PUBLIC REPRESENTATION IN MAINE

VOLUME II: REPORT AND RECOMMENDATIONS

Prepared by:

The Cumberland Legal Aid Clinic

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Maine Criminal Justice Planning and Assistance Agency

NOTE

This proposal (volume I) and report (volume II) were prepared by the Cumberland Legal Aid Clinic of the University of Maine School of Law under a grant from the Maine Criminal Justice Planning and Assistance Agency. The purpose of the grant was to evaluate Maine's assigned counsel system and to recommend any changes deemed necessary.

Except when otherwise indicated, all of the information contained in the subsequent pages was collected by Stephen L. Diamond, Esq., who authored both the proposal and the report under the supervision of Professors Stephen R. Feldman, Judy R. Potter, and Melvyn Zarr of the Law School. As the reader will quickly appreciate, this undertaking could not have been completed without the assistance of numerous persons connected with Maine's court system.

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INTRODUCTION TO THE REPORT

I. Components of the Study.

Briefly stated, the methodology of this study consisted of four different components. These included: 1) The collection of data on assigned counsel cases in Maine; 2) The analysis of questionnaires completed by Maine judges and prosecutors; 3) The examination of defense systems in other jurisdictions; and 4) The research into the writings of authorities in the field, other studies, relevant literature, and case law.

II. Maine Data.

A. Methodology in General.

It was decided at the outset to compile a statistical profile of Maine's assigned counsel system for a period of one year. This encountered immediate problems as a result of inexplicable differences in the time periods for which the various components of the criminal justice apparatus maintain records. For example, the law court and the district court operate according to the fiscal year, the superior court follows the calendar year, and the Office of the Attorney General publishes data from November to November. In the final analysis, calendar year 1973 was chosen as the period to be studied.

For the following reasons, the bills submitted by assigned counsel were selected as the primary source of the data. First, an examination of the bills proved to offer the most direct and most reliable means of locating assigned counsel cases. Second, they were the only records which indicated the amount of compensation paid to the attorney. Third, the District Court Office in Bangor keeps copies of all the bills of appointed lawyers. By contrast, a docket study would have required a visit to the clerk's office of each of the 32 district courts.

Given the above approach, the operative date for inclusion in the study was that on which compensation was paid to the assigned attorney. In other words, the profile contains all cases in which the appointed lawyer was paid in 1973; the few exceptions to this rule will be discussed shortly.

B. District Court Methodology.

Although information was collected for all of the district courts, certain tribunals were selected for a more detailed computer analysis. Included in this computer sample were the tribunals in Caribou, Van Buren, Madawaska, Fort Kent, Presque Isle, Houlton, Bangor, Newport, Rockland, Saco, and Farmington.

As may be noted, the sample covers Districts I,II, and III in their entirety; this resulted from the fact that the original plan was to subject all of the courts to the same scrutiny. The heavy assigned counsel caseload, however, necessitated a modification of this plan.

For the sampled courts, the study completed a fact sheet on each assigned counsel case. These sheets indicated the court, the judge, the amount of compensation, the attorney, and the offense(s) charged. The data was then fed into a computer, which permitted the retrieval of a wide variety of information. For each of the remaining courts, the study complied a list with the name of every appointed attorney along with the number of cases and amount of compensation he received. These statistics, as well as those for the entire system, were collated manually.

Minor problems arose in the course of this survey. At the beginning of 1973, the majority of the courts had a one month time lag between the submission and the payment of the bills (this is now standard procedure). In some tribunals, however, a longer gap existed, and thus, in order to ensure that the study covered the same duration for all of the courts, certain bills had to be excluded even though they were technically paid in 1973. The time lag also accounts for the fact that the compensation was occasionally below the currently prevailing rate, a phenomenon discussed in more detail in the report.

Variations in billing practices also produced some difficulty for the survey. As a rule, attorneys presented one bill for each defendant represented, regardless of the number of charges. Although an infrequent occurrence, some assigned counsel filed separate bills for every charge against a single defendant, which not only produced a higher fee but also tended to distort the data on the number of cases. This problem is also given more elaborate treatment in the report.

C. Superior Court Methodology.

Regarding these tribunals, the study utilized a fact sheet similar to the one developed for the sampled district courts. In addition, it accumulated data on the disposition of assigned counsel cases in all of the superior courts except those located in Aroostook and York counties. The exclusion of case result data from these tribunals stemmed from the fact that the relevant materials were provided by court personnel, in contrast with the customary practice under which the staff attorney personally examined the records. Apart from the disposition data, the information on the fact sheets was programmed into a computer.

To guarantee a meaningful statistical analysis, this study had to formulate a uniform definition of a "case." While this may have been a necessary undertaking in any event, it became indispensible since the variations in billing procedures were greater and more frequent than those encountered in the district courts. Accordingly, the treatment of each bill as a case would not have produced a true picture. It should also be noted that the lack of a standard definition precluded accurate comparisons with other jurisdictions of items such as caseloads and costs per case.

The following definition of a case employed by the study, is essentially the same as that recommended in the proposed fee schedule: "One or more charges against a single defendant arising out of a single set of circumstances; or multiple charges against a single defendant arising out of more than one set of circumstances, if the charges were disposed of in the same proceedings." The application of this definition, however, proved far more difficult than its formulation as a result of two general problems. First, the bills are filed chronologically and are not cross-referred when they pertain to the same case. For reasons that will become apparent, even additional research into the docket books did not always clarify ambiguous situations. Second, certain matters did not fit neatly into the above definition, and in these occasional instances, the study had to use its discretion as to whether the matter constituted one or more cases.

A related difficulty stemmed from the overall state of the court records. Although some attorneys' bills were quite detailed, others gave virtually no information about the case; in an extreme situation, the bill contained neither the docket number nor the name of the defendant. Similarly, an examination of the docket books, usually necessary for the disposition, did not invariably meet with success. The major problems lay in unclear entries and in the failure to cross-refer different docket sheets pertaining to the same case, as when the original indictment was dismissed and the defendant pled to a subsequently filed information. While very rare, there were a few occasions on which the case to which the bill referred could not be found in the docket books even with the assistance of the clerk of courts. Needless to say, these problems complicated and prolonged the collection of the data necessary for an evaluation of the system.

D. Law Court Methodology.

The relevant information on the Law Court was furnished by the Administrative Assistant to the Chief Justice. Since this tribunal was not a focal point of the study, the information consisted only of a list of attorneys appointed in appeals

and habeas corpus proceedings, along with the compensation for each case. As with the other courts, this data included those cases in which the fee was paid in calendar year 1973.

E. General Comments on Court Records.

Although only tangentially related to the subject matter of this study, the record keeping procedures of the courts merit some comment. Simply stated, the records are not designed for easy or effective information retrieval.

In the course of its evaluation, this study utilized a very simple fact sheet for the collection of data. Since most of the data was analyzed by a computer, pursuant to an equally simple program, a wide variety of information could be retrieved. For example, assigned counsel cases could be examined from the perspective of the court, the judge, the attorney, the nature of the offense, and the amount of compensation, as well as for the entire system.

It is submitted that a similar undertaking for all cases might become a continuous feature of the clerical work of at least the superior courts. While the initial design of such an information retrieval system might require time and effort, its execution would not seem particularly onerous. It would presumably involve little more than the completion of an hopefully uncomplicated form at termination of every case. The possible adverse reaction to the additional paperwork should be outweighed by the capability to conduct an ongoing and in-depth evaluation of the court system. Such an innovation seems timely in light of the recent emphasis on court reform, since meaningful reforms require accurate and current information.

III. Questionnaires and Interviews.

In an effort to learn about the actual operation of Maine's assigned counsel system and to assess attitudes toward possible changes, questionnaires were sent to all superior court justices, district court judges, and county attorneys. These questionnaires were of considerable length (the district court questionnaire, for example, ran 15 pages), and covered virtually every aspect of the system. Most of the questions and responses appear in various parts of the report.

Despite the length of the survey, the recipients proved extremely cooperative. Eleven of thirteen superior court justices completed and returned the questionnaires, as did 12 of 19 district court judges, and 10 of 16 county attorneys. In addition, one member of the district court bench was interviewed

at his request. Accordingly, about 71 percent of the judges and county attorneys participated in the survey. Since the answers to particular questions may occasionally total less than the aggregate number of participants, it should be pointed out that some respondents omitted certain questions. This, however, occurred very rarely.

A less systematic approach was taken with respect to private attorneys, who were interviewed at random. Unfortunately, logistical problems limited the number of such interviews and the geographical areas in which they could be conducted. Although valuable input was received from practitioners, this survey was not statewide and could not be said to be representative of the practices and opinions of the bar.

IV. Study of Other Jurisdictions.

While materials were received from at least a dozen other jurisdictions, the study concentrated its attention on the State of Colorado, San Mateo County in California, and the Province of Ontario. These areas were chosen because each represents a highly respected example of a different approach to public defense. Colorado utilizes a statewide public defender system, San Mateo County has an administered assigned counsel system, and Ontario employs the basic features of judicare. While most of the information was received through correspondence and telephone conversations, the Project Director did make on-site visits to the States of Colorado and Nevada.

V. Research into the Literature and Case Law.

Since this facet of the study is largely self-explanatory, it need only be pointed out that special weight was given to the standards promulgated by certain leading authorities in the field. Paramount among these were the American Bar Association and the National Advisory Commission on Criminal Justice Standards and Goals. To a somewhat lesser degree, the report also relied on the recommendations of the National Center for State Courts and the Boston University Center for Criminal Justice. Finally, a considerable amount of material, including forms, was received from the National Legal Aid and Defender Association.[1]

VI. Changes Subsequent to the Completion of the Research.

A potential problem for every study is that significant changes will occur in the subject matter of the study during the interval between the completion of the research and its publication. Most of the empirical research for this report

was carried out in calendar year 1974, and it seems fair to state that there have been no major alterations of Maine's assigned counsel system since that time.[2] It is thus believed that the gap between research and publication has not invalidated any of the findings or recommendations of this report.

FOOTNOTES

[1]The relevant publications of these authorities are cited throughout the report.

[2]As an example of a minor change, one district court recently decided to follow a procedure of strictly rotating assignments among participating lawyers. Whether that procedure will produce a more even distribution of assignments than existed in that court in the past remains to be seen. Even if successful, however, the "strict rotation" approach does not eliminate a basic deficiency in the present method of selecting counsel.

GENERAL DESCRIPTION OF MAINE'S ASSIGNED COUNSEL SYSTEM

I. Method of Operation.

Following a common historical pattern, Maine vests in the judicial branch of government the responsibility for securing legal representation for needy persons accused of crime. The relevant legislation, contained in 15 M.R.S.A. § 810, does little more than authorize the appointment and compensation of counsel.[1]

> ....The Superior Court or District Court may in any criminal case appoint counsel when it appears to the court that the accused has not sufficient means to employ counsel. The District Court shall order reasonable compensation to be paid to counsel by the District Court for such services in the District Court. The Superior Court shall order reasonable compensation to be paid out of the county treasury for such services in the Superior Court.

As was ably pointed out in a recent article by Peter Avery Anderson,[2] the entire burden for the implementation of this right is thus delegated to the judiciary. Seemingly more by default than design, the burden ultimately devolves upon each individual trial judge.

Possibly in response to criticism about the lack of uniformity in the system,[3] the Supreme Judicial Court in 1973 amended the Criminal Rule which deals with the assignment of counsel to include detailed criteria on indigency and compensation. The current version of Criminal Rule 44 lists seven factors which the court "shall" consider to ascertain financial eligibility; similarly, it mandates the consideration of six factors in the fixing of compensation.[4] Although probably intended to simplify the task of the trial judge, the effect of this amendment may be to demonstrate the increased complexity of public representation and to focus attention on the question of whether judges can continue to supervise the system without any assistance.

State decisional law is essentially silent on this subject except to define the parameters of the right to counsel under the Maine Constitution. After various refusals by the United States Supreme Court to extend Gideon v. Wainwright, 372 U.S. 335 (1963), the Supreme Judicial Court of Maine followed the example of other jurisdictions and granted the right to appointed

counsel to "all indigent persons...who are facing criminal charges which might result in the imposition of a penalty of imprisonment for a period of more than 6 months or a fine of more than $500 or both..." Newell v. State, 277 A.2d 731, 738 (Me. 1971). Predicated on the Maine Constitution, Newell theoretically remains in effect notwithstanding the subsequent case of Argersinger v. Hamlin, 407 U.S. 25 (1972). Whether the courts, are, in fact, continuing to apply Newell will be discussed in another section of this report.

Under the rather skeletal format provided by legislative and judicial guidelines,5 it remains for the trial judge to make the system work. Conceptually, the modus operandi is quite simple. When an unrepresented defendant in a criminal case, or an unrepresented juvenile, has his initial court appearance, the judge informs him of his right to appointed counsel. Absent a waiver of this right by the accused, the judicial officer must then determine eligibility. Generally, this entails a finding with respect to the defendant's financial ability to retain an attorney, although in certain misdemeanor cases, it may also require a prediction on the probability that a guilty verdict will result in a jail sentence. Assuming a finding of eligibility, the judge appoints an attorney to represent the accused.

Since most felony, and all misdemeanor and juvenile, cases originate in the district court, that tribunal exercises far greater control than the superior court in the selection of counsel. Even though a district court appointment technically terminates upon arraignment in superior court, the failure of a superior court justice to name the same attorney would, in most cases, be interpreted as a repudiation of that attorney. Accordingly, the superior court justice is under pressure to reappoint the lawyer chosen below. For that reason, an analysis of the selection process, and suggested reforms thereof, must concentrate on the district court.

When all proceedings have been completed in a particular court, the assigned attorney submits a bill to the trial judge who then determines compensation. Apart from the factors set out in Criminal Rule 44, there exist certain fixed financial guidelines. The superior court supposedly reimburses counsel at a rate of $15 per hour for research and preparation and $150 per day for trial; however, numerous complaints by attorneys about variations among the justices lead to the conclusion that these guidelines are subject to considerable judicial discretion. The district court utilizes a fixed fee of $50 per case, which theoretically represents the minimum compensation. In contrast to the alleged inconsistencies among superior court justices, the district court bench is frequently accused of adhering too rigidly to the $50 fee. The law court simply pays a flat rate of $250 for appeals and $150 for habeas corpus proceedings.

The source of funding for assigned counsel varies among the courts. The State underwrites the costs for the law court and the district court, whereas compensation for superior court representation is paid out of the county treasuries. This division is not without at least one seemingly inexplicable idiosyncrasy. Contrary to the practice in all other cases, the county is billed for assigned counsel representation in murder appeals. Curiously, the exact opposite holds true in the prosecution of these cases, since this is the one criminal offense handled exclusively by the Attorney General's Office.

The above description, albeit brief and perhaps over-simplified, demonstrates that the judge bears total responsibility for the assigned counsel system. With little or no assistance, he advises the defendant of his rights, determines eligibility, selects counsel, rules on motions for withdrawal of counsel, authorizes the employment of defense investigators and experts, and sets compensation. In short, he does everything but write the checks. The efficacy of this approach will receive greater scrutiny as the various facets of the system are analyzed.

II. Statistical Profile of the Assigned Counsel System.

To put the system into a meaningful perspective, some caseload and cost statistics are necessary. The following profile is for calendar year 1973; as noted in the introduction, the profile includes all cases for which appointed counsel were compensated in 1973.

A. Caseloads.

There were 2800 assignments in the district court system for calendar year 1973. With the exception of involuntary hospitalization hearings in Augusta and Bangor, the above figure includes civil cases, but these matters constitute only a small percentage of the caseload.

Based upon data for eleven district courts, Table I-1 gives a breakdown of the caseload according to the nature of the offense. It should be noted that for cases involving more than one charge, the case is categorized according to the most serious offense charged.

TABLE I-1

DISTRICT COURT CASELOAD BREAKDOWN

Type of Case	% of Assigned Caseload
Felony	38.7%
Misdemeanor	30.3%
Traffic	6.1%
Juvenile	22.9%
Miscellaneous[6]	2.0%
	100.0%

Some variations exist among the sampled courts. For example, juvenile cases accounted for 11.1 percent of the caseload in Houlton and 45.7 percent of the caseload in Saco.

The superior court system had 1077 assignments in 1973. Eight of the appointed attorneys served as co-counsel, and in three instances the original attorney was replaced. Accordingly, the actual number of assigned counsel cases was 1066.

Based upon data for all the superior courts, Table I-2 indicates the breakdown of the caseload. It should be noted that the nature of the offense could not be determined in 15 cases.[7]

TABLE I-2

SUPERIOR COURT CASELOAD BREAKDOWN

Type of Case	# of Assigned Cases	% of Assigned Caseload
Felony	801	76.2%
Misdemeanor	92	8.8%
Traffic	35	3.3%
Juvenile	44	4.2%
Miscellaneous[8]	79	7.5%
Total	1051	100.0%

Although the above distribution holds true for most of the courts, there are again some variations. For example, Washington County, with 12 juvenile appeals, had 27.3 percent of the statewide total, whereas its overall caseload of 37 represented only 3.5 percent of the statewide total.

A brief look at the felony caseload in the superior court reveals that offenses against property predominate.

TABLE I-3

SUPERIOR COURT FELONY CASELOAD BREAKDOWN

Type of Felony	# of Assigned Cases	% of Assigned Caseload
Offenses against property	449	56.1%
Offenses against the person	205	25.6%
Drug Offenses	94	11.7%
Miscellaneous[9]	53	6.6%
Total	801	100.0%

Within this caseload, 273 cases, or 34.1 percent of the felony total, involved an alleged violation of one of the breaking and entering statutes.[10]

Law court assignments totaled 46 in 1973, 35 of which were for appeals and 11 of which were for habeas corpus proceedings. In addition, there were two cases in which only partial compensation was paid, indicating that either the appeal or habeas corpus petition was withdrawn prior to completion. Not included in the above are the four murder appeals charged to county treasuries.

B. Costs.

The cost figures collected by this study are slightly lower than they would be at present rates. This results from a combination of two factors. First, the district court raised the minimum compensation from $35 per case to $50 per case for all assignments made on or after January 1, 1973. Second, this study encompasses all cases for which compensation was paid in 1973. As a result, it includes a small number of cases assigned in 1972, for which the old rate applied. To make up for this difference, adjusted figures, reflecting current levels of compensation, are indicated in parentheses when necessary.

Aggregate compensation of counsel for all of the courts in 1973 amounted to $373,639 ($377,874). When the approximately $6700 expended for defense investigators and experts is included, the total becomes $380,339 ($384,574). Compensation for each court system in 1973 was as follows: district court - $137,165 ($141,400); superior court - $224,438; and law court - $12,036.[11]

The system also contains a number of hidden expenses which are virtually impossible to compute. For example, personnel in the offices of the clerks of court, county treasurers, and administrative office of the district court participate in the

system to a limited extent. Furthermore, the judicial time consumed by determinations of eligibility, assignment of counsel, and compensation of counsel is extremely relevant for comparative purposes, since these functions are performed by staff attorneys or administrators under other defense delivery plans. In a rough attempt to factor in this time, it would not be unreasonable to estimate the actual cost of the system to have been at least $400,000 in 1973.

C. Percentage of Defendants and Juveniles Eligible for Assigned Counsel.

To assess the importance of public representation, it is necessary to have some idea of the percentage of defendants and juveniles who are eligible for assigned counsel. Accordingly, the judges and county attorneys were asked to estimate this percentage for felony defendants, for persons charged with misdemeanors sufficiently serious to warrant the appointment of counsel, and for juveniles. The average estimates of each group appear in Table I-4.

TABLE I-4

ESTIMATED % OF DEFENDANTS AND JUVENILES ELIGIBLE FOR ASSIGNED COUNSEL

	Average Estimate Re: Felony Defendants	Average Estimate Re: Misdemeanor Defendants	Av. Estimate Re: Juveniles
Superior Court Justices	74.1%	32.3%	____
District Court Judges	61.3%	35.0%	59.2%
County Attorneys	69.3%	53.8%	65.7%

The above table indicates that needy defendants and juveniles are not an incidental facet of Maine's criminal justice system, but rather the major part of it. As a result, the State clearly cannot have an effective criminal justice system without effective public representation.

D. Caseloads and Costs for Each County.

Statewide statistics provide only limited insight into the scope of the assigned counsel system, in that they do not reveal the substantial differences among the courts. Accordingly, Table I-5, organized by county, gives each court's caseload and costs

for 1973 along with the frequency with which the court met. When available, the corresponding figure for 1972 is included.

TABLE I-5

SUPERIOR AND DISTRICT COURT PROFILE (1973)

I. Androscoggin County
- A. Superior Court
  1. No. of assignments: 86
  2. Total compensation: $12,504 ($19,179 in 1972)
  3. Judge-months: 10[12]
- B. Lewiston District Court
  1. No. of assignments: 176
  2. Total compensation: $8,700[13]
  3. Court days: Daily
- C. Livermore Falls District Court
  1. No. of assignments: 23
  2. Total compensation: $1245
  3. Court Days: Wednesday
- D. Superior and District Court Composite
  1. No. of assignments: 285
  2. Total compensation: $22,449

II. Aroostook County
- A. Superior Court
  1. No. of assignments: 78
  2. Total compensation: $12,290
  3. Judge-months: 7
- B. Caribou District Court
  1. No. of assignments: 74
  2. Total compensation: $3,600
  3. Court days: Tues. & Thur.
- C. Van Buren District Court
  1. No. of assignments: 10
  2. Total compensation: $455
  3. Court days: Friday
- D. Madawaska District Court
  1. No. of assignments: 13
  2. Total compensation: $620
  3. Court days: Monday
- E. Fort Kent District Court
  1. No. of assignments: 17
  2. Total compensation: $835
  3. Court days: Wednesday
- F. Presque Isle District Court
  1. No. of assignments: 81
  2. Total compensation: $3955
  3. Court days: Tues.Wed. & Fri.
- G. Houlton District Court
  1. No. of assignments: 72
  2. Total compensation: $3533
  3. Court days: Mon. & Thur.
- H. Superior and District Court Composite
  1. No. of assignments: 345
  2. Total compensation: $25,288

III. Cumberland County
- A. Superior Court
  1. No. of assignments: 244
  2. Total compensation: $50,014
  3. Judge-months: 22
- B. Portland District Court
  1. No.of assignments: 645
  2. Total compensation: $31,715
  3. Court days: Daily (2 judges)
- C. Brunswick District Court
  1. No. of assignments: 77
  2. Total compensation: $3830
  3. Court days: Tues. & Thur.
- D. Bridgton District Court
  1. No. of assignments: 33
  2. Total compensation: $1455
  3. Court days: Wednesday
- E. Superior & Dist. Court Composite
  1. No. of assignments: 999
  2. Total compensation: $87,014

IV. Franklin County
- A. Superior Court
  1. No. of assignments: 24 (29 in 1972)
  2. Total compensation: $3,759 ($4,845 in 1972)
  3. Judge-months: 2
- B. Farmington District Court
  1. No. of assignments: 58
  2. Total compensation: $2780
  3. Court days: Tues. & Thur.
- C. Superior & Dist. Court Composite
  1. No. of assignments: 82
  2. Total compensation: $6539

V. Hancock County
- A. Superior Court
  1. No. of assignments: 20 (16 in 1972)
  2. Total compensation: $6,484 ($2,752 in 1972)
  3. Judge-months: 5
- B. Ellsworth District Court
  1. No. of assignments: 22
  2. Total compensation: $1,055
  3. Court days: Mon. & Thur.
- C. Bar Harbor District Court
  1. No. of assignments: 10
  2. Total compensation: $445
  3. Court days: Wednesday
- D. Superior and Dist. Court Composite
  1. No. of assignments: 52
  2. Total compensation: $7984

VI. Kennebec County
- A. Superior Court
  1. No. of assignments: 141
  2. Total compensation: $25,237
  3. Judge-months: 18
- B. Augusta District Court
  1. No. of assignments: 138 1/4
  2. Total compensation: $6680
  3. Court days: Mon. Wed. (PM) Thur. and Friday
- C. Waterville District Court
  1. No. of assignments: 75
  2. Total compensation: $3767
  3. Court days: Tues. Wed. (AM) and Friday
- D. Superior and Dist. Court Composite
  1. No. of assignments: 354
  2. Total compensation: $35,684

VII. Knox County
- A. Superior Court
  1. No. of assignments: 40 (41 in 1972)
  2. Total compensation: $8315 ($6,104 in 1972)
  3. Judge-months: 6
- B. Rockland District Court
  1. No. of assignments: 116
  2. Total compensation: $5743
  3. Court days: Mon. and Wed.
- C. Superior & Dist. Court Composite
  1. No. of assignments: 156
  2. Total compensation: $14,058

VIII. Lincoln County
- A. Superior Court
  1. No. of assignments: 23 (25 in 1972)
  2. Total compensation: $3485 ($3116 in 1972)
  3. Judge-months: 4
- B. Wiscasset District Court
  1. No. of assignments: 58
  2. Total compensation: $2720
  3. Court days: Tues. (AM) & Thur. (AM)
- C. Superior and Dist. Court Composite
  1. No. of assignments: 81
  2. Total compensation: $6205

IX. Oxford County
- A. Superior Court
  1. No. of assignments: 36 (28 in 1972)
  2. Total compensation: $6,720 ($5,372 in 1972)
  3. Judge-months: 6
- B. South Paris District Court
  1. No. of assignments: 33
  2. Total compensation: $1675
  3. Court days: Tues. & Fri.
- C. Rumford District Court
  1. No. of assignments: 38
  2. Total compensation: $1945
  3. Court days: Mon. & Thur.
- D. Superior & Dist. Court Composite
  1. No. of assignments: 107
  2. Total compensation: $10,340

X. Penobscot County
- A. Superior Court
  1. No. of assignments: 182
  2. Total compensation: $47,087
  3. Judge-months: 16
- B. Bangor District Court
  1. No. of assignments: 284 1/4
  2. Total compensation: $13,941
  3. Court days: Daily (with 2 judges 4 days out of the week)

C. Newport District Court
1. No. of assignments: 42
2. Total compensation: $2055
3. Court days: Wed.

D. Lincoln District Court
1. No. of assignments: 33
2. Total compensation: $1650
3. Court days: Tues. & Fri. (PM)

E. Millinocket District Court
1. No. of assignments: 12
2. Total compensation: $600
3. Court days: Wed. & Fri. (AM)

F. Superior and District Court Composite
1. No. of assignments: 553
2. Total compensation: $65,333

XI. Piscataquis County

A. Superior Court
1. No. of assignments: 14 (16 in 1972)
2. Total compensation: $3094 ($2600 in 1972)
3. Judge months: 4

B. Dover-Foxcroft District Court
1. No. of assignments: 45
2. Total compensation: $2220
3. Court days: Mon. & Thur.

C. Superior & Dist. Court Composite
1. No. of assignments: 59
2. Total compensation: $5314

XII. Sagadahoc County

A. Superior Court
1. No. of assignments: 17 (9 in 1972)
2. Total compensation: $4500 ($2006 in 1972)
3. Judge-months: 4

B. Bath District Court
1. No. of assignments: 67
2. Total compensation: $3,203
3. Court days: Tues. (PM) & Thur. (PM)

C. Superior and District Court Composite
1. No. of assignments: 84
2. Total compensation: $7703

XIII. Somerset County

A. Superior Court
1. No. of assignments: 47 (42 in 1972)
2. Total compensation: $9,698 ($6,192 in 1972)
3. Judge-months: 6

B. Skowhegan District Court
1. No. of assignments: 114
2. Total compensation: $5,483
3. Court days: Mon. & Wed.

C. Superior & Dist. Court Composite
1. No. of assignments: 161
2. Total compensation: $15,181

XIV. Waldo County

A. Superior Court
1. No. of assignments: 20 (40 in 1972)
2. Total compensation: $4,550 ($9,859 in 1972)
3. Judge-months: 4

B. Belfast District Court
1. No. of assignments: 45
2. Total compensation: $2,265
3. Court days: Tues. & Fri.

C. Superior & District Court Composite
1. No. of assignments: 65
2. Total compensation: $6,815

XV. Washington County

A. Superior Court
1. No. of assignments: 37 (36 in 1972)
2. Total compensation: $4,199 ($6,018 in 1972)
3. Judge-months: 6

B. Calais District Court
1. No. of assignments: 74
2. Total compensation: $3475
3. Court days: Tues. & Thur.

C. Machias District Court
1. No. of assignments: 40
2. Total compensation: $1,865
3. Court days: Mon. Wed. & Fri. (AM)

D. Superior & District Court Composite
1. No. of assignments: 151
2. Total compensation: $9,539

XVI. York County
 A. Superior Court
  1. No. of assignments: 68
  2. Total compensation: $22,502
  3. Judge-months: 17
 B. Saco District Court
  1. No. of assignments: 127
  2. Total compensation: $6345
  3. Court days: Mon. & Thur.
 C. Sanford District Court
  1. No. of assignments: 101
  2. Total compensation: $4,950
  3. Court days: Wed.
 D. Kittery District Court
  1. No. of assignments: 47
  2. Total compensation: $2,360
  3. Court days: Tues. & Fri.
 E. Superior & Dist. Court Composite
  1. No. of assignments: 343
  2. Total compensation: $36,157

FOOTNOTES

[1]There are also specific statutes which authorize the appointment of counsel in certain types of civil proceedings. See, e.g., 34 M.R.S.A. § 2334 (civil involuntary hospitalization) and 15 M.R.S.A. § 104 (petition for release from institution for mentally ill by person committed as a result of an acquittal on basis of mental disease or defect). Similarly, Danforth v. Dept. of Health and Welfare, 303 A.2d 797 (Me. 1973), establishes the right to appointed counsel for parents at a hearing on a petition by the State to take custody of a minor child.

[2]Anderson, Defense of Indigents in Maine: The Need for Public Defenders, 25 Maine L. Rev. 1 (1973).

[3]Id.

[4]The text of the relevant provisions of Criminal Rule 44 is contained in the sections on financial eligibility and compensation of counsel, infra.

[5]Needless to say, federal court decisions also bear on certain aspects of the right to counsel. These will be discussed as they become relevant.

[6]Miscellaneous includes revocation of probation hearings; extradition proceedings; representation of witnesses; civil cases; etc.

[7]As with the district court, when a case involved more than one charge, it is categorized according to the most serious offense.

[8]Miscellaneous includes revocation of probation; partial representation, such as at bail hearings or on pre-trial motions; habeas corpus actions; representation of witnesses or for purposes of immunity; petitions for release from a mental institution; contempt charges; and civil cases. It also includes four murder appeals, since compensation in those cases was paid by the county.

[9]Miscellaneous includes escapes; perjury; bookmaking; etc.

[10]17 M.R.S.A. §§ 751, 754, and 2103.

[11]This figure reflects the amount expended for the services of counsel. It does not include other costs borne by the State,

such as those incurred in the preparation of the record.

[12]A judge-month is defined as a single judge holding court for one month. Thus, if two judges sat for one month, it would be counted as two judge-months. Whereas the other components of the Table pertain to 1973, this item was taken from the 1974 superior court schedule.

[13]This represents the actual compensation paid in 1973. As noted in the text, the figures for the district courts may be slightly under-stated, in light of the fact that some of the bills were paid at the old rate of compensation.

[14]The caseload figure does not include involuntary hospitalization hearings.

FINANCIAL ELIGIBILITY

I. Policy on Financial Eligibility.

Although inherent in every system of public representation, financial eligibility has proven an elusive concept to articulate and to implement. The reason probably lies in the difficulty of formulating a working definition that does not raise more questions than it answers. Even the shift in parlance away from "indigency" and toward "need"[1] as the basic criterion requires the eligibility determiner to translate a vague concept into a real-life decision.

Maine has not escaped the problems connected with the articulation of an eligibility standard. Under the version of Criminal Rule 44 in effect until March 1, 1973, an attorney was to be appointed if the defendant did not have "sufficient means to employ counsel." In a laudable attempt to elaborate on financial eligibility, the Supreme Court of Maine amended Rule 44 to include the following definition of its basic test: "A defendant does not have sufficient means with which to employ counsel if his lack of resources effectively prevents him from retaining the services of competent counsel." Apart from the insertion of "effectively" and "competent," which are of dubious value in clarifying the test, the statement would seem a perfect tautology. The adroit use of synonyms, such as "resources" for "means" and "retain" for "employ," does not really add substantive content.

In fairness to the Court, Rule 44 (b) lists seven factors which are to be considered in the determination of indigency. Since these will be discussed elsewhere, suffice it to observe that these factors fall short of a policy on financial eligibility. The Rule lacks guidance on how to interpret and weigh the various criteria, some of which are extremely subjective. For example, "the living expenses of the defendant and his dependents," does not indicate what expenses are allowable, nor does it even intimate whether the defendant's family is entitled to mere physical survival or something more. After consideration of all the factors, the decision would seemingly still depend on the personal philosophy of the judge.

Assuming a specific definition of financial eligibility to be unatainable, the same does not apply to general policy guidelines. Thus, the American Bar Association advocates the following standard on eligibility: "Counsel should be provided to any person who is financially unable to obtain adequate representation without substantial hardship to himself or his family."[2] Although imprecise as a test, the standard at least establishes the policy that public representation is to be afforded whenever substantial hardship would otherwise occur. This policy has been endorsed by

other organizations, such as National Advisory Commission, with additional commentary to assist the eligibility determiner in applying it to the case at hand.[3]

In an admittedly unscientific attempt to guage the significance of the "hardship" factor in Maine and to ascertain the extent of uniformity in the judicial philosophy on eligibility, the superior and district court questionnaires included the question:

> Which of the following definitions is closer to your interpretation of "indigency" for purposes of deciding whether to appoint counsel? (Circle one)
>
> a) The defendant is financially unable to obtain private counsel.
>
> b) The defendant is unable to obtain private counsel without substantial financial hardship to himself or his family.

Six superior court justices and seven district court justices circled "a," whereas five members of each court selected "b."[4] In short, the judiciary was rather evenly divided on the appropriate definition.

The federal courts have established that eligibility for public representation does not require total destitution.[5] Many jurisdictions, however, have gone beyond this pronouncement, if only to promulgate broad policy guidelines.[6] By contrast, the Maine courts deal with the problem on an ad hoc basis, leaving it to each judge to develop a personal policy on when counsel should be appointed. The responses to the above question, moreover, suggest that these policies may vary considerably and that "indigency" may not mean the same thing to different judges. Notwithstanding the necessity that someone make the decision in each case, the importance of the decision and the desirability of uniform implementation lead to the conclusion that either the legislature or the judiciary should establish policies on financial eligibility for assigned counsel.

II. Eligibility Factors in General.

Criminal Rule 44 (b) enumerates the factors to be considered in deciding the defendant's eligibility for assigned counsel.

> (b) Determination of indigency. The court shall determine whether a defendant has sufficient means with which to employ counsel and in making such determination may examine the defendant under oath concerning his financial resources. A defendant does not have sufficient means with which to employ counsel

> if his lack of resources effectively prevents him from retaining the services of competent counsel. In making its determination the court shall consider the following factors: the defendant's income, the defendant's credit standing, the availability and convertability of any assets owned by the defendant, the living expenses of the defendant and his dependents, the defendant's outstanding obligations, the financial resources of the defendant's parents if the defendant is an unemancipated minor residing with his parents, and the cost of retaining the services of competent counsel.

As noted above, however, the Rule offers no guidance on how to interpret the relevant financial information.

When asked what factors, apart from the defendant's salary, real property, and personal property, they consider in determining indigency, the responses of the judges varied. The one item to appear on more than half of the questionnaires was a reference to dependents or family status. "Outstanding liabilities," which Rule 44 (b) mandates as a consideration, was mentioned, either explicitly or implicitly,[7] by only 36 percent of the respondents. Some judges placed heavy emphasis on the defendant's possibilities for employment, including the "sincerity of attempt to find work." Only one alluded to the usual cost of retained counsel along with "apparent efforts of defendant to obtain counsel subsequent to arrest." Three judges stated that they do not consider any factors other than those listed in the question.

Perhaps indicative of the subjectivity which often underlies the ultimate decision, a superior court justice included "intangible factors" in his response. This position was shared by another member of the bench, who, in a personal interview, asserted that a judge "develops an instinct" with respect to the ability of the defendant to afford counsel. At the other end of the spectrum, a number of district courts have adopted their own formulas to test eligibility. One judge defines an indigent as a person whose annual income does not exceed $3,000 plus $1,000 for his spouse and $750 for each dependent. Another simply ascertains whether the accused has cash available in the amount of $50 or more, while a third utilizes the income guidelines of Pine Tree Legal Assistance, Inc. in close cases.

Their answers demonstrate that different judges rely upon different factors to determine financial eligibility for public representation, and these do not necessarily conform to the items enumerated in the court rules. Even if Rule 44 (b) eventually brings about standardized areas of inquiry, the

interpretation of the results of the inquiry turns essentially upon the opinion of the eligibility determiner in the given case. Although difficult to measure scientifically, such an idiosyncratic system does not seem conducive to uniform results; whether the decisions of individual judges are internally consistent is also subject to doubt.

III. Specific Eligibility Factors.

Variations among defendants and lack of records render empirical research into financial eligibility a difficult task. The following questions endeavor to overcome this problem by asking judges to respond to specific fact situations. The questions suffer the shortcomings of a one-dimensional approach, but the creation of hypothetical defendants, with complete financial and legal histories, would not only have encountered problems of length, but would also have prevented the assessment of the importance of any given factor.

> If the defendant is not an unemancipated minor, do you inquire into the financial resources of the defendant's parents?_____ Spouse?_____ Other close relatives?_____ Would you appoint counsel if any of the above were able to afford private counsel for the defendant?_____

TABLE II-1

INQUIRY INTO FINANCIAL RESOURCES

	Parents	Spouse	Other Relatives	Would Appoint
Superior Court Justices				
Yes	3	1	0	7
No	6	9	11	1
Other	1	1	0	3
District Court Judges				
Yes	4	10	1	2
No	8	2	10	4
Other	0	0	1	6

The three superior court justices listed under "other"[8] with respect to appointment all gave qualified negative responses. Two said that they would not appoint if the parents could afford counsel, whereas the third limited his answer to the spouse of the accused. A number of the district court judges in this category indicated uncertainty as to the ultimate decision.

The above table reveals general concurrence within each court level except as pertains to the parents of the accused. More significant, however, is the completely opposite opinions of the superior court justices and the district court judges on the relevance of the financial resources of the defendant's spouse. In addition, members of the district court judiciary seem somewhat more inclined to refuse public representation in at least certain instances where persons other than the defendant have the capability to afford retained counsel.

Would you appoint counsel for a defendant who could not afford to retain counsel unless:

a) he sold his automobile which he used in his employment?_____
b) he sold his family's residence?_____
c) he used property which he would otherwise need to obtain his release on bail?_____ Would you appoint counsel if the cash or property to be used for bail belonged to someone other than the defendant?_____

TABLE II-2

WILLINGNESS TO APPOINT IN SPECIFIC SITUATIONS

	Sale of Automobile	Sale of Residence	Use of Bail Money	Use of Another's Money for Bail
Superior Court Justices				
Yes	9	6	6	9
No	0	1	3	1
Other	2	4	1	1
District Court Judges				
Yes	10	8	2	8
No	1	2	9	1
Other	1	2	1	3

Regarding the defendant's residence, a number of the judges asserted that it would depend upon his equity and the possibility of securing a mortgage.

The results of the preceding question are also mixed, with glaring differences of opinion on the issue of bail. Most of the district court judges would apparently deny counsel to persons with the funds necessary to obtain their release. Despite the appearance of agreement on some factors, it bears

noting that extreme viewpoints exist, as demonstrated by one questionnaire which indicated that the respondent would find the defendant ineligible in each of the above situations.

> Would you appoint counsel for an unemployed defendant, released on bail, who in your opinion is capable of working and of thus affording counsel? _____

TABLE II-3

WILLINGNESS TO APPOINT DESPITE APPARENT ABILITY TO WORK

	Yes	No	Other
Superior Court Justices	8	2	1
District Court Judges	5	5	2
Total	13	7	3

On the apparent ability of the defendant to work, there is a split not only between court levels, but also within the district court.

Putting aside the substance of the questions, the responses disclose sufficient disagreement to conclude that Maine judges do not follow a uniform approach to the problem of financial eligibility for appointed counsel. To be sure, one could argue with the implied premise that uniformity is important, but such an argument would rest upon the dubious proposition that the existence of a constitutional right may vary from day to day depending upon the identity of the presiding judge. Furthermore, some of the above questions raise substantial issues; it has been suggested, for example, that "the constitution itself may require that the financial resources of relatives not be treated as precluding the provision of counsel."[9]

IV. Procedures for Determining Eligibility.

The efficacy of eligibility standards obviously depends upon adequate procedures to acquire the information necessary for an accurate and fair decision. The only formal statement on the mechanics for obtaining this information is contained in Rule 44 (b), which provides that the court "may examine the defendant under oath concerning his financial resources." The limitations of this approach are apparent from the skepticism expressed by judges and lawyers about the truthfulness of defendants seeking public representation. For example, one judge, who stated that he would appoint counsel for an accused released on bail with funds furnished by someone else, added the following

observation: "If I were certain the cash belonged to someone else, but that is the usual story." A more elaborate, but equally skeptical, picture was painted by a county attorney,

> Obviously a large percentage of defendants are court wise. They dispose of property prior to court, they fail to disclose property, and they fail to disclose the ability to obtain funds.

Based upon figures supplied by judges, the average inquiry to determine indigency takes about five minutes in the district court and ten minutes in the superior court. Variations among judges run from a low of two minutes for an average inquiry to a high of fifteen minutes. These figures are not dissimilar from those reported by the Cumberland Legal Aid Clinic. In contrast with judicial practice, however, the Clinic requires the completion of an intake form and analyzes the information according to a standardized eligibility formula.

The questionnaires also reveal that almost exclusive reliance is placed upon the assertions of the accused. The majority of district court judges and about half of the superior court justices, moreover, do not put the defendant under oath for purposes of this examination. With respect to other means for determining eligibility, the judges were asked to estimate the percentage of cases, involving a claim of indigency, in which they use the following procedures to decide the validity of the claim: 1) examine or receive information from persons other than the defendant; 2) hear testimony or receive information in opposition to the defendant's claim of indigency; 3) require corroboration of the defendant's claim; 4) require some investigation of the defendant's claim. The following table sets out the average percentage of cases for each court level in which these procedures are utilized.

TABLE II-4

PERCENTAGE OF CASES IN WHICH VARIOUS ELIGIBILITY PROCEDURES ARE USED

		Superior Court	District Court
(1)	Receive information from other persons	22%	16%
(2)	Hear testimony in opposition	4%	2%
(3)	Require corroboration	11%	4%
(4)	Require investigation	7%	3%

Insofar as these figures represent averages, it bears noting that certain of the above procedures are not utilized at all in some courts. For example, seven of the eleven responding superior court justices indicated that they never require corroboration; the average estimate of 11 percent results primarily from one justice who demands it in 90 percent of the cases.

To the extent that information is received from persons other than the defendant, the most frequent sources would appear to be the police and the prosecutors. Some county attorneys report that they have had occasion to investigate or oppose a claim of indigency. In addition, more than half stated that the judges seek the assistance of the prosecutor or the police. The practice seems most prevalent in rural areas where the likelihood of familiarity with the defendant is greatest.

It has been suggested that the inquiry on eligibility may involve self-incriminating testimony by the defendant.[10] This might occur, for example, in a prosecution for failure to support dependents in which ability to provide constitutes a precondition of criminal liability.[11] When queried on this issue, the majority of Maine judges said that they have never encountered the problem. Those few who replied affirmatively, moreover, did not seem to feel that the defendant's answers in the eligibility inquiry would have a prejudicial effect on the case because the judge could ignore any incriminating statements. Despite the difficulty of disproving this contention, its acceptance presupposes great faith in ones ability to disregard potentially vital information.

V. Adequacy of Eligibility Procedures.

In light of the above discussion, it is perhaps not surprising that the majority of judges and county attorneys believe the method of determining eligibility to be inadequate. Their responses to the question of whether the procedures presently in use give the court sufficient information for a truly accurate decision on indigency are set out below.

TABLE II-5

WHETHER PRESENT PROCEDURES ARE ADEQUATE TO DETERMINE ELIGIBILITY

	Yes	No	Usually
Superior Court Justices	3	7	1
District Court Judges	6	5	1
County Attorneys	2	6	1
Total	11	18	3

One county attorney answered affirmateively for the superior court and negatively for the district court.

Among those who believe that the courts receive insufficient information, there exists unanimity of opinion that the system usually errs on the defendant's behalf.

> In general, what is your opinion of the present system for determining eligibility for assigned counsel? (Circle one)
>
> (a) far too lenient; (b) too lenient; (c) about right; (d) too strict; (e) far too strict; (f) no opinion

TABLE II-6

OPINIONS ON PRESENT ELIGIBILITY SYSTEM

	(a)	(b)	(c)	(d)	(e)	(f)
Superior Court Justices	2	5	4	0	0	0
District Court Judges	0	5	6	0	0	1
County Attorneys	1	5	3	0	0	0
Totals	3	15	13	0	0	1

One county attorney stated that the system is about right in the superior court, but too lenient in the district court.

Although various reasons were cited for the apparent leniency in determining whether to appoint counsel, many of the explanations suggest the same general conclusion, namely, that the assigned counsel system is not designed to deal effectively with the problem. In this vein, both judges and county attorneys ascribed the deficiencies of the present system to lack of judicial time, caused partially by the pressure of heavy caseloads, and to the unavailability of investigative resources. Some also mentioned the absence of guidelines on eligibility.

A different sentiment expressed in certain questionnaires was that the fault lies more with the judges than with the system. Members of the bench were criticized for their failure to probe deeply enough into the defendant's resources and for their willingness to accept all assertions of inpecunity. One county attorney intimated that the questions asked in the inquiry are often "leading," in that they indicate to the accused the answers most likely to secure public representation. According to a more extreme view, certain courts never reject a claim of indigency.[12] A prosecutor attributed this attitude to the fear of reversal on appeal and adverse publicity.

Dissatisfaction with current procedures is also demonstrated by the overwhelming receptivity of judges toward possible changes. More than half of those surveyed felt that precise guidelines on eligibility are necessary, while 74 percent agreed that a preliminary investigation of the defendant's financial situation, by someone other than the judge, would assist the courts in determining indigency. The most enthusiastically received suggestion, that all persons who claim indigency fill out an information form, was endorsed by 83 percent of the respondents. A number of judges emphasized, moreover, that the form should be completed under oath.

There is little doubt, then, that the courts frequently lack sufficient information about the defendant on which to base a determination of eligibility. Even with the facts available, many judges appear uncertain how to apply them to the issue of indigency, given the absence of objective standards. Under these conditions, a judge might well adopt the policy of appointing counsel in virtually all cases, for it would be difficult to have any confidence that an adverse determination would be sustained on appeal. Although the dearth of information on defendants renders it impossible to ascertain the magnitude of the problem, one district court judge estimates that errors may occur in 50 percent of the cases.

> Word quickly spreads and everyone wants court-appointed counsel. If the courts had someone who could check these stories out we could eliminate about one-half the appointments.

For purposes of perspective, it should be pointed out that not all attorneys share the belief that erroneous decisions on eligibility always benefit defendants. Since some judges resent what they see as the exploitation by defendants of the right to appointed counsel, it is not inconceivable that they overreact on occasion. In either case, the majority of those connected with the criminal justice system concede the existence of a problem, and the only question, to be taken up later, is whether workable solutions can be found which do not entail excessive costs.

VI. Contribution and Reimbursement.

The area of financial eligibility has been complicated in recent years by the growing belief that needy defendants, in certain situations, should be required either to contribute to the cost of their defense or to make reimbursement. The impetus behind the contribution requirement seemingly lies in two very diverse objectives. The first seeks to expand the right to appointed counsel to include persons who can afford part, but

not all, of the costs of their defense. The second goal is simply to reduce the burden on the taxpayer; this argument applies only to the extent that counsel would have been appointed for marginal defendants in any event. With respect to reimbursement, its use is motivated largely by financial considerations.

Criminal Rule 44 (b) authorizes the courts to condition the appointment of counsel on contribution by the defendant.

> If the court finds that the defendant has sufficient means with which to bear a portion of the expense of his defense, it shall appoint competent counsel to represent the defendant but may condition its order on the defendant's paying to the court a specified portion of the counsel fees and costs of defense. When such a conditional order is issued the court shall file a decree setting forth its findings.

A literal reading of the rule might suggest that the appointment of counsel does not become effective until the defendant makes the required payment to the court. As will be discussed subsequently, however, there is much judicial uncertainty over the means by which contribution should be enforced.

In practice, partial payment by the defendant has yet to receive widespread usage in Maine. Many judges and county attorneys indicate that contribution is never required in their courts; others estimate that it is made a condition of the appointment in about 5 percent of the assigned counsel cases. To some extent, the infrequency with which part payment is ordered may result from the fact that most persons in need of appointed counsel have no money to contribute. Apart from this possibility, however, there can be little doubt that shortcomings in Maine's assigned counsel system bear some responsibility for the limited implementation of the contribution requirement. These shortcomings include the lack of clarity of Rule 44 (b) and the absence of procedures necessary to make effective use of it.

Assuming the court's own rules should be the least likely source of confusion for the judiciary, the results of the following question are somewhat surprising.

> Is Rule 44 (b) sufficiently clear as to the mechanics for requiring payment by the defendant?

TABLE II-7

CLARITY OF RULE 44 (b) ON CONTRIBUTION REQUIREMENT

	Yes	No
Superior Court Justices	6	5
District Court Judges	7	5
Total	13	10

With almost half the judges of each court uncertain about the methods of effecting part-payment, the entire concept clearly needs amplification.

This conclusion is borne out by another question put to members of the bench, which asked what procedures are available to enforce payment when the defendant fails to comply with the court order. Some judges answered "none," some stated "none that are effective," whereas others were simply unsure whether any such procedures exist. A rather common answer was revocation of probation, but that applies only when the defendant is found guilty and when probation is a suitable sentence. Contempt, civil judgment, and removal of counsel were also mentioned, although it appears from the questionnaires that these remedies have rarely, if ever, been employed.

As with indigency in general, there is a paucity of information available to the eligibility determiner in rendering a decision on contribution. Since the judge must ascertain the precise amount the accused can afford, this decision requires an even more detailed picture of the defendant's financial situation. The finding that the eligibility procedures are inadequate in this regard applies, a fortiori, to the question of part payment. This view is shared by a majority of judges.

Despite the absence of a statute or court rule on reimbursement, this practice may be somewhat more common than part-payment. The few judges who specifically state that they have ordered defendants to repay the cost of counsel all make repayment a condition of probation. Although exact figures are not available, only one superior court justice appears to utilize this approach with any regularity; he estimates that 25 percent of the persons he places on probation are ordered to reimburse the county for the cost of counsel.[13] In no instance, however, has he revoked probation for failure to comply with this condition. Whether the few judges who utilize probation as a means to recoup counsel fees follow the procedural safeguards recently articulated in Fuller v. Oregon, 417 U.S. 40 (1974), was not determined by this study.[14]

Contribution and reimbursement, then, do not play a significant role in Maine's assigned counsel system. Assuming the accuracy of the view that the system is excessively lenient on eligibility, the option to require contribution may not be necessary to expand the right to appointed counsel. From a financial perspective, the impact is minimal. In this regard, the prevailing rate of compensation of $50 in the district court hardly justifies elaborate procedures to recoup a portion of the fee. If, however, Maine defendants receiving public representation do have the capacity to pay part of the costs, compensation levels might be increased without a commensurate increase in the burden on the taxpayer.

FOOTNOTES

[1]See ABA Standards Relating to Providing Defense Services (Approved Draft 1968) at 53 (hereinafter cited as ABA).

