Kenna, supra note 64, at 783.

to retain counsel for any other than the most critical legal needs. Whatever plans are initiated in New Hampshire, it appears certain that in order to reach middle-income users, prepaid legal insurance must be organized.

Approach to Implementation

Approach — Encourage use of prepaid legal insurance through court approval and bar initiative

Description:

The Supreme Court should adopt rules affirming that prepaid legal insurance does not violate professional conduct provisions. The New Hampshire Bar Association can take the lead in organizing plans in areas of the state most in need of this service.

Time:

A rule can be adopted within six months. A plan could be launched readily once enough attorneys are organized for this purpose.

Cost:

These plans are designed to be self-financing.

Feasibility:

Changing bar attitudes in many areas have spurred growth of these plans. Once counsel recognize that the need exists and the economics are viable, these plans should flourish. The N. H. Bar Association currently has a "Prepaid Legal Services Plans Committee" and a "Judicare Committee" working on implementing some of the concepts discussed in this standard.

Standard 4.14 ESTABLISH ADEQUATE COMPENSATION FOR ASSIGNED COUNSEL IN INDIGENT CASES, INCLUDING SPECIFIED RATES, DETERMINED BY THE DIFFICULTY OF THE CASE, AND A FINANCING SYSTEM.

Commentary

A wide variety of methods exists for compensating assigned counsel. In some jurisdictions a flat amount per case has been established by statute while in other jurisdictions the court has been given discretion to establish the amount of compensation, usually, within limits governed by statute.[72]

Proponents of court-established fee systems suggest that the court can best determine the true value of services based upon the complexity and type of case in question. However, critics of this system point to the greater risk of inequality of compensation. In any compensation system, it is most important that resources be distributed equitably to satisfy the requirements of counsel as well as to maintain public confidence that financial resources are being used in the most effective manner.

The ABA suggests that these goals can be met by requiring the court to set the fee based upon an hourly rate, within minimum and maximum limits established by the legislature. The fees would be awarded on the basis of time and services necessarily performed. This procedure would thus be consistent with the method of calculating legal fees of privately retained counsel. The

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[72] ABA, supra note 7, §2.4, commentary at p. 30-31.

court, however, would be given some discretion to determine fees depending upon the nature of the case and services rendered (RSA 604-A:5 and 6).

New Hampshire attorneys and judges generally agree that present hourly compensation rates are too low. Chart A below reflects New Hampshire's present rates of compensation as compared to the provisions of the Federal Criminal Justice Act.[73]

| Category | New Hampshire | Federal Crim. Justice Act |
|---|---|---|
| Hourly Rate * | | |
| A. Preparation | $10 | $20 (plus expenses) |
| B. Court Time | $15 | $30 |
| Type of Case | | |
| A. Felony ** | $500 (max) *** | $1,000 (max) |
| B. Misdemeanor | $200 (max) | $400 (max) |
| C. Juvenile | $100 (max) | N/A |
| Post Trial Appeals | Same hourly rate as for preparation and court time | Provides for $1,000 for appeals and $250 for each proceeding in post-trial, probation revocation and other such matters. |

* Expenses are considered in addition to these rates.

** Capital cases or penalty in excess of 25 years, $500 maximum -- each of 2 attorneys assigned -- total $1,000. (Pursuant to N.H. R.S.A. 604-A:5 and 6 the court may in extraordinary circumstances authorize payments in excess of this limit.)

***Maximums set for District Court are $175-Felony, $100-Misdemeanor and $50-Juvenile.

[73]Federal Criminal Justice Act (18 USCA §3006A).

Approach for Implementation

Approach Increased Compensation Rates

Description:

Legislation should be introduced to increase present assigned counsel compensation rates to a flat rate of $25.00/hour with no distinction made between court time and preparation time. Additionally, the maximum rate/type of case should be increased to correspond to the levels established by the Federal Criminal Justice Act. The rate for juvenile cases should not be lower than for adult misdemeanor cases. Additionally, a rate should be established to cover costs associated with the appeal process and other post-sentence activities.

Time:

Six to twelve months would be required to draft and enact legislation.

Cost:

It is estimated that the cost would approximate $150-$200,000.

Feasibility:

Low (0 - 30%)-- task force felt the legislature would be opposed; i.e., "another lawyer bill"; however, the importance of this change is generally recognized.

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# 5.0 GRAND JURY

## Introduction

Controversy concerning the role of the grand jury centers on how well the grand jury has fulfilled the purpose of protecting innocent persons from unfounded prosecution by serving as an impartial buffer to mis-use of prosecutorial power. Critics contend that the grand jury has failed to filter insubstantial cases out of the criminal process and has instead impeded attainment of prompt and impartial justice.

In particular, it is asserted that the grand jury causes unnecessary delays in case processing; duplication of accusatory function occurs in many jurisdictions where constitutional or statutory law requires indictments in all felony cases in addition to informations* and probable cause proceedings. Further, grand juries, which have extensive subpoena power and operate in secrecy, have been accused of serving as prosecutorial adjuncts; the grand jury serves as a more powerful and expeditious tool. Finally, operation of grand juries involves significant expenditures of time and resources.

While critics call for reform, few favor abolition of the grand jury. This is likely the result of a basic disagreement regarding the purpose of grand juries. Many view the buffer function against arbitrary or unfounded prosecution as too limiting since grand juries at both the federal and state levels may exercise investigative powers and often express community sentiment regarding the enforcement of laws under particular circumstances. These powers are considered by many to be of equal or greater importance than the evidence-sufficiency evaluation role commonly

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*Information: a formal accusation of crime which differs from an indictment in that it is returned by a prosecutor instead of a grand jury and is for misdemeanors only in New Hampshire (RSA 601:1).

associated with the grand jury system.

If the expectations of both critics and supporters of the grand jury concept were consolidated, the grand jury could be characterized as a neutral, protective and impartial agent protecting the innocent from unjust prosecution by serving as a buffer between the state and the individual. Members of the grand jury would be knowledgeable regarding their duties and responsibilities. They would no longer serve as a "rubber stamp" for the prosecution. The grand jury would be expected to provide a forum from which the average citizen could affect governmental policy by excercising the grand jury's investigative, quasi-legislative and "watch dog" powers. In addition, it would be a catalyst for reform through its ability to combat corruption in government, and would protect those identified with unpopular causes from improper or politically-inspired charges, and would itself refrain from serving as a "star chamber" secret interrogation aide to ambitious prosecutors who seek leads rather than indictments.

The extent to which the grand jury system today satisfies these idealized goals can best be determined by briefly examining its origin and subsequent development.

The grand jury as known today (see RSA 600) originated in 1166 at the Assizes of Clarendon, England.[1] King Henry II, in an effort to centralize the administration of justice and acquire local knowledge of criminal activity, organized "twelve of the more lawful men of the hundred" to make a sworn presentment of all felons. Contrary then to today's popularly-held belief, the original purpose of the grand jury was not to serve a

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[1] B. Schneider, The Grand Jury: Powers, Procedures and Problems, 9 Colum. J. of L. & Soc. Probs. 682 (1973).

protective function; rather, it served as an investigative body. (See e.g., Powell v. Pappagianis, 108 N. H. 523 (1968)). Its protective function, its tradition of secrecy and its independence as a safeguard against improper governmental prosecution developed as a result of the actions of grand juries during the political prosecutions of the Stuart period in the 1600s.[2]

The concept that the grand jury should serve a protective function was brought to this country and can be found embodied in the Fifth Amendment: "a person should not be placed in jeopardy of a felony prosecution unless a body of citizens finds it probable that he committed the offense charged."[3] State constitutions also adopted this posture as is evidenced by the fact that today, twenty state constitutions, including New Hampshire's require that felonies "be prosecuted solely on the basis of grand jury indictments".[4]

The United States Supreme Court, however, has held that indictment by a grand jury is not necessary for due process of law under the Fourteenth Amendment.[5] Several states began to use informations as the accusatory procedure, obviating the need for indictment by the grand jury. Supporters of informations and critics of the grand jury system see this process as a useful alternative to indictment by a grand jury and contend that it is a less cumbersome, more expedient and less costly method of initiating prosecution. While the information issues directly from the prosecutor,

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[2] Ibid., p. 682.

[3] U. S. Const., Amend. V.

[4] Ibid., p. 683, see N. H. Const., Pt. I, Art. 15. as construed in State v. Canatella, 96 N.H. 202 (1950).

[5] Hurtado v. California, 110 U. S. 516 (1884).

affording the accused no buffer, it also eliminates the prosecutor's ability to use grand jury sessions to interrogate the accused without a defense lawyer present.

In summary, controversy regarding the grand jury system at both the federal and state level is considerable. In part, this uncertainty is caused by evolutionary and developmental processes which have occurred within the institution itself and within the criminal justice system as a whole.

While some revision appears warranted, few advocate abolishing the system. The problems associated with the operations of grand juries are not surmountable and can be identified and resolved.[6] Most often, these problems may be resolved by providing knowledgeable and impartial jurors, who understand their duties and responsibilities and are therefore in the best position to carry out the investigative and protective functions with which they have been charged.

Standard 5.1 PERSONS SELECTED FOR GRAND JURY DUTY WILL RECEIVE THOROUGH ORIENTATION BY THE COURT. JURORS WILL BE INFORMED OF THEIR DUTIES AND RESPONSIBILITIES, COURT PROCEDURES AND LEGAL TERMINOLOGY.

Commentary

The majority of individuals selected for grand jury service have had little or no previous experience with the formal criminal justice system. Few individuals are knowledgeable regarding the function of the grand jury, its purposes, procedures and role in the criminal justice process. It is,

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[6] For a recent examination of the grand jury with extensive analysis, see M. E. Frankel & G. P. Naftalis, The Grand Jury: An Institution on Trial. 58 New Leader (Nov. 10, 1975), p. 3.

therefore, unrealistic to expect such persons to perform efficiently, effectively or, in many cases, impartially when called to serve unless they receive thorough orientation and instruction from the court. It is essential to the overall success of the grand jury function that jurors clearly understand their duties and responsibilities as well as courtroom procedure and frequently-used legal terminology.

Knowledgeable grand jurors increase the probability of impartial action in protecting the innocent from unjust prosecution or misuse of the grand jury's power by the prosecutor. In addition, knowledgeable jurors are less likely to be misled or prejudiced and are better equipped to serve as a democratizing and protective agent of the people.

The orientation process for grand jurors in New Hampshire consists of oral instructions given by the judge regarding juror duties, responsibilities, courtroom procedure and legal terminology. At the present time no written instructions are provided to jurors.

In a questionnaire to former members of the grand jury, jurors were asked to comment upon the orientation process and more specifically, on the clarity of instructions regarding their duties, responsibilities and role as members of the jury. Forty percent responded that they had a very clear understanding of their duties, while 60 percent felt that their duties became sufficiently clear following the orientation process. The jurors considered the orientation process adequate in providing a clear understanding of their role in the grand jury process.

Grand jurors, as well as Superior Court justices, were asked to comment upon the length of time devoted to juror orientation. Most jurors (60 percent) estimated that one to two hours were devoted to

orientation. Their estimate was further substantiated by Superior Court justices, eight of whom also estimated the length of orientation to one to two hours.

Jurors were also asked to comment regarding the amount of time provided for reviewing each case. In addition, they were asked if the allotted time was sufficient to review each case. Nearly all respondents expressed the feeling that adequate time had been given to review each case. Seventy percent estimated the average time of review to be 15 minutes or less.

Information received from the Hillsborough County prosecutor's office indicates that on an average, 150 to 200 cases are presented to the Hillsborough County Grand Jury at any given sitting. It was further stated that the jury usually sits for two days. Assuming that two full eight hour days are devoted to reviewing cases, the average time allotted for review of each case would, in this instance, be 6.4 minutes. A question, therefore, arises as to whether or not this is adequate time for review. Further, the overwhelming majority of county prosecutors (87 percent) as well as grand jurors (66 percent) estimated that over 95 percent of cases brought to the grand jury result in indictments. In light of this estimate, it appears that grand juries in New Hampshire often serve as a "rubber stamp" for the prosecution.

Alternative Approaches to Implementation

Approach #1 Juror Handbook

Description:

A grand juror handbook, similar to the petit jury handbook prepared by the Superior Court, should state in simple, concise terms the responsibilities, duties and function of grand jurors. The handbook would provide a brief historical

the jurors for service. The handbook should be mailed to jurors prior to the convening of the grand jury.

Time:

Estimated time to develop, print and distribute handbook is eight to twelve months.

Cost:

Approximately $12,000, depending upon scope and nature of the handbook.

Feasibility:

High (80 to 100 percent) -- should receive little or no opposition -- generally beneficial to entire system.

Approach #2 Uniform Instructions by Judges

Description:

The Superior Court should promulgate uniform written instructions for judges to use when instructing the jurors, particularly as to how instructions relate to juror duties, responsibilities, functions in court procedure. These instructions should be used by all judges to ensure that all relevant information is given to jurors in a uniform and consistent manner. Task force members expressed the concern that some judges fail to instruct the grand jury properly.

Time:

Estimated time to develop and print instructions is less than six months.

Cost:

Minimal -- less than $1,000.

Feasibility:

High -- no opposition to this practice was anticipated.

Standard 5.2 GRAND JURIES SHOULD, AT THE DISCRETION OF THE COURT, BE SUBJECT TO RECALL UNTIL SUCH TIME AS A NEW GRAND JURY IS EMPANELLED AT THE NEXT TERM OF COURT, OR IN THE ALTERNATIVE, VENUE SHOULD BE SHIFTED TO AN ADJACENT COUNTY WHERE A GRAND JURY IS AVAILABLE WHEN SPEEDY TRIAL IS DEMANDED.

Commentary

A major criticism of the grand jury system is the unnecessary delay it causes in processing criminal cases. Refer to Standard 11.1, Speedy Trial, for a discussion of the extent of delay. This stems from the fact that individuals arrested while the grand jury is not sitting are often incarcerated (or released on bail) until a new grand jury is impanelled at the next term of court. In those areas of the state in which the grand jury convenes semi-annually, delays of four to six months have been experienced. It is especially desirable in instances of incarceration to reduce the time between arrest and indictment by empowering the court to recall grand juries at any time prior to the new term of court. This practice helps to ensure fair and equitable treatment of the accused.

Provision for recall of grand jurors results in additional benefits in that (1) the volume of cases faced by new grand jurors can be reduced; (2) the volume of cases are more evenly distributed between the incoming and outgoing juries; and (3) the reduction of caseload volume results in additional time for each individual case, therefore, increasing the probability of a more thorough and impartial hearing.

In New Hampshire, the court is by statute (R.S.A. 500-A:6) empowered to recall the grand jury at any time during the term of court. In larger counties, e.g. Hillsborough, the jury sits every two (2) months, while in smaller counties, i.e. Coos, Carroll, the time between sittings may extend to six months or more.

Since it is especially desirable in instances of incarceration to minimize the amount of time between arrest (resulting in incarceration) and indictment, consideration should be given to reducing this period of time, especially in the smaller counties where caseloads are lighter and sittings are less frequent.

At present recall of the grand jury is an infrequent occurrence. The volume of cases presented to jurors at each sitting could be reduced, and in turn the time allotted to review each case increased by more frequent sittings. In addition, persons incarcerated after arrest would be treated more fairly by reducing the time between arrest and indictment. Current provisions permitting waiver of indictment do not fulfill the same function as greater availability of the grand jury. (See R.S.A. 601:2.)

Alternative Approaches for Implementation

Approach #1 Petition by Defendant

Description:

It was suggested that the grand jury could be made subject to recall upon petition by the defendant to the presiding judge for that county.

Time:

Legislative action required (six to twelve months).

Cost:

The estimated cost is minimal.

Feasibility:

Low feasibility for this approach is primarily due to frequency at which jury might be subject to recall, burden on jurors and adverse reaction by judges.

Approach #2 Petition by Defendant for Change of Venue

Description:

Defendant would petition the court (as described in Approach #1) with a request for change of venue.

Time:

Legislation would be required, thus it was estimated that at least one year would be needed to implement this alternative.

Cost:

Estimated at between $50,000 - $100,000.

Feasibility:

Low (0 - 30 percent) due primarily to financial considerations and complications which would exist at the county level when transferring cases between jurisdictions and/or reconvening juries.

Approach #3 State Grand Jury

Description:

Establish one grand jury for entire state located in Concord. Jurors would be drawn from throughout the state.

Time:

Undetermined.

Cost:

Undetermined.

Feasibility:

Given the likelihood of constitutional problems arising, this approach requires greater scrutiny before it can be considered.

Approach #4 Monthly Grand Jury Sessions

Description:

It was suggested that the grand jury meet on a regularly scheduled basis each month. This would not only avoid prolonged incarceration of defendants but would also permit more time for jurors to review each case. It was felt that the smoothing effect on caseload by more frequent sittings would enhance the impartiality and fairness of the grand jury system.

Time:

This approach would require legislation or a rule of court. Therefore, time for implementation was estimated to be six to twelve months.

Cost:

Less than $50,000; it was not anticipated that a substantial increase in cost would be incurred since, although the jurors would sit more frequently, the sitting would be shortened. There would be some increase in cost for transportation.

Feasibility:

Considered good (60 to 80 percent) -- provision now exists for recalling the grand jury at any time during the term of court. It was felt that jurors would find it more desirable from a personal planning standpoint to sit one day each month rather than for perhaps three days at the beginning of the term.

Standard 5.3 GRAND JURY SERVICE SHOULD BE LIMITED TO THE TERM OF COURT FOR WHICH THAT GRAND JURY HAS BEEN IMPANELED.

Commentary

Since a primary responsibility of the grand jury is to serve as a buffer against the misuse of the power to prosecute, it is essential for members of the jury to act impartially in rendering indictments. Impartial action by a grand jury is largely a function of (1) minimization of personal biases and prejudices of individual jury members; (2) the extent to which jurors are knowledgeable regarding their duties, responsibilities, powers and limitations (Standard 7.1 infra); and (3) the willingness and ability of jurors to be objective when considering evidence and handing down indictments. The latter is greatly influenced by the demands placed upon the individual called to jury duty. To prevent jurors from becoming callous or unfeeling and to maintain juror interest and enthusiasm, it is important to limit the time required for service. A more positive attitude and more enlightened perspective can result from minimizing the disruptive effect juror service may have upon the personal lives of jurors.

The term of grand jury service in New Hampshire is limited to thirty days (R.S.A. 500-A:6-a). Such limitation of service helps to reduce the demands placed upon individual jurors, thus minimizing the disruptive effect jury duty may have upon individuals called to serve.

To gain some insight into juror attitudes, former members of the grand jury were asked to comment upon any individual hardship caused by jury duty. Thirty percent identified time as a hardship while only ten percent felt

that it was not. In addition, 33 percent thought that increased compensation would have a positive effect on juror attitude. Overall, the juror attitude toward service was positive.

Approach for Implementation

Approach: Limitation of Service

Description:

Although N. H. R.S.A. 500-A:6-a provides that a juror "shall not be required to serve a term longer than thirty days"... it does not specifically prohibit a grand juror from serving for more than one term of court. It may therefore be desirable to amend this statute to specifically limit grand jury service to one term of court while maintaining the six year limitation on eligibility (RSA 500-A:10).

Time:

Legislation required (six to twelve months).

Cost:

None

Feasibility:

High (80 to 90 percent) given that only a simple modification of existing law is required.

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# 6.0 PLEA BARGAINING

## Introduction

The troublesome practice of plea bargaining in criminal cases has attracted increased attention as public concern over congestion in the nation's courts has escalated, in particular as congestion is perceived as resulting in release of defendants who might otherwise be imprisoned. The United States Supreme Court, after reviewing a series of challenges to the constitutionality of existing practices on accepting waivers by defendants at arraignment, articulated minimum constitutional standards for waivers.[1] Each of the waiver cases reflected an overall concern regarding the defendant's awareness of plea bargaining, since the arraignment waiver occurs at the point when many defendants are least familiar with the formal criminal process.

Efforts to standardize the process have begun with arraignment, progressing in two stages. First, arraignment proceedings in many jurisdictions have been revised to comply with the Supreme Court requirements for a knowing, intelligent and voluntary waiver. Second, some states are now considering or implementing recommendations of major law reform institutions specifically directed at plea bargaining which extend beyond Supreme Court dictates. These changes center on: 1) making the plea bargain a visible part of the arraignment record and 2) limiting or standardizing the judge's involvement.[2] The National

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[1] Boykin v. Alabama, 395 U. S. 238 (1969) and McCarthy v. United States, 394 U.S. 459 (1969) mandated intelligent and voluntary pleas. Santobello v. New York, 404 U.S. 257 (1971) required performance of a promise to recommend a plea, or alternatively, permitted withdrawal. Plea bargaining was validated through three further cases: Brady v. United States, 397 U.S. 742 (1970) (plea not involuntary when made in response to assurance of leniency); McMann v. Richardson, 397 U.S. 759 (1970) (plea valid even if attorney's advice erroneous); and North Carolina v. Alfred, 400 U.S. 24 (1970) (plea valid when defendant represented by counsel continued to assert innocence).

[2] See ABA, Standards Relating to Pleas of Guilty (1968), §1.7 at p. 34 (record of proceedings) and §3.3 at p. 1-2 (Approved Draft) (trial judge's responsibility).

Advisory Commission on Criminal Justice Standards and Goals, in what it said "may be the most far-reaching [standard] in the entire Courts Report," recommended abolition of plea bargaining by 1978.[3] Recommendations have even been developed to reduce the court dependence on plea bargaining and to effect modifications to control bargaining at stages prior to arraignment.[4]

Plea bargaining plays the substantial role it does in the criminal justice system because it permits cases to be disposed speedily with a lesser drain on the state's resources than provision of a complete trial in all cases would involve. Certainly it also serves the interests of defendants in gaining immediate or early release. If the practice ceased, many courts could not dispose of caseloads with anything resembling promptness, given their present staffing and resources. Although plea bargaining may result in less severe dispositions, it does impose pressure on a defendant to bargain, thus making it more difficult for defendants to insist on innocence. Access to the benefits of plea bargaining is heavily colored by the availability, competence and experience of defense counsel, the importance of defendant's case, and the prosecutor's daily caseload. Expeditious case processing, which led to widespread acceptance of plea bargaining originally, has exacted a high cost in criminal justice, paid for in public cynicism toward the system and embittered defendants who view themselves as poorly treated. Prosecutors also dislike the

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[3] Courts (1973), Standard 3.1 at p. 46. The Commission acted contrary to the recommendation of its Courts Task Force and was not unanimous. Ibid., pp. 48-49, 319.

[4] In one state, in order to prevent collapse of criminal calendars caused by last-minute plea bargaining, newly promulgated standards will require all bargains to be made by a certain date prior to trial. This reflects the National Advisory Commission, Courts, Standard 3.4 (at p. 54) "Time Limit on Plea Negotiations."

system, since they are frequently forced to retain only the strongest possible cases for trial and must allow defendants to obtain what can prove to be light sentences purely because of the overwhelming caseload.[5]

If plea bargaining is to be retained -- and, faced with the alternative of chaos without the tool, most prosecutors and judges would retain it -- changes may eliminate some abuses while permitting efficient use of the process. The arraignment inquiry into waiver should insure that a defendant is aware of the outcomes which might result from proceeding to trial instead of accepting an offer provided by the plea bargaining process. All defendants similarly situated should be able to expect similar treatment, regardless of their plea bargaining opportunities. The court's role should be limited to avoid the appearance of either prejudgment or undue influence; at the same time, both defendant and prosecutor are entitled to some certainty in knowing whether the court will accept the final negotiated agreement. The entire process should be conducted as openly as possible. Finally, steps should be taken to reduce, in every way possible, the dependence of the court system on plea bargaining as a means of reducing court congestion.

The bargained disposition of cases is a logical attribute of a legal system which, despite emphasis on the adversary process, depends for efficient operations on the practice of settling cases out of court.[6] The pressure to negotiate is great in criminal cases. Negotiation can prove useful if not

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[5]A recent novel explored what could occur if a prosecutor refused to engage in plea bargaining. J. Mills, One Just Man (N.Y.: Simon and Schuster, 1974).

[6]On the civil side, few object to provision of at least one formal occasion where settlement is broached, e.g., a pre-trial conference. See discussion contained in Standard Area 7.0 infra.

attractive to prosecutors because successful bargaining can boost both the rate of conviction and rate of disposition achieved. The parties arrive at an agreement in an atmosphere that is adversary in nature but lacks the control element of a neutral magistrate. They then proceed to formalize the results in open court as if no agreement had taken place. Better definition of the role of the trial judge has permitted change in this process to occur. The police and the prosecutor may overcharge in order to increase leverage in bargaining, since, in contrast to sentence bargaining, the court is much less involved in bargaining relating to charge. If the judge does not inquire into the facts of a plea and waiver, the existence of overcharging and any charge bargain may be obscured. Further, a judge must be acquainted with the facts in order to be certain that charges of excessive leniency in sentencing may be anticipated.

In discussing plea bargaining's shortcomings, the National Advisory Commission cited discouragement of efforts to assert rights, reduced rationality in processing defendants, and consequent harm to rehabilitative efforts.[7]

The standards which follow are predicated on the need to retain plea bargaining in the trial process in order to expedite processing of cases. The National Advisory Commission pointed to Philadelphia's effective use of screening, diversion and a streamlined trial process, accompanied by a firm policy against plea negotiations to achieve wholesale dispositions, as a comprehensive approach to reduce reliance on plea bargaining.[8] The Commission's conclusion is difficult to dispute: "Once the matter of resource insufficiency is surmounted, there is no legitimate function remaining that plea negotiation could serve."[9]

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[7]National Advisory Commission, supra note 3, Ch. 3 at p. 42, Standard 3.1 at p. 46 ff.

[8]Ibid., Standard 3.1 at p. 47.

[9]Ibid.

Standard 6.1 INFORM DEFENDANT PRIOR TO THE ACCEPTANCE OF PLEA THAT IF PROSECUTION SENTENCE RECOMMENDATIONS ARE NOT FOLLOWED THE PLEA MAY BE WITHDRAWN

Commentary

To insure that negotiated pleas are accepted from defendants who are fully aware of their rights and of the consequences of a plea, the defendant must be apprised at the outset that the court is not bound by promises of charge and sentence concessions made by the prosecution. Additionally, to insure the atmosphere of fairness the defendant should be advised before sentencing of the right to withdraw a plea if the court is unwilling to follow the sentence recommendations.

Recently, the New Hampshire Supreme Court held "it would be unfair to hold the defendants to their pleas when their reasonable expectations, which were induced by the prosecutor and by past practice and which led to their pleas, have proven false." State v. Goodrich, 116 N.H. 477 (1976).

This procedure includes the steps required, as discussed earlier, by U. S. Supreme Court rulings: an intelligent and voluntary plea, which may be withdrawn if a prosecutor does not recommend the promised bargain. In addition, the right to counsel at the taking of the plea is required.[10]

The added step of requiring recording of the pleading proceedings insures that the requisite steps are likely to be followed. The American Bar Association standards recommend recording of 1) the court's advice to the defendant. 2) the inquiry into plea voluntariness, and 3) the inquiry into plea accuracy.[11]

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[10]Moore v. Michigan, 355 U.S. 155 (1957). The National Advisory Commisssion, supra note 3 would extend the right to counsel to all plea negotiations. Standard 3.5 at p. 55.

[11]ABA, supra note 2, §1.7 at p. 34 ff. See also Natl. Advs. Comm., supra note 3, Standard 3.2 at p. 50.

The result sought by this standard is to insure that the defendant has had a full opportunity to be informed of what is going on, what the result will mean, and what choices are available. While defense counsel has an affirmative duty to inform the defendant in these regards, and the prosecutor bears a related obligation to refrain from misleading statements in any negotiations, the fundamental responsibility for informing the defendant rests with the trial judge. A concise summary of the judge's informational role follows:

1) determining that the defendant understands the charge,

2) informing that by pleading, trial by jury is waived, and

3) informing of the maximum and minimum possible sentences and the applicability of recidivist statutes.[12]

The judge's inquiry into the facts and circumstances of the plea is discussed in connection with the next standard.

The standard serves to emphasize the holding in State v. Goodrich and ABA Standards Relating to the Function of the Trial Judge (1972) §4.1(c)(iii).

Current practice in New Hampshire as to how courts advise defendants about pleas varies in the Superior Court and in the District and Municipal Courts.

The survey of justice system participants indicated that, while practices varied according to the judge presiding or the clerk, the usual procedure in Superior Court commences with the reading of an acknowledgment of rights form by the defendant, followed by an explanation by the judge who asks if there are any questions. The colloquy lasts from ten to thirty minutes. Survey respondents said that there was no standard procedure in the District and Municipal Courts as to either form or content of information

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[12]ABA, supra note 1, §1.4 at p. 25.

provided. Lay judges were mentioned as less familiar with, and consequently less attentive, to the elements of the process than were legally trained judges.

Of the 384 Superior Court criminal cases sampled, felony cases constituted 47% or 182 of the total. 13.4% of these cases were tried to completion and 20% were nolle prossequi. Of the remaining 66% of the cases which were completed by the entry of a guilty plea at some stage of the proceedings, 6% pleaded in district court, 7% retracted earlier pleas, 75% pleaded at arraignment and 12% pleaded at the beginning of the trial. The lack of precision in specifying the number of dismissals resulting from pleas to offenses other than originally charged requires the use of the 66% rate rather than an inflated rate based on the number of dismissals.

In the District Court guilty pleas were entered in about 263 of the 374 criminal cases sampled (72% of the criminal actions). Of this number, 253 guilty pleas were entered at arraignment (included in that figure are 79 guilty and "nolo contendere" pleas in traffic cases filed by mail).

Approach for Implementation

This standard expresses the existing plea negotiation rule established by the New Hampshire Supreme Court. As indicated in the commentary, implementing the standard -- in effect, enforcing the Supreme Court rules -- at the District and Municipal Court level is the target. Conducting informational meetings for judges and monitoring are two approaches for use in this effort involving minimal cost and a nominal amount of time.

Standard 6.2 EXCLUDE TRIAL JUDGE FROM PLEA NEGOTIATION PROCESS, BUT INFORM THE JUDGE OF THE REASONS FOR A REQUESTED DISPOSITION.

Commentary

Excluding the judge from the plea negotiation process reduces the possibility that his status will influence the defendant to plead guilty.[13] Although the judge should not enter into plea negotiations, he must be fully informed as to the reasons for a requested disposition.[14] Such reasons should 1) be presented in open court, 2) become an official part of the court record, 3) contain a full statement of the terms of the agreement and 4) contain the judge's reasons for accepting or rejecting the plea.[15]

This approach helps to preserve the independence and impartiality of the court, helps the court to evaluate the case more objectively, and allows instances of unfairness in individual cases to be detected more readily. Moreover, the court avoids giving its imprimatur without inquiry to agreements made on its behalf by the prosecutor. While the judge should not participate in the plea negotiations, his two-part role in the process is formidable. His first obligation to assure that the defendant has been adequately informed is discussed under Standard 6.1, supra. The second role he fills is determining

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[13] Task Force Report: Courts, p. 11.

[14] Natl. Advis. Comm., supra note 3, Standard 3.7 at p. 59.

[15] Ibid., Standard 3.2 at p. 50.

that the circumstances of the plea fulfill several requirements. If these have not been met and cannot be corrected, the plea may be deficient and the judge should, without more, refuse to accept it. The requirements are:

1) presence of counsel in negotiations,

2) competence of defendant and fulfillment of informational process,

3) defendant was not mistaken or ignorant about law or facts of case so that plea decision was affected,

4) defendant is aware of and expressly understands that rights waived include:

   a) privilege against self-incrimination

   b) burden of beyond a reasonable doubt

   c) jury trial

   d) confrontation of accusers

   e) compulsory process to obtain witnesses

   f) effective assistance of counsel at trial

5) defendant was not denied a significant, unwaived right during negotiations,

6) defendant was aware of mandatory minimum and of maximum possible sentences,

7) no improper inducements to plead,

8) admissible evidence is sufficient to support a verdict of guilty ("prima facie" case),

9) defendant does not continue to assert innocence, and

10) acceptance of plea does not go against public interest by

a) jeopardizing persons or property,

b) depreciating seriously the defendant's offense,

c) inadequately dealing with the defendant's rehabilitative needs, or

d) resulting in conviction on charges out of proportion to the seriousness of the conduct concerned.[16]

These are very strict criteria which the trial judge should enforce. In assessing the arguable dangers which plea bargaining poses to all parties in the entire criminal justice system, however, compliance with these requirements does not appear an unduly severe cost.

In New Hampshire, a guilty plea is likely to be upheld on appeal and the defendant not allowed to withdraw the plea after a sentence is imposed which follows the prosecutor's recommendations, when a defendant was (a) represented by counsel, (b) pleaded voluntarily, and (c) understood the charges, evidence involved and potential penalty, including maximum possible sentence.[17]

Survey results indicate that the large majority of trial judges, at both the District and Superior Court levels, do not participate in plea negotiations. They are, however, always involved in the acceptance of pleas.

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[16]Natl. Advis. Comm., supra note 3, Standard 3.7 at p. 59 ff.

[17]State v. Gagnon, 113 N.H. 220 (1973); State v. Stone, 113 N.H. 36 (1973); State v. Farris, 114 N.H. 355, 320 A.2d 642 (1974). If no defense counsel is present, the state bears the burden of proving a waiver intelligently and understandingly made. If not so proven, the plea may be withdrawn. State v. Herbert, 108 N.H. 332 (1967).

The extent to which judges are informed of the reasons for a requested disposition varies from court to court. Future investigation is required into the process whereby judges are advised of the reasons for a requested disposition.

Approach for Implementation

Implementation of this standard requires the enforcement of existing rules and close monitoring of the plea bargaining procedure. The time and cost involved in this enforcement and monitoring are minimal. A first step would be the adoption of a standard waiver form for the Superior Court noting the defendant's election to waive.[18] Another step, enhancing the capability of District and Municipal judges is considered under Sections 12.0, Judicial Selection and 13.0, Continuing Education, infra. Given the nominal time and cost involved, the feasibility of this approach is high. A more wide-ranging change would involve making the District Court full time, which is considered under Section 16.0, Court Organization, infra.

Standard 6.3 REVIEW OF SENTENCES BY SENTENCE REVIEW DIVISION SHOULD BE DIRECTED TOWARD REDUCING DRASTIC ABUSES CAUSED BY PLEA BARGAINING.

Commentary

The purpose of sentence review is to ensure impartial and appropriate treatment of each defendant. Sentencing review can monitor and adjust for any abuses generated by the plea bargaining process, after the fact and on a case-by-case basis. "Review should be made available to defendants whose conviction rests upon pleas of guilty as well as to those convicted by juries

[18]National Center for State Courts, Defense Services in New Hampshire (1976), recommendation 2 at p. 8.

or by courts sitting without juries."[19] Sentence review prevents wide disparities in punishment for the same or similar types of crimes, introduces more rationality into sentencing and helps to ensure a higher degree of consistency in sentences.

Provision for review of sentences is particularly important in instances of negotiated pleas since there is always the possibility that an innocent defendant pleaded guilty out of fear or that the prosecution improved its bargaining position by threats of heavier sentences. Measures must be taken at each stage of the plea bargaining process to reduce potential abuses. One major step is recording of proceedings, discussed under Standard 6.1, supra.

The New Hampshire Sentence Review Division may amend in any manner consistent with statutory prescription, a Superior Court sentence which is presented to it on appeal (RSA 651:59). This broad discretion permits the board to correct what it determines to be abuses caused by plea bargaining. Clearly, defendants who recognize substantial benefits from negotiated pleas are unlikely to jeopardize these benefits by appealing to the Review Division which may increase sentences (651:58 II). But the board serves as a ready mechanism to rectify occasional widely varying sentences imposed on defendants who were sentenced following full trial. It is not possible to analyze the impact of the division because adequate records have not been maintained.

Approach for Implementation

In order to assess the impact of the review board on negotiated pleas, full records must be kept of the reasons for revision of sentences by the

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[19] NAC, supra note 3, Standard 6.1, commentary at p. 116.

board. The Divisions proposed rules required this to be done and specify the procedures to be followed by the board. The adoption of a better records keeping system would help. In these ways, it can be ascertained whether the board affects the overall role of plea bargaining in New Hampshire. Trial judges in the Superior Court should be required to state for the record the reasons for their sentence so as to aid review. The cost and time involved in implementing this approach are not significant; consequently, feasibility is high.

Standard 6.4 INSTITUTE CHANGES IN PROCESSING OF CASES AIMED AT REDUCING NEED FOR PLEA BARGAINING.

Commentary

As mentioned earlier, the ability of Philadelphia's criminal justice system to reduce the cases disposed of through guilty pleas to 32 percent (as compared to 90 percent in other large cities and an average of 69 percent in New Hampshire courts) was presented by one major standard-setting report as proof that plea bargaining is not an integral and inevitable part of American justice.[20]

The standards contained herein suggest the generation of methods to improve court operations and to add diversion and screening procedures so as to permit reduction in reliance on plea bargaining. Analysis of New Hampshire cases indicated that 66 percent of Superior Court criminal cases were disposed of through guilty pleas, and 72 percent of District Court criminal matters were so concluded. Approximately 32 percent of Superior Court and 70 percent of the District Court cases were disposed of by pleas at the initial appearance (arraignment).

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[20]NAC, supra note 3, p. 47.

Most respondents (75%) in the justice system survey believed that plea bargaining could neither be reduced nor eliminated. Within the less than 25% who disagreed, equally sized sub-groups asserted that 1) it can be reduced, 2) it can be eliminated, and 3) it cannot be eliminated, respectively. One respondent expressed the view that not only should plea bargaining not be phased out, but that it should be expanded because the state requires the flexibility to make up for faulty police charging practices, particularly in the District and Municipal Courts, where police prosecutors prepare most of the cases and plea bargaining consequently is less frequent (exclusive of traffic pleas).

Alternative Approaches for Implementation

Approach #1 Limit Police and Prosecutorial Overcharging Through Promulgation of Statewide Policies to be Implemented Through Retraining and Enforced Through Monitoring by the Court

Description:

Overcharging increases the pressure for a bargained plea. By court supervision of charging practices, this aspect of the process can be curtailed.

Time:

Implementing an educational program is likely to require six months to one year; establishing a monitoring program would take longer.

Cost:

A retraining program can likely be financed through grant, and in no event should cost more than $50,000. An effective court monitoring program would probably cost at least $50,000 but if

administrative personnel are increased, this cost would apply to a broader group of activities.

Feasibility:

The potential for endorsement of this program is low. Public response would probably favor the police stance; feasibility is therefore low, less than 30 percent.

Approach #2 Standardize Plea Bargaining Process to Monitor and Control it More Effectively

Description:

Requiring participants to observe more formal procedures can aid in reducing the worst disparities in result. A court rule can prescribe the process for negotiation.

Time:

A rule change can be effected within six months.

Cost:

Not significant.

Feasibility:

This approach appears the most feasible since it involves the court only to the extent of its power over prosecutors and defense counsel, all of whom are "officers of the court." Resistance should be the least and encouragement to bargain reasonably should be effective.

Approach #3 Impose a Cutoff Date on Plea Negotiations

Description:

As proposed in other jurisdictions, this approach would require the prosecution and defense to reach any bargain within a set period subsequent to indictment or prior to the week in which trial is

scheduled. If no agreement is made, then the court will require the prosecution to try the case and will accept no sentencing recommendation from the prosecution should the defendant decide to plead at trial, which offers the defense an inducement to reach a bargain if one is sought.

Time:

A rule change can be effected within six months.

Cost:

Not significant.

Feasibility:

This approach is not highly feasible in New Hampshire because it is regarded as severe. Only if it proves successful elsewhere and receives favorable comment is it at all likely to be implemented in New Hampshire. However, scheduling of a date to "pre-try" felonies to determine length of trial or agreement of a plea has been experimented within several counties and should be institutionalized.

Importance of Standard Topic Area

The task force did not believe that the need for and use of plea bargaining could be reduced in the foreseeable future in New Hampshire; however, the members felt that standardization of the process was highly important. Most said there seemed no reason to change a system which they felt worked well.

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State v. Gagnon, 113 N. H. 220 (1973).

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State v. Herbert, 108 N. H. 332 (1967).

State v. Stone, 113 N. H. 36 (1973).

# 7.0 TRIAL PROCEDURES

## Introduction

### 1. Civil

a. Pre-trial Procedures

Civil Cases -- generally those in which rights and disputes between parties (rather than the state's upholding, through the criminal process, of the community's general right to enforcement of penal statutes and the individual's constitutional rights to a fair trial) are at issue -- made up over 22,000 of the matters entered in New Hampshire trial courts in 1975.[1] Since five of every six civil cases disposed of in the New Hampshire trial courts each year do not go to trial,[2] the manner in which these courts treat civil matters before trial is very important in any consideration of the impact of the New Hampshire courts on the public.

The first of four aspects of pre-trial procedures considered in this survey is the use of videotape depositions to make pre-trial proceedings less burdensome and more responsive to the circumstances of citizens called upon to be witnesses. Despite costs of using videotape equipment, it seems likely that this means of obtaining depositions will be less costly for litigants and the court system as a whole. In addition to increased efficiency and convenience, videotape depositions retain the deponent's demeanor, enabling a finder of fact -- whether jury or judge -- to evaluate credibility more effectively.

A second aspect is the use of arbitrators and mediators in place of trial judges when parties agree to their use for resolution of disputes.[3] Because

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[1] Admin. Comm. of Dist. & Munic. Cts., Compilation of 1974 Court Statistics. Superior Court figures are for the year ended July 31, 1975. District Court figures are for the calendar year 1974.

[2] Ibid.

[3] See discussion pertaining to selection and assignment of masters, arbitrators, and auditors in Judicial Selection, 12.0, infra.

arbitrators or mediators may be more readily available than judges, this approach should permit prompter disposition of matters. Many litigants may feel that their disputes would be better resolved in proceedings before an arbitrator or mediator whose experience makes him less removed from day-to-day affairs and more attuned than a judge might be to the special context in which a dispute arose. Thus, more effective justice may be obtained while at the same time the court system is more responsive to the needs of the litigants.[4] Since proceedings might be conducted other than in court or chambers, more efficient use of facilities might also be possible.

Increased use of pre-trial conferences make for more efficient use of time, since they separate those cases with no disputed factual issues for settlement or summary decision.[5]

A final aspect of pre-trial procedures for civil cases involves the assignment of complex cases and family-related matters to mediators or masters, whose findings of law are subject to appellate review, or to one monitoring judge. First, use of mediators and masters can reduce time spent waiting to have a matter heard. Mediators or masters may readily be assigned in areas of their expertise. Such expertise, combined with the possibility of greater flexibility in the time and place for proceedings, may make for increased efficiency in the processing of cases. Availability of appellate court review of questions of law should provide adequate control of this use of neutral third-party adjudication.

Major steps toward eliminating the unnecessary complexities of common law and chancery procedure were taken with the development of the Civil Practice

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[4] The New Hampshire experience with use of masters in marital cases, for example, was assessed in National Center for State Courts, Evaluation of New Hampshire's Marital Masters Program (1976).

[5] However, pre-trial conferences can result in adding to the time judges spend on a case. M. Rosenberg, The Pretrial Conference and Effectiv[illegible]

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Code in New York in 1848 and the English Judicature Act of 1873. Further American efforts culminated in the 1938 promulgation of the Federal Rules of Civil Procedure, which simplified pre-trial procedure and have since been increasingly adapted for use in state courts. In New Hampshire, rules of practice were revamped by the Superior Court in 1963 and are currently being revised These efforts all stressed development of pre-trial procedures to provide prompt, inexpensive disposition of cases on their merits, avoiding penalizing the parties for purely technical errors.

Blackstone observed that a major fault in the English common law of his day was the inability to obtain discovery of facts, which forced parties to seek the assistance of equity courts.[6] American courts, however, authorized common-law courts by as early as 1800 to compel discovery.[7] Several states introduced the use of written interrogatories in the first half of the 19th century. Resistance to broad discovery (expressed through the "sporting theory of justice") was not overcome until the 20th century. The philosophical basis for reform was the belief that a trial should be a "quest for truth," with a just determination on the merits after presentation of all relevant facts.[8]

Paralleling its reluctance to forsake the "sporting theory of justice" for "the quest for truth," the legal system has generally been slow to adopt new technologies to aid its efforts. Motion pictures were first introduced as a medium of evidence in 1915,[9] but courts were slow to recognize their value as a

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6 W. Blackstone, Commentaries on the Laws of England 828-29 (Chase ed. 1914).

7 Millar, Civil Procedure of the Trial Court in Historical Perspective (1952), pp. 204-205.

8 Green, "The Business of the Courts," in H. Jones (ed.), The Courts, The Public, and the Law Explosion at 22 (1965).

9 Glyn v. Western Feature Film Co., 114 L. T. R. 354 (1915).

resource for aiding accuracy in the presentation of facts.[10] Videotape was invented in 1956 and has quickly become a basic information record-keeping device for business, government, and educational use.[11] Its use in the legal system could range from the taking of depositions from witnesses whose testimony might otherwise be difficult or impossible to obtain, to preserving evidence, arguments on motions, and even entire trials.[12]

Arbitration was used to resolve conflicts and adjust differences in ancient times before courts were organized.[13] Today, 33 states and the federal government have enacted statutes rejecting the common law rule holding agreements to arbitrate future disputes voidable, while 15 states have statutes allowing submission of existing disputes to arbitration.[14] While the common law courts of England needed litigation to "stay in business", American courts today have such an overflow of litigation that arbitration has been viewed with increasing favor, especially in the commercial setting, as an alternative means for efficient and low-cost dispute resolution.[15]

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10 Cf. McCormack, Handbook on Evidence (1954).

11 Salvan, "Videotape for the Legal Community," 47 Pa. B. A. Q. 240 (1976).

12 Ibid., 250-253. See National Center for State Courts, Video Support in the Criminal Courts (Pub. No. R0008, 1974).

13 Emerson, "History of Arbitration Law and Practice," 19 Clev. St. L. Rev. 155, at 155-56 (1970).

14 G. Aksen, "What You Need to Know About Arbitration Law -- A 'Triality of Research," 10 Forum 793, 795 (1975).

15 See Note, "An Analysis of a Technique of Dispute Settlement: The Expanding Role of Arbitration," 7 Suffolk L. Rev. 618, at 620, 629-31 (1968). This has been especially so since such decisions as that in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U. S. 395 (1967), have signalled an end to court reluctance to enforce commercial arbitration agreements. The Supreme Court's positive view of arbitration has been particularly strongly expressed in the labor field in the "Steelworkers Trilogy," 363 U. S. 593, 363 U. S. 547, 363 U. S. [illegible]. But cf. P. Hays, Labor Arbitration: A Dissenting View (1966) for a contrasting look.

Although use of a preliminary hearing to prepare a case for trial was common in ancient and European law, it was not recognized in Anglo-American law until the end of the 19th century.[16] The American concept of a pre-trial conference was first introduced in Detroit in 1929, and called for the court and counsel to consider the state of pleadings, the possibility of obtaining reciprocal fact admissions and agreements, and the possibility of settlement.[17] The Detroit practice was so successful in simplifying and expediting proceedings at trial and at identifying cases suitable for disposition without trial that it has been adopted in most states and in the federal courts. Yet there are considerable variations in its use by the different jurisdictions.[18]

The current trend as to timing is to hold the conference(s) at the stage or stages of the proceeding when needed, viz., preparing complicated evidence, stipulating facts, severing causes, determining questions of witness use, and generally planning for the most expeditious conduct of the trial.[19] Civil pre-trial conferences stress simplification of issues to a greater degree than the criminal counterpart, since issues are generally clearer in the latter category.[20] In New Hampshire, conferences are used increasingly in civil cases but generally are held near the trial date rather than at a very early stage to manage discovery.[21]

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16 Millar, supra note 7, at 229.

17 Ibid., at 231; ABA, The Improvement of the Administration of Justice 78 (5th ed. 1971).

18 Compare, e.g., N. J. Court Rules §3:5-3 with Vt. R. Civ. P. 16.

19 ABA, supra note 17, at 78.

20 ABA, Standards Relating to Discovery and Procedure Before Trial (1970) §5.4(b), commentary, at p. 128.

21 See Super. Ct. R. 60, which expands the purview of the pre-trial conference in civil cases.

1. Civil (Cont.)

b. Trial Procedures

In 1975, there were over 3,300 trials of civil matters other than small claims in the Superior, District, and Municipal Courts of New Hampshire.[22] Over 2,000 of these trials were held in Superior Court, where civil trials held were almost four times the number of criminal trials held.[23]

This survey addresses six specific areas of trial procedure and administration. The first calls for all civil trials in the state to be conducted according to uniform rules and procedures applicable in all trial courts. To the extent that such uniformity can be achieved, the treatment of like matters in like fashion by all courts should result in greater impartiality and more effective justice. Uniformity should also simplify training of court personnel, records management and forms design.

Successful application of uniform procedural rules should bring matters to trial more promptly, reducing costs of delay. The effectiveness and impartiality of the rules will be enhanced by inviting comments from all who will use them prior to promulgation.

Case-processing rules are unlikely to accomplish these results unless the trial courts also adopt and enforce reasonable time periods for completion of each phase of the litigation process. Members of the community are likely to see the unfettered granting of continuances as a practice serving lawyers more than clients and the public; actively-enforced time limits will improve these public perceptions.

Design of an information system to minimize conflicts in case scheduling among trial courts may, depending on its complexity, involve initial expenses

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[22] Admin. Comm. of Dist. & Munic. Cts., supra note 1.

[23] Ibid.

for development. But reducing the instance of conflicts should result in cost savings and reduced delay.

Disposition of extraordinary and complex cases should be enhanced by having each case monitored closely by one judge throughout litigation. Duplication of effort resulting from having different judges assigned to different stages with each judge having to learn again the nuances of the case, would be avoided. With a single judge having developed an understanding of the case, there is greater likelihood that problems will be resolved quickly when they arise.

Finally, trial by jury should be retained where most needed to resolve fact issues, but should be limited to those cases in which the amount in controversy exceeds $3,000. Retention of trial by jury reinforces the widespread belief that impartiality and effective justice are best achieved by entrusting determination of many fact matters to the judgment of members of the community. But New Hampshire has recognized, both in its state constitution (pt. 1, art. 20) and in statutes governing small claims proceedings, that impartiality is not unduly endangered by withdrawing the jury right from civil matters not involving large amounts. It has been estimated that bench trials consume an average forty percent less time than jury trials,[24] so that promptness is served by allowing nonjury disposition of matters involving lesser amounts.

In addition to their impact on pre-trial procedures, the Federal Rules of Civil Procedure have had considerable indirect impact on trial procedure in state courts. Rules or codes based closely on the federal model have been adopted in at least half the states (including Maine, Vermont, Massachusetts, and Rhode Island), while at least 10 other states, including New Hampshire, have made extensive procedural reforms since 1938.[25]

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[24] H. Kalven & H. Zeisel, Delay in the Court 78 (1959).

[25] See Wright, "Procedural Reform: Its Limitations and Its Future," 1 Ga. L. Rev. 563, at 564 (1967).

The modern concept of a jury in civil matters -- a body of laymen selected by impartial means to ascertain, under the guidance of a judge, the truth in questions of fact[26] -- is one that has evolved over centuries and whose origin is "shrouded in the mists of antiquity."[27] The influence of common law heritage and colonial experience can be seen in the Bill of Rights, which incorporated a provision for civil jury trial into the U. S. Constitution, and in the constitutions of every state.[28]

But the development of our highly-complex technological society, along with the crush of criminal and civil litigation burdening our courts, has raised many questions about the vitality of trial by jury as an institution devised in simpler, pre-industrial times. In the 19th and 20th centuries, as America expanded westward, various states provided for modifications in civil trials from the traditional model of 12-person juries and unanimous verdicts.[29]

The categories of matters triable to a jury have been limited. Equity matters have traditionally been triable to the court, with an advisory jury in the court's discretion.[30] Workmen's Compensation statutes and no-fault auto insurance have removed certain claims from the courts.[31] Trial by jury was abandoned in England

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[26] 47 AmJur. 2d "Jury" §1 (1969).

[27] Hibdon v. United States, 204 F.2d 834, at 838 (6th Cir. 1953).

[28] U. S. Const. amend. VII; see Ashman & McConnell, "Trial by Jury: The New Irrelevant Right?" 27 Sw. L. J. 436, at 437n. (1973), for a list of state constitutional provisions.

[29] Ashman & McConnell, supra note 28, at 437-42.

[30] Millar, supra note 7 at p. 268. See RSA 491:16.

[31] See Comment, "Remedies to Court Congestion," 19 Syracuse L. Rev. 714, at 726-28 (1968).

40 years ago for ordinary common law actions,[32] and many statutory proceedings created in our country since 1789 have not provided for trial by jury.[33]

2. Criminal

Increasingly, the business of our courts is criminal. In several states, judges have been ordered by the highest court to accord first priority to the disposition of criminal business. Changes in pre-trial and trial procedures employed in criminal matters, however, have come much more slowly, especially in comparison to the vast expansion in the procedural rights accorded by the courts to defendants in recent years. In contrast, civil processing has modernized rapidly: discovery is broad, settlement conferences have become a regular step in procedure, and trial by jury is reserved in many places for the larger civil cases only.

Criminal procedure, on the other hand, shares few of these attributes. Discovery occurs with greater restraints; while plea bargaining, often in a hectic and scarcely regulated manner, dominates the disposition of cases in courts presided over by judges who are either prohibited from involvement, or at the least, uncomfortable with the negotiating process. Trial by jury -- or even trial at all -- occurs in a small minority of cases: 66 percent of Superior Court cases in a 1975 sample survey and 72 percent of District Court cases in the same sample period were terminated by a plea.[34]

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[32] W. Burger, "Agenda for 2000 A. D. -- A Need for Systematic Anticipation," 70 F. R. D. 83, at 89 (1976).

[33] W. Schaefer, "Is the Adversary System Working in Optimal Fashion?" 70 F. R. D. 159, at 161 (1976). However, other statutorily-created actions, such as wrongful death and condemnation proceedings, provide for jury trial when requested. See, e. g., N. H. RSA 598-A:27 (eminent domain, right to jury assessment of damages), and 556:12 and 13 (wrongful death).

[34] See H. Zeisel, et al., A Criminal Justice System Under Stress (N. Y.: Vera Institute of Justice, 1975) at p. 140: "Only 2 percent of felony arrests (in a sample) were disposed of by trial in 1971. Under these circumstances, trial may be seen as the failure to reach a guilty plea in those cases where dismissals were not appropriate."

But procedures for processing criminal cases, before and during trials have undergone significant revision in recent years, even if the steps are neither as wide-ranging nor as fundamental as have occurred on the civil side. Several decisions of the Supreme Court of the United States in the 1960s revolutionized criminal procedural rights, often with more impact in the stationhouse than the courtroom.[35] Nevertheless, even as the institution of the "omnibus hearing" becomes more common and as appellate decisions provide more basis for successful objections to evidence, questions have been raised as to it's effectiveness. In addition, the improvement of automated information systems available to the police and prosecutors forced many courts to begin streamlining their criminal court process. Nevertheless, the number of court appearances needed to dispose of a criminal case still is excessive in many places.

Criminal pre-trial and trial procedures should be designed to expedite the trial process in much the same way as improved procedures for processing civil matters. The specific goals identified by participants in the initial stages of this study as desirable to improve pre-trial criminal procedure are early probable cause hearings, use of videotaped witness depositions, consolidation of criminal pre-trial motions for disposition at omnibus hearings, and increased use of pre-trial conferences where justified by the complexity of a case. Trial procedure goals are the same as for civil cases: conduct of trials according to uniform rules and practice, adoption of rules to assure effective processing, reasonable time periods for completion of each stage, implementation of a scheduling system to minimize conflicts, and assignment of a complex case to one judge. In addition, it was urged that procedures be employed to ensure that existing law separating adult criminal from juvenile calendars be followed in all instances.

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[35] E.g., Miranda v. Arizona, 384 U. S. 436 (1966) (warnings of rights required before interrogation) and United States v. Wade, 388 U. S. 218 (1967) (lineups must adhere to specified protections).

As a model which has evolved in recent years,[36] the pre-trial phase of the full criminal process comprises three stages: 1) the exploratory stage -- discovery by counsel without court involvement; 2) the omnibus stage -- with court appearances and supervision as needed; and 3) the trial planning stage -- in which pre-trial conferences are employed to specify in detail how matters will be organized for trial.

