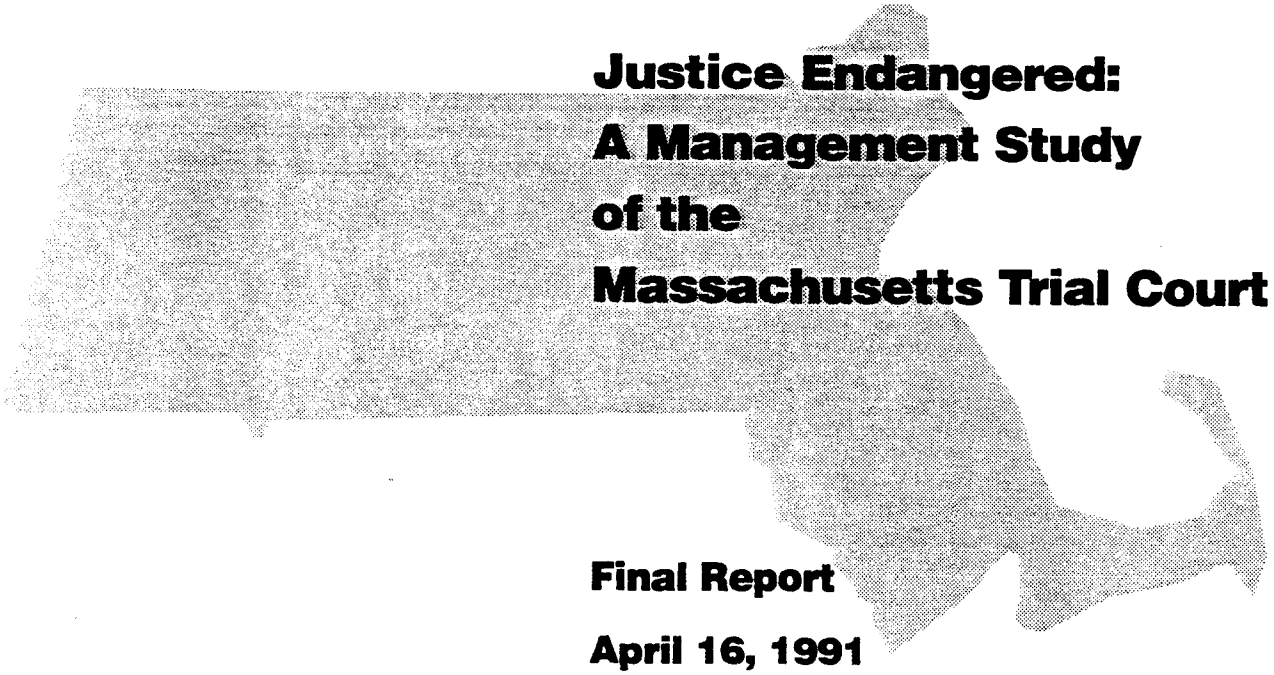

Justice Endangered: A Management Study of the Massachusetts Trial Court

Final Report

April 16, 1991

Prepared for the

Coalition for The Courts

by

HARBRIDGE HOUSE INC

Funding provided by
The Massachusetts Bar Foundation and
The Massachusetts Bar Association

HARBRIDGE HOUSE INC

Eleven Arlington Street, Boston, Massachusetts 02116. Telephone (617) 267-6410, Fax: (617) 424-0058

16 April 1991

Mr. Leo V. Boyle
Chairman, Coalition for the Courts
20 West Street
Boston, MA 02111

Dear Mr. Boyle:

Attached is the final Harbridge House report on the organization and administration of the Massachusetts State Trial Court system. As you know, our findings do not portray an encouraging picture regarding the effective and efficient delivery of justice in the Commonwealth.

Our report includes many specific recommendations for improving the structure, systems and administration of the Trial Court system. It is our hope that you and the other members of the Coalition for the Courts will approve and adopt the report in its entirety. After devoting over 1,700 hours to analyzing the court, we are convinced that our recommendations, taken as a whole, will have a material, lasting, and positive impact on the system.

The Coalition is making a significant contribution to the Commonwealth through the public spiritedness and dedication of its members. The consulting team at Harbridge House has been honored to work on your behalf. Please call on us if there anything else we can do.