[2]Id.

[3]National Advisory Commission on Criminal Justice Standards and Goals, Courts, (1973) at 257 (hereinafter cited as NAC).

[4]Two of the judges who circled "a" commented that definition "b" was ambiguous.

[5]See LaFrance, Criminal Defense Systems for the Poor, 50 Notre Dame Lawyer 41, 80 (1974) and Anderson, supra, at 7.

[6]See NAC at 258.

[7]"Implicitly" refers to a justice whose response to the question was "Set by Maine Rules of Criminal Procedure."

[8]Unless indicated to the contrary, the answers categorized under "other" include: "not sure," "maybe," "occasionally," and "sometimes."

[9]ABA at 54.

[10]See, e.g., Silverstein, Defense of the Poor, (1965) at 115.

[11]19 M.R.S.A. § 481.

[12]This observation was offered by a superior court justice, as well as by some county attorneys.

[13]The actual number of reimbursement orders would probably be quite small, since the justice in question heard only 44 assigned counsel cases in 1973. It should be remembered that some of those cases undoubtedly resulted in acquittals or in sentences other than probation. Accordingly, the number of reimbursement orders would amount to only 25 percent of the remaining cases.

[14]The Court referred with approval to three safeguards contained in the Oregon repayment statute. First, a requirement of

repayment may be imposed only upon a convicted defendant. Second, a court may not order a convicted person to pay costs unless he is or will be able to pay them. Third, a convicted person under an obligation to repay may at any time petition the court which sentenced him for remission of the payment of costs or of any unpaid portion thereof.

RECOMMENDATIONS ON FINANCIAL ELIGIBILITY

Most of the Project's recommendations on the determination of financial eligibility have already been put forth in its proposal for a combined public defender-coordinated assigned counsel system. Accordingly, this report will focus on the reasons for those recommendations.

I. Determination by Staff Attorneys.

There have been a sufficient number of studies over the past decade to justify the conclusion that unadministered assigned counsel systems do not produce accurate decisions on financial eligibility.[1] The pervasiveness of the problem indicates that the fault lies more with the system than with the judiciary.

Essential to finding a solution is the abandonment of the all too common notion that small changes will bring about large improvements. It must be acknowledged that eligibility decisions may often, albeit not always, involve complex questions. There may be questions of fact, necessitating an investigation of the defendant's financial situation, or questions of law or public policy. In addition, the trend away from a strict indigency standard and toward alternative dispositions, as evidenced by the increased use of contribution, reimbursement, and reduced fee panels, complicates the task of the determiner. Given the complexity of the issue, the proposition that a judge, especially if confronted with a heavy arraignment calendar, can render accurate decisions on the basis of a few perfunctory inquiries seems untenable.

The most obvious limitation on the judiciary is the time factor. It is highly unlikely that the court could make anything akin to findings of fact on each of the items listed in Criminal Rule 44 (b) without greatly lengthening the duration of the examination. Unlike other matters before the bench, eligibility does not arise in an adversary context, and thus, the court does not have available the factual and legal research of counsel. The judge who wishes to verify the answers of the accused must initiate the investigation, which poses the serious logistical problem of who is to carry it out. If he were to pursue the information himself, the result would be unreasonable delays and interference with his other responsibilities. As occasionally happens, the judge might instruct the prosecution or police to verify one or two specific items, such as title to property, but it would seem improper for either of these agencies to embark upon a full-scale inquiry on behalf of the court, in light of their adversary relationship with the accused. In short, the means for systematic investigations of persons seeking counsel simply do not exist.

Apart from practical difficulties, the concept of the judge as eligibility investigator encounters objections based on his role in the criminal justice system. Although present procedures only rarely uncover information prejudicial to the defendant, in-depth examinations might increase the frequency and severity of this problem. For example, it has been suggested that the defendant's employment of private counsel in the past is relevant to the eligibility inquiry.[2] A probe into this area might well reveal facts about the defendant's prior record, which are generally not made known to the court until after the completion of the case. Such information could obviously prove prejudicial, especially in a bench trial.

From another perspective, the current approach does not readily lend itself either to the development of uniform standards or to the evolution of a policy on eligibility. The case law on this subject is sparse; appointments of counsel are never appealed, and denials on the grounds that the accused can afford a lawyer rarely reach the reviewing courts. Accordingly, the formulation of both broad policies and specific guidelines turns upon a conscious effort by the eligibility determiners. In addition, this effort must be ongoing, given the improbability that a single definition or formula will appear as an eternally valid solution to all problems of financial eligibility. Burdened with innumerable responsibilities, the judiciary is not well equipped to make the necessary input into what are partly administrative questions. By contrast, staff attorneys, working full-time on public representation, would have the capacity to give this issue the continuing attention it requires.

For similar reasons, staff attorneys can deal more effectively with the multiplicity of options potentially available to the eligibility determiner. Contribution and reimbursement not only demand careful screening of defendants but may involve follow-up work in many cases. It does not seem consistent with the nature of their positions for judges to keep track of defendants who owe money for public representation. In addition, other options exist which have yet to be tried in Maine. A number of jurisdictions have developed "reduced fee panels," designed to provide representation to persons who can afford to pay more than the compensation received by assigned counsel but less than the prevailing rates of the private bar. Similarly, referral services for ineligible defendants have been recommended by some authorities.[3]

The administrative intricacies inherent in a comprehensive financial eligibility plan exceed the present capabilities of the judiciary. Therefore, it is submitted that the responsibility for determining eligibility should be transferred to staff attorneys, except in those courts with small caseloads. Even if the courts could develop the capacity to deal effectively

with questions of eligibility, the recommendation would remain valid in terms of the underlying conclusion of this report that staff attorneys should administer the entire system of public representation.

II. Arguments Against the Use of Staff Attorneys.

The strongest argument against the above recommendation is that public defenders may manipulate eligibility determinations to suit their caseload needs. According to this theory, subscribed to by the American Bar Association, under-staffed defenders might utilize excessively narrow guidelines to avoid additional clients, whereas over-zealous defenders might err on the side of liberality to enhance their caseloads.[4] Both of these dangers seem remote under the proposed plan.

Since a combined system presupposes extensive reliance on staff attorneys and private practitioners, the Office of Public Defense would not have to handle a fluctuating workload with a fixed number of attorneys. The ability to absorb caseload variations, and to avoid the common public defender nightmare of an over-burdened staff, constitutes one of the primary advantages of the mixed approach. As a result, the staff attorneys should not encounter pressure to use eligibility as a tool for keeping their clientele at a prescribed level.

Another weakness of the position of the American Bar Association lies in its implicit assumption that judges, responsible for the assignment of counsel, will not succumb to similar temptations. The results of a study in another jurisdiction, which found that judges occasionally traded lenient sentences for waivers of counsel,[5] cast doubt upon the validity of this assumption. The proposed program offers an additional layer of protection, since the denial of public representation would be appealable to the court in which the case were pending. In the final analysis, the best insurance against the misuse of eligibility to limit the number of persons qualified for public representation probably rests not in the identity of the eligibility determiner, but rather in a system which has the capability to provide the necessary services.

The possibility of excessive leniency, resulting in hostility from the bar and the general public, hardly seems a grave danger, in light of the fact that most judges and lawyers believe it exists in the present system. Staff attorneys not only should prove able to achieve greater accuracy, but they also would have more detailed records with which to dispell impressions of bias. In addition, the involvement of the bar in the system, coupled with more equitable compensation, should help to avert an atmosphere of competition for clients between the program and private practitioners.

A final alternative would delegate the investigation of eligibility to probation officers, on the theory that this group combines the investigative capability with a disinterest in the ultimate decision. Apart from the arguable neutrality of probation officers, this approach would introduce another party into the proceedings, which would mean greater administrative complexity and increased costs. The potential utility of the investigation in the preparation of the defense would also be lost.

III. Procedures for Determining Eligibility.

A. Intake Forms.

The initial prerequisite of an eligibility plan is an efficient and effective method with which to obtain the necessary information about the defendant's financial status. For a variety of reasons, standardized intake forms or questionnaires should be used to accomplish this objective. First, questionnaires simplify the task of the determiner and minimize the possibility that vital facts will be overlooked. Second, the forms provide a written and signed record which can be used to collect reimbursement from a defendant who furnishes erroneous information. Similarly, the forms facilitate an evaluation of the eligibility procedures. Third, their use should contribute to uniformity, since every eligibility determiner will be making essentially the same inquiries.

It is also imperative that the accused complete the questionnaire under oath. A clear warning about the penalties of perjury should in itself serve as something of a deterrent against false statements. Should the occasion arise to initiate a prosecution for perjury, this would further discourage dishonest replies to secure public representation.

Although the precise contents of the form would depend upon the eligibility guidelines, questionnaires from other jurisdictions cover certain common areas. These include: income from employment and other sources, cash, savings, real property, personal property, debts, dependents, prior relationships with lawyers, and attempts to retain counsel in the present case. Depending upon the rules or policy of the jurisdiction, such items as bail and the resources of others may be incorporated into the questionnaire. Another seemingly germane, but infrequently asked, question would be whether the defendant has made any recent purchases or transfers of money or property. Such transactions consummated subsequent to arrest could have an obvious bearing on the defendant's ability to afford counsel.

B. Eligibility Formula.

The most difficult phase of the eligibility determination commences after intake has been completed, for it then becomes necessary to synthesize all the information about the accused so that it forms the basis for a conclusion on whether public representation should be provided. Although not an infallible device, the eligibility formula recommended in the proposal offers the only viable alternative to utter subjectivity. Except in obvious cases, accuracy and consistency seemingly require that the defendant's financial situation be quantified, with the ultimate number in the equation serving as the determinant of eligibility.

The formula has one purpose, to ascertain the precise amount available to the accused for the cost of his defense. It reaches this figure by the simple procedure of substracting a predetermined living allowance, scaled according to the number of dependents, from the defendant's net assets and income. The result is then compared to the probable cost of retained counsel in light of the nature of the offense. This item should also become more or less standardized after the staff attorneys have gained some experience in the area.

As indicated in the proposal, the eligibility determiner would have the discretion to deviate from the formula whenever special circumstances require. In these situations, however, the staff attorney should submit a written explanation to the main office of the program. A periodic review of these cases could then be made for the purpose of evolving new policies to cover previously unanticipated factors. This would permit an ongoing revision of the guidelines based upon knowledge acquired by the staff attorneys. Under this procedure, analogous to the common law system of precedent, the eligibility determiners would have the benefit of prior cases involving similar circumstances, which should facilitate their task and achieve greater uniformity.

A significant advantage of a numerical formula lies in its adaptability to alternative dispositions. For example, if the amount available to the accused for his defense falls short of the cost of retained counsel, that amount could serve as the basis for a contribution requirement. Generally speaking, the proposed method should also inspire more confidence in the final decision, for, in the event of an appeal, the reasons for the determination could be demonstrated with precision. This should minimize the tendency to play it safe by appointing counsel in virtually all cases.

C. Investigation.

The debate concerning investigations of eligibility claims usually focuses not on their desirability, which is uncontested, but rather on their economic feasibility. In response to complaints about the inadequate examination of defendants, the American Bar Association responds entirely in terms of costs. "It would be unsound, however, to establish an elaborate procedure for determining eligibility which would be more costly than the defense of the ineligible defendants."[6] The implication that investigative components invariably exceed the cost of representation is arguable; the presentation of the issue as exclusively one of economics is unjustifiable.

As a starting point, it seems clear that selective investigations of eligibility should suffice. In some cases, the decision should prove obvious, either because the defendant is known or because the necessary information is readily available. Furthermore, all of the remaining claims need not undergo intensive scrutiny, since it has been suggested that a few highly publicized investigations, resulting in either the denial of counsel, a suit for reimbursement or criminal charges, would constitute a strong deterrent against false statements.[7] The claimant would thus be put on notice that his answers to the questionnaire, made under oath, might be subjected to investigation. Even if such an examination were not conducted, the defendant would run the risk that false statements might be uncovered at a subsequent point in the proceedings which could eventually lead to a criminal or civil action against him. In short, his liability would terminate only with the tolling of the applicable statutes of limitation.

From the economic perspective, the absence of data on the number of "ineligible" defendants currently represented by assigned counsel makes it virtually impossible to assess the real costs, or savings, of an investigative component. If the estimate of 50 percent, offered by one judge, even approximates the true figure, the economic scales may lean toward thorough examinations. While such a drastic reduction of the caseload is improbable, the above procedures should increase the frequency of contribution by defendants. As with the number of inaccurate decisions on eligibility, there exists a statistical vacuum on the potential for part-payment. Assuming arguendo that the average contribution for all defendants, excluding juveniles, were $5, the state and counties could have recouped over $15,000 in 1973.[8] This amount alone would probably have defrayed much of the cost of selective investigations.

The most objectionable aspect of the American Bar Association position rests in its apparent, although perhaps unintended,

willingness to subordinate important principles to purely economic considerations. The complaints about inadequate investigation point not only to erroneous decisions on eligibility, but also to false representations by defendants seeking appointed counsel. If there does indeed exist a high incidence of misrepresentation, the courts have a vital interest in taking corrective measures. Respect for the criminal justice system is not engendered by the argument that it is cheaper to tolerate perjury than to prevent it.

The need to preserve the integrity of the courts goes beyond abstract idealism, insofar as attitudes toward the assigned counsel system affect its operation. A number of attorneys justify their reluctance to accept appointments on the grounds that the right to public representation is frequently abused. More than one lawyer has related the story of the client, who, in an attempt to avoid payment of the fee proposed in the initial interview, has subsequently asserted indigency and requested the assignment of the same attorney. Whether such episodes are real or apocryphal, they relfect the feeling of segments of the bar that assigned counsel are often unjustly made to underwrite the cost of the defendant's case rather than to perform a public service. Absent even selective investigations, it is impossible to eliminate real abuses or to refute imaginary ones.[9]

Another problem raised in this context involves the delays that investigations may cause. This difficulty can be overcome by the acceptance of cases on a provisional basis, a procedure that should be also followed when a defendant requires immediate representation, as at a line-up, before the intake form can be completed. Should subsequent information disclose ineligibility, the remedial action would depend upon the stage of the proceedings. Whenever appropriate the accused would have to retain private counsel. For cases in which the substitution of counsel would disrupt the court, the continued services of the program would be conditioned upon payment by the accused. In this sense, all representation would be provisional, since the statute and the intake form would both authorize reimbursement whenever the information furnished by the defendant was discovered to be incorrect or incomplete.

A more serious logistical problem arises from the manpower necessary for eligibility probes. While cursory checks could probably be performed over the telephone by the staff attorneys and secretaries, a thorough background report on the defendant would presumably exceed their capabilities. According to a professional investigator, the compilation of a report to verify an eligibility claim would probably average about $100 per case.[10] Assuming investigations had been conducted on 10 percent of the adult defendants with assigned counsel in 1973, there would have been approximately 220 investigations at a total cost of $22,000.

Employment of investigators might offer a somewhat less expensive solution especially in Districts II and VII where almost half of the cases originate. Along these lines, Pine Tree Legal Assistance, Inc. has had considerable success with recent college graduates serving in a paralegal capacity. Assuming a salary level similar to that paid by Pine Tree,[11] paralegals could perform eligibility investigations at a reasonable cost to the program. To facilitate the investigations, defendants might be required to sign written authorizations allowing access to otherwise confidential public and private records relevant to the determination.[12]

By way of conclusion, an expenditure of from $20,000 to $25,000 should enable the program to investigate selected eligibility claims. The likelihood of commensurate savings in counsel fees appears good, if only because of the deterrent effect of an investigative component. In addition, the benefit in terms of respect for the system, which is currently lacking in some quarters, clearly justifies the price tag.

IV. Standards of Eligibility.

A. Preface.

Despite its emphasis on uniform standards of eligibility, there are two reasons why this report cannot recommend definitive standards. The first is that the fundamental policy questions underlying such standards should be resolved by the collective input of the various segments of the criminal justice system. In this respect, the Defender Commission, recommended in the proposal, might serve as a suitable forum.

The second reason arises out of the nature of the problem, namely, the impossibility of devising a foolproof test that will unerringly separate the eligible from the ineligible.[13] The literature, including this report, points a critical finger at the lack of standards, but the "recommendations" sections contained in the very same writings are often brief and vague. What has seemingly been overlooked is the fact that, to some extent, the formulations of eligibility standards must follow an evolutionary process. This accounts for the proposal that staff attorneys submit difficult and novel situations to the Office of Public Defense, which in turn should promulgate relevant guidelines. In this manner, uniformity will be fostered as much by communication among the eligibility determiners as by adherence to a set of rules.

The above caveat is not intended to convey the impression that policies and guidelines are useless, but only that they cannot anticipate every set of facts and thus provide a clear

answer for every defendant. To the extent possible, then, standards should be articulated to give direction to the eligibility determiners. A formula has already been offered as a point of departure. The ensuing discussion will attempt to put that formula into a broader context so as to shed some light on its application.

B. General Policies.

The State should adopt a basic theory of eligibility against which individual determinations can be measured. Such theories run the gamut from the welfare standard of absolute inability to pay counsel to the elimination of all financial restrictions.[14] In light of its wide acceptance, the "substantial hardship" test, promulgated by the American Bar Association and quoted in the previous section seems to strike the most equitable balance between the interests of the defendant and those of the taxpayer. The National Advisory Commission approved essentially the same standard in the context of payment by the accused for public representation. "Where any payment would cause substantial hardship to the individual or his family, such representation should be provided without cost."[15]

This standard will take on meaning only as specific cases arise. The National Advisory Commission does offer an appropriate illustration of its intent.

> For example, an accused might have a low-paying job that he held for a long time and that had resulted in a substantial accumulation in a pension fund. By leaving his job, he may be able to obtain the money in the pension fund. But, at the same time, he and his family might be forced to become welfare recipients and his family might lose the protection of any survivor's benefits provided by the pension plan.[16]

The Commission interprets the loss of a job in these circumstances as a substantial hardship, and would thus recommend public representation for the defendant. Applying this conclusion to the proposed formula, the potential proceeds from the pension fund would not be included in the defendant's assets.

Another commonly espoused theory would require the assignment of counsel for a defendant "when the value of his present net assets and the value of his income expected prior to the anticipated date of the trial are insufficient, after he has provided himself and his dependents with the necessities of life, to permit him to retain a qualified lawyer...."[17] As an

underlying policy statement, the "necessities of life" approach lacks flexibility. Pursuant to a literal interpretation, the defendant with the pension fund might be denied assigned counsel if the proceeds of the fund would cover his family's immediate needs and the costs of an attorney.

In short, the ensuing proposition should serve as the basic principle behind eligibility decisions. "Counsel should be provided to any person who is financially unable to obtain adequate representation without substantial hardship to himself or his family." Procedurally, the eligibility determiner would not attempt to apply this standard in the abstract, but rather would treat it as the philosophical backdrop against which the specific eligibility formula should be implemented.

The second major policy is that the system should strive to increase the alternative dispositions available to the eligibility determiner, in order to respond more realistically and more equitably to the circumstances of individual defendants. It is widely recognized that an either-or concept of financial eligibility is overly rigid, and that persons who fall just above the cut-off point usually incur the greatest hardship.[18] Commenting on the present system in Maine, one district court judge stated that "the real problem is the defendant who is too rich for court appointment and too poor to retain competent counsel in the open market." To include these individuals in the assigned counsel system is unfair to the taxpayer; to exclude them is unfair to the defendants.

The availability of alternative dispositions, such as contribution, reimbursement, and reduced fee panels, would not only alleviate the problem of marginal eligibility, but it would also render the "substantial hardship" test more workable. With respect to the defendant in the pension plan, for example, the conclusion that he not be compelled to leave his job could be attacked on the grounds that it requires the public to underwrite the cost of his representation even though he had access to the necessary assets. A more satisfactory resolution might be to condition the provision of public representation on part-payment by the defendant along with a promise to reimburse the State for the balance. The cost of avoiding a hardship to the accused would thus not be transferred entirely to the taxpayer.

C. Recurring Eligibility Issues.

There are certain fact situations that recur with sufficient regularity so as to justify the immediate adoption of applicable guidelines. Even without the implementation of a defense system, the division within the Maine judiciary on many of these questions could be eliminated. Although this report will suggest answers, its major concern is that the issues be resolved according to

statewide policies, and not according to the personal philosophies of individual judges. Thus, disagreement with the proposed standards does not obviate the need for uniformity.

1. Bail: The ability of the defendant to post bond should not preclude the provision of public representation. Despite apparent unaminity among the authorities on this proposition,[19] many district court judges follow a contrary practice. The rationale behind the standard is that the accused should not be compelled to choose between two constitutional rights, especially since release on bail may assist in the preparation of his defense. For purposes of the eligibility formula, the resources used to post bond would not be included in the assets available for the retention of counsel. The source of these funds, however, would constitute a legitimate area of inquiry.

2. Resources of Others: The ability of the defendant's relatives or friends to retain counsel should not preclude the provision of public representation. This standard has also received widespread support.[20] It is predicated on the notion that the right to counsel is for the protection of the accused, and it would thus be unjust, and perhaps unconstitutional, to deny that right because of resources possibly beyond the defendant's control. The guideline, however, does not prevent the eligibility determiner from ascertaining whether relatives or friends have the ability and willingness to retain counsel for the accused. In these cases, public representation would be unnecessary.

The resources of dependents do merit consideration with respect to the policy that the accused and his family not be deprived of the necessities of life. For example, while the income of the spouse would not be included in "assets" under the eligibility formula, it could legitimately be used to reduce the monthly living allowance. If the spouse earned an amount sufficient to support the accused and his dependents, the living allowance would become completely immaterial.

3. Ability to Work: The ability of the defendant to find gainful employment, which might enable him to afford retained counsel, should not preclude the provision of public representation. Some judges exhibit an understandable reluctance to compel the taxpayers to subsidize the costs of the defense when it appears that the accused has the capability, but not the inclination, to earn the money necessary for an attorney. The speculative nature of future earnings, the difficulty of obtaining employment with a criminal charge pending, and the desirability of a speedy trial, all make this a risky practice. In addition, the gravity of a criminal conviction renders the denial of counsel an extreme penalty even for willful unemployment. Whether such a denial could withstand constitutional

scrutiny is subject to doubt. A less perilous course would lie in the imposition of a reimbursement requirement, even though the prospects of recovery might be limited.

4. Sale of Assets: The ability of the defendant to afford counsel through the sale or mortgage of an asset should not preclude the provision of public representation if such transaction would result in substantial hardship. Unlike the previous issues the question of when to require the disposition of an asset does not lend itself to a precise solution. Hence, the utilization of the "substantial hardship" criterion, which in this context refers to two characteristics of the asset, its use and its liquidity.

By way of preface, some general observations about the meaning of substantial hardship would seem in order. The phrase is intended to cover those deprivations which would seriously jeopardize the present and future capability of the accused and his dependents to support themselves. Accordingly, it seeks to prevent the loss of commonly accepted necessities, such as food, clothing, shelter, and medical care. The test might be termed an objective one, insofar as it allows everyone the same minimal living standard, without reference to the individual's customary lifestyle. While the loss of half his wealth might be a substantial hardship to a millionnaire, it obviously would not qualify him for public representation, since there would be little danger that his family would fall below the allowable living standard.

Viewed in the above framework, the disposition of an asset would not be required if the asset were essential to the support of the accused and his dependents. The automobile, necessary for the defendant's employment, is probably the most frequently encountered example of an essential asset that would be excluded from the eligibility formula. Such exclusions, however, would be allowed only within reasonable limits. If, for example, the value of the vehicle significantly exceeded the cost of a functional, albeit unpretentious, automobile, the difference would be considered a resource available to the accused.

The Boston University Center for Criminal Justice recommends a very narrow view of liquidity in eligibility determinations. With respect to misdemeanor cases, it asserts that "the relevant assets should not include such nonliquid assets as automobiles and other personal property, and real property (nonliquid in the context of a speedy trial)."[21] It does, however, advocate inclusion of savings in a bank account, stocks, and bonds. The Center's position is seemingly predicated on the belief that the hasty disposition of the excluded items will result either in an unfavorable price to the defendent or in debt financing, which it deems essentially punitive in nature.

This report disagrees with the blanket exclusion of the defendant's personal and real property, even in misdemeanor cases, on the grounds that it is based on a faulty premise and is inherently unfair. Most types of personal property are salable within a reasonable period of time. While it may prove true that the accused will not always receive the best possible price, this argument applies with equal, and perhaps greater, force to stocks and bonds. Although debt financing, with real or personal property as collateral, does involve interest charges, it represents a customary mechanism for raising capital in an emergency. While it may not constitute the most advantageous disposition of property, the purpose of public representation is not to insure against all financial loss.

The inequity inherent in the Center's position may be illustrated as follows. If an individual managed to accumulate $1000 after providing for his family's needs, and he put that money in a savings account, he would be required to use it for the retention of counsel. If another individual, similarly situated, spent his $1000 for the purchase of a snowmobile and a motorcycle, his assets would be exempt, and he would qualify for public representation. It is difficult to justify such a distinction, particularly since it seemingly discriminates against fiscal responsibility. Although it may not be the role of the criminal justice system to promote fiscal responsibility, it certainly should not penalize it.

Liquidity should be a factor, then, only when an asset is not disposable or when its disposition would result in an unconscionable transaction. In these instances, moreover, the imposition of an reimbursement requirement would probably be appropriate.

V. Eligibility Alternatives.

As noted above, a system with different categories of eligibility should theoretically prove more equitable to both defendants and taxpayers. Alternative procedures, however, do pose legal and practical problems, not the least of which is their enforcement. While the various options will be discussed individually, the viability of any or all of them depends upon more sophisticated means for screening defendants. The information presently available to the judge hardly suffices for even a general assessment of eligibility, let alone a determination of the specific category in which the accused properly belong.

A. Contribution.

Contribution, or partial payment, constitutes one of the most widely endorsed alternatives to absolute eligibility or ineligibility.[22] The concept has relevance to the marginally

indigent, to wit, the person with some available resources, but in an amount insufficient to meet the rates of the criminal defense bar. If, for example, the eligibility formula showed that the accused could not afford retained counsel, but possessed $200 which he could devote to the cost of his defense, he would be required to contribute that sum to the defender program or to the State.

Assuming voluntary compliance by every defendant, the idea seems flawless. Unfortunately, that assumption is an act of naivety, and thus, the difficult question pertains to those individuals who refuse to pay or who engage in dilatory tactics. The literature provides little guidance on this problem. The American Bar Association simply states that "the provision of counsel may be made on the condition that the funds available for this purpose be contributed to the system pursuant to an established method of collection."[23] Whether non-compliance with the condition justifies the withholding of counsel is unclear. The National Advisory Commission, which advocates part-payment, completely ignores the issue.

As a practical matter, the apparent maxim of the private bar, that "representation before compensation is stupidity," would probably apply with equal force to the State. Once the defendant has demonstrated a reluctance to pay, reliance on civil remedies to enforce the obligation after determination of the criminal case would not appear cost effective. From an economic perspective the most favorable sanction would be to withhold counsel, with the ultimate consequence that the defendant must have to represent himself.

Although the Center for Criminal Justice asserts that the linking of partial prepayment to the provision of representation has "blackmail implications,"[24] that conclusion overlooks the fact that it merely puts the marginally indigent defendant to the same choice as the ineligible defendant. The latter must also decide whether the expense of counsel outweighs the risk of proceeding without an attorney. Even if he engages the services of a lawyer, the strategy may turn in part upon costs. To give the partially eligible defendant a total exemption from payment seems unfair not only to the taxpayer, but also to the individual one step higher on the financial ladder. If it be blackmail for the one, then it is blackmail for the other, and the only equitable solution lies in free representation for all. However desirable that alternative, its time has not yet arrived.

While this report would thus authorize the denial of counsel as a sanction for nonpayment, it would recommend its use on a discretionary basis. The withholding of representation might be unreasonable if the charge were serious and the amount

of the obligation small. Similarly, when prepayment would cause undue court delay, the balance would shift in favor of an expeditious disposition of the criminal charge. In these cases, the more sensible approach would be to treat the obligation as a reimbursement agreement, even if that would reduce the likelihood of payment. Hopefully, the occasional denial of public representation would encourage defendants to comply with contribution orders.

The above conclusion is predicated upon a reliable and fair eligibility determination process. In this context, the power to require partial prepayment would incur fewer risks under a formula with reasonably liberal living allowances. The accused could appeal the initial contribution order to the judge in the court in which the case were pending. The judge would also have the authority, even without a request from the defendant, to reverse the decision withholding representation and to secure the appointment of counsel.

B. Reimbursement.

Since the Supreme Court has rejected the "chilling effect" argument against reimbursement schemes,[25] the focus of the opposition has been on policy grounds. Concerning the recoupment provision contained in the Model Public Defender Act, the National Advisory Commission offers the following observation:

> The adverse effects of a criminal prosecution, both financial and otherwise, are so great for both convicted and acquitted defendants, that there should not be added the deterrent disincentive to gainful employment that the...Act would provide.[26]

If a repayment obligation does indeed deter employment, or inhibit rehabilitation,[27] the short-term economic benefits would exact too high a price over the long run; the inevitability of these consequences, however, has never been conclusively demonstrated.

Conflicting with the adverse effect that reimbursement may have on defendants is the need, recognized by the Supreme Court, of the State and counties to meet the burgeoning costs of public representation.[28] The criminal justice system operates pursuant to the notion that those who can afford to do so must pay for the services of counsel, and this principle seems equally valid when the capability arises after the completion of the criminal case. Furthermore, reimbursement schemes may engender a flexibility advantageous to defendants, as illustrated by the pension fund example discussed above. Similarly, the eligibility

determiner might permit the retention of an income producing asset, if he believed that the accused would repay the defense program when the income became available.

Given the uncertainty of its effects, reimbursement should be required in selective cases, namely, when there exists a reasonable expectation both that the defendant will acquire the necessary funds and that the obligation will not hinder rehabilitation. In some instances, the facts may clearly warrant repayment. This could hold true for a college student or an individual with good employment prospects. Economically, the selective use of reimbursement will avoid the absurd situation in which the cost of collection exceeds the amount collected.[29]

Although all recipients of public representation would be notified at the outset that the provision of counsel carries a conditional obligation to repay, it is submitted that the decision to enforce the obligation and the amount owed should be communicated to the defendant shortly after the disposition of the case. Admittedly, the eligibility determiner may occasionally guess wrong about an individual's financial prospects. The alternative, however, would be to make every recipient into a debtor for a fixed period of time, notwithstanding the likelihood that many of these debts would expire unpaid. Apart from the administrative burden of periodic financial checks into all closed cases, the high percentage of unenforceable promises might breed an attitude of disdain toward the obligation. There may also be policy reasons against the wholesale approach, as illustrated by the hypothetical example of a defendant, who two years after the disposition of his case finally manages to acquire a good job. If the program were then to assert, for the first time, the probably forgotten debt, it might well acquire a not altogether undeserved predatory image. Accordingly, economics and justice would be better served by a prompt decision on reimbursement and by effective follow-up procedures in those cases in which it is ordered.

The above discussion contemplates the use of civil remedies to enforce payment. Whether reimbursement should also be made a condition of probation raises a difficult question for a staff attorney who represents a defendant at sentencing, insofar as he may have conflicting interests in his dual capacity as defense counsel and employee of the defender program.[30] If probation is to be utilized to exact repayment, the court should have exclusive authority to so order and should oversee the collection process. The probation officer should receive the money for payment into the general fund; the only obligation of the staff attorney would be to inform the court of the cost of the defense. In these cases, moreover, the defender program should not impose a separate reimbursement obligation.[31]

C. Reduced Fee Panels.

A federal district court judge observed more than a decade ago that the criminal bar "has priced itself out of the market for any except the most successful criminals."[32] The lack of data on the fees of retained counsel and the resources of their clients makes it difficult to assess the extent to which this situation exists in Maine. According to one member of the Maine judiciary, however, there is allegedly "a great spread in some courts on the court appointed fee and the private fee." How to deal with defendants whose assets exceed the former but fall short of the latter is a question that has only recently received attention. An effective solution seems impossible under the present system, given the absence of procedures with which to identify these defendants.

Although public representation coupled with a contribution requirement would be possible for these cases, a more efficient approach would be to secure private counsel at reduced rates. A number of other jurisdictions have already established "reduced fee" or "marginally indigent" panels,[33] to which they refer individuals who can afford to pay more than assigned counsel compensation, but less than the private fee. Such an innovation should prove adaptable to the proposed program, since the staff attorney, after completion of the intake procedure, could send qualified defendants to members of the panel. From the perspective of participating attorneys, this alternative should be economically preferable to a court appointment.

Lest the program find itself overburdened at the outset, the formation of reduced fee panels might better be deferred until after the other facets of the plan have become operational. This is particularly true in light of the fact that the staff attorneys will have to solicit the cooperation of local practitioners. Although any workable approach to financial eligibility presupposes familiarity with the fees of retained counsel, reduced fee panels may necessitate even greater knowledge of the economics of private practice. As will be noted subsequently, the collection of information on this subject should prove extremely valuable, but it may take time. Depending upon the time available, then, the program should decide whether to implement reduced fee panels concurrently with the rest of the plan or treat them as a longer range objective.

VI. Conclusion.

Needless to say, the recommendations contained in this report will require far greater administrative input than does the current system. The financial impact of the proposed changes defies precise measurement. While the intake procedures will entail new costs, they should also result in savings to the

extent that they eliminate false claims of eligibility, make more extensive use of contribution and reimbursement, and remove a burden that interferes with the judiciary's ability to hear and dispose of cases. In evaluating the recommendations, moreover, it must be remembered that public representation no longer constitutes an incidental facet of the courts' criminal caseload. Assigned counsel represent a majority of felony defendants and juveniles,[34] and the right to an appointed attorney was recently extended in misdemeanor cases. Developments in public representation have moved inexorably in the direction of expansion, and the State has no control over this phenomenon.

Generally speaking, there appear to be two possible options in the treatment of financial eligibility. The first involves the retention of present procedures, under which the courts either appoint or refuse to appoint counsel on the basis of a rather casual look at the defendant's economic situation. This approach has the advantage of simplicity, but it tends to render the concept of "eligibility" meaningless, and perhaps even something of a sham. Furthermore, it produces inconsistencies among the judges and offers few safeguards against erroneous denials of counsel. The lack of flexibility makes the system particularly ill-suited for marginally eligible defendants.

The second option, advanced by this report, recognizes that financial eligibility poses complex problems not amenable to simple solutions. Although the resultant recommendations call for increased administrative input, which taints them with a stigma of bureaucracy, the alternatives are to eliminate the complexities, which translates into universal eligibility, or to remain satisfied with seriously deficient procedures. Given the intricacies involved and the tangential relationship it bears to the customary business of the courts, financial eligibility may always remain an unpleasant aspect of public representation. Nevertheless, the legal system can and should confront the issue, rather than ignore it.

Finally, it is submitted for future consideration that the entire process whereby individuals charged with criminal offenses employ legal counsel is sorely in need of examination. The traditional view was recently articulated by the United States Supreme Court: "We live in a society where the distribution of legal assistance, like the distribution of all goods and services, is generally regulated by the dynamics of private enterprise."[35] Compared with other facets of private enterprise, scant attention has been paid to the propriety of viewing the retention of counsel as a commerical transaction between relatively equal parties. It seems important to know whether the consumer of defense services suffers any disadvantages occasioned by his critical need for the services, by a possible lack of knowledge about the nature of the services, the persons offering them, and market conditions, and

by a limited period of time within which to acquire this knowledge. Several specific questions exists: What are the fees of retained counsel? How fair are these fees? How much of a selection is available to the non-indigent, but low or middle income, defendant? To what extent does the individual's ability to pay determine the nature of the representation afforded him? How competent is the average defendant to select an attorney qualified for his case?

Although there may be good reasons why the provision of defense services should, whenever possible, remain in the private sector, unlike virtually every other facet of the criminal case, the ability of private enterprise to deliver good representation at a reasonable price should be examined. The government has a strong interest in this subject, since it initiates the prosecution and guarantees the defendant a fair trial. The Bar Association, however, might be the most logical body to conduct such an examination.[36]

FOOTNOTES

[1]See, e.g., Silverstein, supra, at 109-10; Comment, Balance Sheet of Appointed Counsel in Louisiana Criminal Cases, 34 La. L. Rev. 88 (1973).

[2]Inquiries to this effect appear on a number of eligibility questionnaires, such as that used in Massachusetts pursuant to the approval of the superior courts.

[3]Silverstein, supra, at 116.

[4]ABA at 57.

[5]Bing and Rosenfeld, The Quality of Justice in the Lower Criminal Courts of Metropolitan Boston, 7 Crim. L. Bull. 393 (1971).

[6]ABA at 57, 8.

[7]Kamisar and Choper, The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations, 48 Minn. L. Rev. 1, 22 (1963).

[8]This figure is computed on the basis of $5.00 per defendant for each court in which his case is heard. Thus, an individual represented by assigned counsel in the district, superior, and law courts would be presumed to contribute $15.

[9]"Not only would the possible additional public expense of ferreting out false claims of indigency avoid discrimination in favor of liars, it might also cause those who opposed affording free services to indigent criminal defendants to be more receptive to both the present system and forthcoming proposals for extending further aid." Kamisar and Choper, supra, at 22.

[10]Telephone conversation with Camille E. Carrier of Carrier's Detective Agency.

[11]As of the spring of 1975, the starting salary of paralegals was about $100 per week. Telephone conversation with Neville Woodruff, Esq., staff attorney at Pine Tree Legal Assistance, Inc.

[12]See NJRS 2A:158A-15, which empowers the Office of the Public Defender to require such authorization.

[13]See Comment, The Definition of Indigency: A Modern-Day Legal Jabberwocky?, 4 St. Mary's L.J. 34 (1972).

[14]The welfare standard has fallen into disfavor. An interesting argument for universal eligibility appears in LaFrance, supra, at 86, 7.

[15]NAC at 257.

[16]Id.

[17]Oakes, The Criminal Justice Act in the Federal District Courts - A Summary and Postscript, 7 Am. L. Q. 210, 212 (1969).

[18]ABA at 56.

[19]ABA at 55; NAC at 257; National Legal Aid and Defender Association, The Other Face of Justice, (1973) at 61; Boston University Center for Criminal Justice, The Right to Counsel - The Implementation of Argersinger v. Hamlin: An Unmet Challenge, (1974) at vol. 4, p. 127 (hereinafter cited as The Right to Counsel).

[20]ABA at 54; NAC at 257.

[21]The Right to Counsel at vol. 4, p. 135.

[22]ABA at 55; NAC at 257.

[23]ABA at 55.

[24]The Right to Counsel at vol. 4, p. 176.

[25]Fuller v. Oregon, 417 U.S. 40 (1974).

[26]NAC at 258.

[27]"It has been reported that, in Michigan, the use of this system in all cases has produced the result 'that the rehabilitative aspects of their probation have badly deteriorated, with the probation officers becoming mere collection agents.' 22 Cal. Assembly Interim Comm. Rep. 103 (1961)." Kamisar and Choper, supra at n. 114.

[28]See James v. Strange, 407 U.S. 128, 141 (1972).

[29]Such a situation existed in the State of New Jersey. Pursuant to a statute which imposed a lien on all property acquired by persons afforded public representation, the New Jersey Public Defender collected $80,000 from defendants in fiscal year 1971. The cost of the collection process, however, amounted to at least $100,000 excluding the paper work of the local offices. See Comment, New Jersey's Public Defender Lien System: Burdening the Indigent, 4 Rutgers-Camden L.J. 309 (1973).

[30]To some extent, any contribution or reimbursement plan administered by the program may place the staff attorney in an adversary position to the defendant. The probation scheme, however, seemingly presents the defender with incompatible interests in the same proceeding. By contrast, the other recommendations do not affect the disposition of the criminal charge, but rather resemble the attempt by an attorney to collect a debt from a former client, a phenomenon that can occur with retained counsel.

The only way to avoid this problem completely would be to delegate eligibility decisions and enforcement to a third party, a proposition that has been rejected. The staff attorneys, however, might be well advised to farm out to assigned counsel defendants with whom they anticipate having financial problems.

[31]Needless to say, the treatment of reimbursement as a condition of probation must comply with the procedural safeguards set out in Fuller v. Oregon, supra.

Another approach would be to make contribution or reimbursement the subject of a court order and to penalize noncompliance with contempt. This raises a number of problems. First, it would mean the frequent involvement of the courts in the eligibility process, which this report has attempted to eliminate. Second, the contempt hearing would seemingly require the provision of counsel, and since the staff attorney would presumably be disqualified, the court would have to appoint and compensate independent counsel. Third, there is some doubt whether the court could issue an order against a defendant who simply refused to agree to a contribution or reimbursement condition. This refusal might have to be treated as a constructive waiver or as grounds for non-appointment, which makes withholding of counsel the more appropriate remedy. For the argument that compelled support of ones legal defense would be proper, see Kamisar and Choper, supra, at 27.

[32]Connally, Problems in the Determination of Indigency for the Assignment of Counsel, 1 Ga. S.B.J. 11, 15 (1964).

[33]For example, the county bar association in Santa Clara County, California, has created such a panel.

[34]See Table I-4 supra.

[35]Fuller v. Oregon, supra, at 57.

[36]A Maine district court judge has suggested that perhaps the fees of retained counsel in all criminal cases should be reported to the court. Such a reporting procedure might constitute a good starting point for a study of the costs of criminal defense. Toward that end, the fees, along with a detailed statement of services provided and time expended, might be submitted to the State Bar Association on a confidential basis.

CASE ELIGIBILITY

I. Misdemeanors.

In Maine, as in other jurisdictions, misdemeanor prosecutions generate the most confusion over the necessity for appointed counsel. The relevant rules for both the superior and district courts simply state that the judge "may assign counsel" for a defendant in a misdemeanor proceeding.[1] As noted above, judicial decisions determine the types of cases in which public representation is mandatory.

Combining the holdings in Newell v. State and Argersinger v. Hamlin, the following rule emerges. Counsel must be appointed for an indigent defendant, unless waived, if: 1) the allowable statutory penalty of imprisonment exceeds six months; or 2) the allowable statutory fine exceeds $500; or 3) the defendant is to be imprisoned. Furthermore, it seems clear that Argersinger does not affect the continued applicability of Newell, since the latter is explicitly predicated on the Maine Constitution.[2] Accordingly, public representation must be made available to indigent persons when any of the above criteria exists.

A. Compliance with Newell.

It is the finding of this report that the district court judiciary frequently fails to comply with the constitutional mandate set out in Newell v. State. To ascertain the types of offenses for which they furnish an attorney, the judges were asked the following question.

> Absent a waiver of counsel, do you normally appoint counsel for an indigent defendant, with no prior record, charged with any of the following misdemeanors? (Please answer Not Applicable for any offense which you never, or only infrequently, encounter in the courts where you sit.)
>
> (a) Simple assault and battery._____
> (b) Operating a motor vehicle under the influence of intoxicating liquor.
>
> (c) Night hunting. _____
> (d) Possession of canabis. _____

TABLE IV-1

WILLINGNESS TO APPOINT FOR CERTAIN MISDEMEANOR OFFENSES

	Yes	No	N.A.	Sometimes
(a)	3	8	0	1
(b)	3	10	0	0
(c)	1	9	1	2
(d)	9	3	1	0

The statutory penalty for a first conviction of operating under the influence or of night hunting exceeds $500, whereas that for possession of cannabis exceeds both $500 and 6 months.[3] Although the indigent defendant thus has an absolute right to appointed counsel in each of these cases, the overwhelming majority of district court judges do not honor that right for operating under the influence[4] or night hunting. A smaller, but not insignificant, number do not normally appoint in possession of cannabis prosecutions.

The reasons for this failure are not readily apparent from the questionnaires. One county attorney has suggested that the omission may be unintentional, in that the district court judges inadvertently overlook Newell as a result of the subsequent decision in Argersinger. While the superior court judiciary was not surveyed on this issue, one justice did indicate that on occasion he does not advise of the right to appointed counsel in misdemeanors covered by Newell. His explanation was one of expediency, since he seemingly followed this practice only in counties with heavy caseloads and short terms of court. In addition, he ascribed the need for this expediency partly to a law that permitted a defendant in a misdemeanor or traffic case to elect to have the matter heard in either the district or superior court.[5] Whatever the reason, the failure to abide by Newell violates the Maine Constitution.

B. Compliance with Argersinger.

It is extremely difficult to measure with any statistical validity the extent of compliance with Argersinger v. Hamlin. The questionnaires clearly reveal universal awareness of its holding that absent a knowing and intelligent waiver, no person may be incarcerated for any offense, unless he was represented by counsel. While compliance might be presumed from knowledge, the responses of two county attorneys disclose occasional deviations. According to one prosecutor, who stated that the courts are not in full compliance, the local district court judge "will sometimes sentence a defendant (constant repeater) to jail on a plea of guilty at the initial appearance." Another prosecutor, addressing his comments to the rural areas he serves, cited a shortage of lawyers as the reason the courts do not always follow the precise requirements of the law. In his view, however, the judges use "reasonable common sense" in the appointment of counsel to ensure that injustices do not occur.

There are other small indications of noncompliance with Argersinger. For example, a private lawyer reported that a district court judge made a general announcement prior to arraignments that attorneys could be appointed only in felony cases. Despite the above examples, the questionnaires suggest that the imposition of a jail sentence on an unrepresented

indigent defendant, who has not waived counsel, is the exception rather than the rule. Even if infrequent, deviations from Argersinger constitute a serious problem that should be eliminated.

C. Mechanics of Implementing Argersinger.

One of the most controversial aspects of Argersinger v. Hamlin is the requirement that the court engage in a predictive evaluation of the likelihood of a jail sentence in misdemeanor cases. The view that this would create difficulties for the courts has seemingly been borne out by the experiences of the Maine judiciary. A majority of the judges surveyed responded that the necessity of determining, before the proceedings commence, whether a jail sentence will probably be imposed places an undue burden on the courts.[6]

Given the large number of variables possible in a criminal case, the judiciary has understandably not developed a simple approach to the implementation of Argersinger. At least one member of each bench has taken the position that it makes more sense to ignore Argersinger and to appoint counsel for all indigent misdemeanor defendants. Other judges indicated that they generally appoint for some offenses and not for others; interestingly, Justice Powell's concurring opinion warned that this very practice would be an undesirable consequence of Argersinger.[7] One superior court justice responded that he asks whether the state intends to seek a jail sentence, which might be construed as a partial abdication of a judicial power. In light of the previous discussion, it is somewhat ironic that another member of that bench relies exclusively on the categories created by Newell. Perhaps indicative of the ultimate subjectivity inherent in Argersinger is the comment by a justice that he considers, inter alia, "the general atmosphere" in determining whether to appoint counsel.

Assuming a court is to weigh factors other than the category of offense, the judge will often have to receive information from an outside source. Chief Justice Burger's concurring opinion contemplates that the prosecutor will serve as this source.

> Yet the prediction is not beyond the capacity of an experienced judge, aided as he should be by the prosecuting officer.[8]

That Maine prosecutors do, in fact, participate in the process is revealed by their statements that they have had occasion to inform the court of their intention to recommend jail sentences. Only one county attorney indicated a contrary practice. With respect to a court with a comparatively heavy caseload, he observed that "the State is seldom present at the time of appointment of counsel in misdemeanor cases in District Court."

Regarding inquiries into other factors that might influence sentencing and thus affect the need to appoint counsel, the approaches of the judges vary. Specifically, the questionnaires asked whether they ever inquire, prior to commencing any proceedings, about the facts of the case or about the defendant's prior record.

TABLE IV-2

PRETRIAL INQUIRIES FOR ARGERSINGER PURPOSES

	Facts of Case	Prior Record
Superior Court Justices		
Yes	4	3
No	6	7
Sometimes	1	1
District Court Judges		
Yes	4	4
No	8	8

The responses of the county attorneys showed a similar breakdown on the question of whether they ever communicate this information to the judicial officer. In addition, a number of the district court judges indicated familiarity with the prior records of individuals who had previously appeared before them.

Although judicial awareness of the facts underlying the charge and of the defendant's prior records may not be prejudicial in a jury case, the same conclusion does not hold true for bench trials.

> In a nonjury case the prior record of the accused should not be made known to the trier of fact except by way of traditional impeachment.[9]

As a practical matter, this distinction may have very little meaning, since the defendant is usually not compelled to elect the type of proceeding until the appointment of counsel. When considering the appointment question, then, the judge cannot determine the proper extent of his inquiry, insofar as he does not know with certainty whether he or a jury will ultimately be called upon to decide the case. To ensure against possible prejudice, the judge seemingly would have to assume in every instance that he will serve as the trier of fact.

It seems probable, especially at the district court level, that some Maine judges do receive pretrial information in nonjury cases, which technically could be construed as prejudicial to the accused. The problem, however, is not of their making,

nor are there very satisfactory alternatives. With no information about the cases or defendants, they could either risk unnecessary appointments to preserve the option of a jail term, or refuse counsel and forfeit part of the sentencing power conveyed upon them by the legislature. The drawbacks inherent in each approach may well account for the judicial dissatisfaction with Argersinger.

D. Other Case Eligibility Problems.

1. Probated Jail Sentences: The issue has been raised whether Argersinger mandates the appointment of counsel in order to impose a probated jail sentence on an indigent defendant. In practice, the majority of district court judges do offer public representation when they anticipate such a disposition. Among those responding to this question, eight stated they do appoint, three stated they do not, and one judge suggested that it depends upon the case. On a related issue, the overwhelming majority of both superior court justices and district court judges furnish counsel for an indigent defendant at a hearing to revoke a probated jail sentence.[10]

2. Incarceration for Failure to Pay a Fine: The circumstances, if any, under which a defendant may be incarcerated for failure to pay a fine have not been clearly delineated in Maine.[11] One writer has strongly urged adoption of the proposition that "counsel must be provided whenever a determination is made that a defendant may not have the resources to pay a fine if imposed."[12] The results of the questionnaires reveal that some superior court justices have already accepted this position.

> Absent a waiver of counsel, do you appoint counsel for an indigent defendant who you anticipate will be sentenced only to pay a fine, but who may have to be incarcerated because of an inability to pay the fine?

TABLE IV-3

APPOINTMENT IN FINE CASES

	Yes	No	Other[13]
Superior Court Justices	4	5	1
District Court Judges	0	9	3
Total	4	14	4

Since this practice could result in almost universal case eligibility for indigent defendants, the heavier misdemeanor caseloads in the district courts may account for their lack of receptivity to the idea.

II. Availability of Counsel in Non-Misdemeanor Cases.

Problems of case eligibility are largely limited to misdemeanor prosecutions. Criminal Rule 44 clearly establishes the right to assigned counsel in all felony proceedings. Similarly, the courts appear very responsive to the need for public representation in juvenile matters. With respect to post conviction and other collateral proceedings, a recent study found Maine to be essentially in compliance with a relevant standards of the American Bar Association and the National Advisory Commission.[14]

FOOTNOTES

[1]Criminal Rule 44 (a) and District Court Criminal Rule 44.

[2]Newell v. State, supra, at 737.

[3]The penalty for a first conviction of operating under the influence is a fine of not more than $1000 or imprisonment for not more than 90 days, or both (29 M.R.S.A. § 1312 (10) (A)); that for night hunting is a fine of not less than $200 nor more than $1000, which fine shall not be suspended, and an additional penalty of not more than 30 days in jail, at the discretion of the court (12 M.R.S.A. § 2455); that for possession of cannabis is a fine of not more than $1000 and imprisonment for not more than 11 months (22 M.R.S.A. § 2383 (1)).