This redefinition of the criminal process followed efforts to broaden the scope of discovery in criminal cases. The "sporting theory of justice" likely prevailed (and still does) for a longer time in criminal than in civil processing because of the atmosphere of battle created by the penal nature of the proceedings and, more significantly, the usually limited resources of each side pitting overburdened prosecutors against defense counsel hampered in preparing fully for trial by the indigency of their clients. Another objection was the fear that free discovery in criminal cases would lead to perjury, suppression of evidence, and intimidation of witnesses, but this view no longer commands as much support in view of both the success of civil discovery and appellate court movement toward broadened discovery.[37]

Amendment of Federal Rule of Criminal Procedure 16 in 1966 represented a major broadening of criminal discovery.[38] In order to surmount the problem posed to reciprocal discovery by the defendant's privilege against self-incrimination, the ABA supports discovery based on "procedural needs," the National Advisory Commission on Criminal Justice Standards and Goals recommended a broader standard which would exclude from discovery only the statement of the defendant or the intention of the defendant to testify or not to testify at trial.[39]

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[36] ABA Discovery Standards, supra note 20, §5.1 at pp. 108-109.

[37] ABA Discovery Standards, supra note 20, §1.2 commentary at p. 36ff. See, e.g., Brady v. Maryland, 373 U. S. 83 (1963) (due process requires disclosure to defense by prosecutor of exculpatory evidence).

[38] See discussion in ABA Discovery standards, supra note 20, §1.2 commentary at p. 34ff. Several states followed the Federal example. Id.

[39] ABA Discovery Standards, supra note 20, §1.2(b) and (c), commentary at pp. 40-46; National Advisory Commission on Criminal Justice Standards and Goals, Courts (1973), Standard 4.9 at p. 89. Presumably, the NAC intended to exclude the attorney's work-product as provided in civil litigation. See discussion under Standard 6.12 of this section.

Standard 7.1 REQUIRE PROBABLE-CAUSE HEARINGS IN ALL FELONY CASES AS AN EARLY SCREENING STAGE.

Commentary

In the processing of criminal cases all felony cases should be reviewed at an early stage to determine whether further prosecution is advisable. Review should initially be conducted by prosecutorial authorities but should also be a responsibility of the courts. Arraignments, probable-cause hearings, informations and grand jury indictments are all instances of prosecutorial or court review of whether a case is substantial enough to warrant full trial on the merits. While informations are issued in the discretion of the prosecutor and indictments by vote of the grand jury, arraignments and probable-cause hearings are the responsibility of the court.

The formality of the arraignment procedure means that only clearly erroneous, or the simplest cases are likely to be recognized for termination; in contrast, the probable-cause hearing could provide the best opportunity for the court to determine whether a case should proceed. For this reason, it offers the most likely occasion to determine whether the prosecution has gathered enough of a case to go to trial.[40] Therefore, scheduling these hearings as early as possible -- taking cognizance of the time needed for preliminary investigation and case preparation -- will allow cases which should not be carried on the calendar to be halted, limiting the need for further case preparation by both sides and freeing affected defendants from incarceration.

It can thus be asserted that the probable-cause hearing (a more precise description of the NAC "preliminary hearing") should fulfill the same purpose as either an

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40 Regarding formal arraignments as serving "no useful purpose," the NAC recommends that a defendant be informed of his rights and the charges against him at a "presentation before a judicial officer following arrest" at the earliest possible time. NAC, supra note 39, Stand. 4.5 at p. 77. The NAC would limit the preliminary hearing to considering only the issue of probable cause (Stand. 4.8 at p. 87) and recommends using either the hearing or the grand jury indictment process, not both, although recognizing that eliminating the indictment stage will require constitutional change. Stand. 4.4 at p. 74.

indictment or an information: if a defendant earlier is properly advised of charges and rights, the hearing can serve the purpose of an arraignment as that is now conducted.[41]

The hearing in New Hampshire exists to determine whether probable cause exists for detention of a defendant pending grand jury action. See RSA 596-A:1 to 7. The New Hampshire Supreme Court has held that there is no constitutional right that a hearing precede indictment; an indictment thus eliminates the need for a hearing. Smith v. O'Brien, 109 N. H. 317 (1969).

Opinion in the justice system, according to survey results, is sharply divided over the usefulness of the hearing. The largest single group of respondents felt the hearing should not replace the indictment process. Almost an equal number (both minorities, however) regarded the hearing as a waste of time since probable cause is almost always found, although it should be stressed that grand juries fail to present true bills in probably an equally small proportion of cases. A third group, in fact, asserted that both the hearing and the grand jury were ineffective.

The largest overall number surveyed felt that the probable-cause hearing could be useful if improved: if county attorneys had time to screen cases, if full-time judges demanded stricter showings of probable cause, and if all parties took the hearing seriously. A few believed that a defendant should retain the right to appear before the grand jury.

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[41] In contrast to the NAC, supra, which recommends use of the preliminary hearing only to determine probable cause, the ABA does not specifically consider the use of the hearing vis-a-vis indictment or information but does oppose permitting prosecutors to delay preliminary hearings until they are able to obtain indictments which obviate the purpose of the hearing. ABA, Standards Relating to the Prosecution Function (1971) §3.10, commentary, at pp. 99-100.

Approach for Implementation

Approach: Use Probable-Cause Hearing to Screen Felony Cases in District Court to Reduce Dependence on Grand Jury for Screening

Description:

The probable-cause hearing, assuming adequate preparation by both sides but especially the prosecution, would provide a better screening forum than the grand jury now does: a judge can detect insufficiencies in a prosecution case more readily than most grand jurors unused to the variations and nuances of cases. Legislation is needed to define the altered role of the hearing. Procedures relating to the hearing, including mandating its use, could be provided by court rule. The grand jury will be retained, but the prosecution would be barred from bringing a case to it if probable cause was not found or without leave of court.

Time:

The need for legislation broadening the function requires at least six months. Obtaining needed personnel for prosecutors and courts to prepare cases and provide adequate judicial time and capability to a case, respectively, extends the time frame to several years, since at present the professional prosecutors -- the county attorneys -- generally do not appear in District Court at all.

Cost:

Principal costs are in supplementing staff for prosecution to appear in District Courts and to prepare cases for hearing and in providing enough fully trained judges to hold full hearings. The task force estimate cost of such upgrading at more than $250,000.

Feasibility:

Th. limitation in prosecution discretion resulting from this approach and the possibility of longer detention reduces the feasibility of the approach accordingly. Although prosecution seems a favored priority of legislators and the public, the cost of improving institutional capacity is high. Unless there are enough professional prosecutorial personnel to prepare and present cases at hearings, this alternative offers scant improvement. This methods, though, has the advantage of retaining the grand jury for review of a case in which probable cause is found.

Importance of Standard

This standard was rated as second priority by a task force majority.

Standard 7.2 USE OF COURT-ORDERED, IMMEDIATE, VIDEOTAPE DEPOSITIONS TO MAINTAIN COOPERATION AND PROTECTION OF WITNESSES AND EXPAND CAPABILITY OF COURTS TO VIDEOTAPE TRIAL SEGMENTS AND DEPOSITIONS AT INITIATION OF COUNSEL.

Commentary

Superior Court Rule 42 and District Court Rule 1.9(4) authorize the taking of videotape depositions in the trial court's discretion upon agreement by all counsel involved in a given case.[42] When asked in interviews how frequently videotape is used for depositions, almost one-third of the judges and attorneys responding said that it is used frequently or very frequently in their courts or practices, while over half said it is used infrequently. Of the remaining 20 percent, who answered that it is never used, most were judges in district courts with small caseloads. Over three-fourths of those responding felt that the use of videotape should be expanded.

[42]RSA 491 App. R 42 (1975 Supp.).

In the 1976 special session of the New Hampshire General Court, Senate Bill No. 34 as amended was passed by the Senate and would have authorized the taking of videotape depositions in both civil and criminal cases. The bill was referred to interim study in the House, however, and was not enacted into law. The fiscal impact of the bill would presumably occur primarily in criminal cases, where taxation of costs would include deposition expenses incurred by prosecutors or court-appointed defense counsel. In civil matters its effect would primarily have been to emphasize the availability of videotape as an optional means for taking depositions.

Several of those interviewed stated that the use of videotape would be valuable to reduce delay, and that it is particularly helpful in deposing expert witnesses. In other jurisdictions it has been used to take depositions when a witness has been disabled,[43] unavailable,[44] or in danger of dying.[45] In addition, testimony of witnesses, whether taken at the scene of an event or as soon thereafter as is practicable, has been suggested as a valuable means to preserve the clarity of the witnesses' immediate recollection of the event.[46]

In 1969 the Governor's Commission on Court System Improvement recommended that the use of videotape depositions for physicians, expert witnesses, and other witnesses whose availability at trial creates scheduling problems, be encouraged.[47] The Commission recognized the importance of medical and other expert witnesses in personal injury, product liability, and occupier liability cases. It observed that reading a deposition to jurors is a poor substitute for the presence of a competent

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[43] Woodhouse, Drake & Carey Ltd. v. Seltzer (W. D. Pa. 69-1129).

[44] Barber v. Page, 390 U. S. 719 (1968). Note President Ford's deposition in United States v. Fromme, 405 F. Supp. 578 (E. D. Cal.,1976).

[45] Rubino v. G. D. Searle & Co., 73 Misc. 2d 447 (Nassau Co. Ct., N. Y. 19

[46] Salvan, supra note 11, at p. 252 (1976).

[47] 7 N. H. B. J. 217, at 257 (1969).

witness on the stand, and it regarded videotape, which retains the visual effect of a witness, as an acceptable substitute to the personal appearance of experts.

Among the reservations expressed about videotape by those interviewed is the feeling that it may be too expensive for widespread use. At least one attorney observed that court equipment and facilities are adequate. Several attorneys believe that it should be backed up by a stenographic transcription of the deposed testimony which eliminates any fiscal advantage.

Issues that need to be considered in exploring the wider use of videotape deposition include the question whether its present cost is in any way discriminatory against poorer clients unable to afford it. Does its use present problems of storage, maintenance, and viewing for the courts? And what is the impact of videotape on the fact-finder's ability to weigh the credibility and demeanor of a witness?

This last question is one of the reasons why those interviewed in this survey expressed almost unanimous skepticism about the value of videotaping entire trials. They felt as well that it might be too expensive and would not really save time. For these reasons, they seemed generally unreceptive to the idea, as suggested by the National Advisory Commission that the possibility of videotaping entire trials be explored.[48]

Approach for Implementation

Approach: Provide Facilities in Courts for Videotaping of Depositions

Description:

Videotape equipment available for use in trials and depositions

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[48]NAC, supra note 39, Standard 4.2.

would be provided in each county for use of the court and counsel to expedite proceedings.

Cost:

Equipment needed for each county will require less than $50,000. Training can probably be accomplished through grant funds.

Time:

Appropriations will require the most time, at least six months, even if application for a federal grant were successful. Certain rule changes will be required. Probable time is up to one year.

Feasibility:

The task force rated this alternative as 80 to 100 percent feasible based on desire of courts and counsel, and absence of substantial opposition from legislators or others.

Importance of Standard

Most members of the task force assigned this standard a high priority.

Standard 7.3 EMPHASIZE AND INCREASE AVAILABILITY OF ARBITRATORS AND MEDIATORS TO RESOLVE DISPUTES WHERE PARTIES AGREE TO THEIR USE.

Commentary

New Hampshire has long been one of the states in which agreements to arbitrate future disputes will be enforced by the courts.[49] In 1972 the New Hampshire Judicial Council recommended amendment of statutory law to expand and encourage the use of

[49] Franklin Needle Co. v. American Federation of Hosiery Workers, AFL Local No. 173-A, 99 N. H. 101 (1954). See L. 1929, Ch. 147:1, now codified as RSA 542:1, and Kelly, "Kirouac v. Healey: Comments on the Uninsured Motorist Endorsement in New Hampshire," 7 N. H. B. J. 92, at 97 (1967).

voluntary arbitration for resolution of private disputes.[50] The General Court adopted the Judicial Council's recommendation and enacted a statute allowing parties to any civil case with court approval to agree to submit their dispute to arbitration, with fees and expenses generally fixed and paid from public funds.[51]

Despite encouragement of voluntary arbitration by the Judicial Council and the General Court, very few cases are referred to arbitrators unless parties agree to assume the cost. The sampling of civil cases conducted in the course of this study found far less than one percent that had been submitted to arbitration. (Indeed, it was very difficult to obtain a precise determination of how many civil cases are submitted to arbitration, because docket entries for Superior Court do not reflect such a submission unless an arbitrator's report has been filed. Clerks in some of the busier counties have confirmed statistical findings, however, that very few cases are submitted to arbitration.)

The reason for this may in large part be financial. Limitations on local ability to fund arbitrators was one reason why the Judicial Council did not recommend General Court enactment of House Bill 498 (1971), which would have provided for compulsory arbitration of civil claims where the amount involved is $3,000 or less,[52] and which was subsequently defeated. But the Judicial Council reasons for withholding approval also included the increased jurisdiction of the District Courts to handle civil matters of lesser value, proposals to raise the minimum amount in controversy for jury trial, the Superior Court's authority to refer matters to auditors, masters, and referees, and most significantly for this discussion, a proposal by the Judicial Council that voluntary arbitration be encouraged.[53] Thus, the Judicial

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[50] N. H. Judicial Council, Fourteenth Biennial Report 22 (1972).

[51] RSA 542:3-a (L. 1973, Ch. 336:1).

[52] N. H. Jud. Council, supra note 50, at p. 19.

[53] Ibid., at 20-22.

Council did not disapprove of arbitration in itself; rather, it felt that the expense involved is not justified in matters for which a relatively small amount is at stake. Both the Judicial Council and the General Court did, however, imply that voluntary arbitration is a worthwhile court expense that should be encouraged.

Statutory provisions for arbitration now exist for a small number of specific situations: RSA 273 provides a board of conciliation and arbitration for labor disputes; RSA 90:4 provides for arbitration of disputes between New Hampshire and another state regarding domicile of decedents for death tax purposes; and RSA 556:27 provides that a probate court may authorize arbitration to adjust claims against decedents' estates. Examples of the sorts of cases for which the courts might encourage arbitration as an alternative to litigation are: disputes over construction contracts,[54] dissolution of partnerships,[55] landlord-tenant disputes,[56] consumer disputes,[57] and automobile accident cases.[58]

Arbitration can be very attractive to disputing parties because of its simplicity. It can help clear court dockets and free trial courts to address other matters, allowing them nonetheless to provide a forum for review and enforcement of

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[54] See, for example, Aksen, "Resolving Construction Contract Disputes Through Arbitration," 23 Arb. J. 141 (1968), and McEachern, "The Arbitration of Subcontracting Disputes," 19 Me. L. Rev. 55 (1967).

[55] See Fisher, "Dissolution of Partnerships as Arbitrable Issues," 23 Arb. J. 85 (1968).

[56] Sembower, "Landlord-Tenant Arbitration," 24 Arb. J. 35 (1969).

[57] McGonage, "Arbitration of Consumer Disputes," 27 Arb. J. 65 (1972).

[58] G. Aksen, "Arbitration of Automobile Accident Cases," 1 Conn. L. R. . 70 (19

arbitrated matters.[59] But judicial involvement in determining the finality of arbitration awards does create a quasi-judicial atmosphere in arbitration proceedings, despite the non-judicial status of arbitrators.[60] Care must be exercised lest growing legalistic tendencies move arbitration proceedings away from the informality and expedition that are their primary attraction.[61]

Approach for Implementation

Approach: Encourage Arbitration in Appropriate Cases by Providing Arbitrators at Public Cost

Description:

The task force felt that compulsory arbitration was not desirable because of the prospect of yet another forum. Unless arbitration does not result in increased costs to parties, however, the prospects for its wider use are slight.

Cost:

Supplying an arbitrator involves costs similar to those arising when a judge is added to a court. Adding five arbitrators on a full-time basis, thus, would cost approximately $100,000.

Time:

Securing funds, through legislative appropriation, is the time factor for this approach.

Feasibility:

The feasibility of financing an effective voluntary arbitration system

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[59] See ABA Standards Relating to Trial Courts (Tentative draft, 1975), §2.00, commentary, at p. 10.

[60] Jones & Smith, "Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments," 62 Mich. L. Rev. 1115, at 1153 (1964).

[61] Note, "An Analysis of a Technique of Dispute Settlement: The Expanding Role of Arbitration," 7 Suffolk L. Rev. 618, at 643 (1973).

is low, probably less than 30 percent. Appropriation seems less likely because there is no great interest among counsel in encouraging voluntary arbitration.

Importance of Standard

The task force accorded this standard a high priority. The task force felt the alternative of compulsory arbitration imposed undue public constraint. This conclusion, combined with the Judicial Council rejection of the alternative, has resulted in the omission of compulsory arbitration from this compilation.

Standard 7.4 USE OMNIBUS HEARINGS TO EXPEDITE CRIMINAL PRE-TRIAL PROCESS.

Commentary

The major source of support for the concept of an "omnibus hearing" (as well as the source of the term itself) in criminal cases was the ABA Standards Relating to Discovery and Procedure Before Trial, which described the hearing as the recommended stage of the proceedings:

> To ensure that discovery has been properly conducted and that issues are simply and efficiently raised...there is need for court intervention to ensure that what has been done has been correctly done, and that what needs to be done will be done properly and without unnecessary delay.[62]

Four features distinguish the omnibus hearing from other provisions concerning pre-trial procedure, such as motions to suppress evidence (N. H. Super. Ct. Rule 88): 1) all pre-trial motions are brought before the court at the same hearing to reduce the time expended on separate court appearances, 2) the court ascertains affirmatively that all procedural or constitutional issues are considered, 3) motions raised

[62] ABA, supra note 20, §5.3 commentary at p. 115.

## Alternative Approaches for Implementation

### Approach #1 Require a Motion to Suppress Evidence to be Made, if Deemed Appropriate in a Case, within a Specified Period Prior to Trial

Description:

By requiring a motion to suppress to be made by a certain point prior to trial, a hearing can be held in appropriate cases to dispose of most pre-trial motions and other matters. While not as encompassing as the omnibus hearing, this procedure offers the advantage of selecting cases requiring a hearing and does not result in hearings being held in many cases in which the procedure is not needed.

Time:

A change to Superior Court Rule 88 is needed and can be effected in less than six months.

Cost:

The cost of holding these hearings is not a substantial addition to existing pre-trial hearings since only timing of a hearing is shifted. If these hearings simplify and resolve trial issues, savings in court time and jury costs can result.

Feasibility:

This approach ranks between 80 and 100 percent in feasibility since it ties the hearing to a voluntary motion and does not increase costs.

### Approach #2 Encourage Judges to Schedule Omnibus Hearings when Appropriate

Description:

This alternative shifts the burden for use of the hearing to the court. The judge decides that the omnibus hearing will be useful in expediting a criminal case and if scheduled near the date of trial, serves as an occasion to discuss disposition by a plea of guilty.

which require additional discovery or presentation can be disposed of at a continued session of the hearing, and 4) claims available for assertion at the time of the hearing are waived if not asserted.[63]

An omnibus hearing may be had in New Hampshire if requested in the manner of a motion hearing (Super. Ct. Rules 54, 55, 56 and 88). However, very few are held since neither the rules nor practice encourage their use. Most of those who responded to the survey -- both judges and attorneys -- expressed support of the omnibus hearing as a device to consolidate and expedite the pretrial stage. A minority thought the hearing too time-consuming to be justified for use in many cases.

Omnibus hearings are still too new a procedure to permit any clear assessment of their effectiveness. In its commentary to F. R. Crim. P. 12, which allows the omnibus hearing in the Federal courts, the federal rules advisory committee observed, "... it would be premature to write the omnibus hearing procedure into the rules, [but] it [the committee] is of the view that the single pretrial hearing should be made possible and its use encouraged by the rules." 18 U.S.C.A., F.R.Crim.P. 12 at 169. Vermont's rules include the omnibus hearing, which may be had on a party's request, the court's own motion, or when necessary to dispose of pending motions. It will be scheduled to occur thirty days after arraignment unless the court orders otherwise. Vt.R.Crim.P. 12(f). Again, experience with the hearing (the Vermont rule is based largely on the Federal rule and the ABA standards) is too brief to permit conclusions; however, informal reaction of the state's judges tends to support use of the hearing on a non-mandatory basis since it is felt that requiring it means that it will be employed for delay or where it is not needed.

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[63] Ibid., p. 117. The NAC also recommended use of a consolidated motion hearing and a checklist inquiry by the judge to insure that "all proper matters and issues are raised." NAC, supra note 39, Standard 4.10 commentary, at p. 94.

Time:

Same as for Approach #1.

Cost:

Same as for Approach #1.

Feasibility:

Similar to Approach #1, or possibly higher, since court discretion is likely to be preferable to a mandatory procedure.

Importance of Standard

The task force assigned this standard a low priority.

Standard 7.5 EMPLOY PRE-TRIAL PROCEDURES AND CONFERENCES AS NEEDED TO:

A. MONITOR AND EXPEDITE DISCOVERY PROCESS;

B. OUTLINE MATTERS TO BE TRIED; AND

C. STIMULATE SETTLEMENT WHERE POSSIBLE THROUGH SCHEDULING OF CONFERENCE SHORTLY BEFORE TRIAL.

Commentary

Pre-trial conferences in civil cases are now provided for under Superior Court Rules 59 and 62[64] to simplify issues, amend pleadings, admit facts, specify witnesses, determine whether reference to a master is advisable, and explore settlement. Under amended Rule 62, a pre-trial conference may be held if requested by any counsel after ninety days from the return day of a case; cases in which a conference is not so requested may be scheduled for conference by the court one year after the entry date. The amendment also requires counsel to formulate a written pre-trial stipulation within one year after entry of every jury case.[65] The purposes of the stipulation include refinement of fact issues, identification of special

[64] RSA 491:App.; amendment of Rule 60 (62) provides for filing a detailed statement and a pre-trial conference in all jury cases.

[65] Published in 2 N.H.L.W. 327 (June 2, 1976), but since revised in 3 N.H.L.W. 169 (December 15, 1976) as Rule 62.

questions of law or evidence, indication of the state of pleadings and discovery, indication whether a jury trial will be demanded, when the case will be ready for trial and how long it is expected to take, and the prospects of settlement. Under the rule, the primary purpose of a hearing would be to undertake to settle the case, though other matters might also be considered.[66]

Statistics published by the New Hampshire Judicial Council[67] show that an average of 1160 pre-trial conferences, or about one in 15 civil cases, were held in Superior Court in each of the years 1971 to 1974. In cases sampled during this survey (calendar year 1975), 39 pre-trial conferences, or about one for every 10 civil cases, were held. Responses to a questionnaire distributed in the course of this survey indicate that pre-trial conferences are held in almost all jury trials (consistent with Rule 62), while they are seldom held in non-jury matters.

In response to a survey by questionnaire, judges and attorneys were mixed in their feeling whether pre-trial conferences significantly increase settlements, although a majority expressed the belief that they do: 57 percent of the attorneys responded that they do, while 56 percent of the Superior Court judges agreed. When judges and attorneys were interviewed, most (72 percent) indicated that pre-trial conferences for the express purpose of settlement are not held frequently, but 90 percent of those responding believed that conferences for that purpose are useful in the settlement of complex cases. Statistics gathered in the course of this study tend to corroborate the proposition that pre-trial conferences stimulate settlement. There were pre-trial conferences held in 10 percent of the cases sampled. Of these, 60 percent were settled. By comparison, 28 percent of the cases for which there was no pre-trial conference were settled.

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[66]Super. Ct. R 60(f).

[67]N. H. Judicial Council, Fifteenth Biennial Report 45 and 47 (1974), and Fourteenth Biennial Report 97 and 99 (1972).

This result appears to be partly a function of how soon before trial the conference is scheduled. A number of those interviewed or responding to questionnaires indicated that chances of settlement are heightened if the pre-trial conference is held shortly before trial. Some judges and attorneys observed in interviews that many pre-trial hearings are useless because counsel are not sufficiently prepared, despite the express requirement of Rule 60. This provision is apparently not always enforced because the courts accept assertions by trial counsel of heavy workloads. Another provision of the present rule that is not uniformly enforced is the requirement that counsel at the hearing be authorized and prepared to reach a reasonable settlement. The amendment to Rule 60 expedites proceedings by requiring that all discovery be completed at the time of the pre-trial hearing, which would be held for all jury cases no less that one year after entry of the case. Pre-trial conferences, since they can serve at least two purposes -- discovery monitoring and settlement exploring -- should be promptly scheduled with the purpose clearly in mind.

One of the complaints about pre-trial practice expressed by some of the attorneys interviewed was the requirement under the former Rule 60 that all requests for jury instructions be submitted at the conference. This requirement, they felt, was not sufficiently flexible to accommodate developments in the case after the pre-trial hearing. In response to this problem, the amendment to Rule 60 requires submission of requests for jury instructions at the time of the pre-trial conference "insofar as practical" and restricts later requests to those made "for good cause shown."

A final suggestion raised in the course of the interviews was the possibility of creating the position of "settlement master." This person, it was proposed, would ride circuit around the state or in a certain region and conduct conferences with the specific purpose of encouraging settlement. If the settlement master were

a well-respected and experienced member of the bar, it is possible that a significant increase in settlements might be achieved with savings of time and money. Lawyers expressed the preference that if a judge were the settlement master, he should not then sit as judge in a case which was before him in conference.

Superior Court Rules 10 and 11 also permit cases to be expedited to trial. Rule 11, in particular, permits a party to move for trial, without consent of other parties, on the ground that a case is ready and delay is unjustified.

Criminal pre-trial conferences are also useful, although different in content that civil hearings. The ABA recommends use of pre-trial conferences in criminal cases to plan specifically for a trial "in those cases in which there is a reasonable possibility of a trial." Three suitable situations exist when: 1) a trial is likely to be protracted, 2) a trial will be complicated if no conference is held, or 3) counsel concur in requesting a conference.[68] Unlike settlement discussions in civil matters, plea discussions are regarded by the ABA as unsuitable for inclusion at pre-trial conferences since the trial judge is present.[69]

Although the National Advisory Commission stated that in criminal cases, properly conducted pre-trial conferences "will greatly reduce the number of issues to be tried, provide for a more orderly trial, and assist in maintaining the trial calendar," the commission, as did the ABA, felt that the conference should not be mandated.[70] The NAC, however, would require the trial judge to find that "nothing could be gained by holding such a conference" in deciding not to hold one.[71]

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[68] ABA Discovery Standards, supra note 20, §5.4, commentary at p. 124.

[69] Ibid., p. 128.

[70] NAC, supra note 39, Standard 4.10 commentary at p. 94; ABA Discovery Standards, supra, note 20, §5.4 at p. 123.

[71] NAC, supra note 39, Standard 4.10 commentary at p. 94.

## Alternative Approaches for Implementation

### Approach #1 Amend Rules to Require Pre-Trial Settlement Conference

Description:

This approach has already been adopted by the Superior Court, although the amendment to Rule 60 (62) does not require a conference in every case. All cases are subject to pre-trial conference.

Time:

A rule change has been effected.

Cost:

Holding these conferences adds to costs of court operations but if conducted only when needed it is difficult to specify extraordinary increases in personnel and facilities costs.

Feasibility:

Pre-trial conferences are already held. Feasibility is thus high: 80 to 100 percent.

### Approach #2 Provide for a Settlement Master or Masters to Hold Conferences

Description:

This alternative envisions a new group of court personnel: attorneys or retired judges or clerks serving as settlement masters. Conflicts are minimized and staff expertise developed without the presence of a trial judge.

Time:

Appropriations are needed for these personnel, making the likely time factor range from six months to a year.

Cost:

The cost of initial implementation should be less than $50,000 for each full-time master and support.

Feasibility:

The feasibility of this alternative is high -- 80 to 100 percent -- even though an appropriation is required.

Standard 7.6 ASSIGN APPROPRIATE COMPLEX CASES AND FAMILY-RELATED MATTERS TO MEDIATORS OR MASTERS IN THE FIRST INSTANCE. IN SOME CASES, A SINGLE JUDGE SHOULD MONITOR A COMPLEX PROCEEDING.

Commentary

By definition, masters and referees are officers of the court assigned to perform specific functions, distinguishable from arbitrators, who are not officially related to the courts; mediators are persons who intervene between contending parties to reconcile them or persuade them to adjust or settle their dispute, rather than imposing a settlement, and they need not be court officials.[72] This standard, like Standard 6.3 supra, seeks to divert certain matters away from the traditional trial forum to non-judicial decision makers, but differs from that standard in allowing assignment to mediators or masters without party consent. Assignments of this kind are limited by any right to trial by jury that a party may have.[73]

Under RSA 498:12 and 519:9, the Superior Court has ample authority to appoint referees and masters, and proceedings before such officials are regulated by Superior Court Rules 76 - 80.[74] In 1969 the Governor's Commission on Court System Improvement recommended that the Court be authorized to exercise this authority when needed to expedite court business and clear court congestion.[75] Since the publication of the Commission's report, assignment of cases to auditors, masters, and referees has increased considerably, from 163 such references in the year ended July 1, 1970, to 639 in the year ended July 31, 1974.[76]

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[72] ABA., supra note 59, §2.54 at pp. 90-92.

[73] See Murphy & Sons, Inc. v. Peters, 95 N. H. 275, 62 A.2d 718 (1948), regarding what is now RSA 519:9.

[74] RSA 491:App. R76-80.

[75] 11 N. H. B. J. 217, at 246 (1969).

[76] N. H. Judicial Council, supra note 67.

In 1974 the National Center for State Courts recommended appointment of commissioners to assist Superior Court handling of domestic relations matters.[77] Acting under statutory authority to appoint masters, the Superior Court created a Marital Masters Program, in which court-appointed masters were assigned to domestic relations matters in Hillsborough, Rockingham, Strafford, and Merrimack Counties. In the program's first year of operation, these masters heard 2,304 divorces, 501 motions to modify support orders, and 807 other matters at a cost of $11.73 per action.[78]

Clerks in whose counties the program is operating have reported a significant improvement in the status of their dockets, and judge time has been freed to treat other matters. In 1975, the Superior Court expanded the jurisdiction of marital masters to include determination of permanent custody matters.

New Hampshire now provides statutorily for functions of the nature suggested in the above standard in such matters as appeals from orders of labor commissioners (RSA 227:31), minimum wage law appeals (RSA 179:19), review of planning board determinations (RSA 36:34), apportionment of assets and liabilities on dissolution of school districts (RSA 194:46 et seq.), and claims against insolvent estates (RSA 557:21, 558:18 and 19). Statistical sampling conducted in the course of this survey uncovered no cases assigned to mediators.

Two problems exist to impede broader use of mediators or masters. Under RSA 498:13, the expenses of masters are to be paid by the counties. Unfortunately, however, judges, clerks, and masters have found that the amounts appropriated by some of the counties have not been adequate to provide compensation for the number

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[77] National Center for State Courts, The Impact of Domestic Relations Cases on the Superior Court: Analysis and Recommendations, 34-36 and 46-47 (1974). For further findings as to the effectiveness of the marital master system, the evaluation prepared by the Center, note 4 supra, should be consulted.

[78] Summary by Administrative Assistant to the Chief Justice of the Superior Court, August 1975.

of cases the courts are willing to assign and the masters are able to hear. In addition, there are limitations in the availability of recording devices and stenographic personnel to record masters' proceedings and recommended orders.

It has also been suggested that findings of masters or referees be subject to review only on questions of law by the Supreme Court, unless error on the face of a finding was apparent to the Superior Court appointing judge. The Superior Court judge should carefully review a master's findings.

The trial of an extraordinary or protracted case can strain judicial and other court personnel and cause a severe slowdown in the movement of the trial calendar. In 1974 the Governor's Commission on Court System Improvement recognized the impact of a protracted trial in the creation of court congestion, sometimes causing other court functions to come to a virtual standstill and necessitating postponement (sometimes until the next term of court) of cases otherwise ready for trial.[79] The Commission further observed that the only remedy to such a problem is to have at least two judges presiding simultaneously in each court, with facilities adequate for at least two courtrooms.[80]

More broadly viewed, the remedy involves access to as many judges and courtrooms as are needed to dispose of the cases. In fact, cases involving protracted trials are only one sort of unusual or extraordinary cases, for others containing complex factual or legal issues may present special problems during pre-trial motion hearings and pre-trial conferences; still others must be re-opened after trial because of changes in the ongoing relation of the litigants. An additional category was identified by the American Bar Association Commission on Standards of Judicial Administration in recommending that cases in which disruption is reasonably

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[79] 16 N.H.B.J. 1, at 3-9 (1974).

[80] Ibid., p.9.

anticipated, should be to an individual judge, with extensive trial experience and ability as well as a particular reputation for fairness, for all purposes.[81] The Commission further recommends that special attention be given to early identification of complex cases that may be unusally time consuming.[82] Such cases, says the Commission, "generally have two or more of the following characteristics: very large amount in controversy, multiple parties, public notoriety, interconnection with other litigation, and extensive pre-trial activity."[83] Suggesting that checklists or examination of pleadings be used to bring potentially complex cases to the court's attention, the Commission recommends several measures for treating those cases determined to merit special supervision. These include assignment of a complex case for all purposes to an individual judge who by experience and ability may be especially well qualified to manage it.[84]

In response to questions posed during interviews conducted in the course of this survey, judges and attorneys were mixed in their reaction to having a single judge monitor a complex case. Some of the judges mentioned that this is already done to a certain extent, with a judge deciding at a preliminary stage of a particular case to retain jurisdiction of it, or with certain technical cases being assigned to a judge whose specialized background makes him especially qualified to handle them. Only two of those interviewed expressed a belief that complex cases occur very frequently, while 25 (slightly over half those questioned) see complex cases as infrequent, creating no special problems or time loss, and therefore requiring no special treatment.

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[81] ABA, supra note 59, §2.54 at p.97.

[82] Ibid., §2.53, commentary, at p.90.

[83] Ibid.

[84] Ibid.

But six of those interviewed said that having different judges handle the same complex case does create problems internal to the processing of the case, because each judge must take time to become familiarized with its details, because there are personality differences among judges, and because a lack of continuity results that may be detrimental to a party. And there were 14 of those interviewed who said that particular phases or kind of cases present problems that would be diminished by single judge assignment and monitoring. The problem phases or cases cited were: motions generally, and particularly criminal motions; criminal cases generally; domestic relations cases (the most frequent example, mentioned by five people); equity cases; products liability cases; tax abatement cases; and land damage cases.

Whether or not the court system decides on single-judge monitoring as a means to manage extraordinary or complex cases, the characteristics suggested by the American Bar Association may be used and, perhaps added to, as indicators of potential problems. Arguments are frequently made in support of the individual calendar system (where a case remains with one judge from start to finish) or the master calendar (where the sitting judge receives all cases ready for any stage of a proceeding). Each offers advantages, but it is clear that the individual calendar, which is employed in New Hampshire only by the United States District Court, is better able to deal with complex cases. In New Hampshire, the individual calendar system would clash with the Superior Court judge-rotation policy in that a judge assigned to monitor a complex case might be sitting on the other side of the state when a question or motion concerning the case arose. As a result, court officials should pay particular attention to the examples cited by those interviewed in this survey in determining which cases merit this special consideration.

Alternative Approaches for Implementation

Approach #1 Expand the Trial Courts' Use of Masters or Mediators

Description:

This alternative will enable trial judges to refer a complex case to a master for pre-trial preparation or to a mediator or referee as appropriate.

Time:

Immediate implementation is possible.

Cost:

Cost will vary depending on the extent to which masters are used. The cost is likely to range between $50,000 and $250,000.

Feasibility:

The feasibility of this alternative varies with the level of appropriation: state or county. State appropriation for the court system makes the alternative more likely to function effectively throughout the state. Feasibility is between 60 and 80 percent.

Approach #2 Assign Complex Cases to a Single Judge for Monitoring

Description:

This approach requires some change in the Superior Court rotation system but is intended to end use of that system to delay progress of a complex case.

Time:

Rule change needed can be effected within six months.

Cost:

Not significant.

Feasibility:

If limited to complex cases, this alternative probably can be implemented without great obstacle. Careful structuring would be the most important need.

Importance of Standard

This standard was given a high priority.

Standard 7.7 CONDUCT ALL TRIALS IN THE STATE IN ADHERENCE TO UNIFORM RULES AND PROCEDURES APPLICABLE IN ALL TRIAL COURTS.

Commentary

Consistency and predictability are important features of a justice system: differences in determinations caused by varying formal rules rather than the individual merits of cases cannot easily be justified. Though different procedural rules should be used for various types of proceedings and should accommodate special local needs, there is great value in uniform rules. As the American Bar Association has observed,[85] uniform rules establish standards of fairness and efficiency; provide guidelines and authoritative references; restrict favoritism, corruption, and prejudice; and can be formulated in a manner that takes into account all relevant interests, objectives, and constraints.

Under its power of general superintendence of all inferior courts (RSA 490:4), the New Hampshire Supreme Court has power of approval over the rules and procedures of the trial courts. But it has not made the rules of those courts, and its own rules (RSA 490:App.) do not deal with matters before the trial courts. The Superior Court is authorized (RSA 491:10) to prescribe its rules of practice, but even without statutory authority, such a function has been held to be within its inherent power.[86] By such authority the most recent body of rules governing Superior Court practice was adopted in 1972 and approved under RSA 490:4 by the Supreme Court.

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[85] ABA Standards Relating to Court Organization (1974) §1.11(c) commentary [illegible]

[86] Nassif Realty Corp. v. National Fire Ins. Co., 107 N. H. 267 (1966).

Until recently, these Superior Court rules were generally applicable to proceedings in the District and Municipal Courts. In 1975, however, the Administrative Committee of the District and Municipal Courts proposed uniform rules for these courts under RSA 502-A;19-a, which were approved by the Supreme Court under that statute and RSA 490:4. The lower courts' rules differ from, and are less numerous, than the Superior Court rules, although they are generally based on them.

Although it has been suggested that uniform rules of evidence cannot be had because of the use of police prosecutors and lay judges in District and Municipal Courts, it seems entirely unreasonable for proper procedures to be sacrificed owing to the lack of training on the part of one group of officers.

In response to an interview question posed to members of the court system in this survey, most judges and attorneys responded that little significant variation exists in rules and procedures followed in different court levels and locations in the state. Almost 20 percent, however, felt there is a great deal of variation. Some attorneys indicated that judges and clerks vary in their manner of interpreting and applying rules. Others indicated that some of the court clerks tend to "play favorites," by giving certain small advantages to certain attorneys.

Approach for Implementation

Approach: Enforce Uniform Rules of Evidence and Procedure in All Trial Courts and Train Personnel in Their Use

Description:

By this approach, all courts would be required to adhere to the same rules and procedures, as promulgated by the Supreme Court. Unless police prosecutors and lay judges in the District and Municipal courts are trained to be able to function within the rules, however, improvement is unlikely.

Time:

The courts can adopt rules upon approval of the Supreme Court which can occur in less than six months.

Cost:

A training program could be established for less than $50,000. Funding for a training program could be appropriated or obtained by federal grant.

Feasibility:

The feasibility of this approach is less than 30 percent because the task force indicated that uniform rules for all courts, much less providing of training for lay judges and police prosecutors, would be a severe solution to the problem. No suggestions of alternative approaches were made, although, presumably, increase in administrative capacity of the courts could permit greater awareness by the chief justice or administrative committee of a court of the degree of uniformity in practice.

Importance of Standard

High priority was assigned this standard.

Standard 7.8 ADOPT RULES FOR EFFECTIVE PROCESSING OF CASES. THESE SHOULD BE DRAFTED IN THE FIRST INSTANCE BY COMMITTEES COMPRISED OF JUDGES AND ATTORNEYS. DRAFTS SHOULD BE WIDELY DISTRIBUTED, WITH SUFFICIENT TIME PERMITTED FOR COMMENT PRIOR TO ADOPTION AND THOROUGH DISSEMINATION UPON EXAMINATION.

Commentary

Authority to promulgate administrative rules -- those addressed primarily to judges and other court officials and designed to govern how cases are to be processed -- is universally recognized to be within the inherent power of the courts.[87] The American Bar Association recommends that procedural rules shcould be developed and promulgated through a process allowing participation by judges and lawyers.[88] However,

[87] American Bar Association, Standards Relating to Court Organization (1974), §1.11(c) commentary at pp. 11ff; see National College of State Judiciary, Inherent Powers of the Courts (1973).

[88] Ibid., §§1.30 and 1.31 at pp. 71-72.

members of the bar should not share responsibility for making court administrative policy, which should be determined solely by the judiciary.[89] The ABA believes, though, that consultation with members of the bar and others outside the court system -- through advisory committees, joint studies, negotiation, and other procedures -- is essential.[90]

The process for development of procedural and administrative rules is only vaguely suggested in the statutes. RSA 491:10 states that the Superior Court, acting as a body, may formulate rules governing its business. Interviews in the course of this survey indicated that the process of rule development begins when a committee of Superior Court justices proposes rule changes to all of the justices, who then solicit comments from clerks and attorneys regarding procedural rules to be approved by the justices as a body.[91] After further consideration, the proposed rules are then submitted for approval under RSA 490:4 by the Supreme Court.

Rules for the District and Municipal Courts are formulated by the Administrative Committee under RSA 502-A:19-a, reviewed with judges, and submitted for approval by the Supreme Court. It is not clear whether there is any bar involvement in this rule development process.

The process in which proposed Superior Court rules are disseminated through the New Hampshire Law Weekly constitutes a strong first step toward clarifying and broadening the rule development process.

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89 Ibid., §1.32, commentary at pp. 77-80.

90 Ibid.

91 See 2 N.H. L. W. 327 (June 2, 1976), where the chairman of the state bar association's Committee on Cooperation with the Courts solicited attorney comments and suggestions regarding rule amendments proposed by the Superior Court.

Approach for Implementation

No alternatives were suggested because the present Superior Court process appears to have prompted broad participation and was deemed worthy of emulation in other courts by the task force. This standard was given a second priority.

Standard 7.9 MINIMIZE CONFLICTS IN CASE SCHEDULING BETWEEN DIFFERENT TRIAL COURTS AND SESSIONS IN THE SAME AND ADJACENT COUNTIES.

Commentary

Trial courts must take considerable initiative in cooperating with one another if delays caused by attorneys scheduled to appear at the same time in several courts are to be resolved. Even where court administrative operations are centralized, effective cooperation among the trial courts should reduce the burden of central or regional control of trial court operations. Of particular importance is the coordinated scheduling of cases involving those trial lawyers who have heavy court appearance schedules.[92] In New Hampshire, much of the trial work is done by a relatively small number of lawyers, and conflicts frequently arise that call for accommodations and continuances.

At present no system for case scheduling in New Hampshire courts is defined by statute or rule. The current situation is characterized by an informal nexus of communication among clerks and attorneys which identifies conflicts on the day an attorney is scheduled to appear in court and results generally in a continuance. Since a relatively small number of attorneys handle trial cases, scheduling conflicts are quite frequent according to the large majority of those interviewed. Conflicts are ordinarily resolved by agreements among clerks and attorneys.

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92 ABA, supra note 87, §1.12(e) (iii), commentary at pp. 31-32.

Those working in the court system generally felt little or no time is lost to the courts as a consequence of scheduling conflicts, primarily because, it was asserted, other cases can be scheduled to fill "holes" in the court schedule. Respondents did not indicate time lost to litigating parties, witnesses and jurors. However, enough indications were given by system participants that cases are shuffled to resolve scheduling conflicts, permitting the conclusion to be drawn that improvement is highly desirable.

National standard-setting groups have not dealt squarely with the problem of conflicts in scheduling resulting from a small trial bar, characteristic of many states and the principal difficulty in New Hampshire. Standards such as National Advisory Commission on Criminal Justice Standards & Goals Courts, Standard 9.4 on caseflow management and the ABA Trial Court case management recommendations[93] do not go further than calling on administrative and clerical personnel to take an active role in scheduling and to aid the presiding judges in monitoring by providing information gathered from operations.

Some court systems have done more. In Connecticut, civil cases in the Superior Court (soon to become a merged trial court including courts comparable to the District and Municipal Courts in New Hampshire) are monitored through an automated system which prepares and distributes calendars weekly to all scheduled attorneys. The New York courts have organized special sessions for cases involving specific insurance companies, since these cases account for a large portion of the civil caseload. With respect to criminal cases, effective scheduling has forced the New York courts to include, in the standards prepared to reduce delay, a provision that plea bargains, if they are to be received for consideration by the court, must be completed by a certain number of days prior to the scheduled time of the trial.

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[93] NAC, supra note 39, at pp. 187-88; ABA, supra note 20, §2.50 et seq. at p. 78ff. See also M. Solomon, Caseflow Management in the Trial Court (ABA Comm. on Standards of Jud. Admin. Supporting Study 2, 1973).

All of these approaches have drawbacks. Automated systems are expensive to install and may not be justifiable in courts serving relatively small populations. Moreover, it is likely to be advantageous in many instances for clerks and judges with administrative responsibility first to design manual systems of coordination so as to detect problems which will prove more costly to correct were an automated system to be introduced.

Scheduling must be sophisticated in design to take all of these considerations into account. Nevertheless, the effort must be made if the courts are to operate effectively without significant loss of time on the part of attorneys or litigants.

Alternative Approaches for Implementation

Approach #1 Reduce Conflicts by Cutting Trial Time Through Eliminating Jury Visits to Scenes of Accidents

Description:

The task force suggested that jury visits to accident sites be limited, by court rule, in order to expedite trials, reduce time for which counsel are required, and thus reduce time conflicts.

Time:

A rule change can be effected within six months.

Cost:

Not applicable.

Feasibility:

This alternative is highly feasible, between 80 and 100 percent, because the change appears to have broad judicial support and would increase conformance with general practice in the United States.

Approach #2 Introduce an Information System to Permit Cases in All Courts to be Scheduled to Minimize Conflicts

Description:

A scheduling system for trial courts in New Hampshire could be initiated on a manual basis but an automated process is likely to be more successful if carefully designed. When combined with effective pre-trial conferencing, this system can increase efficiency of courts greatly since present practices result in much loss of time.

Time:

An elementary system can be readily designed and implemented. More complex and automated systems require more than a year to produce.

Cost:

Increasing information transfer among levels of court -- Superior, District, and Probate -- and counties and court locations, can be achieved at relatively modest, less than $50,000, cost; automated systems involve substantially higher costs, possibly exceeding $250,000.

Feasibility:

The feasibility of an automated system is low, under 30 percent, because of cost. Increased cooperation among clerks at all court levels, however, increases the feasibility of more modest improvements.

Importance of Standard

Most of the task force accorded this standard a low priority.

Standard 7.10 RESERVE TRIAL BY JURY, IN CIVIL CASES, FOR MATTERS IN WHICH IT IS MOST NEEDED TO RESOLVE ISSUES OF FACT. NO CASE SHOULD BE TRIED BY JURY UNLESS THE AMOUNT IN CONTROVERSY EXCEEDS $3,000.

Commentary

The New Hampshire Constitution provides a right to trial by jury in civil matters for which the right existed under common law at the time of the constitution's adoption, except where the amount in controversy does not exceed $500 and title to real estate is not involved.[94] This right is extended by statute[95] to corporations and municipalities. Statutes also provide for a jury right regarding assessment or award of damages in a number of specific circumstances.[96]

The people of the state have acted from time to time to limit the scope of the civil jury right. In 1877, less than 100 years after the adoption of the state constitution, an amendment inserted an exception regarding cases in which the value in which the value in controversy did not exceed $100 and title to real estate is not concerned.[97] In 1918 it was proposed at the Tenth Constitutional Convention that the amount in controversy limit be raised from $100 to $300, but the proposal was reported "inexpedient" by the committee considering it.[98] In 1960 the amount in controversy was raised from $200 to $500.[99] In 1969, the Governor's Commission on Court System Improvement recommended raising the limit to $2,000, after finding from its study of 1967-68 trial results that few cases are tried where the contro-

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[94] N. H. Const. art I, §20.

[95] RSA 519:17.

[96] See RSA 229:12 (damages of re-establishment of highway boundaries); RSA 234:5 and 235:5 (damages for laying out of highway by town); RSA 371:10, 371:15, and 481:10(II) (damages in condemnation proceedings); RSA 372:13 (damages for taking of property by railroad); RSA 373:26 (damages on closing of highway crossing); RSA 379:15 (damages to railroad for use of its facilities by another railroad); RSA 479:15 (proceeding to compel accounting by mortgages); and RSA 482:28 (damages for construction of dam).

[97] N. H. Const. art I, §20, History.

[98] Buxton, Four Constitutional Conventions and Congress 197 (1928).

[99] N. H. Const. art I, §20, History.

versy does not exceed $5,000 and that the great majority of verdicts returned were well in excess of the recommended $2,000.[100] The Commission's recommendation was not implemented, and in 1972 the New Hampshire Judicial Council gave its support to a legislatively-proposed amendment that, had it been voted by the people, would have raised the amount in controversy limit to $2,500.[101] Nor was a proposal in 1976 to raise the limit to $3,000 able to muster popular ratification.

Given the rapid inflation that New Hampshire has experienced along with other states, it is clear that the scope of the civil jury right contains ever-increasing numbers of relatively minor cases. Since this imposes growing congestion on the courts and negates the intent of earlier limitations of the jury right, it seems clear that the dollar limit should be raised and a more flexible mechanism be relied on to respond to inflationary pressures. Thus it is preferable for the dollar limit to be set by the legislature, which is responsive through the elective process to the wishes of the people, rather than the less accessible process of constitutional amendment.

The time and expense involved in trial of cases to a jury is a matter that has evoked considerable study and comment.[102] In 1959, Kalven and Zeisel found that on the average it takes 40 percent longer to try a case to a jury than to a judge.[103] When judges and attorneys interviewed in New Hampshire during this survey were asked what is the total difference in processing time between trying a case to a jury and trying one to the court, 44 percent of those responding estimated that jury trials

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[100] Report, 11 N. H. B. J. 217, at 238 (1969).

[101] Fourteenth Biennial Report 21 (1972).

[102] See, for example, W. Schaefer, "Is the Adversary System Working in Optimal Fashion?" The Pound Conference, 70 F.R.D. 79 at 160-165 (1976).

[103] H. Kalven & H. Zeisel, Delay in the Court, ch. 6 (1959).

take 50 percent or more longer than issues to court. Another 50 percent estimated that they are longer, but by no more than 33 percent. Only about 6 percent said that jury trials and issues to court take about the same amount of time.

Approach to Implementation

Clearly, this standard is one which must endure long enough to earn public recognition: the recent refusal of the electorate to ratify a constitutional amendment raising the minimum amount in controversy for a jury trial indicates that this issue cannot be resolved expeditiously. However, the amount was raised sixteen years ago; hence, the task force's assignment of a high priority to this standard indicates that amendment can be accomplished if public support is sought and won.

Standard 7.11 SEPARATE ADULT CRIMINAL TRIAL CALENDARS FROM JUVENILE HEARINGS SO THAT, IN CONFORMITY WITH EXISTING LAW, JUVENILES ARE NOT PRESENT IN COURTROOMS WHEN ADULT DEFENDANTS ARE THERE.

Commentary

RSA 169:8 (1975 Supp.) prohibits the committal of a child "to a jail or police station, or other place where he can come in contact with any adult under arrest or charged with or serving sentence under conviction of crime;..." It is equally important that a juvenile be separated from such persons in a courtroom where it is hoped the proceedings will themselves influence his future conduct.

This standard, while not in conflict with the view that juvenile courts should not be isolated from the rest of the court system but an integral part of it,[104] is intended to ensure that juveniles are not needlessly and to their detriment, intermingled with adult defendants, especially since the statute proscribes such mingling

[104]NAC, supra note 39, Standard 14.1 at p. 293.

with respect to correctional institutions. Rather, the standard relates to court facilities, which, at the district and municipal level, often are unable to segregate witnesses (there are no jurors there to separate) or the judicial process from the police function.

In order to carry out the statute's intent, calendars should be prepared for a different part of the day and positive efforts made to maintain the separation between adult and juvenile offenders.

Approach for Implementation

Approach: Initiate Enforcement of this Standard by Facilities Monitoring, as Exemplified by the Court Accreditation Commission

Description:

Periodic inspection of facilities would ensure facilities standards are being met.

Time:

A court rule can be effected within six months.

Cost:

Costs appear minimal, since existing officials can perform inspections.

Feasibility:

This alternative is highly feasible since there is no significant opposition.

Importance of Standard

The task force assigned this standard a moderate priority.

Standard 7.12 PROVIDE FOR FULL AND OPEN DISCOVERY IN ALL CASES, RESTRICTED ONLY BY PRIVILEGES, CONSTITUTIONAL BARS AGAINST SELF-INCRIMINATION, AND SERIOUS DANGER TO WITNESSES.

Commentary

Full pre-trial discovery, now recognized as conducive to speedy disposition and increased fairness in civil proceedings, has become standard practice, subject to specific privileges.[105] Criminal practice has extended the right of pre-trial discovery but in less sweeping fashion. As discussed in the introduction to this section, a major basis for limiting discovery in criminal cases was distrust of the potential uses the defense might make of the matter obtained through discovery.[106] In New Hampshire, the Supreme Court's unwillingness to expand criminal discovery appears to derive largely from precedent and resistance to overburdening prosecutors who usually work on a part-time basis.[107] Determining how much discovery is to be permitted in criminal cases is a matter to be decided in each instance by the trial court[108] "under the circumstances of the case, the defendant's need for discovery and the adverse effect which such discovery might have on the proper prosecution of the offense."[109] In its most recent cases on the subject, the New Hampshire Supreme Court considered what information the prosecution was bound to disclose, even if not requested. The prosecution must now disclose evidence as may reasonably affect the judgment of a jury and the "factual basis of the alleged offense with enough

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105 See, e. g., Willett v. General Electric Co., 113 N. H. 358 (1973), which further defined "attorney's work product," the principal privilege involved against civil discovery. But cf. R. Grace, Invading the Privacy of the Attorney-Client Relationship, 81 Case & Comm. (July-Aug. 1976), p. 46, which examines efforts to limit the attorney-client privilege.

106 See ABA, supra note 20, §1.2 commentary at p. 36 ff.

107 See B. Kenyon, Criminal Procedure, Pre-trial Discovery: State of New Hampshire v. Frances Booton, 17 N. H. B. J. 57 (1975).

108 State v. Superior Court, 106 N. H. 228 (1965).

109 State v. Healy, 106 N. H. 308, 309 (1965).

specificity so that he can prepare for trial."[110] Superior Court proposed rules changes would provide for reciprocal discovery in criminal cases and for disclosure of exculpatory evidence and seized articles.

In explaining why it recommended "discovery and procedures that are different in certain respects from those currently provided by law in any jurisdiction in the United States,"[111] the ABA Discovery Advisory Committee cited three problems: 1) proliferation of pre-trial issues exacerbating an already "cumbersome and often exasperatingly time-consuming" motion practice, 2) inexperienced lawyers confronting more exacting demands by the courts in the interests of justice, and 3) more difficulty in achieving finality in convictions caused by permissive granting of post-conviction relief.[112] This assessment of the obstacles to an efficient criminal justice process led the committee to conclude that "The considerable expenditures of time, energies, talents and money required for trial should not be made until the integrity of the trial has been safeguarded by disposing of relevant collateral issues."[113] The proposed solution consisted of simpler and more efficient procedures, built-in pressures for expediting, and broader discovery practices.[114]

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110 State v. Dukette, 113 N. H. 472 (1973); State v. Booton, 114 N. H. 750 (1974). Limits on discovery include time (no discovery until felony bindover, RSA 604:1-a, or entry of misdemeanor plea, State v. Karafotus, 104 N. H. 191 (1962), grand jury minutes and witnesses (State v. Booton, supra and Opinion of the Justices, 96 N. H. 530 (1950)) and lists of witnesses (State v. Booton, supra, at 754). This was denied because a statute (RSA 604:1) provides for provision of witness lists to capital case defendants 24 hours before trial and the court would not impose a stricter rule in less serious cases.

111 ABA, supra note 20, §1.1 commentary at p. 24.

112 Ibid.

113 Ibid., p. 29

114 Ibid., p. 33.

An even broader range of criminal discovery is recommended by the National Advisory Commission:

> The standard is broader than many current proposals insofar as it calls for almost complete pre-trial disclosure by the prosecutor. Only work products such as investigatory reports and evidence not intended to be introduced at trial generally are exempted, and these are exempted only if they would not be exculpatory or lead to exculpatory evidence. [115]

The commission would permit the trial judge to limit disclosure by counsel of discovered information to others. The broader discovery would not infringe upon Fifth Amendment rights of defendants since it would not force testimony; rather, it would not allow the defendant to retain tactical advantages of timing which would be denied the prosecution. As with the ABA committee, the NAC posited its recommendations in the hope that they would "maximize the early resolution of issues regarding the admissibility of evidence and will encourage administrative disposition of cases with no significant increased danger of conviction of innocent defendants and no unjustifiable infringements upon the right of guilty defendants to be treated with dignity as individuals. [116]

Of the justice system participants surveyed in New Hampshire, 59 percent responded that the court should affirmatively encourage early discovery to expedite case processing. As to the need for more complete criminal discovery, 59 percent also said present discovery was adequate. 14 percent felt broader criminal discovery was needed. Problems raised with current discovery procedure were limited ability to discover information to test witness credibility and the late timing (just before trial) of discovery by court order of witnesses' names and exculpatory statements.

Approach for Implementation

Approach: Provide for Full Discovery in All Courts by Court Rule

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115 NAC, supra note 39, Standard 4.9, commentary at p. 90.

116 Ibid., p.91.

Description:

The task force felt that the proposed Superior Court rules on discovery should serve as models for all courts.

Time:

Rules changes can be effected within six months.

Cost:

Not significant.

Feasibility:

Some resistance to increased criminal discovery in District and Municipal Courts is likely on the part of police prosecutors. However, adoption of rules similar to proposed Superior Court practice appears highly (80 to 100 percent) feasible.

Importance of Standard

The task force set a moderate priority for this standard.

Standard 7.13 INSTITUTE USE OF STANDARD FORM OF POLICE REPORT TO EXPEDITE DISCOVERY IN CRIMINAL CASES.

Commentary

One way to provide information to the defense in discovery which will conform to standard procedures, and will offer the benefit of removing the tactical advantage with which current practice endows the prosecution in enabling the county attorney to exercise discretion in permitting discovery, would be the institution of a standard form of police report. All concerned could determine the critical factual information the report should contain and could then use this format to effectuate discovery of the relevant data known by the police. As things stand, the county attorney is placed in a position to decide whether to permit discovery based on his tactical view of a case. A standard form police report for use in discovery would end both the discretion susceptible to tactical abuse and the need for the trial judge to decide innumerable discovery motions based on this information.

Of attorneys questioned in New Hampshire, 68 percent said police reports were regularly made available through discovery. But, according to 64 percent, the information these reports contained was insufficient. 56 percent responding said that a uniform report form would not improve the situation while 81 percent said that the information and location of the information now included was consistent from one report to another.

Approach for Implementation

Approach: Prescribe Standard Police Report Form Through State Association of Police

Description:

By working with the police association, this standard can likely be implemented without seeking statutory change.

Time:

Estimated time should be less than six months.

Cost:

Costs should be limited to forms design and publication and committee review.

Feasibility:

This approach should be highly feasible, if courts make it clear to police prosecutors that broad discovery is required.

Importance of Standard

The task force assigned this standard a low priority.

Standard 7.14 LIMIT CONTINUANCES IN ALL CASES TO EMERGENCY SITUATIONS, ESPECIALLY WHERE A DEFENDANT IS INCARCERATED BEFORE TRIAL. ADVANCE APPLICATION IN WRITING SIGNED BY A PARTY SHOULD BE REQUIRED FOR CONTINUANCES.

Commentary

Enforcement of a firm policy restricting continuances, adjournments and extensions is an indispensable part of any effective caseflow management program. While judges should be willing to grant continuances when good cause is shown, leniency

has frequently dominated court continuance policy, with clerks free to grant extensions without limit and rarely on advance notice to the court or opposing counsel. Lawyers, witnesses and judges are forced to waste time, preparing for sessions which must then be postponed. Courtrooms lie dormant in spite of backlogged cases. Worse yet, leniency "sets off a cycle in which lawyers expect continuances to be granted, and therefore are not fully prepared for their hearings and trials; because they are unprepared, further continuances become necessary."[117]

Two steps are recommended by the ABA to remedy this situation: involvement of judges in deciding requests for continuances (including regular reporting to chief justices) and recording of continuances granted, so that attorneys who persistently request extensions can be advised to ad just their management of their practices.[118] Chief Justices can discuss instances of excess granting of extensions with individual judges.

Approach for Implementation

Approach: Adopt and Enforce Firm Continuance Policy by Court Rule

Description:

Superior Court Rule 46 provides for limits on continuances. Enforcement by the court is needed; this of necessity must be tied to effective processing of cases, else there is no reason to deny continuances.

Time:

Rules can be further amended within six months.

Cost:

Not significant, except for personnel to expedite case processing.

Feasibility:

Although the bar resists court control of caseflow and continuances,

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[117] ABA, supra note 59, §2.56, commentary, at pp. 101-102, see Super. Ct. R. 46 which limits civil case continuances.

[118] Ibid., §2.56 at pp. 100-101.

this approach is feasible if court case backlogs are reduced to a duration which makes continuance limitation meaningful.

Importance of Standard

The task force majority assigned this standard a moderate priority.

Standard 7.15 SESSIONS FOR MOTION HEARINGS SHOULD BE SCHEDULED REGULARLY, BUT NOT LESS OFTEN THAN MONTHLY.

Commentary

If civil litigaton is to proceed effectively, regular opportunities for motions to be heard and determined must be available, particularly during the discovery stage. In criminal cases, the same need exists, although use of the omnibus hearing can reduce the number of motions which must be heard individually. Regular opportunities for motions to be heard are frequently a major problem area for court systems in which judges ride circuit, as is the case with the New Hampshire Superior Court, which leaves some counties without a sitting judge for extended periods. While the caseload in a small county may not justify the continuous presence of a trial judge, the movement of litigation prior to trial is halted for lengthy periods as relatively routine motions await the next court term.

The ABA's recommendations for managing "short cause" dockets apply to the problem of securing rapid adjudication of motions.[119] Clerks should prepare a calendar of motions and other "short causes," such as applications for temporary orders, settlement approvals, orders for publication. In this way, a judge can be assigned regularly to spend a day hearing this calendar to permit cases to move closer to trial readiness. "A better approach is to have a reserve of judicial manpower that is available on brief notice when a short cause calendar threatens to become clogged," observes the ABA Commission.[120]

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[119] ABA, supra note 59, §2.55 at p. 99.

[120] Ibid., commentary at p. 100.

Alternative Approaches for Implementation

Approach #1 Increase Scheduling of Motion Days in All Counties

Description:

The Superior Court now assigns a judge to supervise county judicial business at all times. This approach would emphasize regular presence of that judge in the county to decide motions speedily so that litigation cannot be delayed by long intervals between court terms.

Time:

The court can revise rotation and motion hearing policy immediately.

Cost:

Slight impact of increased travelling by judges can occur.

Feasibility:

If planned with full awareness of clerks and judges, this approach is highly feasible (80 to 100 percent).

Approach #2 Ease Discovery Rules to Reduce Motion Frequency

Description:

This approach is based on the view that if courts are firm in enforcing full discovery, delaying motions will be reduced and the need for court sessions also lessened.

Time:

Policy shifts of this kind will require a consensus of the court.

Cost:

Not significant.

Feasibility:

This approach is probably feasible as to implementation but its likely impact in actually reducing the number of motions is much less certain.

Importance of Standard

The task force assigned this standard a moderate priority.

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## 8.0 SENTENCING

### Introduction

As the crime rate in America continues to rise, public concern regarding the sentencing practices of our courts has increased drastically. Many believe that the courts are too lenient, that harsh sentences are a deterrent to crime and that courts treat criminals with too much indulgence.

"Certainly, it is one of the major goals of sentencing that an offender be dealt with in a manner that is most likely to avoid the commission of a new offense at some future time."[1] This goal requires sentencing to be viewed in terms of its ultimate effectiveness in addition to its functions of providing retribution for crime and of protecting the community. The sentencing decision thus is both difficult and complicated. While it prescribes punishment, it also must serve as the basis for rehabilitation, protection of the community and deterrence of others from committing similar crimes. These objectives often prove to be "mutually inconsistent, and the sentencing judge must choose one at the expense of others."[2]

Complicating the sentencing decision is the fact that in large measure, sentencing is no more than a prediction. It involves predicting human behavior under certain circumstances: specifically, how the offender will react to various correctional alternatives. Often, information on the offender's background and character is fragmentary or is not available at all to the judge. Few judges in our crowded criminal courts have the time to mull the likely impact of sentencing decisions. At best, "wise and fair sentencing requires intuition, insight and imagination; at present, it is less a science than an art."[3]

The Model Penal Code specifies the general purposes of sentencing and the treatment of offenders as follows: preventing the commission of offenses, promoting

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[1] ABA, Sentencing Alternatives and Procedures (1963) §1.11, Introduction at p. 5.

[2] President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967), p. 141.

[3] ABA, supra note 1.

the correction and rehabilitation of offenders, safeguarding offenders against excessive, disproportionate or arbitrary punishment and differentiating among offenders with a view to a just individualization of their treatment.[4] This latter purpose requires that a distinction be drawn not only between individuals but also between age groups, i.e., juveniles and adults.

Juveniles possess unique characteristics, are involved in different activities and are viewed as a comparatively distinct entity by society.[5] While no age bracket is uniformly identified, there is general agreement that juveniles should receive more individualized treatment from the justice system. Therefore, juvenile sentencing practices must be distinguished from adult sentencing practices.

The philosophy known as parens patriae characterized juvenile courts for many years. Under this concept, the child is considered a ward of the state, requiring protection and guidance, rather than punishment. Separating the juvenile court from the criminal court has resulted in sentencing alternatives and correctional resources specifically designed for juveniles. It has also sought to increase the responsiveness of the court to the problems of youth since emphasis is placed upon the child's care and protection rather than upon criminal penalties.

The shift from juvenile correctional reform to emphasis on the court process did not occur until the late 1800s. Separation of juveniles from adults prior to trial was initiated in 1861 with the formation of a commission in Chicago to hear and adjudicate minor offenses committed by juveniles between the ages of six and seventeen years. In 1869, a Massachusetts statute provided for the presence of an agent of the state in court in any case where a child might be committed to a state reformatory.

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4 ABA, supra note 1, Appendix B, Model Penal Code Sentencing Provisions, Art. I, Sec. 1.02, at p. 306.

5 President's Commission on Law Enforcement and Administration of Justice: Juvenile Delinquency and Youth Crime (Washington; GPO, 1967), p. 120.

In 1898, Rhode Island moved to provide separate facilities for juveniles awaiting arraignment and trial. In 1899 the Juvenile Court act of Illinois provided treatment of juveniles as wayward children, and for the first time, consolidated neglect, dependency and delinquent cases under one jurisdiction: juvenile or family courts.

By 1911, 22 states had adopted juvenile court acts similar to that of Illinois and by 1925, 46 states had organized juvenile courts.

In recent years, the U. S. Supreme Court has acted to protect juvenile rights. Kent v. United States[6] focused on recognition of individual rights by juvenile courts rather than giving attention only to the process. The next year, the Supreme Court exposed the shortcomings in the parens patriae doctrine and placed new emphasis on the child's individual rights of due process.[7]

The thrust of juvenile correctional programming is "toward smaller, more intensive programs to deal with young offenders."[8] (Specific dispositional alternatives for youthful offenders are discussed in detail under Section 2.0, supra.) Sentencing decisions involving youthful offenders must consider the unique problems of young people and incorporate measures which will ensure youthful offender rehabilitation.

In adult sentencing as with juveniles, the consequences of the sentence must be recognized since improper sentences can deprive the law of its effectiveness and reinforce criminal behavior. Five basic sentences are already available to the court: confinement, partial confinement, probation, use of facilities geared to provide special treatment, and fines and restitution.

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[6] 383 U. S. 541 (1966).

[7] In re Gault, 387 U. S. 1 (1967).

[8] President's Commission, supra note 5, at p. 125.

Recently, attention has been directed toward study of the sentencing decision-making process.[9] Preliminary findings indicate the most crucial aspect of the sentencing decision judges make is their determination as to whether a convicted defendant should be incarcerated or put on probation. Their reliance on information relating to the crime and the offender's history before and after making this determination is now being studied. In addition to reliable presentence investigations, a promising development has been the preparation of sentencing guidelines for court use, based on the past experience of judges, the seriousness of the offense and the previous criminal history and background of the offender. Mechanisms such as those used by the Sentencing Review Division in New Hampshire can utilize these guidelines to review decisions that vary beyond the normal ranges and therefore learn when exceptions should or are likely to occur. Guidelines and a review process permit the courts to examine the nature of the offense, the background of the defendant and the intent of the legislation which is obviated by mandatory sentence provisions.

Standard 8.1 DETERMINATION OF WHERE A SENTENCE IS SERVED SHOULD DEPEND ON WHAT RESULTS THE SENTENCING COURT INTENDS THE SENTENCE TO PRODUCE, RATHER THAN UPON THE LENGTH OF THE SENTENCE OR THE AGE OF THE DEFENDANT.

Commentary

Statutory sentences often prescribe not only the length of confinement but where confinement is to occur. Such specificity provides uniformity but does not take into consideration the appropriateness of the correctional facility to meet the particular needs of the offender. A county house of correction or special treatment center may possess greater ability to deal with an inmate's needs than the state prison.

RSA 651:15 provides that sentences for offenses which bear a maximum term of more than one year are to be served in the state prison. Similarly, RSA 651:17

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[9] One major national study, which has used Denver and Vermont as study sites, is the long-term sentencing in state courts project now in progress at the State University of New York, Albany, School of Criminal Justice.

states, "Whenever a person is sentenced either (a) for a misdemeanor under provisions of RSA 651:2 or (b) for a felony under the provisions of RSA 651:1, or (c) for an extended term of imprisonment under RSA 651:6 and the maximum term thereof does not exceed one year, the sentence shall be that the offender be confined to hard labor, for the term ordered by the court, in the county house of corrections, or in a jail, except where otherwise expressly provided."

These statutes provide specificity and uniformity in sentencing. However, they limit the judicial discretion in sentencing to send a convict to an institution best able to serve both the needs of the offender and the community.[10]

Survey results showed that a large majority of justice system participants (60 percent) supported the position that alternative dispositions in sentencing be imposed free from legislative mandates based upon age or length of sentence. Approximately 30 percent found the present degree of flexibility adequate.

Alternative Approaches for Implementation

Approach #1 Amend the Statutes to Expand Judicial Discretion to Sentence Offenders to Appropriate Institutions

Description:

This alternative would revise the New Hampshire statutes to permit a judge to sentence an offender to serve a term in the state prison or other correctional facility based on the court's perception of the convict's needs and security considerations and available rehabilitative resources, regardless of the offender's age or length of sentence.

Time:

The legislative process is likely to require six to twelve months.

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[10] Report of Governor's Commission on Court System Improvement, 16 N. H. B. J. 1 (1974) at p. 121.

Cost:

None.

Feasibility:

The task force felt that this standard would encounter public resistance based on perception of the legislation as a weakening of the criminal sanction. Feasibility was put at 0 - 30 percent. If, however, the proposed legislation is presented as aimed, among other ends, at increasing the ability of the state to incarcerate dangerous inmates in the prison who now must remain in county jails, the prognosis for passage could be brighter.

Approach #2 Improve County Resources to Provide Specialized Treatment For Different Categories of Inmates

Description:

This approach would emphasize the need for differing correctional resources which cannot be maintained economically at all institutions and which can be designed to suit the problems particular to a county. At the time of sentencing, judges should be required to express their reasons for sentencing an individual to a specific institution. If resource improvements occur, inter-institutional transfers ought not be promoted, except in emergency situations, without notification to the court.

Time:

Creation of treatment alternative capabilities is likely to require significant time, as yet undetermined.

Cost:

Cost of improving county facilities in this manner would exceed $50,000 but not necessarily involve more than $250,000.

Feasibility:

Because of costs, this approach bears a feasibility estimate of 30 to 60 percent, based on some community recognition of the need for correctional facility improvement and the availability of federal funding.

Importance of Standard

The task force assigned this standard a high priority.

Standard 8.2 OVERALL CONSISTENCY IN SENTENCING SHOULD BE ACHIEVED THROUGH MECHANISMS SUCH AS A SENTENCING REVIEW BOARD

Commentary

As stated in the introduction to this section, the sentencing decision is often the most difficult and complicated one in the criminal process. Moreover, the more factors taken into consideration in the sentencing decision and increased number of defendants, the greater the likelihood of indefensible disparate sentences.

It therefore becomes imperative that provision for review of sentences be incorporated into the judicial process. Such review not only results in greater overall consistency and fairness in sentencing; it also improves reformative efforts in that offenders, who feel that they have been treated fairly in relation to others, are likely to be more receptive to the rehabilitation process.

Critics of appellate review of sentences express fear that "the exercise of appellate power as to the sentence would lead to a large number of frivolous appeals. However, the successful reversal of an inappropriate or grossly excessive sentence is hardly frivolous in terms of correctional programing or the offender's interest."[11]

While the establishment of a sentencing review board in the neighboring State of Maine has proven successful in terms of ability to handle the workload,[12] the over-

[11] National Advisory Commission on Criminal Justice Standards and Goals, Corrections, Washington, D. C. (1973), Standard 5.11, Commentary at p. 178.

[12] Report, supra note 11, at p. 121.

all impact of sentence review has not been assessed in Maine.

In New Hampshire, the Chief Justice of the Superior Court appoints three Superior Court justices or judicial referees, and three Superior Court justices or judicial referees as alternates, to constitute a sentencing review division of three members (RSA 651:57). Application and review procedures are set forth in NH RSA 651:58 and RSA 651:59, respectively. The Sentencing Review Division (as it is known statutorily) has not been in operation for a sufficiently lengthy period to permit significant conclusions to be drawn concerning its operations or effectiveness.

In the future, as sentencing guidelines are considered and prepared for advisory use by the court, the review division could review all sentences falling outside guideline range. It will be most important, however, to assess review division impact to assure that offenders do not gain sentence reduction on parole merely through repeated petitions and to protect judges from avoiding imposition of appropriate sentences because of fear that the division may revise them.

Implementation:

Since the review division exists, no implementation approaches are needed. However, the court system must provide for adequate records to be maintained of review division operations to permit accurate assessment of the impact of this procedure. The standard was rated by the task force as a first priority. See Standard 6.3 supra, approach.

Standard 8.3 OFFENDERS SHOULD NOT BE SUBJECT TO HABITUAL OFFENDER IMPRISONMENT AFTER FIVE YEARS HAVE PASSED FROM THE DATE OF THE EARLIER OFFENSE.

Commentary

Both the President's Commission and the ABA Advisory Committee on Sentencing and Review suggest that "The legislature serves its function best by arming the

system with the power to deal individually with individuals. The legislature can create institutions and programs, can provide the system with funds and facilities, can isolate goals and objectives -- but it cannot prescribe a proper sentence in advance of the event."[13]

Habitual offenders are often the target of mandatory sentences to protect the public from further criminal conduct. These provisions, while justifiable for a reasonable time period, should not affect determinations occurring many years after the original offense. If mandatory sentences are to be used at all, a time limit and circumstances should be suggested on what constitutes habitual criminality. "The reason for such a provision is that the judgment of likely recurrence which repeated criminality permits, and which provides the justification for an enhanced term in the first place, becomes progressively diluted as the time between the present and the last offense increases. Several states have recognized this factor by providing that felonies which have been committed more than five years before the previous offense cannot be considered."[14] (E.g., Pa. Stat. Ann. tit. 18 §5108 (1963); Wis. Stat. Ann. §939 62(2)(1958).) Other states, i.e., Minnesota, have longer periods for the same purpose.

In New Hampshire, RSA 651:6 permits imposition of extended terms of imprisonment if a defendant is shown to be a habitual criminal by the circumstances of the crime for which sentencing is to occur, if a defendant has twice previously been imprisoned on sentences in excess of one year, or under certain other conditions. No provision is made for eliminating classification in habitual offender status created by previous imprisonment after the passage of any period of time.

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[13]ABA, supra note 1, Standard 2.1 commentary at p. 53-54.

[14]Ibid., Standard 3.3(b)(iii) commentary at p. 171.

Alternative Approaches for Implementation

Approach #1 Amend Statute to Limit the Period in Which Habitual Offender Status May Be Invoked to Five Years

Description:

The present statute permits the court to sentence any convict as an habitual offender if any of several conditions are met. This approach would permit such treatment only for a five-year period following an offense.

Time:

Legislation requires at least a six to twelve-month period.

Cost:

None.

Feasibility:

The feasibility of this step was felt to be high, 60 to 80 percent, based on the emphasis it would place on habitual offender sentencing by specifying a time period. It is also likely, however, that specification of a time period could increase pressure on courts to apply habitual offender status in all possible situations, reducing present exercise of judicial discretion.

Approach #2 Provide Guidelines By Rule of Court for Judges to Apply in Determining Whether to Apply Habitual Offender Sentencing Provisions

Description:

Using this approach, the court can by rule provide guidelines for judges to employ in deciding whether to treat an offender as an habitual offender for purposes of sentencing. The rule would create a structure within the discretion allowed by the statute. In this way, the need for legislation mandating habitual offender sentencing can be minimized.

Time:

The rule promulgation process can be completed within six months.

Cost:

None.

Feasibility:

Since the court can accomplish by rule the aim of this standard, while specifying more clearly how the existing statute should be applied, the feasibility of this approach should be high: 80 to 100 percent, although it is likely that some judges will resent limiting of their discretion in this manner.

Importance of Standard

The task force accorded this standard an intermediate priority rating.

Standard 8.4 JUVENILE STATUS OFFENDERS SHOULD NOT BE INCARCERATED.

Commentary

Many states including New Hampshire define the status offender as a person in need of supervision (PINS) or a child in need of supervision (CHINS). Such actions as smoking, drinking, curfew violations, running away and truancy are, by statute, categorized as status offenses, i.e., an offender is so categorized by engaging in one of these proscribed forms of behavior, even though no sanction would be forthcoming if an adult so behaved. The intent of these statutes may have been remedial and therapeutic; however, juveniles found in violation are often incarcerated. Although these actions are not considered criminal conduct, the juvenile is nevertheless subjected to the criminal correction system.[15]

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[15]Alan J. Couch, "Diverting the Status Offender from the Juvenile Court," National Council of Juvenile Court Judges, 25 Juvenile Justice (No. 3, Nov. 1974), pp. 18-22.

Statistics compiled by the National Criminal Justice Information and Statistics Service indicated that, as of June 30, 1971, there were 48,050 adjudicated delinquents in institutions, and 21 percent of those youngsters, 10,156, were status offenders.[16]

Since status offenders have not committed what would be a crime if they were adults, they should be diverted from the juvenile justice system. Processing status offenders through the formal juvenile justice system results in stigmatizing the youth as delinquent, which only aggravates the problems he already has and encourages delinquency.

In New Hampshire, disposition of persons in need of supervision (PINS) is governed by RSA 169:13a, which became effective on August 28, 1975. This statute prohibits mixing adjudicated delinquents and PINS in detention or correctional facilities, but does not expressly prohibit incarceration of PINS as a dispositional alternative.

This standard recognizes that where persons found to be in need of supervision become incorrigible, some sanction involving limitation of activity is needed. The standard is aimed, however, at making incarceration a last resort rather than a regular occurrence.

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[16] "Children in Custody: A Report on the Juvenile Detention and Corrective Facility Census of 1971" (LEAA and National Criminal Justice Information and Statistics Service Washington: GPO, 1967), p. 19.

## Alternative Approaches for Implementation

Approach #1 Provide Sufficient Facilities for Treatment of Juvenile Status Offenders

Description:

To comply with the existing statute and avoid incarceration of status offenders, sufficient shelter care facilities are needed as present requirements far exceed available resources.

Time and Cost:

These factors are both undetermined since the present facilities are so limited.

Feasibility:

Cost, in particular, places the feasibility of providing added treatment facilities in the undetermined category.

Approach #2 Require By Rule of Court That Juvenile Status Offenders May Only Be Incarcerated as a Last Resort Upon a Clear Showing of Danger to Self or Community

Description:

This approach emphasizes the legislative intent to resort to confinement of these persons only as a last step.

Time:

A rule can be promulgated within six months.

Cost:

None.

Feasibility:

Since this rule would implement generally accepted views, the feasibility of its adoption is high, in the 80 - 100 percent range.

## Importance of Standard

The task force accorded this standard a high priority.

Standard 8.5 ADULT AND JUVENILE CLASSIFICATION AND DIAGNOSTIC UNITS SHOULD BE ESTABLISHED FOR PRE- AND POST-SENTENCING REVIEW.

Commentary

Adult and juvenile classification and diagnostic units provide additional alternatives to pre-sentence investigations. These units, operated by correctional agencies, provide extensive testing and screening in an effort to choose the best correctional program for offenders. Interviews, observation and testing are utilized to explore past behavior, present attitude, educational level, vocational skills, aptitudes, family and social background, as well as other factors relevant to development of a plan of disposition and treatment.[17]

"The sentencing decision is of such complexity that each sentencing court must have available to it a broad range of services and facilities from which it can obtain more information about the defendant's mental, emotional and physical condition than can be afforded in the pre-sentence report. The court should be able to employ such services in any case in which more detailed information of this type is desired as the basis for a sentence."[18]

Results of the survey indicate that there is a widely recognized need for a classification/diagnostic capability for pre-sentence recommendations and post-sentence review in New Hampshire (in addition to pre-sentence investigations authorized by RSA 651:A), especially for juveniles. Judges, members of the bar, probation personnel and police officers were interviewed regarding the need for such a capability. Of 40 persons interviewed, 33 responded positively while seven felt there was no need for the capability.

Most respondents (75 percent) who favored the establishment of a classification/diagnostic capability felt that these services should be provided by the state, while the remaining 25 percent would make community mental health clinics responsible for these services.

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17 President's Commission on Law Enforcement and Administration of Justice, Corrections (Washington, D. C. GPO, 1967), p. 19.

18 ABA, supra note 1, § 4.6 at p. 228.

Approach for Implementation

Approach: Establish classification and diagnostic units by statute or rule of court

Description:

In exercising its statutory obligation to consider pre-sentence investigation reports, the court could order use of a classification and diagnostic procedure. Alternatively, the classification/diagnostic resources could be established by statute.

Time:

Organizing units by either route would likely require at least a year.

Cost:

It would probably require from $50,000 to $250,000 to organize these units.

Feasibility:

Legislation is likely to encounter resistance on grounds of cost; the same obstacle would confront appropriations for implementation of a court rule. Although a clear majority of justice system personnel favors the step, feasibility was only rated at the 0 - 30 percent range.

Importance of Standard

The task force set a high priority for this standard.

Standard 8.6 JUSTIFICATION SHOULD BE REQUIRED BY THE SENTENCE REVIEW DIVISION IN ALL INSTANCES WHERE CONSECUTIVE SENTENCES ARE IMPOSED.

Commentary

"A therapeutic penology is supported by a unified sentence rather than a multiplicity of sentences against a defendant who has committed more than one crime. A treatment plan is one that works toward the offender's return to the community for another start. But if the termination of one sentence serves only as the beginning

of another, perhaps in another institution, no plan of treatment can be said to exist."[19]

Where public safety may require a longer sentence, the court should be authorized to impose consecutive sentences.[20] However, if the extended period of confinement is based solely on the basis that more than one crime was committed, rather than the needs of the offender or public safety, the result constitutes sentencing solely for the purpose of punishment and is not consistent with the basic goals of sentencing.[21]

Following the repeal of RSA 651:3, III, consecutive sentences are allowed in all cases. Interviews with Superior and District Court judges in New Hampshire revealed that consecutive sentences are infrequently ordered, although the majority of interviewees felt that in certain instances justification existed for their use, especially for class A felonies -- dangerous offenders with a history of violent acts and habitual offenders.

The purpose of this standard, requiring justification for consecutive sentences, is to ensure that such sentences are imposed only under circumstances in which no other alternatives are available.

The United States Court of Appeals for the Second Circuit has recently adopted new sentencing procedures for Federal courts in New York, Connecticut and Vermont. Among the new rules is one requiring judges to give reasons for each sentence. This new rule is "prompting judges to be more circumspect and thoughtful in their sentencing."[22]

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[19] National College of the State Judiciary, supra note 10, §17 at p. 166. In addition, detainers serve the same function as obstacles to effective treatment. The Interstate Agreement on Detainers (enacted as RSA 606-A) provides the means for a convict to demand that pending charges in other jurisdictions be adjudicated promptly.

[20] NAC, supra note 12, Standard 5.6, at p. 165.

[21] Ibid., p. 166.

[22] P. Chapin, "Second Circuit Adopts Sentencing Procedure," 60 Judicature 46 (June-July, 1976).

Approach for Implementation

Approach: Require the Court, by Rule, to State in Writing the Reason for Imposition of Consecutive Sentences

Time:

A rule can be put into effect within six months.

Cost:

None.

Feasibility:

This standard is difficult to implement through rule because it is generally felt by most judges that consecutive sentences are only imposed where justification for their use is clear. If, however, the requirement that justification be in writing is regarded as necessary for the review board to function effectively, and desirable for the trial judge in his formulation of the sentence to be imposed, feasibility could be increased to the 60 - 80 percent level.

Importance of Standard

The task force assigned this standard a low priority.

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# 9.0 PROBATION

## Introduction

Probation has been recognized by the American Bar Association and National Advisory Commission on Criminal Justice Standards and Goals as the sentence of choice in most criminal cases.[1] During the past ten years the courts' reliance on probation sentences has increased dramatically.[2]

Whether one traces the origins of probation back to English common law or early attempts at "judicial reprieve" -- suspended sentences,[3] the first documented use of probation in the United States occurred in Boston in 1841. In the late 1800s Vermont and Rhode Island each enacted legislation to provide probation supervision, Vermont on a county basis and Rhode Island on a statewide basis.[4] During the following sixty years, probation departments were developed in each state. An example of the increased emphasis placed on probation services can be seen in the dramatic increase in professional probation personnel. In 1907, 795 positions were classified as probation officers compared to 26,000 in 1968.[5]

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[1] For the purposes of this discussion, probation refers to a sentence imposed by the court which provides varying degrees of supervision for an offender who has been released in the community. This correctional subsystem or agency is referred to as the Probation Department and includes services such as screening, diversion and pre-sentence investigations.

[2] See ABA, Standards Relating to Probation (1970) Introduction pp. 1-7, §1.2, commentary at pp. 27-29; and ABA, Standards Relating to Sentencing Alternatives and Procedures (1968) §2.3, commentary at p. 72-73.

[3] President's Commission on Law Enforcement and Administration of Justice, Corrections. (Washington: GPO, 1967), p. 27.

[4] National Advisory Commission on Criminal Justice Standards and Goals, Corrections, (1973) Ch. 10, p. 312.

[5] Paul W. Tappan, Crime, Justice and Correction, (New York: 1960), p. 546-549.

Probation services represented a response to the realization that the goals of the criminal justice system generally, and sentencing alternatives specifically were not being realized. Indeed neither the community, in terms of increased protection, nor the offender, in terms of alternative behavior patterns, was significantly aided by the creation of prisons. The objectives for the creation of probation services were to provide the court with: 1) a factual basis upon which to make a sentencing determination; 2) a sentencing alternative which offered greater potential, at less economic and human cost, for reducing recidivism than prison; and 3) a more human sentence.

As probation services developed, the preparation of pre-sentence investigation reports and supervision of sentenced offenders were the agency's main duties. However, as greater reliance was placed on probation supervision by the court and correctional strategies began to emphasize community-based programs, the role of probation offices expanded. Whether as a result of pragmatism or in defense of a worsening situation, the courts have placed increased reliance on probation sentences. As correctional institutions reach capacity and the cost of incarcerating offenders skyrockets, the courts have been forced to increase further the role of probation.

The consequences of the increased roles are visible in several areas. Pre-sentence investigation reports are frequently completed prior to adjudication to expedite the investigation process and eliminate delay between adjudication and sentencing. As workloads increase, the quality and speed with which reports are completed is reduced. Probation supervision caseloads have burgeoned to unmanageable levels thereby reducing the amount of supervision to prepare investigation reports and individual assistance that can be provided -- the generally agreed purpose of probation. As greater amounts of time are taken away from supervision to collect family support payments and to provide assistance in screening and

diversion services, the level of recidivism among probationers increases. While the services required from probation departments have increased, the budgetary assistance essential to keep pace has not been forthcoming.

Clearly, the original objectives which led to the development of probation services are as important today and must be reemphasized if probation is to continue as an effective element in the criminal justice system.

Although not exhaustive, the standards and commentary which follow address the major concerns voiced on this topic during the survey. Included in the topics are:

- a definition of the nature of probation as a sentence and as a correctional subsystem;
- an assignment of priorities to the tasks required of probation personnel;
- a review of the essential elements of supervision and presentence investigation reports;
- a discussion of the administrative and organizational structure of probation services; and
- the recommended role of probation personnel in screening and diversion.

The ABA states that "the starting point for every sentence should be probation."[6] Institutionalization, although justifiable and necessary in some instances, most often results in furthering one's criminal associations. Not only are institutional sentences costly in a financial sense, but they also subject the offender to a degrading and futile environment, "the poorest possible preparation for their successful re-entry into society, and often merely reinforce in them a pattern of manipulation and destructiveness."[7] While removing an offender from the community

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[6] ABA, Sentencing, supra note 2, §2.3(e) commentary, at p. 72.

[7] President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, (Washington: GPO, 1967) p. 159.

has proven effective in curbing crime for the instant, it has not had any demonstrable effect on reducing future crime. The community-based individualized supervision possible under probation affords a greater potential for decreasing recidivism at a reduced financial and personal cost and as such requires significant attention under this survey.

Standard 9.1 INVESTIGATION AND SUPERVISION FUNCTIONS SHOULD BE ORGANIZED TO INSURE CONSISTENT LEVELS OF PERFORMANCE.

Commentary

As noted in the introduction to this section, the completion of pre-sentence investigations and supervision of probationers represent the major functions of a probation officer. Given the priority attached to the completion of pre-sentence investigations by the court, the amount of time an individual officer has available for supervision is often a function of the number of pre-sentence investigations assigned. The competitive situation that results from such pressure often impares the quality of both investigation reports and supervision. If probation is to continue as a sentence of choice, performance standards for investigation reports and case supervision must be developed and maintained to reduce the potential of over-emphasizing one function over the other.

The majority of judges and probation officers interviewed indicated that pre-sentence investigation reports did take precedence over supervision. Their comments indicated, however, that this was the result of limited staff available to complete reports rather than a specific departmental policy. RSA 504:2 requires the preparation of a pre-sentence report prior to the imposition of a probation sentence, unless waived by a superior court judge, and RSA 651:4 requires the preparation of a pre-sentence report for all persons convicted of a felony and for misdemeanors as ordered by the court. Additionally, the Director of the state Probation Department has issued a directive to all state officers that reports

will be completed on all cases in which an indictment is returned. An average of 12-15 hours is required for each report, or about two complete work days. The problem in report preparation, however, is not so much the actual time expended as the time needed to compile information from various sources. While the Probation department can in most instances prepare a report in two days, medical, education, and supplemental reports from other agencies extend the time required to complete the report. Of the probation officers responding to a survey questionnaire, the average amount of time spent conducting investigations was approximately 41 percent, while the average amount of time devoted to supervision was 27 percent. The balance of their time was divided among administration (11 percent), collections (6 percent), and miscellaneous (15 percent), including court time, volunteers, and community activities. The disproportionately high percentage of time devoted to investigations reflects the importance accorded this function both by the department and the court.

One obvious consequence of the preference accorded investigations is reduction in time for supervision. The average number of probationers supervised by the state probation department during the first six months of 1976 was approximately 2,400. While it is impossible to accurately estimate how often each probationer was contacted by his officer, due to individual variations, most officers estimated an average of one or two contacts per month. Contacts included office visits, phone conversations, occasional meetings in the community, or contact with another agency involved in the case. Clearly, if supervision and the successful re-integration of the offender is the primary goal of probation, this goal does not now receive such emphasis.

When questioned as to the advisability of having a single officer provide both investigatory and supervisory services, the majority of probation officers (84 percent) favored retention of this present system. The sole qualification to

that support was the need for smaller caseloads if both roles were to be managed effectively. Over 50 percent of the Superior Court judges who were asked the same question opposed assignment of the same individual to both duties.

A variation exists in the District Courts which have their own locally-based probation service. While the majority of District Court judges did not favor probation officers having collection responsibilities, no appreciative concern was noted in the officers undertaking both pre-sentence and supervision roles. This position may be a function of the reduced requirement for probation officers completing pre-sentence investigations in cases tried at the District Court. Only 42 percent of District Court juvenile cases and less than 15 percent of District Court misdemeanors and violations (non-traffic) cases sampled had pre-sentence investigations completed, compared to 72 percent for Superior Court felony cases.

While the majority of District and Superior Court judges considered pre-sentence reports as acceptable, some concern regarding consistent quality and variations in style was shown. The problem was regarded as more troublesome in the Superior Court than in the District Court since the same judge and probation officer are generally present in the District Court but not in the Superior Court where the judges are assigned to circuits.

Alternative Approaches for Implementation

Approach #1 Separation of Investigative and Supervision Functions

Description:

One method for assuring adequate quality of pre-sentence investigations and supervision is to separate the functions within a probation office. Such specialization has been used in New Jersey, Massachusetts, and Rhode Island and leads to greater uniformity in the quality of reports. Additionally, this approach insures that time for supervision is not reduced by increases in the investigation reports assigned.

Such an approach could be implemented in New Hampshire by departmental directive. Assistance for coordinating assignments and monitoring case loads would continue to be provided by the probation department's central office.

Time:

This approach could be implemented by administrative directive. The time required for converting the present system would be minimal, one to two months, once a conversion plan was developed. Determination of the time required to secure adequate funds to implement such an approach was not possible, consequently no estimate of time was made.

Cost:

Given present caseloads, the time required to complete investigation reports and the projected increase in the volume of investigations separation of the investigation and supervision functions would require the addition of approximately 10 probation officers. In addition to these salary and benefit costs, department travel costs would be increased if investigators were assigned regionally. The estimated annual operation cost of the additional personnel and travel is $150,000 to $200,000.

Feasibility:

Given the estimated cost of additional officers and travel, the problems of one officer completing an investigation in a case to be supervised by another officer, the anticipation of professional dissatisfaction generated by over-specialization, and the potential for overly standardized reports being prepared, the feasibility of affecting this approach is considered only 30-60 percent.

Approach #2 Establish Caseload Limits

Description:

Another approach for insuring adequate supervision and investigative

services is to establish specific caseload limits. The 1967 President's Commission Report and National Council on Crime and Delinquency have recommended the establishment of specific caseload levels, 35 and 50 respectively. Studies of the effectiveness of limiting caseload levels to increase supervision time thereby reducing recidivism have not demonstrated conclusively the value of this approach.[8] A variation of the caseload system which appears more realistic is a unit system in which types of cases are assigned a value, e.g., investigation of juvenile case = 5, and an adult supervision for a first offense = 3; and each officer is given an operating level, 75 units. Such a system requires the development of unit assignment criteria; availability of additional officers when unit levels are exceeded; and agreement by the court that unit levels will not be exceeded.

Given present supervision and investigation caseloads and projections for increases over the next five years, it is estimated that 10 additional probation officers would be required to establish realistic unit caseload levels. Such a system could be implemented by administrative order of the Director and Board of Probation.

Time:

The time required to implement this approach is dependent on the development of criteria; agreement by the courts; and addition of approximately 10 officers. Six months is considered minimal for accomplishing these tasks. (The time estimate should be modified if budget submission does not occur within six months.)

Cost:

The cost of this approach is estimated at $150,000 to $200,000 annually. This includes the salaries, benefits, and travel of the new officers. Present facilities and equipment are initially adequate;

[8] See generally, Neithercut, M.G., "Caseload Size and Difference in Probation/Parole Performance," Crime and Delinquency (1973).

however, a strategy for capital improvements would be required.

Feasibility:

The advantages of establishing working levels include greater professional job satisfaction, increased availability for supervision, greater opportunity for quality in pre-sentence reports, and flexibility for variations in individual performance. The negative aspects of such an a-proach are the cost of additional officers, problems of assigning additional assistance, and monitoring the effectiveness of individual work levels. While probation personnel, practitioners and members of the court agree that such an approach is desirable, the cost of 10 additional officers places the feasibility at the 60-80 percent level.

Standard 9.2 SEPARATE REGULAR PROBATION PERSONNEL FROM ALL DOMESTIC RELATIONS COLLECTIONS RESPONSIBILITIES.

Commentary

The purpose of probation, in providing supervision of convicted offenders and preparation of pre-sentence reports is to facilitate the reintegration of the offender into the community, while reducing the cost to the state.[9] An additional responsibility often assigned to probation departments has been the collection of support fines and restitution payments and counsel fees. Reimbursement may be a condition of probation, and as such clearly falls within the supervisory role of a probation officer; however, the regular collection and disbursement of support payments poses problems for probation officers. Not only do these tasks reduce the time an individual officer has for supervision and investigations, but they also lower the regard in which the probation officer, as an agent of the court, is held by those he serves.

If probation is to be viewed as a generally appropriate sentence, rather than a measure of leniency, as suggested by the National Advisory Commission report on

[9] National Advisory Commission on Criminal Justice Standards & Goals, Courts, (1973) p. 17.

Corrections,[10] the supervisory and investigatory roles must be stressed at the expense of the added jobs acquired over the years. To date, probation has been forced to accept ancillary roles to justify its expansion, if not mere existence. The greater acceptance probation now receives may be sacrificed unless supervisory and investigatory services are improved.

Currently, the New Hampshire Probation Department is empowered to collect and disburse "fines and restitution-payments and payments ordered in divorce, non-support, and support for children of unwed parents" when so ordered by the court (RSA 504:16). Although collection by the Probation Department occurs at the discretion of the court, in practice, the department is assigned collection responsibility in these cases. Eight counties are currently served by six domestic relations officers who oversee support collections and disbursements while regular officers are responsible for restitution and counsel fees in two counties. Although the domestic relations officers have relieved regular officers of collection responsibilities in these instances, all officers are still required by statute to serve as collection agents.

The amount of time required for collection activities varies greatly between local offices. State and local probation officers surveyed estimated their average involvement in collection activities as accounting for 6 percent of their time. Of this amount of time, 80 percent was devoted to restitution, 15 percent to court fines and professional bills, and 5 percent to counsel reimbursement. Except in Sullivan and Cheshire counties, regular state probation officers do not collect support payments, which is the function of the domestic relations personnel.

While probation officers charged with supervisory and investigatory responsibility are statutorily required to make collections, the domestic relations officers handle the major portion. Only restitution, fines and counsel fees are regularly

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[10] NAC, supra note 4, Standard 5.4, commentary at p. 159.

collected by probation officers, a task that 80 percent of judges and probation officers interviewed felt was appropriate.

Although the State Probation Department is scheduled to become the collection agent under Title IV-D of the Social Security Act, the provision of 75% federal funding for additional personnel should allow the Department sufficient resources to accommodate the projected 100% increase in cases resulting from the assumption of Title IV-D responsibilities.

Approach for Implementation

Approach — Domestic Relations Officer for Sullivan and Cheshire Counties

Description:

Provision should be made for a (1) domestic relations officer within the State Probation Department to make collections in Sullivan and Cheshire counties. (All other counties currently have such officers to make collections in domestic relations cases.) This position would be established by departmental directive and would be included in the department's budget. Additionally, N. H. RSA 504:16 should be amended to read "domestic relations officer" instead of "probation officer."

Time:

The position could be established and filled within six months. The statutory amendment to RSA 504:16 could be accomplished in 6-12 months.

Cost:

Estimated cost is $15,000 - $20,000 (salary, fringe and travel) for one additional domestic relations officer.

Feasibility:

The feasibility of this approach was considered high (80-100%) since this approach is in keeping with existing practice, would assure uniform practice within the probation department and is a desirable method for improving the overall performance of the probation department.

Standard 9.3 ESTABLISH PROBATION SERVICES ADEQUATE TO MEET THE SPECIAL NEEDS OF ALL PROPATIONERS, DEVOTING SPECIFIC ATTENTION TO THE NEEDS OF JUVENILE AND FEMALE PROBATIONERS.

Commentary

As originally instituted, probation services were offered to both adult and juvenile males and females. Indeed, the availability of juvenile probation services exceeded those for adults in the early 1900s.[11] One result of mixed probation caseloads was the development of generalist skills by probation officers. Each officer worked with juveniles and adults, male and female. While the ability of the officer to provide effective individualized supervision was sometimes impaired by the special needs of the probationer, the cost of establishing specialized caseloads was prohibitive. Clearly, some officers are able to meet a wide range of client needs, but most develop particular areas of competence.

One objective of a probation sentence is to provide individual assistance to all probationers; however, it has become increasingly evident that the needs of all juveniles and females require special attention. For example, juveniles may require assistance in education, mental health counseling, occupational training, recreation, or family counseling. While no single agency provides all such services, neither do most agencies address the needs of both juveniles and adults. Probation caseloads can be divided into numerous specialized groups; the emphasis on juveniles and females merely represents one method of subdivision which demonstrates certain specialized needs of a statistically-significant percentage of the probation population.[12]

Often, antisocial behavior stems from the specialized needs of the individual or type of individu If probation is to be effective in reducing future criminal and delinquent behavior, it must address these needs.

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[11] NAC, supra note 4, ch. 10 at p. 312.

[12] Several states have established separate adult and juvenile probation units. See ABA, supra note 2, §1.1 at p. 29.

The need for specialized probation services for juveniles and females was noted by 65 of the 75 individuals interviewed with respect to probation services. Although a majority of those interviewed recognized a need for more specialized services, there was little agreement as to the express nature and method of providing such services. Specialized caseloads for probation officers, diagnostic and counseling capabilities, and local officers were some approaches suggested.

Most of those surveyed recognized the special needs of both juveniles and females; however, creation of specialized caseloads was considered impractical in most areas due to the extensive amount of travel and relatively diffused caseload. The state's larger urban centers, such as Manchester, Nashua, Keene and Portsmouth were considered possible locations where such a division of probation responsibilities would be effective. Regardless of the approach taken, the need for probation officer awareness of the peculiar needs of probationers, particularly juveniles and females, is considered an important goal for both state and local probation officers to pursue.

Alternative Approaches for Implementation

Approach #1 Probation Officers Specializing in Juvenile Matters

Description:

Additional probation officers, with specialized training in juvenile matters, could be added to the department. These new officers would deal exclusively with juvenile cases. This approach could be implemented by departmental directive with the cost of these additional officers included in the department's budget.

Time:

It was estimated that approximately six months would be required to staff these new positions.

Cost:

The estimated cost of this approach is $150,000 - $200,000 since approximately 10 new probation officers would be required at an average cost

of $15,000 - $20,000 including salary, fringe benefits and travel.

Feasibility:

The feasibility of this approach was considered low (0-30%) due to the significant cost of adding new personnel. Further, the task force members expressed the concern that dealing exclusively with juveniles could be extremely taxing on a probation officer.

Approach #2 Specialized Training for Probation Officers

Description:

Probation officers should be provided specialized training, especially in the area of family counseling since juveniles may be dealt with more effectively if the probation officer deals effectively with the youth's family. Training in other areas relating to juvenile matters or the special needs of female probationers should also be provided.

This approach to improving probation services to juvenile and female probationers could be accomplished by departmental directive with provisions in the budget for absorbing training costs.

Time:

It was estimated that some formal training opportunities could be provided within six months.

Cost:

The costs of providing specialized training was estimated to be less than $50,000. Certainly, the cost would be considerably less if members of the community who are knowledgeable in juvenile matters could be persuaded to share their experience and expertise on a voluntary basis. The cost of this approach is therefore dependent upon the extent and depth of training provided and upon who is employed to do the training.

Feasibility:

The feasibility of this approach was considered high (60-80%) largely due to the fact that the cost of training should be relatively low, particularly in relation to the benefits which would accrue from the approach.

Approach #3 Regional Consultants for Probation Officers

Description:

Probation officers could be provided access to persons knowledgeable and experienced in juvenile matters and in meeting the special needs of female probationers.[13] These regional consultants (psychologists, social workers or others) would be available to officers to assist them in dealing with their probationers, both from a diagnostic and therapeutic standpoint. While local mental health personnel are presently of some assistance, they are largely unavailable to the officers for consultation. Additionally, probationers often feel negatively about dealing directly or indirectly with mental health clinics due to the stigma which is associated with mental illness. This approach could be implemented by departmental directive with costs for such services included in the department budget.

Time:

It is estimated that 3 - 6 months would be required to initiate this program.

Cost:

Since the consultants would be used on a part-time basis and their services would be called for only in special cases, as determined by the officer, consultant fees should not exceed $50,000.

Feasibility:

The feasibility of this approach was considered relatively low (50-60%) due to the costs associated with this program. The desirability of this approach, however, was considered high and the task force felt that the results would be favorable although difficult to quantify.

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[13] It is envisioned that the state would be divided into four (4) regions with one or more consultants available in each region, depending upon need.

Standard 9.4 ORGANIZE PROBATION SERVICES UNDER AN ADMINISTRATIVE STRUCTURE WHICH FOSTERS THE MOST EFFECTIVE PROVISION OF SERVICES TO THE COURT AND PROBATIONER.

Commentary

Two major choices need to be addressed in discussing administration of probation services: first, the branch of government which should control probation services--executive or judicial; second, the level of government at which probation should be administered--state or local. Traditionally, human services, including corrections, have been organized under the executive branch.[14] This is the practice in the six New England states and generally true nationally. Probation, however, maintains a slightly different posture, being administratively controlled by the executive branch but primarily responsible to the judicial branch. The frequent compromise in this situation is that budgetary control over probation affairs rests with the executive while functional responsibility is defined by the judicial branch. The potential for conflict in a setting where task assignment and resource allocation are not governed by the same body is obvious.

The inability of probation departments to define a selective rather than general role and objectives serves as a major contributor in the conflict over organization and control. As the initial basis for probation service, pre-sentence investigation and supervision expands to include collections and domestic relations supervision, the issue of control becomes more clouded.

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[14] NAC, supra note 4, Ch. 10, p. 313.

Probation departments currently serve as the courts' greatest resource in preparing investigation reports. While some states have placed a statutory priority on this role,[15] the dual objective of probation - investigation and supervision - should not be overlooked. Clearly, if probation is to be considered the sentence of choice in criminal cases,[16] the emphasis placed on supervision cannot be reduced. To have probation departments uniformly organized under departments of corrections as recommended in the National Advisory Commission report on Corrections, Standard 16.4, overlooks one of the major objectives of probation services, providing investigation reports to the court promptly. Only when probation departments have specifically defined their role can a determination as to the most appropriate and effective administrative and organizational structure possible.

The issue of state versus local control of probation services has long been contested. Arguments of standardization and uniformity loom large in the arsenal of state absorption, often at the expense of effective service. Until proponents of either position demonstrate the effectiveness of one approach or the other, the issue cannot be resolved.

Analysis of over 105 interviews, 400 questionnaires, and probation statistics from New Hampshire did not reveal any significant trend in either preference for which branch or level of government should control probation services. Additionally, no significant difference in the rate

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[15] See Cal. Penal Code §1203 (1966, Supp.).

[16] NAC, supra note 4, at p.2.

Chart 9.4

District Court Probation Officers

| Town | No. of Officers |
|---|---|
| Concord | 1 |
| Durham | 1 |
| Franklin | 1* |
| Hanover | 1* |
| Laconia | 1* |
| Lebanon | 1* |
| Manchester | 4 |
| Nashua | 5 |
| Portsmouth | 2* |
| Rochester | 1* |

These departments, while under the statutory control of the State Board of Probation, RSA 504:13, operate on an independent basis serving the local district court. In the more rural areas of the state, the State Probation Department provides officers.

* part-time probation officers.

of recidivism[17] among state and local probationers was discernable. Consequently, no conclusions can be drawn regarding the administrative placement of probation in either the judicial or executive branch or the efficacy of state or local administration. The present organization of probation departments as an element of the executive branch fosters coordination with other correctional and human service institutions. Judges generally agreed the present system was responsive to the courts both in the preparation, submission of pre-sentence investigations, and in providing regular reports on the status of probationers.

Similarly, the present hybrid system of state and local probation offices appears not only practical but effective in New Hampshire's correctional system. In those instances where the number of probationers is large, several communities have established local probation departments (see Chart 9.4).

It was the general consensus of the task force members that the Probation Department is presently responsive to the courts and thus the current administrative structure should be maintained. Further, it was concluded that should a Department of Corrections be established in the future, the Probation Department should not be incorporated into the Department of Corrections.

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[17] Recidivism for the purpose of this study was defined as any criminal or delinquent offense committed during or following a term on probation. (No outside time limit was established to restrict the period in which a new offense was committed.)

Standard 9.5 PRE-SENTENCE INVESTIGATION REPORTS SHOULD BE INITIATED ONLY AFTER A PLEA OR CONVICTION UNLESS (A) AUTHORIZED BY DEFENDANT, OR (B) SPECIFICALLY REQUESTED BY THE COURT.

Standard 9.6 INSULATE THE RATIONALE FOR TREATMENT PLAN (BUT NOT FACTUAL MATERIAL OR RECOMMENDATIONS) IN PRE-SENTENCE REPORTS FROM VIEW OF ALL EXCEPT THE TRIAL JUDGE AND THE SENTENCE REVIEW DIVISION.

Commentary

In 1954, the Model Penal Code[18] recognized the value of pre-sentence investigation in improving the quality of judicial sentencing. Whether a pre-sentence report should only be completed in specific types of cases (see Cal. Penal Code §1203 (1966 Supp.)), or at the discretion of the court,[19] the value of such a report in providing the court with reliable information upon which to impose an informed and effective sentence is widely recognized. The American Bar Association notes that the "adversary system is not appropriate as the dominant element in the proceedings leading to a sentence."[20] Clearly, the availability of current and factual information relating to the defendant is crucial for the court's sentencing decision.

The court's authority for ordering pre-sentence investigations is provided under RSA 651:4 (adults) and RSA 169:9 (juveniles) and applies to all felony, misdemeanor, neglect and delinquency cases. RSA 504:2 further expands the court's responsibility to order pre-sentence reports prior to the imposition of a probation sentence. While the authority provided under RSA 651:9 and RSA 504:2 is discretionary, RSA 169:9 mandates the completion of a report prior to final disposition. The results of the statewide statistical survey reveal that in 42 percent of district court misdemeanor and violation (non-traffic) cases and in 72 percent of superior court felony cases, pre-sentence investigations were ordered. The importance of maintaining the court's

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[18] Model Penal Code draft (1954) §707, commentary, p. 53.

[19] ABA, supra note 2, Sentencing, §4.1 at pp. 202-203.

[20] Ibid., p. 201.

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discretionary authority for ordering reports is crucial for the effective completion of reports.

Current discussion, as reported in ABA and National Advisory Commission studies, concerns all aspects of pre-sentence reports: authority and requirement for pre-sentence investigations, distribution of report information, form and content of reports, time for preparation, and the opportunity to controvert information contained in the report. Three principal issues which require attention in the context of New Hampshire needs are: 1) what should be included in a pre-sentence report; 2) when should pre-sentence reports be initiated; and 3) when should such reports be open for inspection and who should be eligible for review.

The purpose of a pre-sentence investigation is to provide the court with "succinct and precise information upon which to base a rational sentencing decision."[21] As the frequency of pre-sentence reports has increased, so has reliance on the information they provide. Not only do prosecution and defense attorneys often have the report available for plea bargaining purposes[22] but the reports are also used by a variety of social service and correctional agencies.[23] Some of the consequences of this dispersal of information include: probation officers becoming embroiled in the plea bargaining process; the information required in reports becomes more encompassing as the number of agencies using it are increased; the defendant's right to privacy is often violated; and the courts, for whom the reports were originally intended, may not have the information required for sentencing in a usable format. The pitfalls and potential abuses associated with the types of information and purpose thereof

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[21] ABA, supra note 2, Probation, Standard 2.2, p. 33.

[22] See ABA, supra note 2, Sentencing, §4.4 at p. 214-224.

[23] Ibid., §4.3 at p. 212.

are so significant as to require specific standards for the content of reports.

In most jurisdictions an adjudication of guilt or plea serves to initiate the preparation of the report; however, present New Hampshire practice is to start completion of these reports at the time of bindover or when an indictment is returned. The rationale for the procedure is predicated on large probation caseloads and significant case backlog in the Superior Court. While some criticism has been leveled against the practice of completing reports prior to plea or adjudication, it does have significant positive aspects. First, it reduces the amount of time between conviction and disposition. The average time for 393 sampled cases was 1.7 days, as compared with other northeastern jurisdictions where the time ranges from two weeks to several months. Not only does this practice reduce potential delay, but it also eliminates the problems created from incarcerating or releasing a convicted defendant pending final disposition. Either alternative has severe drawbacks: the houses of corrections are crowded and may not be sufficiently secure and releasing defendants who have been convicted increases the potential for flight. Second, it provides the court with significant social history and previous record information relative to the defendant which may be of assistance in determining what sentence bargain to agree to if a plea is entered.

The obvious criticisms of the New Hampshire approach are right to privacy, due process guarantees, and the wasted time experienced from "fall-out" cases. The present use of a waiver signed by the defendant authorizing investigation into non-offense-related areas appears to satisfy the first two criticisms at least in New Hampshire. The second issue, fall-out, is not as significant a problem as an estimated 85 to 90 percent of felony cases result in a plea or

conviction. Another concern raised was the potential loss of the court's impartiality if the report is submitted prior to plea or adjudication. RSA 504:2-A limits court review of a pre-sentence report until either conviction or plea are entered, thereby establishing a procedural limitation on loss of impartiality as an issue.