[4]In the event that the relatively recent amendment to the operating under the influence statute, which increased the maximum fine from $200 to $1000, may have affected the responses of the district court judges, it seems relevant to set out the chronology of that amendment and the questionnaires. The amendment was signed into law on April 10, 1973 and became operative on Oct. 3, 1973. The first completed questionnaire, received by the study from a district court judge, was postmarked March 28, 1974. The remaining questionnaires were received between that date and the end of the first week of August, 1974. Accordingly, it would be difficult to ascribe the failure to appoint counsel for that offense to recent changes in the law.

[5]15 M.R.S.A. § 2114. According to some justices, that provision substantially increased the caseload of misdemeanor and traffic offenses in the superior court.

[6]The breakdown on the question of whether Argersinger imposes an undue burden was as follows:

	Yes	No
Superior Court	7	4
District Court	5	6

[7]Argersinger v. Hamlin, supra, at 53.

[8]Id. at 42.

[9]Id. The same policy is reflected in Maine Criminal Rule 32 (c) (1), which deals with pre-sentence reports: "The report

shall not be submitted to the court or its content disclosed to anyone unless the defendant has pleaded or has been found guilty."

[10]

	Yes	No	Sometimes
Superior Court	9	1	1
District Court	9	0	0

One superior court justice said he appoints "if requested."

[11]See Blackwell v. State, 311 A.2d 536 (Me. 1973).

[12]Anderson, supra, at 6. A variation of this position existed briefly in the State of Florida. In Rollins v. State (unpublished opinion in case no. 42,992), the Florida Supreme Court held that the incarceration of an indigent defendant for failure to pay a fine invalidated the conviction for which the fine was imposed, if the defendant had not been offered counsel at his original trial. On rehearing, the Court decided that Argersinger was inapplicable and that the case involved nothing more than a potential violation of Tate v. Short, 401 U.S. 395 (1971). Accordingly, the defendant was merely entitled to reasonable time within which to pay the fine. 299 So.2d 586 (Fla. 1974).

[13]The other responses included: "sometimes (serious misdemeanors);" "usually;" "usually not;" and "not necessarily."

[14]Maine Judicial Conference, A Comparative Study: Standards for Criminal Justice of the State of Maine with National Advisory Commission on Criminal Justice and the American Bar Association (1974) at 176-78.

RECOMMENDATIONS ON CASE ELIGIBILITY

I. Standards.

A. Introduction.

Since the case law establishes minimum standards with respect to the offenses for which counsel must be appointed, the threshold question is whether the availability of public representation should be extended beyond present requirements. This question, which pertains solely to misdemeanor prosecutions, involves a number of basic considerations. These include fairness to defendants charged with crimes for which the right to assigned counsel does not attach; the likelihood that a more comprehensive formula would be less cumbersome to apply than the Argersinger rule; and the capability of the criminal justice system to absorb a further expansion of public representation. In the context of these considerations, certain alternative standards, which have been proposed by various authorities, will be briefly discussed.

B. "Right to Counsel in all Criminal Cases" Standard.

If afforded the luxury of designing a system unrestrained by economic limitations, this report would probably urge the adoption of the above standard. Universal case eligibility has been recommended by respectable authorities,[1] and some jurisdictions have taken steps in this direction.[2] From the perspective of the defendant, the benefits are clear. The Supreme Court has emphasized the value of the assistance of counsel in resolving complex issues,[3] and even some traffic cases can involve such issues. Furthermore, there is a growing recognition that "minor" offenses can have major consequences, especially if they result in the loss of license or a criminal record. With regard to its application, this standard relieves the judge of the need to play soothsayer and allows him to determine the appropriate sentence after all the facts have been heard.

Despite these advantages, it is the third consideration that renders universal case eligibility an unrealistic alternative. The adoption of that standard would place an intolerable burden on a system that has scarcely had the time to respond to the demands on its resources brought about by Newell and Argersinger. This conclusion will probably continue to have validity for as long as traffic offenses remain a part of the "criminal" process.[4] The costs will entail far more than the increased compensation occasioned by additional appointments. Equally expensive would be the time necessary to determine financial eligibility and secure representation in these cases.

If the above discussion seems to reflect an undue subservience to practical concerns, it should be pointed out that the position of this report stems partly from the belief that

improvements in the present system of delivering defense services should have priority over the wholesale extension of those services to other categories of offenses. Since this report contains a variety of recommendations, which will require a period of adjustment and additional funding, it does not consider a major expansion of case eligibility feasible at this juncture.

C. "Imprisonment in Law Standard."

Another possible extension of the Newell-Argersinger rule would attach the right of appointed counsel to all statutes allowing the imposition of a sentence of imprisonment on conviction of the offense charged.[5] Although ostensibly a compromise between representation in all criminal cases and existing law, this standard would mean virtually universal case eligibility in Maine. The reason arises from the simple fact that a penal statute without a jail term is a rare phenomenon in Maine; even the general penalty provisions of the fish and game laws authorize imprisonment for up to 90 days.[6] As a result, this standard would have the same operative effect as that discussed in the previous section, and thus, it encounters the same objections.

An alternative would be to limit the "imprisonment in law" standard to what might be called the traditional criminal offenses, contained in Title 17 of the Revised Statutes, as opposed to so-called regulatory offenses. Keeping in mind the fact that many misdemeanors already fall within Newell, the effect of such a change would turn upon the number of additional crimes that would require public representation. Although Title 17 is replete with statutes carrying penalties below the Newell limits, it is likely that no more than 10 of these appear in the courts with any frequency. The most common are probably simple assault and battery, for which the judges occasionally appoint counsel, shoplifting, and disorderly conduct.[7]

The only theoretical justification for according Title 17 misdemeanors special treatment rests upon the tenuous assumption that a conviction for one of those offenses results in a greater stigma than does a violation of a regulatory law. Applying this argument to specific crimes, it would be assumed that a conviction for assault and battery would have more severe social consequences than one for reckless driving or hunting from a public way. The weakness of this analysis is that of almost all generalizations, namely, that it may not hold true for every individual. For example, a truck driver might well prefer the social stigma of assault and battery to the occupational problems caused by reckless driving.

Practically speaking, this report lacks the hard data necessary to estimate the costs for the implementation of the "imprisonment in law" standard to Title 17 misdemeanors. Given

the limited number of offenses that may be involved, however, this approach may represent a feasible expansion of the right to counsel. As noted above, the standard is not offered as the final answer to the problem, but rather as a possible next step in the evolution of public representation.

D. Argersinger Standard.

Even adherence to the present case law is not without problems, insofar as there exists disagreement as to the dimensions of the Argersinger holding. Specifically, the debate focuses on whether Argersinger requires the appointment of counsel if the judge intends to impose a probated prison sentence, or a fine that can be converted into a jail term for nonpayment. Without embarking upon the lengthy legal and policy arguments that these issues have attracted, it is submitted that the offer of representation should be mandatory only with respect to probated prison terms. Appointment in cases when only a fine is contemplated would completely erase the dividing line established by Argersinger.[8] On the other hand, a probated prison sentence poses the real possibility of revocation and imprisonment. Furthermore, the majority of judges have already adopted the practice of providing counsel in these cases.

E. Conclusions and Recommendations.

In formulating its recommendations, this report attempts to give appropriate weight to matters of money and personnel, as well as to matters of principle. As a result of the need to strike such a balance, two general courses of action are suggested; the first applies to the immediate future, the second to the long term.

With respect to public representation, it is submitted that the first order of business must be to upgrade the system of providing defense services. As noted above, Newell and Argersinger are relatively recent decisions. Given the findings of this report, full compliance with those rulings should be attained before the scope of the right to counsel is widened. In addition, subsequent sections of this report will describe other deficiencies in the present approach to public representation, which hopefully will substantiate the need for a combined public defender-coordinated assigned counsel plan. For obvious reasons, the correction of those deficiencies should take precedence over the expansion of the system.

Assuming the above choice must be made, this report recommends the retention of current case eligibility standards for the near term. This does not mean that the courts are locked in by Newell and Argersinger. Maine law does not specifically limit the judicial power to assign counsel, and 60 percent of

the judges report that they occasionally appoint an attorney even in the absence of an explicit constitutional or statutory right thereto. This practice serves as an important safety valve for cases that present special circumstances. To the extent that responsibility for assignments is transferred to staff attorneys, moreover, "discretionary appointments" could become a far more important factor, since the defender could determine the necessity of public representation based on a complete familiarity with the facts of the case. A more elaborate explanation of this concept will appear in the section on the proposed procedures for determining case eligibility.

Prior to a consideration of the long range recommendations, it should be pointed out that seemingly unintentional changes in case eligibility periodically occur. This comes about when a legislative body amends the penalty section of a criminal statute so as to bring it within the minimum limits of Newell. For example, in 1973, the State Legislature increased the possible fine for a first conviction of operating under the influence of intoxicating liquor from $200 to $1000. Despite the obvious purpose of this amendment to increase the severity of the punishment for the offense, informal research suggests that most judges continue to impose the same sentences as were meted out prior to the amendment. Accordingly, the only effect of the legislation may well have been to create another offense requiring the appointment of counsel for financially eligible defendants. Judging from the sparse legislative record, it is not believed that the sponsor of the bill intended this result.

In a similar vein, the City Council of Portland recently raised the maximum fines for violations of a variety of ordinances from $100 to $1000. Since it is beyond the scope of this report to delve into the complex issue of the legal status of municipal ordinances, suffice it to observe that a number of those provisions appear penal in nature.[9] In addition, some of the prohibited conduct could well apply to the poor.[10] As a result, the Council may have inadvertently activated Newell and added to the list of offenses for which public representation must be made available. Should this interpretation prove valid, it would be ironic that measures designed to enhance municipal revenues could indirectly contribute to the higher costs of state and county government.

Changes in the right to appointed counsel thus occur, albeit not on a grand scale, in an haphazard and apparently unnoticed fashion. It would be surprising, moreover, if this modus operandi did not generate some confusion even among segments of the judiciary. Whether a more orderly consideration of the effects of legislative decisions on public representation can be achieved under an unadministered assigned counsel system it is debatable.

The prospects would certainly seem brighter with an organized defense office responsible for monitoring relevant developments on all fronts.

For purposes of long term objectives, incarceration must be recognized as but one form of serious harm that may result from a criminal conviction, and thus it constitutes a somewhat arbitrary dividing line for the right to public representation. The concept that other consequences may render an offense "serious" was ably articulated by the Supreme Court of Alaska.

> Not only must the maximum possible punishment be considered, but one must look at the social and moral opprobrium that attaches to the offense, the degree to which it may be regarded as anti-social behaviour, the possible consequences to the defendant in terms of loss of livelihood, and whether the offense is one traditionally regarded as a crime or is predominately in the nature of a regulatory offense.[11]

As noted by Justice Powell, these consequences may occasionally weigh more heavily on the defendant than a brief stay in jail.[12]

If one accepts this premise, the logical and just conclusion is that the right to appointed counsel must ultimately be extended to all crimes, excepting violations of minor motor vehicle and other regulatory statutes. Objections to this conclusion, on economic and personnel grounds, encounter the argument that other jurisdictions, such as New Hampshire, have already adopted the standard.[13] Whether the State decides to implement the standard in one step or in a series of steps is less important than acknowledgement of the final destination. Should an incremental approach be chosen, the application of the "imprisonment in law" or "eligibility in all cases" formula to Title 17 offenses (or those contained in the new Maine Criminal Code) might serve as a starting point.

Even if one disagrees with the need to expand public representation, practical considerations require that the State prepare for just such an eventuality. The growth of the right to counsel in Supreme Court decisions has been a slow, but inexorable, process, and Justice Powell's concurring opinion in Argersinger predicts its continuation.

> The thrust of the Court's position indicates, however, that when the decision must be made, the rule will be extended to all petty offenses except perhaps the most minor traffic violations.[14]

Accordingly, the State's long range objective should be the provision of counsel for financially eligible defendants in all cases involving offenses that are of a criminal nature.

II. Procedures.

The prior discussion of Argersinger has already explored the problems inherent in the predetermination requirement imposed on the judiciary. To restate the basic dilemma, an in-depth examination into the factors relevant to the appointment of counsel raises the possibility of prejudice, whereas a restrained inquiry may not give the court sufficient basis for an informed decision. Although a perfect solution seemingly does not exist, the proposed system should substantially alleviate this conflict.

Assuming the implementation of the combined public defender-coordinated assigned counsel plan, this report recommends that the staff attorneys, in the primary courts, make a preliminary determination of case eligibility whenever necessary. While the decision to appoint would turn primarily on the probability of a jail sentence, other considerations might justify the provision of representation. Examples include the existence of complex issues, the inability of the defendant to represent himself, and the possibility that particularly adverse consequences, other than incarceration, would flow from a conviction.

This procedure should not require psychic insight into the judge's probable actions. The need for public representation might be predicated upon specific facts uncovered in examining the case, such as a long prior record, or upon an expressed prosecutorial intention to seek a term of imprisonment. Furthermore, the staff attorney might well become sufficiently conversant with a judge's sentencing practices to base his decision on more than mere speculation. It should also be remembered that the procedure applies only to those misdemeanors not covered by Newell.

Should the staff attorney determine that public representation was not warranted, the court would necessarily have the authority to overrule this decision. Without such authority, part of the judicial power to sentence would be delegated to the staff attorney, since the absence of counsel would preclude imposition of a prison term. The possibility that a judge would rely too heavily on the judgment of a defender, and thereby abdicate some of his control over sentencing, seems remote; it is more likely that the thinking of the former would influence the decisions of the latter. In any event, this poses no greater danger than reliance on the intentions of the prosecution.

The primary advantage of the proposed format is that it further reduces the responsibility of the court to perform a

pre-adjudication screening of defendants, a process that inevitably has prejudicial overtones. Viewed realistically, Argersinger presents the judge with unattractive alternatives. He can hear an essentially ex parte statement of the facts, possibly including the defendant's prior record; he can base his decision solely on the intentions of the prosecutor; he can take pains to avoid prejudice and act more or less intuitively; or he can avoid the problem by overappointing at the expense of the taxpayer or underappointing at the expense of his power to impose a prison sentence. By contrast, the suggested procedures permit an informed decision without even the appearance of prejudice. The judge becomes involved only when he feels he may disagree with a denial of representation. This has the added benefit of saving valuable court time.

Finally, the presence of a staff attorney provides the court with a specialist in case eligibility. Although one might question the need for such a specialist, the findings of this report reveal considerable confusion on this subject, probably brought about by frequent legislative enactments and court decisions. The staff attorney should act as an added safeguard against unintentionally improper refusals to appoint counsel.

FOOTNOTES

[1]NAC at 253. It should be noted that the Commission also recommends the removal of most traffic offenses from the criminal arena. See also The Right to Counsel at vol. 3, p. 209.

[2]See discussion of long range recommendations, infra.

[3]Powell v. Alabama, 287 U.S. 45, 68-9 (1932).

[4]Subsequent to the writing of this report, the State Legislature reclassified a number of minor traffic offenses from misdemeanors to infractions and eliminated prison sentences for such infractions. See PL 1975, c. 430, § 2303 (1).

[5]For a more detailed discussion of "imprisonment standards," see Junker, The Right to Counsel in Misdemeanor Cases, 43 Wash. L. Rev. 685, 708-15 (1968).

[6]12 M.R.S.A. § 3060. The newly adopted Maine Criminal Code continues this policy, in that it attaches an imprisonment penalty to all criminal offenses. See 17A M.R.S.A. §§ 4, 1251.

[7]The other offenses in this category include indecent exposure, public nuisance, simple assault on or interference with an officer, affray, receiving stolen goods when the value does not exceed $500, and trespass.

[8]The need to appoint counsel in order to incarcerate for failure to pay a fine raises a separate question. The Florida Supreme Court has expressed doubt as to whether Argersinger requires such appointments. Rollins v. State, supra. Given the fact that incarceration is a direct result of the decision, public representation probably should be furnished.

[9]The limited precedent in Maine suggests that a material fine renders an ordinance "penal." City of Saco v. Jordan, 115 Me. 278, 279 (1916) (ordinance requiring that houses be connected with public sewers). The Alaska Supreme Court shares this view that a large fine in itself indicates criminality. Alexander v. City of Anchorage, 490 P.2d 910, 915 (Ala. 1971). Finally, a number of these ordinances specifically label the proscribed conduct "misdemeanors."

[10]Examples of such violations of the Municipal Code of Portland include: sec. 313.12 which prohibits, inter alia,

putting garbage in a vacant lot, alley, lane, sidewalk or street, beach, etc.; sec. 501.19 dealing with vandalism and unleashed dogs in public parks; and sec. 318.6 regulating the purchase, sale, and delivery of hand guns.

[11]Baker v. City of Fairbanks, 471 P.2d 386, 393 (Ala. 1970).

[12]Argersinger v. Hamlin, supra, at 48.

[13]NHRSA 604-A:2 provides, in relevant part: "In every criminal case in which the defendant is charged with a felony or a misdemeanor and appears without counsel, the court before which he appears shall advise the defendant that he has a right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel." According to a recent study, at least 15 jurisdictions use the "imprisonment in law" standard or one that is even wider in scope. The Right to Counsel at vol. 3, p. 183.

[14]Argersinger v. Hamlin, supra, at 51.

INITIAL PROVISION OF COUNSEL

I. Present Maine Procedures.

The Maine Rules provide that a person arrested on either a felony or misdemeanor charge must be informed of his right to counsel at his first appearance before a magistrate.[1] Criminal Rule 5 (b) states, in relevant part:

> When a person arrested, either under a warrant or without a warrant, is brought before the magistrate, or a defendant who has been summoned appears before the magistrate in response to a summons, the magistrate shall inform him...of his right to request the assignment of counsel...

The corresponding District Court Criminal Rule, which deals with arraignments in misdemeanor prosecutions, differs only to the extent that the magistrate is to advise the accused of his "right to counsel."[2] Despite the absence of a specific reference to the assignment of counsel, the rule presumably requires such a statement by the magistrate whenever the offense is one that may warrant public representation.

Since the offer of counsel occurs at the defendant's first court appearance, the speed with which defense services are made available depends upon the time period between arrest and presentment or arraignment. Under the rules, the accused must be brought before a magistrate "without unnecessary delay,"[3] and a recent study found that "although an effort is made to present arrested persons before a magistrate on the day of arrest, presentment is often delayed a day for those persons arrested in the afternoon or on weekends."[4] Subsequent research reveals, however, that this conclusion holds true only for the more urban sections of the State; the combined effect of the rules and of court schedules makes considerably longer delays possible in rural areas.

Criminal Rule 4 (b) (1) provides that the arrest warrant "shall command that the defendant be arrested and brought before the judge of the court from which it issues." If, for example, the warrant were issued from the Bridgton District Court, the defendant would be brought before the judge of that tribunal.[5] The problem arises from the fact that the judge at Bridgton sits only on Mondays, and thus, an accused, arrested on Tuesday, would have to wait 6 days before presentment or arraignment. Should the Monday following arrest be a legal holiday, the delay would seemingly be extended to 13 days.

The same situation results from the procedures for arrests without warrants contained in Criminal Rule 5 (a).

> Any person making an arrest without a warrant having been issued shall take the arrested person without unnecessary delay before the nearest available magistrate within the division within which the arrest was made. (Emphasis added.)

Except in Aroostook County, each district court constitutes a separate division.[6] Accordingly, if the arrest took place within the division served by the Bridgton District Court, the Rule requires that the judge of that court preside over the presentment or arraignment. Once again, the infrequency with which the court meets could produce long delays.

For purposes of perspective, it should be pointed out that the defendants in these cases are almost invariably taken before a bail commissioner prior to the intial court appearance, and a vast majority are apparently released on bail.[7] The problem, however, remains with respect to the offer of counsel, insofar as this aspect of the process is handled exclusively by the judiciary. Furthermore, Bridgton represents but one example of this phenomenon; there are 4 other judicial divisions in which the court meets one day per week and 18 divisions with only two court days. Thus, the potential for delay in the offer and provision of public representation is not an isolated problem.

Similar delays between arrest and the assignment of counsel exist in some juvenile cases. These occur primarily when the arresting officer apprehends the juvenile when court is not in session and decides, pursuant to 15 M.R.S.A. § 2608, that he should be detained in the Boys Training Center pending a hearing.[8] Since the Center will hold the juvenile only for 24 hours in the absence of a court order, the officer usually secures the necessary order the next day, at which time the hearing date is set. It is at this hearing that counsel is assigned, but according to the resident advocate of the Center, the time between arrest and the juvenile's first court appearance generally runs from three to ten days.[9] During this period, the juvenile remains incarcerated without access to legal representation.

Even longer delays may result if the judge exercises his authority under 15 M.R.S.A. § 2503 and orders that the juvenile undergo a psychiatric examination.[10] The effect of this examination is to postpone further court action. Since on occasion the order for the examination precedes the appointment of counsel, a somewhat questionable procedure in itself, the juvenile does not have the benefit of an attorney until the completion of the examination and the resumption of the proceedings. In these cases, the resident advocate estimates that

the gap between arrest and the provision of legal representation is usually about two to four weeks; for at least one juvenile, the delay was as long as five weeks. At the risk of repetition, the juvenile spends this time deprived of his liberty, even though he has not yet been found to have committed an offense.

Although the requirement that counsel be offered at presentment or arraignment theoretically should ensure a comparatively speedy delivery of defense services, the practice does not always conform to the theory. The system breaks down when the initial appearance before a judicial officer does not follow promptly after arrest. An attempt to quantify "promptly" or "unnecessary delay" may admittedly be the subject of some debate. On the one hand, it seems unrealistic to expect all sections of the State to comply with the National Advisory Commission recommendation that every initial appearance be held within six hours of the arrest.[11] On the other hand, the delays described above can certainly be characterized as unreasonable. Even if the accused is released on bail, an excessive delay in the provision of counsel may adversely affect his defense.

II. Representation Prior to Court Appearance.

In light of the improbability of devising workable procedures under which every arrested person or suspect could be brought immediately before a magistrate, the need to make representation available prior to the initial court appearance raises important issues. When asked whether the present system offers counsel early enough in the criminal process to adequately safeguard the defendant's rights, the overwhelming majority of Maine judges and county attorneys responded affirmatively.[12] One dissenting prosecutor, however, profferred the observation that since it does not occur until arraignment, "we usually have a statement by then." A superior court justice took a somewhat different view of the manner in which the unavailability of an attorney may hurt the accused.

> If an arrested defendant asks for counsel, the police officer simply stops interrogation and puts him in the slammer. It may be in the defendant's best interest to talk!

Nevertheless, most judges and prosecutors do not consider the lack of pre-arraignment representation a deficiency in Maine's assigned counsel system.

Although not a model of clarity, the case law fails to sustain constitutional argument for the provision of counsel prior to the initial court appearance. The momentum generated by United States

v. Wade, 388 U. S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967) was at least temporarily halted by Kirby v. Illinois, 406 U.S. 683 (1972). In that decision, the Court restricted the per se exclusionary rule of pretrial lineup identifications, conducted without notice to and in the absence of counsel, to post-indictment lineups. The opinion unequivocably asserted that "a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him."[13]

Of perhaps greater significance is the Court's emphasis of the fact that Escobedo and Miranda were predicated upon the privilege against compulsory self-incrimination and not upon the right to counsel.[14] Implicit in this reasoning is the conclusion that if a defendant responds to the Miranda warning with a request for counsel, the police are not obliged to provide an attorney, but merely to cease the interrogation. Accordingly, while the case law limits the extent of the investigation that may be carried out in the absence of a waiver of counsel, it does not require the State to fulfill a request for representation prior to the initial court appearance.

From a policy standpoint, however, the earliest possible delivery of defense services is almost universally recommended. Illustrative of this view are the relevant standards promulgated by the American Bar Association and the National Advisory Commission.

> (A.B.A.): Counsel should be provided to the accused as soon as feasible after he is taken into custody, when he appears before a committing magistrate, or when he is formally charged, whichever occurs earliest.[15]

> (N.A.C.): Public representation should be made available to eligible defendants... beginning at the time the individual either is arrested or is requested to participate in an investigation that has focused upon him as a likely suspect.[16]

Although mechanical problems deterred the Commission from a formal recommendation for even earlier access to counsel, it does support in principle "informal efforts to make lawyers available for consultation with those merely under suspicion."[17]

Perhaps the strongest testimonial for post-apprehension, pre-court appearance representation comes from experienced defense attorneys. The State Public Defender of Colorado regards access to the accused immediately following arrest as one of the "keys" to an effective defense system.

> In any criminal proceeding what happens in the first few minutes or hours after apprehension and arrest is all too often critical to the outcome of the case.[18]

His view that vital constitutional rights are frequently lost at this stage of the process is supported by the Maine prosecutor quoted above. For the same reason, manuals on the defense of criminal cases advise lawyers to conduct the initial client interview as expeditiously as possible.[19] Although seemingly without constitutional significance at this time, it bears remembering that monied defendants usually have the opportunity to consult with an attorney immediately after arrest. The importance attached to this right militates in favor of affording the same opportunity to less affluent persons.

FOOTNOTES

[1]A magistrate is defined as "a judge of the District Court, a judge of the municipal court, or a trial justice." Maine Criminal Rule 54 (c). Since the latter two positions have been eliminated, the term presumably includes only judges of the District Court.

[2]District Court Criminal Rule 5 (b).

[3]Criminal Rule 5 (a) and District Court Criminal Rule 5 (a).

[4]Maine Judicial Conference, supra, at 215.

[5]This would not necessarily hold true if the arrest were made at a place 100 miles or more from the place where the warrant were issued. In that instance, the arrested person could demand to "be taken before the nearest available magistrate within the division in which he was arrested." Criminal Rule 5 (a).

[6]See 4 M.R.S.A. § 153.

[7]Telephone conversation with the clerk of the Bridgton District Court. Those defendants, not released on bail, are detained in a county jail either at Portland or at South Paris.

At times, the entire procedure seems to make little sense. For example, a defendant arrested in Bridgton, on a warrant issued from that court, might be transported to Portland to await the next session of the Bridgton District Court, which might not occur for a number of days. Thus, he would have to spend the time incarcerated in the county jail, despite the fact that the Portland District Court, located only a few blocks away from the jail, sits on a daily basis. Since the rules seemingly preclude presentment or arraignment in that court, the defendant would have to incur both the delay and a 38 mile trip back to Bridgton for purposes of his first appearance.

[8]The arresting officer may follow this procedure whenever he "believes that security provisions must be made for any juvenile arrested until he may be brought before a juvenile court." 15 M.R.S.A. § 2608. Statistics provided by the Boys Training Center reveal that it held 491 juveniles for court in 1974. In only 95 cases did the final disposition involve a commitment order.

[9]Telephone conversation with the resident advocate at the Boys Training Center.

[10]The statute allows such an examination if "the court has cause to believe that the juvenile is mentally retarded or mentally ill." 15 M.R.S.A. § 2503. The courts required 180 psychiatric examinations at the Boys Training Center in 1974.

[11]NAC at 77.

[12]Only 3 superior court justices and 2 county attorneys indicated that there are cases in which the offer may not occur early enough.

[13]406 U.S. at 688.

[14]406 U.S. at 688-9.

[15]ABA at 43-4.

[16]NAC at 253.

[17]Id. at 254.

[18]Letter from Rollie R. Rogers, State Public Defender of Colorado.

[19]"It is, therefore, evident that it is extremely urgent to interview the client without delay, irrespective of who summoned the lawyer." I. Mendleson, Defending Criminal Cases (Practicing Law Institute 1967) at 14.

RECOMMENDATIONS ON THE INITIAL PROVISION OF COUNSEL

This report recommends that the State take steps to make counsel available in appropriate cases prior to the initial court appearance. Since many of the reasons for early representation have already been discussed, it should suffice to briefly paraphrase the arguments put forth by the National Advisory Commission.

The primary need for early representation results from the fact that "waivers of fundamental constitutional rights occur principally during the prearraignment stage of a criminal proceeding."[1] Given the complexities involved, the accused may often need the assistance of counsel to understand and assert these rights. From the perspective of efficiency, the availability of this assistance could substantially reduce the number of motions challenging the admissibility of evidence gathered prior to the first appearance. The late entry of counsel may also prejudice the factual defenses of the accused. In certain types of cases, delay can be critical: "the need to obtain experts before perishable or transitory evidence is lost is becoming increasingly frequent as the courts come to depend more and more on science and technology to assist them in resolving issues of fact."[2]

Another of the Commission's arguments has particular applicability to Maine. Appointment of counsel at or after the initial appearance often occasions delay insofar as the attorney has to interview the defendant and usually has to do some research or investigation. Accordingly, a continuance becomes almost automatic, which only serves to increase court congestion. In a similar vein, the provision of an attorney prior to the first court appearance would facilitate early plea nogotiation to the benefit of the defendant and the court system. The previous finding that long delays sometimes exist before presentment or arraignment adds force to the proposition that counsel should be available within a reasonable time after arrest, if not sooner. The difficult problems rest, however, not in the desirability of this recommendation, but in the development of procedures necessary for its formal implementation.

An unadministered assigned counsel system is singularly unsuited to afford representation at an early stage of the criminal process. This deficiency stems from the simple fact that the judiciary possesses the exclusive authority to appoint counsel. To accelerate provision of defense services, then, arrested persons, or someone acting on their behalf, would have to contact a judge who would in turn have to shop around for an attorney. It is easy to envision the inconvenience that would result from such procedures, especially for defendants apprehended

at night or on weekends. This approach clearly could not accommodate a needy person who considered himself a suspect and who thus wished to consult with an attorney in anticipation of a possible arrest.

For purely practical reasons, the burden of securing legal representation should be removed from the shoulders of the judges. The limitations on their time and availability have been recognized in other contexts in the criminal justice system, and this recognition has led to the delegation of certain powers traditionally vested in the judiciary. Such delegations have usually occurred in situations where speed may be of the essence. For example, the judicial authority to issue warrants is shared by complaint justices and clerks of court.[3] An even closer analogy involves the setting of bail, where the time factor may be critical from the perspective of the defendant. The realization that judges may not always be accessible has led to the use of special bail commissioners.[4] The considerations applicable to warrants and bail have equal validity with respect to the delivery of defense services.

The proposed public defender-coordinated assigned counsel system would have a far greater capability to provide pre-first appearance representation. In contrast with judges, who possess a myriad of other duties, the staff attorneys' sole responsibility would be criminal defense. Even if judicial officers could be contacted outside of the courtroom, they suffer the disadvantage of being able to act only as intermediaries; they still must find an attorney to represent the accused. The use of staff attorneys eliminates an unnecessary step, insofar as they can serve as counsel and thus furnish representation without delay.

Although variations within the State make uniform procedures infeasible, some examples of the mechanics of early representation can be offered. Where adequate manpower existed, the program could have staff and panel attorneys "on call" at all times. Thus, if a person apprehended in the evening requested counsel, the police would call an answering service, which would relay the message to the appropriate lawyer. The cooperation of law enforcement officers could be mandated by statute, as recommended in the Model Defense of Needy Persons Act,[5] or solicited through informal channels without the creation of a legal duty.[6] As a substitute for, or supplement to, this procedure, the defense office should make daily checks of all the jails within its district to ascertain whether any individuals are being held pending a court appearance.

Apart from the above suggestions, the mere existence of a defender office would facilitate the speedy delivery of services. In areas where prompt court appearances are not

possible, bailed defendants could contact the program during the interim between arrest and presentment or arraignment. Similarly, a representative of an incarcerated person could bring the matter to the attention of a staff attorney. With respect to the detained juveniles discussed in the previous section, the resident advocate of the Boys Training Center could notify the office to secure counsel. In each of these instances, the courts, as well as the defendants, stand to gain, since the determination of eligibility and the preliminary work on the case could be completed prior to the appearance before a judge. The ultimate effect would be to accelerate the disposition of cases and to reduce the backlog.

This report does not pretend that counsel can be made available to every needy person in every section of the State within minutes after arrest. It believes, however, that substantial progress toward this goal is possible under the proposed system. Equally clear is the improbability that a more rapid delivery of defense services can be attained as long as judges are saddled with the burden of having to find lawyers to represent persons accused of crimes.

FOOTNOTES

[1]NAC at 254.

[2]Id.

[3]See 4 M.R.S.A. § 161; 15 M.R.S.A. §§ 706, 707.

[4]See 14 M.R.S.A. § 5542.

[5]Sec. 3 (a) of that Act provides as follows:

> (a) If a person who is being detained by a law enforcement officer, or who is under formal charges of having committed, or is being detained under a conviction of, a serious crime, is not represented by an attorney under conditions in which a person having his own counsel would be entitled to be so represented, the law enforcement officers concerned, upon commencement of detention, or the court, upon formal charges, as the case may be, shall:
>
> (1) clearly inform him of the right of a needy person to be represented by an attorney at public expense; and
>
> (2) if the person detained or charged does not have an attorney, notify the public defender...that he is not so represented.

As used in this section, the term "commencement of detention" includes the taking into custody of a probationer or parolee.

[6]The Office of the Public Defender in Colorado has had considerable success in the use of informal channels to establish a good working relationship with the police. According to the State Public Defender, law enforcement officers regularly call the public defender whenever an arrest is made and the defendant needs counsel.

OFFER AND WAIVER OF COUNSEL AND FREQUENCY OF APPOINTMENTS

I. Offer and Waiver of Counsel.

A. Introduction.

Since the right to public representation may be abandoned only through a "knowing and intelligent waiver,"[1] the adequacy of the procedures for offering counsel turns upon their effectiveness in enabling defendants to fully understand their rights. In this sense, the ultimate test is unavoidably subjective. The extent of the explanation necessary to inform a court-wise defendant may not suffice for a person arrested for the first time. As might be expected, the law on this subject is rather general.

A discussion of the offer of counsel can be broken down into three questions, each of which has a descriptive and evaluative component. First, in what types of cases is counsel offered? Do these cases include all of those for which a right to public representation exists? Second, by what methods is the right to counsel communicated to defendants? Do these methods insure a sufficient understanding of the right so that defendants can make knowing and intelligent decisions? Third, what information about the right to counsel is communicated to defendants? Does this information allow defendants a sufficient basis on which to make knowing and intelligent decisions?

Given the nature of these questions, they are not amenable to conclusive answers based upon hard data. One approach might have been a massive "court watching" project to observe the methods used by judges and the reactions of defendants. Such a project had already been undertaken in Maine with only limited success,[2] and a second attempt exceeded the resources of this study. Accordingly, the ensuing observations about present practices are based upon admittedly limited "factual" input supplemented by the opinions of this and other writers.

B. Types of Cases.

This issue has already been treated in the section on case eligibility, where it was concluded that counsel frequently is not offered when required by Newell v. State. It has further relevance here only to the extent that the general announcements made by district court judges prior to arraignment affect defendants' perceptions of their eligibility for public representation and thus influence their decision to seek it. Although there is no evidence of widespread judicial misstatements on case eligibility, in at least one instance, mentioned previously, the presiding judge indicated that the right applied only to felonies. A similar incident was reported by a court watcher, who observed district court proceedings prior to Argersinger but subsequent to Newell.[3] In all fairness, these episodes merely point to the possibility that defendants may occasionally receive erroneous information as to the offenses for which counsel will be appointed.

C. Method of Informing Defendants.

As a result of heavy arraignment calendars, lower tribunals seem to experience the most difficulty in devising a fair, yet efficient, method for informing defendants of their right to counsel. One approach is the mass notice, whereby the judicial officer opens court with a general announcement to the entire assemblage concerning both legal procedures and rights. Potential problems arise when exclusive reliance is placed upon this technique. That this situation exists in some Maine courts is demonstrated by the fact that four members of the district court judiciary responded "no" to the following question: "If you have made a general announcement at the beginning of the court session, do you again explain the right to assigned counsel to every potentially eligible defendant who appears before you without an attorney?"[4]

The difficulty with the mass notice is that it may not be heard or fully understood by all defendants, especially since it usually includes a wide variety of legal information. For these reasons, one court has held that a general announcement by the clerk is insufficient to show a knowing and intelligent waiver.

> The clerk's announcement here, while perhaps an efficient way to communicate information to a large calendar, is of no value if not actually heard and in any event can only be a preliminary step.[5]

This same conclusion is implicit in a number of other decisions which require the judge to make specific inquiries of the defendant.

There are also indications that some district court judges characterize the right to public representation in such a way as to put the onus on the defendant to request it.[6] While this may appear a matter of semantics, appellate courts have taken the position that the failure to request appointed counsel may not constitute a knowing waiver. Accordingly, they have placed the burden on the judge to make a specific offer to each accused.

> Because of the critical nature of the arraignment, an accused is entitled to the assistance of counsel <u>whether or not he requests it</u>. A finding of waiver will not be made unless it appears from the record that at each critical stage of the proceeding <u>the trial judge specifically offered, and the accused knowingly and understandingly rejected</u>, the representation of appointed counsel.[7]

In a similar vein, it has been held that the court must assume the initiative of ascertaining whether the defendant is indigent.[8]

The case of Gilliard v. Carson, 348 F. Supp. 757 (M.D. Fla. 1972), probably contains the most comprehensive guidelines on the offer of counsel in lower tribunals. Finding the notification procedures inadequate, a federal judge enjoined the prosecution of indigent citizens for any offense punishable by imprisonment unless the municipal court followed extremely detailed steps, set out in the opinion, to ensure that any waiver would be voluntary and intelligent. Included in those steps were a list of facts about the right to counsel of which the defendant had to be informed and a list of questions which he had to be asked. Furthermore, the decision permitted the use of a written waiver only if it were read to the accused and he were afforded an opportunity to ask questions about it.

Gilliard v. Carson stands as one of the few attempts to probe into the communication process in the lower courts. It also points out the apparent absence of standardized procedures for the Maine district courts; there is nothing comparable to Criminal Rule 11 for waivers of counsel. The available information also suggests that the courts often do not carry the notification and waiver process as far as Gilliard v. Carson.[9] Whether this failure raises the possibility of uninformed waivers is a debatable question, on which this report will offer its views shortly.

D. Information Communicated to Defendants.

In Von Moltke v. Gillies, 332 U. S. 708 (1948), the Supreme Court enumerated the factors that had to be communicated to the accused before a knowing waiver of counsel could be found.

> To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.[10]

Subsequent decisions, however, have not treated this list as an absolute prerequisite, but rather have emphasized the facts of the particular cases.[11] Accordingly, there are no universally accepted words, the presence or absence of which will validate or invalidate a waiver of counsel.

The questionnaires suggest that Maine judges do not follow a uniform formula in apprising the accused of his right to

public representation and in accepting a waiver thereof.[12] A partial exception exists with respect to felony cases, in light of the fact that the overwhelming majority of waivers are accompanied by guilty pleas. Criminal Rule 11 thus comes into play, and the court is obliged to satisfy itself "that the defendant in fact committed the crime charged" and that "the plea is made voluntarily with understanding of the nature of the charge." A comparable provision does not exist for misdemeanor prosecutions in the district court, and the practice seems to vary from judge to judge, and perhaps from case to case.

E. Frequency of Waivers.

The judiciary is unanimous in its conclusion that financially eligible felony defendants scarcely, if ever, waive the right to public representation. Half of the superior court justices surveyed stated that such refusals never occurred in their courts, and the highest estimated percentage of felony defendants who waived counsel was only 10 percent.

A far more divergent picture emerges with respect to misdemeanor prosecutions. To ascertain the frequency of waivers in those cases, the judges were asked: "What percentage of indigent misdemeanor defendants who appear before you would you estimate waive assigned counsel?" While most of the district court bench gave very low estimates, two judges put the figure at 75 percent, and one at 50 percent. Two superior court justices also indicated that at least 50 percent waived.[13] Given the unscientific nature of the inquiry, it is difficult to determine the extent to which this variation stems from different judicial attitudes and practices with respect to the offer and waiver of counsel.[14] It does raise the possibility that differences exist and that these differences affect the likelihood that a misdemeanor defendant will receive public representation.

II. Frequency of Appointments.

To compare the relative frequency of appointments in the district courts, this report utilized the following procedure: it divided the number of attorneys' bills for the court by the total number of criminal (excluding traffic) and juvenile charges, and then restated the result as a percentage. For example, the Farmington District Court had 58 attorneys' bills and 614 charges in 1973;[15] dividing the former by the latter produces a result of .094, or 9.4 percent. Needless to say, a higher percentage of bills to charges reflects a greater frequency of appointments.

Some caveats about this procedure appear necessary. First, the figure for each court does not necessarily indicate the true percentage of cases handled by assigned counsel, insofar as a

bill may cover more than one charge.[16] Accordingly, the figures are intended only for comparative purposes. Second, variations in judicial practices constitute but one explanation of the differences among the courts. Other possible explanations include the comparative frequency of felony, serious misdemeanor, and juvenile charges, the standard of living of the area served by the court, and the fees of retained counsel. Since these and other variables could not be eliminated, the results do not have laboratory accuracy as a measure of the judicial approach to the appointment of counsel and the acceptance of waivers.

The following chart sets out the percentage of bills to charges for those courts in which the same judge or judges sat during most of 1973.[17] The courts are listed in descending order with respect to the frequency of appointments.

TABLE VIII-1[18]

FREQUENCY OF APPOINTMENTS BY DISTRICT

Court	% of Bills to Charges
1. Bangor and Newport (Dist. III)	13.4%
2. Bath, Wiscasset and Rockland (Dist. VI)	11.5%
3. Portland	10.0%
4. Calais and Machias (Dist. IV)	7.7%
5. Farmington and Skowhegan (Dist. XII)	7.6%
6. Augusta and Waterville (Dist. VII)	7.2%
7. Presque Isle and Houlton (Dist. II)	7.1%
8. Saco, Sanford and Kittery (Dist. X)	6.6%
9. Lewiston	6.5%
10. South Paris, Rumford and Livermore Falls (Dist. XI)	6.0%
11. Caribou, Madawaska, Fort Kent, and Van Buren (Dist. I)	5.6%
12. Ellsworth, Belfast, and Bar Harbor (Dist. V)	3.2%
13. Lincoln, Dover-Foxcroft and Millinocket (Dist. XIII)	3.1%

At a minimum, the range of the deviation justifies the suspicion that some courts are more likely to provide the accused with public representation.

Another aspect of this analysis reveals the frequency of appointments to be somewhat higher in the more heavily populated areas. When the courts are grouped into categories according to population, the following composite picture emerges.

TABLE VIII-2

FREQUENCY OF APPOINTMENTS BY POPULATION

Courts by Population	% of Bills to Charges
1. Courts in the top third by population.	8.5%
2. Courts in the middle third by population.	7.2%
3. Courts in the bottom third by population.	5.2%

As Table VIII-3, giving the percentages for all the courts indicates, this pattern does not always hold true. Nevertheless, there does seem to be a trend, and although the reason for it is not readily apparent from the data, it might be conjectured that the unavailability of counsel in certain rural areas plays a significant role.

TABLE VIII-3[19]

FREQUENCY OF APPOINTMENTS BY COURT

Court	# of Charges	# of attorneys' bills	% of bills to charges
1. Bangor	1998	284	14.2%
2. Rockland	947	116	12.2%
3. Brunswick	678	77	11.4%
4. Bath	605	67	11.1%
5. Livermore Falls	216	23	10.6%
6. Wiscasset	552	58	10.5%
7. Portland	6439	645	10.0%
8. Newport	428	42	9.8%
9. Farmington	614	58	9.4%
10. South Paris	423	36	8.5%
11. Caribou	901	74	8.2%
11. Machias	486	40	8.2%
11. Sanford	1231	101	8.2%
14. Houlton	938	72	7.7%
15. Calais	992	74	7.5%
15. Lincoln	441	33	7.5%
17. Augusta	1882	138	7.3%
18. Saco	1802	127	7.0%
19. Skowhegan	1652	114	6.9%
19. Waterville	1080	75	6.9%
21. Presque Isle	1209	81	6.7%
22. Lewiston	2721	176	6.5%
23. Belfast	913	45	4.9%
24. Van Buren	232	10	4.3%
25. Kittery	1111	47	4.2%
26. Bridgton	805	33	4.1%

Court	# of Charges	# of attorneys bills	% of bills to charges
27. Rumford	976	38	3.9%
28. Madawaska	359	13	3.6%
29. Dover-Foxcroft	1470	45	3.1%
30. Fort Kent	601	17	2.8%
31. Ellsworth	967	22	2.3%
32. Bar Harbor	503	10	2.0%
33. Millinocket	1022	12	1.2%

FOOTNOTES

[1]Argersinger v. Hamlin, supra, at 37.

[2]The project, conducted in 1972, was supervised by Peter Avery Anderson, Esq., then of Pine Tree Legal Assistance, Inc. The author of this report wishes to thank Pine Tree Legal Assistance, Inc. for making available the information collected by its court watchers.

[3]The court watcher quotes the judge as telling defendants that you "may have appointed counsel if you satisfy the court that you have no job, no money and you are charged with a felony." The date of this observation was May 1, 1972.

[4]One of the judges specifically limited his negative response to misdemeanor prosecutions.

[5]Campbell v. State, 195 S.E.2d 664, 665 (Ga. App. 1973). The charges in this case were misdemeanors. Cf. In re Johnson, 398 P.2d 420 (Cal. 1965), which asserted that mass notice might suffice in misdemeanor cases, but which reversed petitioner's conviction because he had not expressly waived public representation.

[6]One district court judge stated in a questionnaire that defendants are told that "they must make application to the court for the appointment of counsel." Similarly, a court watcher reported that the judge informed defendants that if they want a lawyer appointed, they should speak to him at the bench. (Date of observation: Oct. 10, 1972).

[7]People v. Slaton, 300 N.E.2d 46, 49 (Ill. App. 1973). See also Carnley v. Cochran, 369 U.S. 506, 513 (1962).

[8]People v. Slaton, supra.

[9]To some extent this conclusion is based upon the personal observations of the author of this report, who spent approximately eight months in the Cumberland and York County district courts in a previous position of employment.

[10]332 U.S. at 723-4. Although the charge in this case was conspiracy to commit espionage, there is nothing to suggest that the holding would not apply to less serious offenses.

[11]For a discussion of these decisions, see The Right to Counsel, at vol. 3, pp. 189-91.

[12]This conclusion is based upon the responses to the following inquiry contained in the questionnaires: "What information do you give to defendants, charged with misdemeanors serious enough to warrant the appointment of counsel, as to their right to assigned counsel, if indigent?"

[13]These two estimates were 50% and 75%.

[14]It is possible that these discrepancies stemmed from different interpretations of the question which was phrased as follows: "What percentage of indigent misdemeanor defendants who appear before you would you estimate waive assigned counsel?" A respondent who based his percentage on all indigent misdemeanor defendants would undoubtedly have given a higher estimate than one who computed it on the basis of indigent defendants charged with misdemeanors serious enough to warrant public representation. Although the latter is clearly the intended interpretation, insofar as one cannot waive a right that does not exist, it cannot be said with absolute certainty that some respondents did not follow the former interpretation.

[15]While both the bills and charges are for a 12-month period, the bills are for calendar year 1973 and the charges for fiscal year 1973. The former information was collected by this study, whereas the latter was taken from the Annual Report of the Maine District Court.

[16]For example, the 58 bills in the Farmington District Court encompass 69 charges. Thus, the actual percentage of charges handled by assigned counsel in that tribunal was 11.2 percent. Although it might have been preferable to use this figure, instead of the total number of bills, it was not available for all of the courts.

[17]The Bridgton and Brunswick District Courts were not included in this analysis because different judges sat there during the year.

[18]A serious problem arises from variations in billing practices. Although this will be discussed in detail in the section on compensation, it must be mentioned here as it affects the data on the frequency of appointments.

Generally speaking, the district court policy and the customary procedure are to define a case, for billing purposes, as one or more charges against a single defendant arising out of a single

occurrence. Occasionally, however, an attorney will bill and be compensated for each charge involved in a single case. This practice inflates the number of bills for the courts involved, and thus, it may distort the frequency of appointments. Despite this problem, it is believed that billing by charge does not occur with sufficient regularity to have a major effect on the results of this analysis. According to the data collected by this study, moreover, the courts most probably affected are those in Districts VI (especially Bath) and XIII (especially Lincoln and Dover-Foxcroft). Even if adjusted for this distortion, District VI would remain rather high on the list and District XIII would only solidify its position at the bottom.

[19]This table suffers from the same distortion referred to in note 18. Correcting the data for those courts where the potential distortion seems greatest, the respective percentages for Bath, Lincoln, and Dover-Foxcroft would be approximately 10.1 percent, 6.3 percent, and 1.0 percent.

RECOMMENDATIONS ON OFFER AND WAIVER OF COUNSEL

I. Introduction.

The following discussion is directed primarily at the district courts for three reasons. First, the vast majority of criminal and juvenile cases originate in that tribunal. Second, given the infrequency of waivers in felony prosecutions, a greater potential for problems exists with respect to misdemeanors. Third, the heavy arraignment calendars in some district courts make it difficult to devise and implement procedures for offering counsel which are both fair and efficient.

As noted above, the true test of the method by which public representation is offered is an extremely elusive one, namely, its ability to enable the defendant to fully understand his rights. Although most of the county attorneys surveyed felt that the present system successfully accomplishes this objective,[1] their opinions were seemingly derived largely from experiences in the superior courts. The gist of the problem for the district courts was succintly expressed by a member of that bench, who observed that the "offer may not be readily understood by a defendant, unless he has been through the system before." Support for this view comes from studies conducted in other jurisdictions, which have found that some defendants are not even certain of the meaning of the word "counsel."[2] In an extreme case, a prisoner explained that he waived counsel because he did not realize that it meant lawyer.[3]

Subtle factors, such as "the things that are said, the tone of voice, and the atmosphere in the courtroom,"[4] may also influence the defendant's decision with respect to assigned counsel. In this regard, the words used by the judges, and the attitudes suggested by those words, appear to vary considerably. One indicated in his questionnaire that he informs eligible defendant's that "if I were in your position I would seek counsel." Some give a far more neutral explanation of the right to public representation. At the other end of the spectrum, a court watcher quoted a judge as telling an accused that if he "could afford a drink, he could afford a lawyer."[5] While the denial of assigned counsel in that case was probably appropriate for other reasons,[6] the attitude displayed by the judge might well have deterred defendants awaiting arraignment from seeking public representation. Similarly, a literal interpretation of the statement, attributed to another judge, that assigned counsel was available only for persons with "no funds, no job and no property"[7] could have convinced a potentially eligible defendant that he would not qualify.

II. Offer by an Attorney.

A. Reasons.

This report endorses the American Bar Association recommendation that, whenever feasible, attorneys should explain the right to counsel to potentially eligible persons.[8] Although it would not go so far as to make consultation with a lawyer an absolute prerequisite to a valid waiver at this time, the report does believe that the State should move in that direction.[9]

The primary argument for a system utilizing attorneys to make the offer of public representation is that it is better suited to impart to the accused a full comprehension of his rights. In achieving this objective, current practices have a number of drawbacks, most of which are not the fault of the judiciary. First, mass notice has already been shown to be an unsatisfactory method of communicating vital information.[10] Second, even a direct dialogue between the judge and the accused occurs in surroundings which may discourage the latter from seeking a full clarification of his rights. Standing alone before a judge in a crowded courtroom may prove intimidating to persons who have never before appeared in court. The inhibitions of the defendant may well be enhanced by the time pressures which are usually apparent to everyone in tribunals with heavy arraignment calendars. In short, the overall atmosphere is conducive to hasty decisions and may foster an attitude in the defendant to have the matter over and done with, even if he still has unanswered questions.

The questions of defendants, moreover, often relate to the merits of the case or to the probable penalty for the offense charged. The inability of the judicial officer even to entertain such inquiries prior to a disposition of the matter produces ackward exchanges.[11] The accused is sometimes told that he must enter a plea before any facts about the case can be discussed. If he pleads "not guilty," the matter will be set for trial, often at a future date requiring another court appearance. If he pleads "guilty," the court will then permit him to raise questions and to explain his actions. The situation has "Catch-22" overtones, insofar as the information sought by the accused to assist him in deciding how to plead can be obtained from the judge only after he has entered a plea of guilty. Although a conscientious judge will not accept the plea if the subsequent dialogue discloses doubt on the part of the accused as to his guilt, the entire procedure is an inefficient way of giving the accused an understanding on which to base his decision. In addition, it poses a constant danger that the statements or questions of the defendant will reveal prejudicial information.[12]

The notion that consultation with counsel may affect the decision of the accused is not without substantiating evidence. One superior justice has found that "after a conference with a lawyer the defendant would change his mind and accept an attorney." Moreover, if one concurs with the premise that the advice of counsel is necessary to assist the accused in making critical choices about vital rights, it is difficult to see why it is not equally essential with respect to what may be the most critical of all choices, namely, the decision to waive counsel.[13]

From another perspective, more than half of the district court judges indicated that the need to explain the right to assigned counsel to every potentially eligible defendant puts a burden on the court's time. If the judicial officer meticulously insures that each individual fully understands his rights, the cumulative effect of these interruptions in the arraignment calendar can cause serious delays in the busier tribunals. Since these explanations could occur simultaneously with other court business, the delays clearly seem avoidable.

It is submitted that the above problems would not exist were defense attorneys to inform defendants of their rights. Without the pressure created by crowded docket, the lawyer could take pains to guarantee that the accused appreciated the nature of the charges, the probable consequences, and the available options. Since the dialogue would be conducted in private and presumably less threatening surroundings, the accused should feel less restrained about raising questions. Equally important, those questions could go to the merits of the case which is usually the subject of paramount importance to the defendant. Needless to say, the judicial time saved by this procedure could be devoted to those functions which only the court can perform.

Some doubt about the advisability of this approach has been expressed on the grounds that the recitation to the accused of his right to counsel would not appear on the record, a precondition of a valid waiver.[14] This objection hardly seems insurmountable. If the defendant, after consultation with a lawyer, decided to waive his right to public representation, the judge could make very brief inquiries to insure that the defendant understood his actions.[15] An appellate court would almost certainly consider the discussion of the case with an attorney as evidence that the waiver was knowing and intelligent. Further, an approved outline of discussion points could be drafted by the program and followed by attorneys in every case. Alternatively, since most waivers are followed by guilty pleas, the attorney could represent the defendant at this proceeding, and the court could follow its customary practices in accepting such pleas.

Another possible criticism of this recommendation is that it will encourage needy persons to avail themselves of public representation, and thus, add to the congestion and delay in the criminal justice system. Apart from the fact that this argument conflicts with the high value the legal community places on the assistance of counsel, its conclusion does not necessarily follow from its premise. It is quite probable that a defendant will accept the offer of assigned counsel because he has one or two questions about the culpability or consequences of his actions. Accordingly, the court must select and appoint an attorney, a process that frequently entails at least one continuance.[16] By contrast, if the defendant's questions are susceptible of speedy answers, the opportunity to consult with a lawyer at arraignment might result in an immediate disposition of the case.

B. Modes of Implementation.

As explained in the proposed plan, staff attorneys could play the major role in advising defendants in the busier district courts. Since these attorneys cannot provide full-time coverage to all of the State's lower tribunals, other approaches must be examined. Among these, the "duty counsel" concept, developed by the Ontario Legal Aid Plan, seems the most impressive.[17]

The duty counsel roster consists of private practitioners who serve in the courts in which defendants make their first appearance. Generally speaking, they are assigned for a week or two at a time and are compensated on an hourly or per diem basis. Their primary function is to inform all unrepresented criminal defendants, whether they are in custody or responding to a summons, of their legal rights.

More specifically, the roster attorney will interview the accused prior to the appearance before the judge. If necessary, he will also represent the defendant at this time, in order to have bail set or to arrange for a continuance so that an attorney can be engaged. In relevant cases, duty counsel will also instruct the person on the procedures by which he can apply for legal aid. The roster attorney may give advice in certain circumstances, and should the defendant insist on pleading guilty, he may render assistance in entering the plea and in the sentencing process. Except in remote areas, duty counsel rarely act as lawyers for individuals who plead not guilty.

According to Justice Brooke of the Supreme Court of Ontario, the duty counsel system functions effectively both in densely and sparsely populated areas.[18] Although it would seem economically infeasible to have a roster attorney present during every arraignment session in a rural court, there is one unusual feature of the Ontario Legal Aid Plan that may justify such a practice. This feature is a provision that makes the services

of duty counsel available to all persons, regardless of their financial situation. Thus, the roster attorney acts as a sort of general advisor to all unrepresented defendants in court for a first appearance or arraignment. Given the confusion that may be felt by an individual totally unfamiliar with court procedures, there is much to commend this concept.

> The result, then, hopefully is that the great number of persons who were disposed of on their first appearance on a plea of guilty without advice or representation by counsel is a bit of history and does not happen today- a step to ensure an adequate defense.[19]

C. Implementation in Maine.

With respect to the implementation of the above concepts in Maine, staff attorneys could assume the responsibility for informing defendants of their rights at the inception of the proposed system. Although limited to the busier district courts, those tribunals process the majority of cases, and the judges presiding therein probably have the greatest need of such assistance. As caseloads increase, the judicial officer can devote less time to individual defendants. Accordingly, it makes sense to initiate this procedure in those courts with the heaviest caseloads.

By contrast, the use of private attorneys as duty counsel, while theoretically desirable, should be viewed as an experiment to be tried after a combined public defender-coordinated assigned counsel program has become established. There are a number of reasons for this timetable. First, improvement in the delivery of present services must take priority over the expansion of those services. Second, the experiences of the Ontario Legal Aid Plan notwithstanding, there remain serious questions about the economic wisdom of duty counsel, especially if they are not permitted to advise non-indigent persons.[20] Third, differences among the district courts may make the concept workable in some areas and not in others.

Given the costs inherent in a fixed duty counsel roster, the experimental implementation of this procedure might be undertaken on an informal basis. Instead of assigning a specific attorney to appear every court day, the judge could simply appoint a lawyer already present to act as duty counsel whenever such services became necessary. The appointment would be for consultation only, the major purpose being to advise defendants of their rights. Standard fees would be set for these services, and there would be a special budgetary allocation for the payment of these fees.

Although an informal approach conflicts with a basic premise of this report that effective public representation requires

administrative control, it may be the only modus operandi that does not involve prohibitive costs. To compensate an attorney for a court appearance, even when his services do not become necessary, is a difficult expenditure to justify. On the other hand, there are usually lawyers waiting in court for their cases to be called who could perform this function with little inconvenience. Ideally, this report believes that duty counsel, in the person of the staff attorney or a private practitioner, should be available in every court to consult with every unrepresented defendant charged with an offense to which the right to counsel attaches. It is for purely practical reasons that an informal system is suggested as a compromise experiment.

Even when duty counsel is available, moreover, a consultation should not assume the character of an absolute prerequisite to a valid waiver. If the judicial officer is convinced that an accused, who has not had the opportunity to talk with duty counsel, fully understands his rights, the court should be permitted to accept a waiver of those rights. To compel a consultation would waste the time of all the parties concerned. Needless to say, the judge should not forego the use of duty counsel unless he is strongly persuaded that the waiver is intelligent and voluntary.

III. Acceptance of Waiver by Judicial Officer.

Especially when the accused has not talked with an attorney, certain minimum safeguards, applicable in both felony and misdemeanor cases, should be required to effectuate a valid waiver. As has been done in other jurisdictions, these safeguards might be incorporated into the Maine Criminal Rules.[21]

Procedurally, a waiver should not be accepted unless there has been a direct colloquy between the judge and the defendant, as a result of which the court is satisfied that the latter's choice is knowing and intelligent. Along similar lines, the silence of the accused should not be construed as a decision to proceed without counsel. The Florida Rules of Criminal Procedure express this principle in the following language:

> Rule 3.111
> Providing Counsel to Indigents
>
> (b) Waiver of Counsel.
>
> (1) The failure of a defendant to request appointment of counsel or his announced intention to plead guilty shall not, in itself, constitute a waiver of counsel at any stage of the proceedings.

To say that the court must be satisfied that the waiver is knowing and intelligent is to raise the question of what the defendant must know. The wisdom of Von Moltke v. Gillies has been

challenged by some authorities on the grounds that it would arguably "require the court to give the defendant a course in law."[22] In keeping with the notion that simplicity benefits the accused as well as the criminal justice system, the explanation of the right to counsel should concentrate on truly critical information. More specifically, it is submitted that the judge should ensure that the defendant understands the following:

(1) The nature of the charges against him and the range of possible penalties therefore;

(2) That a defense lawyer can render important assistance even in the event of a guilty plea; and

(3) That counsel will be provided at no charge to the defendant, or at an amount that a defendant is found able to pay.

The above are intended as minimum standards, and in some instances, the presiding judge may have to take additional steps to guarantee the validity of a waiver. If, for example, it appears that the accused lacks the capacity to make an intelligent decision because of his mental condition, education, or some other factor, the court may have to require representation or at least consultation with an attorney.[23] In serious or complex cases, the court should impress upon the defendant the inadvisability of proceeding without counsel. On the other hand, when a person decides to waive after a discussion with duty counsel, the colloquy may be more perfunctory, for the purpose of establishing a record. Alternatively, written waiver forms might be used in these cases.[24] One form would be signed by duty counsel to the effect that he had fully explained the right to counsel to the defendant; the other, signed by the accused, would indicate his understanding of, and decision to waive, this right.[25]

FOOTNOTES

[1]However, one prosecutor stated that "many defendants have a misconception of the right to counsel, i.e., are not aware /of it/ or believe that they can get it in all cases."

[2]Silverstein, supra, at 90. See also Remington, Defense of the Indigent in Wisconsin, 37 Wisc. Bar Bull. 40 (1964). "At least one Wisconsin judge asks the defendant, 'What do I mean when I say right to counsel?' He indicates that he often receives an answer which persuades him that the defendant does not really understand what is involved." 37 Wisc. Bar Bull. at 46.

[3]Silverstein, supra, at 90.

[4]Id. at 89.

[5]Observation made by a court watcher in district court on Dec. 12, 1972.

[6]The charge was operating under the influence. Assuming it were a first offense, the statutory penalty at that time would have fallen below the Newell limit.

[7]Observation made by a court watcher in district court on May 5, 1972.

[8]Standard 7.1 provides that "this warning should be followed at the earliest possible time by the formal offer of counsel, preferably by a lawyer, but if that is not feasible, by a judge or magistrate." ABA at 59. See also Campbell v. State, supra, at 666.

[9]The decision not to make such a consultation mandatory stems primarily from the difficulty some courts might experience in having a lawyer present at all times.

[10]It should be remembered that this notice usually deals with other aspects of the criminal process, such as the various types of pleas and the right to a jury trial. In short, a considerable amount of law is covered by these general announcements.

[11]The author of this report has witnessed such exchanges on various occasions.

[12]See State v. Burke, 126 N.W.2d 91, 95 (Wis. 1964). One factor relevant to whether the defendant understands his rights is his previous experience with court proceedings. Inquiries in this direction can obviously elicit prejudicial responses.

[13]See Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956).

[14]See The Right to Counsel at vol. 3, pp. 194-95.

[15]The use of written waivers in these cases is discussed in a subsequent part of the text.

[16]For a discussion of the delays that this procedure entails, see the section of this report entitled "Selection and Notification of Counsel," infra.

[17]For a general description of this Plan, see Honsberger, The Ontario Legal Aid Plan, 15 McGill L.J. 436 (1969).

[18]Speech by Justice Brooke, reproduced in ABA Section of Criminal Justice, To Assure an Adequate Defense (1973) at 9-12.

[19]Id. at 11.

[20]Although technically beyond its scope, this report endorses the concept that duty counsel be available to advise all unrepresented defendants, other than those charged with minor traffic and similar violations, regardless of their financial situation. This recommendation is predicated upon the belief that a court can be extremely confusing for an individual not conversant with its procedures. Assuming duty counsel are not permitted to represent these defendants on a retained basis, the practice should not amount to unfair competition. Rather, duty counsel, subject to appropriate regulations of the local bar association, could act as a referral service for those defendants able to afford a lawyer.

[21]See, e.g., Rule 3.111 of the Florida Rules of Criminal Procedure. The Uniform Rules of Criminal Procedure contains a model rule dealing with the waiver of the right to counsel. Uniform Laws Annotated, Uniform Rules of Criminal Procedure, Rule 711 (1974). Many of the recommendations on waiver put forth in this report are based on the Uniform Rule.

[22]Comment to Rule 711 of the Uniform Rules of Criminal Procedure, supra, at 308.

[23]Florida Rule of Criminal Procedure 3.111 (d) (3) provides:

> No waiver of counsel shall be accepted where it appears that the defendant is unable to make an intelligent and understanding choice because of his mental condition, age, education, experience, the nature or complexity of the case, or other factors.

[24]Generally speaking, this report does not favor written waivers, insofar as they provide no assurance that the accused actually comprehends the contents of the form when he signs it. This danger is minimized, however, when duty counsel must also state in writing that he has advised the defendant of his rights and that in his opinion, the latter understands those rights.

[25]This report does not treat the problem of the right of a defendant to refuse public representation and proceed pro se, because it does not seem to arise with any frequency in Maine. In one serious case in which it did occur, the superior court justice followed the commendable practice of appointing an attorney to sit with the accused and consult with him when necessary during the trial. This practice accords with Uniform Rule of Criminal Procedure 711.

SELECTION AND NOTIFICATION OF APPOINTED COUNSEL

I. Introduction to the Selection of Counsel.

It is difficult to describe the system whereby counsel are selected for particular cases, insofar as the process hardly merits characterization as a "system." Apart from some rather vague judicial attitudes, research fails to reveal any organized or consistently followed procedures for making appointments. Although practices vary among the courts, they almost all share a lack of a formalized modus operandi. The ensuing description is pieced together from the comments of judges and prosecutors; a subsequent section will deal with the actual distribution of appointments.

II. Use of Rosters.

A. District Courts.

The use of rosters from which to select attorneys is a commonly endorsed recommendation for assigned counsel systems.[1] At first blush, the district courts appear in compliance with this recommendation, since eight members of that judiciary indicated that such lists are maintained in the courts in which they customarily sit. Only three judges responded "no" to this inquiry, whereas one stated that rosters exist in some tribunals, but not in others.

Casting doubt upon the actual use of these rosters are the observations of the county attorneys. When asked whether the district courts in their counties "use a roster of attorneys from which assigned counsel are selected," none gave an affirmative answer.[2] One prosecutor did indicate a belief that the district court which he serves has such a list, but he expressed considerable skepticism about the frequency with which it is consulted.

There is a seemingly logical reconciliation of the responses given by the judges and the county attorneys. It is highly probable that rosters of attorneys were compiled at one time or another in many of the district courts. It is equally probable that these lists often play only a minor, if any, role in the actual selection of assigned counsel. This conclusion receives support from the data, collected by this study, on the distribution of assignments.[3]

B. Superior Courts.

With respect to rosters of attorneys at the superior court level, there is a consensus that they are the exception rather

than the rule. When the justices were asked how many of the courts in which they sit maintain such lists, their responses broke down as follows: "None;" 6; "Do not know of any:" 1; "One:" 1; "Most:" 2; and "All:" 1. Similarly, only two county attorneys indicated that such rosters are utilized in their jurisdictions. For those tribunals which do adhere to this practice, the task of keeping the list generally falls to the clerk or county attorney. In one instance, however, the county bar association performs this function.

Since all of the justices travel among the courts, the divergence of their answers, ranging from "none" to "all," is somewhat surprising. The explanation may lie in the possibility that certain justices tend to be assigned to the same courts, all of which either do or do not have rosters of attorneys. It is also conceivable that the different answers result from the phenonomen to which this report has already alluded, namely, the fact that a roster exists does not ensure its utilization. Support for this theory comes from one justice who stated that "these lists may exist, but I have never been shown one." Since the quoted jurist has spent a number of years on the bench, his comment does not suggest a particularly well organized system of appointments.

III. Method of Selecting Counsel.

A. District Courts.

The district court judges were asked the following question with respect to their methods of selecting counsel: "In general, do you have a system, formal or informal, for deciding which attorney to appoint in any given case?" The responses ("Yes:" 8; "No:" 2; "Varies:" 1) create the impression that the majority consistently follow certain predetermined procedures. Their descriptions of these procedures, however, quickly dispel that impression, since the systems generally amount to little more than vague judicial policies with no mechanism for their implementation. A not uncommon "system," for example, involved informal attempts to appoint more experienced and more competent counsel for serious offenses. Along these lines, one judge offered this description of his system: "Depending upon the complaint-You cannot appoint Clarence Darrow for a misdemeanor."

At least four members of the bench mentioned that they rotate assignments among the attorneys who practice in their courts. Closer examination reveals that, in the absence of organized procedures, what the court has in mind and what actually occurs do not always coincide. The ensuing observations, from a district court judge and a county attorney working in the same courts during the same time period, exemplify this discrepancy between intent and result.

> Judge: /Assignments/ rotated on an "his turn" basis, except in cases of very serious felonies.
>
> County Attorney: District Court appoints whoever is available and frequently does not have much choice.

In a similar vein, a county attorney painted the following picture of the selection of counsel in a court, which, according to the judicial officer, follows strict rotation procedures.

> I believe the...District Court does maintain such a list. I doubt if equal rotation is maintained, since if X, Y, or Z happen to be in the courtroom at the time (as often happens), they are likely to be appointed.

Perhaps the strongest evidence that informal attempts to follow a rotation system often do not get beyond the good intentions stage is found in the data on the distribution of assignments. In a court presided over by a judge who in his own words "rotates the cases among the lawyers," one attorney received 56 percent of all the assignments in 1973.[4]

Other judicial descriptions of the methodology for making appointments appear even less systematic. Certain considerations in the selection process do, however, emerge from these descriptions, including: 1) the selection of young attorneys; 2) the selection of readily available attorneys; 3) the selection of attorneys who express a desire for appointments; and 4) the selection of attorneys requested by defendants. The following quotes from three district court judges are illustrative of the way in which members of that bench describe their procedures.

> Judge 1: I give appointments to those who want to do it, younger attorneys who need work and others who specifically are requested by defendants.
>
> Judge 2: Frequently I name at attorney who is then in the court house. I try to divide it up, although many defendants request certain counsel.
>
> Judge 3: Informal-Attorneys chosen who generally practice some criminal law.

The questionnaires also disclose a lack of uniformity among the district courts. In this respect, the comments of the judges-at-large are perhaps most instructive since they preside in

various locales throughout the State. According to one such judge, "in some courts we follow the roster. In other courts, anyone around may be appointed." Another characterized the selection process as "sometimes by turn; sometimes by availability; sometimes because of special competence."

The picture of an ad hoc assignment system, without either clear objectives or established procedures, is reinforced by the comments of many of the county attorneys. To be sure, a few do look favorably upon the process, particularly in areas which have a small number of lawyers all of whom are well known to the local judge. In some of these counties, the prosecutors feel that the familiarity of the judge with the bar makes for an acceptable system. "The court is either well aware, or informed, of all the attorneys in the county, or who frequently practice here, who are willing to accept such appointments." Even in the sparsely populated sections of the State, however, this opinion is far from universal, as demonstrated by the county attorney who described the system in his locale as "random or available." Finally, a more critical evaluation of the procedures, or absence thereof, came from a county attorney practicing in courts with comparatively heavy caseloads.

> Solely at the judge's discretion. The District Court Judge has a select few he appoints regularly. Others are appointed if they happen to be in court at the right time.

By way of conclusion, most of the district courts fail to take a systematic approach to the selection of counsel for needy defendants. Although some apparently attempt to utilize rosters and to rotate assignments, the available evidence suggests only limited success in these endeavors. The probable explanation is the same as that offered in other contexts in this report, namely, that public representation has grown to such an extent that the judiciary, with all its other responsibilities, no longer possesses the capability to administer it effectively. The implications of this development, especially with respect to the selection of counsel, will be discussed subsequently.

B. Superior Courts.

Only half of the superior court justices indicated that they have a system for deciding which attorney to appoint in any given case. As in the district courts these systems generally involve little more than an effort to select experienced lawyers for serious offenses or complicated cases. In no instances do they entail adherance to formal procedures.[5]

The limited comments of the justices on their methods of choosing counsel may result from the fact that they play a comparatively small role in this facet of public representation. It has already been explained that most assignments originate in the lower tribunals, and that the superior court justices are under pressure to acquiesce in these appointments. The control exercised by the district courts is reflected in the estimates of the superior court justices of the percentage of cases in which they name the same lawyer to represent the defendant. These estimates range from 75 percent to 100 percent, with both the mean and median falling at 90 percent. This situation has generated some complaints, as exemplified by the remarks of one justice: "In most cases I am 'stuck' with counsel who has been appointed in the District Court."

It bears noting that a few county attorneys expressed the view that the superior court judiciary is more conscientious than its district court counterpart in the selection of counsel. Specifically, these comments referred to efforts to ensure that qualified lawyers handle serious cases and to distribute assignments equally. Although only speculation, the fact that justices are called upon to make far fewer appointments may enable them to exercise greater diligence.

IV. Other Aspects of the Selection Process.

A. Very Serious Cases.

In response to a specific inquiry as to whether the selection process differs for cases involving very serious charges, the vast majority of the superior court justices stated that it does. Generally speaking, their explanations were to the effect that special care is taken to appoint highly qualified lawyers. One justice also alluded to the problem that may confront the superior court when it is not satisfied with the choice of counsel below: "In an occasional serious situation I will substitute my choice for that appointed in the District Court."

Although six district court judges also asserted that they utilize special criteria for very serious offenses, five members of that bench apparently do not.[6] In addition, a court officer charged with the maintenance of a roster, stated that his tribunal has adopted a strict policy of calling the next lawyer on the list for all but homicide offenses. While the questionnaires do not reveal the reason for this phenomenon, an educated guess might be that some district courts are reluctant to make judgments, either explicit or implicit, about the capabilities of attorneys appearing before them. This explanation is supported by a judge who remarked that it is "hard to repudiate members of the bar in the absence of a certification of competence or incompetence, no matter by whom determined." The refusal to distinguish among practitioners can constitute an extremely serious deficiency in an assigned counsel system.[7]

B. Preferences of Defendants.

Virtually all of the members of both benches attempt to comply with defendants' requests for the appointment of specific attorneys.[8] Although not as widely endorsed, it is also a common policy not to assign a particular lawyer in the face of objections by the accused.[9]

One superior court justice strongly opposes both of these practices and does not even inquire into the defendant's preference. His reasons are interesting, insofar as they are oriented as much toward the protection of the accused as the convenience of the system. In his view, defendants often receive poor advice as to which lawyer to request; on occasion, this advice may even emanate from the arresting officer. Furthermore, the names of a few attorneys frequently circulate through a community, which leads to repeated requests for the same counsel. These requests are often based more on reputation than on competence. Although it is difficult to verify the impressions of this justice, he cannot be faulted for attempting to protect the accused from making a bad decision. The safer course would certainly be to honor such requests, which insulates the judge from the complaint that he did not permit the defendant counsel of his choice.

C. Appointment of Co-Counsel.

The Maine judiciary also voices almost unanimous support for the occasional use of two attorneys to represent a single defendant.[10] In describing the circumstances under which they follow this practice, most of the district court judges made reference to murder or other serious charges. Members of the superior court bench included certain additional factors, such as the investigation and time involved, the inexperience of counsel requested by defendant, and the willingness of an associate of the appointed lawyer to assist in the case. Although not specifically queried on who selects co-counsel, one justice stated that he sometimes authorizes the assigned attorney to employ an assistant. Finally, the fact that a number of superior court justices asserted that they appoint co-counsel when they question the ability of the lawyer assigned in the lower court is another indication of occasional dissatisfaction with the selection process in some district courts.

Superior court data collected for 1973 reveals that in actuality co-counsel are assigned almost exclusively in murder and manslaughter cases. Of the eight defendants represented by co-counsel, only one was not charged with homicide, and that case entailed four counts of aggravated assault and battery. Particularly in light of the expense involved, the use of co-counsel is not without its critics, and an evaluation of the practice will appear in another section of this report.

V. Notification of Counsel.

According to the estimates of the judiciary, the percentage of cases in which the attorney is present at the time of appointment varies considerably among the courts. The figures furnished by the district court judges ranged from 2 percent to 90 percent with an average of approximately 38 percent of the cases.[11] It is possible that this variation stems, at least in part, from the tendency of the particular judicial officer to appoint a lawyer present when the case is called.

The average estimate for the superior courts is 60 percent. Given the practice of selecting the same lawyer to represent the defendant at the superior court level, one might expect attorneys to be present with greater regularity for arraignments in that tribunal. Notwithstanding that fact, the estimates of the superior court justices, which ran from a low of 10 percent of the cases to a high of 90 percent of the cases,[12] indicate that this conclusion does not hold true for every court.

Needless to say, when the attorney chosen to represent the accused is not in court, someone must assume the responsibility of notifying him and of confirming his availability. Most frequently, this task falls to the clerk, although it is not unusual for it to be performed by the judge, the court officer, or the county attorney.[13] In some instances, the defendant is simply given the name and address of the lawyer and initiates the contact himself.

Although the majority of judges and county attorneys do not feel that the need to select and notify counsel interferes with the orderly conduct of the court's business, approximately 30 percent do view this facet of the system as a problem. The most commonly cited objection focuses on the delay inherent in the notification procedures. This complaint, voiced by a number of superior court justices, was articulated by a member of that bench in the following terms:

> In at least half the cases the court has to contact counsel desired to see if they are willing and able to serve--Possibly this is because I allow defendants to nominate counsel and appoint the nominee where possible.[14]

A potentially more serious problem arises from the use of the prosecutor as the liaison between the court and assigned counsel. This situation seems most prevalent at the superior court level, insofar as justices travel among the counties and must rely on other participants in the criminal justice system to carry out certain administrative duties, including the provision of public representation. Since there is no court

official specifically responsible for securing counsel in the absence of the judge, the county attorney is sometimes called upon to fill the vacuum. At least one superior court justice has recognized the possibility of a conflict when the de facto authority to name a lawyer for the defendant passes to the prosecution.

> Frequently the county attorney volunteers to arrange for counsel, not with any evil intent, but because the clerk will not do it. A judge present for a single motion day may find this convenient--but it is a bad practice.

This view is shared by a county attorney who observed that requests by the court to notify defense counsel of an appointment put his office in "an awkward position."[15]

The problems raised in this section all point to a basic shortcoming of Maine's assigned counsel system, to wit, the absence of specific criteria and procedures for the selection and notification of counsel. These problems, moreover, do not result from conscious policy decisions; they stem rather from a lack of an administrative capability to run the system on anything but an ad hoc basis. As already noted, the judge is the focal point, but his numerous other responsibilities preclude an organized approach designed to effectuate carefully conceived objectives. Accordingly, he must often rely on other components in the criminal justice apparatus, with the potentially detrimental consequences recounted above. The fact that the judiciary does not complain more about these administrative burdens may reflect an attitude of resignation rather than one of satisfaction with present conditions. As one superior court justice stated in response to the question of whether the selection and notification of counsel interfered with the court's business, "it does take time, but so do many other things we now have to do in dealing with indigent defendants."

FOOTNOTES

[1]See, e.g., ABA at 29.

[2]Two prosecutors added the opinion that rosters are unnecessary in their courts because of the judges' familiarity with local lawyers.

[3]See the data in the section entitled, "Bar Participation," infra.

[4]The attorney in question handled 25 of the court's 45 assigned counsel cases. The attorney with the second highest number of appointments had only seven cases.

[5]The most elaborate description offered by a superior court justice of his system for making appointments was the following: "If the attorney appointed below is competent and acceptable to the defendant and will accept the appointment, I usually appoint him. Otherwise I try to appoint an attorney whose ability is equal to the requirements of the case."

[6]The actual figure may be somewhat higher since a prosecutor from a county in which the local district court judge did not answer the questionnaire stated that "no preference is expressed by the court between attorneys or between degrees of offenses."

[7]See the section entitled, "Recommendations on the Selection of Counsel and Bar Participation," infra.

[8]Some judges gave conditional support to this practice. These conditions included the location of the requested attorney within the area served by the court and the competence of the attorney. One judge honors such preferences only in serious cases. Finally, a member of the district court bench said he would appoint the lawyer requested by the defendant "unless he has attempted to hire him and balked at the fee."

[9]Specifically, the judges were asked" "If an indigent defendant objects to the attorney you name to represent him, do you usually attempt to appoint another attorney?" The district court judges gave the following responses: "Yes:" 7; "No:" 2; "Usually:" 1; and "Only with good reason:" 1. Only one superior court justice did not answer in the affirmative.

[10]Only two district court judges and one superior court justice indicated that they never appoint co-counsel.

[11]The district court estimates, along with the number of judges giving each estimate, were as follows: 2%-1; 5%-1; 25%-1; 33%-1; 50%-4; 90%-1. In addition, one judge stated "usually," while another inexplicably answered "yes."

[12]The superior court estimates, along with the number of justices giving each estimate, were as follows: 10%-1; 50%-4; 60%-1; 80%-2; 80% or more - 1; 90%-1. One justice answered "usually."

[13]The questionnaires also reveal that notification is occasionally handled by the court messenger or the police officer.

[14]Similarly, another justice asserted: "Proceedings in court delayed when it becomes necessary to find an attorney ready, willing, and able to defend."

[15]An equally unhealthy situation obtains when the judges ask the prosecutor to prepare the list of attorneys available for assignments. This has occurred in at least one county at the superior court level.

BAR PARTICIPATION

I. Introduction.

A fundamental criterion by which assigned counsel systems are evaluated is the extent and nature of the participation they receive from the private bar. Since the previous section described the procedures for the selection of counsel, it becomes appropriate to examine the results of those procedures from the perspective of attorney involvement in the system.

Bar participation breaks down into three main questions. First, how many practitioners receive court appointments? Second, what is the distribution of appointments among those practitioners and among the entire bar? Third, which attorneys handle court appointed cases in Maine? Whereas the first question appears self-explanatory, it cannot give an accurate picture without some information on how evenly or unevenly the cases are divided among participating lawyers. Finally, the third area of inquiry is unavoidably vague, in light of the fact that a typical assigned counsel does not exist. As a result, it must suffice to present the few available statistics on participating attorneys, supplemented by the opinions expressed in the questionnaires and interviews.

II. District Court Data on the Number of Participants and the Distribution of Assignments.

A. Introduction to Table XI-1.

Table XI-1 sets out the following information for each of the district courts in Maine: 1) the total number of court appointments in calendar year 1973; 2) the number of attorneys receiving appointments in that court; and 3) the highest number of cases assigned to any one practitioner in that court. For most of the district courts, the table also gives selected distribution data, by indicating the number of cases and percentage of the caseload handled by those attorneys most frequently appointed to represent needy defendants.[1]

The selected distribution data is essential for a true understanding of the extent of local bar involvement. For example, the table reveals that 22 attorneys received a total of 176 appointments in the Lewiston District Court, which comes to an average of eight cases per lawyer. The picture changes completely, however, when it is seen that four practitioners, or fewer than 20 percent of the participating attorneys, handled over 50 percent of the assigned caseload. This figure reveals a concentration of appointments not apparent from the aggregate number of assignments and participants.

TABLE XI-1

DISTRICT COURT DATA ON BAR PARTICIPATION AND DISTRIBUTION OF ASSIGNMENTS

Lewiston District Court

1. No. of assignments: 176
2. No. of participating attorneys: 22
3. Most cases for one attorney: 32

# of attorneys	# of cases	% of caseload
2	58	33.0%
4	89	50.6%
5	101	57.4%
6	110	62.5%

Livermore Falls District Court

1. No. of assignments: 23
2. No. of participating attorneys: 9
3. Most cases for one attorney: 5

Caribou District Court

1. No. of assignments: 74
2. No. of participating attorneys: 10
3. Most cases for one attorney: 19

# of attorneys	# of cases	% of caseload
3	43	58.1%
5	64	86.5%

Van Buren, Madawaska, and Fort Kent District Courts (combined)

1. No. of assignments: 40
2. No. of participating attorneys: 8
3. Most cases for one attorney: 12

# of attorneys	# of cases	% of caseload
2	22	55%
3	28	70%

Presque Isle District Court

1. No. of assignments: 81
2. No. of participating attorneys: 13
3. Most cases for one attorney: 15

# of attorneys	# of cases	% of caseload
6	56	69.1%

Houlton District Court

1. No. of assignments: 72
2. No. of participating attorneys: 14
3. Most cases for one attorney: 23

# of attorneys	# of cases	% of caseload
1	23	31.9%
3	38	52.3%
5	52	72.2%

Portland District Court

1. No. of assignments: 645
2. No. of participating attorneys: 86
3. Most cases for one attorney: 34

# of attorneys	# of cases	% of caseload
10	251	38.9%
15	328	50.9%
24	429	66.5%

Brunswick District Court

1. No. of assignments: 77
2. No. of participating attorneys: 24
3. Most cases for one attorney: 16

# of attorneys	# of cases	% of caseload
2	24	31.2%
5	43	55.8%

Bridgton District Court

1. No. of assignments: 33
2. No. of participating attorneys: 10
3. Most cases for one attorney: 7

# of attorneys	# of cases	% of caseload
4	22	66.7%

Farmington District Court

1. No. of assignments: 58
2. No. of participating attorneys: 9
3. Most cases for one attorney: 16

# of attorneys	# of cases	% of caseload
3	37	63.8%
4	45	77.6%

Ellsworth District Court

1. No. of assignments: 22
2. No. of participating attorneys: 11
3. Most cases for one attorney: 9*

# of attorneys	# of cases	% of caseload
2	12	54.5%

Bar Harbor District Court

1. No. of assignments: 10
2. No. of participating attorneys: 5
3. Most cases for one attorney: 6*

Augusta District Court

1. No. of assignments: 138
2. No. of participating attorneys: 23
3. Most cases for one attorney: 22

# of attorneys	# of cases	% of caseload
5	77	55.8%
7	98	71.0%

Waterville District Court

1. No. of assignments: 75
2. No. of participating attorneys: 15
3. Most cases for one attorney: 17

# of attorneys	# of cases	% of caseload
3	40	53.3%
4	50	66.7%

Rockland District Court

1. No. of assignments: 116
2. No. of participating attorneys: 21
3. Most cases for one attorney: 18

# of attorneys	# of cases	% of caseload
4	53	45.7%
5	61	52.6%

Wiscasset District Court

1. No. of assignments: 58
2. No. of participating attorneys: 14
3. Most cases for one attorney: 10*

# of attorneys	# of cases	% of caseload
4	32	55.2%

South Paris District Court

1. No. of assignments: 33
2. No. of participating attorneys: 8
3. Most cases for one attorney: 7

# of attorneys	# of cases	% of caseload
4	27	81.8%

Rumford District Court

1. No. of assignments: 38
2. No. of participating attorneys: 7
3. Most cases for one attorney: 15

# of attorneys	# of cases	% of caseload
2	25	65.8%
3	33	86.8%

Bangor District Court

1. No. of assignments: 284
2. No. of participating attorneys: 42
3. Most cases for one attorney: 34

# of attorneys	# of cases	% of caseload
5	109	38.4%
8	144	50.7%
14	199	70.1%

Newport District Court

1. No. of assignments: 42
2. No. of participating attorneys: 11
3. Most cases for one attorney: 16

# of attorneys	# of cases	% of caseload
2	26	61.9%
3	31	73.8%

Lincoln District Court

1. No. of assignments: 33
2. No. of participating attorneys: 2
3. Most cases for one attorney: 22

# of attorneys	# of cases	% of caseload
2	33	100%

Millinocket District Court

1. No. of assignments: 12
2. No. of participating attorneys: 4
3. Most cases for one attorney: 6

# of attorneys	# of cases	% of caseload
1	6	50%

Dover-Foxcroft District Court

1. No. of assignments: 45
2. No. of participating attorneys: 7
3. Most cases for one attorney: 25

# of attorneys	# of cases	% of caseload
1	25	55.6%

Bath District Court

1. No. of assignments: 67
2. No. of participating attorneys: 15
3. Most cases for one attorney: 13*

# of attorneys	# of cases	% of caseload
3	35	52.2%
4	44	65.7%

Skowhegan District Court

1. No. of assignments: 114
2. No. of participating attorneys: 22
3. Most cases for one attorney: 15

# of attorneys	# of cases	% of caseload
3	42	36.8%
5	61	53.5%
6	70	61.4%

Belfast District Court

1. No. of assignments: 45
2. No. of participating attorneys: 5
3. Most cases for one attorney: 28

# of attorneys	# of cases	% of caseload
1	28	62.2%
2	38	84.4%

Calais District Court

1. No. of assignments: 74
2. No. of participating attorneys: 5
3. Most cases for one attorney: 42

# of attorneys	# of cases	% of caseload
1	42	56.8%
2	68	91.9%

Machias District Court

1. No. of assignments: 40
2. No. of participating attorneys: 7
3. Most cases for one attorney: 18

# of attorneys	# of cases	% of caseload
2	26	65%

Saco District Court

1. No. of assignments: 127
2. No. of participating attorneys: 22
3. Most cases for one attorney: 45

# of attorneys	# of cases	% of caseload
1	45	35.4%
2	63	49.6%
3	72	56.7%
5	88	69.3%

Sanford District Court

1. No. of assignments: 101
2. No. of participating attorneys: 13
3. Most cases for one attorney: 31

# of attorneys	# of cases	% of caseload
2	58	57.4%
3	85	84.2%

Kittery District Court

1. No. of assignments: 47
2. No. of participating attorneys: 13
3. Most cases for one attorney: 15

# of attorneys	# of cases	% of caseload
3	29	61.7%

*This table is somewhat misleading with respect to the overall distribution of assignments, in light of the fact that a number of attorneys practice in more than one district court. For example, the same lawyer received the most appointments in both the Ellsworth and Bar Harbor Districts Courts. A similar situation obtained in Wiscasset and Bath. Accordingly, the statewide distribution of assignments is even more limited than this table would suggest.

B. Analysis of Table XI-1.

It is a commonly accepted maxim that one characteristic of a good assigned counsel system is widespread bar involvement.[2] Viewed positively, such involvement gives the court a large and varied pool of practitioners from which to select and keeps a significant segment of the bar active in criminal law and familiar with the problems of needy defendants. From a complementary perspective, it prevents the development of a small clique which monopolizes, and sometimes depends upon, court appointments. Although not inevitable, these cliques often tend to be less experienced or less capable than their bretheren. Finally, as bar participation dwindles, the jurisdiction moves closer to a de facto public defender system, with none of the benefits of an organized program. These de facto defenders occupy their positions by default rather than by a deliberate selection process. In contrast with an organized plan, they do not receive any supervision, nor are their performances monitored.[3]

Examined in the context of the above discussion, Table XI-1 discloses a pattern of a concentration of district court appointments in a handful of attorneys. In almost every tribunal, no more than five lawyers represented over one-half of the eligible clients. Even in the more urban areas of Bangor and Portland, the relevant figures are 8 and 15 attorneys respectively. Given their heavy caseloads and the large number of lawyers practicing in the areas they serve, those courts demonstrate an equally, and perhaps more, limited distribution of assignments. At the other end of the spectrum, some of the smaller tribunals, such as the Calais and Lincoln District Courts, already have what might be characterized as de facto defenders, with only two attorneys handling all or virtually all of the cases.[4]

Although seemingly relevant to this inquiry, it is very difficult to compute the percentage of the local bar participating in the system in any given area. There are two basic problems in this respect. First, precise figures on the number of attorneys actually practicing in a particular locale are not readily available. Second, defining the "local bar" as practitioners in the area served by the court may create something of a distortion, in light of the fact that assignments occasionally go to lawyers from other communities. Despite these drawbacks, Table XI-2 offers selected estimates, believed to be reasonably accurate, of local bar participation computed on a percentage basis.[5]

TABLE XI-2

PERCENTAGE OF LOCAL BAR PARTICIPATION

District Court	% of Local Bar With Over ½ of the Cases	% of Local Bar With Over 2/3 of the Cases
Lewiston	5%	9%
Saco	6%	10%
Bangor	7%	13%

The above tables justify the conclusion that the bulk of the assigned counsel caseload falls to a comparatively small portion of the Maine Bar. Even when it appears that a substantial number of attorneys are participating in the system, distribution statistics tell a different story. For example, 86 lawyers did assigned counsel work in the Portland District Court in 1973. However, 50 percent of those practitioners had a combined assigned caseload of 91; by contrast, three attorneys received a total of 94 appointments. Statewide figures suggest an even more restricted distribution of assignments.

C. Statewide Distribution of Assignments.

As a result of attorney mobility, the previous discussion does not account for those lawyers who are assigned cases in more than one court. Accordingly, statewide statistics provide a more accurate measurement of bar participation.

Simply stated, the 2800 district court assignments for which attorneys were compensated in 1973 were divided among 380 practitioners. Although those attorneys constitute approximately 30 percent of Maine practitioners,[6] the distribution of cases among the participants was anything but equal. Over one-fourth of the caseload went to 25 attorneys, or less than two percent of all Maine practitioners; over one-third of the caseload went to 37 attorneys, or less than three percent of all Maine practitioners; and finally, exactly one-half of the caseload went to 66 attorneys, or approximately five percent of all Maine practitioners. In terms of the actual number of assignments, the top 50 attorneys averaged 23.4, the top 25 averaged 28.8, and the top 10 averaged 34.4. The most cases assigned to one practitioner was 45.

The distribution of assignments might look even narrower if civil cases were eliminated from the survey. This results from the fact that some lawyers were assigned exclusively to these matters, and they generally represented only one or two

clients during the course of the year. In any event, the data clearly reveals a concentration of assignments in a handful of lawyers. While the actual number of cases given to any one attorney may not compare unfavorably with heavily urban areas, the limited distribution of assignments among the bar does not suggest an effective system. To the extent that widespread bar participation is an essential ingredient of a good assigned counsel program, it does not exist in the Maine District Courts.

III. Superior Court Data on the Number of Participants and the Distribution of Assignments.[7]

A. Table XI-3.

Data for the superior courts does not reveal quite as heavy a concentration of appointments as is found in the State's lower tribunals. To a significant extent, this difference stems from smaller caseloads. By way of illustration, superior court assigned counsel cases in 1973 amounted to only 38 percent of the district court total. Since there were fewer needy defendants, it would have been difficult for an attorney to accumulate as many assignments. Another possible explanation may be that the justices have a greater pool of attorneys from which to draw, since the jurisdiction of the superior courts usually covers a larger geographical area than that of the lower tribunals.

Although only speculation, there is at least some support for the view, expressed by a number of county attorneys, that superior court justices exercise more diligence in the selection of counsel. If true, the size of their caseloads may partially account for this phenomenon. Conversely, attorneys may prove more amenable to superior court appointments, given the nature of the cases and the level of compensation. According to one district court judge, "not all attorneys of experience wish to represent indigents unless they believe it will go to superior court."

In light of the above discussion, Table XI-3 follows the same format as Table XI-1, but only for selected superior courts. It must be strongly emphasized that the table does not purport to present a representative sample; rather, its sole purpose is to demonstrate that in some superior courts, there is at least a tendency toward a concentration of assignments among a comparatively small group of practitioners. As indicated in the table, statistics for tribunals in the less populous counties cover a 2-year period. The time frame of the study had to be expanded for these tribunals in order to include a sufficient number of cases to render the data meaningful.

TABLE XI-3

SELECTED SUPERIOR COURT DATA ON BAR PARTICIPATION AND DISTRIBUTION OF ASSIGNMENTS

Androscoggin County (1973)

1. No. of assignments: 85
2. No. of participating attorneys: 22
3. Most cases for one attorney: 16

# of attorneys	# of cases	% of caseload
4	45	52.9%
5	53	62.4%

Cumberland County (1973)

1. No. of assignments: 243
2. No. of participating attorneys: 76
3. Most cases for one attorney: 20

# of attorneys	# of cases	% of caseload
5	75	30.9%
9	103	42.4%
12	121	49.8%

Franklin County (1973 & 1972)

1. No. of assignments: 52
2. No. of participating attorneys: 8
3. Most cases for one attorney: 14

# of attorneys	# of cases	% of caseload
2	26	50%
3	38	73.1%

Kennebec County (1973)

1. No. of assignments: 141
2. No. of participating attorneys: 32
3. Most cases for one attorney: 20

# of attorneys	# of cases	% of caseload
3	48	34%
5	64	45.4%
6	71	50.4%

Knox County (1973 & 1972)

1. No. of assignments: 81
2. No. of participating attorneys: 18
3. Most cases for one attorney: 20

# of attorneys	# of cases	% of caseload
1	20	24.7%
4	47	58%

Penobscot County (1973)

1. No. of assignments: 182
2. No. of participating attorneys: 40
3. Most cases for one attorney: 19

# of attorneys	# of cases	% of caseload
5	67	36.8%
8	93	51.1%
14	127	69.8%

Somerset County (1973 & 1972)

1. No. of assignments: 89
2. No. of participating attorneys: 21
3. Most cases for one attorney: 18

# of attorneys	# of cases	% of caseload
4	51	57.3%

Washington County (1973 & 1972)

1. No. of assignments: 73
2. No. of participating attorneys: 14
3. Most cases for one attorney: 39

# of attorneys	# of cases	% of caseload
1	39	53.4%

Although the actual number of cases assigned to any given attorney is generally less in the superior courts than in the district courts, Table XI-3 discloses that a small, select group of practitioners often handle a higher percentage of the caseload. Whereas eight lawyers received 50 percent of the assignments in the Bangor District Court, the same number had 51.1 percent of the appointments in the Penobscot County Superior Court. Similarly, three attorneys represented 63.8 percent of the needy defendants in the Farmington District Court, while an equal number provided the representation in 73.1 percent of the cases in the Franklin County Superior Court. The same phenomenon is observed in a comparison of the Lewiston District Court with the Androscoggin County Superior Court, the Portland District Court with the Cumberland County Superior Court, the Rockland District Court with the Knox County Superior Court, and the Skowhegan District Court with the Somerset County Superior Court.

Thus, it may well be that smaller caseloads are primarily responsible for the fact that superior court assignments do not appear as heavily concentrated in a select segment of the bar as are district court appointments. Since some superior courts already exhibit a relatively narrow distribution of assignments, caseload increases in those tribunals might eliminate this difference between the court levels.

B. Statewide Distribution of Assignments.

The 1073 assigned cases in 1973 were handled by 286 attorneys, or approximately 22 percent of the practicing lawyers in Maine. While this averages out to only four appointments per lawyer, the distribution, as in the district courts could hardly be characterized as balanced. Over one-fourth of the cases (272) were assigned to 18 attorneys, or 1.4 percent of all Maine practitioners; 38.5 percent of the cases (413) were assigned to 34 attorneys, or 2.6 percent of all Maine practitioners; and about one-half of the cases (541) were assigned to 54 attorneys, or 4.2 percent of all Maine practitioners. Stated somewhat differently, more than 50 percent of the needy defendants were represented by fewer than 19 percent of the lawyers participating in the system.

In terms of actual numbers, the top 50 attorneys averaged 10.3 assignments, the top 25 averaged 13.5 assignments, and the top 10 averaged 17.8 assignments. The most cases allocated to any one attorney was 23, with four practitioners having at least 20 assignments each. Finally, 9 lawyers received at least 15 appointments each, while 21 lawyers were assigned in at least 10 cases each.

By way of conclusion, as with the district courts, the actual number of superior court cases assigned to any one attorney may not seem excessively high, especially when compared with heavily urban states. That this results more from the size of the caseload than the effectiveness of the system, however, is demonstrated

by the data on the distribution of assignments. A system in which less than 5 percent of the practicing bar represents more than 50 percent of the needy defendants has hardly been successful in attracting widespread attorney participation. Since Maine probably has a lower percentage of specialists, who never appear in a courtroom, than urban jurisdictions, this deficiency reflects an even greater weakness in the present system.

IV. Combined District and Superior Court Data.

A. Overlap Between the Court Systems.

As might be expected, attorneys with large numbers of assignments generally tended to be active at both court levels. In 9 of the State's 16 counties, the lawyer with the most district court assignments in 1973 also received the greatest number of superior court cases. Even in the remaining seven counties, high volume practitioners usually participated heavily in both courts. In Cumberland County, for example, the attorney who ranked first in superior court assignments was third in district court cases, while another lawyer occupied the second position in both tribunals. Accordingly, when the system is viewed in its totality, the picture of a concentration of appointments in a small segment of the bar emerges even more strongly.

There were some exceptions to the above phenomenon in 1973. Although a rare occurence, a few attorneys participated actively at the superior court level without a commensurate involvement in the district courts.[8] For example, the practitioner with the heaviest statewide superior court caseload in 1973 (23 appointments) had only 10 district court assignments, a comparatively low figure. Similarly, another lawyer received 10 assignments in the superior court but only 6 in the district courts, a reversal of the usual pattern. It bears noting that these attorneys were often appointed to cases of a relatively serious nature.

Somewhat more common were practitioners whose participation in public representation was limited almost exclusively to the lower tribunals. Of the 29 attorneys with at least 20 district court appointments, 8 handled fewer than 5 superior court cases. At the extreme end of this spectrum, the lawyer with the greatest number of assignments in the Portland District Court (34) was appointed on only four occasions at the superior court level. In another instance, an attorney who handled 22 cases in a rural district court did no assigned work in the higher tribunals. Along the same lines, some superior court appointments resulted directly from the high volume in the district court. For example, although the practitioner with 45 district court assignments did receive 9 appointments in the superior court, only one of these cases did not involve a juvenile appeal.

Generally speaking, however, the same members of the bar constitute the core of the assigned counsel system in both the district and superior courts. The most frequently encountered exceptions are young attorneys with heavy caseloads limited largely to the district courts.[9] These exceptions, however, do little more than create a slight variance in the basic pattern of a concentration of assignments among a relatively small group of practitioners.

B. Statewide Distribution of Assignments.

The following statistics present a composite picture of the statewide distribution of assignments. The two court systems had a combined total of 3,873 appointments in 1973, which were divided among 417 attorneys, or approximately 32 percent of the practicing bar. With regard to the distribution of these appointments, one-quarter of the cases were assigned to 25 lawyers, or 1.9 percent of the practicing bar; one-third of the cases to 37 lawyers, or 2.8 percent of the practicing bar; and over one-half of the cases to 70 lawyers, or 5.4 percent of the practicing bar. From the perspective of the internal allocation of assignments, 16.8 percent of the participating lawyers received more than 50 percent of the appointments.

As with the treatment of the two court systems individually, the figures on the actual number of cases handled by the high volume practitioners may shed some light on bar participation. The top 50 attorneys averaged 31.8 assignments in 1973; the top 25 averaged 38.9 assignments; and the top 10 averaged 48.8 assignments. The greatest number of appointments allocated to any one practitioner in 1973 was 62, whereas 4 lawyers had at least 50 assignments, and 10 lawyers received at least 40 assignments. While it is recognized that separate district and superior court assignments may occasionally be for representation of the same defendant in different tribunals,[10] the above figures reinforce the conclusion that Maine's assigned counsel system has only limited bar participation.

V. Judicial Hospitalization Hearings.

Since the relevant statute governing judicial hospitalization hearings in the district court took effect in late 1973,[11] the data collected by this report on assigned counsel representation in those hearings covers a period of only one month.[12] For that reason, the statistics were not included in the overall district court caseload. At this point, however, it seems appropriate to briefly summarize the report's findings with respect to those hearings, insofar as they demonstrate that the basic pattern of bar participation carries over to newly developed proceedings.