If the present practice of early completion of reports is continued, certain safeguards should be considered: 1) require written consent of defendant to authorize initiation of a report prior to plea or conviction; 2) restrict the distribution of the recommendations in the report prior to finding, verdict or plea; and 3) provide sufficient time to controvert factual details of the report.[24]

As noted, it is the Probation Department's present policy to have the defendant sign a waiver authorizing the conduct of an investigation prior to adjudication; however, the policy is informal.[25] Currently, RSA 504:2-A requires a probation officer at the time of filing a pre-sentence report to notify counsel for the state and defendant that the report is on file at the clerk's office and available for review and inspection. This procedure assists both prosecution and defense counsel by providing sufficient time to controvert the factual material; however, at present the report includes both the recommendations and rationale for the treatment plan. The inclusion of this latter material creates the potential for future conflict between the probation officer and probationer as well as involvement of the probation officer in plea (sentence) bargaining with the prosecution and defense. While the majority of judges and attorneys with substantial criminal practices interviewed favored the continued early disclosure of

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[24] Points 1) and 2) are almost paraphrases of ABA Probation Standard 2.4, and ABA Sentencing Standard 4.2, and also represent the opinions of a majority of regional group members and those interviewed.

[25] Allowing the defendant and counsel the right to withhold consent is unlikely to change practice, since most counsel will likely advise consent in the hope that cooperation with the Probation Department will produce the dividend of a favorable report. But permitting the defendant to decide this is similar to maintaining the right not to enter into a plea bargain.

pre-sentence reports, few of those interviewed objected to limiting the report to factual material. This limitation reduces the potential for probation officers' involvement in sentence negotiating and limits the effect of having the probationer disgruntled by an officer's recommendation and being subsequently placed under that officer's supervision. This result, however, is in direct contrast with the provision of Standard 4 of the Model Sentencing Act (1972), which recommends the right of all defendants, not only those being sentenced as dangerous offenders, to see the completed pre-sentence report, including the recommendations.[26]

Sufficient feeling existed both for disclosing pre-sentence investigations prior to and after a finding of guilt to suggest that neither the court nor the bar has had sufficient experience with the statute(RSA 504:2-A) since its enactment in August 1975 to assess its positive or negative impact.

Conclusive survey results regarding 1) whether the report should be withheld from the court until a finding or verdict and 2) whether the recommendation section of the report should be available to anyone other than the court, were not obtained. One result is clear, however: the disclosure of probation pre-sentence investigation reports prior to adjudication breeds a climate for plea negotiation which almost inevitably involves the probation officer. If probation is to be the sentence of choice, involvement of probation in plea negotiation clearly undermines the potential effectiveness of that sentence.

Alternative Approaches for Implementation

Approach #1 Clarify Preparation of Pre-Sentence Reports

Description:

At present there is neither a statute or rule which defines when a pre-sentence investigation should be completed nor is there any definition as to who is responsible for designating when such reports should be completed. RSA 504:2 assigns the discretionary authority for conducting

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[26] Natl. Council on Crime & Delinquency, Model Sentencing Act (2d ed. 1972), in Natl. Coll. of the State Judiciary, Sentencing and Probation (1973), p. 144.

an investigation with the Superior Court, and RSA 504:8 establishes the Board of Probation as the unit delegated responsibility for "establishing rules and regulations for...work of probation officers." The Superior Court and Board of Probation could enact the above standard by promulgation of a rule of court and/or administrative policy.

Time:

The time required to implement the above-mentioned approach was considered less than six months. While a rule or policy could be drafted and promulgated immediately, it was considered crucial to such a policy modification that sufficient time be afforded both the court and probation department to insure that the transition to such a practice causes a minimum of disruption in the system.

Cost:

The cost of this effort was considered negligible, certainly less than $50,000. While some procedural changes would necessitate new forms and modifications in case scheduling and supervision, the impact of such changes in financial terms was considered nominal.

Feasibility:

The single greatest concern regarding the approach revolved around what would be done with the defendant between conviction and the time of sentencing. While the probation officers and members of the court did not see either releasing convicted offenders on bail pending sentence or incarcerating those not eligible for bail as significant problems, they recognized that correctional officials and the public would probably be less accepting of such a plan. Consequently, the approach was given a 60-80 percent feasibility rating.

Approach #2 Delay Completion and Circulation of Pre-Sentence Reports

Description:

A modification of the Standard was suggested which would continue the present practice of initiating reports prior to a plea or conviction;

however, the report would not be completed until after conviction at which time the probation officer would interview the defendant and collect information relative to the offense (information which is lacking under the present system). This information could be prepared quickly thereby limiting either the time of release or incarceration for the convicted offender prior to sentencing. This approach was strongly supported, given the questions raised by the complete modification of the present practice for completing reports. The two distinct advantages of this approach are the inclusion of offense data in the report and inasmuch as the report would not be completed until after a plea or conviction had been entered, the report would not be distributed to prosecution or defense counsel until after a conviction thereby reducing the probation involvement in plea bargaining, while insuring an opportunity to controvert the report.

Implementation of the approach could be affected by agreement between the Superior Court and Board of Probation, and the issuance of a new administrative procedure by the Board. An additional element of this approach includes the restriction on the distribution of the rationale for the treatment plan to counsel. The probation officer's rationale for recommendation would not be subject to review by the attorneys or defendant, and as such should become a confidential element of the file used solely for court review. Disclosure of this information can have a negative impact on the relationship between the probation officer and defendant in subsequent supervision.

Time:

As with the first approach, to insure an effective and efficient transition, approximately 3 months were considered necessary for complete implementation.

Cost:

The cost of this approach was considered under $5,000 as it only changes the time frame of present practice.

Feasibility:

The minimal extent of system disruption and cost resulted in this approach being ranked in the 80-100 percent feasibility range.

Approach #3

Description:

A third approach which was discussed involves the promulgation of a Superior Court rule specifying when pre-sentence investigations may be commenced.

Time:

The estimated time for completion of this approach was 0 to 3 months. This estimate did not consider time required to develop or integrate new procedures.

Cost:

The estimated cost for this approach is nominal.

Feasibility:

This approach received a 30 - 60 percent feasibility rating given the public and political pressure anticipated regarding release of convicted offenders pending sentence and increased county correctional costs.

Standard 9.6 INSULATE TREATMENT PLAN RATIONALE

Approach #1

Description:

Implementation of Standard 9.6 can and should be accomplished by a rule of court. Limiting the content of such reports to the factual material surrounding the case and recommendation of the probation officer achieves the objective of the standard without requiring an amendment to RSA 504:2-A. The information currently included under the "treatment

plan rationale" should be submitted to the court as under separate cover and considered "confidential."

Time:

Implementation of this standard could be accomplished immediately upon promulgation of a rule of court.

Cost:

No additional cost to the present system of report preparation and dissemination is antiicpated.

Feasibility:

The feasibility for this approach was assessed at 80-100 percent.

Standard 9.7 INCREASE INVOLVEMENT OF PROBATION PERSONNEL IN PRE-TRIAL SCREENING AND CONDITIONAL RELEASE-SUPERVISION.

Commentary

The prevention and deterrence of crime and delinquency cover a wide range of activities. Whether viewed as a formal procedure or less structured prevention technique, the screening of cases[26] prior to their being processed through the court is a valuable and necessary part of an effective criminal justice system. Additionally, the use of conditional release both prior to and following formal case processing has been demonstrated to be an effective method of maintaining the defendant's ties with the community while maintaining tight control over that freedom.[27] Both the process and decision to screen cases and the decision to use some type of conditional release are contingent upon the knowledgeable participation of justice system personnel.

If screening is to be effective, the involvement of trained and experienced personnel capable of determining the positive or negative impact of

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[26] Screening, for the purpose of this discussion, refers to the process by which complaints are reviewed to determine the most appropriate method of proceeding with the complaint, either conventionally through the justice system or on an extra system basis.

[27] ABA, supra note 2, Probation §1.1(b) at pp. 23-24.

court processing must be insured. Screening occurs daily in schools, police stations, prosecutor's offices and court rooms. One problem of allowing an informal and selective system of screening to continue is that all the information essential to make an informed screening decision may not be available to a single individual. The benefits of having several parties involved in a screening decision include: greater breadth of information; better understanding of resources, and less arbitrary decision making process. Additionally, for individuals not trained or experienced in preparing background information, the information compiled may be misleading. Lastly, prior to making a screening determination one should have a complete understanding of what diversion or non-court resources might be employed to minimize future criminality of delinquency.[28]

The probation officer serves as a valuable and necessary resource in addressing these needs. As trained and experienced investigators, officers can collect, verify or review information critical in the screening process. The officer's knowledge of local resources aids in alternative placement decisions; familiarity with the type of individual most effectively screened from formal court processing assists the screening process. If screening is to be included in the justice system, probation personnel should be involved.

Survey results with court personnel, probation officers and individuals involved in screening programs indicate a lack of uniformity in probation personnel participation. Only three of the six screening programs contacted included regular probation officers in the membership of the screening committee. While all of the programs indicated a willingness to utilize probation personnel, considerable uncertainty was voiced concerning the potential role of the officer. As more direction and emphasis are provided for screening cases, the involvement of probation personnel should be clearly defined and required by the court to insure an adequate and accurate review of the facts of the case, personal background, and potential impact of diversion or court processing.

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[28] See Sherwood Norman, The Youth Service Bureau: A Key to Delinquency Prevention (NJ, NCCD: 1972).

Alternative Approaches for Implementation

Approach #1 Probation Personnel Assigned to Intake Units (See Screening/Diversion Std. 2.1, 2.2)

Description:

The establishment and function of community-based screening committees (in-take units) comprised of law enforcement personnel as well as probation personnel is described under topic area 2.0 Screening/Diversion, Standard 2.1, Participation by probation personnel in the screening process is considered an important aspect of intake unit approach. The time, cost and feasibility of utilizing probation personnel in this role is assessed under Standard 2.1.

Approach #2 Increase Use of Probation Personnel for Pre-Trial Conditional Release Supervision.

Description:

Conditional release (with supervision) prior to formal case processing can be an effective method of maintaining the defendant's ties with the community while retaining some control over the defendant's actions. Probation personnel are the logical choice to perform this supervisory function since they are already familiar with court procedure and possess the necessary supervising skills. The court may, under existing authority, specify that certain defendants report to a probation officer as a condition of release pending further court action. Increased supervision can improve the results of pre-trial release programs.

Time:

A minimum amount of time would be required to increase the use of probation personnel in a supervising capacity during pre-trial release if existing personnel could be utilized. However, given the heavy workload of many probation officers, additional probation personnel may be required before this approach could be

fully implemented.

Cost:

The cost of additional probation personnel to perform this supervisory function is included in Standard 2.1 Screening/Diversion since any new probation officers could be used to screen complaints as well as supervise conditonally-released defendants.

Feasibility:

This approach was considered highly feasible by task force members since little time or cost is necessary for its implementation (80-100 percent).

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## 10.0 APPELLATE PROCEDURE

### Introduction

The right of appeal has long been regarded as a mainstay of procedural fairness. In many instances the right appears to diminish in value when an aggrieved party realizes the likely delay to be faced before a case reaches final disposition. For this reason especially, major trends in American appellate procedure in recent years have stressed simplification and acceleration of the appellate process.

a) One trial and one appeal.. In 1938, a landmark American Bar Association report, prepared by the section of judicial administration urged "That appeals from inferior courts by way of full re-trial in a higher court should be avoided as far as possible, by improving the quality of the inferior courts..."[1] The most recent analysis of appellate needs, the ABA Standards Relating to Appellate Courts observes, "The right of appeal should not ordinarily include a right to have successive appeals."[2] In sum, it has been concluded that all interests are best served by trying a case once; except for unusual questions necessitating further review by a higher tribunal on a selective basis, a single appeal should suffice to dispose of most cases.

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[1]Report of ABA Section of Judicial Administration (1938), included as Appendix A in ABA, The Improvement of the Administration of Justice (5th ed. 1971), p. 152.

[2]§3.10, commentary, at p. 16.

b) Court control of appellate case processing. Most authorities concur that only through regulation of the operation of all steps of the appellate process by the court can effective caseflow management attack appellate delay. Recommended procedures include: 1) control of case process through continuous monitoring from filing of notice of appeal to final disposition; 2) early differentiation of cases according to complexity and common subject or parties; 3) termination of cases within stated time periods, and 4) consultation with court, staff, bar, and public in establishing procedural rules and goals.[3] Court control means that the clerk or staff is charged with enforcing time standards in the interest of the litigants and justice, rather than relegating enforcement to individual attorneys through motions.

c) Simplified procedure. Rules requiring exceedingly narrow specifications of alleged error of the trial court have persisted in appellate practice long after the strictures of common-law pleading were loosened in the trial courts. Elimination of such practice steps as court findings and assignments of error has generally expedited appeals without unduly increasing the work of the reviewing court. In the same manner, simplifying the record on appeal permits more rapid review and eliminating requirements for lengthy notices of appeal permits counsel to emphasize preparation

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[3] American Bar Association, Standards Relating to Appellate Courts (tent. draft, 1976), §§3.50, 3.51, pp. 80-86. §3.52 at pp. 88-89 recommends these time standards as goals: a) completion of record within 30 days of ordering; b) brief (first) due 30 days after record filed, other briefs 30 days later; c) oral arguments promptly after briefs closed; d) decision due in average of 60 days, with 90-day maximum in complex cases, after argument.

of the record and briefs rather than an extended notice which will be duplicated in the brief: the notice should serve the purpose of its name. Probably the most dilatory influence in appeals is the role of the transcript: while it cannot be eliminated -- how else can what occurred at trial be ascertained? -- its scope can be limited to necessary portions and technological improvements encouraged (such as computer-aided transcription).

d) Mechanisms to deal with increased caseload.

Appellate courts, formerly able to luxuriate in the review of a comfortable number of cases each year, have found themselves in the same struggle as many trial courts waging to dispose of surging numbers of cases. Among the strategies employed have been use of memorandum opinions where a case presents no novel point, screening of cases by the judges or their staff, establishment of intermediate appellate courts, and expansion of the ability of an appellate court which reviews intermediate appellate court rulings to determine itself which cases merit review.[4] In many instances, these changes permit increased effectiveness; however, some suggested innovations such as limitation of oral argument, require more careful analysis before wholesale change occurs.[5] Another mechanism increasingly employed is selection of only the most significant appellate opinions for publication, both to reduce costs and to limit the almost infinite amount of research materials which must be reviewed in preparing a brief on appeal.

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[4]These techniques are explored in D. Meador, Appellate Courts: Staff and Process in the Crisis of Volume (West, 1974).

[5]See discussion of oral argument in Advisory Council on Appellate Justice, Report and Recommendations on Improvements of Appellate Practices, in V Appellate Justice: 1975, p. 127.

e) Scope of review. The scope of review has not changed greatly. Appellate courts have always stated that they will disturb judgments below only when findings of fact are clearly erroneous, substantial prejudice resulted from procedural errors, conclusions are clearly unsupported by evidence, manifest injustice would result from a refusal to consider an issue not raised below, or serious departures from established precedent are shown.[6] How appellate courts apply these precepts is another matter. In general, it is recognized that the trial court has the best ability to determine facts and that no good purpose is served by retrying a case on appeal. Whether the applicable standard for reversal be plain, reversible or more-than-harmless error, some such criterion is normally employed.

Many jurisdictions have limited the right to interlocutory appeals. Limiting this right offers advantages to be gained from consolidation of all claims of error in one appeal; however, discretion in limiting the right appears advisable since the result of a reversal is a new trial: surely it is better to resolve a crucial question early in a complex case after a brief interruption rather than be forced to retry it as a result of an appeal delayed until after final judgment.

f) Provision of counsel. The principle followed most frequently today calls for a person entitled to appointment of counsel in a trial court proceeding to have counsel appointed for an appeal.[7]

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[6]See ABA, supra note 3, §3.11 at p. 19.

[7]Ibid., §3.20 at p. 42.

Standard 10.1 RESOLVE ISSUES OF FACT AT A SINGLE TRIAL BEFORE A LEGALLY TRAINED JUDGE, INSTEAD OF CONTINUING TO USE THE REPETITIOUS APPEAL DE NOVO WHICH RESULTS IN EVIDENCE LOSS, WITNESS ABSENCE, AND INEVITABLY UNSPEEDY TRIALS. ALTERNATIVELY, DECRIMINALIZE SELECTED OFFENSES WHICH NOW REQUIRE APPEALS DE NOVO.

Commentary

Appeals or, more accurately, trials de novo are allowed, with certain limitations in jurisdiction, in 39 states. Within these states, of course, the right varies: 1) in ten states, the trial de novo may be had in criminal cases because no jury was available in the initial court; 2) 21 other states allow criminal trial de novo to a jury even though a jury trial may have been held in the first instance; 3) eight states allow criminal de novo trial but only in very limited instances; 4) in six states, a transfer to a court of general trial jurisdiction may be had if the right to a jury in a criminal case is asserted; and 5) eleven states do not have trials de novo, with minimal exceptions in four of these.

Recently, both the use of trials de novo and non-lawyer judges were upheld by the United States Supreme Court in Ludwig v. Massachusetts, 96 S. Ct. 2781 (1976) and North v. Russell, 96 S. Ct. 2709 (1976), respectively. In permitting non-lawyer judges, however, the court specifically cited the availability of appeal de novo as a justification.

While trial de novo remains legally valid (by a 5-4 vote), as does use of non-lawyer judges (by 6-2), few strong arguments can be made in support of either practice on grounds of wise public policy. National practice, as expressed by recent national standards, is moving away from reliance on either. The National Advisory Commission on Criminal Justice Standards and Goals called for all trials to be held on the record before lawyer judges.[8] The Commission commented:

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[8] National Advisory Commission on Criminal Justice Standards & Goals, Courts (1973), Standard 8.1 at p. 164.

> By calling for the keeping of a record and the use of the same appeal procedure in all cases, the standard would abolish the trial de novo. Where the quality of the trial courts clearly is below minimum standards, there may be some justification for providing a more appropriate forum for defendants willing to spend the time and money to litigate their cases again. But if the general quality of the courts determining such matters initially is raised, there is no justification for an entirely new proceeding. Even when the quality of the lower courts is open to question, provision for a trial de novo in a higher court is a poor remedy. In fact, some studies have suggested that providing the escape valve of a trial de novo reduces lower court incentive to improve. On balance, trial de novo cannot be justified whatever the conditions of the lower courts. [9]

In discussing trials before non-lawyer judges, the ABA standards merely recognize trial de novo as "the only feasible method of review."[10]

In assessing the impact of trials de novo in New Hampshire, the most frequent responses of those justice system participants surveyed were that the procedure consumes an excessive amount of time and that the existence of the jury trial right in Superior Court increases pressures to compromise, benefiting defendants. The statistics sampled showed that in 1975, approximately 42 percent of the Superior Court's caseload consisted of appeals de novo. Of these cases, 56 percent were misdemeanors and 44 percent were violations. Some suggested requiring a defendant to elect a jury trial at the start of proceedings. Others proposed elimination of the right to jury trial for some offenses (requiring constitutional change), while most observed that the simpler course of decriminalization of offenses would accomplish the same goal. Only a few felt that trials de novo had no effect on caseloads or ultimate disposition.

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[9] Ibid., commentary at p. 166.

[10] ABA, supra note 3, §3.90, commentary, at p. 124.

In summary, decriminalization of driving while intoxicated (or removing the possibility of a jail sentence for first offenders) was the most frequent suggestion in resolving the problems of caseload crowding, plea bargaining pressure, and disruputed continuity caused by trial de novo following an initial trial before a non-legally trained judge. Eliminating these problems are the prime results to be achieved in phasing out trials de novo.

Alternative Approaches for Implementation

Approach #1 Eliminate Need for De Novo Appeals by Decriminalizing Most Frequently Occurring De Novo Offenses, e.g., Driving While Intoxicated

Description:

By decriminalizing (reducing to violation status) or, more specifically, removing the possibility of a jail term for certain offenses which frequently require Superior Court re-trial through the appeal de novo process,[11] these cases can be effectively disposed of by one trial. Delays in processing will be reduced with punishments likely to remain much the same, since Superior Court summary treatment of these cases has resulted in many dispositions approximating the non-incarceration penalties for violations.

Time:

Legislation to redefine certain offenses as violations, and thus not require jury trial (RSA 592-A:2-b), should be enacted. The minimum time necessary to implement such legislation is six months.

[11] National Center for State Courts, Maine Traffic Court Study (1975), p.14.

Cost:

No cost factor, since trials now held in District Court will be longer, but Superior Court trials will be ended.

Feasibility: 30-60 percent

This is a practical alternative but there is likely to be legislative resistance to reducing the penalty for a crime long viewed as especially threatening to the public, even though speedier and, in terms of percentage of eventual convictions, more effective justice would likely result.

Approach #2 Early Election of Jury Trial

Description:

By forcing defendants to elect a jury trial at an early stage, the case would be immediately removed from District or Municipal Court and placed on the Superior Court calendar. This would at the least expedite proceedings which now require the initial trial in District or Municipal Court.

Time:

This change could be accomplished by revision of court rules by the Supreme Court, likely to require less than six months.

Cost:

No cost factor, except to reduce costs in District and Municipal Courts from elimination of trials there.

Feasibility: 80 percent

This procedural change is certainly feasible, but its impact is open to question since it will not reduce (and is likely to worsen) the already overburdened Superior Court calendar of these cases.

Approach #3 Provide Facilities for Jury Trial in District and/or Municipal Courts

Description:

This would eliminate the de novo appeal by making the first trial the only one--at the lower court level. Appeal would only be permitted on questions of law, to be decided by the Supreme Court. If this alternative is to comply with constitutional requirements, it may be necessary to provide lawyer judges in the lower courts. (Non-lawyer judges were allowed by a recent Supreme Court decision, but the availability of appeal de novo was cited as a justification. North v. Russell, 96 S. Ct. 2709 (1976): Accord, Jenkins v. Canaan Municipal Court, 366 A.2d 208 (N.H. 1976).

Time:

In order to provide jury trials and lawyer judges in these courts, legislation will be required. Moreover, funding to equip existing courtrooms to handle juries will be needed. The task force placed its estimate of time in the undetermined category.

Cost:

Costs would include renovation of courthouse facilities, increased jury payments and judicial salary increases, totalling at least $250,000, if improvements are limited to making some courts full-time and others circuit stations.

Feasibility: 0-30 percent

Costs seems the major limiting factor, along with the probable need for providing lawyer judges, creating a host of problems,

especially legislative, in any effort to reorganize the District Court where change in judicial personnel would occur. A related alternative, merger of all trial courts, would encounter the same problems as upgrading the District and Municipal Courts would.

Approach #4 Elimination of Jury Trial Right in Lesser Criminal Cases

Description:

Elimination of jury trials in processing of criminal matter such as driving while intoxicated would require constitutional amendment. It could only affect crimes where the punishment was not in excess of six months. Duncan v. Louisiana, 391 U.S. 145 (1968). This would allow final disposition in the District or Municipal Court.

Time:

Time is an important factor, since amendment of the state constitution, which may take from one to eight years, depending upon the process used, would be required.

Cost:

Cost would not be a significant factor.

Feasibility: 50 percent

Further restriction of the right to jury trial is not likely to arouse great public support, nor would court-improvement groups muster much enthusiasm for a step to bolster the non-lawyer judges in the District and Municipal Courts.

Importance:

This standard was rated as first priority by a task force majority.

Standard 10.2 IMPROVE MONITORING OF SUPREME COURT CASES BY REQUIRING ADEQUATE NOTICE TO THE COURT AT THE START OF AN APPEAL, AND INCREASING SUPERVISION OF TRANSCRIPT PREPARATION IN ORDER TO BE ABLE TO ASSESS REGULARLY WHETHER THE IMPACT OF AN INCREASING CASELOAD REQUIRES MECHANISMS SUCH AS SCREENING, CERTIORARI, SUMMARY DISPOSITION, OR AN INTERMEDIATE APPELLATE COURT TO DISPOSE OF APPEAL.

Commentary

At present, the Supreme Court of New Hampshire, the state's appellate tribunal, has proven capable of disposing of increasing numbers of appeals. In 1975, for example, an average period of almost seven months elapsed between entry of an appeal and argument or submissions; an average case was disposed of approximately three months following argument or submission.[12]

Nevertheless, one critical time period has not been monitored: from the time an appellant files notice in a trial court initiating an appeal until the appeal is actually entered in the Supreme Court. In most instances, an appellate case is brought by the "reserved case" or "bill of exceptions" methods. These do not require the trial judge to specifically determine the questions to be appealed but do require that the case be forwarded to the Supreme Court. Until the transcript of proceedings is ready, even cases forwarded or filed directly with the court, as in certain administrative appeals, are not entered. As the Clerk of the Supreme Court comments: "Considerable time

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[12] G. Pappagianis, A Primer on Practice and Procedure in the Supreme Court of New Hampshire, 17 N. H. Bar J. 172, 182-183 (1976). The median time periods were even shorter: five months and two months, respectively.

may pass before entry of the case ir the Supreme Court following the trial court's approval of the case for transfer. The most common reason for delay in entering the case is the time required to prepare the transcript in a case."[13]

The Supreme Court has recognized the need for monitoring of the appellate process, e. g., timely submission of briefs, following entry of the case. "The traditional policy of allowing the adversary to monitor a case's progress on appeal has gradually been replaced by court management of case progress."[14] Since, however, completion by an appellant of the initial steps required in the trial court does not even become known to the Supreme Court until entry, which usually occurs much later, no monitoring of this initial period occurs.[15]

Only by requiring direct notice to the Supreme Court at the start of all appellate cases can the court ascertain how long the entire process takes. A complete docketing statement filed at the time an appellate case is initiated will permit the court to monitor both the progress of the case, the time it will require for disposition, and the efficiency of the transcript preparation process. If caseloads increase to the extent that the present procedure cannot cope with lengthy delays or backlogs, the procedures cited in the standard and discussed in the introduction can be considered. The use of settlement conferences not unlike those discussed in connection with trial procedure (Standard 6.5) should also be considered. In one appellate court (the U. S. Court of Appeals for the Second Circuit) where appeals are sent to a settlement conference before being set down for argument or submission, approximately one-third of the cases are settled at the conference stage.

Participants surveyed were satisfied with the ability of the Supreme Court to dispose of its caseload expeditiously. The result to be sought through this

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13 Ibid., p. 186.

14 Ibid., p. 183.

15 Ibid., p. 186.

standard is maintaining information concerning the court's operations and caseload adequate to allow proper planning to occur, thereby aiding effective performance.

Alternative Approaches for Implementation

Approach #1 Require Early Filing of Appeals in Supreme Court With Docketing Statement

Description:

By requiring early notification to the supreme court of all appeals through submission of a docketing statement at the time the appeal is initiated, the court and its staff will learn earlier what the upcoming workload will consist of and how speedily cases now progress through the appellate stage. The need for procedural changes will be identified through the monitoring of each step.

Time:

This alternative can be effected by a court rule, which should require less than six months.

Cost:

Added staff for monitoring may require up to $50,000 in cost.

Feasibility: 80-100 percent

This would seem a very likely alternative, since cost and time are reasonable and little extra work is required by the bar. Ultimate impact, however, will be determined by how much monitoring capability is developed and how willing the court will be in pressuring recalcitrant counsel and dilatory trial judges and stenographers.

Approach #2 Increase Stenographic Resources

Description:

This alternative addresses one of the usual serious bottlenecks in appellate processing: preparation of the transcript. This could take several forms: 1) providing more stenographers; 2) establishing a central staff "bank" for dictating and typing transcripts, judicial opinions and correspondence; 3) adding part-time staff for either need; and 4) introducing increased automated transcript capability.[16]

Time:

Funding will require legislative action. Changing stenographic work conditions will also take time. Estimate: at least 1 year.

Cost:

All options require significant funding, at least in excess of $100,000, even if some civil transcript costs could eventually be recoverable from the parties.

Feasibility: 50 percent

Resistance to funding will reduce feasibility of all options, as will resistance by present stenographers interested in preserving status quo. A central pool poses biggest change; automation feasibility is limited by present "state of the art."

Approach #3 Introduce Screening Mechanism in Supreme Court

Description:

Introducing screening of cases, sifting through original petitions for extraordinary writs, or summary disposition would all mean a major change in the supreme court's present operating procedure. These would, however, permit the court to select the cases truly meriting thorough review and encourage those desiring speedy review to initiate appeals and enter original petitions knowing that if a case is screened as worthy, processing will be speedier.

Time:

Legislation or rules changes will probably be required to modify present procedures relating to reserved rights on appeals and to provide funding.

Cost:

Added staff may be needed to screen, although the justices could likely handle the initial burden with their present law clerks.

Feasibility: 80 percent

Time and cost pose only slight barriers. The court itself is likely to await more definitive proof of the need, possibly requiring the threat of a backlog. In sum, though, this is surely a feasible step. Closely related alternatives such as creating an intermediate appellate court (30-60 percent) and enlarging the supreme court (60 percent) are more costly, would take more time, and thus require more justification.

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[16]See National Center for State Courts, Technology and Management in Court Reporting Systems (1973).

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# 11.0 SPEEDY TRIAL

## Introduction

> Delay in the courts is unqualifiedly bad. It is bad because it deprives citizens of a basic public service... it is bad because delay may cause severe hardship to some parties...and it is bad because it brings to the entire court system a loss of public confidence, respect and pride.[1]

The requirement for a speedy trial addresses both the right of the criminal defendant and the interests of the public. During the past decade, the courts in the United States have balanced the desire for swift prosecution with the procedural safeguards afforded by state and federal constitutions. However, both the public and defendants are best served by expeditious case processing. The Sixth Amendment guarantee[2] to a speedy trial has been said to be "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself."[3] In pursuing the goal of a speedy trial, the court protects the rights of a defendant while maintaining a responsive posture toward public concern. In any event, if the court is to resolve issues of fact and law effectively, then delays in case processing must be eliminated.

The specific objectives to be achieved by reducing delay and fostering speedy trials of all types include:

- Ensure that procedural safeguards for case processing are followed;

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[1] Hans Zeisel, Harry Kalven, Jr., and Bernard Buchholz, Delay in the Court (Boston: Little, Brown & Co., 1959), p. xxii.

[2] U. S. Constitution, Sixth Amendment.

[3] United States v. Ewell, 383 U. S. 116, 120 (1966).

- prevent protracted periods of delay prior to and during the processing of a case;
- eliminate unilateral delay as major bottleneck in case processing;
- provide specific time-frames with which the court and public can monitor the progress of a case;
- establish time limits which insure the rights of both parties while moving the case forward in all levels of court and each type of case; and
- reduce backlogs while maintaining quality of procedures and fairness.

Although judicial and legislative concern for speedy trial has focused mostly on criminal case processing, the importance of establishing pecific time periods for each phase of all types of cases should not be overlooke!. Speed of case processing attempts to:

- prevent deprivation of rights, attachment of property, and separation of families;
- minimize anxiety associated with potential liability and public accusation;
- insure that witnesses are competent and available;[4] and
- satisfy interest of both plaintiffs and defendants for expeditious resolution of conflicts.

The oft-quoted "Parkinson's Law" declares that work expands to occupy the time available.[5] The rule has clearly been applicable to case processing: few court rules and statutes set forth specific processing time constraints until the Federal Speedy Trial Act of 1975.[5a] Courts currently evaluate "undue delay" in civil proceedings on a case-by-case basis. And while Barker v. Wingo, 407 U. S. 514 (1972), provided guidance for assessing what delay is impermissible in criminal cases, it provided criminal, civil, and juvenile courts with no

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[4] Ibid.

[5] C. Northcote Parkinson, Parkinson's Law.

[5a] 18 U.S.C. §3161 et seq.

specific time periods against which to measure unacceptable delay. A brief analysis of the developments in treating delay in criminal case processing provides a useful background to discussion of the present steps suggested to make the right to a speedy trial a reality.

The Sixth Amendment guarantee of a right to speedy trial was only slightly clarified in 1905 when the Supreme Court held that the right is relative, depending on the circumstances of the case and tempered by the interests of public justice.[6] In 1967 the Court held that the Fourteenth Amendment made the Sixth Amendment guarantee of a speedy trial applicable to the states.[7] "As in earlier cases, however, the Court did not address the issue of specific criteria to determine whether the Sixth Amendment guarantee had been violated."[8] Although issues surrounding the rights of prisoners to a speedy trial were addressed in the late Sixties, Smith v. Hooey, 393 U. S. 374, 377 (1969) criteria for evaluating performance were not defined. In United States v. Marion, 404 U. S. 307 (1971), the Supreme Court did define the purpose of the right: "to limit pretrial incarceration, minimize needless anxiety and protect an accused's ability to defend himself."[9]

It was not until Barker v. Wingo[10] that the Court identified criteria for evaluating whether the Sixth Amendment guarantees were violated. While not

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[6] Beavers v. Haubert, 198 U. S. 77, 87 (1905). See also Strunk v. U.S., 412 U.S. 434 (1973).

[7] Klopfer v. North Carolina, 386 U. S. 213, 223 (1967).

[8] W. Erickson, "The Right to a Speedy Trial," 10 Houston L. Rev. 237 (1973).

[9] Ibid. at 239.

[10] 407 U. S. 514 (1972).

providing specific time limits or a "demand-waiver rule,"[11] the Court listed four factors to be considered in evaluating cases: (1) length of delay; (2) reason for delay; (3) defendant's ascertainment of his rights; and (4) prejudice to defendant.[12] In some respects, these factors have clouded rather than clarified the issue of what constitutes a delay. If the requirement for a speedy trial is to be effectively addressed, "a system of rules and procedures designed to effect a speedy trial should be concrete and definite."[13]

Several states and various commissions have enacted or recommended time periods. Thirty-six states have adopted time periods ranging from terms of court to days.[14] In 1967 the President's Commission on Law Enforcement and the Administration of Justice recommended specific time frames between each stage of the proceedings.[15] Similarly, the California Penal Code, the National Advisory Commission on Criminal Justice Standards and Goals (1973), and the American Bar Association Standards Relating to Speedy Trial each recommend specific periods in which criminal cases should be processed.[16] More than 38 percent of the states with specific time periods for case processing have enacted such statutes within the past six years.[17]

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[11] The "demand-waiver rule" refers to the accused waiving his right to a speedy trial for any period prior to a request for trial.

[12] Barker v. Wingo, supra note 10, at 525-527.

[13] Erickson, supra note 8, at 244.

[14] Ibid., p.245, fn. 47.

[15] See President's Commission on Law Enforcement and the Administration of Justice, Task Force Report on Courts (Washington, D. C., 1967), pp. 84-88.

[16] See also, Speedy Trial Act of 1975, 18 U.S.C. 3161 et seq., and National Advisory Commission on Criminal Justice Standards and Goals, Corrections §4.10 and commentary at pp. 138-140.

[17] Erickson, supra note 8 at p. 245, fn. 47.

As greater attention is focused on case delay and congestion in the courts, attempts to resolve these situations will increase. One effective method of moving cases forward while insuring the procedural rights of litigants is to quantify the time limits for each phase of the trial process. While quantification is not a cure for congestion, it does provide a definitive basis upon which to assess individual cases in light of both the rights of the parties and the public interest in expeditious case processing.

Although ABA Speedy Trial Standard 2.1, "Speedy Trial Time Limits," does not establish a specific number of days to process each type of case, some defined time deadlines are recommended in the ABA Standards Relating to Trial Courts.[18] Both suggest, however, that specific deadlines be determined by the individual jurisdictions which could evaluate local constraints and establish realistic limits. The following standards represent such an assessment of local conditions and are considered realistic benchmarks for case processing in New Hampshire.

These standards on Speedy Trial should be considered in connection with each of the other standard areas, since these provide the dimension of time as a substantive factor impacting on other aspects of the court system. However, reference to the other standard areas is urged because of the difficulty of separating speedy trial from other parts of the process.

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[18] See ABA, Standards Relating to Speedy Trial (1967) §2.1 at p. 4 and National Advisory Commission on Criminal Justice Standards and Goals, Courts (1973), Standard 4.1 at p. 68. Cf. ABA, Standards Relating to Trial Courts (1976) §2.52 at p. 93.

Standard 11.1

CRIMINAL OFFENSES SHOULD BE TRIED WITHIN THE FOLLOWING TIME LIMITS, WITHOUT DEMAND BY THE DEFENDANT:

(A) FELONY CASES IN WHICH THE ACCUSED IS NOT INCARCERATED SHOULD BE TRIED WITHIN 120 DAYS FROM THE DATE OF ARREST OR INDICTMENT:

(B) WHERE THE ACCUSED IS INCARCERATED, A FELONY CASE SHOULD BE TRIED WITHIN 60 DAYS OF ARREST;

(C) MISDEMEANORS AND VIOLATIONS SHOULD BE TRIED WITHIN 60 DAYS OF SUMMONS OR ARREST; WHERE THE ACCUSED IS INCARCERATED, THE PROCESS SHOULD BE COMPLETED IN 30 DAYS; AND

(D) ARRAIGNMENT ON ANY CHARGE SHOULD BE COMPLETED WITHIN 24 HOURS OF THE TIME OF ARREST.

Commentary

The focus of these standards is to establish clear and definitive limits which insure the rights of a defendant and interests of the public in the prompt processing of criminal charges. Criminal offenses and charges as discussed in this section refer to misdemeanors and violations as well as felonies. Distinctions between the types of offenses are made both in the standards and commentary.

The thrust of the ABA Standards Relating to Speedy Trial address the rights of the defendant.[19] In contrast, the tenor of National Advisory Commission Standard 4.1 is directed toward the public interest being protected.[20] Clearly, both interests, those of the defendant and

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[19] ABA, supra note 18, §2.1 at pp. 14-17.

[20] NAC, supra note 18, §4.1 at p.68.

community, are addressed through the establishment of specific time periods which are responsive to conditions in New Hampshire. "Definite time limits clarify the right and simplify any necessary court interpretation."[21]

The New Hampshire constitution addresses itself to delay in case processing under Article 14 of the Bill of Rights:

> Every subject of this state is entitled to a certain remedy, by having recourse to the laws for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely and without delay; conformably with the laws. [22]

This right was reinforced when the New Hampshire Supreme Court in State v. Blake noted, "the right is one to 'orderly expedition and not mere speed' [citations omitted]. The accused is entitled to be free from arbitrary, vexatious or oppressive delays...but the procedural safeguards afforded to him necessitate a deliberate pace..."[23]

As with the United States Supreme Court, the New Hampshire Supreme Court recognizes the procedural right violated by undue delay; however, the court has not defined concrete standards against which violations of this right could be evaluated.

Standards 11.1(a) and 11.1(b) establish the basis for setting priorities in the case processing. Although not stated, the intent of these two standards is (1) to give preference to criminal cases over other types of cases and (2) to process cases in which the accused is incarcerated before other criminal cases. The rationale for giving preference to cases in which the defendant is incarcerated is simply to reduce pretrial incarceration.

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[21] Erickson, supra note 8, p. 246.

[22] N. H. Const. Pt. 1, art. 14.

[23] State v. Blake, 113 N. H. 115 (1973).

Similarly, the emphasis of processing criminal cases before other types of cases responds to public desire for swift prosecution, insuring the maximum deterrent effect of both prosecution and conviction. Expeditious processing of cases reduces the likelihood of diminished availability and quality of both incriminating and exculpatory evidence. The ABA Speedy Trial standards call for (a) scheduling of criminal before civil cases and (b) trial of defendants in custody before those released on bond. In setting priorities, the ABA includes with incarcerated defendants those individuals on pretrial release status who present "unusual risks" to the public.[24]

None of the standards relating to time periods for criminal case processing envisions the defendant being required to request, or, formally "demand", a speedy trial, In Barker v. Wingo the United States Supreme Court rejected the application of a "demand-waiver" as "inconsistent with the well-settled doctrine that waiver of fundamental rights should not be presumed from inaction." Nevertheless, the Court further stated that "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."[25]

While the ABA Standards relating to Speedy Trial comment on several jurisdictions which require the defendant to demand a speedy trial, the ABA concluded that a sufficient number of situations exist in which it would be unfair to expect the defendant to demand a speedy trial so as to make a requirement for

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[24]ABA, supra note 18, §1.1, commentary at pp. 10-11; see also ABA, Code of Judicial Conduct, 3A(5).

[25]Barker v. Wingo, supra note 10, at 523-26.

demand inappropriate.[26] A defendant, however, who seeks postponements, especially on multiple occasions, should find it difficult to allege deprivation of the right to a speedy trial at a later date.

Aside from RSA 592:20-a (Place and Time of Detention) and RSA 596-A:1 (Adjournments) no specific time requirements for processing criminal cases or violations are provided for by New Hampshire statute or court rule.[27] RSA 592:20-a requires that a person detained in custody be "...taken before a district or municipal court without unreasonable delay but not exceeding twenty-four hours, Sundays and holidays excepted..." and RSA 596-A:1 provides for adjournment in district and municipal court proceedings "for cause from time to time."

While two of these statutes establish time periods, only RSA 594:20-a begins to address the creation of time limits against which to assess violations of a defendant's constitutional rights.

Table 11.1A displays the results of the sample conducted in the Superior and District Courts. The sample includes an analysis of over 750 cases, 384 Superior Court felonies and appeals, and 385 District Court misdemeanors and violations. Ten Superior Courts and 40 District Courts were included in the survey.

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[26] See ABA, supra note 18, §2.2 commentary at p. 17.

[27] The Statute of Limitations (RSA 625:8) is excluded since its intent is different and its periods are consequently far longer than would be appropriate when speedy trial is the issue concerned.

Table 11.1(A): Average Time from Complaint or Indictment to Disposition

| Court | Type of Case | Avg. Time in Days |
|---|---|---|
| District | Misdemeanors | 28.06 |
| | Violations | 18.96 |
| | Combined Misdemeanors and Violations | 20.42 |
| Superior | Felonies | 167.18 |
| | Appeals | 197.25 |
| | Combined Felonies and Appeals | 187.21 |

The results of the District Court survey indicate that both misdemeanor and violation cases are being completed within the time limits specified by the standards. Although the figures in Table 11.1A include both released and incarcerated defendants, the combined average elapsed time from filing of the complaint to final disposition is below the time limit established for incarcerated defendants.

The time limits specified in standard 11.1 were further supported by the justice system interview responses. Over 68 percent of those interviewed considered it realistic and desirable to complete misdemeanor and violation cases within 30 days. 81 percent of all those interviewed and all of the district court judges interviewed agreed that misdemeanors and violations should be completed within 60 days.

The results of the statistical survey and interviews indicate that downward revision of the time period of standard 11.1(c), which sets 60 days as the maximum time for processing of misdemeanor and violation cases, may be desirable While selected cases do require more time, the vast majority are currently being completed in less than thirty days. If the standard is to serve as a benchmark to monitor the progress of the court, a thirty-day time limit for both released and incarcerated defendants appears logical.

The Commission report projected a mean elapsed time of 89.7 days from filing to disposition in 1973 compared to 187.21 days in 1975, Table 11.1(A). Given the lack of available data concerning how the 89.7-day figure was developed, these

figures may not be directly comparable; however, the discrepancy suggests that the problem of delay is increasing rather than remaining static.)

In contrast to the results of the District Court elapsed time, the time for completion of Superior Court criminal cases--197.25 days for appeals de novo and 167.18 days for felonies--substantially exceeds the standard. Additionally, Table 11.1(B) portrays the average elapsed time for individuals on release status and for those incarcerated.

Table 11.1(B): Elapsed Time from Complaint to Disposition for Defendants Incarcerated and Released

| Court | Type of Cases | Average Elapsed Time Released | Incarcerated |
|---|---|---|---|
| Superior | Felonies | | |
| District | Misdemeanors | 34.88 | 19.74 |

The mean time to complete Superior Court criminal cases (whether the defendant is released or incarcerated) exceeds the time limit specified in Standards 11.1(a) and 11.1(b). Tables 11.1(C) and 11.1(D) display the average amount of time required to complete each phase of the Superior and District Court case process. The greatest delay in the Superior Court occurs between indictment and arraignment (73.43 days). The next longest time period comes between the probable cause hearing at the District Court and indictment (61.39 days). The causes for delay thus rest more with the prosecutor and grand jury than with the court's ability to move the case forward.

An indication of increases in the amount of delay experienced in processing Superior Court criminal cases - both District Court appeals and felonies--is disclosed in comparing the results of the sample conducted by the Governor's Commission on Court System Improvement in 1974 [28] with the instant survey results.

[28] Report of the Governor's Commission on Court Systems Improvement, 16 N. H. B. J. 1 (1974) at p. 12.

Table 11.1(C): SUPERIOR COURT AVERAGE TIME LAPSE BETWEEN STATES OF THE PROCEEDINGS

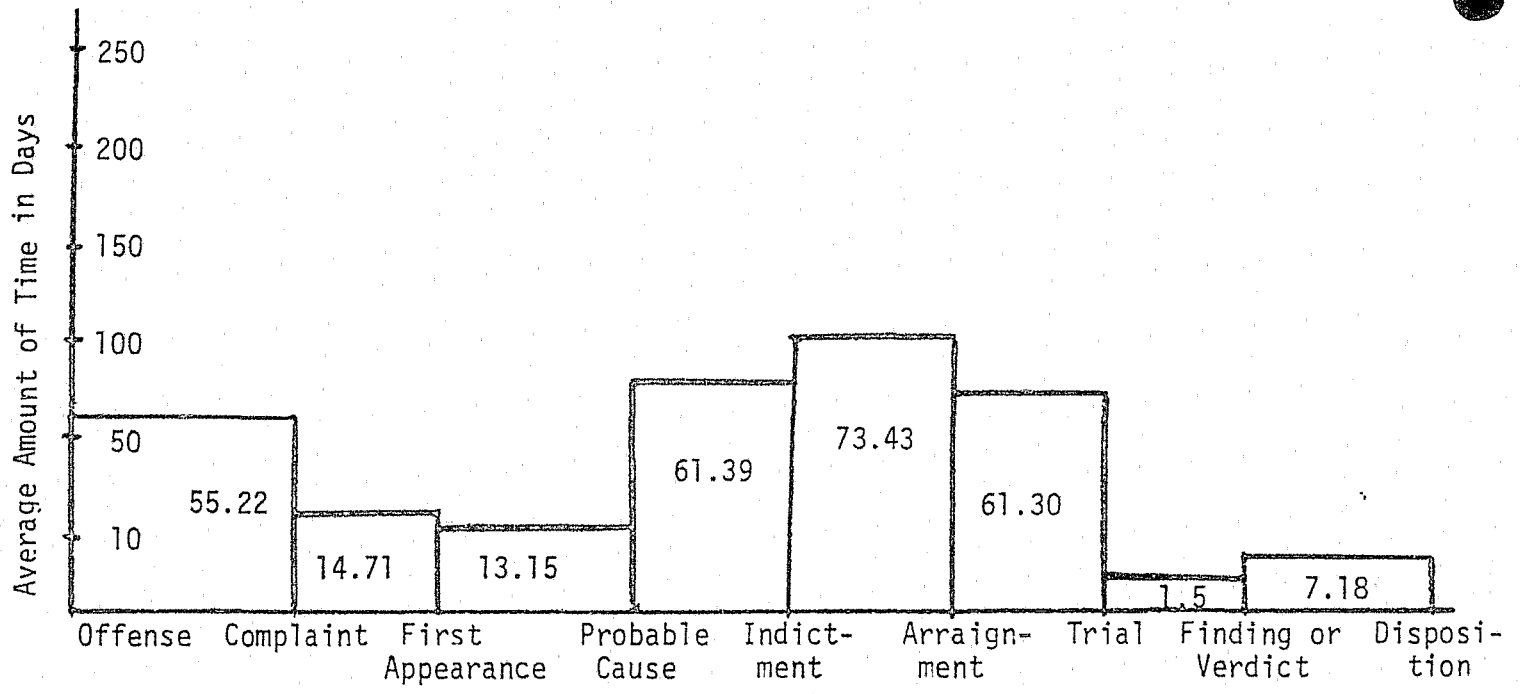
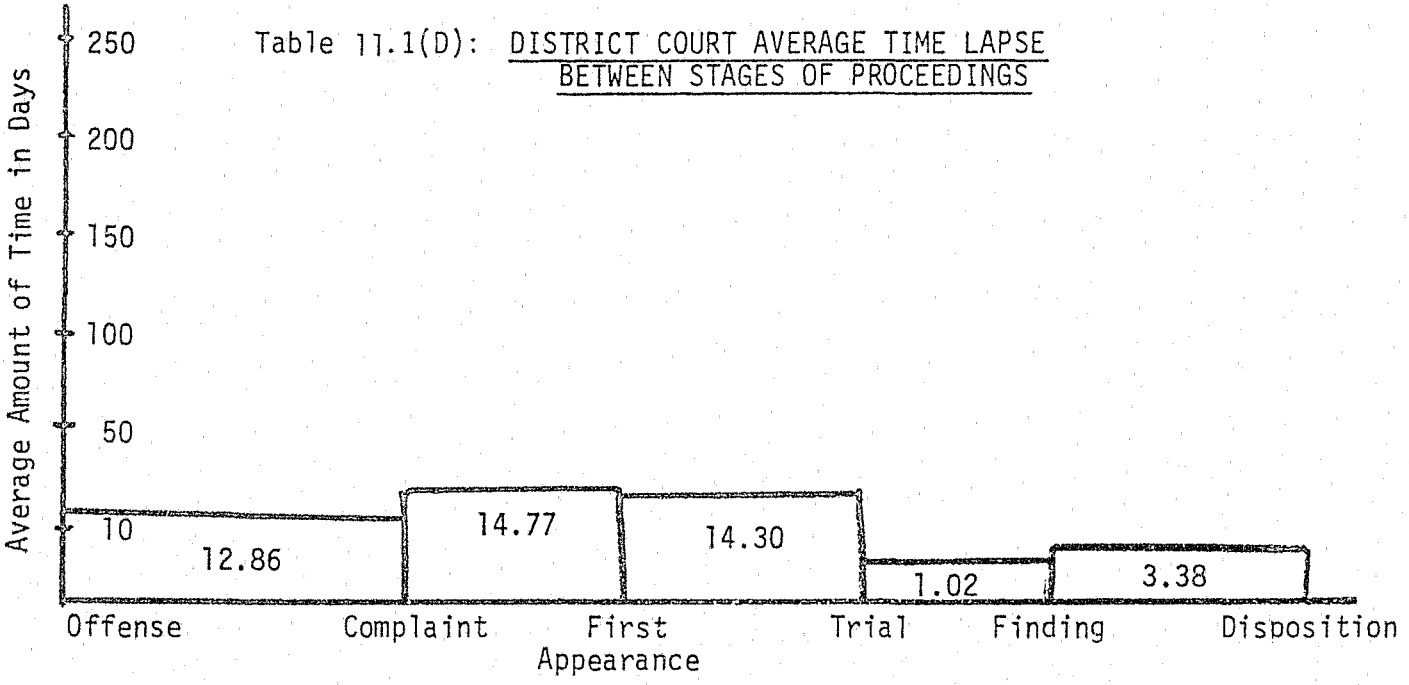
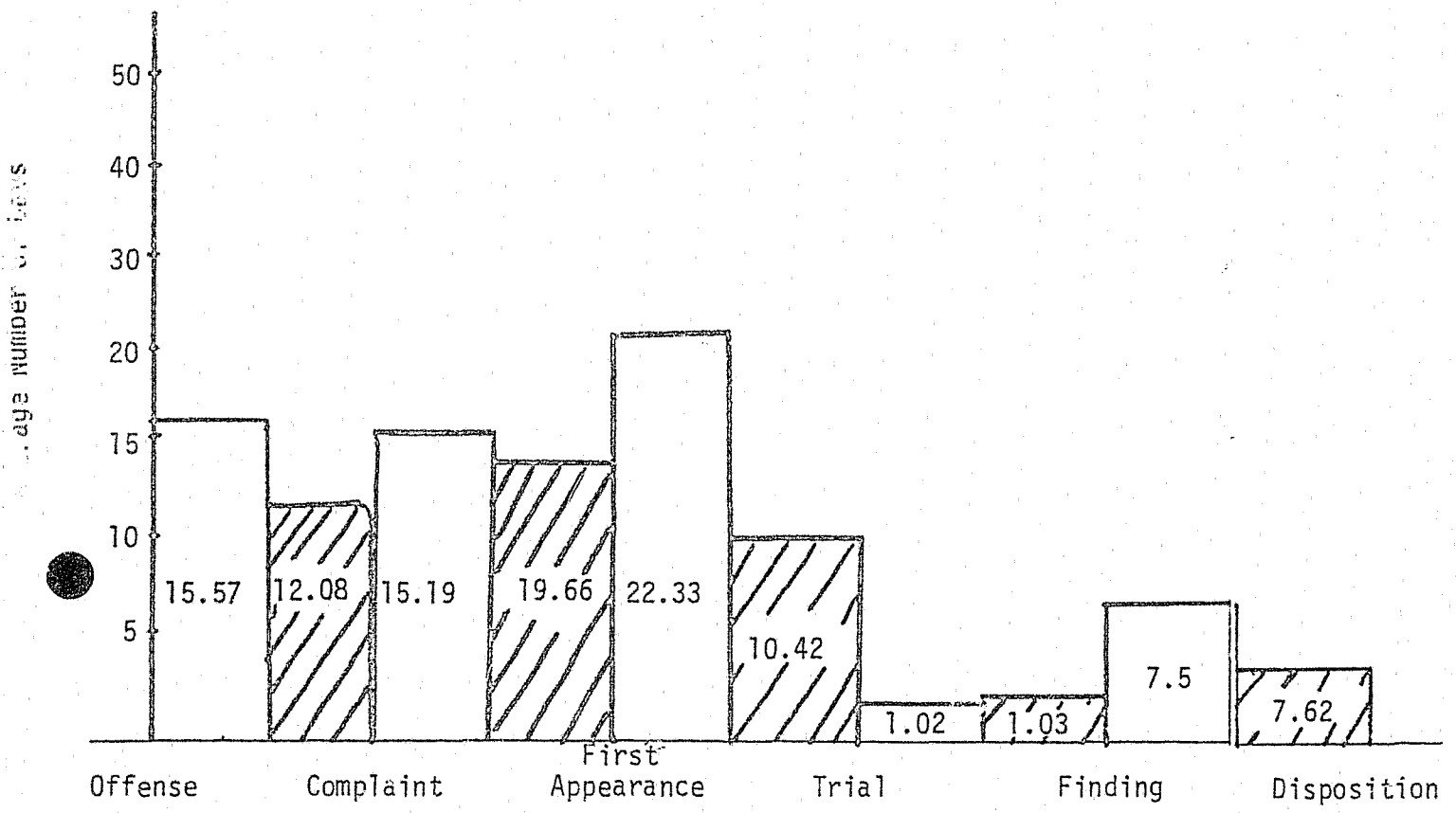



Table 11.1(D): DISTRICT COURT AVERAGE TIME LAPSE BETWEEN STAGES OF PROCEEDINGS



## COMPARISON OF MISDEMEANOR and VIOLATION PROCESSING
## AVERAGE ELAPSED TIME BETWEEN STAGES




Key: Misdemeanors

Violations

In reviewing alternative approaches for reducing the amount of time required to process a felony case, three different time periods need to be addressed (1) indictment to arraignment; (2) probable cause to indictment and (3) arraignment to trial. Each of these steps in the judicial process is affected by numerous variables. When these have been identified, alternative approaches for implementing the standard can be clearly defined and assessed.

a. INDICTMENT TO ARRAIGNMENT

As noted above, the average amount of time between the return of an indictment to arraignment is approximately 73.4 days. Some of the factors contributing to this situation are: high prosecutor caseloads; irregular court sessions, and the time taken to arrest or serve process. The court has little control over the length of time it takes to arrest or serve a defendant. The resolution of this issue is contingent upon greater availability of personnel to serve process and better control or supervision of defendants released after bindover from a probable cause hearing. Similarly, the size of prosecutorial caseloads neither is an area which can be controlled by the court nor is the greatest contributor to delay at this stage.

One of the greatest problems associated with the delay between indictment and arraignment is the frequency with which the court sits in a given area. In the southern, more populated areas of the state, the Superior Court meets almost continuously; however, in the northern part of the state, the court convenes less frequently. For example, in Coos County, the court holds two terms annually for a total of 12 weeks. Anyone indicted at the beginning of a term who is not arrested or served may wait six months before being arraigned. This problem is somewhat reduced with the present system of appointing a presiding judge for the term of

court, thus assigning administrative responsibility beyond the time the judge is physically presiding in the county. While the court can reconvene for special issues, this practice occurs infrequently.

Alternative Approaches for Implementation

Approach #1 Increase the Number of Superior Court Judges

Description:

The most frequently mentioned proposal to address this situation involves increasing the number of Superior Court judges. Three approaches have been discussed:

- provide at least one full-time judge for each superior court;
- increase the number of judges to allow one or two judges to remain in the less populated counties on circuit;
- add several judges so the present system of assignment could be continued on a more regular basis.

The last two approaches differ only to the extent that the judges are assigned to a given county and remain in that geographic area for the term of court. This is in contrast to the present assignment structure which may move a presiding judge to the opposite end of the state upon completion of the trial calendar. The single greatest problem with such an assignment system is the limitations it places upon the presiding judges to return to that court when cases are scheduled for hearing in the county in which the judge is sitting. (Such scheduling is currently being done two to three weeks in advance.)

Assignment of a single judge to one county on a full-time basis may be feasible on a limited basis (one or two counties); however, the majority of counties do not have a sufficient caseload to justify such

a system. Rather a system which assigns judges to insure their availability for regular return at prescribed times is most desirable.

Increasing the number of Superior Court judges requires statutory amendment of RSA 491:1.

Time:

The time required to effect an increase in the number of Superior Court judges is estimated at six to twelve months. This time projection anticipates an increase of three judges. The estimate includes the time required to complete the legislative process, enact the legislation, and select and appoint additional judges. A bill to this effect has been filed with the legislature.

Cost:

The cost of adding three additional Superior Court judges is approximately $125,000 annually. (This figure does not include any projection for the amortized actuarial cost of the retirement benefits accrued.)

Feasibility:

The feasibility of this approach was rated at 60 to 80 percent, given the relatively high cost of complete implementation. Some public and political resistance was anticipated to creating more judgeships; however, it is anticipated that this could be overcome through public education. Cost is the greatest impediment to implementing this approach.

Approach #2 Use of Masters to Conduct All Pre-Trial Hearings

Description:

Masters would hear all pretrial matters, including conditions for release and motions. With New Hampshire's provision for interlocutory appeal, parties could seek Superior Court review at any time through

and jurist, the potential for conflict exists. Given this constraint, the feasibility of the approach was rated at 30 to 60 percent as a short-term, transitional, solution if closely monitored.

Approach #3 Plea by Mail

Description:

Increased use of Rule 90-A, plea by mail, was suggested. While such a plan would aid in reducing delay, expanding use of the rule is considered difficult since the court cannot compel a defendant to use the 90-A Rule.

Time:

Expanded use of the plea by mail system is contingent upon greater practitioner use. A combination of public and continuing legal education programs should be developed and offered. Such programs would take three to six months to complete.

Cost:

The cost of implementing the approach is minimal as it requires only broader understanding of existing procedures.

Feasibility:

Expanding the use of 90-A seems of questionable effect, given that 43 percent of the felony cases sampled already elected to use the 90-A option. Feasibility was rated at 60 to 80 percent.

b. PROBABLE CAUSE INDICTMENT

The time period between the probable cause hearing and indictment is the second largest time span in processing a felony case. The following discussion

the certification process and Supreme Court review if the issue is of sufficient importance. In either event the findings and determinations of masters are subject to the review and approval of the court. The Superior Court or presiding justice, with the approval of the Chief Justice, can appoint a master to serve on a regular basis or in the absence of the presiding justice, so long as due process is not denied or access to the court (through some form of review) restricted.

Time:

The Superior Court could commence a masters program in four months. Although such a program could be implemented immediately based on court authority, the development of guidelines, selection and appointment criteria, and a monitoring system are needed before such a program were instituted.

Cost:

As with the marital master program, a per diem rate of $150 should be established for masters. It is estimated that, given this level of compensation, $50,000 to $60,000 may be required during the first year of operation.

Feasibility:

While the annual cost associated with a masters program is substantially less than the cost of three additional judges and the assignment or use of masters can be limited to an as-needed basis, the inherent problem of such an approach is the potential for conflict created when a judicial officer -- the master -- serves on a part-time basis. Whenever the situation exists that an individual can serve both as advocate

of alternative approaches to reducing the time between probable cause and indictment assumes the retention of the probable cause hearing. Although several lawyers and judges questioned the value of retaining the probable cause hearing, the constitutional and statutory questions raised by proposed elimination are substantial. The most often cited cause for delay at this stage was the infrequency of grand jury sessions. As a rule, grand juries sit at the beginning of each term of court. In Coos County, the grand jury only sits twice a year. Consequently, aside from waiving indictment or requesting a change of venue, a defendant in several counties who has been bound over may wait more than three months before grand jury review is even possible. The discussion of alternatives focuses on the proposition that the primary cause for delay between the probable cause hearing and return of an indictment is the frequency of grand jury sessions.

Alternative Approaches for Implementation

Approach #1 Increase Number of Grand Jury Sessions

Description:

The frequency of grand jury sessions should be increased to one day per month. In most areas of the state, this increase should not affect the total number of days the grand jury sits each year. Rather, it would spread these days on a more periodic schedule. Under RSA 500-A:6 the court currently has authority to recall a grand jury at any time during the term of court. Exercise of this authority is considered the most feasible vehicle for implementing the approach. Policy guidelines should be set by the court to establish specific dates for reconvening the grand jury.

Time:

Recall of the grand jury on a monthly basis could be accomplished immediately. As mentioned above, given the need for policy guidelines, a more realistic estimate is three months.

Cost:

The annual cost of implementing this approach is below $10,000. The only anticipated increase over present spending will occur in those counties in which the grand jury sits fewer than 12 days per year.

Feasibility:

The feasibility of convening the grand jury monthly was rated at 60 to 80 percent. The task force members felt that such a policy change might reduce the frequency of probable cause hearings and the cost of appointed counsel and police witnesses associated with that step of the criminal process.

Approach #2 Organizing a State Grand Jury

Description:

Another approach would mirror the federal system by appointing a special grand jury for the state to sit monthly. Authority to establish such a statewide body is poorly defined, although the New Hampshire Supreme Court has said, "The list from which prospective jurors are drawn need not be a statistical mirror of the community and less than a proportionate representation of some categories of the populace is not fatal where not clearly shown to result from purposeful and systematic exclusion of groups cognizable as a distinct class." State v. Fleury, 114 N.H. 325, 321 A.2d 108.(1974).

Time, Cost, Feasibility:

Given the additional research required to adequately evaluate this approach as a viable alternative, particularly in view of both the possible constitutional questions arising from expanding the geographic breadth of indictment power and the excesses which have been asserted to have resulted from the federal experience, projections of time, cost, and feasibility of implementation are omitted.

c. ARRAIGNMENT TO TRIAL

Delays between the time of arraignment and trial cannot be attributed to a single source. The elements most frequently cited as contributing to delay at this stage of a criminal proceeding are: (1) lack of full-time prosecution; (2) court backlog; (3) repeated defense requests for continuances and (4) de novo appeals to Superior Court. Reduction in the extent of delay, then, is contingent upon resolution of issues associated with each of these factors.

(1) Lack of Full-time Prosecution

Standard 3.16 presents the rationale for creating full-time prosecutors as well as several approaches for effecting this change. That standard and Prosecution section 3.0 should be reviewed for an examination of those aspects of prosecutorial operation which affect the courts' ability to move cases forward.

(2) Court Backlog

Backlog is related to increases in the number of filings, processing of complex cases, poor screening of cases, available space and personnel, and efficient case assignment. As the prime forum for public adjudication of disputes, the court cannot regulate either the number of filings or the complexity of cases

filed. The court can, however, exercise broad discretion in moving cases forward through caseflow management policies.

Regardless of the technique used -- e.g., master or individual calendars -- the establishment of a rational and objective system for assigning and scheduling cases is critical to reducing delay. Of comparable importance is the development of effective case screening procedures. Several of those interviewed felt that the number of unwarranted or deficient criminal cases prosecuted in the Superior Court exceeded 90 percent. Cases which result in dismissals or are "nolle prossed" negatively affect the processing of "good" cases.

Finally, the availability of courthouse facilities and both judicial and clerical support personnel to process cases ready for trial is imperative. However, neither the need for facilities or for personnel addresses the issues associated with improved case management or case screening. If improvements in case management are not first addressed, expansion of facilities or increases in personnel are likely to occur repeatedly without significant effect.

Alternative Approaches for Implementation

Approach #1 Calendaring

Description:

As a first step in improving the efficiency of caseflow management, the court should assume complete control over the calendaring of criminal cases. Limitation of the county prosecutor's influence over calendaring procedures is necessary if the court is to manage pending cases to reduce delay.

Several caseflow management techniques can be implemented to improve case processing. The time and cost, and consequently, the feasibility, of each technique is different.

The following approaches exemplify techniques which may be employed to effect fair and efficient case processing. Neither exhaustive nor a panacea, they are, however, examples of rational and objective attempts at managing cases.

Case Assignment Techniques[29]

- master calendar
- individual calendar
- hybrid calendar

Management Techniques

- trial readiness documents
- overscheduling the calendar
- prosecutor case scheduling

Approach #2 Effective Prosecutorial Case Screening

Description:

Examples of prosecutorial case screening are included in the Prosecution topic. Screening refers to evaluating the legal sufficiency of complaints drawn by law enforcement officers. Similarly, the grand jury and probable cause hearing stages can be strengthened to increase the success of screening at each stage. Discussion of the improvement of both these areas to facilitate case screening are contained in the Grand Jury and Trial Procedures topic areas.

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[29]See generally, E. Friesen, E. Gallas & N. Gallas, Managing the Courts (1971), pp. 170-183, and M. Solomon, Caseflow Management in the Trial Court (1973), pp. 8-29.

Approach #3 Increase Personnel and Expand Facilities

Description:

Addition of judges and clerical support staff and expansion of the present courtroom capacity of the Superior Court was suggested by a majority of interviewees as essential ingredients to reducing backlog. The obvious requirement for these steps is funding. While increasing the number of judges or clerical personnel is not directly tied to the expansion of facilities, adding personnel in Rockingham, Merrimack and Cheshire Counties would require substantial renovation and expansion. Additionally, before the number of judges is increased, RSA 491:1 must be amended.

Time:

The time required to amend RSA 491:1 was estimated at six months. Estimates for the amount of time required for the state or county to increase the court's budget significantly were considered too tentative and consequently not provided.

Cost:

The combined costs for improved facilities, additional judges, and clerical support are estimated at several million dollars. The cost of four additional Superior Court judges and eight clerical positions is approximately $250,000 per year.

Feasibility:

Given the level of financing required to complete an expansion of facilities and increase in personnel, the feasibility of this approach was rated low. Neither the state nor the counties are currently

capable of increasing their court appropriations to the level deemed necessary. One possible solution to this impasse is design of a phased implementation effort which relates projected improvements to anticipated increases in resource availability for each county and the state.

(3) Requests for Continuance by Defense Counsel

As noted in the introduction to this topic area, the constitutions protect a defendant's right to a speedy trial, ostensibly in both the defendant's and the public's interests. In many instances, however, the defendant may see the chances of conviction diminish if the processing of the case is delayed: as evidence and witnesses become harder to find, prosecutorial willingness to bargain may rise. One judge estimated that 80 to 90 percent of all indictments were ready for trial during the term of court in which they were returned. However, defense counsel opted to continue the case.

Although not all continuances are sought to improve the defendant's position, present methods of appointing counsel to represent indigent defendants increase resort to continuances because a limited number of attorneys try the bulk of the indigent defense cases.[30] Defense requests for delay consequently impair the court's ability to move the trial calendar.

Under the Federal speedy trial statute, a defendant may waive his right to a speedy trial.[31] Such a waiver eliminates the burden on the court to hold a hearing

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[30]National Center for State Courts, Defense Services in New Hampshire (1976), pp. 27-29.

[31]18 U.S.C. §3161.

within a specified time limit. This type of procedural device protects the defendant's rights while emphasizing the public's objective of swift prosecution. Clearly, the balance required to protect the defendant and respond to the public is a delicate one. Although the question of whether the court can require a defendant to have a speedy trial has yet to be resolved, the court currently has sufficient authority to monitor case progress and to screen thoroughly all requests for continuances.

Limiting the defendant's ability to delay once a speedy trial time limit has been established is difficult. Enforcement of strict standards for granting continuances represents the primary technique for checking such delay.

In the Trial Procedures topic area, alternative approaches for limiting continuances and establishing an objective continuance policy are discussed.

(4) Limitation of De Novo Appeals

The rationale for maintaining trial de novo is described in the Appellate Procedures topic area. As noted, the ABA support for the right to de novo appeal is predicated on the existence of lay judges in courts of limited jurisdiction.[32] Fourteen, or 13.7 percent, of the justices of New Hampshire's District and Municipal Courts are lay judges. The Municipal Courts are being phased out of existence with the resignation or retirement of the justices: as only 3.7 percent, 3 of 81 judges on the District Court bench are lay judges, the appeal protection afforded by de novo trials need not be maintained on the grounds of their existence.

The impact of de novo appeals on the Superior Court is substantial: over 50 percent of the criminal cases surveyed in that court were de novo appeals.

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[32]ABA, Standards Relating to Appellate Courts (Tent. draft, 1976), §3.90, commentary at p. 129.

The majority of these appeals arose in driving while intoxicated cases.

Among those surveyed, three approaches were suggested to limit the problems associated with de novo appeal: (1) total elimination of the right to de novo appeal; (2) requirement to elect a jury trial within five days of filing a complaint; and (3) decriminalization of motor vehicle offenses.

The first approach requires a constitutional amendment which is an unlikely course in light of the historical experience of recent efforts. Additionally, public opinion supports maintenance of a right to jury trial as a cornerstone of the justice system. Requirement to elect a jury trial within five days of the filing of a complaint therefore, is more consistent with existing civil practice (RSA 502-A:15) and reduces the duplication of two complete trials. This approach would require legislation and if such trials were to be held at the District Court level, significant reorganization of the present system.

The third course -- decriminalization of first offense driving while intoxicated -- is the least far-reaching; however, it eliminates the greatest source of de novo appeals. It has been considered for several years,[33] and requires statutory amendment of RSA 262-A:62, which would reduce the offense to a violation and thereby eliminate a right to trial de novo. The most frequent criticism of such an approach is the resulting limitation on the criminal sanctions which could be imposed. Nevertheless, although the change to a violation would eliminate the potential for incarceration of first offenders, few, if any, judges, have imposed jail terms in first offense convictions.

For a more complete analysis of alternative approaches for limiting trial de novo, the Appellate topic area should be reviewed.

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[33] New Hampshire Bar Journal, "Decriminalization of DWI--Some Questions," (1975) Vol. 16, No. 3 at pp.260 - 261.

Standard 11.2 PETITIONS INVOLVING JUVENILES -- EITHER PERSONS IN NEED OF SUPERVISION (PINS) OR DELINQUENTS -- SHOULD BE COMPLETED (A) WITHIN THIRTY (30) DAYS FROM FILING OF PETITION IF THE JUVENILE IS NOT INCARCERATED. (B) IF INCARCERATED, PROCEEDINGS SHOULD BE COMPLETED AS QUICKLY AS POSSIBLE BUT WITHIN THIRTY (30) DAYS.

Commentary

While In re Gault[34] served as a major cornerstone to insure the rights of juveniles, family courts, juvenile divisions and separate juvenile courts are all indices of the importance and special treatment that courts and legislators have accorded the processing of juvenile cases. One obvious condition which specialized courts and distinct rules of procedure address is the courts' desire for expeditious processing of juvenile cases.

The purpose of placing such emphasis on the processing of juvenile cases is both to insure that expeditious determination of the rights of individuals and society occurs, and to minimize the often negative impact of juvenile involvement with the justice system so as to deter future crime.

The case for insuring the procedural rights of the juvenile and meeting the public interest in "swift prosecution" is the same as that developed for adults under Standard 11.1. Speedy trials insure constitutional safeguards against delay; reduce protracted periods of pre-trial incarceration; minimize the anxiety associated with formal prosecution; reduce reliance on plea negotiation; and address the public's desire for expeditious prosecution. While the basic argument for each of these items applies to adults and juveniles, greater

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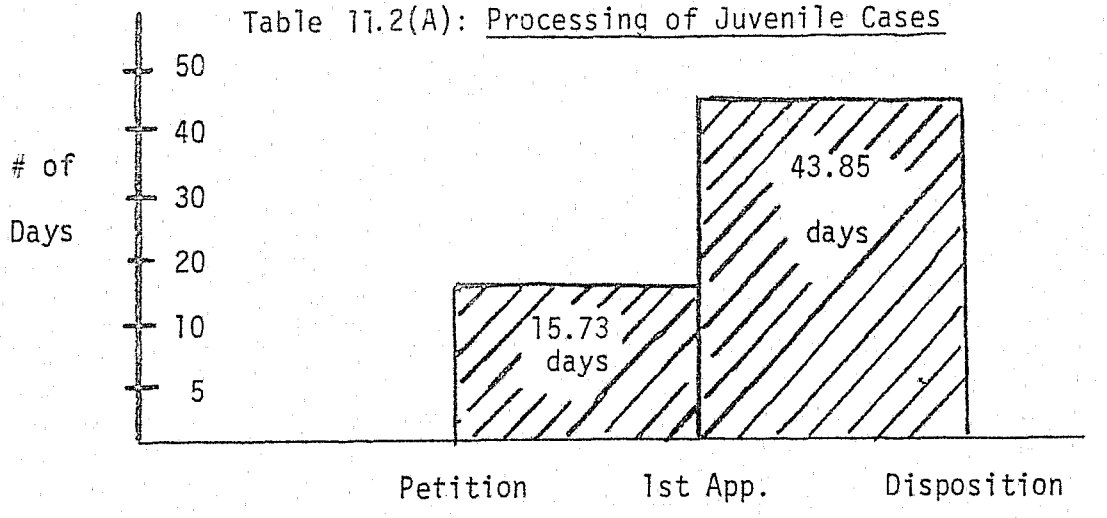
[34] 387 U. S. 1 (1967).

emphasis should be placed on juveniles if the court is to serve a preventive role in curbing future anitsocial behavior.

Minimizing the negative impact of processing through the criminal justice system is an additionally important reason for reducing delay in juvenile cases. Whether the juvenile is placed in a detention facility or released back to the community, the stigma attached to the delinquency label creates a climate more likely to make a juvenile less inclined toward compliance with society's rules. For those individuals incarcerated and awaiting final disposition, contact with other alleged delinquent youths reinforces antisocial behavior. As noted by Donald Cressy,[35] association alone is often sufficient to advance delinquent and criminal behavior.

Table 11.2(A) displays the average amount of time required between each phase of the proceedings to process a juvenile case, delinquent and PINS (Person in Need of Supervision) through the juvenile justice system. The average elapsed time between filing of a petition and the juvenile's first appearance is 15.73 days.

Table 11.2(A): Processing of Juvenile Cases




[35] See D. R. Cressey, "The Development of a Theory: Differential Association" in M. Wolfgang, et al., The Sociology of Crime and Delinquency (N.Y.: Wiley, 1962), pp.81-95.

An average of 43.85 days elapsed from the date of the first appearance and the final disposition of the case. The primary reason cited for the average of 43.85 days between the first appearance and a final disposition is the time expended in completing investigation reports. The average elapsed time from the initiation of a juvenile action to its final disposition is 57.57 days.

Fifty percent of the cases surveyed required three court appearances and 10 percent of the cases required four appearances. The average elapsed time between the filing of the petiton and second court appearance is 69.96 days. The average time between the filing and third appearance is 100.06 days.

The intent of processing juvenile cases within 30 days is to reduce both prolonged periods of pre-disposition detention and the potentially negative efforts of the criminal justice system, as well as to effect prompt resolution of disputes. While no opposition was made to these aims, some negative consequences of a 30-day time limit were noted. Of greatest concern was the pressure placed on the probation department. RSA 169:9 requires the submission of a probation investigation report prior to final disposition in juvenile cases.[36] Many of the officers interviewed felt that 30 days was an insufficient time to complete an adequate report. As noted above, the results of the statistical survey support this concern, since the average elapsed time from the court order to complete a report to submission was 44.74 days. (This figure includes reports submitted by the Youth Development Center, the New Hampshire Probation Department and child welfare agencies.)

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[36]Although RSA 169:9 requires an investigation report to be submitted prior to the final disposition being made, in only 60% of the cases surveyed were such reports even ordered. While a large number of the juvenile cases were "filed" or "continued for disposition," all cases surveyed were officially considered disposed of in 1975, meaning final formal action had been completed.

The concern raised regarding the time limit did not oppose the objective of that standard but rather stressed the constraints of high caseloads and limited personnel which impair the officers' ability to file reports in timely fashion. Such constraints must be considered when reviewing the impact of implementing the standard.

RSA 169:7-III establishes a 30-day limitation on detaining a delinquent at the Youth Development Center prior to disposition; no other time limitations exist for the processing of juvenile matters, except for RSA 169:9, which does not establish a specific period.

Alternative Approaches for Implementation

Approach #1 Increased Probation Staff

Description:

All probation officers would maintain a caseload which will allow them to complete any evaluation report assigned within twenty days without impairing supervision of the probationers assigned to the officer. For a more complete discussion of this approach, refer to standard 9.2.

Time:

Refer to standard 9.2.

Cost:

Refer to standard 9.2.

Feasibility:

Refer to standard 9.2.

Approach #2 Full-Time District Court

Description:

Part of the problem of delay in juvenile cases is attributable to lack of daily court sessions. Full-time district courts were proposed to resolve this problem. To provide daily access, the recommended court structure would reduce the number of district courts throughout the state and establish district courts on a population basis. This proposal requires a statutory amendment and considerable organizational restructuring of the court.

Time:

Given the problems encountered to date with previous full-time district court bills (e.g., 1975 House Bill 490 and Sen. Bill 122), no estimate of time is made. A year is considered a conservative estimate.

Cost:

Although cost is difficult to accurately project, no additional expense to the present district court system is anticipated. Rather, existing costs will be reapplied.

Feasibility:

While all task force members agreed with the need for a full-time district court structure, at least similar to that proposed, most set the feasibility of such a plan being implemented at 0 to 30 percent. The primary issue thwarting such an approach was considered loss of revenue to municipalities not retaining a court.

Standard 11.3 CIVIL CASES SHOULD GENERALLY BE DISPOSED OF WITHIN NINE MONTHS OF ENTRY OF APPEARANCE (OR THE EXPIRATION OF THE TIME FOR SPECIAL PLEAS) AND A PRE-TRIAL CONFERENCE SHOULD BE REQUIRED WITHIN SIX MONTHS OF THAT DATE.

11.4 SMALL CLAIMS CASES SHOULD BE DISPOSED OF ON THE RETURN DATE, NO LATER THAN 60 DAYS FROM THE INITIATION OF THE CASE.

Commentary

As indicated in the introduction to this section, the right to speedy trial, or the right to a day in court without undue delay, has been stressed largely in the criminal sphere. Yet to ignore the civil side of the courts' business is to compel those whom the courts presumably exist to serve and who support the courts' operations--the citizenry--to take their disputes elsewhere.

The ABA Commission on Standards of Judicial Administration has recommended that civil cases be tried within six months of filing "except in particular types of cases where a longer interval is deemed necessary because of normally encountered eventualities such as exceptionally complicated discovery, stabilization of injury in personal injury cases, and settlement of financial affairs in probate cases.[37] In its commentary, the ABA notes that judges who do not render decisions promptly "cannot expect members of the bar to be prompt in their preparational duties.[38]

Lawyers, however, have not complained about court delay.[39] They are restrained in complaining by both professional courtesy and their recognition,

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[37]ABA, Standards Relating to Trial Courts (1976) §2.52 at p. 88. Summarily heard cases, e.g., small claims, should be tried 30 days from filing and custody, support, or commitment cases in 45 days. Id.

[38]Ibid., §2.52 commentary at p. 89.

[39]Except to the extent that lawyers bring cases in the U.S. District Court, which, because of a light caseload and effective processing, is able to expedite a case, instead of their initiating litigation in state courts.

through participation, in the burdens placed on the court system, in addition, of course, to the direct benefits accruing to some clients from delay.

Clients--the public--are under no such restraints.[40] Of a random sample of New Hampshire citizens by questionnaire, the two most frequent responses to a question asking for the major problem facing New Hampshire courts today were excessive delay and leniency in criminal case dispositions. More than half the legislators polled in a sample listed backlogs and processing delay as the major problem in the courts. It can fairly be concluded that the public does not find the current processing time acceptable.

Actual time spans from initial court filing to judgment in New Hampshire are listed in the following table. Neither dismissals nor settled cases are included.[41]

Table 11.4(A)

| Court | Case Category | Number of Cases Sampled | Average Time Span | Smallest Time Span | Largest Time Span |
|---|---|---|---|---|---|
| Superior | All Civil | 211 | 8 mos. | 3 days | 3 yrs. 9 mos. |
| Superior | Contract & Tort | 73 | 11 mos. | 16 days | 3 yrs. 4 mos. |
| Superior | Matrimonial | 113 | 5 mos. | 1 mo. | 2 yrs. 3 mos. |
| District | All Civil | 362 | 2 mos. | 3 days | 1 yr. 2½ mos. |
| District | Contract & Tort | 126 | 3 mos. | 8 days | 11 mos. |
| District | Landlord/Tenant | 39 | 1 mo. | 7 days | 4½ mos. |
| District | Small Claims | 195 | 1½ mos. | 3 days | 1 yr. 2½ mos. |

In a survey of judges and attorneys in New Hampshire, except for the response from those mostly active in District Courts (who said that civil cases should be processed in one to three months), 25 percent of the judges and attorneys

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[40] A citizen survey in New York recently showed that 83% of respondents felt there was unnecessary delay in disposition of civil cases. Adult Collegiate Education Pro.: "Courts and the Community," Queens College Sch. of Gen. Studies, Spring 1976. Results on file in NCSC office.

[41] Although comparison is difficult because of a different sampling technique and case categorization, application of weighting techniques to a survey completed in July 1973 discloses that the average time span in Superior Court civil cases then was nine months, 22 days, averaging marital, equity, auto negligence and other civil cases equally. See 16 N.H.B.J. 1 (1974) at p. 13.

responded that civil cases should be disposed of in three to six months, another 25 percent answered six to nine months, and 25 percent more suggested nine to twelve months. A slightly smaller number said cases would take more than a year, and a few less specified less than three months, referring to collection and non-jury cases.

Determination of a proper time span to serve as a goal for civil cases can be based on the averages listed above, the ABA six-month standard, and the responses of those surveyed who work in the courts. Nine months appears reasonable.

But setting any time-period as a goal is only part of a strategy to reduce civil case delay. Regular monitoring of civil cases through scheduling of pre-trial conferences offers an effective means of assessing whether a case is progressing or why it is delayed. Pre-trial conferences, discussed in the section entitled Procedures Before and During Trial, should be held to schedule the progress of discovery and other pre-trial procedures; to explore the possibility of settlement; to prepare an outline of the trial, including witnesses and evidence presentations; and to determine procedures to be followed in jury selection and determination of pre-trial motions.[42]

Pre-trial conferences should be used only in cases that are large enough to warrant the expenditure. For civil cases "of intermediate amount," techniques such as limited discovery, trial by judge, mediation, arbitration, expedited evidentiary presentation, and limited appellate review should be considered for use where the full procedure costs more than the amount in controversy and certainly where cases involve less than $2,500.[43]

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[42]Pre-trial conferences are not a panacea nor do they always expedite a case. The results of a study conducted in a jurisdiction where pre-trials were mandated in all cases showed that such unrestricted use of pre-trials added significantly to total processing time. M. Rosenberg, The Pre-trial Conference (1971).

[43]ABA, supra note 31, §2.74 and commentary, pp. 123-129.

Table 11.4(B): Summary of District Court Time Lapse Activity Stages for Civil, Landlord and Tenant, and Small Claims Cases

| ACTIVITY | Average Time in Days CIVIL | L & T | SMALL CLAIM | ALL CASES |
|---|---|---|---|---|
| Initiated → Service | 11.39 | 3.09 | 19.68 | 14.83 |
| Service → Response | 18.45 | 12.00 | 12.16 | 14.90 |
| Response → Pre-Hearing | ____* | ____* | 9.00 | 31.44 |
| Pre-Hearing → Final Hearing | ____* | ____* | ____* | 72.75 |
| Final Hearing → Finding | 1.52 | 1.00 | 1.07 | 1.24 |
| Finding → Disposition | 1.50 | 2.21 | 1.38 | 1.52 |
| Disposition → Post-Judgment Remedy | 45.14 | 23.47 | 37.72 | 38.74 |
| Initiated → Settlement | 105.25 | 42.50 | 46.61 | 61.30 |
| Initiated → Disposition | 94.14 | 28.08 | 46.12 | 60.82 |

* population too low to allow reliable average

There appears no reason why small claims cases cannot be disposed of in two months. Pleadings are simplified by use of standard forms.[44] The survey results indicate that an average small claims case is completed in 1½ months. The ABA standards prescribe a one-month period. By setting this goal, courts can be encouraged to schedule regular sessions and limit the granting of continuances in cases which have been brought in a manner limited to cases not exceeding $500 in amount in order to gain the advantage of expeditious hearing and disposition.

Alternative Approaches for Implementation

Approach #1 Limit Continuances by Requiring Parties to Sign Requests

Description:

The intent of this approach is to involve those directly affected by litigation -- the clients -- in the process of requesting any delays. It is argued that this change will reduce the occurrence of lawyers consenting to delays because of professional courtesy within the bar. If this approach is to prove effective, it should be combined with a strong policy of the court to exercise restraint in granting continuances.

Time:

A District Court Rule similar to Superior Court Rule 46 would be required. The promulgation process can be accomplished in six months.

Cost:

None.

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[44] See N.H. Dist. Ct. Rules 4.1 et seq. and Forms.

Feasibility:

The task force felt this approach had a likely feasibility of 60 to 80 percent, based on judicial support and some bar resistance.

Approach #2 Establish Civil Case Management System

Description:

A civil case management system would employ pre-trial conferences, monitoring of cases by one judge or a master, an information system to permit conflict-free scheduling, and broad discovery to make civil cases progress speedily to trial on settlement.

The cost, time and feasibility of each of these strategies are discussed in the following parts of this report:

- Standard 7.9, Approach 2 -- Introduce an information system to permit cases in all courts to be scheduled to minimize conflicts
- Standard 7.6, Approach 2 -- Assign complex cases to a single judge for monitoring
- Standard 7.5, Approach 1 -- Amend rules to require pre-trial settlement conference
- Standard 7.5, Approach 2 -- Provide for a settlement master or masters to hold conferences
- Standard 7.12, Approach -- Provide for full discovery in all courts by court rule

Approach #3 Improve Small Claims Case Processing by Designing a Management System

Description:

In managing the flow of small claims cases, special techniques are needed: sessions must be held regularly, on the same day and at the same time each week; plaintiffs and defendants must be made aware of their respective duties in preparing a case; arbitrators must be made available as needed; and all procedures both simplified and tailored to suit those who use the court. Clerical and other support staff members must recognize and fulfill the special service needs of this court. A management system for those cases, therefore, is no more than a concentration of attention by those concerned with court operations on addressing the court's particular needs.

Time:

Design of a system for New Hampshire must be fitted into the currently disparate set of District and Municipal Courts. A full-time District Court and added court administrative capacity (see Standards 16.1 and 16.7) will reduce the time to one year.

Cost:

Costs should be minimal since restructuring rather than adding new operations is the main need.

Feasibility:

This approach is highly feasible since small claims courts are popular with the citizenry but standardizing the usually independent behavior of the District and Municipal Courts reduces feasibility to less than 50 percent.

Standard 11.5 UNCONTESTED PROBATE AND UNCONTESTED DOMESTIC RELATIONS CASES SHOULD BE DISPOSED OF WITHIN SIXTY (60) DAYS; IF CONTESTED, THE STANDARD SET FOR CIVIL MATTER (11.3) SHOULD APPLY

Commentary

As with the previous standards, the purpose of establishing specific time limits for processing uncontested probate and domestic relations cases is to insure the prompt resolution of issues of fact and law and to create a basis for evaluating the performance of the court in relation to that standard. For the court to be involved in uncontested matters is questioned; the time and cost of providing the complete range of procedural requirements to an uncontested matter are unwarranted. However, the court has been delegated responsibility for providing such ministerial processing as a matter of convenience and expectation as much as tradition. A consequence of the ministerial nature of such cases is the relatively low priority given them. The potential if not the occurrence of delay is great in this type of case.

The ABA Trial Courts standards recommend that cases involving (a) custody hearings, (b) support for dependents, and (c) commitment to an institution be completed 45 days from filing.[45] Although not specific on this point, the commentary includes both contested and uncontested matters. For other civil cases, a six-month time limit is suggested. Although the sixty days established as the limit under this standard exceeds one aspect of the ABA recommendation, it is significantly lower in other probate and domestic issues.

73% of the attorneys interviewed felt that sixty days was an advisable time limit as it allows all parties sufficient time to make appearances, consider the issues and resolve differences to the extent possible. Several

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[45] ABA, supra note 31, §2.52 and commentary at pp. 88-90.

Cost:

Given present caseload levels and employing masters on a per diem or half-day basis, the anticipated first-year cost is less than $50,000.

Feasibility:

While the approach has proven effective in four counties, the relative priority accorded marital cases reduces the probability of additional funds being appropriated to support such a program. The feasibility thus is 30 to 60 percent.

Standard 11.6 ADOPT AND ENFORCE REASONABLE TIME PERIODS IN THE TRIAL COURTS FOR COMPLETION OF EACH PHASE OF THE LITIGATION PROCESS.

Commentary

The American Bar Association Commission on Standards of Judicial Administration commented that a goal of speedy disposition of cases cannot be fully achieved unless it is particularized by specific time standards, but that nothing is gained by establishing objectives that (1) are impossible to achieve, (2) achieve expedition at the expense of fair adjudication, or (3) fail to recognize and provide for justifiable or excusable exceptions.[46]

One means to determine what are reasonable time periods is to find how long cases actually take for disposition. The Governor's Commission on Court System Improvement studied cases for 1973 in four New Hampshire counties.[47]

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[46] ABA, supra note 31, §2.51 commentary, at pp. 82-83.

[47] Report, 16 N. H. B. J. 1, 12 (1974). At present, many rules of the Superior Court (e.g., 10,11, 25, 26, 28, 33 (as proposed), 34, 41, 51, 55, 62, 67, 69, 81, 212, 213, 223, and 224) set forth time limits for performance of certain functions in civil procedure. But the rules set forth no explicit time limits for completing litigation from start to finish, through its various phases.

Registers of Probate felt a sixty-day limit was essential if the parties in thei somewhat unusual jurisdiction were to be adequately located and notified of a pending action.

The importance of establishing specific limits for processing all types of cases including uncontested matters cannot be overstated. While questionnaire and interview responses did not suggest that these cases now pose a significant problem in New Hampshire, the creation of such a standard reduces the potential for cases being overlooked or relegated to a place of lesser importance.

Alternative Approaches for Implementation

Approach: Extend the Use of the Marital Master Program

Description:

In those areas in which uncontested probate and uncontested marital cases exceed the specified time limit, marital masters should be employed to reduce delay. Authorization for the presiding justice to appoint a master from an approved list can be accomplished by rule of court. Such use would be limited to an as needed basis for both the Superior and Probate Courts. (It should be noted that this standard and approach are primarily aimed at reducing delay in uncontested marital areas, as little to no delay was detected in the Probate Court.)

Time:

Implementation of the approach could be effected immediately as Rockingham, Strafford, Merrimack and Hillsborough Counties have used such a program for two years.

For civil matters it found that about 70% of auto negligence cases are ready for trial in six to 12 months, while more than 20% are ready in less time; for other civil actions, almost 60% were ready for trial in six to 12 months, and 30% ready in less than six months; 70% of equity actions other than marital matters were ready for trial in six to 12 months, while the remainder were almost equally split between those taking less than six months and those taking more than a year before being ready for trial; finally, about 55% of all marital actions surveyed were ready in less than six months, while 40% were ready between six and 12 months.[48] Only for equity cases was the average disposition time longer than one year, and for marital cases the average was only a little longer than four months.[49] Comparable statistical figures gathered in the National Center's survey weregenerally consistent with the findings of the Commission.

Those interviewed were not generally sure that a fixed time limit could be set for civil cases, because of difficulty in generalizing about the length of time necessary to ready civil cases for trial. Eleven of those questioned stated it would be impossible to generalize, and that preparation time would vary according to the type of case, the attorneys involved, or the judge. Eight respondents answered that a year or less is needed to prepare for trial, while four answered that more than one year is needed at the Superior Court level. A much shorter preparation time was urged as applicable in District and Municipal Court civil cases.

The largest number of those interviewed considered imposition of costs or fines against attorneys as the best means to enforce time limits. More than half that number, however, felt that no sanctions are necessary.

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[48] Ibid., at 12-13.

[49] Ibid. at 13.

It appears unwise for this standard to recommend specific time periods for each litigation phase. Although each case is not as unique as counsel frequently suggest, there is sufficient variation among cases, depending on location of parties, amount of damages or character of remedy sought, number of witnesses, type of evidence, and complexity of legal issues, to deter promulgation of any single set of deadlines. Nevertheless, trial judges must be aware of the need for setting such deadlines in the cases they monitor, and must not hesitate to issue orders to this effect after consulting with counsel. In this way, the characteristics of a case can be considered by a judge likely to be familiar through experience with how quickly each stage can reasonably be expected to be completed.

## Approach for Implementation

### Approach

The thrust of this standard is to foster efficient case management and calendaring rather than impose a set of time limits which do not afford sufficient flexibility to address the peculiarities of each case. In that regard, the discussion of alternative approaches found under standards 11.1, 11.3 and 11.4 should be reviewed for a more complete discussion of techniques for calendaring cases and managing caseflow.

Standard 11.7 DECISIONS IN MATTERS TRIED TO A JUDGE SHOULD BE RENDERED WITHIN THIRTY (30) DAYS FROM SUBMISSION TO THE COURT.

Commentary

For many reasons, mostly the extended waiting time required for jury trials, parties intent on gaining rapid adjudication of their cases are more likely to elect trial by judge alone. While such trials can be completed more speedily, they place a heavier burden on the judge, who now becomes the trier of fact as well as arbiter of law. Judges thus require a longer time to prepare both findings of fact and decisions on the law. In some instances, the backlog of decisional work brings the entire processing time for a court trial close to the length of time required for use of a jury, which faces a much more immediate pressure to reach its verdict of fact.

Parties should be able to expect judges to decide their cases within thirty days of the trial. However, in seeking attainment of this standard, it is necessary to recognize the resources required: few trial judges, especially in the circuit-riding Superior Court, have access to a sufficient number of law clerks to perform legal research and drafting work while the judges are on the bench. The travelling judges in New Hampshire also must depend on the court stenographers to type opinions and perform any secretarial duties. Speedy decision of cases may require added judges but the significance of providing needed support staff should not be underestimated in achieving optimum time performance.

Alternative Approaches for Implementation

Approach #1 Provision of Law Clerks

Description:

Access to a law clerk for research and drafting has been cited as one of the crucial elements needed to achieve this standard. Two approaches which have been suggested are: (1) the creation of a pool of law clerks (5) who would be available on call; and (2) the assignment of a clerk to each Superior Court judge. While significant differences in cost and administration exist between the two approaches, both achieve the stated objective of increasing law clerk availability. Implementation of either approach is contingent upon an increased appropriation to the court.

Time:

Six months are needed to complete the budget process and secure the funding necessary for implementation.

Cost:

The total annual cost of establishing a law clerk pool is estimated at $70,000 for five law clerks as compared to a yearly operating cost of $175,000 if the second alternative is implemented.

Feasibility:

The need for Superior Court law clerks is generally recognized. Thus the feasibility of increasing the number of law clerks is predicated on financing. The first approach was rated at 60 to 80 percent; feasibility with the second at 30 to 60 percent, based upon the amount of funding required.

Approach #2 Increased Secretarial Services

Description:

Three distinct approaches were suggested for providing secretarial support for the Superior Court justices: (1) creation of a secretarial pool; (2) permanent secretarial assignment to several courts; and (3) assignment of a secretary for each judge; and (4) providing funds for part-time contract labor. As in the case of the law clerks, the sole factor affecting the court's ability for implementing any of these approaches is the availability of financing. While statutory authority to create secretarial positions for the court may be requested at a later date, the court need only include the positions in its biennial budget request to initiate such an approach.

Time:

The time required to complete the budget process is six months.

Cost:

Given the present rate of compensation for clerk stenographers in the Superior Court, the following projections were developed to approach (1) $40,000; (2) $60,000; (3) $90,000; (4) $40,000.

Feasibility:

The feasibility for increasing the secretarial support provided to the Superior Court was rated at 80 to 100 percent. The question of cost again influenced the task force members' opinions as to which alternative was not feasible. As the cost of the approach increased, the feasibility of complete implementation correspondingly decreased.

Standard 11.8 APPEALS SHOULD BE PROCESSED ACCORDING TO THE FOLLOWING TIME PERIODS:

1) transcripts should be provided within 30 days of request;

2) appeals should be submitted for decision or argued within 120 days from the taking of the appeal;

3) decisions should be completed within 60 days from argument or submission.

Commentary

The last stage of the legal process--appeal--has frequently taken longer to conclude than the entire pre-trial and trial segments of a case. "It is not uncommon for a year or more to elapse from conviction to appellate disposition," the National Advisory Commission reported in 1973.[50] Terming the current time performance of appellate courts "unacceptable," the NAC calls for drastically speedier processing. Its recommendations are listed below, with those of the American Bar Association.[51]

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[50] NAC, supra note 18, Stand. 6.4, commentary, at p. 126. This discussion of appellate case processing refers to appeals on questions of law -- in New Hampshire, to the Supreme Court -- rather than to trials de novo, which are also styled "appeals." The term "appeal" as used in this standard refers to the former category. Trials de novo should conform to the time standards relating to other criminal cases. See Standard 11.1 supra.

[51] ABA, Standards Relating to Appellate Courts (Tent. draft, 1976) §3.52 at pp. 88-89.

# TIME PERIODS FOR DISPOSITION OF CASES ON APPEAL

## NAC Recommendations

Time between imposition of sentence and "initial action" by appellate court (screening) -- 30 days

Time between imposition of sentence and disposition of appeal --

a) cases presenting insubstantial issues: 60 days

b) cases presenting substantial issues: 90 days (60 days between sentence and submission to court)

## ABA Recommendations

Time between:

a) judgment or sentence below and completion of preparation of record, including transcript: 30 days

b) record completed to filing of appellant's brief: 30 days

c) filing of appellant's brief to filing of appellee's brief: 30 days (argument or submission to occur "promptly" following filing of appellee's brief

d) argument or submission to decision:

i) 3-judge panel:

A) normal case: 30 days
B) complex case: 60 days

ii) more than 3-judge panel:

A) normal case: 60 days
B) complex case: 90 days

Total time (for more than 3-judge panel):

a) normal case: 150 days

b) complex case: 180 days

Attainment of the recommended time periods will demand significant improvement in monitoring efforts, transcript preparation time, and early submission of statements of points by appellate parties. As the NAC concedes, "...none of these proposed time schedules could be complied with under traditional appellate procedures."[52]

In 1975, an average case took ten months (300 days) from entry and disposition in the Supreme Court of New Hampshire[53] but this figure omits the initial period following trial in which appellate questions for framed by counsel and certified by the trial judge for transmission to the Supreme Court for entry there. During this initial stage, the transcript is prepared. Therefore, the 300-day figure must, in many cases, be extended significantly to double that time or more. Procedural mechanisms to improve appellate processing are discussed in the sectior 10.0, Appellate Procedure and the approaches described therein.

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[52] NAC, supra note 18, Stand. 6.4 commentary at p. 126.

[53] The median time period was seven months (210 days).

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## 12.0 JUDICIAL SELECTION AND CONDUCT

### Introduction

"The quality of our judges is the quality of our justice..."[1]

Judges are the focal point of the common-law justice system. Clear statutes, sound court rules and procedures, and advanced case processing court techniques cannot supplant the individual jurists who must render the decisions. Judicial selection is thus an important issue, whether the process involves appointment, election or a combination of these processes. Regardless of the method employed, the result should be selection of individuals possessing the professional and human qualities which will enable them to function as fair and efficient judges.

What qualities and qualifications should a judge possess? What judicial selection process will best assure that judges will possess these qualities?

At the 1965 session of the National College of State Trial Judges, judges were asked to respond to a questionnaire designed to identify those qualities which best equip lawyers to be good judges. A second survey was made at the annual meeting of The National Conference of State Trial Judges later that year. The two groups reported nearly identical views. Highest on their list of qualities for the trial bench were:

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[1] R.A. Leflar, The Quality of Judges, 35 Ind. L.J. (1960) p. 289, 305.

(1) moral courage
(2) decisiveness
(3) reputation for fairness and uprightness
(4) patience
(5) good health, physical and mental
(6) consideration for others[2]

A striking feature of these highest ranking attributes is that they tend to focus upon the personality of the candidate: "what he is rather than what he has done; his innate or intrinsic qualities rather than his external attainments."[3] In addition, these qualities are, with the exception of good health, subjective, difficult to recognize and measure and not peculiar to members of the bar or bench.

It is suggested by many experts on judicial selection that "personal virtues should be used as a basis for veto rather than as standards for selection. A lawyer should not be appointed on a showing or assumption (for want of contrary proof) that he has all the homely virtues, but he definitely should be rejected if there is credible evidence that he lacks any of them."[4]

Selection of judges on the basis of merit would therefore involve a two-step process:

(1) rejection of any candidates who lack essential virtues

(2) utilization of objective criteria to select from those who possess these attributes.

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[2]G. R. Winters, Judicial Selection and Tenure, (American Judicature Society, 1973), p. 4.

[3]Ibid., p. 18.

[4]Ibid., p. 18.

Objective criteria may include education, training, professional attainments, experience in supervision, activity in professional associations and qualifications which may be specified by law such as age, citizenship, residence and length of practice. The goal of all merit selection processes is to select qualified individuals for the bench. Assuming that the most appropriate qualifications or qualities can be identified and measured, it is essential that the selection procedure screen candidates in an unbiased, unprejudicial manner.

Judicial selection methods utilized in the United States have their roots in England. Prior to the 1700's, the judiciary in England was considered an adjunct to the throne. In 1701, however, a statute was passed which provided that judges remained in office after the appointing sovereign died. The American colonies, however, did not share in this major step toward judicial independence. Judges in the colonies were very much under royal control.

Following the American Revolution, the colonies chose methods of selection contrary to English colonial practice. In eight states judges were appointed by the legislature, in two states by the governor and his council, and in three states by the governor with the consent of the council. At the federal level, judges were appointed by the President; yet the U. S. Constitution (Article III, Section 1) provided insulating safeguards of the "good behavior" tenure and Senate confirmation to assure judicial independence.

The elective method of selecting judges became popular during the Jacksonian era. During the post-Civil War period, however, abuse of the system by political machines resulted in widespread dissatisfaction and

resentment of political party control of candidates; in turn, this stimulated use of the appointive process.

The search for a method of judicial selection which would combine the positive aspects of appointment and election was led by Roscoe Pound and many others. In 1937, the ABA endorsed a proposal which not only combined appointment with election but also added a very important third element: a judicial nominating commission. This plan was adopted by Missouri in 1940 and quickly became known as the "Missouri Plan."

"The three-part approach consisted of: (a) a judicial nominating commission to nominate candidates to the bench; (b) an elected official (usually from the executive branch) who would make his appointments from the list submitted by the commission; and (c) subsequent non-partisan and noncompetitive election in which judges so chosen would run on their records."[5]

Nonpartisan merit selection plans have continued to gain popularity and have been adopted in twenty-one states, Puerto Rico, the District of Columbia and Guam.[6] Although many varieties of the original "Missouri Plan" are in existence, the national trend is toward a merit selection process which incorporates a nominating commission to screen and select candidates, followed by executive appointment and subsequent nonpartisan, non-competitive popular election to determine tenure of office.

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[5] A. Ashman, et al., The Key to Judicial Merit Selection: The Nominating Process (American Judicature Society, 1974) p. 11.

[6] Ibid., p.2.

The 1974 Report of the Governor's Commission on Court System Improvement recommended that New Hampshire adopt a voluntary merit selection plan by executive order of the Governor. Statutory enactment of the plan would contain all elements of such plans used in other states except, for constitutional validity, the requirement that the Governor must appoint a candidate from the list recommended by the panel. Constitutional amendment was also recommended to make selection from panel nominations mandatory.

Standard 12.1 A MERIT SELECTION PLAN FOR THE SELECTION OF JUDGES SHOULD BE DESIGNED AND ADOPTED IN NEW HAMPSHIRE.

Commentary

An effective merit selection plan provides stability and permanence to the judicial selection process and is applicable to all levels of court on a statewide basis.

The process of judicial selection should be systematic and aggressive in seeking the best judicial talent. Aspirants who are unqualified should be identified and rejected, while outstanding potential judges should not be overlooked. The selection process must operate with dignity and confidentiality to avoid discouraging good lawyers from serving on the bench and to encourage public respect.

The purpose of a merit selection plan is to help ensure that only the most qualified judges are appointed to the bench. Appointments should be based upon such factors as professional skills and character, and should be free of untoward political forces. Judges should therefore be appointed to the bench solely on the basis of merit.

Judges of all courts in New Hampshire are appointed by the Governor with the approval of the Executive Council (H.H. Const. pt. II, Art. 46). Tenure of office is until age seventy (N.H. Const., pt. II, Art. 78) upon "good behavior." (N.H. Const. pt. I, Art. 35 and pt. II, Art. 73)[7]

Recently there have been some initial steps taken in New Hampshire toward developing a merit selection plan. On May 6, 1976, the Governor and the N.H. Bar Association announced that an "informal arrangement" had been made whereby the Bar Association would submit to the Governor the name of potential candidates it considered qualified for judicial appointments to the District, Superior and Supreme Courts.[8]

These lists were to be updated at least once annually and were not to be considered exclusive. Further, these lists were advisory rather than mandatory, but the Governor did agree to first ask the Association to screen candidates he wished to nominate whose names had not appeared on the Bar Association list.[9]

The President of the N.H. Bar Association recently reported that this procedure had thus far been "strictly observed by all parties", except for the fact that a District Court list had not yet been prepared. In this regard the Board of the N.H. Bar Association has recommended that District Court Candidates be screened on a "more local level without preparation of lists by the Board." The Board also recommended that candidates for the Probate Court also be screened by the Bar Association utilizing the same procedure as described for the District Court. While

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7 16 N.H. Bar J. (No. 1 Sept. 1974), pp. 59-60.

8 2 N.H. Law Weekly 348 (June 9, 1976).

9 3 N.H. Law Weekly (Oct. 20, 1976).

this new "informal arrangement" for screening judicial candidates appears to have been a constructive move toward the development of a judicial merit selection system, it can only be considered an initial step and does not offer the permanence and stability of a mandatory system, participation in the process by the citizens of New Hampshire, system wide applicability,[10] standardization and formalization of screening criteria, and relief from the potential that political pressures will determine the appointment of candidates rather than the merits of the individual.

The results of the Court Systems Survey[11] showed that interviewees were divided in their opinion as to the present system of judicial selection. Slightly over 50 percent were of the opinion that good candidates are overlooked by the present selection process. Others, however, expressed the opinion that the present system was adequate.

Alternative Approaches for Implementation

Approach #1 Proceed with New Hampshire Bar Association Plan

Description:

Substantial progress has been made by the N. H. Bar Association in the area of judicial merit selection by virtue of its imformal screening arrangement with the Governor. While the current system has many weaknesses, it nevertheless offers the basis upon which a more permanent and mandatory system could be established.

Since considerable time and effort has been expended by the Bar's Special Committee on the Administration of Justice[12] and since a working relationship with the Governor has been established, it may be desirable to capitalize on that work in efforts to strengthen the screening and selection process.

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10 The Probate Court is not presently covered by the screening process although the Board of the N.H. Bar Assoc. has recently recommended inclusion of the Probate Court.

11 Prior to the agreement between the N.H. Bar Assoc. and the Governor on a screening procedure.

12 3 N.H. Law Weekly 103 (Oct. 20, 1976).

Time:

The time necessary to effect a permanent judicial merit selection process might be considerable (2-5 years) using this approach. It is often more time consuming to improve a weak system than to introduce a totally new one.

Cost:

Minimal financial cost.

Feasibility:

The fact that changes in the existing selection procedure would occur gradually may enhance the feasibility of this approach by reducing opposition which often surfaces when sweeping changes are proposed. The feasibility of this approach is rated at 60-80 percent.

Approach #2 Judicial Nominating Commission

Description:

A permanent nonpartisan commission of lawyers and non-lawyers could be established to independently generate, screen and submit a list of judicial nominees to the Governor who would then be legally or voluntarily bound to make a final selection from this list of three candidates. Composition of the nominating commission might include one judicial, five lawyer and five non-lawyer members. Lawyer members of the commission would be elected at large by members of the New Hampshire Bar, while non-lawyer members would be appointed by the Governor. The one member from the judiciary would be the Chief Justice of the N. H. Supreme Court who would also serve as Chairman of the commission.

Time:

If the nominating commission is established by executive order, implementation time would be minimal (0-6 mos.) However, if legislation is required, additional time will be needed (6-12 mos.).

Cost:

There should be minimal cost associated with establishing and operating the commission since service will be on a voluntary basis.

Feasibility:

Given the present political climate and if a constitutional amendment is required, the task force rated the feasibility of implementation to be low (0-30 percent).

Standard 12.2 MASTERS OR ARBITRATORS WHO AID THE COURTS AS FINDERS OF FACT SHOULD BE SELECTED BY THE CHIEF JUSTICE FROM NOMINATIONS PROVIDED BY A COMMISSION.

Commentary

Auditors, masters, referees and other neutral third parties are designated by many courts to determine facts in matters which are sufficiently complex or routine so as to benefit from the attention (on a full-time basis) of a fact-finder who possesses expertise in a particular area. Complex commercial or real estate appraisal disputes fall into the first category; while uncontested matrimonial (divorce) proceedings often are characteristic of the second.

The use of masters or arbitrators in selected cases provides an opportunity for a fair hearing while freeing judges to preside at cases which

can only be heard by a judge. However, several questions arise in connection with the selection and use of masters and/or arbitrators.

First, when is it appropriate to assign a case or category of cases to a master? Is legal training a pre-requisite for service as a master or arbitrator?

Masters or other third-party fact finders are modern descendants of persons who were, in ancient times, requested to decide disputes between two or more parties. Such were the "judges" of the Biblical Book of Judges who acquired enough respect to be able to serve both sides in providing a peaceful alternative in settling disputes.

The tradition of use of masters changed as nations employed professional judges. However, in the two areas previously discussed -- complex, specialized disputes and simple, repetitive ones -- many have recognized that these cases do not always require the skills of professional jurists. Most cases, for example, brought to the United States Supreme Court under its original jurisdiction are complex disputes between states over boundaries or water rights. Traditionally, the court assigned these cases for initial hearing before a master, whose background usually included a distinguished career as a federal trial or appeals court judge with specialized expertise. The court reviewed his report prior to ratifying or rejecting the findings. In similar fashion, trial courts across the country assign cases involving complicated facts likely to benefit from a specialist's attention to either lawyers or laymen possessing the necessary expertise. Simple, repetitive cases such as uncontested divorce or small claims matters are also assigned in many jurisdictions for hearing before a lawyer or layman equipped to determine the facts speedily, knowledgably, and impartially.

Where laymen possess the specialized indepth knowledge and when some form of appeal on the law is available to the parties, there are no reasons to preclude the use of lay fact-finders. Lawyers, however, face potential conflict situations, much the same as part-time judges who practice law. Brethren at the bar may oppose counsel in one case who later appear in an adjudicating capacity. For this reason, use of lawyers as masters is unwise except where the attorney may be semi-retired or where legal specialization permits a lawyer to practice in a field in which he is unlikely to encounter practioners in matters in which he serves as a master.

How should masters be selected? Because of the specialized service masters render, the decision to employ them should be made by the court.[13] There is little justification for selecting masters by a political selection process. To minimize political consideration, the masters should be designated by the chief justice of a court, upon recommendations by other judges. This procedure helps ensure meeting the courts' needs and employing only the most qualified individuals as masters.

In New Hampshire, masters are appointed by the court and used in several areas. Final approval of decisions, however, remains with the judge. The use of masters has become particularly significant in disposing of uncontested matrimonial cases (Super. Ct. Rules 76-80). Questions concerning conflicts of interest often arise since many of those named as masters are active attorneys.

Note: This standard conforms to existing practice since at least marital masters are selected on the basis of merit by a committee of Superior Court judges.

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13 Ex Parte Peterson, 253 U.S. 300 (1920).

Standard 12.3 ESTABLISH A JUDICIAL CONDUCT COMMISSION TO REVIEW AND SCREEN COMPLAINTS AGAINST JUDGES WITH POWER TO DISCIPLINE OR REMOVE JUDGES.

Commentary

A Judicial Conduct Commission comprised of judges, members of the bar and the general public, results in a more effective and less costly method for disciplining or removing judges. The commission assumes the principal responsibility for disciplining and removing judges, thus avoiding removal by address or impeachment procedures. In addition, a Judicial Conduct Commission helps to minimize prejudicial actions, or accusations of such action by involving the general public and members of the bar in disciplinary or removal actions.