Given the location of the State's mental institutions, the vast majority of the judicial hospitalization hearings were held in the Bangor and Augusta District Courts. During the month in question, the former tribunal heard 57 cases in which the patient was represented by court appointed counsel. This caseload was divided among seven attorneys, with the most frequently appointed practitioners handling 13, 10, and 10 cases respectively. Significantly, two of these three practitioners ranked first and second in other assignments in the same tribunal.

As indicated in Table XI-1, eight lawyers represented 50.7 percent of the eligible defendants in the Bangor District Court in 1973. Had judicial hospitalization hearings been included in this computation, the percentage of the caseload absorbed by the same number of attorneys would have been 54.3 percent. Accordingly, the establishment of a new proceeding, which requires the assignment of counsel, seems to enhance the concentration of appointments.

The 20 Augusta District Court hearings, which utilized the services of assigned counsel, were divided equally between two attorneys. While this statistic speaks for itself with respect to bar participation, another interesting point emerges from the data. According to the bills submitted by one of the attorneys, all 10 of his hearings were conducted on the same day. While the amount of preparation time is unknown (it is difficult to believe it could have been extensive in light of the probably duration of each hearing), it still bears noting that compensation for these hearings was at the customary district court rate of $50 per case. The total reimbursement seems disproportionately high in comparison with the amounts paid in other types of cases in the district and superior courts.[13]

VI. Characterization of Participants in the Assigned Counsel System.

As noted above, it is virtually impossible to make a hard and fast characterization of those attorneys who participate, especially on a more than occasional basis, in Maine's assigned counsel system. Accordingly, this report contains an appendix which lists for each court the names of all assigned counsel compensated in 1973 and the number of appointments they received. The remainder of this section will thus offer isolated facts about participating attorneys. The comments of judges and prosecutors contained in subsequent sections should help to present a more complete picture.

When the recipients of the questionnaires were asked to identify the groups which constitute the pool from which assigned counsel are selected, the most frequently circled responses were "attorneys with a trial practice" and "attorneys who indicate a willingness to accept appointments." The other two listed options, "attorneys admitted to practice" and "attorneys actually

practicing," were indicated on considerably fewer questionnaires. These results suggest that practicing attorneys who do not engage in, or show an interest in, trial work are rarely, if ever, called upon to represent indigent defendants.

That Maine's assigned counsel system relies almost completely on the willingness of attorneys to volunteer their service is revealed by the strong preponderance of negative answers to the following question: "As a rule, do you appoint attorneys who express a preference not to take assigned counsel cases?"[14] While virtually all of the county attorneys concurred in the view that pressure is not brought to bear on unwilling practitioners, one prosecutor suggested something of a double standard: "It depends almost totally on whether the attorney is prestigious enough to have those wishes (expressed or merely understood) respected." To the extent that the representation of needy persons is still considered an obligation of those admitted to the bar, the fulfillment of that obligation turns entirely on the inclination of each individual lawyer.

To ascertain whether certain practitioners actively solicit assignments, the county attorneys were asked whether there are lawyers in their area who come to court regularly in order to obtain court appointments. Six indicated that the practice occurs in their counties, whereas four stated that it does not. It should be added, however, that the prosecutors had varying opinions on the capability of lawyers who solicit appointments in comparison with the rest of the defense bar.

From a statistical perspective, it appears that high-volume attorneys at the district court level tend to be younger members of the bar, while practitioners in their middle years are noticeably underrepresented. Table XI-4 illustrates this phenomenon by dividing into three age brackets the lawyers with the greatest number of assignments in each district court. Although there are only 32 district courts, the sample consists of 36 attorneys as a result of the fact that two or more attorneys shared the top position in some tribunals.[15]

TABLE XI-4

BREAKDOWN BY AGE OF ATTORNEYS WITH MOST ASSIGNMENTS IN THE VARIOUS DISTRICT COURTS

Age Bracket	Number of Attorneys
33 years of age or less	22
34-59 inclusive	9
60 years of age or more	5

Although category two includes a period of 26 years, probably more than half of the professional life of the average practitioner, only 25 percent of the high volume attorneys were in that bracket. Along similar lines, 21 members of the sample had been admitted to the bar for five years or less in 1973.

VII. Evaluation of Bar Participation by Judges and Prosecutors.

A. Availability of Attorneys.

As a general rule, it appears that there are usually a sufficient number of attorneys available to absorb the assigned counsel caseload. Of the 22 judges surveyed, only five stated that at times they had difficulty finding attorneys to represent indigent defendants; significantly, four of the five are members of the superior court bench. In describing the problems they encounter, these judges pointed to refusals of attorneys to participate, numerous requests for the same practitioners, and a shortage of lawyers capable of handling the cases.

In terms of numbers alone, then, the consensus is that the system does not seem in any immediate danger. With regard to efforts to involve specific segments of the bar, a different picture emerges. For example, a superior court justice asserted that he does not have difficulty finding lawyers to represent needy defendants "except as to my attempt to get civil attorneys." Similarly, while the county attorneys all gave very low estimates of the percentage of cases in which there were problems in procuring the services of assigned counsel, one prosecutor added that "there might be more trouble if some of those who shouldn't receive appointments (or so many) stopped receiving them."

B. Availability of Competent Attorneys.

The questionnaires to the judges and prosecutors included the following inquiry: "Are there a sufficient number of attorneys, competent to try criminal cases, who are willing to accept court appointments in felony cases?" _____. In misdemeanor cases? _____. In juvenile cases? _____. Table XI-5 sets out the responses for each category of case.

TABLE XI-5

AVAILABILITY OF COMPETENT ATTORNEYS

Felony Cases

	Yes	No	Other[16]
Superior Court Justices	3	7	1
District Court Judges	9	2	0
County Attorneys	9	1	0
Total	21	10	1

Misdemeanor Cases

	Yes	No	Other
Superior Court Justices	8	2	1
District Court Judges	11	0	0
County Attorneys	10	0	0
Total	29	2	1

Juvenile Cases[17]

	Yes	No	Other
District Court Judges	9	2	0
County Attorneys	10	0	0
Total	19	2	0

In interpreting this table, it should be pointed out that some of the respondents made a distinction between the availability of competent counsel and their utilization by the courts. For example, two county attorneys who answered "Yes" for each type of case commented that the more competent lawyers are not always appointed. One prosecutor put it quite simply: "Everybody who is asked accepts. The wrong people are asked...." Thus, it should not be assumed that the availability of adequate representation insures it provision; that issue will receive more extended discussion in the next section.

The most startling, and disquieting, aspect of Table XI-5 lies in the opinion of a strong majority of superior court justices that there are not enough competent attorneys willing to accept appointments in felony cases. That view alone suffices to raise serious doubts about the effectiveness of Maine's assigned counsel system.

C. Distribution of Assignments.

Perhaps the most revealing insights into the selection process and bar participation are contained in the comments of the questionnaire recipients on the subject of the distribution

of assignments. With respect to this aspect of the system, the following inquiry was made of the judges and prosecutors: "Do you think that assigned counsel cases are distributed equitably among practicing attorneys? _____. If no, how is the distribution inequitable?" Table XI-6 sets out the responses to the first part of the question.

TABLE XI-6

EQUITABLENESS OF DISTRIBUTION OF ASSIGNMENTS

	Yes	No	Other[18]
Superior Court Justices	4	6	0
District Court Judges	6	7	0
County Attorneys	3	5	2
Total	13	18	2

The table seemingly needs no explanation to demonstrate that the prevailing view, at all levels of the criminal justice system, is that the practicing bar does not share equitably in the responsibility of providing representation to indigent defendants.

A number of the respondents elaborated on which segments of the bar handle the bulk of the caseload. The following observations, for example, were offered by three superior court justices.

1. Too many attorneys are picked in the District Court since their workload makes it easy for an appointment to a class of attorneys whose financial existence depends on District Court appointments.
2. The appointments made by the District Courts are usually from that portion of the Bar that practices "indigent criminal law."
3. Because the compensation is low--burden is limited to less than all competent attorneys. Because the better attorneys are busy--defendants sometimes are poorly represented.

Other respondents pointed out that the system is inequitable for defendants, rather than for participating attorneys.

1. (District Court Judge): Perhaps equitable from point of view of attorneys who wish to participate in court appointments, but not equitable from the defendant's point of

view, for most competent attorneys from an economic point of view do not need court appointments.

2. (County Attorney): I think it is equitable to those attorneys with a criminal practice but not equitable to the general defendant population.

Finally, certain comments attribute the uneven distribution to the judiciary, especially members of the district court bench. In some instances, there is a charge of favoritism; in others, a suggestion of judicial laxity. Depending upon the individual's viewpoint, the favoritism takes different forms, namely, the favored attorney is either excluded from the system or else given too many assignments.

1. (County Attorney): Some attorneys seem to get out of it.
2. (County Attorney): Attorneys favored by the judge are most frequently appointed.
3. (Superior Court Justice): In some counties it appears that the same lawyers are always appointed in District Court.
4. (County Attorney): Attorney in court is usually assigned.

VII. Conclusion.[19]

Except in occasional instances, it seems fair to conclude that attorney availability and willingness usually determine who gets court appointments. As the statistics demonstrate, this phenomenon produces a situation in which a relatively small segment of the bar constitutes the backbone of Maine's assigned counsel system. Conventional wisdom suggests that this is an unhealthy development; at a minimum, it deprives the State of one of the supposed advantages of an assigned counsel approach, to wit, that it keeps a large number of lawyers active and interested in indigent criminal defense.

Since there seems to be virtually no screening of attorneys seeking court appointments, and since the competition for these cases does not exactly appear keen, it may legitimately be asked which lawyers become the high-volume practitioners. According to the available data, younger lawyers occupy a disproportionately large position in this group.[20] By contrast, certain more established segments of the bar are conspicuous by their absence. For example, the Board of Governors of the Maine Trial Lawyers Association has only one member who ranked in the top 25 in 1973 in terms of total appointments and two members

who ranked in the top 50.[21] Both of these individuals, moreover, are among the Board's younger members. Since this Board presumably consists of specialists in trial work, their absence cannot be explained by a lack of familiarity with courtrooms. Finally, comments by certain judges suggest that some of the high volume practitioners are motivated to accept appointments primarily for financial reasons.

FOOTNOTES

[1]Distribution data is not given for the Livermore Falls District Court because no attorney had more than five assignments, and for the Bar Harbor District Court because of the small number of appointments.

[2]See, e.g., ABA at 26: "Assignments should be distributed as widely as possible among the qualified members of the bar."

[3]It should be emphasized that limited bar involvement and an uneven distribution of appointments constitute only circumstantial evidence of an ineffective assigned counsel system. The conclusion would not hold true for an administered program with meaningful procedures for screening attorneys. Under such a program, the majority of cases might be allocated to the most competent criminal practitioners, assuming their willingness to participate. Similarly, a public defender organization, capable of attracting a skilled staff, could provide a consistently high caliber of representation with only a limited number of lawyers.

[4]An even more extreme example is the Van Buren District Court, where one attorney received 9 of 10 appointments. This may have been a matter of necessity, however, since the Maine Bar Directory lists only two lawyers with offices in Van Buren.

[5]For purposes of Table XI-2, the "local bar" was determined by counting the number of lawyers listed in the Bar Directory with offices in the communities served by the particular court. Ten percent was then subtracted from that total on the assumption that some of the listed lawyers might not be in private practice.

[6]Estimates of Maine lawyers actually in private practice, supplied by the Maine State Bar Association and other sources, ranged from 1200 to 1400. For lack of an exact figure, this report averaged the estimates and decided to use 1300 as the total number of active practitioners in Maine.

[7]One problem encountered in the collection of the superior court data stemmed from the fact that bills were occasionally submitted in the firm name (this occurred most frequently in Kennebec County). In all of these instances, the docket book was checked to ascertain which member of the firm actually handled the case. Despite this procedure, it is possible that a very small number of cases may have been misattributed. This would have occurred if the docket book were unclear or incomplete.

It should also be noted that the four murder appeals were excluded from the superior court data, despite the fact that compensation was paid by the counties. There seemed to be no justification for their inclusion, while all other criminal appeals were omitted.

[8]This discussion pertains only to those lawyers with a comparatively heavy assigned caseload.

[9]Assuming some of these attorneys were just beginning their legal careers, it is possible that they received superior court assignments, but that the cases had not been completed by the end of 1973. Given the methodology of this study, these assignments would not have appeared in the data.

[10]During the time period covered by this study, the right to a trial de novo existed for misdemeanor and traffic cases. Accordingly, it is probable that fewer of these cases made their way to the superior court, which may mean that fewer of the bills were for the same defendant than would have been the case under the election statute.

[11]34 M.R.S.A. § 2334. This section was amended again in 1974.

[12]This data is for hearings held in November of 1973, for which compensation was paid in December of 1973.

[13]This was not an isolated phenomenon. For example, a Bangor attorney appeared at seven judicial hospitalization hearings on Nov. 20, 1973, and according to his bills, the preparation for all of these cases was performed on the previous day. His compensation of $350 for a maximum of 2 days work compares very favorably with that paid for other types of representation, such as the $250 for criminal appeals.

[14]A few judges added that they never heard such preferences expressed. It is not known whether that is because they never solicited the participation of previously unavailable lawyers or because their solicitations were never turned down.

[15]As noted in Table XI-1, two attorneys each had the most assignments in two different district courts. Both of these attorneys are included twice in Table XI-4, on the theory that the table should encompass the lawyers with the heaviest caseload in each court. One of these practitioners was less than 33 years of age, whereas the other was 60 years of age.

[16]One superior court justice answered "in most cases" for both felonies and misdemeanors. In addition, a district court judge declined to answer the question because the word competent is "relative." Curiously, that judge used the term "competent" in subsequent responses.

[17]The superior court judiciary was not queried on these cases.

[18]One county attorney responded "not always." Another answered "yes and no," with the explanation that it was equitable for criminal lawyers, but not for defendants.

[19]The questionnaires also inquired into the circumstances under which an attorney is excused from accepting a specific court appointment and those under which he is permitted to withdraw. Since the responses do not suggest a problem in this area or much of a variation in judicial attitudes, they are not discussed in the text.

With respect to the first part of the inquiry, the most frequently cited reasons were conflict of interest, a heavy caseload, other commitments, and a prior unsatisfactory relationship with the defendant. Two district court judges also asserted that a reluctance to serve would suffice. Withdrawals most often result from the inability of the defendant and the attorney to agree or communicate. Some judicial officers indicated that they will replace counsel at the defendant's request, although one added that there must be a good reason, while another stated that he allows only one such replacement in each case.

[20]For a discussion of possible deficiencies of neophyte lawyers as assigned counsel, see Bazelon, The Defective Assistance of Counsel, 42 U. of Cin. L. Rev. 1, 14 (1973).

[21]According to a list furnished by that organization in late 1974, the Board of Governors of the Maine Trial Lawyers Association, including its director, consisted of 26 members. At least two of those members probably could not have accepted court appointments because of full-time faculty positions at the University of Maine Law School.

RECOMMENDATIONS ON SELECTION OF COUNSEL AND BAR PARTICIPATION

I. The Need for Changes in the Selection Process.

The proposition that changes should be effected in the procedures for the selection of assigned counsel is endorsed by a substantial number of those individuals most directly connected with Maine's criminal justice system. Specifically, the questionnaires asked: "Do you think the present system for selecting attorneys to represent indigent defendants should be changed?" The answers, as indicated in Table XII-1, reveal that 50 percent of the respondents believe reforms to be necessary.

TABLE XII-1

NEED FOR CHANGES IN THE SELECTION OF COUNSEL

	Yes	No
Superior Court Justices	6	4
District Court Judges	5	7[1]
County Attorneys	5	5
Total	16	16

In light of the fact that the judges bear responsibility for the selection process, their acknowledgement of the need for reforms carries special weight.

Additional evidence lies in the fact that the present approach involves, to at least some extent, virtually every practice condemned by the American Bar Association Project on Minimum Standards for Criminal Justice. On a general level, the ABA asserts: "the most serious defects which have been attributed to the assigned counsel method of providing counsel arise from the absence of system in its administration."[2] In the same section, the report states that "ad hoc assignment does not fulfill either the objective of quality or of equality."[3] The preceding discussion certainly justifies a characterization of the Maine assignment process as both nonsystematic and ad hoc.

With regard to the appointment of lawyers only because they happen to be in the courtroom at the time the defendant is brought before the court, the position of the Standards is that "the evils of this practice are substantial enough to warrant explicit condemnation."[4] Although rural areas where a large segment of the entire bar is regularly present in court are exempted from this condemnation, the responses of the county attorneys disclose that the practice is prevalent in certain

tribunals serving urban sections of the State. While the problem may not be ubiquitous, it is definitely not an isolated phenomenon.

Equally deserving of criticism, according to the American Bar Association, is judicial favoritism in the selection process. When queried on this subject, half of the county attorneys surveyed expressed the opinion that such favoritism exists in their areas. While the prosecutors' descriptions of this favoritism did not imply any pernicious intentions on the part of the judicial officers,[5] the practice can have serious consequences. For example, one county attorney stated that the district court judges "tend to appoint defense attorneys with whom they are more disposed or who do not create a ruckus in the courtroom." In the view of Chief Judge Bazelon, this propensity to appoint "sweetheart" lawyers threatens the principle of independent advocacy.[6]

From the perspective of bar participation, the Association makes two points relevant to the present situation in Maine. First, it endorses the finding of the Attorney General's Committee "that many of the problems in the administration of criminal justice result from the absence of involvement by most lawyers in the practice of criminal law."[7] Second, it reiterates the commonly voiced criticism that assigned counsel systems place excessive reliance on younger practitioners.[8] As previously discussed, the limited involvement of the bar and the reliance on young lawyers are both features of public representation in Maine.

On the other side of the coin, the need for changes in the method of assigning counsel can also be demonstrated by the discrepancies between procedures utilized in Maine and those recommended by the American Bar Association. Since the recommendations of the Association will be summarized in subsequent parts of this section, these discrepancies should become apparent, and thus it suffices to conclude here that the system falls far short of what the leading authority in the field considers minimally acceptable.

II. Recommendations on the Selection of Counsel.

A. Preface.

Should the proposal for a combined system be adopted, staff and panel attorneys would share responsibility for the representation of needy defendants. One immediate benefit of this change would be a reduction in the size of the caseload assigned to the private bar. This reduction should alleviate some of the pressure on the selectors of counsel to repeatedly name the same attorneys because of their ready availability. Similarly, it should facilitate the implementation of more deliberate criteria in the appointment process.

The ensuing recommendations are offered with the entire State in mind and do not contain specific modifications which may be necessitated by local conditions. As a general rule, the need for such modifications would probably arise most frequently in rural areas, where the entire "local bar" may consist of no more than 10 or 15 attorneys. In such areas, for example, a recommendation for a division of the participants into a number of formal panels would arguably amount to administrative overkill. While the same goals apply statewide, this report recognizes that less formal procedures may be justified by the circumstances existing in a given section of the State.

B. An administered Selection Process.

The American Bar Association commences its treatment of assigned counsel systems with the following standard, which might well be taken as the first principle of the selection process.

> 2.1. Systematic assignment. An assigned counsel plan should provide for a systematic and publicized method of distributing assignments...if the volume of assignments is substantial, the plan should be administered by a competent staff able to advise and assist assigned counsel.[9]

In a similar vein, the National Center for State Courts recommends a centralized assigned counsel system run by an administrative office for indigent defense.[10] The findings of this report point in the same direction for Maine.

Inherent in the concept of a "systematic method of distributing assignments" is the proposition that the selection process should reflect the basic objectives of the system. Since these will be discussed shortly, the question relevant here is whether these goals can be attained in the absence of an administrative component. This report believes that the experiences of Maine and other jurisdictions demonstrate the necessity of competent administrative supervision. Given the continuing need for public representation, the frequency with which the need arises in most tribunals, and the many facets and potential problems involved in indigent defense, the development of procedures which are virtually self-executing looms as an unlikely prospect. The strong advisability of at least occasional monitoring of the procedures exemplifies this point, for this study has found that judicial impressions of the system do not always conform to the hard data.[11]

A corollary question is whether the administrative control can and should be exercised by the judiciary. As with most aspects of indigent defense, practical considerations, especially the weight of other court business, militate against this alternative. At present, the majority of Maine judges seemingly do not have the time to supervise an even modestly sophisticated selection process, and for those members of the bench who travel among the courts, additional problems would exist.[12] The premium on judicial time suggests that they should concentrate on purely judicial, as opposed to administrative, tasks.

Theoretical objections have also been raised to empowering the court to choose defense counsel. Chief Judge Bazelon stated the issue as follows: "Is there any more reason for judges to control the selection of counsel for indigents than for non-indigents?"[13] According to Bazelon, institutional pressures, such as the existence of a heavy backlog of cases, may influence judges to select certain lawyers for the wrong reasons. Conversely, assigned counsel, dependent on the court for future appointments, may be tempted to subordinate the concerns of their client to those of the court. While the extent of these problems in Maine cannot be precisely ascertained, the potential exists under the present system.

By way of conclusion, an independent body, acting under the general supervision and with the backing of representatives from the courts and the bar, should administer the selection process. Quoting again from Chief Judge Bazelon, the delegation of "the power of appointment to a public agency capable of developing and enforcing clear standards for eligibility does seem a better means of ensuring competence and diligence than ad hoc judgments of individual trial judges."[14] It is submitted that the proposed Office of Public Defense, directed by the Defender Commission, would be well suited to assume this function.

C. Basic Objectives of the Appointment Process.

The sole legitimate goal of a system of public representation is to provide needy defendants with the most effective assistance of counsel possible. The methods for achieving this end should be limited only by financial considerations and by the necessity that the courts operate efficiently. Thus, the delivery of defense services must be at a reasonable cost and must not unnecessarily disrupt the court system.[15] It is in the context of effective representation as the underlying purpose of the system that the following objectives of the appointment process should be read.

1. The appointment process should insure that every case is assigned to an attorney who has demonstrated the competence and interest necessary to provide effective representation in the particular case. Stated somewhat differently, this recommendation

calls for the establishment of procedures for screening practitioners to determine whether they are qualified for various types of appointments.

Apart from informal attempts by many judges to select experienced and able lawyers for very serious offenses, most notably homicides, the present system eschews distinctions among attorneys. While the temptation to rely on membership in the bar as the sole qualification for assignments is understandable, there is a growing concern that this fact alone does not guarantee the requisite skills in criminal law and trial advocacy. This concern has been expressed by no less an authority than Chief Justice Burger, who recently stated that "We are more casual about qualifying the people we allow to act as advocates in the courtrooms than we are about licensing our electricians."[16]

This report recognizes that even the suggestion of certification for court appointments is likely to arouse considerable controversy. Nevertheless, the view that attorneys have a right to participate, regardless of their competence, has no valid place in an assigned counsel system. The selectors of counsel should be compelled to consider qualifications for the particular case. Given the complexities involved, however, this report will not attempt to put forth definitive procedures for institutionalizing this objective. Rather, in a subsequent section, it will offer a number of possible alternatives, along with an approach that the program might use at the outset.

2. <u>The appointment process should be designed to involve in public representation as many qualified lawyers as possible.</u> This proposition is predicated more on historical experience than on any inherent validity. Generally speaking, widespread bar participation seems to be accompanied by a higher caliber of representation. If nothing else, it reflects an interest in, and perhaps even a competition for, appointments, rather than a situation in which the vast majority of cases are assigned to the few practitioners with the necessary amount of time on their hands.

As the number of lawyers willing to accept assignments grows, the pool from which the system can draw also increases, which facilitates finding a competent attorney for any given case. In addition, there is a body of opinion which holds that widespread bar participation in this branch of the law has a salutary effect on the entire criminal justice system. Finally, to the extent that the defense of indigents requires a sacrifice on the part of the lawyer, this sacrifice should be spread among as large a segment of the qualified bar as is possible.

3. The appointment process should be designed to distribute assignments equitably among participating attorneys. This objective is urged for essentially the same reasons as the preceding one. The advantages of widespread bar involvement can prove illusory if, in fact, most cases are handled by a small percentage of the participants. From the perspective of fairness to the bar, an equitable distribution is necessary whether one views appointments as a burden or a blessing. Since an attorney's perceptions about the fairness of the procedures may affect his performance, this consideration may have an indirect bearing on the quality of representation afforded by the system. Under no circumstances, however, should the need to assign a lawyer qualified for the particular case be subjugated to the desire to divide the caseload equally.

4. The appointment process should develop procedures whereby inexperienced attorneys, interested in criminal practice, can gain the experience necessary for serious and complicated cases. When viewed as an entity, the assigned counsel system resembles a law office in the sense that the more capable its attorneys are, the better equipped it is to perform its functions. Accordingly, it benefits the system to train its less seasoned panel attorneys. In contrast with present practices, however, there should be at least a tacit understanding that practitioners, who receive experience in this manner, will continue to make their services available to needy defendants.

5. The appointment process should be administered so as to minimize the inconvenience to the courts and to the participating attorneys caused by the need to furnish public representation. The greatest inconvenience to the court system probably lies in the delays occasioned by the present procedures for the selection and notification of counsel. Under a more efficient approach, the services of an attorney might well be secured in many cases prior to the initial court appearance. This goal certainly seems reasonable for the superior courts.

At the district court level, the presence of a staff attorney in the primary tribunals should allow for the quick disposition of certain types of cases, such as those obviously calling for a dismissal. In these instances, representation by a defender would render unnecessary the selection and notification of a private lawyer.

From the perspective of members of the bar, it is believed that their cooperation would be more forthcoming if the system were less disruptive of their practices. One innovation might be advance notice, whereby the staff would inform panel attorneys when their names were about to appear on the roster. As a variation on this approach, a practitioner might be requested to be available for an appointment during a specified time period, which would permit him to plan his schedule accordingly. In

either event, the fact that the staff would have some idea of attorney availability at the time the services of counsel became necessary should reduce the number of fruitless phone calls, along with the concomitant tendency to appoint the same lawyers.

A more frequent complaint about assigned work is that it often entails long waits in court before the case is called. Since this increases the attorney's absence from private practice, for which he is usually not compensated,[17] it constitutes a serious deterrent to the acceptance of appointments. Despite the fact that delays, and their elimination, are a problem for the entire court system, the staff might be in a position to alleviate the hardship on assigned counsel. To the extent of their involvement in the scheduling of cases with public representation, the staff attorneys might inject more precision into the process.[18] In this liaison capacity, they could also notify assigned counsel shortly before the calling of his case, in order to obviate the need for his continuous presence in court. Similarly, the defender could appear in lieu of the appointed lawyer to handle perfunctory matters such as continuances.[19] While these steps might not resolve the underlying problem, they could help to reduce delays to a more acceptable level.

D. Mechanics of Appointment Process.

For the most part, there is little that is revolutionary about the means for implementing the objectives of the appointment process. The success of the system will depend primarily on conscientious administration. Furthermore, as noted above, the ensuing recommendations have in mind courts with comparatively heavy caseloads and with a potentially large number of participating lawyers. It is not suggested that they must be followed religiously in those areas where they would prove overly complicated in light of local conditions.

1. Rosters. For obvious reasons, the roster is the basic tool of an administered assigned counsel system. The roster should be kept in the district office and should contain, in addition to the name, address, and phone number of the attorney, a record of his recent and present appointments, along with information as to his future availability.

The program should also maintain a file on the participating lawyer, which would include the bills and information sheets submitted at the termination of every case and any other materials deemed relevant. These files would permit a relatively speedy evaluation of both the attorney and the overall system. Regarding the attorney, for example, the file would reveal the number of assignments and amount of compensation he received during a specified time period; these factors might influence his eligibility for appointments in the near future. Similarly, by indicating the nature of the offenses and proceedings the

attorney has handled, the file would enable the program to make ongoing evaluations of his experience with respect to particular types of cases. The value of this device for periodic evaluations of the entire system does not require extended discussion; it should suffice to point out that the collection of detailed assignment, compensation, and disposition data from present records is an onerous if not impossible task.

The rosters might also serve as the means for making distinctions among practitioners with respect to their eligibility for appointments. As to mechanics, these classifications might be effected by the creation of separate rosters for different types of cases, or by a designation next to the name of each attorney on a single master list. This designation would indicate the types of offenses for which the attorney could be appointed.

2. Eligibility for Appointments. Implicit in the preceding section is the concept of eligibility standards for court appointments. As stated above, the dimensions of this issue preclude definitive recommendations at this time. Nonetheless, this report takes the position that an assigned counsel system must formulate prerequisites for attorney participation; under the proposed format, the Defender Commission might be entrusted with the responsibility for the final decision on this facet of public representation. This report will thus confine its remarks to a broad discussion of the problem, supplemented by a specific recommendation for what might be deemed an interim solution.

The eligibility question can be divided into two components, namely, general standards which qualify the applicant for all appointments and specific standards which qualify him for certain categories of appointments. The former contemplates a single roster system with no distinctions among members of the panel. Its use is considered essential by the National Center for State Courts.

> Attorneys applying for participation in an assigned counsel program should be carefully screened, and new attorneys lacking experience should be required to complete a training and internship program prior to admission to the panel.[20]

The United States District Court for the Southern District of New York seemingly utilizes the most elaborate screening procedures of any assigned counsel system in the country.[21] After an application is received by the court, the attorney is interviewed by a member of a special subcommittee consisting of four lawyers. If doubt remains about the applicant's qualifications, a second member conducts a subsequent interview. This inquiry into the applicant's background focuses upon the following areas:

(1) Nature of his practice;

(2) Extent of experience in criminal cases;

(a) Federal versus state experience; and

(b) Number and nature of trials;

(3) Specialized experience;

(4) Ability to communicate with the client in a foreign language.

(5) Reason for seeking panel membership; and

(6) Disciplinary proceedings of any kind involving the applicant.

After consideration of the application and the interview, the individual is placed in one of four categories:

(1) Highly Qualified;

(2) Qualified and Recommended;

(3) Qualified; and

(4) Not Recommended.

The ultimate decision rests with the court, which adheres to a practice of admitting to the panel those attorneys placed in the first two categories. "Qualified" applicants are invited to re-apply after they have gained additional criminal law experience. Practitioners are almost never placed in the "not recommended" category unless they fail to follow up their application with an interview.

Generally speaking, the Southern District of New York appears to make no distinctions among the attorneys admitted to its panel. The program, however, does plan the creation of an uncompensated co-counsel roster, whereby inexperienced attorneys could gain exposure to federal criminal law and practice by assisting assigned lawyers. To date, this plan has yet to be put into effect.

For a jurisdiction in which appointable offenses range from petty larceny to murder, a single set of eligibility standards may not suffice. Instead, it would benefit both the criminal justice system and the participating attorneys to utilize different qualifications depending upon the nature and severity of the case. Although this report has not discovered any defense plans with specific eligibility criteria, some jurisdictions do

have more or less sophisticated procedures for making distinctions among lawyers. For example, the San Mateo County Bar Association Private Defender Program requires potential panel members to complete a rather lengthy questionnaire about the nature and extent of their previous criminal law experience and training. Possessed of this and other information, the Program Administrator attempts to make appointments for which the given attorney is qualified.

> Case assignments are made by the administrator to the individual attorneys on the basis of the charge, considering the seriousness and complexity of the problem, along with the skill and experience of the individual lawyer.[22]

Despite the above policy statement, it is difficult to measure the success of the San Mateo Plan in consistently assigning cases to lawyers with the necessary qualifications. The absence of specific criteria always poses the danger that good intentions will not produce good results, since the effectiveness of the screening depends entirely on the wisdom and fortitude of the administrator. By contrast, the use of formal eligibility standards raises the question of whether they must be limited to objective considerations, such as the types of criminal cases or the number of jury trials handled by the particular attorney. Such a limitation erroneously presupposes that experience constitutes the only valid criterion; according to one county attorney, experience is not necessarily synonymous with expertise or ability. On the other hand, the explicit consideration of subjective factors might touch a sensitive nerve in certain segments of the legal community. This approach would almost certainly have to involve prestigious members of the bench and the bar.

Given these problems, the proposed program might be well advised to make only a modest beginning in the use of eligibility standards. If employed at all, formal criteria might be restricted to inexperienced attorneys, who could be required to represent a specified number of misdemeanor defendants before qualifying for appointment in lesser felony cases. Another prerequisite might include a certain amount of jury work. Similarly, these panel mambers might be precluded from more serious felony appointments until they had served as co-counsel with seasoned practitioners. Since a wealth of options exist with respect to eligibility standards, the specific details are better left to the collective wisdom of a body such as the Defender Commission.

Regarding "established" practitioners, the proposal recommends that the district defenders rely heavily on the presiding superior court justice of the region in which the district is

located. More specifically, the defender and the justice would meet periodically to determine which panel members are qualified for the serious cases and possibly also which should be given a larger share of the caseload. As an added safeguard against the appointment of an unqualified attorney, the judge hearing a particular case would be empowered to replace the lawyer selected by the program or to appoint co-counsel. While the above recommendations conflict with the goal of relieving the judiciary of responsibility for public defense, judicial involvement is essential in an informal approach, insofar as the justice is in a unique position to evaluate the capabilities of the practitioners in his region.

This report believes that the ultimate solution to this problem lies in a certification scheme for court appointed work, and perhaps, for the practice of criminal law as well. Its refusal to urge the immediate adoption of such a scheme stems solely from the fact that in a small jurisdiction, such as Maine, any form of certification, however limited, may have a significant effect on an attorney's career. Consequently, certification must be considered in a broader context than a defender plan.

A well administered assigned counsel system could also possess the discretion to allow panel members to specialize in a particular area. For example, if a practitioner developed an interest and expertise in juvenile matters, there appears to be no reason why he could not limit his participation to those cases. Such specialization might prove an effective way to utilize the talents of those attorneys who practice criminal law on an infrequent basis. The program, however, must take care not to misuse specialization in such a manner that a select group of attorneys receive the more desirable appointments.

While the development of eligibility standards presents complex issues, it is difficult to dispute the premise that an assigned counsel system, if it is to furnish the most effective representation possible, must emulate certain attitudes and practices of private law offices. In this regard, the system should seek skilled attorneys and should utilize the panel members in accordance with their ability. Similarly, training should be available for inexperienced lawyers, either through representation in less serious cases or co-counsel assignments. Just as membership in the bar does not guarantee an individual law firm employment or a retained clientele, it should not automatically entitle him to appointments; this conclusion applies, a fortiori, to serious cases.

3. Rotation of Assignments. The traditional methodology of assigned counsel systems is to rotate appointments among the roster attorneys. This procedure offers the obvious advantage of insulating the selector of counsel from allegations of favoritism.

For the above reason, rotation constitutes a reasonable means of allocating assignments, as long as it is not elevated to the level of an absolute principle. Once again, the analogy of a large law firm seems germane, insofar as such an enterprise would not rotate the affairs of its clientele among its member attorneys, in total disregard of the experience and skills of the latter. Similarly, a defense system must subordinate the concept of rotation to the greater goal of insuring that a qualified attorney is assigned in every case. The administrator must thus have the discretion to deviate from this procedure, even if such deviations deprive the program of the absolute neutrality inherent in what might be characterized as a lottery approach.

While this report has dwelled at length on the need for quality control in the appointment process, some mention should be made of the reverse phenomenon, namely, the use of certain attorneys exclusively in serious cases. Research reveals that a number of experienced Maine practitioners receive only a handful of assignments, all of which invariably entail major offenses. From one perspective, this can certainly be viewed as a commendable use of the State's legal talent. On the other hand, substantial benefits might result if these attorneys were required, or at least encouraged, to accept lesser cases when the rotation procedure so dictated. This is particularly true in light of the belief that misdemeanor representation in the lower courts often stands as the weakest aspect of the system.[23] The participation of highly qualified attorneys could help to overcome this problem.

4. Co-Counsel. This report has already made numerous references to the use of a co-counsel roster as a training mechanism for new and inexperienced attorneys. Under the plan being implemented in the Southern District of New York, letters were sent to all panel members asking if they would be interested in having a lawyer work with them on an assignment. Those who consented were also requested to submit a critique of the performance of their co-counsel at the termination of the case.

Such a plan would seem adaptable to Maine if co-counsel were not compensated or paid only a nominal fee. The justification for this policy will be discussed in a subsequent section dealing with the present role of younger attorneys; similarly, the utilization of co-counsel for other purposes will also be taken up in another part of this report.

5. Administrator. Since a case has already been made for an administrative component, it is necessary only to emphasize that the above procedures will not accomplish their objectives in the absence of close supervision. Past experience demonstrates that rotating assignments from a roster does not guarantee widespread bar participation or an even distribution of

appointments. In addition, matching cases with attorneys possessed of the necessary ability requires the judgment of an individual conversant with the criminal justice system. In short, both the importance and complexity of the recommended selection process dictate that a staff attorney oversee its operation. With respect to certain aspects of this operation, particularly the implementation of eligibility standards, the advice and assistance of the local judiciary and bar could prove invaluable.

III. Recommendations on Bar Participation.

A. Maximization of Attorney Involvement.

As indicated in a previous section, Maine's assigned counsel system lacks the participation of a substantial segment of the bar, especially when the distribution of assignments is considered. Briefly restated, the combined data for the superior and district courts reveals that 32 percent of the State's practicing attorneys represented at least one needy defendant in 1973, and that only 5.4 percent handled over one-half of the cases. On its face, this data suggests that the system has had limited success in soliciting the assistance of the bar.

Despite a paucity of statistics from other jurisdictions, figures from the Ontario Legal Aid Plan tend to reinforce the above conclusion.[24] Under that program, 3,350 of the Province's 6,000 practicing lawyers, or 55.8 percent, are enrolled in the panels for the defense of criminal cases. When civil matters, also covered by the Plan, are included in the data, the results are even more impressive. According to a recent study conducted by the Ontario Law Society, 72 percent of the practicing lawyers were participating in either criminal or civil cases, or in both. These figures reflect a far greater bar commitment to the representation of needy persons than exists in Maine.

Since this and other reports have postulated maximum bar participation as a goal of assigned counsel systems, the relevant area of inquiry must center on the means to this end. Judging from the complaints of attorneys, certain reforms could help to enhance their involvement. For example, a more efficient and predictable selection process, along with stronger supporting services, could render assigned work less of a sacrifice. In addition, compensation changes, in terms of both the amount and uniformity of the fees, would certainly encourage some practitioners to represent needy defendants. Nevertheless, there is scant possibility that assigned cases will ever be as attractive to the average practitioner as retained cases.

In light of the above conclusion, the present system suffers from a glaring deficiency. Despite sentiment among members of

the judiciary that the burden of public representation is not shared equally by qualified attorneys, almost no steps have been taken to solicit more widespread cooperation. Two prosecutors expressed the opinion that there are a sufficient number of competent lawyers to make the system work, but that the judges often fail to request the assistance of the most qualified practitioners.

> Judges are hesitant to ask older, more experienced attorneys to accept appointments, in many cases because they are not in court and there would be some disruption of their practice to have them come in for appointments.

In short, the most direct and least expensive approach to increasing bar participation has not been undertaken.

Judicial reluctance to actively solicit lawyers may well stem from legitimate concerns. The first is the time factor to which this report has already alluded. Second, such a practice might thrust the judicial officer even more deeply into the attorney-defendant relationship. These problems would not exist were the system run by a staff attorney. Rather than compromising his position, an active and ongoing campaign to bring more practitioners into public defense work would be an integral part of his job. Realistically speaking, the goal of maximizing bar participation does not seem attainable under present ad hoc procedures, but requires a concentrated effort possible only under a carefully administered program.

B. "Qualified" Panel Attorneys.

Inherent in the notion that an assigned counsel system should draw upon the services of as many qualified attorneys as possible is the problem of defining the word "qualified." Ideally, participation might be limited to "experts" in criminal law, but, as the American Bar Association points out, the number of such experts is exceedingly small.[25] This conclusion certainly seems valid for Maine.

In response to this problem, the Association offers the following standard:

> Every lawyer licensed to practice law in the jurisdiction, experienced and active in trial practice, and familiar with the practice and procedures of the criminal courts should be included in the roster of attorneys from which assignments are made.[26]

Although the standard requires trial experience, it deems some familiarity with criminal law and practice sufficient.

At least one Maine superior court justice has expressed the view that a major failure of the assigned counsel system lies in its inability to elicit the involvement of civil practitioners well versed in trial work. This opinion receives some support from additional data on the participation of members of the Board of Governors of the Maine Trial Lawyers Association. Of the 24 members active in private practice in 1973, 13 handled no assigned counsel cases in the superior court. Viewed somewhat differently, only three members of the Board had more than four superior court assignments. Although the familiarity with criminal law of individual members is unknown, it seems fair to assume that they are all experienced in trial practice. This suggests the strong possibility of a resource not being tapped by the present system.

Assuming experienced trial practitioners, an organized program should have the capability to facilitate compliance with the familiarity requirement. One possibility, strongly recommended by the American Bar Association, is the "establishment of continuing legal education to assist the trial lawyer who infrequently tries a criminal case in keeping pace with developments in criminal practice."[27] Effective supporting services could also ease the burden on the practitioner who handles criminal matters only on an occasional basis. These might include brief and memorandum banks, research assistance from students, and the advice of the staff attorneys.

Another advantage of a carefully administered system is that it can utilize its panel members in a selective fashion. If, for example, through previous appointments, a lawyer has gained experience in the defense of drug offenses, the staff attorney might attempt to give him similar assignments in the fugure. This would avoid the necessity that the lawyer start fresh in an area of substantive law to which he has had no prior exposure. A rational use of its resources improves the efficiency and effectiveness of any enterprise, and there is no reason why this principle should not apply to public representation; it certainly makes more sense than religious adherence to rotation procedures.

By way of conclusion, the concept of "qualified" must inevitably remain amorphous. Given the paucity of criminal law experts, the ABA standard seems eminently reasonable. It probably should even be extended to include those trial practitioners who exhibit a willingness to acquire the necessary familiarity with criminal law and practice. Thus, only those individuals who exclusively pursue an office practice would be excluded, although some authorities argue for mandatory participation by all licensed attorneys.[28]

C. Role of Younger Attorneys.

Proponents of the assigned counsel concept frequently point to its value as a training ground for younger attorneys, which eventually increases the number of competent criminal lawyers in the jurisdiction. While this argument has validity, it is subject to two qualifications. First, the training must not be at the expense of the defendant. Second, the education argument benefits the system only to the extent that attorneys continue to participate in public representation. Otherwise, the taxpayers are merely subsidizing new attorneys until the latter can obtain the experience and reputation necessary for successful private practice.

Although it is difficult to prove scientifically that extensive reliance on junior members of the bar has adversely affected the quality of representation in Maine, various authorities warn against this practice. While the admonition of the American Bar Association has already been cited, Chief Judge Bazelon is even more severe in his criticism.

> Defense of an indigent is not an extension of law school...you may have heard the familiar refrain; "I got experience--my client got jail." I, for one, would not like to be the defendant whose trial is the vehicle for some young lawyer to gain trial practice. The medical profession is often accused of letting new doctors get their training by practicing on the poor without the close supervision they need. The charge applies with equal force to our own profession.[29]

The practice of letting new lawyers represent needy defendants without supervision certainly exists in Maine.

That some lawyers tend not to remain active in public defense after they have gained experience is suggested by the comparatively small number of middle-aged practitioners with heavy assigned caseloads. Statistics have already been offered to illustrate this point; Table XII-2 provides additional evidence by giving the number of lawyers in each age bracket who had at least 15 district court appointments in 1973.

TABLE XII-2

BREAKDOWN BY AGE OF ATTORNEYS WITH AT LEAST 15 DISTRICT COURT ASSIGNMENTS

Age Bracket	Number of Attorneys
Less than 35 years of age	28
35-59 inclusive	19
60 years of age or more	4
Age unknown	4

Of those individuals whose ages could be ascertained, only 37.3 percent fell in the 25 year span that might be characterized as middle-aged. Breaking the data down further, 13 practitioners, or 25.5 percent of the total, were in the 35-49 age bracket. By contrast, 54.9 percent were in the youngest group. Regarding lawyers with at least 10 superior court appointments, a greater number were less than 35 years old than were in the 35-49 age bracket.[30] These figures cast some suspicion on the notion that the experience afforded by public representation ultimately accrues to the benefit of the system.[31]

Since the training argument theoretically has merit, steps should be taken to avoid the problems referred to above. With respect to the possibility that neophyte lawyers may not be prepared to provide a high caliber of defense, various measures are available. These include: (1) initial assignments to relatively minor cases, with a gradual escalation to more serious matters as they acquire experience; (2) co-counsel assignments; (3) educational programs; and (4) perhaps even an evaluation of their performance by staff attorneys and judges. The system obviously needs younger attorneys, but there is no reason why defendants must pay the price for their experience.

Dealing with defections by lawyers who develop successful private practices is a far more difficult issue. Apart from an understanding that enrollment on a panel entails a moral commitment to continued participation, there do not appear to be any workable sanctions to enforce such a commitment. One source of protection for the system might be to pay newer attorneys a lower rate of compensation until they have handled a specified number of appointments. Along these lines, co-counsel assignments at nominal compensation can be justified on the grounds that the practitioner is gaining the experience and qualifications needed for more serious cases. In the final analysis, however, the bar should inculcate in its members the attitude that assigned

work does not exist for the convenience of the lawyer, to be pursued until he can earn more money from private clients.

D. Supervision of Roster Attorneys.

Many of the preceding recommendations stem from the common premise that certain management principles should guide the delivery of defense services. On a general level, this involves the articulation of clear objectives and the development of the means to attain those objectives. More specifically, the system should strive to make the most effective use of its resources, to expand the resources available to it, and to function efficiently. To accomplish these goals, the overall operation and its components must undergo periodic evaluation.

The most crucial point, however, is that management presupposes authority. When applied to public representation, this concept translates into authority over the attorneys who represent needy defendants. In some contexts, this may not prove too controversial. For example, the staff attorneys might have the power, under specified conditions, to suspend from the rosters practitioners who refuse a certain number of consecutive assignments, who indulge in unjustifiable delays in the disposition of their cases, or who submit excessively high bills.

Ironically, the exercise of authority over the utilization of the program's resources is the aspect of management both most crucial to the system's success and most likely to cause resentment. This stems from the fact that such authority will inevitably entail judgments about the capabilities and attitudes of lawyers with respect to the defense of needy persons charged with crimes. Based upon these judgments, the program must have the power, perhaps in conjunction with the judiciary, to determine the eligibility of its roster attorneys to receive various types of appointments.

This report does not attempt to describe the precise extent of the authority of the staff attorneys, since the judiciary and the bar must share in that determination. The report, however, must emphasize the proposition that while attorneys are owed fair treatment, the raison d'etre of the system is to provide needy defendants with a high caliber of representation. To the degree that supervisory powers over participating lawyers are essential to the realization of that objective, the administrators of the system must have those powers. The stakes are too high to justify the notion, which seems to persist in some courts, that every attorney, regardless of his experience, ability, motivation, or past performance, is entitled to participate on a perfectly equal basis. No law office would operate on that principle, nor should a defense delivery system.

FOOTNOTES

[1]Two of the judges included in this category responded "not necessarily" and "not particularly."

[2]ABA at 24.

[3]Id. at 25.

[4]Id.

[5]The examples of favoritism cited by the county attorneys were the appointment of lawyers present in court, the appointment of younger lawyers, and the appointment of those preferred by the judge. In one instance, the favoritism was described as "not appointing people who should be appointed more often."

[6]Bazelon, supra, at 15.

[7]ABA at 26.

[8]Id. at 27.

[9]Id. at 24.

[10]National Center for State Courts, Implementation of Argersinger v. Hamlin: A Prescriptive Program Package (1974) at 39-40.

[11]See text accompanying note 4 in the section entitled "Selection of Appointed Counsel."

[12]According to one member of the bench, "judges riding circuit are initially handicapped in selecting counsel for a particular offense or a particular type of defendant."

[13]Bazelon, supra, at 19.

[14]Id. at 19-20.

[15]The term "disrupt" refers to factors such as the scheduling of cases rather than to the comportment of counsel in the courtroom. The latter subject is beyond the scope of this study.

[16]Burger, The Special Skills of Advocacy, 46 N.Y. St. B. J. 89, 91 (1974).

[17]This is particularly applicable to the district courts, where the payment of a flat fee is the customary practice.

[18]Charged with administrative responsibility for all cases with public representation, the staff attorney could work with the prosecutor and court officials to achieve a more exact scheduling of cases. This might ameliorate the problems which arise when the prosecutor or clerk has to contact every attorney.

[19]The San Mateo Private Defender Program has adopted a specific policy designed to minimize court appearances. Its fee schedule, distributed among all participating attorneys, contains the following note:

> A further suggestion is that assigned counsel remember that their fellow assigned attorneys are appearing in all courts in the county and would be able to make special appearances on behalf of their fellow assigned attorneys if the client, district attorney and the court have been properly advised, and if the matter entails nothing more than a routine continuance.

[20]National Center for State Courts, supra at 43-4.

[21]The ensuing description is based on documents sent to this Project by the office of Charles A. Stillman, Esq., who chairs the screening committee for panel applicants.

[22]"Resume of Private Defender Program," p. 2 (Sent to this Project by the San Mateo Private Defender Program).

[23]See Argersinger v. Hamlin, supra at 34-7.

[24]To Assure an Adequate Defense, supra at 9-12.

[25]ABA at 27.

[26]Id. at 26.

[27]Id. at 28. The Attorney General's Office of Maine conducts a continuing education program for prosecutors; the same need certainly exists for defense attorneys engaged in public representation.

[28]Under what is known as the "San Antonio Plan," all licensed attorneys are technically included in the pool, except those granted exemptions for reasons of age, disability, government employment, membership in the state legislature, and legal aid employment. In addition, the Plan permits an attorney to buy his way out of participation for a yearly fee of $200. For a further description of this Plan, see Huff, A Further Inquiry into the Quality of Indigent Defense, 6 St. Mary's L.J. 586, 594-97 (1974).

[29]Bazelon, supra at 13.

[30]Of the 21 practitioners in this category, nine were less than 35 years of age, whereas seven were in an age range of from 35 to 49. In addition, four attorneys were between 50 and 60, and one was over 60.

[31]Perhaps the most scientific way to measure this phenomenon would be to study attorney participation over a period of years. Although such an undertaking exceeded the resources of this study, the following fact may be of some relevance. The names of three of the six young attorneys (less than 35 years of age) with comparatively heavy caseloads (at least 11 assignments) in the Portland District Court in 1973 no longer appear on that tribunal's roster in 1975.

COMPENSATION OF COUNSEL

I. District Court.

A. Compensation Provisions.

Neither the Maine statutes nor the rules of court contain any dollar guidelines with respect to the compensation of assigned counsel. District Court Criminal Rule 44 does appear, however, to incorporate by reference the relevant section of the corresponding superior court rule. Pursuant to that section, the appointed attorney is to be afforded "reasonable compensation for his services." The rule, moreover, mandates that the court weigh a variety of elements in fixing the precise amount of the fee.[1]

Apart from the court rules, the only other factor affecting reimbursement is the minimum rate set by the Chief Judge of the District Court. For all matters assigned on or after January 1, 1973, that rate has been $50 per case. Although the exact status of the $50 fee has been the source of some confusion, the words of the Chief Judge in office at the time of its adoption leave no doubt as to the official interpretation: "the $50 is not a flat fee but a minimum as was the prior $35 fee."[2] As with other aspects of the system, however, the compensation data reveals a divergence between theory and practice.

B. Compensation Data.

For 11 of Maine's district courts,[3] compensation data was collected in all cases in which the assigned attorney was reimbursed during calendar year 1973. Table XIII-1 sets out the different amounts of compensation and gives both the number of cases and percentage of the caseload in which each amount was paid.

TABLE XIII-1

DISTRICT COURT COMPENSATION DATA (Paid in 1973)[4]

Amount of Compensation	# of Cases in Which Amount was Paid	% of Caseload in Which Amount was Paid
$25	3	.3%
$30	1	.1%
$35	81	9.1%
$50	798	89.3%
$60	2	.2%
$75	3	.3%
$100	3	.3%
$125	1	.1%
$131	1	.1%
$143	1	.1%
Total	894	99.9%

Most significantly, the $50 minimum was exceeded in only 1.2 percent of the cases. That figure strongly suggests that in the vast majority of instances, the judges ignore the rule and simply award the minimum fee.

The reluctance to set compensation in excess of $50 was exhibited by the judges in all of the sampled tribunals. Within the sample, the Bangor District Court had the most cases with a fee higher than $50, a total of 3 out of 284 assignments. Generally speaking, when higher compensation is awarded, the appointment usually involves serious charges or lengthy proceedings.

While some judges are loath to authorize more than a $50 fee, others adhere to the rate with absolute fidelity. Although not part of the sample, a check of the Portland District Court bills disclosed only one case in 1973 in which the fee exceeded $50. Since that matter was handled by a circuit-riding judge, it is fair to conclude that the resident judicial officers never deviate from what is theoretically the minimum level of compensation. Had that tribunal's 645 assignments been included in the sample, moreover, the percentage of cases with compensation in excess of $50 would have dropped to .83 percent.

Despite official policy to the contrary, then, the $50 fee is more of a flat rate than a minimum. In addition, an analysis of the data points inexorably to the conclusion that the district court judiciary does not abide by the "reasonable compensation" provision of Criminal Rule 44.

C. Explanation for Adherence to Minimum Fee.

Although this report can only speculate on the reasons for the strict adherence to the $50 fee, there is substantial support for the proposition that many of the judges do not feel entirely free to set higher levels of compensation. When asked whether they "have sufficient discretion in setting compensation," 8 of the 11 responding judges answered in the negative.[5] Another simply stated: "We have none." Accordingly, the majority apparently believe either that the rate is automatic or that they may authorize higher compensation only in exceptional cases.[6]

Whatever the reasons for the above phenomenon, it has potentially undesirable results. It produces a situation in which the possibility of higher compensation exists in some district courts, but not in others. It also creates the impression that the courts fail to comply not only with their own policy, but also with the governing court rule. One county attorney has characterized this apparent noncompliance as "the biggest disgrace in the system." While that characterization may be somewhat extreme, the district court compensation scheme certainly needs clarification.

D. Definition of a "Case" for Compensation Purposes.

Since the district courts almost invariably pay a fixed rate of compensation per case, the manner in which that term is defined can significantly affect the amount of money an attorney receives when more than one offense is involved. According to the District Court Office, the proper definition seems to be one or more charges against a single defendant arising out of a single occurrence. The research of this study indicates that most attorneys follow that formula; thus, assigned counsel have been paid the customary $50 even when the arrest resulted in as many as six or seven criminal complaints against the defendant.

The study has found, however, instances in which the appointed lawyer submitted bills and received compensation for each separate offense, despite the fact that they seemingly arose out of a single occurrence. One example should suffice to illustrate this phenomenon. In that case, the defendant was charged with operating under the influence, operating after suspension, and failure to stop at a stop sign. The available court records lead clearly to the conclusion that the offenses were committed at the same time and resulted from a single arrest.[7] Furthermore, the three charges were all disposed of during the same court session. Whereas the customary practice would have been to submit one bill for legal representation on the charges, the appointed attorney submitted three and was paid the prevailing rate for each offense.[8] In short, his compensation was 200 percent more than the usual amount for such services.

While district court compensation never reaches particularly high levels, the above example does demonstrate that multiple, as opposed to single, billing can produce great inequities among assigned counsel. The extent of the practice is difficult to ascertain, insofar as considerable investigation may be required to determine whether the separate offenses stemmed from a single occurrence. Nevertheless, the examination of attorneys' bills performed by this study uncovered what appeared to be incidents of multiple billing in at least six of the district courts. Although the evil may be more one of fairness than of finances, it reflects the type of problem that can develop in the absence of administrative supervision.

Other inconsistencies also exist in the system, as shown by the few situations in which the minimum rate is exceeded. For example, an attorney received $140 in compensation for a case which involved four charges and required eight hours of work. In another case with the same number of charges, the appointed lawyer was paid the minimum fee, even though the bill indicated 14½ hours of work and 450 miles of travel. While that attorney was not allowed any travel allowance, a practitioner in another court was awarded a fee of $50.66, with the 66¢ representing reimbursement for phone calls. While these inconsistencies may

have minimal financial impact, they certainly suggest an erratic system. To the extent that dissatisfaction with district court compensation affects bar participation, the impact ceases to be minimal.

E. Conclusion.

The occasional exceptions only serve to emphasize the fact that the district court judiciary compensates assigned counsel at a flat rate of $50 per case. In pursuing this course, moreover, the judges do not appear to be in accord with District Court Criminal Rule 44. Despite the simplicity inherent in a fixed fee, inconsistencies still occur, resulting primarily from the absence of clear guidelines and effective monitoring. The critical question of the adequacy of the compensation will be taken up in a subsequent section.

II. Superior Court.

A. Compensation Provisions.

Criminal Rule 44 (c) sets out rather elaborate ground rules for the determination of the assigned attorney's fee.

> (c) Compensation of Counsel. Counsel appointed to represent a defendant shall be afforded reasonable compensation for his services and for the costs of the defense. In fixing the amount of counsel fees the Court shall consider the following factors: The professional responsibility of the Bar to assist the court in providing legal assistance to indigent defendants, the experience of appointed counsel, the difficulty of the case, the quality of the representation, the time counsel has expended, and the customary fees paid to privately retained counsel for the same or similar services. Appointed counsel shall under no circumstances accept from the defendant or anyone else on his behalf any compensation for services or costs of defense, except pursuant to court order.

The nature of the available records makes it almost impossible to assess the true importance of Rule 44 (c) in the compensation process. When they fixed a fee, the justices do not give any explanation of why they settled on a particular amount. In addition, the bills submitted by assigned counsel vary considerably, ranging from detailed statements of the time expended and services provided to slips of paper containing little more than the names of the case and the attorney.

On its face, Rule 44 (c) does not possess the attribute of easy applicability. It would appear extremely difficult to translate some of the factors, like the "quality of representation," into sums of money. Others, such as the "professional responsibility of the Bar" and the "customary fees paid to privately retained counsel," seemingly pull in opposite directions; their reconciliation rests with the discretion of the individual justice. In fact, the subjectivity of the entire rule leaves a great deal to the compensation determiner's personal philosophy. Since attorneys frequently complain about wide variations among the justices, the desirability of this approach is questionable.

The Superior Court Conference has established rough dollar guidelines for use in the determination of compensation. The specific rates are $15 per hour for research and preparation and $150 per day for trial. Once again, the paucity of information in the bills submitted by most attorneys does not permit an assessment of the extent to which those guidelines are followed. Interviews with practitioners suggest that they have not been successful in achieving uniformity among the justices; this impression is supported by the available data.

B. Compensation Data.

Excluding representation in murder appeals, the superior courts authorized compensation for assigned counsel in 1973 in the amount of $221,791. That total constituted fees for services rendered in 1,062 cases; accordingly, the mean compensation per case was $208.84. Since some of these matters involved the participation of more than one attorney, either because the original lawyer withdrew or co-counsel shared the work, there were actually 1,073 assignments in 1973. When computed by assignment, then, the mean compensation became $206.70.

Greater insight into the system is gained from a breakdown of the data according to the nature of the case. Table XIII-2, which contains such a breakdown, should prove self-explanatory except perhaps with respect to the first category of offenses. Included in that category are all felony, misdemeanor, traffic, and juvenile cases; omitted are such items as representation in civil cases, in derivative proceedings such as probation revocations, and for a limited purpose such as a bail hearing.

TABLE XIII-2

SUPERIOR COURT MEAN AND MEDIAN COMPENSATION

Nature of Case	Mean Comp.	Median Comp.
All felony, misdemeanor, traffic, and juvenile cases	$217.51	$125.24
Felony cases only	$240.73	$132.50
Misdemeanor and traffic cases only	$119.80	$ 99.25

Given their impact on the system, some mention should be made of the fees paid in murder and manslaughter cases. Table XIII-3 compares the mean compensation for these offenses with all other felonies.

TABLE XIII-3

SUPERIOR COURT FELONY MEAN COMPENSATION

Nature of Felony	Mean Comp.
Murder cases	$2,737
Manslaughter cases	$ 804
All other felonies	$ 181

Stated somewhat differently, the 24 murder and manslaughter cases in which public representation was afforded accounted for 2.3 percent of the caseload, but 23.2 percent of the total compensation.

Although the work required obviously contributed to the higher fees in homicide cases, some of the difference resulted from the use of co-counsel. As previously noted, there were eight cases in which co-counsel were formally appointed and seven of these involved murder or manslaughter charges. Formal appointments cover those in which the names of both attorneys appear in the record; it is possible that there were other instances in which a member of the same firm assisted the assigned lawyer, and this fact was considered in fixing compensation. In any event, the mean compensation for the 11 murder cases with one attorney came to $2,078; the comparable figure for the six cases with formally appointed co-counsel was $3,947. While it is possible that the latter entailed more complicated issues, the fact remains that the use of co-counsel significantly increased the cost of the defense.

It is difficult to determine the exact expenditures necessitated by the appointment of second attorneys, since there is no sure way of knowing which practitioner served in that capacity. Nevertheless, by assuming that the lawyer with the lower fee acted as the assistant (where the fees were equal, the problem does not arise), a cost figure can be reached. Under this method of computation, the superior courts paid $10,490 to the eight "assistant attorneys" compensated in 1973.

C. Comparative Compensation Data.

One of the most frequent complaints of attorneys concerns widespread differences among the justices with respect to the

amounts of compensation they are willing to authorize. Although variations among the cases make this allegation difficult to substantiate, the study attempted to overcome this problem, to the extent possible, through the use of the following procedure. Data was collected on the median and mean compensation paid by each superior court justice in all felony cases,[9] except those involving murder or manslaughter charges. The exclusion of those offenses was based on the belief that the high fees customary in such matters could distort the results.

Table XIII-4 contains the median and mean compensation for each justice. While one or two high fees may affect the true significance of the mean compensation, the same does not hold true for the median. Significant variations in that category would at least suggest different judicial attitudes toward "reasonable compensation."

TABLE XIII-4

MEDIAN AND MEAN COMPENSATION PAID BY EACH SUPERIOR COURT JUSTICE
(Table includes all felonies except murder and manslaughter cases)

Justice	# of Cases	Median Comp.	Mean. Comp.
McCarthy	96	$189.06	$224.99
Knudsen	53	182.25	322.36
Spencer	55	178.75	229.60
Glassman	61	142.50	158.21
MacInnes	56	132.50	160.05
Delahanty	18	127.25	183.78
Rubin	83	127.03	163.04
Bishop	44	126.83	176.23
Roberts	37	120.25	167.54
Lessard	75	111.63	141.56
Stern	51	100.75	128.61
Naiman	75	97.14	138.12
Reid	66	95.00	166.56

As the table reveals, there is a considerable spread among the justices. The median compensation paid by Justice McCarthy, for example, exceeds by almost 100 percent the comparable figures for Justices Reid and Naiman. The differential in mean compensation is even greater, ranging from $128.61 to $322.36. It seems doubtful whether a few unusually high fees could completely account for this difference.

To shed more light on this subject, Table XIII-5 ranks the justices in descending order, according to the amounts of their

median and mean compensation. Should a member of the bench occupy positions near the top of both lists, it might well be fair to ascribe this phenomenon to his view of "reasonable compensation," rather than to the cases he happened to hear. The same applies to those justices at the bottom of both lists.

TABLE XII-5

RANK IN MEDIAN AND MEAN COMPENSATION FOR EACH SUPERIOR COURT JUSTICE (Table includes all felonies except murder and manslaughter cases)

Justice	Rank in Median Comp.	Rank in Mean Comp.
McCarthy	1	3
Knudsen	2	1
Spencer	3	2
Glassman	4	10
MacInnes	5	9
Delahanty	6	4
Rubin	7	8
Bishop	8	5
Roberts	9	6
Lessard	10	11
Stern	11	13
Naiman	12	12
Reid	13	7

Based upon the table, a pattern seems to emerge. Justices McCarthy, Knudsen, and Spencer ranked in the top three in both categories, whereas Justices Lessard, Stern, and Naiman were in the bottom four with respect to both median and mean compensation. Virtually all of the remaining members of the bench ranked consistently in the middle. The table provides rather strong evidence that there are indeed "high paying" and "low paying" judges.

While the small number of misdemeanor and traffic cases might preclude drawing inferences based on those matters alone, the relevant comparative compensation data can be used to confirm the presence or absence of a pattern. Accordingly, Table XIII-6 ranks, in terms of median and mean compensation for misdemeanor and traffic cases, the individuals whom this report has suggested are the high and low paying judges.

TABLE XIII-6

RANK IN MEDIAN AND MEAN COMPENSATION FOR SELECTED SUPERIOR COURT JUSTICES (Table includes misdemeanor and traffic cases)

Justice	# of Cases	Rank in Median Comp.	Rank in Mean Comp.
Knudsen	12	2	2
McCarthy	18	3	1
Spencer	8	4	4
Lessard	7	11*	12
Stern	17	8	6
Naiman	7	11*	13

*Although the data includes 13 justices, eleventh represents the lowest rank for median compensation paid in misdemeanor and traffic cases. This stems from the fact that three justices tied for the lowest median compensation.

The table certainly seems to speak for itself. Those justices who authorized higher than average compensation in felony cases did so for lesser offenses as well. With one slight exception, the same holds true for those members of the bench whose felony fees were lower than those of their brethren.

Finally, a computation of the mean compensation for all assignments only serves to reinforce the above conclusion. In that category, Justices McCarthy, Knudsen, and Spencer ranked 1st, 2nd, and 5th respectively, whereas Justices Lessard, Naiman, and Stern ranked 11th, 12th, and 13th. The possibility of distortion from murder cases is minimal since collectively the latter heard more of those offenses than the former.[10]

Even if case differences preclude a scientifically infallible test, the data utilized by this survey seems sufficiently refined and sufficiently extensive to substantiate the existence of high and low-paying justices. Given the inequality inherent in this phenomenon, it is not surprising that it sours many attorneys on the assigned counsel system. The achievement of greater uniformity probably lies in a more precise fee schedule, administrative control over compensation, and periodic evaluation of the amounts paid.

D. Definition of "Case" for Compensation Purposes.

The superior court records reveal an even greater variation in billing practices than exists in the district courts. The absence of a flat fee, however, minimizes the likelihood that this affects the amount of compensation since the presiding justice can simply prorate the fee according to the number of

bills submitted. A potential problem does arise when a case spans more than one term of court. If bills are presented in the case to different presiding justices, there is a possibility that an attorney may be compensated twice for the same services. Although this report believed the possibility so remote as not to justify investigation, it did unintentionally discover one example of apparent double billing. Whether double billing occurred in that case, and whether it was intentional, are now the subject of litigation. For purposes of this report, the more salient point is that closer administrative supervision would probably have prevented the problem.

III. Adequacy of Compensation.

A. Introduction.

In a sense, the adequacy of compensation turns largely on an individual's personal philosophy. At one end of the spectrum is the view that members of the bar have a social obligation to represent needy defendants, and thus should receive either no or only nominal remuneration. A problem with this argument, which may well render it irrelevant, arises when a substantial number of practitioners do not share this feeling of obligation, and thus, refuse to participate. Unless the obligation can somehow be made enforceable, a measure of questionable desirability, the theoretical merit of the argument is overshadowed by the fact that it produces an unsatisfactory system of public representation. The ultimate losers, of course, are the defendants.

At the other end of the spectrum is the position that court appointed work should be viewed in the same light as services rendered in the open market. The proponents of this theory would presumably argue that attorneys should not be singled out from the rest of the population and compelled to underwrite the cost of public representation. Complete acceptance of the notion that compensation for the representation of indigents should be commensurate with that paid by private clients has not been forthcoming; no governmental unit appears willing to pay the full freight.

Generally speaking, the trend has been away from the social obligation theory and toward a compromise position. Criminal Rule 44 (c) clearly reflects this compromise, for it directs the court to consider both "the professional responsibility of the Bar" and "the customary fees paid to privately retained counsel." As will be discussed subsequently, it is the position of this report that assigned counsel compensation must approximate the minimum fees of the open market, if the use of private practitioners is to prove effective.

B. Maine Opinion on Adequacy of Compensation.

The recipients of the questionnaires were asked whether they believe the level of compensation authorized for assigned counsel work in the District Court to be "adequate," "inadequate," or "very inadequate." Table XIII-7 sets out their responses.

TABLE XIII-7

ADEQUACY OF DISTRICT COURT COMPENSATION

	Adequate	Inadequate	Very Inadequate
Superior Court Justices	1	2	5
District Court Judges	5	6	0
County Attorneys	3	4	3
Total	9	12	8

As the table indicates,[11] a strong majority think that district court fees for appointed attorneys are insufficient; a significant number of respondents even characterize the level as very inadequate. While this study does not possess detailed information on private rates, attorneys often assert that a large gap exists between those rates and the level of compensation granted for publicly financed representation.

Table XIII-8 contains the results of a similar inquiry with respect to superior court compensation.

TABLE XIII-8

ADEQUACY OF SUPERIOR COURT COMPENSATION

	Adequate	Inadequate	Very Inadequate
Superior Court Justices	5	4	2
District Court Judges	3	3	0
County Attorneys	4	4	2
Total	12	11	4

Although the opinions are more evenly divided, the prevailing view holds that superior court compensation is inadequate.

Given the dissatisfaction with assigned counsel remuneration, the obvious question is whether changes would benefit the overall quality of public defense in Maine. To ascertain this, the recipients of the questionnaires were asked: "If you believe compensation is inadequate, would a higher level of compensation significantly improve the assigned counsel system? _____. If yes, in what way?" Table XIII-9 contains the responses to this inquiry.[12]

TABLE XIII-9

LIKELIHOOD THAT HIGHER COMPENSATION WOULD IMPROVE THE SYSTEM

	Yes	No	Other[13]
Superior Court Justices	4	2	2
District Court Judges	2	5	0
County Attorneys	4	4	0
Total	10	11	2

Among those who responded in the affirmative, the belief was expressed that higher compensation would either interest a greater number of attorneys in public representation or allow the participants to devote more time to these cases, or both.

The subjectivity surrounding this entire area necessitates that the perceptions of the judges and prosecutors be given considerable weight. Accordingly, the preceding discussion supports the conclusion that assigned counsel fees, especially in the district courts, are inadequate, and that higher rates might upgrade the overall quality of public defense. The importance attached to this issue is demonstrated by another section of the questionnaire which asks the respondents to cite major deficiencies in Maine's assigned counsel system. As will be seen, many put compensation problems in this category.

C. Comparison with Other Jurisdictions.

While comparisons with other jurisdictions would appear to provide a simple yardstick for measuring the adequacy of compensation in Maine, there are a number of impediments to such an undertaking. First, states utilize widely different formulas. Some pay flat fees according to the types of case;

some employ hourly or daily rates; some have detailed schedules geared to the services provided or the nature of the proceedings; others use a combination of the above approaches. Second, and more important, the fact that many schemes give the compensation determiner a measure of discretion makes it difficult to ascertain the real, as opposed to the theoretical, fees. The Maine Superior Courts illustrate this problem, for, notwithstanding the existence of numerical guidelines, compensation varies considerably. Unfortunately, there is virtually no useful information from other jurisdictions on the actual amounts of remuneration for various types of cases.

Subject to the above caveat, this report will offer some general observations, based on its research, about the adequacy of compensation in Maine from a comparative perspective. Simply stated, the $50 fixed fee in the district courts clearly falls on the low side. With regard to the superior courts, the absence of a standard fee does not permit this report to reach as definitive a conclusion. Assuming faithful adherence to the rates of $15 per hour for preparation and $150 per day for trial, a questionable assumption in light of the differences among the justices, superior court compensation would not be out of line with other jurisdictions. It should be added, however, that the trend appears to be in the direction of higher compensation, such as the $20 per hour for out-of-court time and the $30 per hour for in-court time authorized in the federal courts. Viewed in that context, it could be argued that the "theoretical" superior court rates are ripe for an upward revision.

As with other studies in the area, this report has collected only limited information on the appellate aspect of public defense. Based upon that information, however, the customary law court fee of $250 for appeals does not compare favorably with certain other jurisdictions. For example, the First Circuit Court of Appeals has adopted the rates contained in the Criminal Justice Act, which includes a maximum of $1,000. Similarly, compensation for appeals in the State of Hawaii ranges from $250 to $1500, with the State Supreme Court fixing the precise amount in each case. Interviews with attorneys also suggest that appellate remuneration is frequently not commensurate with the amount of work required by most appeals.

IV. Possible Effects of Maine's Compensation Scheme on Defense Strategy

Although a sensitive subject, the question must be raised whether Maine's compensation scheme ever influences defense decisions in a manner unrelated to the best interests of the accused. This inquiry seems particularly relevant, insofar as the low fixed rate paid by the district courts could well create

a temptation to take cases to the superior court because of the higher remuneration there and the possibility of a second fee.

An incident related by a former assistant county attorney illustrates the way in which the present compensation system can exert an undesirable influence. In that case, the defendant was arrested for prostitution, a charge which the prosecutor offered to file in the district court. Although assigned counsel indicated his amenability to that disposition, he requested that the filing be done in the superior court; the available information strongly suggests that his motive was a desire to receive an additional fee. Despite a warning from the prosecutor that he would probably be out of office when the matter was called in superior court and that he could not bind his successor, hearing was waived and the case appealed. In fact, the new prosecutor did not consider filing to be an appropriate disposition of the matter, and accordingly, the defendant was convicted of the offense.

It must be emphasized that the existence of an isolated example does not mean that the practice is widespread. In an attempt to get a more complete picture, the recipients of the questionnaires were asked the following:

> Do you think that the possibility of higher compensation ever leads assigned counsel to take cases to Superior Court which might otherwise be disposed of in District Court? _____. Please indicate other ways, if any, in which you think the present system of compensation effects the strategy of assigned counsel.

With regard to the first part of the inquiry, a clear majority stated that it never or only infrequently occurs. Among the eight who answered in the affirmative, some stressed that their responses pertained to a small number of attorneys.[14]

While the questionnaires revealed the majority view to be that compensation does not often affect defense strategy, there was sentiment to the contrary, especially among certain county attorneys. One referred to the filing and argument of "frivolous motions" in an "attempt to pad bills." Another asserted that low fees lead assigned counsel to "dispose of the case as quickly and easily as possible, frequently by a plea." Finally, a superior court justice commented that "a very small number of our lawyers try jury cases which I do not feel they would try if their client's money was involved."

A more extreme position was taken by a county attorney who stated that the present compensation scheme adversely affects both the defendant and the court system. With regard to the former, his observations were directed at waivers of probable cause hearings.

> ...the low compensation undoubtedly contributes to the high percentage of waiver of probable cause hearings, which are valuable discovery tools...(and if the case is weak, can result in dismissal or reduction to a misdemeanor at that stage). The State has seldom had an opportunity to interview all its witnesses; the police versions of these witnesses' stories may tend to be biased in favor of getting the County Attorney's Office to approve issuance of a felony complaint in the first place. Naturally, the State seldom complains when probable cause is waived. We're already overburdened in district court.

According to the same prosecutor, the $50 fee encourages taking cases to the superior court, and the crowded dockets which result constitute a major problem for the court system.

Even if compensation only rarely influences defense strategy, an opinion not unanimously shared, the potential for abuse exists under present procedures. The most effective solution would probably lie in more equitable fees, which would neither deter defense counsel from presumably useful steps nor encourage unnecessary ones. In addition, a careful monitoring and comparison of bills could reduce the possibility of abuse and allow for periodic revisions of the compensation scheme. A subsequent section will discuss these recommendations in greater detail.

FOOTNOTES

[1]The relevant provisions of Criminal Rule 44 are set out and discussed in the section on superior court compensation.

[2]Letter from former Chief Judge Robert L. Browne.

[3]The courts included in the sample are listed in the introduction to the report.

[4]The fees below the $50 minimum are for cases which were assigned prior to Jan. 1, 1973, but in which the compensation was paid after that date.

5. The same question, regarding the discretion of the district court judges, was included in the superior court questionnaire. Although most of the justices either omitted the question or indicated that they did not know, the four who responded all answered "no."

[6]This belief may stem from the fact that it is customary for the District Court Office to get the approval of the Chief Judge for all fees in excess of $50.

[7]The records indicate the same arresting officer and the same date of offense for all of the charges. In addition, the three cases have successive docket numbers. Finally, the clerk of the court expressed the opinion that they all arose out of one incident.

[8]The prevailing rate at the time of the assignment was $35 per case. Similar situations have been uncovered in which the assignment was made after the $50 minimum took effect.

[9]Excluded from this data are a small number of cases in which Justice Violette presided or in which the identity of the presiding justice could not be determined. In addition, there was a matter involving three defendants in which two justices heard different parts of the proceedings. To avoid complications, this matter was also omitted from the data; its inclusion, however, would not have significantly affected the results.

[10]The mean compensation for the justices referred to in the text was as follows: McCarthy: $305.21 (includes 2 murder cases); Knudsen: $271.41 (includes no murder cases); Spencer: $217.83 (includes no murder cases); Lessard: $153.47 (includes one murder case); Naiman: $147.76 (includes one murder case); and Stern: $145.88 (includes one murder case).

[11]Apart from the responses reported in the Table, one district court judge circled both "adequate" and "inadequate" and added the following comment: "But in the end it evens out." Another expressed in a personal interview the opinion that compensation probably is not inadequate. He stressed the obligation of lawyers to accept these cases.

[12]Included in the Table is one district court judge who answered the question even though he had indicated that compensation was adequate. Predictably, he was of the view that higher compensation would not significantly improve the system.

[13]Two justices were doubtful whether compensation increases alone would upgrade the representation. Their comments, set out below, were similar.

> (Justice 1): We can get competent counsel in murder cases as the compensation is definitely adequate there. Whether this would be true if the compensation were increased for ordinary felonies, I don't know, but I anticipate we would only be paying more for the same thing.
>
> (Justice 2): If the system were improved to select better counsel - yes. More would be available if better paid. <u>But</u>, simply to pay the same attorney more money would not necessarily improve performance.

[14]Other answers included "don't know," "sometimes," and "it is possible." The reluctance of some respondents to discuss the issue was typified by a district court judge who stated "No comment."

RECOMMENDATIONS ON COMPENSATION OF COUNSEL

I. Preface.

Incorporated in the public defender-assigned counsel proposal is a recommended fee schedule for the assigned counsel component. In addition to the rates of remuneration for various types of cases, the schedule sets forth guidelines and target mean compensation levels. As a result, this report will deal only with the objectives which the recommended compensation plan seeks to attain.

II. Objectives of the Proposed Fee Schedule.

A. Increased Rates of Compensation.

Notwithstanding any theoretical obligations of the bar, it is the position of this report that the best insurance for an assigned counsel system would be to pay compensation comparable to that available in the private sector. The report also recognizes that few jurisdictions would underwrite such a system, and accordingly, it acknowledges the need for the compromise referred to in a previous section. Under such a compromise, however, compensation must not be so low as to create the widespread impression that the prevailing rates require an undue sacrifice from the participants. That would have an adverse impact on the effectiveness of public defense. "Reasonable compensation" might thus be defined in a functional manner, namely, compensation which will guarantee a consistently high quality of representation.

From the opinions expressed in the questionnaires and from a comparison with other jurisdictions, the conclusion has been reached that the fees paid in Maine are frequently not "reasonable." Since the problem seems most severe in the district court, the proposed schedule advocates an increase of 100 percent in the mean compensation level for that tribunal. More modest increases of 50 percent are recommended for the superior court and the law court. It should be pointed out that the revised rates are not predicated on a precise formula, an impossible task in light of the elusive nature of "reasonable compensation." They do reflect, however, close examination of several fee schedules recently adopted in other jurisdictions.[1]

In contrast with its treatment of other categories of offenses, the recommended compensation plan seeks to hold the line in murder and manslaughter cases. There are two reasons for this exemption. First, the fees currently paid for the defense of those charges appear reasonable, especially when compared with other types of cases. Second, there is respectable opinion to the effect that the present system unnecessarily appoints co-counsel for homicides, which results in

needless double compensation. Assuming some of these appointments are avoidable, an even stronger argument can be made for the adequacy of the prevailing mean compensation level.

According to an experienced Maine trial lawyer, the use of co-counsel in homicides usually stems not from the complexity of the issues, but rather from defects in the appointment process.

> Normally, counsel is appointed at the District Court level and usually the appointed attorney is either requested by the defendant or one of the attorneys normally appointed for indigent cases. As the attorney begins to fully realize the extent of his responsibility and the consequence of losing, he quite often feels he does not wish to or is not qualified to actually defend the case. He, therefore, at the Superior Court level, requests the court to appoint trial counsel to assist him.
>
> The necessity of appointing two attorneys and the resulting double compensation could be eliminated if the original appointment of counsel was done with advance thought and planning.

The same lawyer also points out, however, that the gravity of a conviction for murder mandates that every avenue of defense be explored and considerable investigation be undertaken. Although not an absolute necessity, these factors could justify the appointment of an assistant from a special panel of less experienced practitioners. As discussed in a previous section, these assistants would be paid far less than the currently prevailing rates; part of their remuneration would be in the form of experience which would ultimately qualify them for primary responsibility in serious cases.

With one exception, then, this report recommends compensation increases for assigned counsel representation. The overwhelming sentiment that fees are inadequate suffices to support the need for such a recommendation.

B. Uniformity and Predictability.

The proposed fee schedule also attempts to respond to the finding of this report that the present compensation scheme operates in an erratic and unpredictable fashion. Some attorneys express more resentment over the variations among the judges than over the actual amounts of the fees. Participating lawyers seem entitled to uniform and predictable remuneration.

To accomplish this goal, the proposal relies upon a rather detailed fee schedule along with clearly articulated guidelines. Although the schedule might be criticized as excessively elaborate, experience indicates that a system with less precise rates can easily become haphazard. In addition to the schedule, periodic monitoring of fees can help to bring about greater consistency.

A problem with rigid rates is that they do not take into account the quality of the representation afforded by assigned counsel. Although an ideal system might make such distinctions, "quality" seems too subjective a factor to incorporate into a fee schedule. Nevertheless, when warranted by special circumstances, the eligibility determiner might have limited discretion to exceed the stated rates. In instances where there existed reason to be dissatisfied with the services of counsel, however, the more appropriate remedy might be to limit the attorney's eligibility for future appointments.

C. Compensation Based on Services Rendered.

Particularly in the district court, the amount of the fee rarely bears any relationship to the services rendered by assigned counsel. The absence of clear guidelines also raises questions about the consistency with which the superior courts link compensation to the work performed. With some justification, many attorneys view the failure to compensate according to the time and effort expended as an unfair aspect of the system. In addition, as discussed above, a flat fee poses the constant danger that a lawyer may be tempted to omit a step in the defense that he might otherwise perform.

Unlike present procedures, the recommended fee schedule establishes specific rates geared to the time expended and the nature of the services; this approach is endorsed by the American Bar Association.[2] In an effort to create an even closer relationship between the lawyer's effort and the compensation he receives, the schedule prescribes higher rates for what are traditionally considered more complicated cases or more difficult types of proceedings. Although such distinctions require generalizations, and thus cannot operate perfectly in every case, even imperfect distinctions should prove far more equitable than flat fees. Finally, the recognition that public treasuries do not contain unlimited funds necessitates compensation maxima.

The converse to the proposition that attorneys are entitled to remuneration commensurate with their work is the principle that the taxpayer should not have to pay for unnecessary services. In this context, the American Bar Association states that "assigned counsel should be compensated for time and service necessarily performed...."[3] The determination of "necessarily

performed" is left to the discretion of the court. Second guessing the strategy of attorneys, however, may prove more difficult in practice than in theory.

One way to reduce "unnecessary services" is to eliminate the financial incentive whenever possible. The recommended fee schedule, for example, attempts to accomplish this in misdemeanor cases appealed to the superior court without a hearing in the lower tribunal. In those situations, the assigned attorney would not submit his bill until the completion of the case in the superior court. Furthermore, except when a jury trial was involved, the same hourly rates and the same compensation limits would apply for both courts. Accordingly, appealing the matter to superior court would not create the pssibility of either a higher fee or of double compensation. Such possibilities exist under the present system.

Unfortunately, no fee schedule can totally remove the temptation to provide unnecessary services. An organized program, however, would have the capability of carefully monitoring bills, and within a reasonably short period of time, it should have some idea of what is required in different types of cases. When a bill appeared excessive, the program would have the authority to award a fee lower than that requested by the appointed attorney. Should a practitioner, with no apparent justification, consistently submit higher than average bills, his eligibility for future assignments could also be restricted. If for no other reason, such a policy could be supported on the grounds that a defender program, like an individual or a state agency, should be able to purchase services at the lowest cost, assuming this does not adversely affect the quality of the services.

D. Administration and Evaluation of the Fee Plan.

This report recommends that the staff of the defender program determine and pay compensation. Such a procedure would relieve the judiciary of a potentially burdensome obligation, especially in light of the detailed nature of the proposed fee schedule, and would help to foster uniformity. By contrast, the American Bar Association would delegate this task to the judges, presumably because they are better situated to decide the value of the services rendered.[4] Although there is some validity to this argument, it would be possible under the proposed format for the staff attorney and the presiding judge to confer on the appropriate fee whenever either party deemed it necessary. In short, the judiciary, at its discretion, could have a voice in the compensation paid in any given case, but would not be saddled with responsibility for the entire fee system.

In its administrative capacity, the program should perform periodic evaluations of the compensation component. The purposes

of these evaluations would be to monitor and predict the costs of the component, to gauge the extent of the uniformity among the fees, and to establish yardsticks against which the bills of individual attorneys could be measured. In addition, the results of these evaluations would enable the program to explain to the public the manner in which its tax dollars are being spent.

The compensation scheme, and the need for periodic evaluation, will obviously require detailed and standardized billing forms. Although the district courts have taken steps in this direction, even their forms would have to be enlarged to allow for the information called for under this plan. Along these lines, it cannot be stressed too strongly that present records are woefully inadequate for a meaningful evaluation of this system; on a comparative basis, the problem is most severe in some of the superior courts.[5] Given sufficient administrative input, this situation could probably be rectified with little difficulty.

FOOTNOTES

[1]Particular attention was paid to the fee schedule of the defense system recently established in San Mateo County, California.

[2]ABA at 31.

[3]Id. at 30.

[4]Id. at 31.

[5]This report has already alluded to the variations in the bills submitted by assigned counsel. To cite an extreme example, one bill contained neither the name of the case, the docket number, nor the offense charged. Accordingly, it was impossible to do further research on the matter in the docket book or other court records.

Another problem results from cases in which more than one bill is submitted. Frequently, these bills are filed separately without any cross-referring. As a result, it is purely a matter of good fortune if the bills are sufficiently detailed to lead the researcher to the realization that they are for services rendered in the same case.

As in the district courts, some attorneys bill by the charge, rather than by the case, for superior court representation. Although this usually does not affect compensation, it renders evaluation more difficult. Furthermore, it can lead to distorted statistics if appropriate adjustments are not made.

In short, the records on public representation must be overhauled and standardized. Absent such reforms, effective monitoring will remain extremely difficult and unnecessarily expensive.

DEFENSE SERVICES

I. Data on Defense Investigators and Experts.

A. Introduction.

Concurrently with its examination of attorneys' bills, this study collected data on the use and compensation of defense investigators and experts in assigned counsel cases for 14 of the State's 16 superior courts; excluded from the survey were the tribunals in Aroostook and York Counties.[1] Since certain problems pertaining to the available records may raise doubt as to the completeness of this data, the methodology employed by the study must be described.

Investigators and experts are apparently paid in one of two fashions. Either the court compensates them directly or else it reimburses the attorney for money expended for these services.[2] The study sought out all of the bills submitted by investigators and experts and also examined the bills of attorneys for indications of reimbursement. Regarding the latter, potential problems stem from the fact that assigned counsel often do not itemize their bills and as a result, a slight possibility exists that some of their compensation may actually represent reimbursement for the services of others.

In addition, the thoroughness of this data depends in turn on the thoroughness of the records of the government office which keeps the bills approved by the court. For most counties, this responsibility rests with the treasurer, although it occasionally is assumed by the clerk of courts. For the bills submitted by experts and investigators, the record-keeping procedures do not seem as clear as for assigned counsel.

Since the ensuing data will reveal that Maine makes very infrequent use of defense investigators and experts, the above caveat was deemed necessary. Despite the possibility of methodological problems, and the word possibility must be emphasized, it is the belief of this report that the data portrays a reasonably accurate picture. Needless to say, the possibility of statistical problems could be eliminated under a more closely administered system.

B. Use of Investigators and Experts.

For the sampled courts, this study discovered only six cases in which the services of an investigator were utilized by assigned counsel. Four of these were murder cases, whereas the other two, which both arose in Oxford, County, each involved a number of lesser felony charges. The total compensation paid to investigators amounted to $3,274.40, with the fees ranging from $145.60 to $1,630.50.

The employment of experts to act on behalf of the defense was limited to the services of psychiatrists and psychologists and was an even less frequent occurrence. The charges in the three cases with defense experts were murder, attempted escape, and the sale of amphetamines. In the murder case, the defense utilized the services of two experts, who participated both in a competency hearing and in the ensuing trial. Somewhat expectedly, their combined compensation came to $2,147 out of a total of $2,512 for all of the sampled courts.

According to the available data, then, there were only nine cases in which a defendant represented by assigned counsel also had the assistance of a professional investigator or an expert. The aggregate cost of such assistance in the sampled tribunals in 1973 was $5,786.40. If that figure were extrapolated to include Aroostook and York Counties, a reasonable estimate of the statewide expenditures for such services would be about $6,700.[3]

Although there is no mathematical formula which gives the percentage of cases in which supporting services are theoretically necessary, the data strongly suggests that Maine's assigned counsel system avails itself of such assistance on an extremely infrequent basis. As will be discussed in a subsequent section, Maine practice seems to fall far short of the recommendations of the leading authorities in this field.

II. Questionnaire Responses on Defense Investigators and Experts.

A. Availability of Funds and Frequency of Use.

Under the present system, the issue of supporting services has no relevance in the district court, insofar as virtually all of the judges stated that there are no funds "available for reimbursement for experts or investigators requested by appointed counsel to assist in the preparation of his defense." Curiously, one judge disagreed on this point and was also the only member of the district court bench to assert that he had ordered such reimbursement. It is perhaps symptomatic of the confusion which besets the system when one judicial officer believes he has the power to authorize the services of investigators and experts, while his brethren, including the Chief Judge, all assert that the courts have no money for this purpose.[4]

At the superior court level, the inquiry focused on the availability of funds for supporting services in cases other than those involving the most serious offenses. Although the majority confirmed the existence of such funds, two justices gave contrary responses. The lack of unaminity provides additional evidence of confusion with respect to this facet of public defense. Among the justices who answered the previous

inquiry in the affirmative, the prevailing view was that reimbursement for investigators and experts is frequently requested and granted. That view certainly does not square with the data collected by this study.

B. Evaluation of the Use of Investigators and Experts.

To determine whether Maine's assigned counsel system takes sufficient advantage of supporting services, the superior court justices and county attorneys were asked two questions. The first was whether investigators and experts are used as frequently in assigned counsel cases as in retained counsel cases involving the same offenses. The second was whether they are used as often by assigned counsel as the respondent thinks they should be. The responses, contained in Table XV-1, reveal that disagreement exists among the justices, whereas the prosecutors generally see the infrequent use of supporting services as a deficiency in the system.

TABLE XV-1

USE OF INVESTIGATORS AND EXPERTS

As Frequently as in Retained Cases

	Yes	No	Other[5]
Superior Court Justices	3	3	4
County Attorneys	1	6	2
Total	4	9	6

As Often as Respondent Thinks They Should Be

	Yes	No	Other
Superior Court Justices	5	5	0
County Attorneys	3	6	0
Total	8	11	0

In explaining their negative responses to the second inquiry, the prosecutors offered a number of different reasons. Some ascribed the infrequent employment of investigators and experts to the refusal of the court to grant authorization, possibly caused by a reluctance to spend the county's money. One stated that these services simply do not exist in his area. Finally, a county attorney observed that many practitioners believe that

they can conduct a better investigation than a trained investigator, a proposition with which he strongly disagreed.

Although differences admittedly exist on this point, there is a solid basis from which to conclude that Maine's assigned counsel system does not utilize defense services to the extent that it should. The views of the prosecutors must be given particular credence, insofar as their positions make them familiar with the value of investigators and experts. Similarly, the data supports this conclusion since it demonstrates that the use of defense services is a rarity in assigned counsel cases.

III. Comparison with Proposed Standards and Other Jurisdictions.

While it may be impossible to delineate the exact situations in which defense services are necessary, the authorities in this field all stress their importance. For example, the American Bar Association asserts that these services should be available not only for purposes of the trial, but also "for effective defense participation in every phase of the process, including determinations on pre-trial release, competency to stand trial and disposition following conviction."[6] In another standard, the Association strongly recommends the use of investigators to interview witnesses.[7] Along similar lines, the National Advisory Commission advocates that the resources of a defense system for the employment of experts and specialists should be substantially equivalent, and certainly not less than, those of the prosecution, the private bar, and the police.[8]

Commentators are equally insistent that the value of defense services be recognized. A recent article argues that experts and investigators "must be made available to assist the defense as a matter of right,"[9] for essentially the same reasons that the defendant has an absolute right to counsel. The policy considerations underlying this argument were succintly, but effectively, articulated in a manual on criminal defense.

> The story of the indigent defendant who, upon being offered counsel by the court, replied "If it's all the same to you, Judge, I'd rather have a couple of good witnesses," summarizes what defense counsel will quickly learn--most cases turn on presentation of evidence and not on legal argument.[10]

Given the significance attached to the assistance of investigators and experts, their use in Maine seems paltry by comparison.

Although statistics on supporting services seemingly do not exist for other assigned counsel jurisdictions, some insight

can be gained from public defender programs. Based upon its experience, the Office of the Public Defender in Colorado has determined that there should be one full-time investigator for every three staff attorneys.[11] By contrast, the total work performed by investigators for publicly represented defendants in Maine in 1973 would not have justified the employment of one full-time professional for the entire State.

The public defender system recommended by the National Center for State Courts for a hypothetical state with a population of 1.1 million illustrates this point even more dramatically.[12] Under that plan, there would be 25 investigators at an approximate cost to the system of $225,000. In addition, the budget would allocate $19,500 for expert witnesses and lab fees, which brings total expenditures for supporting services to $244,500. While that plan contemplates a caseload considerably greater than Maine's, the caseload difference does not even approach the difference in the amounts for defense services.

On a comparative basis, then, Maine's assigned counsel system seems to take extremely limited advantage of the services of investigators and experts. Whether this results from the failure of counsel to request such assistance[13] or the refusal of judges to grant it is an open question. Of more immediate concern are ways in which the system can be changed to increase the availability and facilitate the use of these potentially valuable resources.

IV. Recommendations.

A. Authorization by the Office of Public Defense.

Assuming adoption of the proposed public defender-assigned counsel program, the Office of Public Defense should have the power to authorize and compensate investigators and experts. In contrast with the present system of case-by-case appointment and reimbursement, an organized approach would permit the formulation of guidelines with respect to the circumstances in which defense services are warranted and the appropriate fees for such assistance. Based upon its experience, the program could make essential policy decisions, such as the most economical way in which to purchase supporting services. On this question alone, various options exist, including a salaried investigative staff, contractual agreements with investigators, or their retention on an "as needed" basis. The currently available information precludes an intelligent consideration of these options, let alone an informed decision.

As with its participating attorneys, the Office of Public Defense could monitor the performance and fees of investigators and experts. Detailed timesheets and itemized bills would be required, and the comments of attorneys solicited. This would

enable the program to make determinations as to the future use of particular investigators and experts and to offer recommendations to assigned practitioners according to their needs in any given case. Similarly, the Office of Public Defense could act as a liaison for assigned counsel in remote areas, where, according to one county attorney, supporting services are not readily available.[14]

If these recommendations appear general in nature, the reason rests primarily in Maine's lack of experience with publicly funded defense services. While the proposals of an organization such as the National Center for State Courts could easily be adopted to Maine, those proposals might well prove unsuitable in light of customary prosecutorial and defense practices. Accordingly, the recommendation that the Office of Public Defense assume responsibility over supporting services could probably be justified solely on the need for additional input on this subject.

Based upon the literature and upon developments in other jurisdictions, it seems reasonable to predict a far greater use of investigators and expert witnesses in Maine. From a financial perspective, this trend might encounter less resistence under the aegis of a state funded Office of Public Defense. By way of illustration, four justices assert that there are presently not sufficient funds for investigative and/or expert services on behalf of indigent defendants. As one member of the bench explained it, there are no specific financial restrictions, "but practically we are aware of the impact upon county government of any excessive spending on the part of the courts." Unlike the judges, an organized defense system could actively solicit the necessary resources. Finally, the proposed format would represent another step in the removal of the judiciary from involvement in the defense of persons accused of crimes.

B. Authorization by the Courts.

Although not favored by this report, should the power to authorize the employment of investigators and experts remain with the courts, the State should adopt procedures similar to those contained in the Criminal Justice Act.[15] A feature of that Act essential to the protection of the defense is the practice of demonstrating the necessity of the services in an ex parte proceeding from which the prosecution is excluded. Sealing the transcript of that proceeding also serves to avoid an unfair disclosure of defense theory or tactics.

Regarding the necessity of the services, a recent article makes a convincing argument for a two-tier classification of "need."[16] The first would arise when professional expertise were required to determine if a particular line of defense existed. The reimbursement authorized for such assistance would be comparatively low. The second echelon would be reached

when counsel demonstrated what is commonly known as a "particularized need," namely, the existence of a particular line of defense which requires the aid of an investigator or expert. This distinction is seemingly provided for in the Criminal Justice Act, which permits $150 in compensation for supporting services without the prior approval of the court; to exceed that amount, counsel must secure judicial authorization, which presumably would be forthcoming only on a showing of a particularized need.

Although the determination of the necessity of the services would turn upon the discretion of the presiding judge, there is precedent, under the Criminal Justice Act, for a broad interpretation of that concept.

> The rule in allowing defense services is that the Judge need only be satisfied that they reasonably appear to be necessary to assist counsel in their preparation, not that the defense would be defective without such testimony.[17]

Furthermore, the absence of reliable cost data militates in favor of adopting the federal compensation maxima.

FOOTNOTES

[1]This exclusion results from the fact that the assigned counsel data was provided by the clerks of those courts; statistics on defense services were collected only when the author of this report personally examined the records.

[2]Instances of the second procedure were found only with respect to experts; investigators seemingly were always compensated directly by the county, with the approval of the court.

[3]This is computed on the premise that the ratio of compensation in those tribunals to the statewide total would be the same for defense services as for assigned counsel.

[4]In felony cases, the superior court can apparently appoint experts and investigators prior to the preliminary hearing in the lower tribunal. Furthermore, a new statute now permits reimbursement of appointed counsel in the district court "for reasonable disbursements made in behalf of the client, including but not limited to witness fees, sheriff's fees and travel, upon approval of such disbursements by the court." PL 1975, c. 341.

[5]For the superior court justices, the responses included in this category were "approximately," "probably not," "don't know," and "more frequently." In addition, one county attorney answered "more so," while another asserted that they are "seldom used at all except for homicide."

[6]ABA at 22.

[7]ABA Standards Relating to the Defense Function (Approved Draft 1971) at 231.

[8]NAC at 280. One superior court justice expressed the same view.

[9]Margolin and Wagner, The Indigent Criminal Defendant and Defense Services: A Search for Constitutional Standards, 24 Hastings L.J. 647 (1973).

[10]Amsterdam, Segal, and Miller, Trial Manual for the Defense of Criminal Cases - II2 - 85 (2d ed. 1971).

[11]Letter from the Public Defender of Colorado.

[12]For a description of this plan, see National Center for State Courts, supra at 30-7.

[13]The remarks of two justices suggest this explanation, at least for cases other than homicides.

[14]It is interesting to note that the highest investigative fee was paid to an agency in Muncton, New Brunswick, for a case in the Hancock Superior Court. Whether this resulted from facts peculiar to the case or from the unavailability of comparable services in Maine is unknown.

[15]18 U.S.C. § 3006 (A) (e) (1970).

[16]Margolin and Wagner, supra.

[17]United States v. Pope, 251 F. Supp. 234, 241 (D. Neb. 1966).

QUALITY OF REPRESENTATION

I. Introduction.

An appraisal of the quality of the legal representation afforded by defense counsel encounters numerous problems. First, the very concept of quality bespeaks the subjectivity inherent in such an appraisal. Second, judgments about the services of a large number of lawyers must inevitably be in the form of generalizations, to which there may be many exceptions. Third, participants in the criminal justice system may feel some reluctance to deprecate the skills or the efforts of fellow members of their profession.[1] While a statistical evaluation of performance seems to offer a seductively simple way around these problems, a subsequent section will detail the pitfalls in that approach. In short, the nature of the inquiry may preclude definitive conclusions, but its importance requires at least some discussion.

II. Questionnaire Responses.

Although really a measure of equality, rather than of quality, commentators frequently seek to compare the services of assigned counsel with those of attorneys retained by defendants. Along these lines, the questionnaires included the following inquiry:

> In your opinion, is there a difference in the quality of representation afforded by assigned counsel and counsel retained by defendants? _____. If yes, please indicate the degree to which this is attributable to differences in experience, ability, motivation, preparation or any other factors.

Table XVI-1 sets out the responses to the first part of the question.

TABLE XVI-1

DIFFERENCE IN QUALITY OF REPRESENTATION AFFORDED BY ASSIGNED AND RETAINED COUNSEL

	Yes	No	Other[2]
Superior Court Justices	5	5	1
District Court Judges	2	9	1
County Attorneys	3	7	0
Total	10	21	2

It should be pointed out that two of the superior court justices listed in the no column actually gave qualified negative answers. Citing his willingness to pay higher than average compensation, one limited his response to cases over which he presides and suggested that a difference does obtain for other members of the bench. The second stated that "the differences in quality exist without regard to the nature of representation, except for a few of the very wealthy or influential defendants."

As to the reasons for any differences, the possible explanations contained in the question were mentioned with virtually equal frequency. One justice attributed this phenomenon to all four factors. In addition, two respondents observed that low compensation is the primary cause of inferior representation. Finally, a justice explained that assigned attorneys' fear of post-conviction claims of incompetent counsel leads to "prolix and useless procedures" which may actually be detrimental to the defendant.[3]

By way of conclusion, approximately one-third of the judges and prosecutors do not believe that the present system furnishes needy defendants with representation equal in quality to that available to persons capable of hiring their own lawyers. Significantly, this view is held by at least 50 percent of the superior court judiciary. These results suggest that indigency may play a role in how an individual fares when accused of a criminal offense.

Taking a somewhat different tack, a second inquiry asked the questionnaire recipients for their "opinion of the overall quality of representation afforded by the assigned counsel system as it presently operates in Maine." Generalizing about the responses of the county attorneys, most described the representation as generally good or adequate. Two were more effusive in their praise, while the same number were only willing to characterize it as fair. One prosecutor stated flatly that assigned counsel representation was not good in his area; another suggested that criminal law was becoming too specialized for many participants; and a third offered the somewhat cryptic observation that "in comparison with representation given in retained cases, the system is not all that bad."