Currently, judges in New Hampshire can be removed directly by the Governor and the Executive Council for reasonable cause upon address of both houses of the legislature. (N.H. Const., pt. II art. 73) and by the senate by impeachment (N.H. Const., pt. II, art. 38) and to a limited extent by the General Courts' power to "erect and constitute judicatories and courts of record." (N.H. Const., pt. II, art. 4).

Past and present experience in the state is described in the following section included in the Report of the Governor's Commission on Court System Improvement (16 N.H. Bar J. (1974) at pp. 60-61):

> The power to impeach is granted to the house of representatives, upon trial by the senate, "for bribery, corruption, malpractice or maladministration in office" (pt. II, art. 38). The exercise of this power has been

attempted only once with respect to the judiciary, and not at all since 1790. The removal of judges by use of the power of legislative reorganization and by address has occurred numerous times. The power of address has been exercised for reasons of "decays of nature and infirmities of age", for reasons of "the public good", by virtue of political defeat of the party which appointed the incumbent judge, and for reasons of misconduct relative to enforcement of traffic laws and administration of marriage laws. However, the power has seldom been exercised in the past one hundred years.

Prior to 1966, the power of address could be exercised without giving a judicial officer an opportunity for hearing. In addition to curing this defect, the 1966 amendments to the New Hampshire constitution appear to have added the requirements that removal be for reasonable cause and that the cause not be a ground for impeachment (pt. II, art. 73).

The practice of removing members of the judiciary indirectly by the device of abolishing courts has been exercised numerous times in our State's history, usually for political reasons. Amendments to our constitution in 1966 established our supreme and superior courts as constitutional courts, not subject to the General Court's power to legislate courts out of existence (pt. II, art 72-a). Our other three classes of courts remain subject to this power.

More recently, the New Hampshire Supreme Court concluded that:

> This court has the power upon the proper showing of abuse or misconduct, to order a suspension of a judge from sitting in his court or to assign some other judge in his place. In re Mussman, 112 N.H. 99, 289 A.2d 403 (1972), 113 N.H. 54, 302 A.2d 822 (1973).

Finally, on January 1, 1973, the New Hampshire Supreme Court adopted a code of judicial conduct in the form of Supreme Court Rule 25 which is intended to assist it in carrying out its duties of supervision of our court system.

A substantial majority of those surveyed felt that the existing system provides an adequate mechanism for maintaining acceptable judicial conduct. The minority favored methods including: 1) Supreme Court power to discipline and remove; 2) a "bench-bar" parallel or other commission; 3) use of the Judicial Council to screen complaints, or 4) use of a

committee representing all levels of judges. While the constitutional methods of removing judges are appropriate, they can be cumbersome and time-consuming. The Supreme Court should therefore continue the exercise of its power to suspend or otherwise discipline judges.

Approach for Implementation

Approach Judicial Conduct Commission

Description:

The Supreme Court could establish a Special Committee to serve as a Judicial Conduct Commission, empowered to review complaints, and if necessary to recommend suspension. The N. H. Bar Association has recommended the creation of such a committee.[14]

Time:

Minimal - 0-6 mos.

Cost: None

Feasibility:

Moderate (60-80 percent) - should have support of the Bar.

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[14] N.H. Law Weekly Vol. 3, p. 108, Oct. 20, 1976.

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# CONTINUED

# 4 OF 6

## 13.0 CONTINUING EDUCATION

### Introduction

The absence of continued training isolates judges, attorneys and court personnel from exposure to new legal thought, management and judicial techniques helpful in improving the administration of justice. Continuing education should not be limited to legal training. Each individual within the court system exercises varying measures of responsibility and can benefit from additional training.

"The best organization of the courts will be ineffective if the judges who man it are lacking in necessary qualifications."[1] When these words were written in 1956, continuing education of judges had just begun with the first appellate judges seminar held at New York University Law School. The seminar objectives, as stated by Judge Frederick G. Henley, then the Chief Justice of the State of Washington and an early leader of the Appellate Judges Seminar, were to provide appellate court judges with refresher courses in the law, emphasizing particularly recent and current trends and thinking.

Following the appellate judges seminars, which have continued to be held annually, many judicial education seminars followed, sponsored by the National College of the State Judiciary, the National Council of Juvenile Court Judges, and the National Conference of State Trial Judges, among others. In addition to the national organizations sponsoring judicial education seminars for judges, state and regional sponsored sessions are conducted.

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[1]A. Vanderbilt, Judges and Jurors: Their Functions, Qualifications and Selection (1956), p. 3.

Continuing education for judicial personnel should contain two objectives for a well-balanced program. First, there is a need for orientation of new judges, lawyers and court personnel. The second objective should be to provide refresher and enhancement courses for all court personnel as well as the bench and bar. As a member of the bar, an attorney may specialize in a particular area of the law; upon appointment to the bench, many lawyers need to orient and train themselves in other areas of law and procedure; formal and informal continuing education opportunites should be provided.

Formal training may be at a national program, through access to veteran jurists at state-wide meetings, or informally by providing a judge with up-to-date publications and manuals such as bench books.

The bar also has a responsibility to continue the education of its members. Attorneys must keep apprised of and conform to procedural changes. Entry into new fields of practice requires education and training to better serve clients; seminars should be held to continue this process. Continuing education in some form may be made mandatory for attorneys.

In 1975, Minnesota became the first state to mandate continuing legal education for attorneys admitted to practice as a condition of eligibility to practice.[2] Minnesota established a Board of Continuing Legal Education, with a salaried executive director, to supervise the operation and record-keeping of the program and certify courses as satisfying the requirement of 45 hours of continuing education in every three-year period. Iowa followed

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[2]Rules of the Supreme Court for Continuing Legal Education of Members of the Bar, 27B Minn. Stats. Ann. (1975-76 pocket pt. at p. 64 et seq., Sup. Ct. Rules), April 3, 1975.

Minnesota's example six days later, but only certifies sponsors, not the courses themselves.[3] Minnesota has designed its program so that luncheon speeches and law firm meetings do not qualify as fulfilling continuing education requirements.[4]

The training needs of non-judicial court personnel, clerks, court reporters, court officers and others should be addressed. Standardization of training procedures is likely to increase the efficiency of the court and professionalization of staff.[5]

Standard 13.1 THE SUPREME COURT SHOULD ESTABLISH MINIMUM CONTINUING EDUCATION REQUIREMENTS FOR JUDGES, LAWYERS, AND COURT PERSONNEL. THE COURT WITH THE COOPERATION OF THE NEW HAMPSHIRE BAR ASSOCIATION SHOULD CERTIFY AND, IF NECESSARY, ORGANIZE IN-STATE PROGRAMS FOR CONTINUING EDUCATION.

Commentary

It should be the responsibility of the Supreme Court in its supervisory capacity to see that all personnel practicing and working in the state courts are aware of changes in law, court rules and administrative policies.

Minimum continuing education requirements should begin for an attorney when admitted to the bar. The court could require that new attorneys be familiar with court rules and provide regular opportunities for explanation and introduction of new forms and procedures. Upon appointment to the bench, judges should be given assistance with and orientation to new responsibilities.

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[3]Supreme Court of Iowa Rule 123 (April 9, 1975).

[4]See D. Heidenreich, Toward A More Competent Bar, 60 Judicature 21 (June-July 1976).

[5]ABA, Standards Relating to Court Organization (1974), §1.44 at p. 96; ABA, Standards Relating to Trial Courts (1975, Tentative Draft), §2.41(3) at pp. 63-64.

Trial judges' seminars can aid during this transition. Continuing education requirements should not end with orientation; periodic attendance at seminars refresh both members of the bench and bar. In addition, approved practice series and benchbooks would be of assistance.[6]

As many national and state continuing education programs exist, the State Supreme Court should review and approve those programs which would satisfy continuing education requirements which are now being developed.[7]

District and Municipal Court judges must now attend at least one judicial conference.[8] One commentator predicted: . . ."the principle will probably continue to expand to include other levels of our judicial system, such as the superior and supreme court, as well as the practicing bar itself."[9]

Approach for Implementation

Approach: Establish board of continuing legal education

Description:

The Supreme Court, in conjunction with the New Hampshire Bar Association, could develop minimum mandatory continuing education requirements for all judges, lawyers, clerks, probation officers and other non-judicial personnel. The first step in this process would be to establish a Board of Continuing Legal Education, comprised of judges, non-judicial personnel and members of the bar. The structure, functions and responsibilities of this Board might be

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[6]Loughlin, Martin F., New Hampshire Trial Procedure (1975).

[7]In Re Proposed Rule Relating to Continuing Education for District and Municipal Court Judges, Sept. 30, 1975, discussed at 17 N.H. Bar J. at 130 (1975).

[8]Ibid.

[9]Ibid.

modeled after the Minnesota Board of Continuing Legal Education as described in the introduction to this section. It would be wise at any rate to investigate more fully the Minnesota experience to determine the effectiveness of this approach. The Board, with the approval of the Supreme Court, and in cooperation with the Bar, would establish and enforce the minimum requirements.

Time:

It is anticipated that the time necessary to establish the Board might only take three to six months; however, more time may be required before minimum continuing legal education requirements could be developed and approved. Additionally, the Board would have to ensure that educational opportunities to meet the requirements were available prior to establishing minimum standards. Therefore, the estimated time to fully implement this approach is likely to take one to two years.

Cost:

The initial costs associated with establishing the Board are estimated to be $50 to $75,000. This amount reflects the salary of an Executive Director, equipment, secretarial services and other related costs. The actual cost of sponsoring training opportunities should be considered separately and would depend upon the minimum requirements and policies of the Board.

Feasibility:

The feasibility of this approach should be moderately high, given the favorable survey responses from judicial and non-judicial personnel. The overwhelming majority (80% +) of the survey

participants were in favor of minimum continuing legal and non-legal education and requirements. It was deemed advisable that such a Board and staff should be distinct while complimenting other criminal justice training entities. Thus, the climate seems right for creating the Board and effecting its policies. Feasibility is rated at 60 to 80 percent.

Standard 13.2 SPECIALIZED TRAINING SHOULD BE REQUIRED FOR ALL JUDGES, INCLUDING MASTERS, IN ALL COURTS; IF THE TRAINING IS ONLY AVAILABLE OUT OF STATE, THE COURT SYSTEM SHOULD INCUR THE COST OF ATTENDANCE.

Commentary

Beyond the orientation of new judges, additional educational opportunities are necessary for judges to maintain and improve their judicial skills. Specialized training programs provide the opportunity for judges to develop new areas of expertise and sharpen skills. Masters as well should be required to participate in training programs, especially those related to their jurisdictional responsibilities.[10] National organizations, representing various levels of courts, sponsor seminars and programs of special interest. This publication would be informative as to appropriate training programs.

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[10] NCSC, Evaluation of New Hampshire's Marital Masters Program (1976), pp. 7-8.

Approach for Implementation

Approach: Designation of Approved Training Programs

Description:

The Board of Continuing Legal Education (described in Standard 13.1) could investigate and approve selected seminars, conferences and programs from the NCSC Master Calendar and other sources. Program content could be reviewed and thereafter a list of those approved could be compiled and circulated to judges and masters so that they could select a program of interest.

Time:

Once the Board was established, the compilation of the list would require approximately three months.

Cost:

The cost of identifying training programs as described in this approach should be minimal and part of the operating cost of the Board. (See Cost Standard 13.1.) The cost of sending judges and masters to approved training programs is difficult to estimate and would depend upon the location of the program and its length.

Feasibility:

The cost of training is certainly the key factor in assessing the feasibility of this approach. Few people are likely to disagree with the premise that judges and masters should receive needed training. However, the legislature may be unwilling to approve the funds necessary to fully implement the program. Therefore, the feasibility is rated at 30 to 60 percent.

Standard 13.3 SPECIALIZED TRAINING SHOULD BE PROVIDED FOR NON-JUDICIAL COURT PERSONNEL, INCLUDING COURT OFFICERS, COURT REPORTERS, CLERKS, PROBATION AND POLICY PERSONNEL.

Commentary

As with judicial personnel, non-judicial staff should also be continually afforded opportunities for specialized training. The changing court environment requires that all employees maintain and improve their skills. Formal training programs offer the opportunity to communicate changes in court procedure, case processing, office operations and policy. In addition, non-judicial employees can be instructed in new techniques as they relate to their particular area of responsibility.

In New Hampshire, few training opportunities are available for non-judicial personnel. During the court systems survey, clerks of court, probation officers, stenographers, and other non-judicial personnel were asked to assess the availability of specialized training in their particular area of responsibility; 72 percent of the respondents rated the existing opportunities as "fair to poor" and attendance at programs that are available as "poor." The majority of respondents did favor the establishment of minimum educational requirements.

Approach for Implementation

Approach: Develop Specialized Educational Programs for Non-judicial Personnel

Description:

The Board of Continuing Legal Education in conjunction with the Administrative Assistant to the Chief Justice, should have the responsibility for developing specialized educational programs for non-judicial personnel. The program suggested most often by survey respondents included:

Clerks - civil procedures, especially small claims; filing; and uniform bookkeeping.

Stenographers - transcript preparation and legal terminology.

Probation Officers - court procedure, pre-sentence investigations, probation violation procedure, juvenile law, and counseling techniques, including orientation to social service agencies and other resources.

Time:

As with standard 13.2, the time necessary to implement this approach is dependent upon the establishment of a Board (standard 13.1). However, once the Board was established, it is likely that some training programs could be developed, perhaps in cooperation with the clerks' associations. Therefore, some training opportunities should be available three to six months after the Board is created.

Cost:

If training programs are held in conjunction and in cooperation with non-judicial personnel associations (i.e., clerks' associations and others) costs could be substantially reduced. Utilizing the associations, one projected cost of this approach is less than $50,000.

Feasibility:

As with specialized training for judicial personnel (see standard 13.2), the major factor in determining the feasibility of this approach is cost. Non-judicial personnel appear receptive to

having minimum requirements established and are eager to participate in training programs. If costs can be minimized, the feasibility of this approach is rated at 30 to 60 percent. However, legislators are likely to be more receptive to training judicial personnel than non-judicial personnel.

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# 14.0 PUBLIC EDUCATION AND NEWS COVERAGE

## Introduction

For the public to support the judicial system, citizens must know and understand their role in the judicial process. A basic understanding of the formal procedural framework of the court is fundamental to citizen participation as litigants, jurors, witnesses, or as observers monitoring the performance of the courts.

The Sixth Amendment to the United States Constitution requires the courts to provide an accused with a public trial by an impartial jury. The First Amendment guarantees freedom of the press to fulfill the public's right to know in order to enable citizens to criticize and participate in the judicial system. The right of an individual to a public trial also reinforces the monitoring function of the public to protect an individual's procedural rights.

A conflict, popularly known as the fair trial-free press issue, has arisen between courts and the media as each proceeds towards its perceived goal: a public, impartial trial vs. the public's right to know. Only when each side understands and accepts the other's goal as equally legitimate can the conflict be resolved. Once the common goal of preserving a balance between the free flow of information and the maintenance of the integrity of the judicial process is recognized, the potential for cooperative efforts by all those involved is fostered.

The courts must accept their responsibility to initiate efforts toward attainment of this goal. Once those in the judicial system develop and enforce ethical standards, tighten jury selection and trial procedures, and identify potentially prejudicial information, a means must be developed to disseminate information concerning court actions, procedures and purposes to the public through the media so that a climate conducive to public understanding and support can be created.

The Sixth Amendment right of an accused to a public trial is rooted in English common law, and originated in response to the tyrannical secret proceedings of the Court of Star Chamber.[1] The Constitution bars secret proceedings, according to the United States Supreme Court, which has cited the advantages of publicity as an effective restraint on judicial power, and education of the public as a beneficial influence on the functioning of the judicial system.[2]

In the American colonies the governor and council strongly exercised the power of prior restraint. American colonists felt the strong arm of the governmental censor when attempts were made to publish newspapers. In 1690 William Bradford of Pennsylvania was charged with seditious libel and jailed for having printed tracts of a separatist Quaker faction; the first trial resulted in a deadlocked jury and the case ended only upon a request by a New York governor that Bradford be released to set up a printing press there. The first victory for a free press was the acquittal of John Peter Zenger in 1735. Zenger had been jailed on a charge of seditious libel for having printed articles involving freedom of the press and attacks upon Governor Cosby of New York. Zenger's attorney, Andrew Hamilton, argued that the "Liberty - both of exposing and opposing arbitrary Power ... by speaking and writing Truth" was the only matter at issue, repudiating the common law rule that the jury may decide only on the basis of whether or not the defendant had actually published the articles in question.[3]

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[1]J. Lofton, Justice and the Press (1966), p. 55.

[2]In re Oliver, 333 U.S. 257 (1948).

[3]Lofton, supra note 1, pp. 11-13.

The adoption in 1791 of the First Amendment guaranteeing freedom of speech and the press still did not resolve all conflict. In certain instances, the Supreme Court has been willing to restrain speech and press: in the early 1900s, "bad tendency" was a test employed; in the 1930s it became "clear and present danger" to society.[4]

Means to curb the publication of potentially prejudicial information, such as the use of contempt power by the courts, or the postponement of trial coverage by the press until the end of a proceeding, proved unpopular and often unjust. Although the American Bar Association in 1908 adopted its Canons of Professional Ethics and the press responded similarly by the adoption of the Canons of Journalism in 1923 by the American Society of Newspaper Editors and the Code of Ethics in 1933 by the American Newspaper Guild, no code of ethics restrained the furor surrounding the 1934 Hauptmann trial for the New Jersey kidnapping of the infant son of Charles Lindbergh. It did inspire the American Bar Association, however, to initiate in 1936 a Special Committee Between the Press, Radio and Bar to decide upon "Standards of publicity of judicial proceedings and methods of obtaining an observance of them, acceptable to the three interests represented." In addition to agreement on some points of concern, the committee recommended that local bar committees and corresponding media committees be appointed to continue discussions on related matters.[5]

In 1966, the U. S. Supreme Court recognized the harmful effect of prejudicial publicity when, for the first time, it reversed a conviction solely

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[4]Schenck v. United States, 249 U.S. 47 (1919).

[5]Ibid., pp. 118-121.

on the grounds that virulent publicity had denied the defendant a fair trial.[6] In its decision the Court detailed the means that the court might have used to control trial publicity. Since then, the opinion has led to the formulation of fair trial-free press standards. Unfortunately, as is discussed below, the standards have not always remained in accord with the Sheppard decision.

The American Bar Association's Advisory Committee on Fair Trial and Free Press issued its tentative draft of Standards Relating to Fair Trial and Free Press in October 1966. These standards stress the importance of cooperative efforts "by the bench, bar, and the law enforcement branch to put their own houses in order." The extent to which potentially prejudicial publications may affect a juror, and thus influence the outcome of a trial, is only now being demonstrated by empirical research. The committee felt that measures need not be delayed pending such a determination.

The National Advisory Commission on Criminal Justice Standards and Goals strongly believed that the effective functioning of courts which, by their very nature, are subject to public scrutiny, depends upon the quality of their relations with the community, and the resulting respect which the public feels for the court process. The standards proposed by the commission suggest public information and education programs as a means of fostering public interest in the judicial system.[7]

The Code of Professional Responsibility[8] for attorneys has been adopted by many states. Existing and proposed standards are now being examined for use as guidelines in individual states.

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[6] Sheppard v. Maxwell, 384 U.S. 333 (1966)

[7] National Advisory Commission on Criminal Justice Standards and Goals, Courts (1973), Standards 10.2 and 10.3 at pp. 198 ff.

[8] ABA, Code of Professional Responsibility (1971).

Cooperative efforts by the bench, the bar and the press were evidenced in the 1960s by the development of guidelines for the press and bar and statements of policy regarding the release of information to the media: Oregon, 1962; Massachusetts, 1963; Philadelphia, 1964; U.S. Department of Justice, 1965; and Cleveland, 1966.[9]

Guidelines, however, depend for effect upon continued discussion and understanding of issues in areas of conflict. Some states have developed court-media committees which meet on a regular basis; particularly successful are those in North Carolina, California and Washington.

Courts are becoming increasingly aware of the needs and responsibility to educate the public concerning the judicial process. Public information offices for the courts have been established in a number of states (e.g., Illinois, California, New Jersey, Pennsylvania and Massachusetts) to serve as a central source of information regarding the courts. Unless the courts clearly express their interest in increasing the information flow, however, these offices can result in reducing the amount of information the public receives about court operations. The Conference of California Judges' Project Benchmark has strived to broaden lawyers' and judges' understanding of the problems of the news media covering a court, and has prepared materials to educate students on court functions.

In many respects, however, the recent decision by the U. S. Supreme Court in Nebraska Press Association v. Stuart[10] has revived the principles first enunciated in the Sheppard case, supra. Although Sheppard suggested steps for use

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[9]D. Gillmor, Free Press and Fair Trial (1966), pp. 37-38.

[10]96 S.Ct. 2791 (1976).

in controlling the "carnival" atmosphere of the courtroom in that case -- including limitation of number of reporters, insulation of witnesses, control of information release by police and counsel, change of venue, and jury sequestration -- the courts during the last decade, along with the ABA standards-drafters, tended to ignore the Sheppard catalog of devices in favor of one which the court did not suggest or discuss at all: the gag order on reporters or newspapers. Since the Nebraska decision rules out the use of gag orders except and then, only possibly, in the most extreme situations (and even considering how bad the Sheppard court scene was, the court had not suggested a gag order there),[11] both jurists and journalists now may hopefully return to the more rational process of establishing a rapport which will permit development of working relationships which recognize the rights of all involved and that neither side must or can always be paramount.

Standard 14.1 INFORM THE PUBLIC OF THE GOALS, METHODS AND PROCEDURES OF THE COURTS AND THE REASONS FOR EACH, IN ORDER TO PREPARE MEMBERS OF THE PUBLIC FOR SERVICE AS JURORS, PRESENCE AS WITNESSES, AND RIGHTS AS PARTIES.

Commentary

A public which is informed about and understands its judicial process is much more likely to view the system more favorably, or at the least, assess its operation more constructively. The ultimate measure of a successful public education program is the support the citizenry gives by providing the courts with adequate resources. Citizen pressure can effect increases in legislative appropriations and the enactment of bills favorable to court improvement.

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[11]The Nebraska ruling did not entirely ban gag orders as a prior restraint barred by Near v. Minnesota, 283 U.S. 697 (1931). But the several opinions make the prognosis very dim for the survival of any gag order.

Knowledge can also motivate citizens toward more active participation in the courts. Their willingness to participate as witnesses or jurors can indicate that the public education process is working effectively. Public familiarity with the court process should exert a positive effect upon service as witnesses or jurors.

By informing the citizens of their rights as parties, the courts become more accessible to citizens able to recognize when rights have been violated and cognizant of legal means of redress.

New Hampshire citizens appear to be less than fully aware of the goals, methods and procedures of the courts, according to a sampling by questionnaires distributed to citizens throughout the state.

When asked "Are you familiar with the various levels of court within the state and how they operate?" approximately 44 percent responded yes, 39 percent no, and 17 percent did not answer, commenting that they felt unqualified to respond to the entire questionnaire because of total unfamiliarity with the court system. A closer analysis discloses that of those who responded yes, 25 percent said that their knowledge was only of a very general nature (i.e., what levels of court exist, but not procedures within the courts), acquired through newspapers or local chatter; others attributed their knowledge to jury service, direct involvement in court proceedings as a party, or attendance at court sessions as an observer. Those who responded affirmatively generally desired to learn more about the courts.

Of those who responded negatively, lack of knowledge was attributed to having been spared the "misfortune" of an encounter with the courts. Some others who failed to comment upon their answer indicated their attitude in

responding to a later question: "Can the average citizen impact upon the court's operation?" The response: "Why bother? Courts don't listen to the average citizen anyway." Others were frustrated by not being able to influence the courts because they know too little to make any judgments about court operations.

Despite lack of specific knowledge of the courts, most were able to identify problems in the courts -- leniency, variation in sentencing, backlog -- problems easily detected through reading newspapers. Those who understood more about the system tended toward more favorable comments -- viz., by comparison with other states, and considering inadequate funding, facilities and staff, the New Hampshire system is functioning surprisingly well. The same questions were asked of legislators; although a greater proportion acknowledged familiarity with the courts, responses indicated attitudes similar to those of the citizens.

An attitude of distrust was evident in both groups, indicated by such comments as "courts are a closed operation"; "lawyers and judges are out for themselves," and "impervious to criticism"; "court actions favor the accused, not the victim"; "'justice' is dependent upon the lawyer's ability to use technical loopholes."

The responses of those who have at least general knowledge of the courts show the positive effect that a public education program can have. Their comments stressed constructive means to improve the operations and public image of the courts: inclusion of courts in school curricula; and more detailed reporting in the media, particularly to explain reasons for dismissal of cases before the court.

The courts have until now relied on a "laissez-faire" approach which has proven ineffective. Only if the judicial system is willing to initiate and implement a widespread public education program and demonstrate its willingness to be responsive to the needs of the citizens, can negative impressions of the courts be corrected.

Alternative Approaches for Implementation

Approach #1 Establish a Public Information Program for the Courts

Description:

This alternative involves more than the establishment of a Supreme Court press office: a public information officer should make sure that all court decisions released to the public are available to libraries and disseminating media. Furthermore, this officer would organize educational programs for the schools and the public at large, as well as serving as a resource for other governmental bodies, particularly the legislature and the executive branch leadership. Other aspects of the approach that are almost free of costs, such as a general column on law prepared by members of the bar, can multiply the effectiveness of this program.

Time:

The task force estimated that a basic program could be organized within six months by court administrative action.

Cost:

The cost of establishing a program should be less than $50,000.

Feasibility:

The task force felt the feasibility of establishing a working, effective program fell between 30 and 60 percent because of the cost of a program that can serve as more than window-dressing and the low priority the courts are likely to place on this area.

Approach #2 Develop a Process to Educate Jurors for Their Task

Description:

A jury education process can use lectures, handbooks or audio-visual aids to make jurors more fully aware of their role in the justice system.

Time:

A program can be initiated within six months.

Cost:

Costs are minimal for lectures but handbook or audio-visual productions should cost less than $50,000.

Feasibility:

The Superior Court has recently distributed a juror's handbook published at no charge by Equity Publishing Company. This activity makes the feasibility of this segment of the approach 100 percent.

Approach #3 Organize Specific Programs, Such as Citizens' Conferences, to Spur Public Involvement in the Justice System

Description:

Citizens' conferences have been held in many states, including New Hampshire (in 1970). They bring judges, lawyers, and members of the public together for two or three days of discussions. The

American Judicature Society, AJS, often sponsors and assists in organizing these conferences.

Time:

A conference can be organized within six months.

Cost:

Not significant, since AJS generally will provide most of the materials.

Feasibility:

The task force expressed dissatisfaction with the citizens conferences as a useful approach unless extensive preparations and advance educational efforts were made to diminish the likelihood of "hot air" at sessions. The task force set feasibility (of success) at 30 to 60 percent.

Importance of Standard.

The task force assigned this standard first priority for the topic area.

Standard 14.2 SPECIFY THOSE ASPECTS OF CRIMINAL CASES WHICH ATTORNEYS, JUDGES, LAW ENFORCEMENT OFFICERS, COURT EMPLOYEES, PARTIES AND WITNESSES ARE FORBIDDEN TO DISCLOSE TO THE PRESS OR PUBLIC IN ORDER TO PRESERVE AN ACCUSED'S RIGHT TO A FAIR TRIAL.

Commentary

An accused's right to a fair trial is preserved when a case is decided on the merits of evidence presented in the courtroom to an impartial jury. When publicity relating to a case is limited to factual information, free of opinion concerning guilt or innocence, that right is protected. Information which is part of the public record should be released to inform the public

of the scope of the investigation in progress, enlist assistance in the investigation, warn of potential dangers and increase familiarity with the process. Rules should be promulgated to ensure that all participants in the criminal justice system will not hamper operations of the process by releasing information which will prejudice jurors.

The New Hampshire Superior Court justices proposed adopting rules on May 7, 1976 which restrict disclosure of information in criminal proceedings.[12] The rules conform to the ABA Standards Relating to Fair Trial and Free Press (1968) and those of the U. S. District Court in Concord. Upon request by the New Hampshire Bar Association Board of Governors, the justices postponed final action on the rules. The N.H.B.A. Board of Governors and media expressed opposition to the proposed rules, and sought more information on the issue. The proposed rule was referred to a study committee. With respect to lawyers, a recent federal case restricted blanket prohibition on a lawyer's right to discuss publicly pending litigation.[14]

Alternative Approaches for Implementation

Approach #1 Establish Guidelines With Aid of a Court-Media Committee to Preserve Fair Trial and Free Press Rights

Description:

Using this alternative, voluntary guidelines would be developed which recognize that cooperation is needed to overcome what can be time-consuming legal battle to resolve conflciting rights.

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[12] 2 N.H.L.Weekly (June 2, 1976), pp. 334, 336. Rules Relative to Release of Information in Criminal Cases: A. Release of Information by Attorneys in Criminal Cases; B. Release of Information by Courthouse Personnel in Criminal Cases.

[13] The review committee included Superior Court judges and representatives of the Bar and news media.

[14] Cunningham v. Chicago Council of Lawyers, 522 F.2d 242 (7 Cir. 1975), cert. denied, 96 S. Ct. 3201 (1976).

Time:

Guidelines require careful drafting by a committee but should be completed within six months.

Cost:

Not significant.

Feasibility:

The task force felt that this alternative was likely to prove the most workable, estimated at 60 to 80 percent (especially when compared with use of rule-making power) because of the cooperative atmosphere it is designed to engender following on the success of a conference held by the Superior Court on December 4, 1976.

Approach #2 Promulgate Rules to Guarantee Fair Trial and Free Press Rights

Description:

The court system (Supreme Court) or each level of court would prescribe what information can and cannot be disclosed by court personnel.

Time:

Undetermined.

Cost:

Not significant.

Feasibility:

Although the Superior Court has proposed such rules, the opposition they have engendered among the bar and the press indicates that the likelihood of the rules' serving to improve court-public relations or being promulgated as presently drafted is low, less than 30 percent.

Importance of Standard

The task force set an intermediate priority for this standard.

Standard 14.3 INSURE FAIR TRIALS BY PROVIDING TRIAL JUDGES WITH A RANGE OF MEASURES TO USE WHEN PREJUDICIAL PUBLICITY THREATENS AN ACCUSED PERSON'S RIGHTS: CHANGE OF VENUE, CONTINUANCE, SEQUESTRATION OF JURORS AND WITNESSES, EXAMINATION AND SPECIAL CAUTIONING OF JURORS, EXCLUSION OF PUBLIC FROM PRE-TRIAL HEARINGS, AND SETTING ASIDE VERDICTS IN CASES WHERE EARLIER STEPS HAVE PROVEN INSUFFICIENT.

Commentary

The trial judge bears the most direct responsibility for preserving the right of a criminal defendant to a fair trial and the interests of the public in the administration of justice.[15] Where it appears that regular safeguards, such as prohibiting court personnel from disclosing information about a case other than that which is contained in the public record[16] have failed, the judge must consider whether other steps are required[17] to insure a defendant due process of law. As discussed earlier, many of these potential prevention steps or remedies, some of which are specified in this standard, have been mentioned by the U. S. Supreme Court as deserving consideration in appropriate situations. But while the courts can surely control the statements of judges, clerks and court employees, and to only a slightly lesser extent, attorneys, police and public employees whose work relates to the courts, gag orders aimed at the media or the citizenry have been rejected for use in most, if not all, cases. In the past ten years, use of these orders has taken the place of creative application of less stringent measures. Now, a return to the use of the kinds of steps specified in this standard has been ordered.[18]

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[15]ABA, Standards Relating to the Function of the Trial Judge (1972), §1.1 at p. 25.

[16]See Standard 14.2, supra, herein.

[17]Recent cases indicate that these steps are not required in civil proceedings.

[18]Nebraska Press Association v. Stuart, supra.

A change of venue or continuance reduces the effect of any pretrial publicity by selection of a locale in which there has been less exposure to publicity or by allowing time for its effect to abate. Careful and individual examination of potential jurors increases the likelihood that a verdict will be based on the evidence and not on bias. Sequestering the jury eliminates exposure to potentially harmful news coverage during the trial which may affect the verdict. Setting aside a verdict is an appropriate remedy only when other safeguards have failed and when the court, on the basis of competent evidence, finds it likely that one or more jurors was prejudiced by exposure to information outside the trial record.

Each of these measures contains drawbacks. Change of venue is inconvenient for parties, counsel, and other courts which must accommodate the burdens brought by trial of a celebrated case. Continuances work directly against speedy trials. Screening of jurors is far from a perfectly refined and productive process. Sequestration may induce more powerful prejudices against those, among whom may be included the defendant, the police or the judge, whom the witness or juror perceives as responsible for the discomfort. Throwing out a verdict is a step which means previous efforts have failed, adding significant burdens to the costs borne by all involved, including the community.

Nevertheless, rather than closing courtrooms to the public or restraining newspapers from publishing, the U. S. Supreme Court has chosen to require adherence to the often exceedingly difficult process of selecting and providing throughout the trial an impartial and unprejudiced jury (see Sheppard, supra). This standard becomes more readily applied when it is recalled that an unprejudiced jury is

not the same as an ignorant one. The New Hampshire Supreme Court has held that an impartial jury does not mean an ignorant one. The court distinguished inherent prejudice, which so taints a trial as to prevent fairness, requiring no showing of actual prejudice from the latter, where actual opinions of jurors must be proven to have prevented a fair hearing.[19] The problem of differentiating between the objectivity and ignorance has long persisted.[20] Only hard inquiry by the court and counsel, combined with use of the steps specified in this standard, will accomplish this aim. But while the courts must strive for objective juries, it is unlikely that "laboratory conditions" are ever likely to be achieved. A "mere preconceived notion" does not rebut the presumption of impartiality on the part of a juror, who can show that it can be put aside.[21] That this may be, however, is not sufficient reason for not working to provide fair conditions.

The Superior Court adopted a proposed rule[22] which allows the court, either on its own motion, or the motion of either party, to take special precautions to preserve the right of an accused to a fair trial. This conforms with the ABA Standards Relating to Fair Trial and Free Press (1968) §3.5 and avoids the contempt provisions of §4.1 which are likely to be contrary to the Nebraska decision.

Approach for Implementation

> Provide by Rule for Trial Judge to Select Appropriate Measures for use in preserving Fair Trial Right

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[19] State v. Laaman, 114 N.H. 794, 331 A.2d 354, 357 (1974).

[20] As Mark Twain once put it: "The only problem with our great court system is the difficulty of finding every day twelve men who don't know anything and can't read."

[21] State v. Laaman, supra, at 358.

[22] Provisions for Special Orders in Widely Publicized and Sensational Cases, 2 N.H.L. Weekly, 334, supra.

Description:

A rule to empower a trial judge in this regard should be close to a guideline in design: rather than require selection of any one measure, the rules should specify the permitted approaches with pertinent commentary discussing the advantages and problems associated with each measure.

Time:

Rules changes can be effected within six months.

Cost:

Not significant.

Feasibility:

This alternative is a likely one since the Superior Court is developing such a rule, but ultimate feasibility will depend upon the degree to which the rule reflects sensitivity to the need to provide rather than prescribe alternative measures. The task force assigned a feasibility rating of 30 to 60 percent.

Importance of Standard

The task force set an intermediate priority to this standard.

Standard 14.4 THE CLERK SHOULD PROVIDE THE PUBLIC AND THE PRESS WITH RAPID ACCESS TO ALL ACCURATE INFORMATION ABOUT THE WORK OF THE COURTS WHICH IS PART OF THE PUBLIC RECORD.

Commentary

The clerk is the court staff member who most often comes into direct contact with the public and is most readily identified as a resource for information about both the work of the courts generally and individual cases before the court. The clerk must establish rapport with all those he works

with -- support staff, judges, attorneys and the public -- to assist in the efficient performance of his duties. A clerk who is able to respond quickly and accurately to requests for information can play an important role in enhancing the public image of the courts.

Clerks are currently recognized by the press and the public in New Hampshire as a valuable information resource. They receive numerous telephone inquiries from the public requesting information about cases pending before the court and procedures for initiating cases with the court. When surveyed about how courts now make information public, the majority of those interviewed responded that courts do not provide information on their own initiative. press personnel either seek information from the clerk's office or attend court proceedings.

Cooperation of the clerks in providing information upon request is seen by most as adequate. However, press personnel offered some suggestions for improved service. Information provided by clerks is now generally limited to facts on individual cases; the practice of most clerks is to furnish the press with documents in the case file (excluding juvenile records), e.g., the complaint form in the District Courts. Additional explanatory information, such as the reasoning for a particular judgment, or general information about court procedures, which is not and should not be volunteered by the clerk, would be helpful to educate the public and the press. A court public information officer can assist in providing this information and can determine when referral of questions to judges is appropriate. Police officers also recognized the need for establishing a means to inform the public about court procedures and functions. More advance public notice of scheduling of matters can result in public attendance in court and wider press coverage.

Most clerks do not foresee expansion of the role attributed to them to provide information because they assert that the office support staff is inadequate to warrant assignment to fulfill a function not required by statute. Moreover, few clerks have had special training in public relations. Most saw no immediate need for additional distribution of information; the two who did comment felt that, although cases should be more fully reported by the press, it is the task of the press, not the clerk, to obtain that information through attendance at court sessions. Only one clerk said that it might be helpful to have a public relations officer on the staff.

Court clerks appear to be fulfilling the literal recommendations made by the ABA standards concerning availability of court information. However, more effective communication might be encouraged by providing weekly calendars to the media to enable fuller coverage through attendance at court sessions. Such action by clerks would involve a slight additional burden and would encourage public interest in court activities. Where courts such as the District Court do not sit every day and clerks are not available as frequently, the need for public information becomes most pronounced.

Approach for Implementation

Description:

By augmenting the often small staffs of clerks' offices, these offices can increase their capacity to assist the public in dealing with the courts. This approach would add and train staff for this specific purpose. Although the alternative specified under 14.1 to organize a public information system relates to this approach, the goal of this approach is to increase capability

in each court to handle requests submitted to it directly rather than to provide new services as would occur under a system-wide public information system.

Time:

A court rule change can be effected within six months. Additional appropriation for staff could extend the time required to one year.

Cost:

While the costs of training are nominal, needed additional personnel will raise the cost to slightly less than $50,000, even if they are part-time. In most offices, it will suffice, but in larger counties, needed personnel will raise the cost even if personnel added are part-time.

Feasibility

The task force rated this approach from 30 to 60 percent in feasibility because of the need for higher appropriations, as well as the requirement that the courts be convinced of the need.

Importance of Standard

The task force set a high priority for this standard.

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# 15.0 COURT FACILITIES

## Introduction

> "While justice is not guaranteed by adequate facilities, a neglected and inadequate courthouse debases the entire judicial system."
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> -- Report of the New Hampshire Court Accreditation Commission on the Accreditation of Court Facilities, p. 1.

The quality of justice cannot be assured by the design and maintenance of court facilities; however, the physical and operational environments significantly affect the public's perception of the provision of justice and the efficiency of court operation. That justice is done in space which is attractive and efficient bolsters the citizen's opinion of the courts as important in the society. Further, the public, paying for the facility, can expect it to be a place in which they may feel a civic pride.

If the public is to maintain confidence in the justice system and the courts are to provide efficient and effective service, the facilities which house the court must be well designed and maintained.

> "The physical organization of the modern courthouse has become completely transformed by the enlarged scale of the court's operations and concomitant growth of their administrative staffs. The problem is not simply one of providing the necessary additional space...most older courthouses cannot support the court as it now functions and becomes a positive hindrance to efficient operations, security, and public safety."[1]

In colonial American society, the court house often included little more than a court room. As the financial base of communities imoroved, the attention paid court facilities increased, until in the mid-nineteenth tury when the court house became the most impressive and important structure

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[1] Allan Greenberg, Courthouse Design: A Handbook for Judges and Court Administrators (1976), p. 31.

of the community.[2] Like many other parts of the country, county government in New England provided the majority of large scale public services, e.g., registry of deeds, correctional institutions, and trial courts of general jurisdiction. As new facilities were developed at the county level, many additional services were incorporated in the central structure. This method of providing court facilities is certainly justifiable from a financial point of view; however, it often resulted, then and now, in court facilities which do not meet the needs of the court. Although many older courts continue to serve the residents and communities effectively, few courthouses were constructed with a clear recognition and understanding of the needs of the court system.[3] The result is a failure to provide the proper judicial atmosphere because they were designed to serve many other functions, not all of which are compatible with the responsibilities of the court.

The American Bar Association and American Institute of Architects, the Law Enforcement Assistance Administration and the American Bar Association Commission on Standards of Judicial Administration have since the early 1970s developed a series of guidelines and standards for court house design and space management.[4] None of these works purport to be a panacea or last word on the topic of court facilities, but they do sharpen the focus on what considerations are crucial for effective facility design, renovation and use.

While each set of guidelines, standards, defines a series of considerations which apply equally to all public facilities, e.g., convenience of

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[2] The American Bar Association and The American Institute of Architects, The American Courthouse (1972), p. 227.

[3] See generally, G. R. Winters and J. J. Alfini, Selected Readings Courthouses and Courtrooms (1972); see also, Courthouse Reorganization and Renovation Program, Reorganization and Renovation of Courthouses and Related Law Enforcement Facilities (1971).

[4] See generally, Greenberg, supra note 1; ABA and AIA supra note 2; and Michael J. Wong, Space Management and The Courts (1973), pp. 138-145.

location, effective space utilization and opportunity for expansion, the suggested standards address the peculiar needs of the courts. Included in the special issues described in these standards are:

- proximity to detention facilities;
- organization of court support services, e.g., clerks, bailiffs, stenographers, probation;
- security of the facility;
- availability of specialized court resources, judicial chambers, attorney conference rooms, law library, jury room, holding facilities, and waiting rooms;
- suitable courtroom facilities evidence storage space, recording equipment, evidence presentation equipment (audio visual aids); and
- access to information systems and records systems.

Poorly designed court facilities do not incorporate the desired features previously mentioned and often demean the appearance of justice. Locating police stations, political headquarters, prosecutors, county welfare or other agencies, banks, private attorneys, registers of deeds, or recruiting stations in the courthouse compromise the court's ability to administer justice fairly and efficiently.

Aside from poor design, the second major problem in providing adequate court facilities is the inability or unwillingness of many localities to allocate sufficient financial resources either to build or maintain courthouses which will accommodate the level of judicial business of the locality. In New Hampshire, except for the Supreme Court (which is totally state supported and recently moved to an excellent building constructed with the court's needs paramount in the design), all courts occupy structures built and maintained by counties or localities.

While the lack of available financial resources makes it difficult for the state or counties to finance construction or renovation of court facilities,

some state action, through a strengthened accreditation commission, for example, is necessary if the court system is to move in the direction of having facilities which at least meet minimum standards. In assessing the needs of their state's courts, Wisconsin citizens commented:

> The state court administration should undertake comprehensive studies of space, manpower, and security requirements for courthouses in all areas in the state.... Assuming eventual full state financing of the court system, the State Court Administrator should assume leadership in directing the renovation of existing facilities and construction of new ones, as needed.....[5]

In New Hampshire, accreditation without mandated improvement has been a step, however limited, taken on a statewide basis to upgrade court facilities. Clearly, the establishment of the accreditation commission constituted a first step and involved minimal cost. While the commissioners invoked no sanctions, other than stating that a non-accredited facility "fails to meet minimum standards and should not be used as a courthouse in its present condition" and that courthouses built without attention to standards might well fail to receive federal grants,[6] the commission implied that stronger measures might be necessary to move county and local appropriations bodies.

Standard 15.1 PROVIDE ADEQUATE AND APPROPRIATE COURTHOUSE FACILITIES THROUGH ENFORCEMENT OF THE ACCREDITATION COMMISSION STANDARDS. PREPARE A STATEWIDE SCHEDULE OF NEEDS EMPHASIZING MODERNIZATION OF NON-ACCREDITED FACILITIES.

Commentary

Accreditation has served as a first step in courthouse facilities improvement. However, further state action appears necessary. An internal survey of all Superior and District Court facilities by project staff indicates that two counties have either renovated or constructed new Superior Court facilities, and that there have been few improvements in District Court buildings. Two Superior

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[5] Citizens Study Committee on Judicial Organization, Report (Madison, Wis., 1973), p. 113.

[6] Report of the New Hampshire Court Accreditation Commission on the Accreditation of Court Facilities (1973),pp. 5, 8.

Court structures which were deemed unsatisfactory in 1974 remain so today: both are unchanged because county delegations refused to authorize improvements.

The demands on localities for public services continue to increase. Whether the courts are accorded proper treatment may often depend on local priorities, political structures, or economic conditions. State Administration of courts alone does not guarantee this improvement will be made. In Vermont, where the District Court is operated by the state, the quality of court facilities varies widely.

Nevertheless, increased involvement of the state in this area appears necessary if improvements are to be made. How this involvement occurs may depend on whether the District Courts become full-time operations (see Standards 16.1 and 16.7), Court Organization and Administration).

Alternative Approaches for Implementation

Approach #1 Enforce Adherence to Courthouse Accreditation Standards by State Appropriation for or Financing of Court Facilities

Description:

In this approach the state would assume responsibility for financing court facilities construction and maintenance or for appropriating sums to permit specific improvements.

Time, Cost and Feasibility:

This approach (including two options) involves the same considerations discussed in the next section relating to Court Organization and Administration, Standard 16.2, covering state court financing, to which reference is made.

Approach #2 Require Counties and Localities to Improve Court Facilities Under Their Control to Meet Court Accreditation Standards

Description:

This approach recognizes that state financing of courts (or even appropriations for specific construction projects) is likely

to require some time to win acceptance. Legislation in the interim, therefore, can serve the same purpose by mandating that improvements be made by the county or locality.

Time:

Legislation would be needed, requiring a minimum of six months.

Cost:

The cost of improving New Hampshire courts to meet minimum accreditation standards is undetermined. Updating the 1974 commission ratings finds three Superior, one Probate, 9 District and 13 Municipal Courts still in the same "Not Accredited" status. In addition, the enactment of legislation making District Courts full-time will probably increase the need for improvements in the existing District and Municipal Court facilities.

Feasibility:

This alternative follows the accreditation commission initial effort toward voluntary improvement, it is unlikely that county delegations will favor this approach. However, if a full-time District Court is created and if the court system increases its ability to document its needs, the feasibility of this approach could increase.

Standard 15.2 PROVIDE SEPARATION OF COURT FACILITIES FROM OTHER LAW ENFORCEMENT OR OTHER GOVERNMENT AGENCIES HOUSED IN THE SAME BUILDING.

Commentary

The problem of law enforcement agencies sharing buildings (or dominating buildings) with the courts exists at the Superior Court level, where the sheriffs' departments are often housed in the courthouse, but poses a far more troublesome problem in some District and Municipal Courts, where the court is a virtual adjunct of the local police station.

This standard recognizes that the courts should no longer be regarded as components of the law enforcement structure. In most instances, however, it is likely that the court will be forced to move rather than the police station, based on local priorities and proportion of space occupied.

This standard would be affected by proposed full-time District Court legislation, however, since reorganization of these courts could result in retaining those facilities.

Approach for Implementation

Require that Courts Occupy Separate Facilities From Law Enforcement Agencies

Description:

This approach would mandate the separation of these two institutions. The approach could be accomplished by legislation although a mandate, unaccompanied by appropriation, would be unlikely to encourage compliance. Presumably, the Supreme Court could require courts by rule to remove their operations from unacceptable facilities. This step, insofar as it increased funding levels, might be based on inherent powers, which in itself militates against employing such an approach in a state which is usually regarded fiscally conservative. The courts, even if they possess such powers, might find their exercise counterproductive in view of the steps that the legislative and executive branches might take.

Cost:

Removal of courts from structures housing law enforcement agencies will, in each instance, require construction or renovation of a new court facility. The cost of this approach is undetermined.

Time:

Legislation requiring separation could be enacted within one year.

Feasibility:

Although this standard follows the strong recommendation of the court accreditation commission, it is most likely to be effectuated as part of an overall upgrading of facilities if and when a full-time District Court bill is enacted.

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# 16.0 COURT ORGANIZATION AND ADMINISTRATION

## Introduction

For courts to accomplish their basic objective of deciding cases justly, promptly and economically, court systems must develop an organizational structure capable of facilitating (1) selection and assignment of competent judicial and auxiliary personnel, (2) sound financial administration, (3) efficient use of manpower, facilities, and equipment, and (4) continuous planning for the future.[1]

Attention to court structure and recognition of court administration are recent developments. Both have occurred as the courts realized that cumbersome and unwieldy operating practices must be revised if the courts are to discharge the responsibilities they have been given. Since the judicial branch will continue to rely on long-accepted and respected processes for determining truth and defining rights of parties, improved organizational structure and administration must be seen as means to aid the courts in accomplishing these tasks.

How the courts are organized, though, will determine whom they are best able to serve. When administrative concepts are applied to a court system, processes affecting the substance of justice are changed; often, these changes in the judicial process lead all concerned to reconsider what ends are served by the court system.

The basic principles of court organization and administration are relatively simple and rarely occasion disagreement. Troublesome issues usually arise only when a court system attempts to tailor these general principles to its particular needs and characteristics. The principles are readily identifiable: court systems should define jurisdiction uniformly so that all courts at each level will have

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[1] American Bar Association, Standards Relating to Court Organization (1974) §1.00 at p. 1.

identical jurisdiction; structure should be simple, consisting of a trial court and an appellate court, with divisions as needed; judges should be selected through a merit system of appointment with substantially secure tenure; procedural rules should be uniform with local variations in administration approved by a central authority; responsibility for policy-making should be vested in the highest court or a council of judges; and administrative supervision of the system should be exercised by a chief justice, with the policy-making body serving in an advisory capacity and an administrator performing administrative operations.[2]

These basic principles permit wide variation among implementation designs. Also, the structure of courts and the extent of administrative needs will vary greatly according to the size (both geographic and population) of a jurisdiction. Both New Hampshire's court structure and administrative services are characteristic of other New England states. The points where these systems diverge from the general principles can easily be identified.[3]

Structure in New England court systems is traditionally horizontal. Frequently, each level of court is administratively independent or is so in practice. For example, the judges of the Superior Court in each state generally are responsible for directing the operations of their court, with the Supreme Court and court administrators playing less significant roles. The administration of these courts is statewide at each level of court: Superior, District, Probate. While the structure of the district or probate courts in a state may possess some statewide characteristic, e.g., administrative offices in Massachusetts; chief superior court judges in Maine, Massachusetts, Connecticut, Vermont, and New Hampshire

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[2] Ibid., §§1.10, 1.11 and 1.41 at pp. 2-4 and 87-88.

[3] One variation common to all the New England states is the separate existence of a Probate Court. Recent standards call for changes in the probate jurisdiction to remove all except contested cases from the courts for administrative disposition and to hear remaining cases in a general trial court. ABA, Standards Relating to Trial Courts §2.73 at pp. 121-22. See Standard 16.4, infra.

(Rhode Island's Superior Court has a comparable office of Presiding Justice); chief district court judges in Vermont, Maine and Massachusetts; administrative committee in New Hampshire; most operations of these courts are controlled at the local level with only slight involvement of state or regional supervising judges or administrators.

In the same way, procedural rules vary between levels of court and in many courts, local practices make court operations disparate even at the same court level. Judicial councils, as in New Hampshire and Massachusetts, often propose and review proposed legislation, but rarely are accorded the recommended policy-making function. Often the highest courts in the New England states (all are called Supreme or Supreme Judicial Courts) are reluctant to exercise supervisory authority over other courts in their state, although "general superintendence" or similar powers are provided for these courts in almost all of the state constitutions. Vermont, Connecticut, Maine and Rhode Island have state court administrators; while in Massachusetts, the purview of the Executive Secretary to the Supreme Judicial Court is narrower than that of the state court administrators. In New Hampshire, there are administrative assistants to the Chief Justices of the Supreme and Superior Courts and an executive secretary to the Administrative Committee of District and Municipal Courts; the posts are not comparable to that of a state court administrator.

A court system lacking a clear and functional administrative structure is less equipped to fulfill its purposes: financial review must often be entrusted to executive agencies less cognizant of judicial needs; facilities are designed for courts by officials unaware of court operations; the system is unprepared for increased demands placed on it by court decisions and legislation; no uniform process is followed to appoint or employ personnel serving the courts, or to oversee their performance; variation in procedures and rules among courts results in confusion and makes it difficult to determine how well any court is performing its functions;

and lack of administrative supervision or authority causes judicial leadership much embarrassment when local court employees or judges are discovered by others to be guilty of misfeasance or nonfeasance of duties.

"The challenges of our system of justice are colossal and immediate and we must assign priorities. I would begin by giving priority to methods and machinery, to procedures and techniques, to management and administration of judicial resources, even over the much needed reexamination of substantive legal institutions."[4]

Standard 16.1 REQUIRE ALL JUDGES TO SERVE ON A FULL-TIME BASIS. USE OF A ROTATING CIRCUIT SYSTEM CAN INCREASE ACCESS TO COURTS IN ALL COMMUNITIES IF MAKING ALL JUDGES FULL TIME REDUCES THE TOTAL NUMBER OF JUDGES.

Commentary

"All judicial functions in trial courts should be performed by full-time judges."[5] Unless judges serve on a full-time basis, few organizational or administrative improvements can be made to increase court effectiveness. A judge who practices law in any field encounters limitless opportunities for conflicts of interest or their appearance. Of those surveyed in the New Hampshire justice system, 82 percent felt that in regard to part-time judges, conflicts or their appearance occur "sometimes" or "often" (responses equally divided). Beyond the conflict issue, though, are broader limits on a part-time judge's effectiveness: the court system cannot assign a part-time judge to relieve judges in overburdened courts because of the limited judicial skills of many part-time jurists; part-time judges are less likely to be familiar with the latest legal developments and decisions; access by litigants to part-time judges is far more limited than in a full-time court; and part-time judges, because their hours on the bench are only a part of their working day, are less responsive to the needs of the courts as a system.

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[4] Chief Justice Burger, at the National Conference on the Judiciary, quoted in National Advisory Commission on Criminal Justice Standards and Goals, Courts (1973), p. 171.

[5] NAC, supra note 4, Stand. 8.1 at p. 164.

In New Hampshire, the District, Municipal and Probate Courts are staffed for the most part by part-time judges and are mainly part-time courts. There are 41 District Courts, 17 Municipal Courts, and 10 Probate Courts. To achieve a full-time complement of judges, national standards call for merger of all levels into one, including the trial court of general jurisdiction,[6] while the ABA standards would prefer merger but would find divisions within the merged court based on function to be acceptable.[7]

These changes are major ones. The NAC concedes, "The reforms...go further than any jurisdiction now has."[8] All of the standards, however, presuppose full-time judges. While all the arguments for a merged trial court make some sense for New Hampshire, the state need not take this step to accomplish the purposes of this standard. If, for example, judges were made full-time and the existing District and Municipal Courts merged into one system serving the same localities in similar court locations, a judge could serve several courts in the county based on the size of the caseload; several judges would be on call for emergencies; access would be greater than now since sessions are often held only once a week in small localities; under the new system, a judge in an adjacent locality could be available to hear a case when a part-time judge is unavailable. A judge moving from town to town is more likely to produce a uniform standard of justice in a larger area because of the standardization of procedures which he will tend to stimulate.

Part-time judges are a disappearing breed in New England. Vermont, for example, has ended the judicial functions of its justices of the peace, and in Massachusetts, District Court justices, even if they do not work full-time, are assigned to full-time courts which are available to the public during business hours. Judges who work full-time and travel among the courts of a county are likely to prove as ac-

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[6] Ibid.

[7] ABA Supra note 1, §1.11 (b), commentary, at p. 7-10.

[8] NAC, supra note 4, Stand. 8.1, commentary, at p. 164.

cessible in emergency situations as are stationary but part-time judges. And should "an emergency" require transportation to a nearby town, a hearing before a judge sitting there may result in speedier justice than now prevails when court is only held weekly in many towns.

## Approach for Implementation

### Description:

The task force felt that any changeover from part-time judges and courts must recognize the generally-held belief that courts must be locally-based in order to administer justice properly. The goal of impartial justice is further enhanced through full-time professional operation. To justify creating full-time judges for the present district and municipal courts, either the geographic area served by the court must be enlarged or jurisdictional levels increased. The task force suggested that for the delivery of judicial services, the state be divided into larger geographic areas, each area encompassing enough court activity to warrant a full-time judge. Maintenance of accessibility remains a critical need.

The division of the state into geographic areas should occur as the first step, even though implementation may be phased in over several years. The purpose of the phase-in approach is to test the workability of a merged court (sitting in one or several locations in the area) and to permit present part-time judges to be replaced over time. At the start, though, it is important to set establish a statewide organizational structure to serve as a vehicle for implementation.