In terms of laudatory comments, the incidence of superlatives was highest among the district court judiciary. Four members of that bench called the quality "excellent," and two gave almost equally positive responses. While three judges described the representation as "good" or "reasonably good," there were some dissenters from the majority viewpoint. Two of these felt the quality of the services to be only "fair" or "fairly good," whereas a third stated that it "varies from

inadequate to excellent." Finally, one member of the bench distinguished between types of cases: "In felony representation, the system works reasonably well, referring only to the District Court. In misdemeanor representation, a more even and realistic handling of the cases would result from a public defender system."

The severest criticism emanated from the superior court judiciary. Although most justices believed the representation to be "reasonably good" or "generally competent," and two rated it highly, there were some negative comments. Two justices asserted that it "could be improved," while another deemed the quality "poor." Finally, the remarks of one justice reveal the depth of his dissatisfaction with the performance of assigned counsel: "I would like to use stronger words to describe it but at the present time it is not good as a general rule."

Since the variety of opinions makes the above responses difficult to interpret, certain additional observations might prove helpful. Some respondents clearly predicated their answers on a comparison with other components in the criminal justice system. Their expressions about the adequacy of assigned counsel representation seemed to reflect the feeling that it is on a parity, for better or worse, with prosecution and/or retained representation.[4] In addition, a reading of the questionnaires in their entirety occasionally produces a somewhat less favorable picture. For example, one justice described the overall quality of representation as "usually adequate" and "sometimes excellent," but gave the following response to a subsequent question as to whether there are counties where the assigned counsel system functions with a particular effectiveness or a particular lack of effectiveness:

> Penobscot excellent because almost entire bar involved. Somerset poor because not enough lawyers. Cumberland poor because inadequate counsel frequently appointed in District Court.

In short, his opinion on the overall caliber of defense services would presumably not hold true for every section of the State.[5] For the system as an entity, moreover, even if most participating attorneys provide an adequate defense, the quality of representation may suffer from a lack of participation. With respect to this point, it bears repeating that seven out of eleven superior court justices indicated that there are not a sufficient number of attorneys, competent to try criminal cases, who are willing to accept felony appointments.[6]

A definitive statement about the quality of the representation afforded by assigned counsel does not seem possible from the questionnaires. From one perspective, the fact that a majority of

respondents consider the representation to be at least "reasonably good" would suggest the absence of very serious problems. From another perspective, however, the existence of more than isolated statements of criticism, some of it quite severe among the superior court judiciary, could lead to the opposite conclusion. Perhaps, the most accurate characterization lies between these extremes, namely, that as a rule, the system provides reasonably good representation, but that its weaknesses are sufficiently frequent and sufficiently serious to justify the need for change.

III. Data on the Quality of Representation.

A. General Discussion.

In the course of its research, this study collected data on the disposition of assigned counsel cases in 14 superior courts. After deliberate consideration, however, it was decided that a statistical comparison with retained counsel in Maine or with a public defender program in another jurisdiction would not be feasible. Given the importance often attached to statistics, this decision merits some explanation.

The threshold problem in a comparison of the performance of assigned and retained counsel lies in the need to isolate comparable defendant populations. Stated somewhat differently, all of the variables, except the nature of the representation, must be eliminated. While it might appear at first glance to be a simple matter of comparing the dispositions for the two types of representation, other studies have exposed the fallacy in such an approach. For example, it was determined in one jurisdiction that the caseloads of public defenders and private counsel vary in terms of the frequency with which they deal with certain types of offenses, and that the conviction rate is higher for different crimes, regardless of who defends the accused.[7] Accordingly, that study established that the comparison must be broken down by the category of offense.[8]

A similar conclusion has been reached with respect to whether the defendant is incarcerated or on bail pending the outcome.[9] It has also been hypothesized that prior record affects the disposition.[10] The implications of these studies should be clear: a comparison would be valid only if it were limited to defendants who were charged with the same types of offenses, who had the same bail status, and who had similar prior records. For most, and possibly all, Maine counties, these refinements of the defendant population would produce too small a sample for comparative purposes. The alternative of extending this study to cover a period of many years would have been prohibitive in terms of time and money.

Even assuming these and other problems[11] were surmountable, a comparison of assigned and retained counsel still rests upon

a very tenuous premise. By definition, they represent defendant populations which differ at least with respect to their financial positions, and arguably, also with respect to their social status. Since it is conceivable that these differences alone may influence the disposition of their cases,[12] the elimination of all variables except for the nature of the representation does not seem possible. While a comparison might prove useful by raising certain questions or arousing suspicions,[13] the uncertain value, coupled with the costs involved, deterred this project from undertaking such a study.[14]

Briefly stated, a comparison with the limited public representation data available from other jurisdictions is precluded by two factors. The first involves methodological differences in both data collection[15] and court procedures. The second stems from the fact that the results could be attributed to a number of causes other than the quality of representation; examples include police, prosecution, and judicial practices and the nature of the offenses that comprise the caseload.

The above discussion is not intended to minimize the importance of data for purposes of evaluation. On the contrary, this report strongly recommends improved and uniform record keeping procedures to facilitate the retrieval of relevant information. Under such procedures, comparative studies might well prove more feasible.

B. Data for Assigned Counsel Cases.

Table XVI-2 sets out the dispositions for all felony, misdemeanor, and traffic cases handled by assigned counsel in the sampled superior courts. For purposes of the table, a case is defined as one or more charges against a single defendant arising out of a single occurrence, or a series of similar charges against a single defendant disposed of in the same proceeding. The table covers those matters for which assigned counsel were compensated in 1973.[16]

TABLE XVI-2

ASSIGNED COUNSEL SUPERIOR COURT DISPOSITION DATA

Disposition	# of Cases	% of Caseload
Plea to original charge(s)	436	43.2%
Plea to reduced charge(s)	104	10.3%
Plea to at least one charge; at least one charge dismissed, filed, or reduced	121	12.0%
Charge(s) dismissed or filed	144	14.3%
Jury trial: guilty of original charge(s)	78	7.7%
Jury trial: guilty of lesser included offense	7	.7%
Jury trial: guilty of at least one charge; acquittal (or hung jury) on at least one charge	2	.2%
Jury trial: acquittal	42	4.2%
Bench trial: guilty of original charge(s)	28	2.8%
Bench trial: guilty of lesser included offense	7	.7%
Bench trial: guilty of at least one charge; acquittal on at least one charge	3	.3%
Bench trial: acquittal	32	3.2%
Jury trial: mistrial or guilty but reversed by Law Court (thus pending)	5	.5%
Total:	1009	100.1%

Summarizing the table, 78.3% of those defendants represented by assigned counsel in the superior court were found guilty of some offense. In reality, this figure should probably be slightly higher since a small number of the

dismissals resulted from a conviction in another court. Furthermore, 19.8% of the final dispositions were determined by a trial; assigned counsel secured acquittals or directed verdicts in 37.2 percent of these cases.

Although this study has not attempted to draw any conclusions from the above data, it is hoped that both the methodology and statistics will serve as the basis for future evaluations of public defense in Maine. This report has argued throughout that such periodic assessments are necessary. Most successful enterprises pursue a policy of ongoing evaluation, and there is no reason why this policy should not apply with equal validity to a defense delivery system.

FOOTNOTES

[1]For example, one judge stated in a telephone conversation that his views on the weaknesses of the system were probably more extreme than reflected by his questionnaire answers.

[2]One superior court justice responded "minimal," and one district court judge responded "some."

[3]The tendency to pursue "frivolous technicalities" in order to build a record against subsequent charges of incompetent representation was cited by a number of respondents throughout the questionnaires.

[4]The following answers of three superior court justices exemplify this propensity to assess assigned representation on a comparative basis:

(Justice 1): Very competent - Much better than counsel who represent the State of Maine.

(Justice 2): Usually adequate, sometimes excellent - generally equal to the representation which the state has.

(Justice 3): Poor - but then so is the quality of retained representation and prosecution.

[5]Similarly, another justice called the quality "reasonably good," but later expressed his support for a public defender system on the grounds that "there would be more uniformity of representation."

[6]See Table XI-5, supra.

[7]Taylor, Stanley, deFlorio, and Seekamp, An Analysis of Defense Counsel in the Processing of Felony Defendants in Denver, Colorado, 50 Denver L.J. 9 (1973); see also Taylor, Stanley, deFlorio, and Seekamp, An Analysis of Defense Counsel in the Processing of Felony Defendants in San Diego, California, 49 Denver L.J. 233 (1972).

[8]The categories used in those studies were: (1) Crimes against persons; (2) Crimes against property; and (3) Crimes against public health and safety.

[9]See Huff, supra, and the studies cited in note 7.

[10]See the studies cited in note 7. The ages and races of defendants have also been mentioned as possibly important variables.

[11]There are various and sundry problems whenever one attempts to reduce something as complex as a criminal case to statistical analysis. A person accused of multiple offenses provides a good example. Assuming a defendant confronted with four charges pled to one in return for a dismissal of the others, the researcher would have difficulty classifying the disposition. If each charge were taken separately, it would be categorized as one plea and three dismissals, which would distort what actually occurred. Even if the charges were considered as a single case, the data would not be meaningful unless it indicated the nature of the offense to which the accused pled. Given the number of variables in a criminal case, such "classification" problems arise frequently.

[12]Although only speculation, differences include the following possibilities: (1) needy defendants are actually guilty more or less often than non-needy defendants; (2) needy defendants are more or less capable of assisting in the preparation and execution of their defenses; and (3) prosecutors and police are more or less likely to show leniency toward needy defendants. Certain possibilities are not quite as speculative. According to some questionnaire respondents, for example, indigents will occasionally push counsel to trial unnecessarily because they are not paying the costs of the defense. If true, this could result in a higher percentage of guilty verdicts in assigned counsel cases, which in no way stems from the performance of appointed lawyers.

[13]It would measure only equality, not quality. Whether equality is sufficient, if the quality is poor, raises important and complex policy questions.

[14]With due respect to the Institute of Judicial Administration, it is submitted that the value of its statistics is limited by the factors discussed in the text. See Institute of Judicial Administration, The Supreme Judicial Court and the Superior Court of the State of Maine (1971) at 58-60.

[15]In addition to the studies cited above, see Comment, Analysis and Comparison of the Assigned Counsel and Public Defender Systems, 49 N.C. L. Rev. 705 (1971); Gitelman, The Relative Performance of Appointed and Retained Counsel in Arkansas Felony Cases - An Empirical Study, 24 Ark. L. Rev. 442 (1971); Benjamin and Pedeleski, The Minnesota Defender System and the Criminal Law Process, 4 Law & Soc'y Rev. 279 (1969).

[16]For the smaller counties (Franklin, Hancock, Knox, Lincoln, Oxford, Piscataquis, Sagadahoc, Somerset, Waldo, and Washington), the data also includes cases for which compensation was paid in 1972. Furthermore, there were 31 cases for which the dispositions could not be ascertained.

GENERAL EVALUATION BY QUESTIONNAIRE RECIPIENTS

I. Deficiencies of the Present System.

The questionnaire recipients were asked what they consider to be the major deficiencies of the assigned counsel system in Maine, and what, if anything, they would suggest to improve it. Although their opinions varied, three primary areas of concern emerged from the responses. These include compensation, bar involvement, and the quality of representation.

A. Compensation.

Among the complaints about the present system, compensation problems were mentioned most frequently. The criticism focused not only on the general inadequacy of the fees, but also on the absence of uniform standards, and the failure to pay in accordance with the work done. As might be expected, the recommendations called for increased levels of reimbursement, with one county attorney suggesting a minimum of $150 in misdemeanor cases and $500 in felony cases, and for uniform fee schedules. Perhaps symptomatic of the depth of the dissatisfaction in some quarters is the reference of a district court judge to the "embarrassment of the courts" in having "to request attorneys to work for little compensation."

At the superior court level, two justices gave very different reasons for the insufficient fees. One placed the blame on his fellow members of the bench, whereas the other asserted that the failure lay in the attitude of county governments.

> As long as assigned counsel are paid by the counties whose officials have very provincial ideas of proper charges the compensation of assigned counsel will either be inadequate or result in the creation of local prejudice against the lawyer.

The justice quoted above added that he did not think "this system will ever work well until it is state financed with some definite schedule of uniform fees."

B. Bar Involvement.

According to some questionnaire recipients, the limited participation in the assigned counsel system of large segments of the legal community produces two undesirable results. First, it places an unfair burden on the comparatively few lawyers who do accept appointments. Second, it limits the courts' options in the selection of counsel and poses the constant danger that attorneys will not be available when needed. Referring to the

latter, one district court judge observed: "So far I have had no major problems but I admit the situation is getting tighter all the time." Another member of that bench specifically accused the big law firms of failing to live up to their obligation to assist in the representation of needy defendants.

> I am of the opinion that the larger and more prominent firms should offer the services of members of their firms - at the present time, they are woefully lacking in cooperation in this aspect.

Despite this criticism, the respondents did not offer detailed plans for rectifying the situation. The one exception was a superior court justice who recommended that administration of the appointment process be removed from the judiciary.

> I believe that the court should not have responsibility for assigning counsel except through the instrumentality of a limited public defender system, where the workload of individual lawyers could be more reliably known and equitably shared.

C. Quality of Representation.

The comments of those judges and prosecutors dissatisfied with the caliber of defense services can be divided into two categories. On the one hand, a few directed their remarks toward the overall quality of representation, a position which does not require extended discussion. On the other hand, complaints about the uneven performance of assigned counsel were more prevalent; such complaints also raise the complicated question of internal quality control.

The potential need for quality control is probably best illustrated by a prosecutor's description of the problem existing in his county.

> There are attorneys who, in my opinion, are not very competent in the practice of criminal law.... There are one or two attorneys who accept appointments who will not go to trial and it is my opinion that they should not be appointed to represent an individual and perhaps encourage the defendant to plea because of their own inclination not to try a matter.

Support for the view that unqualified attorneys are occasionally appointed comes from a superior court justice who asserted that the major deficiency in the present system is that there is "not enough care in the selection of counsel."

Although the prosecutor quoted above dispaired of finding a solution, another county attorney suggested the need to screen criminal lawyers. After advocating that a list of "qualified" practitioners should be maintained, he added the following:

> Along this line, even before the establishment of a specialized "criminal bar," should that ever come, the Court might have inherent authority to decide who may do criminal work (retained and appointed; defense and prosecution) based on testing and opinions of courtroom practice by the judges.

Implicit in this recommendation is the conclusion that the present system does not guarantee a consistently high quality of representation.

D. Miscellaneous.

The questionnaire recipients alluded to a variety of other factors as major deficiencies in Maine's assigned counsel system.[1] Since these did not receive, nor do they seem to require, any elaboration, it should suffice to list them here: 1) Absence of financial eligibility guidelines; 2) Difficulty of finding attorneys in rural areas (especially when case involves co-defendants, and appointment of one lawyer might present a conflict of interest); 3) Excessive court involvement in defense; 4) Lack of training for criminal trial attorneys; 5) Inefficient disposition of cases; and 6) Tendency of assigned counsel to raise unnecessary and inapplicable defenses, to the potential detriment of the accused, in order to avoid allegations of incompetent representation. All of these problems have been mentioned elsewhere in this report. In addition it is submitted that the proposed plan would alleviate, if not eliminate, most of them.

II. Views on a Public Defender System for Maine.

The judges and county attorneys expressed widely divergent opinions on the wisdom of establishing a public defender system in Maine. Generally speaking, the prosecutors opposed the idea, the district court judges were about evenly divided, whereas a majority of superior court justices favored at least a limited public defender plan. Accordingly, the questionnaires did not reveal overwhelming sentiment in either direction,

although the opinions of some individuals, on both sides of the issue, were stated rather emphatically.[2]

The questionnaire recipients were also asked to comment on certain operational facets of a public defender system, should it be decided to institute one in Maine. On certain points there was virtual unaminity. For example, the prevailing view clearly supported the concepts that the defenders should be appointed, and not elected, and that they should be full-time whenever possible. The propositions that the defenders should share the caseload with assigned counsel, instead of completely replacing them, and that the system should function on a statewide, as opposed to a local, basis were endorsed by somewhat smaller majorities.

Finally, it should be noted that many of the respondents gave explanations for their respective viewpoints. Although space limitations preclude a discussion of these explanations, they were carefully considered when the combined public defender - coordinated assigned counsel proposal was drafted. To that extent, then, the proposal represents a synthesis of the various opinions expressed by Maine judges and prosecutors.[3]

FOOTNOTES

[1]It should be noted that a handful of respondents either considered the system to be without major deficiencies or answered "no comment" to the question.

[2]Illustrative of these differences are the remarks of two superior court justices on the desirability of a public defender system.

> (Justice 1): I feel that a public defender system would not help indigent defendants in Maine.
>
> (Justice 2): It can be no worse than what we have now and it wouldn't have to be very effective to be better.

[3]The views of other participants in the criminal justice system were also considered as were the recommendations of various authorities. Needless to say, the final product is a synthesis of different opinions only insofar as those opinions are reconciliable.

CONCLUSION

I. Basic Recommendation - An Administered System.

In evaluating Maine's assigned counsel system, this report has cited numerous problem areas, including financial eligibility, case eligibility, initial provision of counsel, offer of counsel, selection of counsel, bar participation, compensation, defense services, and the quality of representation. The most salient fact to emerge from the preceding discussion, however, is that these problems have a common denominator: they all stem largely from the lack of a carefully organized and closely administered modus operandi. Similarly, the recommended solutions all point to the need for a more structured and systematic approach to public representation.

To the extent that the present system can be said to have resulted from conscious choices, those choices were made in response to conditions which no longer exist. Since the basic format was settled, virtually every facet of indigent defense has grown in both scope and complexity. The most dramatic change has occurred in the tremendous expansion of the types of cases covered by the constitutional right to public representation. The practice of criminal law has also undergone significant developments, with more specialized knowledge required by court decisions and by the use of technical evidence. Furthermore, greater emphasis has been placed on the early delivery of defense services, innovations have been made with respect to financial eligibility, and there has been an increasing recognition that the providers of legal representation to the poor deserve adequate compensation.

In the face of all these changes, Maine's assigned counsel system has remained relatively static. It seemingly continues to treat the needy defendant as the exception rather than the rule, an orientation that conflicts with both local and national statistics.[1] The reality, unpleasant as it may be, is that public representation and criminal defense are rapidly becoming synonymous. In short, the quality of the entire criminal justice system depends in a large measure on the quality of the system for furnishing legal representation to needy defendants.

It is thus not surprising that ad hoc procedures have fallen into disfavor as anachronistic. While the debate between the advocates of professional defenders and private attorneys persists,[2] there is virtual unaminity on the need for administered systems. Well before the Argersinger decision, Chief Justice (then Judge) Burger perceived the inevitability of this development.

> It is particularly significant that the organized defender approach is

> gaining momentum. In a reasonably short time, I would think, this will be the prevailing mode of handling representation in this country.[3]

The single most important conclusion of this report, then, is that the State should replace the present ad hoc system with an organized program for the delivery of defense services. It is not submitted that an administered system will automatically solve every problem connected with public representation. It is submitted, however, that these problems will not be solved without an administered system.

II. Combined Public Defender - Administered Assigned Counsel Proposal.

Given the findings of this study, the specific provisions of its proposal do not require additional explanation. To dispel possible misconceptions, however, certain broader, and perhaps more basic, issues merit at least brief mention.

First, this report does not stand alone in its recommendation that fundamental changes should be effected with respect to the delivery of defense services in Maine. Virtually every organization and individual to study the problem in the past decade has reached a similar conclusion. One need only read a 1965 Judicial Council report, the recommendations of the Institute of Judicial Administration and a recent article in the Maine Law Review[4] to verify this fact. Accordingly, the emphasis should focus on the mechanics of implementing necessary reforms, rather than on their desirability.

Second, the proposal advocates the creation of a public agency, a prospect which inevitably will generate some opposition. On this subject, however, it must be remembered that the representation of needy defendants is a constitutional obligation with which the State must comply. The present system requires the time of not only the judges but also of numerous individuals in clerical positions. The lack of an organized system may tend to hide the involvement of public officials and employees, but their involvement remains a reality. In short, it is not simply a matter of transferring to the government a service heretofore performed entirely by the private sector.

The adoption of the proposal will admittedly result in the establishment of more visible and more structured administrative machinery. To those who would characterize this as another needless bureaucracy, the simple answer is that it is needed. If the conclusions of this report and the recommendations of all the authorities establish one fact, it is that solid organization and careful administration are essential

in the delivery of defense services. Large enterprises are not run on an ad hoc basis, nor do judges select lawyers at random to prosecute cases. For similar reasons, the magnitude of public representation has rendered such approaches obsolete.

Third, the proposal calls for substantially greater expenditures for public representation. Although hidden costs in the present system make the exact differential difficult to calculate, there can be no doubt that the recommended changes will entail increased funding. There can be only one justification for such an increase, namely, that the additional money will purchase a far superior product.

When assigned counsel cases constituted only a small percentage of criminal business, reliance on lawyers to volunteer their services may have been a viable option. With the upsurge in the number of these cases, however, the practice of criminal law now involves in large measure the representation of needy defendants. Accordingly, unless the fees for the provision of such services are reasonable, the impetus to acquire the necessary expertise does not exist. This is particularly true as the growing complexity of the field requires the input of more time and effort on the part of practitioners. Along these lines, the State recently enacted substantial salary increases for prosecutors in an effort to foster professionalism. It seems hypocritical to argue that prosecution must be carried out by well paid professionals, while public defense work can be left to any lawyer willing, or perhaps forced, to render services at bargain basement rates.

On the subject of costs, two points made in the proposal bear repetition. While the price tag of the plan is high when viewed in the context of past expenditures in Maine for defense services, the same does not hold true in a comparison with other jurisdictions using public defender systems and with the recommendations of most authorities. From the perspective of the latter, the proposal might even be criticized for its failure to allocate sufficient funds for public representation. In addition, the taxpayers' money is to be used to guarantee one of the most vital rights contained in both the Maine and United States Constitutions. While the priorities of the demands on the public treasury may often involve subjective judgments, the State has reached the danger point if it cannot afford the cost of its citizens' constitutional rights.

Fourth, the proposal does not seek to create a system which will defeat the prosecution or even place it at a competitive disadvantage. Opponents of defender plans often fail to recognize that the criminal justice system operates as an entity, which can function effectively and justly only if each component is strong. It is probably for this reason that

prosecutors frequently lead the fight to improve the representation furnished needy defendants.[5] In arguing that "the prosecution is best served if there is an organized defender service to represent the indigent," Frank Hogan, a widely respected former district attorney, offered the following observation:

> Prosecution and defense are integral parts of the single function of criminal justice. Failure to adequately support either part undermines the whole.[6]

This proposal, then, shares a common objective with plans for the police, the prosecution, and the courts: that objective is to improve the quality of justice in Maine.

FOOTNOTES

[1]See Table I-4, supra. On the national level, the poor constitute 60 percent of all persons accused of felonies and 47 percent of all persons accused of misdemeanors. Goldberg, Defender Systems of the Future: The New National Standards, 12 Am. Crim. L. Rev. 709 (1975).

[2]Although it considered them in the formulation of its proposal, this Project does not deem it necessary to reiterate the many arguments on this issue. Suffice it to conclude that both positions have theoretical merit. The more critical factors in providing effective representation may well lie in the design of the system and the competence of the staff that administers it.

[3]Report of Proceedings of the National Defender Conference (NLADA 1969) at 42.

At the same conference, Dean Meador of the University of Alabama Law School stressed the need for an "organized, continuously operating system. The emphasis here is on the concept of an organized system of providing counsel for all defendants, as distinguished from a haphazard or ad hoc method." Id. at 33.

[4]See Anderson, supra.

[5]See, generally, Report of Proceedings of the National Defender Conference, supra.

[6]Id. at 17.

ATTORNEY PARTICIPATION FOR EACH COURT

LEWISTON DISTRICT COURT

Number of assignments: 176
Total compensation: $8700

Attorney*	Cases	Compensation
1. Gaston M. Dumais	32	$1605
2. John D. Griffin	26	$1300
3. Adrian G. McCarron	18	$ 885
4. Paul P. Murphy	13	$ 635
5. Daniel J. Murphy	12	$ 600
6. Robert S. Hark	11	$ 550
7. Roscoe H. Fales	9	$ 450
8. Jon S. Oxman	9	$ 435
9. John L. Hamilton	6	$ 300
10. Janice M. Lynch	6	$ 300
11. Kenneth C. Young, Jr.	6	$ 300
12. William Rocheleau, Jr.	5	$ 235
13. Lendall L. Smith	5	$ 250
14. Michael I. Sayer	4	$ 200
15. William H. Clifford, Jr.	3	$ 150
16. John C. Orestis	3	$ 120
17. Richard G. Hamann	2	$ 100
18. Robert A. Laskoff	2	$ 100
19. John D. Clifford, III	1	$ 50
20. Paul A. Cote	1	$ 50
21. Robert L. Couturier	1	$ 35
22. Philip K. Hargeshimer	1	$ 50

LIVERMORE FALLS DISTRICT COURT

Number of assignments: 23
Total compensation: $1245

Attorney	Cases	Compensation
1. Edward H. Cloutier	5	$ 250
2. Paul R. Dumas, Jr.	5	$ 275
3. Gaston M. Dumais	4	$ 220
4. Daniel J. Murphy	3	$ 150
5. William A. Rowe	3	$ 150
6. Charles H. Abbott	1	$ 50
7. Patrick E. Joyce	1	$ 50
8. Thomas F. Kinnelly, III	1	$ 50
9. William Rocheleau, Jr.	1	$ 50

*When the name of the attorney's law firm is listed in parenthesis, it indicates that at least one bill was submitted in

the firm name and that the available records do not reveal which member of the firm actually provided the representation. This problem arose infrequently, and it is thus believed that the vast majority of cases are correctly attributed to the attorney who handled the matter.

ANDROSCOGGIN SUPERIOR COURT

Number of assignments: 86
Total compensation: $12,504

Attorney	Assignments	Compensation
1. Gaston M. Dumais	16	$1700
2. Daniel J. Murphy	11	$1680
3. Paul P. Murphy	10	$1920
4. John D. Griffin	8	$ 983
5. Robert S. Hark	8	$ 754
6. Kenneth C. Young, Jr.	6	$ 405
7. Adrian G. McCarron	4	$ 755
8. Richard G. Sawyer	3	$ 445
9. Grover G. Alexander	2	$ 100
10. John D. Clifford, III	2	$ 358
11. William Rocheleau, Jr.	2	$ 350
12. Michael I. Sayer	2	$ 145
13. Louis Scolnik	2	$ 500
14. Paul A. Cote	1	$ 300
15. Richard G. Hamann	1	$ 120
16. Philip K. Hargeshimer	1	$ 250
17. Dennis L. Jones	1	$ 75
18. Patrick E. Joyce	1	$ 75
19. Thomas F. Kinnelly, III	1	$ 200
20. Linell, Choate & Webber	1	$ 100
21. Bruce R. Livingston	1	$ 25
22. Harold J. Shapiro	1*	$ 914
23. Lendall L. Smith	1	$ 350

* Murder appeal.

CARIBOU DISTRICT COURT

Number of assignments: 74
Total compensation: $3600

Attorney	Cases	Compensation
1. Robert H. Page (Solman, Solman & Page)	19	$ 935
2. John E. Welch	13	$ 650
3. Ferris A. Freme	11	$ 510
4. Gerald L. Keenan	11	$ 575
5. Hugh S. Kirkpatrick	10	$ 480

Attorney	Cases	Compensation
6. Peter S. Kelley	3	$ 110
7. John D. McElwee	3	$ 150
8. Frank Hickey	2	$ 100
9. David B. Griffiths	1	$ 50
10. Walter S. Sage	1	$ 60

VAN BUREN DISTRICT COURT

Number of assignments: 10
Total compensation: $455

Attorney	Cases	Compensation
1. Philip P. Parent	9	$ 405
2. Alfred E. La Bonty, Jr.	1	$ 50

MADAWASKA DISTRICT COURT

Number of assignments: 13
Total compensation: $620

Attorney	Cases	Compensation
1. Alfred E. La Bonty, Jr.	8	$ 370
2. Joel R. Le Blanc	4	$ 200
3. Rudolph T. Pelletier	1	$ 50

FORT KENT DISTRICT COURT

Number of assignments: 17
Total compensation: $835

Attorney	Cases	Compensation
1. Ronald A. Daigle	6	$ 300
2. Alfred E. La Bonty, Jr.	3	$ 150
3. Frank H. Bishop	2	$ 100
4. Ferris A. Freme	2	$ 100
5. Robert L. Jalbert	2	$ 100
6. Philip P. Parent	2	$ 85

PRESQUE ISLE DISTRICT COURT

Number of assignments: 81
Total compensation: $3955

Attorney	Cases	Compensation
1. Frank H. Bishop	15	$ 705
2. John C. Walker	9	$ 450

Attorney	Cases	Compensation
3. Stephen Canders	8	$ 400
4. Richard C. Engels	8	$ 400
5. David B. Griffiths	8	$ 385
6. John R. Sandler	8	$ 395
7. Frank Hickey	7	$ 335
8. Harold L. Stewart	6	$ 300
9. Donald E. Quigley	5	$ 235
10. Floyd L. Harding	4	$ 200
11. John D. McElwee	1	$ 50
12. Walter S. Sage	1	$ 50
13. Currie M. Sullivan	1	$ 50

HOULTON DISTRICT COURT

Number of assignments: 72
Total compensation: $3535

Attorney	Cases	Compensation
1. Philip K. Jordan	23	$1130
2. Frank Hickey	8	$ 400
3. George B. Barnes	7	$ 320
4. Thomas O. Bither	7	$ 350
5. Thomas W. Wells	7	$ 350
6. Robert N. Moore, Jr.	5	$ 250
7. James D. Carr	4	$ 185
8. Torrey A. Sylvester	3	$ 150
9. Forrest Barnes	2	$ 100
10. Gary A. Severson	2	$ 100
11. Frank H. Bishop	1	$ 50
12. David B. Griffiths	1	$ 50
13. Roy E. Thomson, Jr.	1	$ 50
14. John C. Walker	1	$ 50

AROOSTOOK SUPERIOR COURT

Number of assignments: 78
Total compensation: $12,290

Attorney	Assignments	Compensation
1. Robert H. Page	9	$ 755
2. Thomas O. Bither	8	$1130
3. Frank Hickey	7	$1003
4. John R. Sandler	7	$1636
5. Philip K. Jordan	5	$ 790
6. Forrest Barnes	4	$ 781
7. Frank H. Bishop	4	$ 807
8. Robert L. Jalbert	4	$ 889
9. Alfred E. La Bonty, Jr.	4	$ 460
10. John E. Welch	4	$ 580
11. James D. Carr	3	$ 400

Attorney	Assignments	Compensation
12. Robert N. Moore, Jr.	3	$ 330
13. John C. Walker	3	$1031
14. Malcolm I. Berman	3	$ 185
15. Ferris A. Freme	2	$ 250
16. Stephen Canders	1	$ 100
17. Ronald A. Daigle	1	$ 100
18. Richard C. Engels	1	$ 155
19. John D. McElwee	1	$ 94
20. Walter S. Sage	1	$ 200
21. Gary A. Severson	1	$ 230
22. Torrey A. Sylvester	1	$ 235
23. Stuart White	1	$ 150

PORTLAND DISTRICT COURT

Number of assignments: 645
Total compensation: $31,715

Attorney	Cases	Compensation
1. Richard S. Emerson, Jr.	34	$1700
2. Franklin F. Stearns, Jr.	32	$1585
3. Theodore Barris	28	$1370
4. Maurice Davis	28	$1355
5. Bennett B. Fuller, II	27	$1335
6. Joseph P. Connellan	22	$1085
7. Edward W. Rogers	21	$1050
8. Cushman D. Anthony	20	$ 985
9. George Milliken	20	$1000
10. Edward T. Devine	19	$ 935
11. Robert E. Noonan	18	$ 885
12. Janice M. Lynch	15	$ 690
13. Alexander A. MacNichol	15	$ 735
14. Robert Napolitano	15	$ 750
15. Millard E. Emanuelson	14	$ 685
16. Ronald L. Kellam	13	$ 650
17. Mary K. Brennan	12	$ 600
18. Howard T. Reben	12	$ 585
19. Warren E. Winslow	12	$ 585
20. Peter W. Culley	11	$ 520
21. Douglas P. MacVane	11	$ 550
22. Caroline Glassman	10	$ 500
23. Nunzi F. Napolitano	10	$ 500
24. Ronald A. Wallace	10	$ 500
25. David C. Pomeroy	9	$ 450
26. R. John Wuesthoff	9	$ 450
27. Mathew Goldfarb	8	$400
28. William B. Troubh	8	$ 370
29. Hugh Calkins	7	$ 350
30. Josephine L. Citrin	7	$ 320

Attorney	Cases	Compensation
31. Herbert J. Ludwig	7	$ 350
32. Festus B. McDonough	7	$ 350
33. Thomas P. Wilson	7	$ 350
34. Joseph E. Brennan	6	$ 300
35. Thomas A. Cox	6	$ 300
36. Robert R. Goodrich	6	$ 300
37. Donald G. Lowry	6	$ 300
38. Arthur A. Stilphen	6	$ 300
39. Stephen P. Sunenblick	6	$ 300
40. James A. Connellan	5	$ 175
41. Kinsey B. Fearon	5	$ 250
42. John A. Graustein	5	$ 250
43. Homer Michal	5	$ 250
44. Robert D. Platt	5	$ 250
45. Walter E. Foss	4	$ 200
46. Norman S. Reef	4	$ 200
47. Peter J. Rogers	4	$ 200
48. Paul K. Stewart	4	$ 200
49. Peter Ballou	3	$ 120
50. Arthur Chapman, Jr.	3	$ 150
51. David J. Corson	3	$ 150
52. Peter J. DeTroy, III	3	$ 150
53. David N. Fisher, Jr.	3	$ 150
54. Kermit V. Lipez	3	$ 150
55. George J. Mitchell	3	$ 150
56. David N. Ott	3	$ 150
57. Harold C. Pachios	3	$ 150
58. Ronald D. Russell	3	$ 150
59. Kenneth E. Snitger	3	$ 150
60. Robert Walker	3	$ 150
61. Grover G. Alexander	2	$ 70
62. Alan R. Atkins	2	$ 100
63. Tom Brand	2	$ 100
64. Douglas S. Carr	2	$ 85
65. Robert A. Cohen	2	$ 100
66. Thomas F. Gillan	2	$ 100
67. Edward G. Hough	2	$ 100
68. Daniel Lilley	2	$ 85
69. James A. Athanus	1	$ 35
70. Bernstein Shur, Sawyer & Nelson	1	$ 50
71. George A. Bouchard	1	$ 35
72. Dana W. Childs	1	$ 50
73. Edward C. Dalton, Jr.	1	$ 50
74. John P. Erler	1	$ 50
75. Dwight A. Fifield	1	$ 50
76. William P. Hardy	1	$ 50
77. Michael T. Healy	1	$ 50
78. Donald A. Kopp	1	$ 50
79. Richard P. LeBlanc	1	$ 50

Attorney	Cases	Compensation
80. S. Peter Mills, III	1	$ 50
81. Daniel W. Mooers	1	$ 100
82. Ray R. Pallas	1	$ 50
83. Peter J. Rubin	1	$ 50
84. Neal Stillman	1	$ 50
85. Paul E. Thelin	1	$ 50
86. Carl R. Trynor	1	$ 35

BRUNSWICK DISTRICT COURT

Number of assignments: 77
Total compensation: $3830

Attorney	Cases	Compensation
1. Albert C. Boothby	16	$ 800
2. Richard C. Ames	8	$ 400
3. Richard L. Barton	7	$ 350
4. J. Michael Conley, III	6	$ 300
5. Daniel R. Donovan	6	$ 300
6. David J. Corson	4	$ 210
7. Bertha E. Rideout	4	$ 200
8. Joseph L. Singer	4	$ 200
9. James A. Athanus	3	$ 150
10. Arthur D. Dolloff	2	$ 100
11. Roger S. Golin	2	$ 100
12. David Klickstein	2	$ 85
13. Michael I. Sayer	2	$ 100
14. Carl O. Bradford	1	$ 50
15. Robert T. Coffin	1	$ 50
16. Robert S. Hark	1	$ 50
17. G. William Higbee	1	$ 50
18. Richard A. Lord	1	$ 50
19. Patrick N. McTeague	1	$ 50
20. Orville T. Ranger	1	$ 35
21. David Soule	1	$ 50
22. Leon L. Spinney	1	$ 50
23. Carl W. Stinson	1	$ 50
24. John Wolhaupter	1	$ 50

BRIDGTON DISTRICT COURT

Number of assignments: 33
Total compensation: $1455

Attorney	Cases	Compensation
1. Geoffrey H. Hole	7	$ 350
2. Joseph N. Margolin	5	$ 235

Attorney	Cases	Compensation
3. Howard T. Reben	5	$ 250
4. Robert W. Reece	5	$ 235
5. George A. Bouchard	3	$ 150
6. Robert S. Batchelder	1	$ 50
7. Maurice Davis	1	$ 50
8. Kenneth H. Kane	1	$ 50
9. Stephen P. Sunenblick	1	$ 35
10. John P. Waite	1	$ 50

CUMBERLAND SUPERIOR COURT

Number of assignments: 244
Total compensation: $50,014

Attorney	Assignments	Compensation
1. Maurice Davis	20	$2725
2. Franklin F. Stearns, Jr.	18*	$2751
3. Alexander A. MacNichol	14	$2300
4. Theodore Barris	12	$1700
5. Bennett B. Fuller, II	12	$1400
6. Joseph P. Connellan	7	$1400
7. Festus B. McDonough	7	$1050
8. George Milliken	7	$1125
9. William B. Troubh	7	$2655
10. Tom Brand	6	$ 750
11. Stephen P. Sunenblick	6	$1090
12. Warren E. Winslow	6	$ 650
13. Cushman D. Anthony	5	$1514
14. Albert C. Boothby	5	$ 550
15. Donald G. Lowry (Lowry & Platt)	5	$ 825
16. Herbert J. Ludwig	5	$ 665
17. Peter W. Culley	4	$ 600
18. Richard S. Emerson, Jr.	4	$ 625
19. Robert E. Noonan	4	$ 711
20. Edward W. Rogers	4	$ 475
21. Henry Steinfeld	4	$2124
22. Richard C. Ames	3	$ 275
23. Thomas A. Cox	3	$ 725
24. Mathew S. Goldfarb	3	$ 325
25. David C. Pomeroy	3	$1685
26. Henry N. Berry, III	2	$ 150
27. Mary K. Brennan	2	$ 325
28. Josephine L. Citrin	2	$ 325
29. Robert A. Cohen	2	$ 225
30. J. Michael Conley, III	2	$ 474
31. Edward T. Devine	2	$ 200
32. Millard E. Emanuelson	2	$ 200
33. Geoffrey H. Hole	2	$ 300

Attorney	Assignments	Compensation
34. Ronald L. Kellam	2	$ 150
35. David Klickstein	2	$ 600
36. Daniel Lilley	2	$ 350
37. Janice M. Lynch	2	$ 150
38. Douglas P. MacVane	2	$ 200
39. Robert Napolitano	2	$ 185
40. David N. Ott	2	$ 500
41. Peter J. Rubin	2	$1850
42. Thomas P. Wilson	2	$ 475
43. John Wolhaupter	2	$ 175
44. R. John Wuesthoff	2	$ 325
45. Grover G. Alexander	1	$ 200
46. Alan R. Atkins	1	$ 50
47. Udell Bramson	1	$ 232
48. Hugh Calkins	1	$ 150
49. Arthur Chapman, Jr.	1	$ 500
50. David M. Cohen	1	$ 202
51. David J. Corson	1	$ 75
52. Edward C. Dalton, Jr.	1	$ 250
53. Peter J. DeTroy, III	1	$ 150
54. Kinsey B. Fearon	1	$ 100
55. Duane D. Fitzgerald	1	$4208
56. Robert A. Goodrich	1	$ 75
57. Richard P. LeBlanc	1	$ 200
58. Kermit V. Lipez	1	$ 200
59. George J. Mitchell	1	$ 150
60. Daniel W. Mooers	1	$ 357
61. Nunzi F. Napolitano	1	$ 100
62. David C. Norman	1	$ 350
63. Harold C. Pachios	1	$ 105
64. Ray R. Pallas	1	$ 250
65. John W. Philbrick	1	$ 236
66. S. Mason Pratt, Jr.	1	$ 910
67. U. Charles Remmel	1	$ 250
68. Bertha E. Rideout	1	$ 75
69. Ronald D. Russell	1	$ 150
70. Alan L. Sachs	1	$ 750
71. Richard G. Sawyer	1	$ 60
72. Joseph L. Singer	1	$1200
73. Kenneth E. Snitger	1	$ 175
74. Neal K. Stillman	1	$ 150
75. Arthur A. Stilphen	1	$ 200
76. Ronald A. Wallace	1	$ 100

*Includes one murder appeal.

FARMINGTON DISTRICT COURT

Number of assignments: 58
Total compensation: $2780

Attorney	Cases	Compensation
1. Calvin B. Sewall	16	$ 740
2. Gerard S. Williams	12	$ 570
3. Robert J. Beal	9	$ 420
4. Joseph F. Holman	8	$ 400
5. Edward H. Cloutier	6	$ 300
6. Vincent A. Drosdik, Jr.	3	$ 150
7. William A. Rowe	2	$ 100
8. Paul R. Dumas, Jr.	1	$ 50
9. Currier C. Holman	1	$ 50

FRANKLIN SUPERIOR COURT

Number of assignments: 24
Total compensation: $3759

Attorney	Assignments	Compensation
1. Calvin B. Sewall	7	$ 655
2. Joseph F. Holman	6	$ 685
3. Gerard S. Williams	6	$ 740
4. Robert J. Beal	2	$ 300
5. Edward H. Cloutier	1	$ 105
6. Patrick E. Joyce	1	$ 75
7. Irving Friedman	1*	$1199

*Murder appeal.

FRANKLIN SUPERIOR COURT (1972)

Number of assignments: 29
Total compensation: $4845

Attorney	Assignments	Compensation
1. Gerard S. Williams	8	$1500
2. Edward H. Cloutier	6	$1400
3. Joseph F. Holman	6	$ 645
4. Calvin B. Sewall	5	$ 650
5. William A. Rowe	3	$ 300
6. David F. Aldrich	1	$ 350

ELLSWORTH DISTRICT COURT

Number of assignments: 22
Total Compensation: $1055

Attorney	Cases	Compensation
1. Roger G. Chagnon	9	$ 420
2. Paul B. Fitzgerald	3	$ 150
3. Samuel Nesbitt, Jr.	2	$ 100
4. Joseph L. Ferris	1	$ 50
5. Philip Foster	1	$ 50
6. David Kee	1	$ 50
7. Barry K. Mills	1	$ 35
8. William W. Peasley	1	$ 50
9. Peter Roy	1	$ 50
10. Edwin R. Schneider	1	$ 50
11. James Silsby	1	$ 50

BAR HARBOR DISTRICT COURT

Number of assignments: 10
Total compensation: $445

Attorney	Cases	Compensation
1. Roger G. Chagnon	6	$ 285
2. Nathaniel R. Fenton	1	$ 50
3. Wayne Libhart	1	$ 35
4. Barry K. Mills	1	$ 25
5. Bernard C. Staples	1	$ 50

HANCOCK SUPERIOR COURT

Number of assignments: 20
Total compensation: $6484

Attorney	Assignments	Compensation
1. Roger G. Chagnon	9	$3340
2. Philip Foster	3	$ 294
3. Paul B. Fitzgerald	2	$ 350
4. David W. Kee	2	$ 450
5. Wayne P. Libhart	2	$ 300
6. Douglas B. Chapman	1	$1665
7. James A. Silsby	1	$ 135

HANCOCK SUPERIOR COURT (1972)

Number of assignments: 16
Total compensation: $2752

Attorney	Assignments	Compensation
1. Roger G. Chagnon	4	$ 545
2. Frank B. Walker	3	$ 225
3. Philip D. Buckley	2	$ 320

Attorney	Assignment	Compensation
4. William S. Silsby (Silsby & Silsby)	2	$ 200
5. Douglas B. Chapman	1	$ 250
6. Frank G. Fellows	1	$ 550
7. Oscar Fellows	1	$ 412
8. Francis C. Marsano	1	$ 200
9. Shirley Povich	1	$ 50

AUGUSTA DISTRICT COURT

Number of assignments: 138
Total compensation: $6680

Attorney	Cases	Compensation
1. Norman C. Bourget	22	$1085
2. Alan L. Sachs	16	$ 725
3. Richard G. Sawyer	14	$ 700
4. Sumner H. Lipman	13	$ 650
5. Michael Barr	12	$ 600
6. Harold J. Shapiro	11	$ 520
7. Ernest L. Goodspeed, Jr.	10	$ 505
8. Jessie H. Briggs	7	$ 320
9. Richard A. Foley	5	$ 250
10. Dennis L. Jones	4	$ 200
11. Bruce R. Livingston	4	$ 185
12. Warren E. Winslow, Jr.	4	$ 185
13. Alan C. Sherman	3	$ 150
14. Janice M. Lynch	2	$ 70
15. Paula G. Sawyer	2	$ 100
16. Daniel E. Wathen	2	$ 85
17. H. Michael Alpren	1	$ 50
18. Patricia A. Danisinka	1	$ 50
19. Robert J. Daviau	1	$ 50
20. Daniel R. Donovan	1	$ 50
21. Robert G. Fuller, Jr.	1	$ 50
22. Stanley E. Holt	1	$ 50
23. Daniel J. Murphy	1	$ 50

WATERVILLE DISTRICT COURT

Number of assignments: 75
Total compensation: $3767

Attorney	Cases	Compensation
1. Morton A. Brody	17	$ 893
2. Sidney H. Geller	12	$ 573
3. Alan C. Sherman	11	$ 535

Attorney	Cases	Compensation
4. Robert J. Daviau	10	$ 470
5. Robert E. Sandy, Jr.	6	$ 300
6. Burton G. Shiro	5	$ 250
7. Norman C. Bourget	3	$ 135
8. Bernard A. Cratty	2	$ 100
9. Joseph M. Jabar	2	$ 100
10. Richard G. Sawyer	2	$ 100
11. Ernest L. Goodspeed, Jr.	1	$ 35
12. Malcolm Lyons	1	$ 50
13. William P. Niehoff	1	$ 126
14. Timothy R. O'Donnell	1	$ 50
15. Clyde Wheeler	1	$ 50

AUGUSTA DISTRICT COURT (Involuntary hospitalization hearings - Nov. 1973)

Number of assignments: 20
Total compensation: $1000

Attorney	Cases	Compensation
1. Michael Barr	10	$ 500
2. Ernest L. Goodspeed, Jr.	10	$ 500

KENNEBEC SUPERIOR COURT

Number of assignments: 141
Total compensation: $25,237

Attorney	Assignments	Compensation
1. Norman C. Bourget	20	$4745
2. Alan C. Sherman	16	$4055
3. Sumner Lipman (Lipman & Gingras)	12	$1920
4. Richard G. Sawyer (Sawyer & Sawyer)	8	$1025
5. Jeffrey A. Smith	8	$1105
6. Daniel E. Wathen (Wathen & Wathen)	7	$2320
7. Robert J. Daviau	7	$ 815
8. Robert G. Fuller	5	$ 458
9. Dennis L. Jones	5	$ 375
10. Robert E. Sandy, Jr.	5	$ 900
11. Michael Barr	4	$ 450
12. Jessie H. Briggs	4	$ 585
13. Morton A. Brody	4	$ 550
14. Peter T. Dawson	4	$ 937
15. Ernest L. Goodspeed, Jr.	4	$ 600
16. Richard A. Foley	3	$ 275
17. Sidney H. Geller	3	$ 498

Attorney	Assignments	Compensation
18. Bruce R. Livingston	3	$ 375
19. William P. Niehoff	3	$ 979
20. Alan L. Sachs	3	$ 300
21. Burton G. Shiro	2	$ 300
22. Warren E. Winslow, Jr.	2	$ 200
23. William J. Batten	1	$ 250
24. Patricia A. Danisinka	1	$ 257
25. Robert S. Hark	1	$ 125
26. Joseph M. Jabar	1	$ 100
27. Thomas P. Kapatais	1	$ 150
28. Janice M. Lynch	1	$ 75
29. Malcolm J. Lyons	1	$ 125
30. Daniel J. Murphy	1	$ 125
31. William A. Rowe	1	$ 200
32. Gerald Speers	1	$ 75

ROCKLAND DISTRICT COURT

Number of assignments: 116
Total compensation: $5743

Attorney	Cases	Compensation
1. Edward B. Miller	18	$ 885
2. Dominic Cuccinello	13	$ 728
3. Jean B. Chalmers	11	$ 535
4. Stephen Little	11	$ 535
5. Peter P. Sulides	8	$ 385
6. Alan A. Grossman	7	$ 350
7. Robert Adams	6	$ 300
8. Barry M. Faber	6	$ 300
9. Frank F. Harding	6	$ 300
10. John L. Knight	5	$ 235
11. Joseph B. Pellicani	5	$ 220
12. Richard Clawson	4	$ 200
13. Joel E. Hokkanen	4	$ 200
14. Samuel Cohen	3	$ 135
15. Curtis M. Payson	2	$ 100
16. Stuart C. Burgess	1	$ 50
17. Wayne R. Crandall	1	$ 50
18. Rendle A. Jones	1	$ 50
19. Martha D. Merrill	1	$ 35
20. Clifford O'Rourke	1	$ 50
21. William B. Troubh	1	$ 50
22. (Unknown)	1	$ 50

KNOX SUPERIOR COURT

Number of assignments: 40
Total compensation: $8315

Attorney	Assignments	Compensation
1. Edward B. Miller	10	$1910
2. Alan A. Grossman	6	$ 940
3. Joseph B. Pellicani	4	$ 575
4. Barry M. Faber	3	$ 790
5. Peter P. Sulides	3	$1140
6. Samuel Cohen	2	$ 650
7. Dominic Cuccinello	2	$ 280
8. Frank F. Harding	2	$ 200
9. Joel E. Hokkanen	2	$ 425
10. John L. Knight	2	$ 725
11. Jean B. Chalmers	1	$ 50
12. Wayne R. Crandall	1	$ 75
13. Stephen Little	1	$ 75
14. David A. Nichols	1	$ 408

KNOX SUPERIOR COURT (1972)

Number of assignments: 41
Total compensation: $6104

Attorney	Assignments	Compensation
1. Edward B. Miller	10	$ 825
2. Dominic Cuccinello	7	$1670
3. Joseph B. Pellicani	6	$ 880
4. Peter P. Sulides	5	$ 550
5. Wayne R. Crandall	3	$ 379
6. Frank F. Harding	3	$ 525
7. Richard Clawson	2	$ 475
8. John L. Knight	2	$ 225
9. Martha D. Merrill	1	$ 100
10. Curtis M. Payson	1	$ 75
11. Arthur E. Strout	1	$ 400

WISCASSET DISTRICT COURT

Number of assignments: 58
Total compensation: $2720

Attorney	Cases	Compensation
1. J. Michael Conley, III	10	$ 425
2. Samuel Cohen	9	$ 435
3. Joseph Steinberger	7	$ 350
4. Cleveland A. Page	6	$ 270
5. Richard W. Elliot	5	$ 250
6. John J. Lynch	4	$ 200
7. David B. Soule	4	$ 200
8. Daniel R. Donovan	3	$ 135
9. Joel F. Bowie	2	$ 100

Attorney	Cases	Compensation
10. R. James Davidson	2	$ 100
11. James F. Day	2	$ 70
12. Stanley A. Tupper	2	$ 85
13. Norman C. Bourget	1	$ 50
14. Bruce R. Livingston	1	$ 50

LINCOLN SUPERIOR COURT

Number of assignments: 23
Total compensation: $3485

Attorney	Assignments	Compensation
1. Richard W. Elliot	6	$ 825
2. John J. Lynch	3	$ 275
3. Samuel Cohen	2	$ 400
4. Daniel R. Donovan	2	$ 720
5. David B. Soule	2	$ 255
6. Clayton Howard	2	$ 178
7. Norman C. Bourget	1	$ 130
8. J. Michael Conley, III	1	$ 109
9. Daniel Lilley	1*	$ 268
10. Grant Lyons	1	$ 100
11. Joseph Steinberger	1	$ 125
12. Michael N. Westcott	1	$ 100

*Murder appeal.

LINCOLN SUPERIOR COURT (1972)

Number of assignments: 25
Total compensation: $3116

Attorney	Assignments	Compensation
1. Samuel Cohen	7	$ 650
2. J. Michael Conley, III	4	$ 683
3. Michael N. Westcott	4	$ 525
4. Daniel R. Donovan	2	$ 300
5. Richard A. Lord	2	$ 300
6. Cleveland A. Page	2	$ 340
7. Norman C. Bourget	1	$ 118
8. Richard W. Elliot	1	$ 75
9. Clayton Howard	1	$ 75
10. David B. Soule	1	$ 50

SOUTH PARIS DISTRICT COURT

Number of assignments: 33
Total compensation: $1675

Attorney	Cases	Compensation
1. Franklin R. Larrabee	7	$ 320
2. Joseph N. Margolin	7	$ 305
3. Michael J. O'Donnell	7	$ 475
4. F. Boardman Fish, Jr.	6	$ 300
5. Albert J. Beliveau, Jr.	2	$ 125
6. Rupert Aldrich	1	$ 50
7. George Bouchard	1	$ 50
8. Paul R. Dumas, Jr.	1	$ 50

RUMFORD DISTRICT COURT

Number of assignments: 38
Total compensation: $1945

Attorney	Cases	Compensation
1. Paul R. Dumas, Jr.	15	$ 750
2. F. Boardman Fish, Jr.	10	$ 500
3. Albert J. Beliveau, Jr.	8	$ 475
4. William A. Rowe	2	$ 100
5. Charles H. Abbott	1	$ 50
6. Fred E. Hanscom	1	$ 35
7. James S. Stevenson	1	$ 35

OXFORD SUPERIOR COURT

Number of assignments: 36
Total compensation: $6720

Attorney	Assignments	Compensation
1. Albert J. Beliveau, Jr. (Beliveau & Beliveau)	6	$1761
2. Paul R. Dumas, Jr.	5	$ 474
3. Michael J. O'Donnell	5	$1253
4. Rupert F. Aldrich	4	$ 450
5. F. Boardman Fish, Jr.	4	$ 807
6. Fred E. Hanscom	4	$ 450
7. Joseph N. Margolin	3	$ 275
8. George Bouchard	2	$ 300
9. William A. Rowe	2	$ 200
10. Basil A. Latty	1	$ 750

OXFORD SUPERIOR COURT (1972)

Number of assignments: 28
Total compensation: $5372

Attorney	Assignments	Compensation
1. Albert J. Beliveau, Jr. (Beliveau & Beliveau)	6	$ 625
2. David Q. Whittier	6	$ 960
3. James H. Kendall	4	$ 903
4. George Bouchard	3	$ 625
5. William A. Rowe	3	$ 300
6. Fred E. Hanscom	2	$ 350
7. Severin Beliveau	1	$1034
8. Gaston M. Dumais	1	$ 250
9. Frank B. Foster	1	$ 150
10. Patrick E. Joyce	1	$ 175

BANGOR DISTRICT COURT

Number of assignments: 284
Total compensation: $13,941

Attorney	Cases	Compensation
1. Marvin H. Glazier	34	$1781
2. John F. Logan	28	$1265
3. Peter M. Weatherbee	17	$ 835
4. Eugene C. Coughlin	15	$ 735
5. George W. Kurr	15	$ 705
6. James R. Austin	12	$ 600
7. Morris D. Rubin	12	$ 600
8. Frederick J. Badger	11	$ 535
9. George Z. Singal	11	$ 550
10. Paul F. Zendzian	11	$ 505
11. Marshall A. Stern	10	$ 410
12. Peter Adams Anderson	9	$ 450
13. Philip L. Ingeneri	8	$ 400
14. Lawrence E. Merrill	8	$ 400
15. Joseph T. Walsh, Jr.	8	$ 400
16. Jordan I. Kobritz	6	$ 285
17. Lewellyn R. Michaud	6	$ 270
18. Joseph L. Ferris	5	$ 220
19. John E. Harrington	5	$ 250
20. James S. Horton	5	$ 250
21. Garth K. Chandler	4	$ 200
22. Oscar Fellows	4	$ 200
23. Jerome B. Goldsmith	4	$ 200
24. Errol K. Paine	4	$ 200
25. Allan Woodcock, Jr.	4	$ 185
26. Robert S. Briggs	3	$ 150
27. Thomas M. Brown	3	$ 135
28. Michael E. Goodman	2	$ 100
29. David C. King	2	$ 100
30. Mary L. Kurr	2	$ 100

Attorney	Cases	Compensation
31. Jules L. Mogul	2	$ 100
32. Charles O. Spencer	2	$ 100
33. Torrey A. Sylvester	2	$ 100
34. Albert H. Winchell	2	$ 100
35. Max S. Cohen	1	$ 50
36. Theodore S. Curtis, Jr.	1	$ 50
37. Richard Edwards	1	$ 50
38. Roscoe J. Grover, Jr.	1	$ 50
39. James A. Mooney	1	$ 35
40. William W. Peasley	1	$ 50
41. Harry A. Tabenken	1	$ 100
42. Oscar Walker	1	$ 50

BANGOR DISTRICT COURT (Involuntary hospitalization hearings - Nov. 1973)

Number of assignments: 57
Total compensation: $2850

Attorney	Cases	Compensation
1. John F. Logan	13	$ 650
2. Marvin H. Glazier	10	$ 500
3. Joseph T. Walsh, Jr.	10	$ 500
4. Peter Adams Anderson	7	$ 350
5. Frederick J. Badger	7	$ 350
6. William E. MacDonald	6	$ 300
7. Morris Rubin	4	$ 200

NEWPORT DISTRICT COURT

Number of assignments: 42
Total compensation: $2055

Attorney	Cases	Compensation
1. Michael E. Goodman	16	$ 770
2. Robert E. Cox	10	$ 485
3. James R. Austin	5	$ 250
4. Lewellyn R. Michaud	2	$ 100
5. George Z. Singal	2	$ 100
6. Torrey A. Sylvester	2	$ 100
7. Marvin H. Glazier	1	$ 50
8. Jerome B. Goldsmith	1	$ 50
9. George W. Kurr	1	$ 50
10. James L. Peakes	1	$ 50
11. Richard J. Relyea	1	$ 50

LINCOLN DISTRICT COURT

Number of assignments: 33
Total compensation: $1650

Attorney	Cases	Compensation
1. John S. Edwards	22	$1100
2. Daniel G. Aiken	11	$ 550

MILLINOCKET DISTRICT COURT

Number of assignments: 12
Total compensation: $600

Attorney	Cases	Compensation
1. M. Stanley Snowman	6	$ 300
2. Noel K. Evans	2	$ 100
3. Jerome B. Goldsmith	2	$ 100
4. Wakine G. Tanous	2	$ 100

PENOBSCOT SUPERIOR COURT

Number of assignments: 182
Total compensation: $47,087

Attorney	Assignments	Compensation
1. Marshall A. Stern	19	$5300
2. Marvin H. Glazier	14	$4429
3. John F. Logan	13	$1967
4. James R. Austin	11	$1325
5. Joseph L. Ferris	10	$1215
6. Frederick J. Badger	9	$3673
7. Errol K. Paine	9	$3940
8. John E. Harrington	8	$1250
9. Peter M. Weatherbee	8	$ 795
10. Paul F. Zendzian	6	$ 800
11. Peter Adams Anderson	5	$ 550
12. Oscar Fellows	5	$ 700
13. James S. Horton	5	$2350
14. Lewellyn R. Michaud	5	$ 400
15. Eugene C. Coughlin	4	$2800
16. Philip L. Ingeneri	4	$ 475
17. George Z. Singal	4	$ 665
18. Robert E. Cox	3	$ 375
19. Jerome B. Goldsmith	3	$ 225
20. Michael E. Goodman	3	$ 395
21. George W. Kurr	3	$ 375
22. Lawrence E. Merrill	3	$ 850

Attorney	Assignments	Compensation
23. Joseph T. Walsh, Jr.	3	$ 300
24. Albert H. Winchell	3	$ 700
25. Alan Woodcock, Jr.	3	$ 450
26. Jules L. Mogul	2	$ 385
27. Morris D. Rubin	2	$ 175
28. Torrey A. Sylvester	2	$ 261
29. Lewis V. Vafiades	2	$5514
30. Daniel G. Aiken	1	$ 125
31. David A. Bower	1	$ 200
32. Garth K. Chandler	1	$ 125
33. Edward Cohen	1	$ 125
34. Dana C. Devoe	1	$ 125
35. Paul L. Hazard	1	$ 75
36. Daniel Lilley	1	$ 450
37. Richard J. Relyea	1	$ 364
38. Beverly W. Spencer	1	$ 197
39. Charles O. Spencer	1	$ 100
40. Orman G. Twitchell	1	$2562

DOVER-FOXCROFT DISTRICT COURT

Number of assignments: 45
Total compensation: $2220

Attorney	Cases	Compensation
1. Richard Edwards	25	$1220
2. Keith N. Edgerly	7	$ 350
3. John L. Easton, Jr.	5	$ 250
4. Joseph J. Bichrest	4	$ 200
5. James L. Peakes	2	$ 100
6. Errol K. Paine	1	$ 50
7. Alvin W. Perkins	1	$ 50

PISCATAQUIS SUPERIOR COURT

Number of assignments: 14
Total compensation: $3094

Attorney	Assignments	Compensation
1. Richard Edwards	5	$ 375
2. Joseph J. Bichrest	2	$ 118
3. Keith N. Edgerly	2	$ 150
4. James R. Austin	1	$ 75
5. John L. Easton, Jr.	1	$ 100
6. Robert S. Lingley	1	$ 75
7. James MacMichael	1	$1070
8. Marshall A. Stern	1	$1131

PISCATAQUIS SUPERIOR COURT (1972)

Number of assignments: 16
Total compensation: $2600

Attorney	Assignments	Compensation
1. Richard Edwards	4	$ 300
2. Arthur Hathaway	4	$ 325
3. Joseph J. Bichrest	3	$ 250
4. Alvin Perkins	2	$ 325
5. Keith N. Edgerly	1	$ 50
6. Jules L. Mogul	1	$ 750
7. Bartolo Siciliano	1	$ 750

BATH DISTRICT COURT

Number of assignments: 67
Total compensation: $3203

Attorney	Cases	Compensation
1. J. Michael Conley, III	13	$ 560
2. Daniel R. Donovan	11	$ 550
3. Randall H. Orr	11	$ 550
4. Duane D. Fitzgerald	9	$ 450
5. Roger R. Therriault	7	$ 335
6. Albert C. Boothby, Jr.	3	$ 150
7. Carl W. Stinson	3	$ 150
8. Bertha E. Rideout	2	$ 100
9. Donald A. Spear	2	$ 70
10. Susan Calkins	1	$ 50
11. James F. Day	1	$ 50
12. G. William Higbee	1	$ 53
13. Dennis L. Jones	1	$ 50
14. Charles T. Small	1	$ 35
15. Kenneth C. Young, Jr.	1	$ 50

SAGADAHOC SUPERIOR COURT

Number of assignments: 17
Total compensation: $4500

Attorney	Assignments	Compensation
1. Daniel R. Donovan	3	$ 325
2. Roger R. Therriault	3	$ 325
3. Duane D. Fitzgerald	2	$1395
4. Randall H. Orr	2	$ 175
5. Robert T. Coffin	1	$ 450
6. J. Michael Conley, III	1	$ 630
7. Michael P. Feely	1	$ 100
8. G. William Higbee	1	$ 825
9. Joseph Steinberger	1	$ 75
10. George F. Wood	1	$ 100
11. Kenneth C. Young, Jr.	1	$ 100

SAGADAHOC SUPERIOR COURT (1972)

Number of assignments: 9
Total compensation: $2006

Attorney	Assignments	Compensation
1. Richard C. Ames	2	$ 350
2. Carl W. Stinson	2	$ 583
3. Daniel R. Donovan	1	$ 158
4. Gaston M. Dumais	1	$ 100
5. Duane D. Fitzgerald	1	$ 100
6. Paul P. Murphy	1	$ 400
7. Roger R. Therriault	1	$ 315

SKOWHEGAN DISTRICT COURT

Number of assignments: 114
Total compensation: $5483

Attorney	Cases	Compensation
1. James MacMichael	15	$ 691
2. George W. Perkins	14	$ 610
3. Richard S. Sterns	13	$ 665
4. George S. Johnson	10	$ 508
5. Peter B. Dublin	9	$ 450
6. Donald E. Eames	9	$ 435
7. Elton A. Burky	6	$ 300
8. Michael Ferris	5	$ 300
9. John C. Hunt	5	$ 250
10. Clinton B. Townsend	5	$ 235
11. Morton A. Brody	4	$ 185
12. Douglas A. Clapp	4	$ 185
13. William Thomas Hyde	4	$ 140
14. W. Philip Hamilton	2	$ 100
15. John L. Merrill	2	$ 100
16. Edward H. Cloutier	1	$ 50
17. Stephen F. Dubord	1	$ 50
18. Thomas P. Kapantais	1	$ 50
19. Errol K. Paine	1	$ 59
20. Alan C. Sherman	1	$ 35
21. Charles H. Veilleux	1	$ 35
22. Carl R. Wright	1	$ 50

SOMERSET SUPERIOR COURT

Number of assignments: 47
Total compensation: $9698

Attorney	Assignments	Compensation
1. George W. Perkins	11	$2346
2. Donald E. Eames	5	$1453
3. James MacMichael	5	$ 625
4. Richard S. Sterns	4	$ 525
5. W. Philip Hamilton	3	$ 450
6. Clinton B. Townsend	3	$ 684
7. Morton A. Brody	2	$ 370
8. George S. Johnson	2	$ 176
9. Elton A. Burkey	1	$ 100
10. Bernard A. Cratty	1	$ 168
11. Patricia A. Danisinka	1	$ 130
12. Peter B. Dublin	1	$ 100
13. Sidney H. Geller	1	$ 110
14. Thomas P. Kapatais	1	$ 250
15. Errol K. Paine	1	$ 800
16. Alan C. Sherman	1	$ 511
17. Burton G. Shiro	1	$ 200
18. Wathen & Wathen	1	$ 75
19. Peter M. Weatherbee	1	$ 225
20. Carl R. Wright	1	$ 400

SOMERSET SUPERIOR COURT (1972)

Number of assignments: 42
Total compensation: $6192

Attorney	Assignments	Compensation
1. Donald E. Eames	8	$ 905
2. W. Philip Hamilton	8	$ 947
3. George W. Perkins	7	$2105
4. Elton A. Burkey	5	$ 435
5. James MacMichael	4	$ 425
6. Charles Veilleux	3	$ 225
7. Alan C. Sherman	2	$ 225
8. Burton G. Shiro	2	$ 200
9. Morton A. Brody	1	$ 200
10. Errol K. Paine	1	$ 200
11. Carl R. Wright	1	$ 325

BELFAST DISTRICT COURT

Number of assignments: 45
Total compensation: $2265

Attorney	Cases	Compensation
1. F. Frederick Romanow, Jr.	28	$1460
2. Paul L. Hazard	10	$ 470
3. Stanley W. Brown	4	$ 185
4. Thomas W. Hammond, III	2	$ 100
5. Richard M. Dostie	1	$ 50

WALDO SUPERIOR COURT

Number of Assignments: 20
Total compensation: $4550

Attorney	Assignments	Compensation
1. Paul L. Hazard	6	$ 825
2. F. Frederick Romanow, Jr.	6	$ 700
3. Richard M. Dostie	2	$ 375
4. Stanley W. Brown	1	$ 100
5. Garth K. Chandler	1	$ 75
6. Marvin H. Glazier	1	$ 50
7. Thomas W. Hammond, III	1	$ 75
8. Francis C. Marsano	1	$2000
9. Marshall A. Stern	1	$ 350

WALDO SUPERIOR COURT (1972)

Number of assignments: 40
Total compensation: $9859

Attorney	Assignments	Compensation
1. Thomas W. Hammond, III	13	$2139
2. John H. Fallon	10	$3898
3. Paul L. Hazard	8	$1225
4. Stanley W. Brown	5	$1200
5. Norman C. Bourget	1	$ 386
6. Robert J. Daviau	1	$ 361
7. John E. Harrington	1	$ 300
8. Francis C. Marsano	1	$ 350

CALAIS DISTRICT COURT

Number of assignments: 74
Total compensation: $3475

Attorney	Cases	Compensation
1. Robert E. Tibbetts	42	$1970
2. John P. Foster	26	$1205
3. Oscar L. Whalen	3	$ 150
4. David J. Fletcher	2	$ 100
5. Frank Hickey	1	$ 50

MACHIAS DISTRICT COURT

Number of assignments: 40
Total compensation: $1865

Attorney	Cases	Compensation
1. Francis J. Hallissey	18	$ 870
2. Peter K. Mason	8	$ 370
3. William Simons	6	$ 300
4. Gerald E. McDonald	5	$ 175
5. John P. Foster	1	$ 50
6. William Talbot	1	$ 50
7. Oscar L. Whalen	1	$ 50

WASHINGTON SUPERIOR COURT

Number of assignments: 37
Total compensation: $4199

Attorney	Assignments	Compensation
1. Robert E. Tibbetts	20	$1616
2. Francis J. Hallissey	3	$ 275
3. William Simons	3	$ 472
4. John P. Foster	2	$ 125
5. Peter K. Mason	2	$ 378
6. Marshall A. Stern	2	$ 200
7. Charles F. Washburn	2	$ 375
8. Alan D. Graves	1	$ 551
9. Frank Hickey	1	$ 132
10. William Talbot	1	$ 75

WASHINGTON SUPERIOR COURT (1972)

Number of assignments: 36
Total compensation: $6018

Attorney	Assignments	Compensation
1. Robert E. Tibbetts	19	$2973
2. Peter K. Mason	4	$ 300
3. William Talbot	4	$ 625
4. Oscar L. Whalen	4	$ 300
5. David Fletcher	1	$ 265
6. Francis J. Hallissey	1	$ 230
7. Gerald E. McDonald	1	$ 250
8. Marshall A. Stern	1	$ 75
9. Frederick Ward	1	$1000

SACO DISTRICT COURT

Number of assignments: 127
Total compensation: $6345

Attorney	Cases	Compensation
1. Philip E. Graves	45	$2190
2. Gerald E. Nason	18	$ 885

Attorney	Cases	Compensation
3. Ronald E. Ayotte	9	$ 450
4. Lloyd P. LaFountain	8	$ 370
5. George F. Wood	8	$ 400
6. Theophilus A. Fitanides	6	$ 300
7. Roger C. Nadeau	6	$ 300
8. Randall E. Smith	4	$ 200
9. John Evans Harrington, Jr.	3	$ 150
10. Charles W. Smith, Jr.	3	$ 200
11. Edward L. Caron, Jr.	2	$ 100
12. Bennett B. Fuller	2	$ 100
13. John J. Harvey	2	$ 100
14. Herschel Lerman	2	$ 100
15. Raoul E. Paradis	2	$ 100
16. Joseph P. Connellan	1	$ 50
17. Robert E. Crowley	1	$ 50
18. Roger P. Flaherty	1	$ 50
19. Roderick R. Rovzar	1	$ 50
20. Louis Spill	1	$ 100
21. Marcel R. Viger	1	$ 50
22. William F. Wilson, Jr.	1	$ 50

SANFORD DISTRICT COURT

Number of assignments: 101
Total compensation: $4950

Attorney	Cases	Compensation
1. Basil L. Kellis	31	$1615
2. Ronald D. Bourque	27	$1305
3. Roger P. Flaherty	27	$1275
4. J. Woodrow Vallely	5	$ 250
5. Robert S. Batchelder	2	$ 100
6. John J. Harvey	2	$ 85
7. Mary K. Brennan	1	$ 50
8. James H. Dineen	1	$ 50
9. Robert Fisher	1	$ 35
10. Theophilus A. Fitanides	1	$ 35
11. John Evans Harrington, Jr.	1	$ 50
12. Lloyd P. LaFountain	1	$ 50
13. George F. Wood	1	$ 50

KITTERY DISTRICT COURT

Number of assignments: 47
Total compensation: $2360

Attorney	Cases	Compensation
1. Duncan A. McEachern	15	$ 690
2. James M. Dineen	8	$ 385
3. James J. Fitzpatrick	6	$ 300
4. Francis P. Daughan	3	$ 200
5. James H. Dineen	3	$ 135
6. John N. Winiarski	3	$ 150
7. Roger P. Flaherty	2	$ 100
8. Patrick Veilleux	2	$ 100
9. William C. Handerson	1	$ 50
10. Basil L. Kellis	1	$ 50
11. Charles W. Smith, Jr.	1	$ 100
12. Nicholas S. Strater	1	$ 50
13. George F. Wood	1	$ 50

YORK SUPERIOR COURT

Number of assignments: 68
Total compensation: $22,502

Attorney	Assignments	Compensation
1. Roger P. Flaherty	9	$3350
2. Philip E. Graves	9	$ 575
3. James M. Dineen	4	$ 600
4. Basil L. Kellis	4	$3600
5. Ronald E. Ayotte	3	$ 700
6. Ronald D. Bourque	3	$ 250
7. Theophilus A. Fitanides	3	$ 506
8. Bennett B. Fuller, II	3	$ 350
9. George F. Wood	3	$3400
10. Mary K. Brennan	2	$1882
11. James J. Fitzpatrick	2	$ 350
12. Gerald C. Nason	2	$ 175
13. Alan S. Nelson	2	$ 300
14. Patrick Veilleux	2	$ 478
15. Marcel R. Viger	2	$1581
16. William F. Wilson, Jr.	2	$ 325
17. Bruce W. Bergen	1	$ 75
18. Edward L. Caron, Jr.	1	$ 100
19. Robert N. Cyr	1	$ 450
20. Francis P. Daughan	1	$ 100
21. John Evans Harrington, Jr.	1	$ 600
22. John J. Harvey	1	$ 300
23. William C. Henderson	1	$ 250
24. Lloyd P. LaFountain	1	$ 200
25. J. P. Nadeau	1	$1500
26. Raoul E. Paradis	1	$ 125
27. Roderick R. Rovzar	1	$ 75
28. Louis Spill	1	$ 230
29. J. Woodrow Vallely	1	$ 75

APPENDIX B

ATTORNEYS WITH MOST DISTRICT COURT ASSIGNMENTS*

Attorney	Cases	Compensation
1. Philip E. Graves	45	$2190
2. Robert E. Tibbetts	42	$1970
3. Gaston M. Dumais	36	$1825
4. Marvin H. Glazier	35	$1831
5. Richard S. Emerson, Jr.	34	$1700
6. Basil L. Kellis	32	$1665
7. Franklin F. Stearns, Jr.	32	$1585
8. Roger P. Flaherty	30	$1425
9. J. Michael Conley, III	29	$1285
10. Maurice Davis	29	$1405
11. Bennett B. Fuller, II	29	$1435
12. Theodore Barris	28	$1370
13. John F. Logan	28	$1265
14. F. Frederick Romanow, Jr.	28	$1460
15. Ronald D. Bourque	27	$1305
16. John P. Foster	27	$1255
17. Norman C. Bourget	26	$1270
18. John D. Griffin	26	$1300
19. Richard Edwards	25	$1220
20. Joseph P. Connellan	23	$1135
21. Philip K. Jordan	23	$1130
22. Janice M. Lynch	23	$1060
23. Paul R. Dumas, Jr.	22	$1125
24. John S. Edwards	22	$1100
25. Morton A. Brody	21	$1078
26. Edward W. Rogers	21	$1051
27. Cushman D. Anthony	20	$ 985
28. Daniel R. Donovan	20	$ 985
29. George Milliken	20	$1000
30. Albert C. Boothby, Jr.	19	$ 950
31. Edward T. Devine	19	$ 935
32. Robert H. Page	19	$ 935
33. Frank H. Bishop	18	$ 855
34. Michael E. Goodman	18	$ 870
35. Francis J. Hallisey	18	$ 870
36. Frank Hickey	18	$ 885
37. Adrian G. McCarron	18	$ 885
38. Edward B. Miller	18	$ 885
39. Gerald C. Nason	18	$ 885
40. Robert E. Noonan	18	$ 885

*This table does not include assignments for involuntary hospitalization hearings in Augusta and Bangor.

ATTORNEYS WITH MOST SUPERIOR COURT ASSIGNMENTS

Attorney	Assignments	Compensation
1. Marshall A. Stern	23	$6981
2. Norman C. Bourget	21	$4875
3. Maurice Davis	20	$2725
4. Robert E. Tibbetts	20	$1616
5. Franklin F. Stearns, Jr.	18*	$2751
6. Alan C. Sherman	17	$4566
7. Gaston M. Dumais	16	$1700
8. Bennett B. Fuller, II	15	$1750
9. Marvin H. Glazier	15	$4479
10. Alexander A. MacNichol	14	$2300
11. John F. Logan	13	$1967
12. James R. Austin	12	$1400
13. Theodore Barris	12	$1700
14. Sumner Lipman (Lipman & Gingras)	12	$1920
15. Daniel J. Murphy	12	$1805
16. Richard G. Sawyer (Sawyer & Sawyer)	12	$1530
17. George W. Perkins	11	$2346
18. Joseph L. Ferris	10	$1215
19. Edward B. Miller	10	$1910
20. Paul P. Murphy	10	$1920
21. Errol K. Paine	10	$4740

*Includes one murder appeal.

BREAKDOWN OF SUPERIOR COURT ASSIGNMENTS BY TYPE OF CASE

Type of Case	Androscoggin Superior Court Number of Cases	% of Caseload	Aroostook Superior Court Number of Cases	% of Caseload
Felony	70	85.4%	65	83.3%
Misdemeanor	3	3.7%	11	14.1%
Traffic	1	1.2%	0	0.0%
Juvenile	2	2.4%	1	1.3%
Miscellaneous	6	7.3%	1	1.3%
Unknown	4			

Type of Case	Cumberland Superior Court Number of Cases	% of Caseload	Franklin Superior Court Number of Cases	% of Caseload
Felony	194	81.9%	14	58.3%
Misdemeanor	12	4.9%	2	8.3%
Traffic	6	2.5%	4	16.7%
Juvenile	6	2.5%	0	0.0%
Miscellaneous	19	8.0%	4	16.7%
Co-counsel	1			
Unknown	6			

Type of Case	Hancock Superior Court Number of Cases	% of Caseload	Kennebec Superior Court Number of Cases	% of Caseload
Felony	13	72.2%	108	78.3%
Misdemeanor	3	16.7%	7	5.1%
Traffic	1	5.6%	4	2.9%
Juvenile	0	0.0%	1	0.7%
Miscellaneous	1	5.6%	18	13.0%
Co-counsel	1			
Replacement Counsel			1	
Unknown	1		2	

Type of Case	Knox Superior Court Number of Cases	% of Caseload	Lincoln Superior Court Number of Cases	% of Caseload
Felony	30	75.0%	12	52.2%
Misdemeanor	7	17.5%	8	34.8%
Traffic	1	2.5%	1	4.3%
Juvenile	1	2.5%	0	0.0%
Miscellaneous	1	2.5%	2	8.7%

Type of Case	Oxford Superior Court Number of Cases	% of Caseload	Penobscot Superior Court Number of Cases	% of Caseload
Felony	26	76.5%	141	80.1%
Misdemeanor	6	17.6%	16	9.1%
Traffic	1	2.9%	3	1.7%
Juvenile	1	2.9%	4	2.3%
Miscellaneous	0	0.0%	12	6.8%
Co-counsel	1		4	
Replacement Counsel			2	
Unknown	1			

Type of Case	Piscataquis Superior Court Number of Cases	% of Caseload	Sagadahoc Superior Court Number of Cases	% of Caseload
Felony	7	50.0%	13	76.5%
Misdemeanor	3	21.4%	0	0.0%
Traffic	1	7.1%	2	11.8%
Juvenile	0	0.0%	0	0.0%
Miscellaneous	3	21.4%	2	11.8%

Type of Case	Somerset Superior Court Number of Cases	% of Caseload	Waldo Superior Court Number of Cases	% of Caseload
Felony	35	74.5%	9	45.0%
Misdemeanor	3	6.4%	2	10.0%
Traffic	4	8.5%	1	5.0%
Juvenile	2	4.3%	4	20.0%
Miscellaneous	3	6.4%	4	20.0%

Type of Case	Washington Superior Court Number of Cases	% of Caseload	York Superior Court Number of Cases	% of Caseload
Felony	21	58.3%	43	64.2%
Misdemeanor	0	0.0%	9	13.4%
Traffic	1	2.8%	4	6.0%
Juvenile	12	33.3%	10	14.9%
Miscellaneous	2	5.6%	1	1.5%
Co-counsel			1	

Discussion of Breakdown of Assignments

Although the above tables appear self-explanatory, it is interesting to note that two superior courts, Washington and York, had a comparatively high number of juvenile appeals. Together, they accounted for 50 percent of the statewide total.

These tribunals share another characteristic, in that they are both fed by a district court in which an extremely large percentage of the caseload was assigned to one practitioner. Furthermore, these practitioners were responsible for the vast majority of juvenile appeals. In Washington County, the same attorney handled all 12 of these cases, whereas in York County, one lawyer represented eight of the ten juveniles in superior court. Accordingly, there seems to be a correlation between the existence of a high volume practitioner and the incidence of juvenile appeals.

APPENDIX E

BREAKDOWN OF DISTRICT COURT CASELOAD BY OFFENSE*
(For the sampled district courts only)

Felony Offenses	Number of Cases
1. Burglary; Breaking and entering (17 MRSA 751, 754, 2103)	148
2. Grand larceny (17 MRSA 2101)	6
3. Embezzlement (17 MRSA 2107, 2101)	2
4. Larceny from the person (17 MRSA 2102)	2
5. Receiving, concealing, or possession of stolen property (17 MRSA 3746)	9
6. Forgery or uttering (17 MRSA 1501)	18
7. Cheating by false pretenses (17 MRSA 1601)	14
8. Murder (17 MRSA 2651)	7
9. Manslaughter (17 MRSA 2551)	1
10. Recklessly causing death (29 MRSA 1315)	1
11. Rape (17 MRSA 3151)	3
12. Robbery (17 MRSA 3401)	9
13. Armed robbery (17 MRSA 3401-A)	5
14. Assault with intent to murder (17 MRSA 2656)	2
15. Assault with intent to rape (17 MRSA 3153)	4
16. Aggravated assault and battery (17 MRSA 201)	25
17. Assault with a firearm (17 MRSA 201-A)	10
18. Kidnapping (17 MRSA 2051)	3
19. Sale, furnishing, or possession of barbiturates or potent medicinal substances; possession or furnishing of amphetamines (22 MRSA 2210, 2215)	9
20. Sale of amphetamines (22 MRSA 2210A, 2215)	1
21. Possession of hallucinogenic drugs (22 MRSA 2212-B)	2
22. Possession or sale of hypodermic syringe (22 MRSA 2362-A)	4
23. Sale or furnishing of cannabis (22 MRSA 2384)	13
24. Arson (1st, 2nd, and 3rd degree) (17 MRSA 161, 162, 163)	6
25. Sodomy (17 MRSA 1001)	2
26. Incest (17 MRSA 1851)	3
27. Indecent liberties (17 MRSA 1951)	6
28. Threatening communications (17 MRSA 3701)	16
29. False bomb report (17 MRSA 504)	3
30. Escape from jail (17 MRSA 1405)	1
31. Possession of firearm by a felon (15 MRSA 393)	1
32. Conspiracy (17 MRSA 951)	4

Misdemeanor and Traffic Offenses	
1. Trespass offenses (17 MRSA Ch. 127 generally)	10
2. Petty larceny (17 MRSA 2101)	56
3. Concealment (shoplifting) (17 MRSA 3501)	6
4. Using motor vehicle without consent (29 MRSA 900)	19

Misdemeanor and Traffic Offenses - cont'd	No. of Cases
5. Fraudulent check (insufficient funds) (17 MRSA 1605)	5
6. Unlawfully obtaining unemployment benefits (26 MRSA 1051)	1
7. Defrauding an innkeeper (30 MRSA 2701)	1
8. Shooting or killing a human being while hunting (12 MRSA 2953)	1
9. Simple assault and battery (17 MRSA 201)	29
10. Possession of cannabis (22 MRSA 2383 (1))	34
11. Being present where cannabis is kept (22 MRSA 2383 (2))	10
12. Inhaling toxic vapor (17 MRSA 3475, 3476)	2
13. Arson (4th degree) (17 MRSA 164)	1
14. Malicious mischief (17 MRSA Ch. 83 generally)	19
15. Tampering with a motor vehicle (17 MRSA 2493)	1
16. Indecent exposure (17 MRSA 1901)	2
17. Annoying telephone calls (17 MRSA 3704)	1
18. False alarm (17 MRSA 3958)	2
19. Libel (17 MRSA 2201)	2
20. Possession of obscene literature (17 MRSA 2901)	1
21. Resisting apprehension or breaking arrest (17 MRSA 1405)	7
22. Interfering with an officer; assault on an officer (17 MRSA 2952)	7
23. Contributing to delinquency of a minor (17 MRSA 859)	6
24. Selling or giving intoxicating liquor to a minor (17 MRSA 856)	2
25. Neglect or non-support of a child (19 MRSA 481)	2
26. Cruelty to children (19 MRSA 218)	1
27. Carrying concealed weapon (25 MRSA 2031)	3
28. Possession of dangerous knife (17 MRSA 3952)	2
29. Intoxication (17 MRSA 2001)	3
30. Begging (17 MRSA 3751)	1
31. Lascivious speech (17 MRSA 3758)	1
32. Disorderly conduct (17 MRSA 3953)	21
33. Disturbance of public meeting (17 MRSA 3954)	1
34. Malicious injury to domestic animals (17 MRSA 1092)	2
35. Night hunting (12 MRSA 2455)	3
36. Hunting deer in closed season (22 MRSA 2353)	1
37. Operating under the influence (29 MRSA 1312)	25
38. Operating after suspension (29 MRSA 2184)	18
39. Other traffic offenses	11

Other Cases	No. of Cases
1. Revocation of probation (34 MRSA 1633)	3
2. Fugitive from justice hearing (15 MRSA Ch. 9)	8
3. Civil cases (e.g., protective custody)	7
4. Juvenile offenses	201
5. Co-counsel appointments	1
6. Unknown	14

*Cases involving more than one offense are classified according to the most serious offense charged. The courts included in the sample are Caribou, Van Buren, Madawaska, Fort Kent, Presque Isle, Houlton, Bangor, Newport, Rockland, Saco, and Farmington.

BREAKDOWN OF SUPERIOR COURT CASELOAD BY OFFENSE*

Felony Offenses	Number of Cases
1. Burglary; Breaking and entering (17 MRSA 751, 754, 2103)	273
2. Grand larceny (17 MRSA 2101)	36
3. Embezzlement (17 MRSA 2107, 2101)	2
4. Larceny from the person (17 MRSA 2102)	6
5. Receiving, concealing, or possession of stolen property (17 MRSA 3746)	26
6. Forgery or uttering (17 MRSA 1501)	71
7. Cheating by false pretenses (17 MRSA 1601)	14
8. Perjury (17 MRSA 3001)	3
9. Murder (17 MRSA 2651)	17
10. Manslaughter (17 MRSA 2551)	6
11. Armed manslaughter (17 MRSA 2551-A)	1
12. Recklessly causing death (29 MRSA 1315)	2
13. Rape (17 MRSA 3151)	11
14. Armed rape (17 MRSA 3151-A)	1
15. Robbery (17 MRSA 3401)	39
16. Armed robbery (17 MRSA 3401-A)	8
17. Assault with intent to murder (17 MRSA 2656)	10
18. Assault with intent to rape (17 MRSA 3153)	3
19. Aggravated assault and battery (17 MRSA 201)	44
20. Assault with a firearm (17 MRSA 201-A)	18
21. Assault with intent to rob (17 MRSA 3402)	1
22. Kidnapping (17 MRSA 2051)	4
23. Concealing and disposing of a human body (17 MRSA 1251)	2
24. Deposit of a bomb (17 MRSA 3402)	3
25. Sale, furnishing, or possession of barbiturates or potent medicinal substances; possession or furnishing of amphetamines (22 MRSA 2210, 2215)	19
26. Sale of amphetamines (22 MRSA 2210A, 2215)	10
27. Possession of hallucinogenic drugs (22 MRSA 2212-B)	3
28. Furnishing of hallucinogenic drugs (22 MRSA 2212-C)	1
29. Sale of hallucinogenic drugs (22 MRSA 2212-E)	17
30. Possession of narcotic drugs (22 MRSA 2362)	1
31. Sale of narcotic drugs (22 MRSA 2362-C)	4
32. Possession or sale of hypodermic syringe (22 MRSA 2362-A)	11
33. Sale or furnishing of cannabis (22 MRSA 2384)	28
34. Arson (1st, 2nd, and 3rd degree) (17 MRSA 161, 162, 163)	20
35. Injury to public and utility properties (17 MRSA 2351)	1
36. Sodomy (17 MRSA 1001)	4
37. Incest (17 MRSA 1851)	5

Felony Offenses, cont'd	Number of Cases
38. Indecent liberties (17 MRSA 1951)	8
39. Carnal knowledge (17 MRSA 3152)	3
40. Threatening communications (17 MRSA 3701)	15
41. False bomb report (17 MRSA 504)	1
42. Escape from jail; escape from furlough (17 MRSA 1405; 34 MRSA 527)	23
43. Aiding an escapee (17 MRSA 1404)	2
44. Bringing contraband into prison (34 MRSA 755)	1
45. Possession of firearm by a felon (15 MRSA 393)	3
46. Bookmaking (17 MRSA 1801)	1
47. Conspiracy (17 MRSA 951)	18
48. Habitual offender indictment	1

Misdemeanor and Traffic Offenses	
1. Trespass offenses (17 MRSA Ch. 127 generally)	3
2. Petty larceny (17 MRSA 2101)	10
3. Using motor vehicle without consent (29 MRSA 900)	5
4. Fraudulent check (insufficient funds) (17 MRSA 1605)	3
5. Simple assault and battery (17 MRSA 201)	18
6. Possession of cannabis (22 MRSA 2383 (1))	15
7. Being present where cannabis is kept (22 MRSA 2383 (2))	6
8. Arson (4th degree) (17 MRSA 164)	1
9. Malicious mischief (17 MRSA Ch. 83 generally)	3
10. Tampering with motor vehicle (17 MRSA 2493)	1
11. Resisting apprehension or breaking arrest (17 MRSA 1405)	4
12. Interfering with an officer; assault on an officer (17 MRSA 2952)	6
13. Carrying concealed weapon (25 MRSA 2031)	1
14. Intoxication (17 MRSA 2001)	1
15. Begging (17 MRSA 3751)	1
16. Disorderly conduct (17 MRSA 3953)	7
17. Night hunting (12 MRSA 2455)	3
18. Other minor hunting offenses	3
19. Death by violation of law (29 MRSA 1316)	1
20. Operating under the influence (29 MRSA 1312)	24
21. Operating after suspension (29 MRSA 2184)	5
22. Other traffic offenses	6

Other Cases	Number of Cases
1. Contempt; failure to appear as a witness	2
2. Revocation of probation (34 MRSA 1633)	34
3. Petition for release from State Hospital (15 MRSA 104)	14

Other Cases, cont'd	Number of Cases
4. Appeal to law court (murder cases)	4
5. Post-trial and other motions; bail hearing; non-payment of fine; habeas corpus	14
6. Representation of witness; immunity hearing	6
7. Civil cases (e.g., protective custody)	5
8. Juvenile appeals	44
9. Co-counsel and replacement counsel appointments	11
10. Unknown	15

*Cases involving more than one offense are classified according to the most serious offense charged.

ASSIGNED COUNSEL SUPERIOR COURT DISPOSITION DATA

The following tables contain disposition data for assigned counsel cases in each superior court, except those located in Aroostook and York Counties. Given the problems inherent in classifying the results of criminal cases, some explanatory notes appear necessary.

1. Time frame: Unless otherwise indicated, the tables include those cases for which counsel were compensated in 1973.

2. Types of cases: The disposition data is for felony, misdemeanor, and traffic offenses. Other assignments, such as in juvenile matters or probation hearings, are placed in the "Not relevant" category.

3. Plea to reduced charge(s): Apart from the obvious cases, this category also contains multiple offense cases in which the defendant did not plead to any of the original charges, but rather to one or more reduced charges. Thus, in a case with two offenses, if the accused pled to one reduced charge while both of the original offenses were dismissed, the case would be included in this category.

4. Trials: The disposition data is computed by defendants and not by trials. Accordingly, one trial involving three defendants would be counted as three cases. (Cf. Total number of trials).

5. Trials: A case is included in one of these categories only if the trial occurred during the time period covered by the assigned attorney's bill. One example is the situation in which there has been a trial resulting in a guilty verdict, reversed by the Law Court, and a subsequent plea by the defendant. Since the bill submitted by the attorney in 1973 would presumably be for services rendered after the Law Court reversal, the case would be categorized as a plea.

6. Trials: These categories include cases in which a trial has commenced and has been terminated either by a verdict, a motion for a directed verdict, or a defense motion to dismiss. They do not contain cases in which the charges were dismissed by the prosecution or pled to by the defendant after the trial had begun.

7. Trials: By necessity, these categories encompass trial dispositions subsequently appealed to the Law Court.

8. Total number of trials: In contrast with the disposition data, this item is computed by trial and not by defendant. Thus, a single court proceeding involving three defendants would be counted as one trial.

ANDROSCOGGIN SUPERIOR COURT

Disposition	# of Cases	% of Caseload
Plea to original charge(s)	32	47.1%
Plea to reduced charge(s)	6	8.8%
Plea to at least one charge; at least one charge dismissed, filed, or reduced.	12	17.6%
Charge(s) dismissed or filed	11	16.2%
Jury trial: guilty of original charge(s)	6	8.8%
Jury trial: acquittal	1	1.5%
Unknown	10	
Not relevant.	8	
Total number of jury trials	7	
Total number of bench trials	0	

CUMBERLAND SUPERIOR COURT

Disposition	# of Cases	% of Caseload
Plea to original charge(s)	96	45.5%
Plea to reduced charge(s)	29	13.7%
Plea to at least one charge; at least one charge dismissed, filed, or reduced.	23	10.9%
Charge(s) dismissed or filed	31	14.7%
Jury trial: guilty of original charge(s)	12	5.7%
Jury trial: guilty of lesser included offense	1	.5%
Jury trial: guilty of one charge; hung jury on one charge	1	.5%

Disposition	# of Cases	% of Caseload
Jury trial: mistrial	1	.5%
Jury trial: acquittal	4	1.9%
Bench trial: guilty of original charge(s)	6	2.8%
Bench trial: acquittal	7	3.3%
Unknown	4	
Not relevant	27	
Total number of jury trials	18	
Total number of bench trials	13	

FRANKLIN SUPERIOR COURT
(1973 & 1972)

Disposition	# of Cases	% of Caseload
Plea to original charge(s)	24	51.1%
Plea to reduced charge(s)	4	8.5%
Plea to at least one charge; at least one charge dismissed, filed, or reduced	7	14.9%
Charge(s) dismissed or filed	4	8.5%
Jury trial: guilty of original charge(s)	3	6.4%
Bench trial: guilty of at least one charge; acquittal on at least one charge	1	2.1%
Bench trial: acquittal	4	8.5%
Not relevant	5	
Total number of jury trials	3	
Total number of bench trials	3	

HANCOCK SUPERIOR COURT
(1973 & 1972)

Disposition	# of Cases	% of Caseload
Plea to original charge(s)	8	27.6%
Plea to at least one charge; at least one charge dismissed, filed, or reduced	9	31.0%
Charge(s) dismissed or filed	6	20.7%
Jury trial: guilty of original charge(s)	4	13.8%
Jury trial; guilty of lesser included offense	1	3.4%
Bench trial: guilty of original charge(s)	1	3.4%
Not relevant	6	
Total number of jury trials	5	
Total number of bench trials	1	

KENNEBEC SUPERIOR COURT

Disposition	# of Cases	% of Caseload
Plea to original charge(s)	51	43.6%
Plea to reduced charge(s)	12	10.3%
Plea to at least one charge; at least one charge dismissed, filed, or reduced	10	8.5%
Charge(s) dismissed or filed	15	12.8%
Jury trial: guilty of original charge(s)	16	13.7%
Jury trial: guilty of at least one charge; acquittal on at least one charge	1	.9%
Jury trial: guilty but reversed by Law Court	1	.9%

Disposition	# of Cases	% of Caseload
Jury trial: acquittal	4	3.4%
Bench trial: guilty of original charge(s)	3	2.6%
Bench trial: guilty of at least one charge; acquittal on at least one charge	1	.9%
Bench trial: acquittal	3	2.6%
Defendant found mentally incompetent to stand trial	2	
Unknown	3	
Not relevant	18	
Total number of jury trials	18	
Total number of bench trials	7	

KNOX SUPERIOR COURT
(1973 & 1972)

Disposition	# of Cases	% of Caseload
Plea to original charge(s)	38	52.8%
Plea to at least one charge; at least one charge dismissed, filed, or reduced	6	8.3%
Charge(s) dismissed or filed	9	12.5%
Jury trial: guilty of original charge(s)*	5	6.9%
Jury trial: acquittal	3	4.2%
Bench trial: guilty of original charge(s)	6	8.3%
Bench trial: guilty of at least one charge; acquittal on at least one charge	1	1.4%

Disposition	# of Cases	% of Caseload
Bench trial: acquittal	4	5.6%
Not relevant	8	
Total number of jury trials	6	
Total number of bench trials	11	

*There was also one jury trial in which the defendant proceeded pro se, but an attorney was appointed to sit with him and render assistance when requested. The disposition of the case, a guilty verdict, is not included in the above table.

LINCOLN SUPERIOR COURT
(1973 & 1972)

Disposition	# of Cases	% of Caseload
Plea to original charge(s)	20	46.5%
Plea to reduced charge(s)	7	16.3%
Plea to at least one charge; at least one charge dismissed, filed, or reduced	4	9.3%
Charge(s) dismissed or filed	4	9.3%
Jury trial: guilty of original charge(s)	4	9.3%
Jury trial: acquittal	3	7.0%
Bench trial: guilty of original charge(s)	1	2.3%
Not relevant	5	
Total number of jury trials	7	
Total number of bench trials	1	

OXFORD SUPERIOR COURT
(1973 & 1972)

Disposition	# of Cases	% of Caseload
Plea to original charge(s)	12	20.0%
Plea to reduced charge(s)	11	18.3%
Plea to at least one charge; at least one charge dismissed, filed, or reduced	10	16.7%
Charge(s) dismissed or filed	11	18.3%
Jury trial: guilty of original charge(s)	4	6.7%
Jury trial: guilty of lesser included offense	2	3.3%
Jury trial: acquittal	2	3.3%
Bench trial: guilty of original charge(s)	4	6.7%
Bench trial: acquittal	4	6.7%
Unknown	1	
Not relevant	2	
Total number of jury trials	6	
Total number of bench trials	6	

PENOBSCOT SUPERIOR COURT

Disposition	# of Cases	% of Caseload
Plea to original charge(s)	80	53.3%
Plea to reduced charge(s)	10	6.7%
Plea to at least one charge; at least one charge dismissed, filed, or reduced	12	8.0%
Charge(s) dismissed or filed	20	13.3%
Jury trial: guilty of original charge(s)	11	7.3%

Disposition	# of Cases	% of Caseload
Jury trial: acquittal	9	6.0%
Bench trial: guilty of original charge(s)	4	2.7%
Bench trial: acquittal	4	2.7%
Unknown	7	
Not relevant	18	
Total number of jury trials	19	
Total number of bench trials	8	

PISCATAQUIS SUPERIOR COURT
(1973 & 1972)

Disposition	# of Cases	% of Caseload
Plea to original charge(s)	11	45.8%
Plea to reduced charge(s)	1	4.2%
Plea to at least one charge; at least one charge dismissed, filed, or reduced	2	8.3%
Charge(s) dismissed or filed	7	29.2%
Jury trial: guilty of original charge(s)	1	4.2%
Jury trial: acquittal	1	4.2%
Bench trial: acquittal	1	4.2%
Not relevant	6	
Total number of jury trials*	2	
Total number of bench trials	1	

*One of these trials was held in Bangor as a result of a change of venue ordered by the Law Court.

SAGADAHOC SUPERIOR COURT
(1973 & 1972)

Disposition	# of Cases	% of Caseload
Plea to original charge(s)	5	27.8%
Plea to reduced charge(s)	1	5.6%
Plea to at least one charge; at least one charge dismissed, filed, or reduced	1	5.6%
Charge(s) dismissed or filed	2	11.0%
Jury trial: guilty of original charge(s)	2	11.0%
Jury trial: mistrial	1	5.6%
Jury trial: acquittal	5	27.8%
Bench trial: guilty of original charge(s)	1	5.6%
Unknown	2	
Not relevant	7	
Total number of jury trials	8	
Total number of bench trials	1	

SOMERSET SUPERIOR COURT
(1973 & 1972)

Disposition	# of Cases	% of Caseload
Plea to original charge(s)	24	34.2%
Plea to reduced charge(s)	8	11.0%
Plea to at least one charge; at least one charge dismissed, filed, or reduced	16	21.9%
Charge(s) dismissed or filed	13	17.8%
Jury trial: guilty of original charge(s)	4	5.5%

Disposition	# of Cases	% of Caseload
Jury trial: hung jury	2	2.7%
Jury trial: acquittal	5	6.8%
Bench trial: acquittal	1	1.4%
Unknown	3	
Not relevant	9	
Total number of jury trials	10	
Total number of bench trials	1	

WALDO SUPERIOR COURT
(1973 & 1972)

Disposition	# of Cases	% of Caseload
Plea to original charge(s)	16	36.4%
Plea to reduced charge(s)	3	6.8%
Plea to at least one charge; at least one charge dismissed, filed, or reduced	1	2.3%
Charge(s) dismissed or filed	7	15.9%
Jury trial: guilty of original charge(s)	4	9.1%
Jury trial: acquittal	3	6.8%
Bench trial: guilty of original charge(s)	1	2.3%
Bench trial: guilty of lesser included offense	5	11.4%
Bench trial: acquittal	4	9.1%
Not relevant	17	
Total number of jury trials	7	
Total number of bench trials	7	

WASHINGTON SUPERIOR COURT
(1973 & 1972)

Disposition	# of Cases	% of Caseload
Plea to original charge(s)	19	35.8%
Plea to reduced charge(s)	12	22.6%
Plea to at least one charge; at least one charge dismissed, filed, or reduced	8	15.1%
Charge(s) dismissed or filed	4	7.5%
Jury trial: guilty of original charge(s)	2	3.8%
Jury trial: guilty of lesser included offense	3	5.7%
Jury trial: acquittal	2	3.8%
Bench trial: guilty of original charge(s)	1	1.9%
Bench trial: guilty of lesser included offense	2	3.8%
Unknown	1	
Not relevant	19	
Total number of jury trials	5	
Total number of bench trials	3	