Time:

Legislation will be required to implement this change. Since previous bills to provide a full-time District Court have not passed, a proposed statute should be designed to prove its workability through phase-in, which combined with "grandfathering out" of present judges, may also increase the bill's legislative palatability.

Cost:

Reduction in the number of judges resulting from a shift to full-time status and possible reductions in the number of clerks and court locations may balance the increased salaries of the judges who would become full-time. Therefore the net cost is likely to remain at the current level. The need for improved facilities will be more pronounced after the initiation of a full-time court; projection of these added costs was impractical.

Feasibility:

Increasing numbers of legislators have responded to heightened demands for a full-time court of limited jurisdiction each time a District Court bill has been introduced. If the system proposed recognizes the need to maintain access and proves, through phasing-in, that the new structure is workable, remaining opposition may be diminished.

Importance of Standards:

Given the tie between full-time judges and the creation of a full-time court of limited jurisdiction, this standard was accorded a high priority rating.

Standard 16.2 DEVELOP A SYSTEM OF COURT FINANCING WHICH PROVIDES GREATER UNIFORMITY AND CONSISTENCY OF FUNDING THROUGH A CLEARLY DEFINED BUDGET PROCESS WHICH INVOLVES ALL LEVELS OF COURT. EXERCISE GREATER COURT CONTROL OVER FINANCIAL MANAGEMENT, MOST NOTABLY THE PROCESSING OF EXPENDITURES AND REVENUES. AUTHORIZE LINE-ITEM TRANSFERS BY THE COURT, NOT SUBJECT TO EXECUTIVE BRANCH APPROVAL. VEST GENERAL FINANCIAL MANAGEMENT CONTROL IN THE SUPREME COURT TO FOSTER CONSISTENT COMPREHENSIVE ALLOCATION OF JUDICIAL RESOURCES AND FINANCIAL PLANNING.

Commentary

Although the purpose of court financing is clear -- effective operation of the courts -- goals of justice once shared by the community are now more frequently in conflict. As a result of this disparity and the pressure from competing interests for public funds, obtaining sufficient financing for the courts has become a struggle. Judges, court administrators, members of the bar and the general public often criticize the level of funding for judicial services as inadequete, but, in turn, officials responsible for raising and appropriating funds respond that while the courts are deserving, the community has other more pressing needs.

Regardless of how well the court is funded, a rational system of financing is critical for effective operations. As a public institution, court requests should be evaluated with those of other public agencies even though with the courts, as a fundamental branch of government, funding decisions should be concerned with the sufficiency, rather than with the advisability of funding. While competition for funding provides and opportunity for establishing state or community priorities, it seriously impairs the courts' ability to manage. Provision of funds from more than one source compounds the problems of effective financial management.

If the court is to operate effectively and efficiently for the purpose of providing justice, then a more stable and rational system of financing must be developed. Included in the restructuring of that system should be the inclusion of:

- a statewide system of budget preparation and review;
- a clearly defined system of court-operated financial control which includes a standardized court accounting and/or reporting system for all courts; and
- specified procedures for the processing of all revenues.

Courts have traditionally been funded by local governments[9] which have relied heavily on property taxes[10] for their revenue base. While this method of funding has been sufficient in smaller jurisdictions, the usual consequence, as experienced in the field of education, has been disparate support based on community wealth. As greater emphasis and burden is placed on local governments to increase public services, funds available for courts dwindle. "For most of their history the common-law courts of the English-speaking world were self-supporting, financing their operations from fees and fines. In fact the earliest circuit court judges of medieval England served as royal tax collectors."[11] The balance has turned, however, and at present courts usually are not and should not be considered money-making or financially self-sufficient. Most court systems increasingly rely on units of local and state government for appropriations.[12]

It does not matter whether a financing system is based at the state or local level. While the ABA court organization standards[13] and National Advisory Commission Courts Standard 8.1[14] recommend the administration of court system fiscal

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9 ABA, supra note 1, §1.50 commentary at p. 84.

10 U.S. Advisory Commission on Intergovernmental Relations, State-Local Relations in the Criminal Justice System (1971), p. 108.

11 James C. McRuer, The Evolution of the Judicial Process (Toronto: Clarke Irwin 1957), Chapter One.

12 Carl Baar, Separate but Subservient, (Lexington: D. C. Heath & Co. 1975), pg.2.

13 ABA, supra, note 9.

14 NAC, supra note 4, Stand. 8.1 at p. 164.

operations through the use of a unified budget and state support for that system,[15] no clear evidence as to the efficacy of that position in New Hampshire or elsewhere has been developed. Whether the system is financed solely at the state level or the present hybrid funding scheme is continued, no significant change in the amount of funding or in the probability of securing additional funds was anticipated by those interviewed. This assessment compares favorably with Carl Baar's experience in surveying the financing practices of the courts nationally. He found that the movement toward state financing of court systems is barely perceptible although strongly recommended by most study groups,[16] and that the shifting of emphasis from local to state financing in no way increased or decreased the funding difficulties: indeed, courts were as likely to receive funds from local as from state government.[17]

The method for court system financing is important as the resource base of local governments varies; however, the feeling on the part of 62 percent of those interviewed in New Hampshire indicated that local control did not adversely affect the quality of court operations. The desired result is to develop a system which affords the court sufficient resources to meet its assigned responsibilities. Two main points should be considered in developing a financial structure: (1) is the structure designed to provide sufficient funding to meet the needs of the entire system? (2) is the system stable, eliminating dependence on federal or temporary funding sources regardless of competitive pressures from other branches of government?

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15 Baar, supra note 4, Stand. 8.1 at p. 164.

16 Ibid., p. 121.

17 Ibid., p. 125.

Nationally, three out of every four dollars expended in state court systems are provided by units of local government;[18] New Hampshire is no exception. Except for the state's highest court, 77 percent of the funding for the Superior Court, and 100 percent of the funding for the District and Municipal courts is provided by local units of government (either directly through local appropriations or indirectly from the return of court revenues from the municipality or district). State funds support Superior Court judicial salaries and expenses, and administrative and law clerk services.

The most frequent inclusions in court budgets nationally are:

- judicial salaries and fringe benefits,
- clerks and office personnel salaries and benefits,
- judicial travel,
- juror and witness fees,
- stenographic services,
- administrative services,
- current expenses, and
- facilities.

Are there sufficient funds to support operations in each of these areas? The concept of sufficiency as used here refers to adequacy of financial resources to meet the present and anticipated demand.

Whatever the sources of court funding, they should be reliable. Court services should not be altered by changes in the amount of fees collected or in local, state, or federal funding priorities. At present, for example, a portion of the compensation for judges and registers of the Probate Courts is based on fees collected for certifications and special sessions. Similarly, annual salaries of District Court judges and clerks are computed on a case volume basis. While a judge's salary cannot

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[18] Ibid., p. 185, fn. 2.

be based on revenues received from fines,[19] basing salaries on case volume is similarly subject to question, owing to the atmosphere of injustice created, even if there is no present constitutional or statutory prohibition.

Of some concern is the increasing reliance on federal support for court activities. More than 12 percent of the state's portion of the Superior Court budget for 1975 was provided by the federal Law Enforcement Assistance Administration. While these funds have resulted in significant improvements in the courts, the appropriateness of their use for basic services is questionable. Clearly, federal support for innovative efforts such as electronic sound recording is within the intent of the existing LEAA statutes; however, using such funds for fundamental resources such as law clerks is questionable in terms of both the federal intent and the reliability of local court financing. If these funds were an integral assured part of an ongoing federal revenue-sharing plan, that less ephemeral status would permit reliance on federal funds.

The approximate cost of operating the state court system for 1975, exclusive of the Probate Court, was $4.5 million. Of this amount the state (including federal grants) provided $1.02 million, the ten counties supplied $2.01 million and $1.4 million came from municipalities and towns. While state revenues are generated from a variety of sales and special taxes, county revenues are derived from a combination of county services, e.g., county home, and local property taxes. Property taxes accounted for approximately 44 percent of the ten counties' budgets in 1975. Although the counties' cost for operating the Superior Court is offset somewhat by court revenues, such revenues only represented about 20 percent of the 1975 operating costs. Given the relatively static nature of revenues developed from county services, budget increases become contingent upon commensurate increases in property taxes. Although proven to be an adequate source of revenue given present

[19] Ward v. Village of Monroeville, 93 S.Ct. 80 (1972).

operating levels, using property taxes as a major funding base creates the potential for serious inequities in the level and quality of service provided among courts. The most notable problem is courthouse facilities. The state Court Accreditation Commission classified 34 percent of the state's court facilities as falling below minimal standards.[20] Although stable, the present financing base for court services needs to be supplemented in some instances to insure comparable service throughout the state.

Proper budgeting provides the basis for financial control and audit by producing a plan against which actual performance is monitored.[21] Budgeting translates system objectives into fiscal terms, creates an objective framework with which to evaluate programs and policies.[22] As such, budgeting serves as a primary component for planning as well as fiscal management. Three major results sought from budgeting are: (1) improved fiscal and programatic planning; (2) increased potential for fiscal control; and (3) expanded potential for program audit.

At present the New Hampshire court system is operated not as an administratively integrated system but rather as a series of independent entities. This fact is glaringly evident in the realm of fiscal planning. In his examination of court financing and budgetary practices, Professor Geoffrey Hazard commented on the dearth of effective court fiscal planning nationally:

> ...the fact that they [the courts] must make episodic forays in pursuit of line item funds is evidence of their failure to anticipate and cope with their workload, manpower, and operational problems -- the weakness of their planning process.[23]

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20 Report of The New Hampshire Court Accreditation Commission on the Accreditation of Court Facilities (1973).

21 R. Anthony & R. Herzlinger, Management Control in Nonprofit Organizations (Homewood, Ill.: Irwin, 1975), p. 228.

22 See A. Wildavsky, The Politics of the Budgetary Process (1964), p. 1.

23 G. C. Hazard, et al., Court Finance and Unitary Budgeting, 81 Yale L.J. 1286, 1292 (1972).

In New Hampshire, only the Supreme Court submits a single budget to a single source. The Superior Court submits a budget to the state and a budget to each county. Similarly, the Probate Court is funded by both the state and the county. The District and Municipal Courts submit budgets to the municipalities served by the court. As a result there is no systemwide fiscal planning. Each court reports its projected expenditures for the subsequent fiscal year, (the fiscal years vary between units of government) on forms which conform to different procedures. Not only does this limit the ability of the Administrative Committee of District and Municipal Courts, for example, to aid local courts in the preparation of their budgets, but it also renders inconsistent and incompatible the body of information generated, which, in turn frustrates comprehensive review. Fiscal information cannot be combined on an intra-court level basis and little potential exists for preparing an accurate statewide view of the total budgetary needs of the court system.

"When a system is not administratively integrated, its budget is a formal, but not functional document. It simply aggregates expenditures for activities that are only nominally related."[24] Planning becomes impossible, as does any rational or comprehensive ordering of priorities which can be accomplished for the system.

The inability of the system and subsystems to assess their needs creates considerable problems in effectively allocating resources. If the state were to reserve additional funds for court improvement, would it be impossible to determine, on any objective basis, which court was most in need of additional aid? Lack of sound operating and financial information impedes allocation of resources on a statewide basis.

Because allocating fiscal resources may not have been viewed as a significant problem in the past, the courts' capacity for long-range planning, especially for capital investments and facilities improvements, is now greatly impaired. A major purpose of an operating budget is to prepare a financial plan to support desired program

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[24] Ibid., p. 7

plans, which will be undertaken with recognition of funding limitations. At present, no single source exists from which the court system can determine what resources are available for the coming year. As with most government organizations, a court system works in a "fixed revenue environment" in which the revenues available for programs vary little from year to year. Dealing with numerous funding sources reduces the court's ability to project available resources. A budget prepared without adequate recognition of available resources is unrealistic and hence of little managerial use.[25] Court revenues should be monitored to develop an accurate portrayal of system income, insure that institutional objectives are framed in realistic fiscal terms, and establish comprehensive programatic priorities.

Projection of expenditure levels for each task establishes a specific direction for the court to follow during the fiscal year and provides accountability and control. Though the Supreme Court has, by common law and statutory authority, powers of general superintence, no single individual or group is responsible for monitoring on a comprehensive and systemwide basis the expenditures of the court. While annual county reports and reports from the Office of the Comptroller are available, the information is presented in a variety of ways, and in those instances in which information appears on its face compatible, one county's definition of a cost may not follow another's.

Examples of County Budget Line Items from County Annual Reports

County A

Care and Supplies for Court House
Jury Payrolls
State vs. Payrolls
Masters Fees
Stenographer, etc.
Clerk of Superior Court
Sheriff and Deputies
Superior Court Administration

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[25] Anthony, supra note 20, at p. 233.

County B

Salaries
Social Security
Jury Payrolls
State vs. Payrolls
Masters Fees
Court Stenographer Fee
Deputy Fee
Communication and Postage
Office Supplies
Printing and Binding
Travel
Insurance

County C

Autopsies
Stenographic Supplies
Dues, Licenses & Subscriptions
Criminal Investigation Fees
Maintenance Stenographer Equipment
Etc.

Approach forImplementation

Description:

To accomplish this standard, movement toward state financing of all courts is the preferable approach. The present hybrid system of local, county, and state funding produces unacceptable variation in the level and quality of court services in the state. Comparable personnel are not so compensated. Provision and maintenance of courthouse facilities has been uneven, depending on the county or locality. Placing budgetary responsibility at the state level while retaining local appropriation of funds is an impractical division of authority not likely to work in New Hampshire. If, however, all revenues derived from court business are combined, it is probable that the court system will support its own operations. The administration of justice should not be directly related to

income. Although these revenues are not predictable (e.g., fines and filing fees), the historically close relation of court revenues and expenses increases the attractiveness of state financing since it is likely that actual cost to the state will increase slightly, if at all.

State assumption of court funding responsibility and state collection of court revenues should be effected through gradual change-over. The phases of the transition can be identified as follows:

a) Preparation of budgets by all courts in a standardized format: the Supreme Court (state), the Superior Court (state and each county), and the District and Municipal Courts (each locality) will submit comparably-prepared budgets to their respective funding sources.

b) Identification of court cost items for phased transfer to state funding: those cost items most easily transferred to state-level funding will be specified and their cost charged back to the county or local revenue source. Personnel costs, facilities construction and maintenance, and provision of equipment and supplies are items likely to prove readily transferable. Until the state receives court-derived revenues (at a later stage) to fund these items, their cost should be charged back to the county or locality.

c) Transfer of court-based revenues to the state: at this stage, after the courts have standardized their budget formats and the state has had experience in appropriating funds for major cost items, full funding responsibility will be transferred to the state, accompanied by the shift of all court-derived revenue (e.g., fines, fees) to the state.

Time:

For this approach to work, and in considering the current budgeting and financial capability of the respective courts, legislation enacting a state-financed court system should provide for at least a five-year phase-in period to permit development of needed skills and adjustments required by planned reallocation of revenues.

Cost:

As discussed, the court system considered as a whole pays for itself now. While this cannot be presumed to continue without using much more sophisticated techniques of forecasting than are now employed, added costs resulting from state assumption of funding and revenues should be minimal. There will be costs involved in training court financial accounting personnel and some localities which rely on court-derived revenue to finance other government functions will need to develop alternative sources of revenue.

Feasibility:

Although state assumption of court financing will likely work best if the courts simultaneously increase their administrative capacities, centralized financing offers distinct benefits of equalizing the level and quality of court services and is feasible even if other aspects of court operations are not immediately overhauled. In many states, county governments have grown increasingly willing to shed their responsibility for funding court operations, which rarely generate surplus revenues for general county use; in contrast, major resistance to state financing usually arises from localities accustomed to sizeable fiscal support from traffic and other fine income. While this dependence will not end without resolution of funding shortfalls created, this problem should be

squarely addressed if the underlying weaknesses of the current pattern of court financing are to be rectified.

Standard 16.3 ORGANIZE A PERSONNEL SYSTEM TO INCLUDE ALL COURT EMPLOYEES OF THE STATE.

Commentary

The introduction and adoption of recommendations for judicial administration by the ABA in 1938 and in subsequent publications on standards of judicial administration[26] has resulted in greater awareness of the importance of court management. As interest in court administration has increased, several specific areas have been recognized as essential for the effective operation of the court. Included in the list of essential activities are development of administrative policy, budgeting, development of records systems and statistics, personnel management and provision of secretariat services for judicial committees. Both the ABA and National Advisory Commission have recognized the importance of personnel management as an activity for inclusion under court administration.[27]

Court personnel can be divided into two major categories: judicial personnel (including judges of all levels of courts, special justices, referees, masters and auditors) and non-judicial personnel (including clerks, registers, stenographers, administrators, clerical personnel, and bailiffs). Although administrative control over ancillary and support personnel such as probation officers and mental health clinic personnel is suggested by the ABA,[28]

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[26] See generally, Arthur T. Vanderbilt, Minimum Standards of Judicial Administration (1949).

[27] See ABA, supra note 3, §§1.40 and 1.41 at pp. 86-87, and NAC, supra note 4, ch. 9 Introduction at p. 175.

[28] ABA, supra note 3, at §1.41 and commentary pp. 87-91.

they are not included in this discussion of court personnel. Additionally, since this study devotes an entire topic area to "Judicial Selection", judicial personnel will not be discussed under this section, although the conclusions reached regarding a court personnel system equally apply to judicial and non-judicial personnel.

Management texts and writings on court administration. Authorities in the field of court administration, e.g. Friesen, Gallas & Gallas, Managing The Courts (1971) include recruitment, screening, selection, promotion, classification systems, grievance procedures, termination, and job descriptions as the essential elements of a personnel system. The ABA Standards Relating to Court Organization expands on these elements slightly with the inclusion of personnel evaluation systems, uniform compensation, and interdepartmental transfers.[29] While various authors, managers, or administrators may disagree on exactly what elements are necessary for an effective personnel system, the results desired from such a system are generally consistent. The results most frequently sought include:

- direct administrative control over all personnel responsible to the courts,
- uniform personnel procedures and policies at each level of court and throughout the system,
- equitable and uniform compensation schedules,
- good morale among court personnel,
- highly qualified staff to help ensure greater uniformity and fairness in the treatment of litigants,
- enhancing the opportunity for operational analysis between courts for the entire system,

[29] Ibid., p. 79.

- ensuring the recruitment, selection, and retention of the most qualified personnel, and
- ensuring compatibility with existing executive branch and/or municipal personnel systems to facilitate inter-department transfers.

While the interviews and questionnaires used to pool New Hampshire residents and court system participants and practitioners did not reveal concern in all of these areas, the results did indicate (1) an interest in ensuring the court-exercised control over its personnel procedures; (2) the desire to establish well-defined personnel procedures for all courts and (3) that whatever system existed, it should be so designed to be compatible with existing state and, to the extent possible, county and local systems. The cornerstone for the accomplishment of these results is the precise delegation or delineation of operational responsibility for personnel administration within the court system, and the promulgation of well-defined personnel procedures and policies which will be used throughout the system. Regardless of the administrative structure of the court system, the assignment of direct responsibility and issuance of procedural guidelines is imperative for the development of an effective personnel system for the courts.

Historically, the courts nationally have accorded little if any attention to the area of personnel administration. The Colorado court system was one of the first to establish a centralized personnel system which included personnel at all levels of court. Although heralded as a major advancement in court administration, the prerequisite for such a system was the existence of a state court administrative office assigned responsibility for personnel administration for the entire court system. In those states which have developed court-administered personnel systems, the trend has been to insure that such

systems are compatible with those of the executive branch.[30] Although the New York system mirrors the state civil service procedures, the system is under the complete control of the judicial branch. Several other states, including Michigan, Connecticut and Nebraska, are exempt from state civil service guidelines; however, they adhere to these procedures and have generally accepted and utilized them throughout the court system. While the Massachusetts court system generally follows state civil procedures, the system is not administratively unified and a significant amount of local control of personnel practices occurs.[31] In an attempt to eliminate divergent practices the Massachusetts court system is currently establishing a court classification system as a first step toward developing a uniform personnel system. The court employees in those states as in New Hampshire are generally guided by county and local personnel practices.[32] Several other states such as Delaware, Illinois and Kentucky are so constrained by local personnel practices that the creation or development of a court personnel system is not considered feasible.

New Hampshire's statutory law and present caselaw define the general superintendence power of the Supreme Court.[33] The Chief Justice of the Supreme Court with advice and consent of the Chief Justice of the Superior

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30 See for example the court personnel manuals for Colorado, Idaho, Maine and New York.

31 National Center for State Courts, Job Descriptions and Compensation Schedule for Clerical Employees of the Massachusetts Supreme Judicial Court and Appeals Court, (1975). See also Massachusetts Supreme Judicial Court, Order re: Personnel, November 25, 1975.

32 It should be noted that the employees of the highest court in these states do participate in the state civil service systems under the control of the court.

33 RSA 490:4; Brown v. Knowlton, 102 N.H. 221 (1959).

Court is responsible for supervising the efficient operation of all courts in New Hampshire. RSA 490-A:3(b) allows the Chief Justice of the Supreme Court "to recommend provisions for adequate staff and personnel", but no specific statutory reference exists regarding judicial branch authority to regulate personnel practices. One result of this lack of specific authorization is the acceptance of a hybrid system of personnel practices adopted over time more on a traditional than rational basis.

The majority of non-judicial personnel are appointed by their immediate supervisor. Judges of the Supreme, Superior, District and Municipal courts appoint the clerks to serve at the pleasure of the judges. (RSA 490:19 (supp. 1975); 499:1, 502-4:7, 502:10). Only the register of probate remains an elective position. In many instances the clerical support personnel within the clerk's office serve at the pleasure of the clerk. The most notable exceptions to this practice are the clerical personnel of the Supreme and Superior Court: the former being part of the state personnel system and the latter approved by the Superior Court itself. The result of this sytem is is a series of poorly defined relationships which accord varying degrees of administrative control in the court.

Rates of compensation and the procedures for administering them vary between levels of court. The salaries for Supreme Court clerical personnel, except for the clerk, are set by the state department of personnel. While the positions are included under the executive branch system, a special court job classification was established for two of the positions. The standard state personnel practices apply to these employees. Although the amount of compensation and method of promotion or demotion of clerical personnel in the Superior Court is to a large extent locally regulated the Superior Court approves all salary and increment requests for employees of that court. The intent of such

an approval procedure is to insure greater comparability between the Superior Courts.[34] While some disparity in compensation was found between deputy clerks of the Superior Court ($180/wk. v. $248/wk.) it is difficult to classify comparable work efforts.

Analysis of personnel practices between individual courts and between levels of courts is all but impossible. As mentioned above, the organizational and operational structures of the various clerks' offices are so dissimilar as to preclude the potential for an accurate comparison. Only the Supreme Court (which is state financed) has established uniform personnel practices. The District, Municipal, Probate and Superior courts are, to a greater or lesser extent, subject to the personnel practices of local governmental units.

The district court has the greatest variation in clerical salaries as they are established by the municipality in which the court is located. While the clerk's salary is established by statute (RSA 502-A:6 (III)) no such salary guidelines are available for support staff. The absence of job descriptions in all but the larger district courts and disparate salary schedules for support personnel impairs inter-court personnel transfers and reduces the court's control over its personnel practices. While the Administrative Committee of District and Municipal Court is charged with overall administrative responsibility for the district courts, it has no authority to regulate personnel practices.

The lack of uniform personnel practices, specifically in establishing (1) job classifications and wage scales, (2) job descriptions, (3) promotion procedures, and (4) grievance procedures restricts the ability of the court and the individual to transfer within the system. Intra and inter-court personnel transfers are all but non-existent in New Hampshire. It is impossible

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[34] Wage scales suggested by the clerk of court are based on comparable rates for that geographic area.

determine the number of employees who have left court service based on an inability to transfer. Given the low staff turnover rates, it would appear minimal; however, the limitation of transfers in a state with relatively limited resources is a condition which should be corrected. Only the Supreme Court, in cooperation with the state Department of Personnel, provides for inter-branch, executive and judicial transfers. As employees move within the state or change their work requirements, provision for transfers throughout the court system should be encouraged to retain qualified employees.

Given the lack of a defined personnel practice at most levels of court, the morale of court employees is surprisingly good. If longevity of employment and low rates of staff turnover are accurate indicators of good morale, New Hampshire's court system is doing well in this regard. The average length of service at all levels of court is in excess of ten years.

While procedures for promotion are poorly defined, the occurrence of intra-court promotions and appointments is very high. One result of such a system of internal advancement is the lack of public awareness of court personnel openings. The general practice of not advertising job openings creates the impression of, if not the potential for exclusionary hiring practices. While evidence of improper hiring practices was not found, maintenance of public confidence and adherence to equal opportunity employment guidelines mandate the review of current procedures. Only the clerical positions for the Supreme Court are routinely advertised when openings occur. As positions become available as a result of promotion or vacancy, a specified recruitment policy (including advertisement, screening, interview and selection requirements) should be followed to engender public confidence and access to the best possible personnel.

Regardless of how the court personnel system is organized, it should provide for:

- clearly defined procedures at all levels of court for recruitment, selection, classification, promotion, training and removal of non-judicial employees;
- judicial branch control over all personnel practices affecting the court employees;
- compatibility with the existing executive branch personnel system (if the systems are the same, judicial control should be assured).

Approach for Implementation

Approach: Unified Judicial Personnel System

Description:

As in the case of court financing, the most preferred solution to court personnel problems is the development of a centralized judicial personnel system. Whether such a system is directly administered by the court or approved by the court and operated under another branch of government, the creation of uniform guidelines for the recruitment, selection, classification and promotion of court employees for all levels of court should be developed and adopted. The consequence of not developing such a structure is the perpetuation of a system characterized by fragmentation, confusion, inequality and lack of control.

While a unified personnel structure represents the most complete approach to effective personnel administration, the design and implementation of such a system should be introduced concurrently with efforts to unify the court system's financial and administrative structures.

Whether the personnel system is attached to that of the executive branch or established within the court, the court must have final authority for policies and guidelines affecting its employees. Given executive branch agreement to direct control by the courts, determination of the most appropriate location of such a system should be predicated on a cost benefit analysis. In New Hampshire it now appears advisable to include the court system personnel structure under the executive branch department which has been assigned personnel responsibility. Not only does such placement assure compatibility, but it also takes advantage of the present administrative structure. Creation of a separate court personnel system would necessitate a duplicate structure which potentially represents a large financial burden without any foreseeable increase in operational effectiveness.

The phased implementation of a personnel system includes three steps and should be completed in a maximum of five years or when state financing of the court system is effected, whichever is first. The first step in the implementation process is the development of personnel guidelines compatible with existing state personnel guidelines covering the areas of recruitment, selection, promotion, compensation, classification, grievances, benefits, termination and training. All such guidelines should be used by the administrative bodies of each level of court to begin a systematic and uniform review of personnel procedures.

The second phase of the implementation effort would be to expand the number of employees included in the system. This expansion should be consistent with the increased state financing

of court positions. Legislation specifying the planned implementation should be introduced to assist the state, counties, and municipalities in the planned transition to the new structure.

The third phase includes the gradual absorption of court employees funded by the state into the personnel system. While the counties and municipalities will have copies of the personnel system guidelines and will be encouraged to support such guidelines, no requirement to abide by such guidelines will exist so long as local financing is maintained. The basis for this allowance is to insure that sufficient finances exist to implement the scheme without placing increased strain on existing revenue sources.

Time:

As mentioned above, a maximum of five years is considered necessary before complete implementation is advisable.

Cost:

If the present executive branch department of personnel administers the court personnel system, three additional persons would be needed. Adding the personnel and operating costs, an annual expenditure of approximately $50,000 to $75,000 would be required to maintain the system when it became fully operational.

Feasibility:

Given the phased implementation approach coordinated with a state financing structure, the feasibility of effecting a statewide court system personnel structure was rated at 60 to 80 percent. The primary opposition was anticipated from those desiring to retain local control of the Superior and District Courts.

Standard 16.4 MAKE THE POSITION OF PROBATE JUDGE A FULL-TIME POST BY EXPANDING THE COURT'S JURISDICTION OR ASSIGNING PROBATE JUDGES TO OTHER COURTS BASED ON AVAILABILITY. THIS COURT SHOULD END USE OF FEE SYSTEM TO FINANCE PROBATE COURT OPERATIONS.

Commentary

As in the other New England states, New Hampshire's court system contains a separate Probate court with jurisdiction including probate of wills and decedents' estates, administration of testamentary trusts, adoption and guardianship proceedings, and certain other related matters.[35] Much of the work of the court centers on processing rather than adjudicating cases, because few proceedings are contested. This being the case, proposals to revamp the operations of the Probate Court, so as to suit its structure to the work it can best perform, range from transforming the court into an administrative body by removing contested cases to the Superior Court, to making the court into a true family court by assigning matrimonial and juvenile cases to its jurisdiction.

"The essentially administrative function of probating uncontested wills and supervising the administration of non-controversial estates is wasteful of judicial manpower, costly to estates, and an inappropriate function for courts."[36] In so commenting, the American Bar Association court organization standards commission recommended that contested actions now heard by specialized courts such as Probate Court be adjudicated by a unified trial court.[37] In New Hampshire, the wasteful process of appeal de novo of probate cases to the Superior Court has recently been abolished.[38] Now, only questions of law may be appealed and these are heard by the Supreme Court as similar questions are heard on appeal from the Superior Court. Fact questions suitable for jury trial can be referred to the Superior Court.[39]

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35 RSA 547:3

36 ABA, supra note 3, §2.73 at p. 122.

37 Ibid., §2.73 at pp. 121-122.

38 RSA 567-A:1 (1975 Supp.) replacing RSA 567:1.

39 RSA 567-A:10.

If the statute were further amended to refer all contested cases to the Superior Court, the principal work of the Probate Court -- administering decedents' estates and the affairs of minors and other wards -- could be performed by the court without the expense of adversary proceedings. The proposed Uniform Probate Code assigns "primary responsibility" for this work to "the families involved and other interested individuals."[40] This, the ABA suggests, "requires no greater procedural formality or expense than the circumstances of the case necessitate."[41] The work of the Probate Court has remained relatively constant during the past five years, with approximately 9,000 new cases (titles) opened each year, between 5,600 and 6,700 accounts allowed annually, and approximately 2,500 licenses (to executors, administrators, etc.) issued each year.[42] In the most recent year for which statistics are available, only 17 matters were appealed to the Superior Court, under the old de novo rule.[43] It can be submitted that these were likely the only major contested cases since, in recommending abolition of the de novo appeal, the Judicial Council stated, "It is common knowledge that under the present [de novo] practice in the Probate Courts many hearings are merely so-called 'fishing expeditions' whose purpose is to determine what evidence the opposing side has..."[44] The 1975 amendment provided for one trial of contested cases: by judge in Probate Court or by jury in Superior Court.[45] The statistics, however, may lead to the more speculative but potentially highly significant conclusion that few cases require trial at all. Statutory provision

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40 ABA, supra note 3, §2.73 commentary at p. 123, discussing National Conference of Commissioners on Uniform State Laws, Uniform Probate Code.

41 Ibid.

42 Fifteenth Biennial Report of the Judicial Council (1974), p. 65.

43 Ibid., p. 46.

44 Ibid., p. 22.

45 See RSA 567-A:10.

could provide for transfer of all contested cases to Superior Court through the same procedure by which jury cases now are transferred. In this way, judicial functions will be performed by the court of general jurisdiction.[46]

If this alternative is selected, the role of the Probate Judge will resemble the court's function in a civil-law system, where a less adversary process places the judge in the position of deciding requests for approval of proposed actions by executors, administrators, guardians, and other petitioners according to the requirements of the statutes and caselaw and the dictates of justice.

Use of the fee system, largely for special sessions, to finance a service of this kind, seems even less appropriate. Since there would be no adversary hearings, judges could decide many matters without the necessity of an appearance, unless a party desired a hearing or the court believed one was needed to further the decisional process. Special sessions -- those held on other than the usual two term days a month -- would no longer be needed in most places and there would be no fees for these sessions. A frequent justification for fees -- that litigants who elect to use the courts should pay the costs of court operations -- is far less applicable to probate cases where heirs or other parties are forced by law to go to court, a trip which often involves loss of a large portion of a small estate.

While the Probate Court could be combined with the Superior Court, the ability of the Probate Court as now organized to provide speedy service and, as recommended in the ABA standard, supra, to render personalized service, particularly in instances of small estates, should be considered. Merger could sacrifice these benefits. If the Probate Court is to remain a court capable of hearing adversary proceedings, its present involvement in the adoption and guardianship aspects of family law suggests its possible assumption of primary responsibility in the family law realm. Both matrimonial and juvenile cases could be heard there. In hearing matrimonial cases, the Probate Judge in his administrative capacity, can be assigned to

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[46] The ABA prefers adjudication by a unified trial court. See ABA, supra note 3, §2.73 at pp. 121-122.

the work now delegated by the Superior Court to masters.[47] By assigning these cases or otherwise supplementing the present part-time workload of the Probate Judges, the present opportunities for conflicts of interest (or appearance of conflict) which exist for both Superior Court masters and Probate Judges could be abolished. At present, Probate Judges are in contact with community service agencies when adjudicating adoption and guardianship matters. This familiarity with the needs of minors and other considerations of family law makes it appropriate for the Probate Court, already a less adversarial legal setting, to assume jurisdiction of juvenile cases.

In the present court structure, family-related cases are divided among the three trial courts. "These complex tasks are best performed by judges who have interest and experience in family law matters."[48] Placing all family matters in a reconstituted Probate Court offers an opportunity to provide a specialized approach needed in this field.

Marital cases in 1974 formed approximately one half of the Superior Court caseload; juvenile cases accounted for about 2 percent of District and Municipal Court criminal caseload in 1973 (if motor vehicle cases are excluded from the total).[49] Although underutilized at present, existing Probate Court hearing room facilities, generally not designed to deal with large numbers of cases, would require some expansion to be capable of absorbing this added jurisdiction. The extension of jurisdiction will also necessitate training of judges as well as non-judicial personnel. In the northern area of New Hampshire, a single Probate Court in each county will be unable to provide the same access now available unless sessions are regularly held in many of the locations where District Courts now sit.

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[47] See Natl. Center for State Courts, Evaluation of New Hampshire's Marital Masters Program (1976), which suggests that this approach, while a possible alternative, may not be the best solution.

[48] ABA, supra note 3, §2.71 commentary at p. 114.

[49] Fifteenth Biennial Report, supra note , pp. 46-47, 66, 69.

Since these courts do not sit daily, scheduling in different locations on a rotating basis could maintain present accessibility levels.

A Probate Court comprised of full-time judges would form a much more collegial group of jurists than currently adjudicates juvenile or marital cases. Special training in juvenile adjudication considerations, such as updated knowledge of treatment options, and of settlement mechanisms for use in marital hearings, could enable the Probate Court to provide the specialized approach these jurisdictional areas especially require.

Alternative Approaches for Implementation

Approach #1 Increase the Jurisdiction of the Probate Courts by Transferring Family-Related Cases, Including Matrimonial and Juvenile Matters, From Superior, District and Municipal Courts

Description:

This approach recognizes that the Probate Court now performs its present jurisdictional field effectively. By adding family-related cases, the judges could serve on a full-time basis, which would increase both the court's capacity and professionalism, while eliminating the potential for conflicts of interest. The full-time presence of a judge will improve the operation of the court in its administrative capacity; will end any justification for fees derived from requests for special sessions and will consolidate the consideration of family related matters.

Time:

Enactment of legislation to broaden jurisdiction and permit either appointment of necessary clerical personnel or expansion of the registers' responsibilities will probably require at least one year. The registers are constitutional officers and

aside from time and other barriers to constitutional amendment, they can either choose to expand their functions or retain their present status.

Cost:

Expanded operations of Probate Courts will require additional funds. However, increased judicial salaries can possibly be financed through state receipt of fees now paid directly to judges. Increased clerical services, judicial and staff training, and facilities improvements will likely necessitate funding in excess of $250,000.

Feasibility:

While increased costs pose the most apparent feasibility problem for this approach, the feasibility may look stronger if it is recognized that transfer of jurisdiction in this manner may be the most expeditious method of coping with the burgeoning caseloads of the Superior and District Court which will need some additional expenditures if reasonable time periods for disposition are to be attained.

The apparent effectiveness of the marital masters program in the Superior Court suggest that transfer of this jurisdiction may not now be necessary or timely. Additionally, shifting juvenile cases to the Probate Court is not considered desirable given present facility constraints, expertise in juvenile matters, and impaired access due to the reduction of court locations. While the several Probate Judges on the task force felt that increase in their functions to full-time status was a wise step, the overall assessment lowered feasibility of the approach to 30 percent.

Approach #2· Assign Probate Judges to Other Trial Courts as Needed

Description:

This alternative employing cross-assignment (see Standard 6.7 below) makes the post of Probate Judge a full-time position and involves training these judges to assume added functions, specifically, trial of cases in the other courts.

Time:

Legislation will be needed to increase the functions of these judges and will likely require at least a year to enact.

Cost:

The principal cost of this approach is in judicial training and increased judicial salaries, which can probably be financed through application of present fees.

Feasibility:

This approach is less feasible than the first because the Probate Judges are less receptive to being assigned cases outside their court. In contrast, Approach #1 brings cases to them. At best, this approach's feasibility can be rated at no higher than 30 percent.

Approach #3 Remove Contested Cases From Probate Court to Superior Court

Description:

This approach assumes that the Probate Court should become an administrative tribunal, which it already is in large part. Cases requiring trial would be removed to the Superior Court where trials are move common and could likely be processed more effectively.

Time:

Legislation would be required and would probably take at least a year to enact.

Cost:

Costs now incurred by Probate Courts for contested cases would be shifted to Superior Court.

Feasibility:

This approach is least feasible, since until the Superior Court is able to reduce its case backlog, transfer of cases from Probate Court will not result in speedier disposition. Removing contested cases might reduce special sessions needed in a more administrative kind of Probate Court but Probate Judges' opposition to dimunition of their functions and current conditions in Superior Court combine to lower the feasibility of this approach to a very low (0-10 percent) level.

Standard 16.5 BASE THE NUMBER OF JUDGES NEEDED ON SIZE AND CHARACTER OF CASELOAD IN ADDITION TO POPULATION.

Commentary

The statute providing for the number of Superior Court judges is keyed to the population of the state (1:60,000), RSA 491:1 (1975 Supp.). District and Municipal Court judges are largely part-time and their number is fixed for each locality, reflecting overall the number of districts and municipalities rather than population or any other factor. RSA 502-A-3.

While population can be used as one factor in determining how many judges are needed (using the number of districts, if relatively equal in population, is equivalent to using population figures; municipal courts are less comparable but their business does relate to one particular police department and other community agencies in one location), some effort should be made to consider other factors, such as geographical accessibility of courts, local

differences -- such as kind of industry and seasonal variations -- which affect the current and anticipated size of caseload, and the kind of caseload. A large city, such as Manchester, for example, produces complex commercial litigation which demands widely varied amounts of court time and service as compared to smaller "general practice" cases in more sparsely-populated areas or in small cities.

Analysis of these different caseloads through use of such techniques as "weighted case averaging," which compares different kinds of cases on the basis of the amount of court time (and what occurs in court) required by each type of matter.[50] Often, local conditions interact to place the caseloads of similarly populous cities at wide variance with each other. By determining what kind of contract, tort, marital, juvenile, real property, equity, felony, misdemeanor, traffic, and other caseloads a court handles, a far more accurate prescription of the need for judges can be made.

Using techniques of this kind, the Judicial Council can be better equipped to recommend to the legislature how many judges will be required to enable courts to keep pace with caseloads. In addition, analysis of economic and social conditions, as has been prepared by the Federal Judicial Center for the Federal District Courts, can be used to forecast the likely impact on court case volume of many influences, including patterns of industrial production, transportation alternatives, and education trends.[51]

Approach for Implementation

> How to Implement the Techniques Suggested in the Commentary to this Standard Will be Determined by the Approach Selected to Implement Increased Court Administrative Capacity, Disdussed in Standard 16.7.

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[50] See discussion at ABA, supra note 1, §1.12(c) commentary, at pp. 28-29.

[51] See Federal Judicial Center, District Court Forecasting Study (1975).

Standard 16.6 REDUCE WAITING TIME FOR WITNESSES INCLUDING POLICE OFFICERS, BY INTRODUCING PROCEDURES TO NOTIFY WITNESSES WHEN ACTUALLY NEEDED.

Commentary

Although long waits are a characteristic feature of the court system for litigants and attorneys, witnesses, whose testimony is critical to the operation of the judicial process, suffer most in that they frequently have no stake in the proceedings. Because witnesses, like parties, are summoned to appear at the convenience of the court, many have tended to take steps to avoid appearing, often by indicating that they will be unable to recall relevant facts if forced to testify. The prospect of wasting hours, if not days, waiting to testify induces forgetfulness in the most acute memories.

Earlier assessment of trial durations, establishing "ready lists" of cases which may be notified by telephone for immediate trial, and recognizing that the public convenience merits at least the consideration accorded the court's comfort will all improve the operation of the judicial process. Unless, however, steps are taken immediately, witnesses are likely to become increasingly unavailable. The survey of New Hampshire courts indicated that there is a pecking order for witnesses in the state courts: while expert witnesses, such as physicians or laboratory analysts, are put on the stand immediately, even by interrupting the trial or testimony in progress, lay witnesses summoned to describe the occurrences they observed, are forced to wait until the court is ready for their testimony.

There are no generally acceptable substitutes to the physical presence of testifying witnesses in court. Although videotaped testimony can be valuable in cases where a witness faces danger and or is truly unavailable, it may limit

the jury's ability to assess to the full the witness' credibility by observing courtroom behavior as it occurs and should be carefully controlled to avoid excessive reliance on videotaping. Affidavits, which have been permitted in military proceedings, are hardly comparable to a witness who is present to be cross-examined as well as observed in court.

Improvement can be accomplished, though, through introduction of a witness notification system. As recommended by the National Advisory Commission on Criminal Justice Standards and Goals, this system features:

1) requiring only those witnesses clearly needed to resolve issues in controversy or required by law to testify in court

2) introducing procedures to notify witnesses by telephone alert when needed to testify: at an early date, witnesses should be required to identify how they may be contacted and whether they can appear on short notice; before court begins, counsel can determine the likely time the witness will be needed

3) early inquiry as to dates when witnesses would be particularly inconvenienced if made to appear.[52]

Special procedures of a similar nature should be employed for police witnesses, with particular emphasis on minimizing appearances at stages where the officer's presence is unnecessary. In Philadelphia, one officer now presents police reports to the regular grand jury where 100 officers appeared each day previously.[53] In New York, a program to eliminate the need for officers to appear at arraignments is being introduced. These programs result in significant savings in police costs as well as reducing wasted waiting time. They involve slight added cost (except telephone), merely reassessment of existing procedures and reassignment of duties of court staff. Witness notification programs do work.[54] Many have been informal until now.[55] The main need now is for the problem to be recognized, since solutions have been demonstrated.

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[52] NAC, supra note 4, Stand. 10.6 at p. 208.

[53] Ibid., p. 209.

[54] See Vera Institute of Justice Projects, Weekly Statistical Summary (5-9-72) (New York).

[55] NAC, supra note 4, Stand. 10.6 commentary at p. 210.

Approach for Implementation

Description:

Implementing a witness notification program will require added staff, improved calendaring, and cooperation of the litigating parties in a case. The approaches described in the commentary can serve as models for organization.

Time:

Obtaining funding for staff and other program needs will probably require at least a year.

Cost:

A pilot witness program can be introduced in specified locations for less than $50,000.

Feasibility:

While existing court personnel could devote a portion of their time to witness notification, permanent additional staff would be required. The need for funding, as well as improved calendaring if the system is to work, make the feasibility of the approach fall in the 30 to 60 percent range, with the major positive aspect being public support for this improvement.

Standard 16.7 PROVIDE EFFICIENT ADMINISTRATIVE SERVICES AT ALL LEVELS OF COURT AND WHERE FEASIBLE, CENTRALIZE ADMINISTRATIVE FUNCTIONS.

Commentary

Historically, the management of all business of the courts was left to judges, whose training and primary responsibility was to resolve issues of law. Of necessity, judge time was devoted to resolving legal disputes rather than developing and implementing administrative policies or procedures. Frequently, management of the

non-judicial business of the courts fell to the clerks (many of whom had no specialized training) who developed administrative procedures and policies based on local needs without regard to the needs of the court system as a whole. The result has often been disparity between courts in record-keeping procedures, caseflow management techniques, budgeting practices and personnel policies. Such disparity often caused confusion among judges, attorneys, other judicial personnel, and the public who came in contact with more than one court. Further, independent development of administrative practices by local jurisdictions has contributed to poorly structured court systems in which administrative authority is not well defined and administrative services are inefficiently rendered, inadequate, or sometimes non-existent.

Effective court administration not only involves formulating and promulgating consistent administrative policy but also aims, as its basic purpose, to "relieve judges of some administrative chores and to help them perform those they retain."[56] Administrative services in the courts should facilitate developing and implementing administrative policy including: calendar management, employment and management of non-judicial personnel, budgeting, management of auxiliary services, compilation of statistical information regarding court operations and planning future operational needs.[57] Delivery of these services to the court may be effected through a variety of administrative techniques and structures, irrespective of the organization of the court system.

However, some organizational structures may facilitate better administration by providing uniformity in jurisdictional authority, simplicity in jurisdictional divisions, uniform rules of procedure and a clear definition of administrative

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[56] NAC, supra note 4, at p. 171.

[57] ABA, supra note 1, §1.40 at p. 66.

authority. Among the most frequent structures are state, regional and trial court administration; administrative judges; administrative assistant to chief judges; and clerks of court. Court administrator positions are most frequently created by statute. This is especially true of state court administrators. The position of trial court administrator, however, is most often created by court order.[58] Administrators are usually appointed by the judge or judges of the court the administrator serves, and generally serve at the pleasure of the appointing power.[59] Most present court administrators have legal training; those with no legal background generally were trained in public administration or office management with some previous court-related experience.

Specific responsibilities of state court administrators usually include fiscal and budgetary matters, project planning, calendaring, case assignment, payroll administration, drafting of legislation, rule drafting, and liaison duties with the legislature and other groups which are involved with the courts.[60]

Trial court administrators are responsible for caseload evaluation and management as well as for performing many of the tasks at the local level which state court administrators perform statewide. Both collect statistical information for the purposes of manpower and equipment planning, and to improve management operations.

As of 1977, 46 states had state court administrators (or their equivalent) the National Advisory Commission suggested that each trial court should be served by either a local or a regional court administrator.[61] Local trial court administrators should be utilized by courts with five or more judges, where caseload volume justifies a full-time administrative position. Smaller courts may be

[58] NAC, supra note 4, at p. 172.

[59] Ibid., p. 172.

[60] Ibid., p. 183.

[61] National Center for State Courts, Judicial Salaries in State Court Systems, (1976), at p. 6.

served by a regional court administrator, who would be responsible for two or more courts within a given region.[62] The use of local trial court, as compared with regional, administrators is largely a function of convenience and need.

At present in New Hampshire, administrative authority exists at various court levels in individuals and committees, including the Chief Justices of both the Supreme and Superior Courts, the Judicial Council, the Administrative Committee of the District and Municipal Courts, the Probate Judges Association, Clerks of Court, and Registers of Probate. While some aspects of administration are generally provided for by statute, rule, the state constitution, or tradition, little uniformity or consistency in direction can be achieved due to the present organizational structure of the courts, limited resources and manpower (particularly the time and staff of the Judicial Council and Administrative Committee of the District and Municipal Courts), and the limited judicial time (particularly the chief justices of the Supreme and Superior Courts),

## PRESENT ADMINISTRATIVE STRUCTURE

1. Supreme Court. The Supreme Court "shall have general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses... perform all duties reasonably requisite and necessary to be done by a court of final jurisdiction of questions of law and general superintendence." RSA 490:4.

The general superintendence power of the New Hampshire Supreme Court over all other courts in the state is statutory and rests with the entire court, i.e., all five

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[62] Ibid., p. 183.

justices. The Chief Justice, by tradition, assumes a leadership role as regards administrative authority within the state. In 1971, a new statute referring to the "unified court system" specified several administrative powers of the Chief Justice, including power to issue administrative rules. For all matters affecting the Superior Court, however, this power is exercised "with the advice and consent of the chief justice of the Superior court." RSA 490-A:2, 3. The general superintendence power of the entire Supreme Court is not so limited. RSA 490:4.

"The superintending control of the supreme court is comprehensive." State v. Murray, 104 N. H. 38 (1962). "The bounds of the supreme court's general superintendence of lower courts are to be determined by the reasons of natural justice and practical necessity on which it rests in the common law of the state." Boody v. Watson, 64 N. H. 162 (1886). Thus were the general superintendence powers of the supreme court amplified in case law.

The Clerk of the Supreme Court is appointed by the court and "shall perform all the duties herein specifically required of him and such other duties as usually appertain to that office," which are not further defined by RSA 490:19.

"The chief justice of the Supreme court with the advice and consent of the chief justice of the superior court in respect to all matters affecting the superior court, shall have the duties, power and authority to...recommend provisions for adequate staff and personnel including court administrators... to meet increasing caseloads...issue such other rules as may be necessary for the improvement of the administration of justice, not inconsistent with any rules adopted pursuant to RSA 490:4 and RSA 491:10." RSA 490-A:1.

The "Unified Court System" statute, RSA Ch. 490-A, clearly intended to establish a unified court system in New Hampshire. The powers and authority granted the Chief Justices of the Supreme and Superior Courts define administrative authority for all levels of court. However, a unified court structure

requires more than such a definition. A unified court structure is characterized by uniform jurisdiction, so that each level of court has within the level identical jurisdiction; simple jurisdictional divisions; uniform standards of justice; uniform rules, and consistent administration of policy. Such characteristics of a unified court structure are not found in today's New Hampshire court system.

2. Superior Court. The administrative authority in the superior court is that vested in the chief justice of the supreme court "with the advice and consent of the chief justice of the superior court." RSA 490-A:3. The chief justice of the superior court, however, is granted the authority to "appoint an administrative assistant to serve as fiscal officer of the superior court and [who] shall perform such other duties as may be required by the chief justice..." RSA 491:6.

The clerks of the superior court are required to "keep all books, records, files and papers belonging to his office..." RSA 499:4. Further, "at the close of each term the clerk shall render to the presiding judge a full and correct account of all money belonging to the county..." RSA 499:5. "A clerk of court may also appoint one or more deputies with the approval of the superior court..." RSA 499:13.

The statutes pertaining to the duties, responsibilities and authority of clerks of court lack specificity and in many courts have been broadly construed to encompass administrative activities. Frequently out of convenience or necessity, clerks of court have assumed responsibility to meet the administrative needs of their local court.

3. Judicial Council. RSA 494:1 established a judicial council consisting of a justice of the Supreme Court, a justice of the Superior Court, a Judge of Probate, the president of the Municipal and District Court Justices Association, the Attorney General, the president of the New Hampshire Bar Association, a clerk of the Superior Court and seven other members appointed by the governor and council, four of whom must be experienced members of the bar.

The Judicial Council's duties include: (a) continuous survey and study of the organization, procedure, practice, rules and methods of administration and operation of each and all of the courts; (b) investigate criticisms pertaining to administration of justice; (c) devise ways of simplifying judicial procedure, expediting the transaction of judicial business and improving the administration of justice; (d) recommend changes in law, rules, organization, operations or methods of conducting business of the courts, and (e) collect, compile, analyze and publish statistics and reports pertaining to the judicial system. RSA 494:3.

The activities of the Judicial Council are reported in its biennial report, which contains information pertaining to legislative activity, caseload statistics and court finances. Members of the Judicial Council work as committees to research and report on a variety of problems within the court system. The results of their efforts and the extent to which the council's efforts can be directed to any given problem is largely a function of time, cost and manpower. Since all members of the council have significant full time responsibilities outisde the work of the council and since the council is

primarily an advisory group, the direct impact of the council on administrative matters in the courts has been limited.

4. Administrative Committee of the District and Municipal Courts. This group consists of three justices of the district courts and two justices of the municipal courts appointed by the supreme court. RSA 502-A:18. It is authorized to recommend uniform rules, practices and procedures in the district and municipal courts, to recommend forms of blanks and records, to superintend the keeping of records by clerks and justices and has general advisory powers. Id.

The administrative committee's recommendations as to rules, form, procedures and records must be submitted to the supreme court for approval. Further, the supreme court may alter or amend the committee's recommendations and may make other rules or forms for the district and municipal courts "as it considers necessary in order to insure regularity and uniformity." RSA 502-A:19(a). The district and municipal courts are obliged to follow the procedures and forms promulgated by the supreme court. Id.

A 1973 report to the Committee indicated that little uniformity exists among the district court administrative practices and procedures.[63] Further, the report concluded that the Administrative Committee has had little effect in unifying and coordinating administrative activites in the courts.

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[63] Institute of Judicial Administration, A District Court for New Hampshire (1973).

"Each court operates as an independent entity, with little supervision or coordination. RSA 502-A:18 established the Administrative Committee of the District and Municipal Courts, with five (5) district and municipal court judges as members. The committee has a paid, part-time executive secretary. The committee is authorized to visit any district or municipal court...to recommend forms of blanks and records... and shall have general advisory powers in relation to said courts. The statute does not grant powers of direction and control to the committee. Because of its limited powers and its limited facilities and manpower, the committee has not been able to coordinate and unify the district and municipal court system to any great extent. Furthermore, although the committee collects and analyzes certain statistics on the courts, the lack of a complete comprehensive and uniform system of records prevents planning future needs."[64]

5. Administrative Committee of the Probate Courts. This committee was established in 1957 by RSA 547:34, consists of three judges assigned to serve by the Supreme Court, may recommend uniform practice and procedure, and has general advisory powers. While one of the committee's purposes is to coordinate the work of the Probate Courts, its authority to influence the operations of these courts comes from the Supreme Court which, upon recommendation by the committee, may approve changes in Probate Court operations.

## Court Organization

As previously stated, the extent to which administrative services are effectively and efficiently provided at all levels of court is largely a function of the organizational structure. Both the American Bar Association and the National Advisory Commission suggest that these objectives of court organization can best be realized by a unified court system.[65]

"The first requirement of court unification is that the jurisdiction of the various courts of the system be defined in a uniform way."[66] "If jurisdictional differences exist among trial or appellate courts at each level, several complications may arise, including procedural advantages to lawyers or parties familar

[64] Ibid., p. 20.

[65] ABA, supra note 1, §1.10 at p. 2; NAC, supra note 4, Stand. 8.1 at p. 1644.

[66] ABA, supra note 1, §1.10 at p. 5.

with local jurisdictional differences, insulation of the court from appellate review and the absence of administrative supervision. Further, in the absence of uniform jurisdiction it is difficult to establish uniform rules of procedure, uniform court records and meaningful statistical reports. Flexibility in terms of personnel assignments is also impeded since transfers to other courts require mastering new jurisdictional and/or procedural rules."[67]

Although RSA 490-A:1 reflects the intent of the legislature to establish a unified court system in New Hampshire, the provisions of Chapter 490-A, "Unified Court System", fall short. For example, the District and Municipal courts lack uniform jurisdiction, particularly in civil matters. While Municipal Courts are empowered to hear only small claims cases where the amount in controversy does not exceed $500 and title to real estate is not involved (RSA 503:1), District Courts have concurrent non-equity jurisdiction with the Superior Court to hear -- in addition to small claims -- landlord and tenant cases and other civil cases where the amount in controversy does not exceed $3000 or title to real estate is not involved. RSA 502-A:14.

Jurisdictional divisions should be simple as well as uniform in authority. In this regard, New Hampshire is moving forward by providing for the gradual discontinuance of municipal courts. RSA 502-A:35.

The third major requirement for a unified court system is provision for a clearly defined administrative authority. There is some disagreement as to whether this authority should be entirely vested in the highest state court, or can better be defined in a judicial conference, containing representatives of the judges of each court; a central administrative structure reporting directly to the highest court; administrative staff serving each level of court; or regional administrative staff provided with central support. Most agree, though, that there is a great need for more and better administration; this is what New

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[67] Ibid., p. 6.

Hampshire's court system lacks. "Differences exist in court priorities, procedures, pay scales, facilities and so forth, without any means to supervise and adjust the frustrations."[68] The New Hampshire Bar Association Sub-committee on Court Unification recently reported: "Personalities easily tend to replace what should be justice and uniformity."[69]

Clear administration in the New Hampshire courts requires either action by the Supreme Court in furtherance of its authority of general superintendence or formation of a policy-making body representing all courts, and by provision of administrative capability in either a central office, staff at each court level, or regional administrative staff.

Allied to this decision is determining the best court organizational structure. While the present structure is in one respect moving toward a simpler format -- establishment of District Courts and proposals to improve these at each legislative session -- there will remain three trial courts: Superior, general jurisdiction; District, limited jurisdiction; and Probate, special jurisdiction. The Bar Association subcommittee report suggests:

> In a small state such as ours, the district court should be replaced by a branch of the superior court, so that there is in fact a single trial level court. Practical considerations would require the present superior courts to handle all jury cases, with former district courts handling non-jury cases only.[70]

Making the District Court (and presumably, the Probate Courts as well) a branch(es) of the Superior Court need not disturb their present jurisdictions. And the bar panel's observation that further merger is not advisable because of "practical considerations", probably facilities, supports this approach. Combining these courts for administrative purposes, emphasizing added ability to produce uniform clerical services, caseflow management, budgeting and financing,

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[68] N. H. Bar Assn., Report of Subcommittee on Court Unification (1976, mimeographed, unpaged).

[69] Ibid.

[70] Ibid.

fiscal control, personnel procedures, and statistical and other information systems, rather than merging the courts and their judges should be the aim of improving court administration. A step-by-step approach may suggest beginning to develop these capabilities at each court level, i.e. Superior, District, Probate, or beginning by providing them through one office for all courts, including the Supreme Court, under the direction of a state court administrator. Since the New Hampshire courts have tended to establish this capacity at each court level, starting with the Supreme Court, relying on its superintendance power offers the best chance of accomplishing improvement.

Unless steps in these directions are taken, the courts will have fragmented, if any, administration. The chief justices alone lack the time to administer the courts on their own; the Judicial Council does not speak for the courts, especially since it is composed of members who are not of the judiciary; the existing administrative assistants to the Chief Justices of the Supreme and Superior Courts and the Administrative Committee of the District and Municipal Courts have not been empowered to take steps to produce uniformity in operations. "The courts belong to all of us, not one town or one city, not one county nor one person." [71]

Alternative Approaches for Implementation

A. Administration

Approach #1 Establish a State Court Administrative Office

Description:

A state court administrative office should be established to serve all courts, with administrative policy-making authority vested in 1) the Supreme Court, or 2) the Chief Justice of the Supreme Court.

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[71] Ibid.

If one office is organized, more specialized personnel in areas such as budget and finance, personnel administration, purchase and property, planning and caseflow management, can be employed than would be possible with separate offices at each court level.

Time:

Since some administrative posts already exist, a state office can be organized by consolidating these positions, such as the administrative assistants, respectively, to the Chief Justices of the Supreme and Superior Courts. The only legislative action which will be required will be in connection with appropriations for staffing.

Cost:

In order to organize a minimally active state court administrative office, approximately $150,000 in either legislatively appropriated or other, e.g., federal funds will be needed.

Feasibility:

Recent establishment of the post of Administrative Assistant to the Chief Justice of the Supreme Court, the report of the New Hampshire Bar Association subcommittee on court unification, and the views expressed by staff members of each court on the task force support the conclusion that the need for increased court administration is becoming recognized.

Approach #2 Increase Administrative Capacity at Each Court Level

Description:

As previously noted, administrative personnel have been added at each court level (except the Probate Courts). Adding staff to each lone administrative aide, or establishing a central pool to

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5 OF 6

provide support to all, clearly provides a means to increase administrative capacity. In each instance, the role of the existing administrative assistant or executive secretary requires better definition and administrative authority, apart from policy formulation, should be increased.

Time:

Each level of court can implement this approach as readily as funding may be obtained.

Cost:

Same as Approach #1.

Feasibility:

This approach involves less change in structure than Approach #1, hence feasibility is enhanced. Again, the need for increased administration is recognized to a greater extent than was previously the case.

Approach #3 Establish Administrative Capacity at the Regional Level

Description:

The differing regions of the state, e.g., the three northern counties (Carroll, Coos, and Grafton) the southwestern two counties, (Cheshire and Sullivan) the Manchester-Nashua urban areas, the seacoast and lakes districts, create different needs for the courts in those areas. In several states, court administration is structured by region responsive to a state court administrator with a staff in a region serving all courts in that area. The common goals and problems of courts at all levels in an area make this structure a practical one.

Time:

Ability to obtain funding is the major time factor.

Cost:

Same as Approach #1.

Feasibility:

This approach is probably the least feasible because it both cuts across the strongest stratifications in the court system, i.e., the lines between Superior, District, Municipal, and Probate Courts, and must be initiated with the least existing structure to build on.

B. Organization

Approach #1 Clarify Jurisdictional Divisions to Merge Courts at Each Level

Description:

Existing legislation permits absorption of Municipal Courts into the District Court system. This approach would follow the direction of the bills introduced to extend the District Court system. The approach includes the alternative methods specified in Standards 16.4 to integrate the Probate Court more fully into the court system. The result would be one appellate court, the Supreme Court; a trial court of general jurisdiction, the Superior Court; a trial court of limited jurisdiction, the District Court; and a trial court of special jurisdiction, the Probate Court.

Time:

Legislation will be required, making the period of implementation at least a year.

Cost:

Merger of the Municipal Courts into the District Court system will require facilities improvements. Cost will be minimal if Municipal Court-derived revenues accrue to the District Court.

Feasibility:

The feasibility of a District Court bill being enacted is increased as recognition of need for a full-time court rises. At present, the likelihood has probably reached 60 to 80 percent.

Approach #2 Merge All Trial Courts

Description:

This approach recognizes that separate trial courts, tiers, or divisions inevitably result in differing classes of justice being dispensed at each level of trial court. Merger will assure that all cases are adjudicated before full-time judges or professional judicial officers and that each kind of case is entitled to a higher minimum level of attention and degree of consideration not possible when part time and inadequately staffed courts or poorly trained court personnel are given responsibility for adjudicating large groups of cases. To a certain extent this approach supplants specialization in narrow jurisdictional areas with a higher general competence of all trial courts.

Time:

Constitutional amendment would be required to include the Probate Courts in a merged trial court. All other trial courts could be merged by legislative action.

Cost:

Costs of merging all trial courts will include facilities improvement and training of all personnel. Judicial salaries will rise but could be off-set in large measure by accrual of revenues now collected by localities. The total cost likely will exceed $250,000 but will not exceed by much the costs of improvements, such as facilities, which are already needed by the present system.

Feasibility:

A merged trial court was recently voted into effect by Connecticut over the opposition of the courts. It is likely that most judicial and support personnel in the court system will feel threatened by merger of trial courts in New Hampshire. While costs likely to be incurred through merger are not excessively high in considering that the improvements are needed even if no change occurs, the general reluctance of the state to revamp governmental structures for fear of added costs will militate against merger. The feasibility thus is very low for this approach.

Approach #3 Utilize Cross-Assignment of Judges

Description:

Judges will be cross-assigned among courts and levels of court depending on the needs of the system as determined by the Chief Justice of the Supreme Court or his designee. Amendment of 490-A:1 is required to implement this approach. Caution must be exercised

in three respects: (1) cross-assignment should neither be exercised nor perceived as a punitive measure; (2) authority for assignment must be cognizant of the competence of the judges to be assigned and the needs of the respective courts; and (3) adequate initial and ongoing training of all judges must proceed full implementation. Moreover, cross-assignment should be employed only to relieve emergency situations and should not remove a judge from his ordinary assignment for excessive periods.

Time:

As legislation, training and caseload information are required a year is considered minimal to affectuate this approach.

Cost:

The anticipated cost for implementing the approach is related to both training and information system costs, described earlier.

Feasibility:

Employment of this approach while efficient and effective in terms of court administration is assigned a low feasibility rating given the perceived systemic disruption.

Importance of Standard

This standard was considered by task force members and those interviewed throughout the state as critical to the improvement and modernization of the courts of the state and the administration of justice therein.

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APPENDIX A

Survey Approach

The following discussion provides a detailed account of the stages of the court survey and the rationale and techniques used for accomplishing each.

The survey was organized into six major phases: (1) isolation of results; (2) refinement of results; (3) documentation of practices and procedures; (4) review of approaches for implementation; (5) technical review of survey and (6) recommendations for priority implementation.

Organization of Survey Groups

As one of the principal objectives of the survey was the development of standards which were realistic and responsive to New Hampshire's needs, a broad cross-section of system participant and citizen input was sought. To provide this broad-based input, six regional groups and one statewide group were formed to serve as a nucleus for review and comment. The decision to create six regional groups was predicated on the existence of geographic difference in court operations. By establishing regional groups, specific attention could be directed at the special needs of a given area. The regions were organized by county: Region I (Carroll, Coos, Grafton); Region II (Cheshire, Sullivan); Region III (Merrimack); Region IV (Belknap, Strafford); Region V (Rockingham); and Region VI (Hillsborough). The members of each group were residents of the region and included: a superior court judge and clerk, a district court judge and clerk, a probate court judge and register, a probation officer, county attorney, corrections officials, law enforcement officer, two practicing attorneys, legislator, and two members of the public.

The membership of the statewide group varied slightly from that of the regional groups, including Justices of the Supreme Court, the Attorney General and a representative from the Governor's Commission on Crime and Delinquency and Director of the Commissions Standards and Goals project. The purpose of the statewide group was to provide an overview of the court system's needs, integrating the concerns of the regional groups.

The criteria for selecting members for each group were: are the individuals from the geographic area; are they knowledgeable about the justice system or the needs of the community, do they have time to spend on a project such as this and are they willing to work hard. Lists of names were developed with the project administrator and submitted to the Chief Justice of the Supreme Court for approval. Each group member was personally invited to participate by the Chief Justice and their responsibilities during the study were outlined.

A total of 105 individuals participated in the group meetings which were held from November of 1975 through October of 1976.

Defining Expected Results

The purpose of the first round of meetings was to define the results the group members expected the court system to be achieving if it were operating effectively. The initial comments made at these meetings were very general, e.g., the fair and prompt resolution of disputes. Such all-inclusive or "blue-sky" comments were further refined and organized into several topic areas, including defense, prosecution, trial procedure and court organization.

The importance of discussing the expected results from the system versus the problems with present practice cannot be overstated. Traditional approaches to setting objectives stress problem identification which only serve to reinforce adverse attitudes. By attempting to reach agreement or concensus on the results or standards the system should be achieving, a more cooperative and constructive direction is possible. Only after such results are identified and refined does documentation of existing performance serve a positive function.

Following the series of seven meetings held throughout the state, the information was synthesized into twenty-one topic areas covering approximately 125 individual standards. The standards or results that emerged represented a consensus statement from the seven groups. In most instances the synthesis process brought the standards from extreme points-of-view to a more tenable and generally acceptable level.

Refinement of Expected Results

The purpose of the second round of meetings was to test or refine the concensus statements and standards from the first meetings. Using Attachment A as a basis for discussion, the suggested standards were modified, eliminated, or expanded. The refinement process afforded another opportunity to develop greater concensus and understanding as to the necessity for such standards. Given the wide cross-section of group membership, total agreement on any standard was rare; however, general agreement and better understanding of individual objectives was obtained.

A secondary purpose of this round of meetings was to isolate those issues which group members felt were important to document. While most group participants felt several of the standards represented current practice, all wanted to be sure that such practices were documented. Additionally, some confusion existed regarding several areas and certain statistical and financial information was requested to document present procedures and performance.

Following this series of meetings the number of topic areas was reduced to sixteen and the number of standards to 110. Additionally, several specific types of data were isolated as being necessary for collection and analysis.

Documentation of Practices and Procedures

The documentation phase of the survey was divided into two parts: (1) general topic area research including statutory and rule documentation, and (2) documentation of individual standards. Included in the first portion of the research was a review of existing national standards of each topic area (primarily those of the National Advisory Commission on Standards and Goals and the American Bar Association), historical research into the development of the topic area generally, and an examination of current national trends. Legal research into present statutory and caselaw requirements and rules of court was undertaken relative to each standard during this phase. The second aspect of the documentation stage involved designing the collection

instruments, determining the sample size and techniques to be used and developing the statistical, interview, and questionnaire instruments and sample populations.

SAMPLE SIZE

A stratified sample of selected district and superior courts was to be used in surveying case files; however, developing realistic criteria upon which to select representative courts was extremely difficult. After a series of meetings with court officials the decision was made to survey all district and superior court. Using disposition caseload statistics from the Fourteenth and Fifteenth Biennial Reports of the Judicial Council (1971 - 1972, 1973 - 1974) activity (volume) ranges were established for each court in a series of categories, e.g. Superior-criminal, civil, appeals, marital and District-criminal, juvenile and civil. Category ranges were then established adding the ranges for each court, listed alphabetically. Using a random number table and setting a desire confidence level at 95% (which required collecting 384 cases for each category), the number of cases to be collected from each category and for each court were determined. The intervals between the random numbers selected for each court were used as the intervals for selecting closed cases, Attachment B. Attachments C, D and E set forth the number and types of cases sampled as well as the dates, data collector's initials and codes.

The cases to be sampled, then, were completed during calendar year 1975. (In the event that the court did not maintain a closed case file, the interval sequence was used with the docket file taking the first case disposed of in 1975 as the beginning case. If the case selected was not closed, the next completed case was selected, continuing the application of the intervals.) Attachments F - J are the data collection sheets used in the district and superior courts.

INTERVIEWS

In contrast to the statistical sample, a stratified sample was used to poll practioners, judges and clerks, probation officers, chiefs of police, county attorneys, and media representatives. In some instances all of the members of a specific group were interviewed, e.g. Superior Court Judges. In those instances in which interviewing 100% of the group was not possible, 30% was set as a minimum. Included in the groups interviewed were:

| | |
|---|---|
| Superior Court Judges | 12 |
| District Court Judges | 13 |
| Probate Judges | 4 |
| Civil Practitioners | 16 |
| Criminal Practitioners | 12 |
| Prosecutors | 4 |
| Probation Officers | 14 |
| Clerks of Superior Court | 4 |
| Clerks of District Court | 11 |
| Police | 9 |
| Press | 4 |

To insure that the interviews reflected a representative grouping the schedule was reviewed with several court officials from throughout the state. (150 interviews were conducted statewide.)

QUESTIONNAIRES

Seventeen separate questionnaires were utilized during the documentation phase of the survey: 1) to supplement information gathered by personal interviews and court visitations and 2) as a primary source of information from private citizens, state legislators, and judicial and non-judicial personnel who were not contacted in person by the survey team. The questionnaires were designed to capture quantifiable information and to permit recipients to complete their responses with a minimum amount of inconvenience.

Questionnaire recipients included: clerks and judges at all levels of court, court stenographers, former members of the grand jury, county prosecutors, members of the bar, state legislators, registers of probate, the Director of the Youth Development Center, Superintendents of County Jails. Houses of Correction, and New Hampshire State Prison, and over 500 private citizens, see Attachment K.

Recipients were randomly selected and approximately 1,000 questionnaires were mailed throughout the state. While the number of respondents varied between generic groups, the overall response was very favorable, nearly 50%. The level of responses for many groups exceeded 90%. The lowest response of 15% was from private citizens, however this return can be considered positive given that citizens were randomly selected from telephone directories throughout the state. The process for selecting residents was not scientifically reliable, given that telephone directories served as the source for selection. The variables introduced through this approach were not considered so significant as to contaminate or impare the validity of the sample population.

The responses to all questionnaires were analyzed to determine geographical perspectives as well as majority and minority views on specific questions.

DATA COLLECTION

Two data collection teams were formed: the first was responsible for conducting all interviews and the second was responsible for collecting all statistical data. Designing, coordinating the mailing and analysis of the questionnaires were completed by one person.

The documentation process was conducted from April through June, 1976. The primary results were collected and analyzed in April and May; however, the need for additional data required extending this stage of the project through June.

Task Force Meetings

Following the completion of phases 1, 2, and 3, a series of nine task force meetings were held to: 1) identify alternative methods for achieving the standards, 2) evaluate each method or approach in terms of cost, time and feasibility of implementation and 3) establish a priority of ranking for the standards within each topic area. (See Attachment L.)

The nine task force groups were organized by topic area and were comprised of regional group members who had a particular interest or expertise in one or more topic areas.

The specific approaches identified by the task force members at these meetings were documented and incorporated into the commentary for each standard. Thus at the conclusion of phase 4, the standards (results) had been identified and refined (phases 1 and 2 ). Where the court was today in relation to the desired standards had been documented (phase 3) and several suggested approaches or methods for achieving the standards had been defined (phase 4).

Technical Review of Survey

Following the inclusion of the approach section in the commentary for each standard, a draft of the entire report was given to eight justice system participants, with different professional perspectives, to review for technical accuracy. Given the scope and detail of the report, it was felt that the potential if not occurrence of technical (statutory, rule, caselaw) deficiencies existed. By subjecting the draft report to this final review, such defects could be corrected.

The comments from each reviewer were incorporated into the text and final drafts of the study were sent to all members of the state group.

Recommendations for Priority Implementation

Given the magnitude of the final report, which covered sixteen major topic areas and included over 100 standards, it was considered essential that those standards having the greatest impact on the quality of justice in New Hampshire be identified for immediate consideration by the Supreme Court. Immediate implementation of all standards contained in the final report was not considered feasible by study participants. However, providing some focus for the Supreme Court in their review of the standards was considered desirable.

Regional and state group members were therefore asked to identify five standards they viewed as most important and to rank these standards (see Attachment M). The combined results of this exercise are shown below:

| Rank | Standard |
|---|---|
| 1 | 11.1 (a-d) Speedy Trial |
| 2 | 15.1 Court Facilities |
| 3 | 16.1 Full-time Judges |
| 4 | 3.1 (a-d) Prosecution |
| 5 | 12.1 Judicial Selection |
| 6 | 8.1 Sentencing |
| 7 | 16.2 Court Financing |

Six public hearings were held throughout the state to solicit public comments regarding the content of the standards as well as to further identify priority standards. A public summary of the survey was made available prior to and at the meetings and served as the basis for discussion. This summary provided a brief explanation of each topic area and a complete listing of all standards developed during the project.

The public hearings were held in each instance at the Superior Court building in the county. The following chart shows the dates, locations, time, and attendance for each meeting.

Public Hearings - 1977

| Date | Location | Time | Attendance |
|---|---|---|---|
| February 25 | Exeter | 7:00 P.M. - 9:00 P.M. | 5 |
| February 28 | Keene | 7:00 P.M. - 9:00 P.M. | 20 |
| March 1 | Concord | 7:00 P.M. - 9:00 P.M. | 20 |
| March 2 | Manchester | 7:00 P.M. - 9:00 P.M. | 16 |
| March 3 | Laconia | 7:00 P.M. - 9:00 P.M. | 12 |
| March 4 | Berlin | 4:00 P.M. - 6:00 P.M. | 16 |

The format for the public meetings was informal and relaxed and consisted of a short presentation by National Center staff which served to provide background information regarding the methodology and objectives of the study. The purpose of the meeting was stated and an explanation given as to how the public could make known their views at and following the meeting.

All standards were then reviewed on a topic area by topic area basis. The public was invited to comment as to their support for or disagreement with any of the standards. They were also encouraged to offer alternative approaches for implementing the standards.

Comments received at each of the public hearings were then documented and submitted to the Supreme Court for their consideration when reviewing the standards.

| Topic Area | | Standard Areas |
|---|---|---|
| Pre-Trial | Criminal | 1. Improve screening and regulation of professional bondsmen, or eliminate private sureties in favor of court-operated bail system supported by percentage fee collected solely for administration. |
| | Criminal, Juvenile | 2. Establish procedure to gather information pertinent to bail decision and specify factors governing eligibility for and amount of bail. |
| | Criminal | 3. Introduce specific process of systematized bail reduction for incarcerated defendants. |
| | | 4. Maintain emphasis on use of personal recognizance unless clear basis for bond is shown. |
| | | 5. End use of bail in misdemeanor or lessor offenses. |
| | Criminal, Civil | 6. Increase use of judicial summons in lieu of arrest. |
| | Criminal | 7. Provide immediate bail decision by empowering sufficient judicial officers to set bail. |
| | Juvenile | 8. Maximize use of pre-trial alternatives to eliminate incarceration of juveniles awaiting trial. |
| | | 9. Employ non-monetary conditions in juvenile cases instead of cash bail. |

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|---|---|---|
| Pre-Trial | Criminal, Juvenile | 10. Provide suitable facilities for detention of juvenile and female defendants in each county or municipality. |
| | Criminal | 11. Increase ability of courts and support services to use conditional release where personal recognizance is not appropriate. |

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|---|---|---|
| Diversion | Criminal, Juvenile | 1. Provide for specific inquiry, prior to any court appearance, by police or prosecutor to determine existence of basis for further proceedings.<br>2. Increase consideration by police, prosecutors and court of use of diversion for youthful offenders (17 to 22).<br>3. Offer increased range and number of diversion service alternatives in each county. |

| | | |
|---|---|---|
| Prosecution | Criminal, Juvenile (all) | 1. Increase provision of professional prosecution in each county:<br>a. extend term of office to increase continuity<br>b. establish full-time position to eliminate conflicts<br>c. organize offices to increase availability of prosecutors or assistance of professional prosecutors at all levels.<br>2. Introduce compensation system which allows retention of experienced personnel.<br>3. Restrict policy of lay prosecution to violation cases and eliminate use of police as prosecutors within five years.<br>4. Determine need for prosecutorial staff by assessment of caseload statistics.<br>5. Provide access to investigative capability for prosecutors to screen all cases for accuracy of charge and, particularly in juvenile matters, appropriateness of court referral. |

| | | |
|---|---|---|
| Defense | Criminal, Juvenile (all) | 1. Determine and apply precise standards of indigency controlling appointment of counsel by the court and rules governing partial eligibility for assistance.<br>2. Maintain access to counsel in all indigent defendant cases where incarceration may result.<br>3. Maintain ability of defendant to select counsel of choice.<br>4. Insure availability of counsel at earliest stage of criminal process (time of arrest) through post-conviction review.<br>5. Require motions for withdrawal in writing.<br>6. Provide defense services to indigents through public defender or rotating assigned counsel systems as determined appropriate by each locality.<br>7. Extend supervision of indigent counsel appointments to maximize reimbursement.<br>8. Establish system for appointing counsel to insure adequate experience in area of assignment and participation in rotating assigned counsel system by all qualified attorneys. |

Defense

9. Set maximum caseload level for individual public defenders and assigned counsel.
10. Require recording of waiver of counsel in all courts.
11. Insulate public defender system from political control.
12. Provide defense services to indigents with the aim of preventing the existence of an inferior standard of representation.

Juvenile

13. Recognize expanded role of counsel in juvenile proceedings and assure assistance of counsel familar with juvenile process.

Civil

14. Maintain provision of counsel to indigents in involuntary commitment and sexual psychopath hearings, termination of parental rights.
15. Provide defense services to indigents in civil cases and explore provision of increased access of middle-income persons to legal assistance through pre-paid legal insurance.

| | | |
|---|---|---|
| Discovery | Criminal, Civil | 1. Provide for full and open discovery in all cases, restricted only by statutory privileges, constitutional bars against self-incrimination and serious danger to witnesses.<br>2. Institute standard form of police report to expedite discovery in criminal cases.<br>3. Increase ability of trial court to monitor discovery, with use of pretrial conferences to structure process and resolve disputes. |

| | | |
|---|---|---|
| Pre-Trial Procedures | Criminal | 1. Employ probable-cause hearings as early screening stage. |
| | Criminal, Civil | 2. Explore use of immediate videotape despositions to maintain cooperation and protection of witnesses. |
| | Civil | 3. Emphasize and increase availability of arbitrators and mediators, to explore settlement in lieu of involvement by the trial and to resolve disputes where parties agree to use. |
| | Criminal | 4. Use omnibus hearing to expedite criminal pre-trial process. |
| | Civil | 5. Schedule pretrial conference to precede trial by a brief time span. |
| | Civil, Family | 6. Assign appropriate complex cases and family-related matters to mediators or masters in the first instance with provision for review by the court on motion of any party. |

Grand Jury Criminal

1. Increase usefulness of grand jury as device to eliminate unjustified proceedings by thorough orientation of grand jurors by the court.
2. Minimize delay caused by grand-jury stage of the criminal process by increasing availability of grand juries, including change of venue and recall of grand jury.
3. Retain limit of grand jury service by term of court to maintain impartial character of grand jury.

Plea Bargaining — Criminal — (Discussion of plea bargaining concerned the need for its use in order to permit system to operate.)

1. State clearly to defendant prior to acceptance of plea that the court is not bound to follow any recommendations and that plea may be withdrawn at that time.
2. No clear preference was shown for involvement or exclusion of trial judge in plea negotiation process. Views were advanced for both courses.
3. Maintain review of sentences by sentencing review board, particularly if plea bargaining retained.

| | | |
|---|---|---|
| Probation | Criminal, Juvenile | 1. Recognize need for provision of separate probation services involving (1) investigation and (2) supervision.<br>2. Divest probation personnel of all collection responsibilities.<br>3. Provide probation services adequate to meet the special needs of juvenile and female probationers.<br>4. Establish effective mechanism for court supervision of probation services, whether or not probation personnel are administratively part of the courts.<br>5. Prepare presentence reports as needed by the court, but the need for a report immediately upon determination of guilt or innocence should be balanced by the desirability of a comprehensive report which takes account of all relevant information.<br>6. Insulate recommendations (but not factual material) in presentence reports from view of all except the trial judge and the sentencing review board.<br>7. Increase involvement of probation personnel in pre-trial screening and conditional release-supervision cases. |

| | |
|---|---|
| Probation | 8. Assess current caseload of probation personnel to determine kinds of cases and persons most appropriately referred for supervision. |

Speedy Trial and Delay

Criminal

1. (a) Felony cases in which the accused is not incarcerated should be tried within 120 days from the date the process is initiated, in most instances, from the date of arrest or issuance of summons.

   (b) Where the accused is incarcerated, a felony case should be tried within 60 days.

2. Misdemeanors should be tried within 60 days; and violations tried in 30 days.

3. Arraignment on any charge should be completed within 48 hours of time of arrest.

Civil

4. Civil cases should be disposed of within six months from joinder of issue.

5. Small claims cases or uncontested civil matters should be disposed of on the return date, no later than 30 days from the initiation of the case.

6. Sessions for motion hearings should be scheduled regularly, but not less than once a week.

7. Uncontested probate and domestic relations cases should be disposed of within 30 days; if contested, the six-month standard set for civil matters should apply.

Speedy Trial and Delay

8. Decisions in matters tried to the court should be made within 30 days of the end of trial.

9. Appeals should be decided within 60 days from argument or submission.

10. Appeals should be argued or submitted without argument within 120 days from the taking of the appeal. Transcripts should be provided within 30 days after requested.

Juvenile

11. Matters involving juveniles--either status of offenses or delinquency cases--should be completed within 30 days from filing of petition if the juvenile is not incarcerated. If incarcerated, proceedings should be completed within 10 days.

Civil, Criminal, Juvenile

12. Continuances in all cases should be limited by all courts to situations of clear emergency, especially in cases of pre-trial incarceration. Courts shoul require advance application in writing for all continuances.

13. Reasonable time periods must be established and enforced by trial courts for completion of each phase of the litigation process, and by appellate courts for each phase of the appellate process.

Sentencing and Other Disposition Alternatives

(Presentence reports and probation are included under "Probation")

Criminal, Juvenile

1. Dispositional or sentencing alternatives should not be predicated on length of sentence imposed.
2. Dispositional alternatives should not be limited because of a defendant's age.
3. Overall normality of sentencing should be achieved through mechanisms such as the sentencing review board.
4. Mandatory incarceration of habitual offenders should not occur after seven years have passed from the date of the previous offense.
5. Minor misdemeanants, juvenile status offenders, and violation offenders should not be incarcerated.

Juvenile

6. Disposition alternatives for juvenile status offenders should be created and the number of alternative dispositions for delinquents should be expanded.

Criminal, Juvenile

7. An adult diagnostic unit for pre-and post-sentencing review should be established.

Sentencing and Other Disposition Alternatives — Civil

8. Residential alternatives to the state hospital should be available for geriatric patients unable to reside in private homes.
9. Greater emphasis should be placed on providing locally-based dispositional alternatives for adults and juveniles, of both residential and non-residential nature.
10. Extraordinary justification should be required by the sentencing review board to permit imposition of consecutive sentences.

Continuing Education

1. Minimum continuing education requirements should be established for the bench and bar by the Supreme Court in cooperation with the New Hampshire Bar Association and sufficient in-state programs should be organized to permit satisfaction of these requirements.
2. Specialized training should be required for all judges, including masters and in each area of their jurisdiction and if this education must be accomplished through attendance at out-of-state programs, costs should be borne by the court system.

Juvenile

3. Specialized training should be provided for all court personnel participating in the juvenile justice system.

Court Facilities

1. Provide adequate and appropriate courthouse facilities to suit the needs of the courts and the communities they serve. Standards set by the Court Facilities Accreditation Commission should be enforced and a state-wide schedule of facilities needs prepared to minimize duplicative and inefficient facilities.
2. House only court facilities in courthouses, not police, prosecutors, public defenders, or other agencies or private attorneys, in order to maintain the proper appearance of justice.

Public Education and News Coverage

1. Inform the public of the goals, methods and procedures of the courts and the reasons for each, in order to prepare members of the public for service as jurors, presence as witnesses, and rights as parties.
2. Specify with precision those aspects of criminal cases which attorneys, judges, law enforcement officers and court employees are forbidden to disclose to the press or public in order to preserve an accused's right to a fair trial, including, for example, prior criminal record; contents or existence of confessions, admissions, or statements of accuseds; performance or results of tests or examinations or refusal or failure to submit to same; identity or other facts about prospective witnesses; possibility of guilty plea; discussion of merits or evidence of the case, except for denial of charges by counsel on behalf of the accused.
3. Act to protect the right to fair trial in individual cases by empowering trial judges, for example, to exclude the public from pre-

Public Education and News Coverage

trial hearings, change venue or continue a case, examine jurors individually, sequester the jury, caution jurors about avoiding outside influences, and setting aside a verdict, where it appears any or all of these or other similar steps are necessary to preserve the right of an accused to a fair trial.

4. Court employees should be instructed to cooperate with the public and the press in providing all information about the work of the courts and information which is public record, rapidly and accurately.
5. Inform each community of the specific alternatives available for screening, diversion and disposition for juvenile.
6. Maintain special procedures to insure confidentiality of juvenile proceedings, results and records of which may be disclosed without names of juveniles or other parties.

| | | |
|---|---|---|
| Juvenile Screening | Juvenile | 1. Develop juvenile community court-screening capability and guidelines for its use in each county and municipality in the state.<br>2. Maximize effort on the part of all court personnel to divert juveniles from the criminal justice system. |

Judicial Selection

All Courts

1. "That New Hampshire adopt a merit selection plan for the selection of judges.
2. That appropriate action be taken to amend the constitution of the State of New Hampshire for the purpose of accommodating a merit selection plan where the Governor selects from the nominees of a judicial selection commission.
3. That pending the adoption of necessary constitution and, perhaps, statutory amendments, the Governor adopt, by Executive order, a merit selection plan." *
4. Establish a judicial conduct committee composed of the Chief Justice of Supreme Court, Chief Justice of Superior Court, President of the New Hampshire Bar Association and two members of the public to be appointed by the Governor to review any complaints concerning judges or employees of the courts. If the committee found a complaint valid, it would be empowered to recommend appropriate action to the Supreme Court.

* Recommendations from the Report of Governor's Commission on Court System Improvement, September 1974, Vol. 16 No. 1 p. 70.

Judicial Selection

5. Neutral finders of fact, such as masters or arbitrators, should be designated by the Chief Judge of the court and should not practice law in the field or practice in which they serve as neutral adjudicators.

| | | |
|---|---|---|
| Trial Procedure | Civil, Criminal | 1. Conduct all trials in the state according to uniform rules and procedures applicable in all trial courts. |
| | | 2. Adopt rules for effective processing of cases. These should be drafted in the first instance by committees comprised of judges and attorneys. Drafts should be widely distributed, with sufficient time permitted for comment prior to adoption and thorough dissemination upon promulgation. |
| | | 3. Adopt and enforce reasonable time periods in the trial courts for completion of each phase of the litigation process. |
| | | 4. Design an information system to permit scheduling of cases to minimize conflicts between different trial courts and sessions in the same and adjacent counties. |
| | | 5. Extraordinary and complex cases should be closely monitored by one judge throughout the processing of the case. |
| | Civil | 6. Reserve trial by jury, in civil cases, for matters in which it is most needed to resolve inssues of fact. No case should be tried by jury unless the amount in controversy exceeds $2,500. |

Civil

7. Schedule trials to follow pretrial conference after a short interval in order that settlement may occur in cases susceptible to settlement.

Juvenile

8. Separate all trial calendars from juvenile cases, so that juveniles do not share a courtroom with adult criminal defendants.

Appellate Procedure

Criminal

1. Resolve issues of fact after a single trial before a competent court. Retention of a trial de novo system causes needless repetition, loss of evidence, absence of witnesses, and inevitably unspeedy trial.
2. Establish a right of appeal on questions of law for the state in criminal cases.

Civil
Criminal

3. Assess on a regular basis the increase in appellate volume to ascertain whether screening, certiorari, summary disposition, an intermediate appellate court or other mechanisms are needed to cope with an increased caseload or with an excessive number of frivolous appeals.

Court Organization and Administration

1. Require all judges to serve full-time, in order to eliminate opportunities for and appearances of conflicts. A change to all full-time judges may reduce the total number of judges needed in the state, but service to all communities should be maintained through use of a rotating circuit system.
2. Establish a process to evaluate the funding needs of the courts irrespective of the revenue provided to the state and to local governments through the courts.
3. Organize a personnel system to include all employees of courts in the state.
4. Review jurisdiction and operations of the Probate Court to determine whether it would be advisable for that court to serve as a family court assigned all matrimonial, juvenile, and currently probate matters.
5. If the current trial de novo system is eliminated (see Appellate Procedure), all trial courts should be capable of trying cases to juries.
6. Base the number of judges needed on size and character of caseload rather than on population alone.

Court Organization and Administration

7. Organize the processing of small claims cases in the court system so that designated times are set for return and adjudication of small claims matters at regular intervals.
8. Design court administrative procedure to notify witnesses when needed to testify, including police officers, so as to minimize waiting time.

Varying proposals relating to court financing--ranging from state assumption of responsibility for funding court operations to apportionment of court operating costs among the counties according to percentage of total caseload--were received, with no view predominating.

Attachment B

COURT: _____ CODE: _____

Type of Case _____

| Case No. | Interval | Docket No. | | Case No. | Interval | Docket No. | |
|---|---|---|---|---|---|---|---|
| | | | | | | | |

Attachment C

SUPERIOR COURTS

| Court | Code | Criminal # Cases | Criminal Name & Date | Civil # Cases | Civil Name & Date | Total | Data Name & Date |
|---|---|---|---|---|---|---|---|
| Belknap | 01 | 34 | | 20 | TB 5/4 (18) | | TB 5/ 4 |
| Carroll | 02 | 19 | | 15 | | | TB 5/ 3 |
| Cheshire | 03 | 21 | TB/JS 5/ 3 | 27 | JS 4/28 | 48 | JS 4/28 |
| Coos | 04 | 11 | JH 4/30 | 16 | JH 4/30 | | JH 4/ 30 |
| Grafton | 05 | 42 | TB 5/10 | 27 | TB 5/10 | | DV 5/ 7 |
| Hillsborough | 06 | 111 | LM/DV 4/23 | 105 | LM 4/28 | 216 | LM 4/22<br>4/28 |
| Merrimack | 07 | 45 | JL 5/11 | 34 | JL 5/11 | | DV 5/ 4 |
| Rockingham | 08 | 66 | DV 4/22<br>JS 4/23 | 111 | JS/LM 5/ 6 | | 4/22-23<br>JS 5/ 6- 7 |
| Strafford | 09 | 60 | LM 5/ 5 | 37 | LM 5/ 4 | | LM 5/3 -4 |
| Sullivan | 10 | 13 | DV/CC 5/ 5 | 14 | DV/CC 5/ 5 | | DV 5/ 5 |

Attachment D

# DISTRICT COURTS

| Court | Code | Criminal # Cases | Criminal Name & Date | | Civil # Cases | Civil Name & Date | | Juvenile # Cases | Juvenile Name & Date | | Interviewer | Name | Date | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Auburn | 21 | 7 | DV | 5/12 | 6 | DV | 5/12 | 4 | DV | 5/12 | CB | CB | 4/29 | |
| Berlin | 22 | 1 | JH | 5/ 3 | 10 | JH | 5/ 3 | 1 | JH | 5/ 3 | JH | JH | 4/30 | |
| Claremont | 23 | 8 | CC | 5/ 6 | 22 | DV | 5/ 6 | | | | | CC | 5/ 6 | |
| Concord | 25 | 4 | JL | 4/22 | 22 | TB | 4/22 | 18 | JL | 4/23 | | JL(Crim)<br>TB(Civ) | 4/21<br>4/22 | |
| Conway | 26 | | | | 14 | | | 2 | | | | JH | 5/ 3 | |
| Derry | 27 | 4(2) | CB | 4/29 | (2) | CB | 4/29 | (2) | CB | 4/29 | | CB | 4/29 | |
| Dover | 28 | 23 | LM | 5/ 3 | 20 | | 5/ 3 | 7 | LM | 5/ 3 | | LM | 5/ 3 | |
| Durham | 29 | 6 | LM | 4/30 | 3 | | | 3 | LM | 4/30 | LM | LM | 4/30 | |
| Exeter | 30 | 3 | TB | 4/29 | 13 | TB | 4/29 | 4 | TB | 4/29 | | TB | 4/29 | |
| Franklin | 31 | 10 | | | 9 | | | 6 | | | | JS | 5/ 3 | |
| Goffstown | 32 | 5 | JH | 4/29 | 1 | JH | 4/29 | 4 | DV/JH | 4/29 | | JH | 4/29 | |
| Gorham | 33 | 3(1) | JH | 4/30 | 3(1) | | 4/30 | 1(1) | JH | 4/30 | TB | JH | 4/30 | |

| Court | Code | Criminal # Cases | Criminal Name & Date | Civil # Cases | Civil Name & Date | Juvenile # Cases | Juvenile Name & Date | Interviewer | Name | Date | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Hampton | 34 | 16 | | 7 | | | | | TB | 4/29 | |
| Hanover | 35 | 5 | CC 5/11 | 6 | TB 5/11 | | | | DV | 5/ 6 | |
| Haverhill | 36 | 1(1) | CC 5/10 | 4 | TB 5/10 | 4 | CC 5/10 | | DV | 5/ 7 | |
| Henniker | 37 | 3(2) | JS 4/30 | 1(1) | JS 4/30 | 2(2) | | | JS | 4/30 | |
| Hillsboro | 38 | 3(1) | JS 4/30 | 4(1) | JS 4/30 | 1 | | | JS | 4/30 | |
| Hooksett | 39 | 7 | JS 4/30 | 3 | JS 4/30 | 6 | | | JS | 4/30 | |
| Jaffrey | 40 | 5(2) | JS 5/ 5 | (1) | JS 5/ 5 | (1) | | | JS | 4/29 | |
| Keene | 41 | 23 | JS 5/ 5 | 30 | JS 4/28 | 13 | LM | | JS | 5/ 5 | |
| Laconia | 42 | 9 | TB 5/ 4 | 24 | JH 5/ 4 | 18 | | JH to DV<br>TB | JH | 5/ 4 | |
| Lancaster | 43 | 3(1) | TB 4/30 | 3(1) | | | | | TB | 4/30 | |
| Lebanon | 44 | 11 | CC 5/11 | 12 | TB 5/11 | 11 | CC 5/11 | | DV | 5/ 6 | |
| Littleton | 46 | 3(3) | TB 4/30 | (2) | TB 4/30 | (2) | TB 4/30 | TB | TB | 4/30 | |

| Court | Code | Criminal # Cases | Criminal Name & Date | Civil # Cases | Civil Name & Date | Juvenile # Cases | Juvenile Name & Date | Interviewer | Name | Date | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Manchester | 47 | 71 | JH 4/27 | 29 | TB 4/27 | 85 | JH 4/28<br>DV 5/11 | DV | JH(Crim)<br>TB(Civ) | 4/27<br>4/27 | |
| Merrimack | 48 | 12 | DV/JH 4/29 | 10 | JH 4/29 | 29 | DV 5/12 | DV | DV | 4/29 | |
| Milford | 49 | 5 | JS 4/29 | 17 | JS 4/29 | 9 | DV 5/13 | | JS | 4/29 | |
| Nashua | 50 | 55 | DV 5/ 3 | 32 | DV 5/ 4 | 123 | | | DV | 4/30<br>5/ 3 | |
| New London | 51 | 2(2) | DV/CC 5/ 6 | (2) | CC 5/ 6 | 2(2) | DV 5/ 6 | | CC | 5/ 6 | |
| Newport | 52 | 3 | DV 5/ 6 | 12 | CC 5/ 6 | 10 | CC 5/ 6 | | DV | 5/ 5 | |
| Ossipee | 53 | 5 | TB 5/ 3 | 10 | JH 5/ 3 | 3 | JH 5/ 3 | | JH | 5/ 3 | |
| Peterborough | 54 | 6 | JS 4/29 | 6 | JS 4/29 | 2 | JS 4/29 | JS | JS | 4/29 | |
| Plaistow | 55 | 3 | CB 5/13 | 8 | CB 5/13 | 5 | CB 5/13 | | CB | 4/29<br>4/30 | |
| Plymouth | 56 | 7 | JS 5/13 | 5 | JS 5/ 3 | 3 | | | JS | 5/ 3 | |
| Portsmouth | 57 | 9 | LM 4/29 | 17 | LM 4/29 | 8 | LM 4/29 | | LM | 4/29 | |

| Court | Code | Criminal # Cases | Criminal Name & Date | Civil # Cases | Civil Name & Date | Juvenile # Cases | Juvenile Name & Date | Interviewer | Name | Date | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Rochester | 58 | 4 | JS 5/ 4 | 16 | JS 5/ 4 | 5 | | | JS | 5/ 4 | |
| Salem | 59 | 14 | CB 5/13 | 15 | CB 4/30 | 9 | CB 4/30 | | CB | 4/30 | |
| Somersworth | 60 | | | 8 | JS 5/ 4 | 5 | | | JS | 5/ 4 | |
| Wolfeboro | 61 | 4(4) | TB 5/ 3 | 4(1) | TB 5/ 3 | 3 | JH 5/ 3 | | | | |

# COURT CODES

1 - Criminal
Constant (see Form)
2 - Civil

3- Juvenile

99 Supreme (1)

## Superior (10) (Range 01-10)

01 Belknap
02 Carroll
03 Cheshire
04 Coos
05 Grafton
06 Hillsborough
07 Merrimack
08 Rockingham
09 Strafford
10 Sullivan

## Probate (10) Range 11-20)

11 Belknap
12 Carroll
13 Cheshire
14 Coos
15 Grafton
16 Hillsborough
17 Merrimack
18 Rockingham
19 Strafford
20 Sullivan

## District (41) (Range 21-61)

21 Auburn
22 Berlin
23 Claremont
24 Colebrook
25 Concord
26 Conway
27 Derry
28 Dover
29 Durham
30 Exeter
31 Franklin
32 Goffstown
33 Gorham
34 Hampton
35 Hanover
36 Haverhill
37 Henniker
38 Hillsborough
39 Hooksett
40 Jaffrey
41 Keene
42 Laconia
43 Lancaster
44 Lebanon
45 Lincoln
46 Littleton
47 Manchester
48 Merrimack
49 Milford
50 Nashua
51 New London
52 Newport
53 Ossipee
54 Peterborough
55 Plaistow
56 Plymouth
57 Portsmouth
58 Rochester
59 Salem
60 Somersworth
61 Wolfeboro

## Municipal (18) (Range 71-88)

71 Alton
72 Bethlehem
73 Bristol
74 Canaan
75 Epping
76 Farmington
77 Greenville
78 Hinsdale
79 Loudon
80 Meredith
81 Newmarket
82 Northumberland
83 Pelham
84 Pittsfield
85 Rollinsford
86 Rye
87 Whitefield
88 Wilton

TB - E. Tobias Balivet
CB - Craig Briggs
CC - Claudia Chadwick
JH - Jeanie Helms
JL - Jeffrey Leidinger
LM - Lorraine Moore
BS - Ben Shapiro
JS - Jon Stathakis
DS - David Steelman
DV - Daniel Valluzzi - Data Collection Manager

Attachment F

DISTRICT COURT--CRIMINAL

Docket # ____ - L

Court Code 1 ____

Type of Case ____
1-Misdemeanor
2-Violation

Age of Defendant ____

Date of Offense ____

Offense (RSA) ____ : ____

Type of Prosecution ____
1-Police (State)
2-Police (Local)
3-County
4-AG
5-Lay

Date of Complaint ____

Issuance of Complaint ____
1-Warrant
2-Summons

A. Date of Arraignment ____

Date of Plea (Retraction) ____

Type of Plea
A. ____
B. ____
1-Guilty
2-Not Guilty
3-Nolo
4-No Plea
5-90-A Guilty

Type of Defense ____
1-Assigned/Appointed
2-Retained
3-Public Defender
4-Pro Se
5-Waived

Date of Trial/Hearing ____

Date of Finding/Verdict ____

Type of Verdict ____
1-Convicted
2-Acquitted

Date of Disposition/Sentence ____

Date Case Dismissed ____

Type of Dismissal ____
1-Nolle Pros
2-Court

Pre-Sentence Report Ordered ____
1-Yes
2-No

Appeal Filed ____
1-Yes
2-No

DISTRICT COURT--CRIMINAL

Docket #

[ ][ ][ ][ ][ ][ ] - [2]

Date of Bail

[ ][ ][ ][ ][ ][ ]

Type of Bail

[ ]

1-Professional Bondsman

2-Cash

3-Personal Recognizance (PR)

4-Surety

5-Bail Denied

6-No Bail Set

Failure to Appear/Bail Forf'd

[ ] 1-Yes

Total # of Appearances

[ ]

DISTRICT COURT--CIVIL

Attachment G

Docket # ☐☐☐☐☐☐

Court Code ☐☐☐

Type of Case ☐
1-Small Claims
2-Landlord/Tenant
3-Civil (Contract & Tort)

Plaintiff Type ☐

Plaintiff/ Defendant Type
1-Individual
2-Corporation
3-Professional (Doctor/Lawyer)
4-Other _____

Plaintiff Representation ☐

Plaintiff/ Defendant Representation
1-Counsel
2-Pro Se

Defendant Type ☐

Defendant Representation ☐

Date Initiated ☐☐☐☐☐☐

Date of Service ☐☐☐☐☐☐

Date of Defendant's Response ☐☐☐☐☐☐

Type of Response ☐
1-Appearance
2-Answer
3-Default
4-_____

Preliminary Hearing ☐☐☐☐☐☐

Final Hearing ☐☐☐☐☐☐

Finding/Verdict ☐☐☐☐☐☐

Settlement/Continuation for Settlement ☐☐☐☐☐☐

Formal Disposition ☐☐☐☐☐☐ Type ☐

Final Post-Judgment Event ☐☐☐☐☐☐ Type ☐

Types of Formal Disposition
1-Voluntary Nonsuit by Plaintiff
2-Default Judgment
3-Settlement Approved by Judge (entered on record)
4-Judgment on a Verdict (after trial)
5-Dismissal without Prejudice
6-Dismissal with Prejudice
7-Other _____

Types of Final Events
1-Certificate of Judgment Sought
2-Certificate of Judgment Issued
3-Appeal Taken
4-Writ of Execution Sought
5-Writ of Execution Granted
6-Writ of Execution Returned
7-Other _____

Formal Disposition: ☐

Favorable to:
1-Plaintiff
2-Defendant
3-Both
4-Neither

Initiated by: ☐
1-Plaintiff
2-Defendant
3-Clerk
4-Judge

JUVENILE

Attachment H

Docket # (1–6)

Court Code (7–9): 3

Type of Case (10)
1-Delinquent
2-Pins
3-Neglect
4-Other _____

Age (11–12)

Type of Offense (13–18)

Date of Complaint/Petition (19–24)

Type of Prosecution (25)
1-AG
2-County
3-Police Local
4-Police State
5-Welfare
6-Other _____

Type of Defense (26)
1-Assigned/Appointed
2-Retained
3-Public Defender
4-Pro Se
5-Waived

Date of Initial Appearance/Hearing (27–32)

(33–34)

2nd (35–40)

(41–42)

3rd (43–48)

(49–50)

Type of Action
1-Guardian Ad Litem Appointed
2-Continued Indefinately
3-Temporary Custody
4-Custody Ordered
5-Continued Indefinately on Probation
6-Detention at YDC
7-Community Agency Assigned Sup.
8-Case Filed
9-Case Dismissed

Date of Final Disposition (51–56)

(57–58)

Evaluation Report Ordered (59)
1-Yes
2-No

Date Report Ordered (60–65)

Report Completed By (66)
1-Probation
2-Welfare
3-YDC
4-Community Agency
5-Other _____

Date Report Submitted (67–72)

Type of Report (74)
1-Social History
2-Psychological
3-Other _____

Total # of Appearances (73)

# SUPERIOR COURT--CRIMINAL I

Docket # [ ][ ][ ][ ][ ][ ] – [1]

Court Code [1][ ][ ]

Type of Case [ ]
1-Felony
2-Appeal

Type of Appeal [ ]
1-Misdemeanor
2-Violation

Date of Offense [ ][ ][ ][ ][ ][ ]

Offense (RSA) [ ][ ][ ][ ] : [ ][ ]

Age of Defendant [ ][ ]

Type of Defense [ ]
1-Assigned/Appointed
2-Retained
3-Public Defender
4-Pro Se
5-Waived

Date of Complaint [ ][ ]/[ ][ ]/[ ][ ]

Type of Issuance [ ]
1-Warrant
2-Summons

Date of Bail [ ][ ]/[ ][ ]/[ ][ ]

Type of Bail [ ]
1-Professional Bondsman
2-Cash
3-Personal Recognizance (PR)
4-Surety
5-Bail Denied
6-No Bail Set

Failure to Appear/ Bail Forf'd [ ]
1-Yes
2-No

Type of Prosecution (P.C. Hearing) [ ]
1-County
2-A.G.
3-Other
4-Police (Local)
5-Lay

A. Date of 1st Appearance D.C. (Plea) [ ][ ]/[ ][ ]/[ ][ ]

B. Date of Probable Cause Hearing [ ][ ]/[ ][ ]/[ ][ ]

C. Date of Arraignment/90-A Filing [ ][ ]/[ ][ ]/[ ][ ]

D. Date of Retraction (Plea) [ ][ ]/[ ][ ]/[ ][ ]

Plea at

a. [ ] 1st app.

b. [ ] p.c. hear'g

c. [ ] arraignment

d. [ ] retraction

Type of Plea
1-Guilty
2-Not Guilty
3-Nolo
4-No Plea

SUPERIOR COURT--CRIMINAL II

Docket # [ ][ ][ ][ ][ ][ ] - [2]

P.C. Hearing Waived
[ ]
1-Yes
2-No

Date of Indictment/Information
[ ][ ][ ][ ][ ][ ]

How Processed
[ ]
1-Indictment
2-Information
3-Waived Indictment (Complaint)

Type of Arraignment
[ ]
1-Court Appearance
2-By Mail/90-A

Type of Prosecution (Arraignment)
[ ]
1-County
2-A.G.
3-Other

Date of Trial/Hearing
[ ][ ][ ][ ][ ][ ]

Type of Trial/Hearing
[ ]
1-Jury
2-Court

Date of Finding/Verdict
[ ][ ][ ][ ][ ][ ]

Type of Verdict/Finding
[ ]
1-Convicted
2-Acquitted

Date Case Dismissed
[ ][ ][ ][ ][ ][ ]

Type of Dismissal
[ ]
1-Nolle Pros
2-Court

Date of Disposition/Sentence
[ ][ ][ ][ ][ ][ ]

Appeal Filed
[ ]
1-Yes
2-No

Type of Disposition
[ ]
1-Remand
2-

Probation PSI Ordered
[ ]
1-Yes
2-No

Date PSI Ordered
[ ][ ][ ][ ][ ][ ]

Total # of Appearances
[ ]

Attachment J

SUPERIOR COURT--CIVIL

Docket #

Court Code [2]

Type of Case
1-Tort
2-Contract
3-Equity
4-Marital
5-Appeal

Plaintiff (Type)
1-Corporation
2-Individual

Respondent Representation
1-Counsel
2-Pro Se

Type of Filing
1-Complaint
2-Writ
3-Libel
4-Petition

Date of Filing

Date of Default

Date of Filing Answer/ Appearance*

Date Case Dismissed

Date of Pre-Trial Hearing

Date of Agreement/Settlement*

Date of Trial/Hearing

Type of Trial
1-Jury
2-Court

Date of Finding/Verdict

Date of Judgment

Date of Execution

Was Appeal Filed?
1-Yes
2-No

* If both the date of agreement and date of settlement are listed, use the date of agreement.

## Questionnaires

| | |
|---|---|
| Superior Court Justices | 13 |
| New Hampshire State Prison | 1 |
| YDC | 1 |
| Attorneys | 120 |
| Court Stenographers | 10 |
| Clerks | 24 |
| Registers | 5 |
| Grand Jurors | 32 |
| Probate Court Judges | 7 |
| District Court Judges | 40 |
| Legislators | 200 |
| Probation | 20 |
| Citizens | 500 |
| County Attorneys | 10 |
| House of Correction/City Jails | 12 |
| TOTAL | 1,045 |

## WEIGHTING SCALE FOR SETTING PRIORITIES FOR STANDARDS/ALTERNATIVES

| Rating | Time | Cost | Feasibility |
|---|---|---|---|
| 1 | No Time | No Cost | 80-100% |
| 2 | 0-6 months | $ 50,000 | 60-80% |
| 3 | 6-12 months | $ 50,000 to $250,000 | 30-60% |
| 4 | 12 months | $250,000 | 0-30% |
| 5 | Undetermined | Undetermined | Undetermined |

(Priority ranking based on lowest cumulative score)

DEFINITIONS

TIME - Amount of time to complete implementation

COST - Potential financial costs for: (A) Initial Investment
(B) Operating Cost

FEASIBILITY - Expectation of success based on: political environment; social impact; available resources; organizational impact (personnel, facilities, skills).

IMPORTANCE - Gain to be realized (favorable impact) on justice system.

EXAMPLE

TOPIC AREA: PRE-TRIAL RELEASE

Standard 1.3: Introduce Process of Weekly Review and Bail Reconsideration By The court for Incarcerated Defendants.

Reworded -- Introduce a Process of Weekly Bail Reconsideration By The Court for Incarcerated Defendants.

| Today | Results |
|---|---|
| . Present requirement for motion and scheduling of motion hours - average time 2 weeks (Superior Court) | . Avoid burdensome procedural steps |
| . Average # of days incarcerated pending trial - 4 days misdemeanors and 60 days felonies | . Minimize protracted periods of pre-trial incarceration |
| . Irregular occurrence of motion hearings | . Regularize bail reconsideration process |

ALTERNATIVE APPROACHES:

(1) eliminate motion requirement and conduct weekly reconsideration hearings - responsibility of court - jail list available

(2) maintain present motion requirement - conduct weekly reconsideration hearings

(3) require written request by defendant - weekly hearing held at jail

PRIORITY SCALE

| Approach | Time | Cost | Feasibility | Total |
|---|---|---|---|---|
| 1 | 2 | 2 | 1 | 5 |
| 2 | 1 | 2 | 1 | 4 |
| 3 | 1 | 2 | 2 | 5 |

BENCHMARKS

| 4 mos. | 6-12 mos. | 12 mos. |
|---|---|---|
| draft court rule | 6. pilot project | complete implementation |

Please rank the three most important topic areas and designate which standard you consider most important in each of the topic areas. Use the bottom of this sheet and reverse side for any additional comments and return in the enclosed envelope.

| Rank | | Topic Areas |
|---|---|---|
| ____ | 1.0 | PRE-TRIAL RELEASE<br>Standard _____ |
| ____ | 2.0 | SCREENING AND DIVERSION<br>Standard _____ |
| ____ | 3.0 | PROSECUTION<br>Standard _____ |
| ____ | 4.0 | DEFENSE<br>Standard _____ |
| ____ | 5.0 | GRAND JURY<br>Standard _____ |
| ____ | 6.0 | PLEA BARGAINING<br>Standard _____ |
| ____ | 7.0 | TRIAL PROCEDURES<br>Standard _____ |
| ____ | 8.0 | SENTENCING<br>Standard _____ |
| ____ | 9.0 | PROBATION<br>Standard _____ |
| ____ | 10.0 | APPELLATE PROCEDURE<br>Standard _____ |
| ____ | 11.0 | SPEEDY TRIAL<br>Standard _____ |
| ____ | 12.0 | JUDICIAL SELECTION AND CONDUCT<br>Standard _____ |
| ____ | 13.0 | CONTINUING EDUCATION<br>Standard _____ |
| ____ | 14.0 | PUBLIC EDUCATION AND NEWS COVERAGE<br>Standard _____ |
| ____ | 15.0 | COURT FACILITIES<br>Standard _____ |
| ____ | 16.0 | COURT ORGANIZATION AND ADMINISTRATION<br>Standard _____ |

Comments:

# APPENDIX B

National Center for State Courts

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