Sincerely,

Daniel M. Kasper
Principal

Carol Colman
Senior Associate

Donald B. Roberts
Principal

:sr
Attachment

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LIST OF EXHIBITS

MEMBERS OF THE COALITION FOR THE COURTS

This report was prepared for the Coalition for the Courts. The members of the Coalition are:

- Leo V. Boyle, President, Massachusetts Bar Association, and Chairman of the Coalition
- Anthony J. Cerce, Partner, Regional Director of Tax, Ernst & Young, and Trustee, Massachusetts Taxpayers' Foundation
- Ronald Homer, President, Boston Bank of Commerce
- Elizabeth Marshall, League of Women Voters
- John M. Nelson, immediate past President and past Chief Executive Officer, Norton Company
- Risa Nyman, President, Massachusetts League of Women Voters
- Dr. Jeanne Taylor, Executive Director, Roxbury Comprehensive Community Health Care

EXECUTIVE SUMMARY

In 1976 the Governor's Committee on Judicial Needs (the Cox Commission) began its Report with the following diagnosis: "The administration of justice in Massachusetts stands on the brink of disaster." Now, more than 14 years later, we are saddened to report that the Trial Court of the Commonwealth is, once again, facing a major crisis. The Court is today riven by internal divisions and paralyzed by a lack of trust. In many respects, it is a system in name only, operating on automatic pilot and carried forward more by past momentum than by any compelling vision of the future.

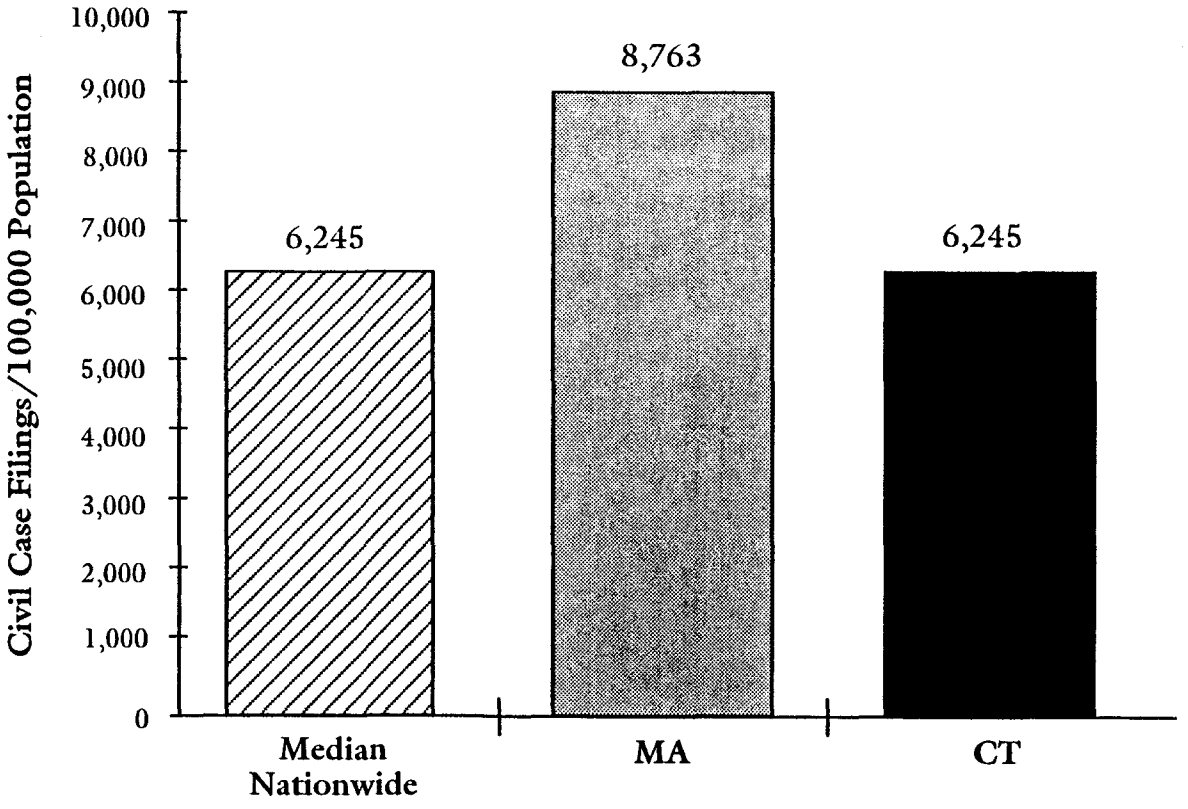
The present crisis exists despite substantial improvements in the administration of the courts since 1976 and notwithstanding the efforts of numerous court system employees, legislators, and others to make the court system work effectively, efficiently, and fairly. The Cox Commission identified a number of structural problems that inhibited effective management of the Trial Court. Like another, more famous road, however, the path from the Cox Commission Report to the present crisis is paved — at least in part — with good intentions.

In 1978 the Legislature responded to the Commission Report by enacting Chapter 478. Although the legislation adopted some of its recommendations, the legislature failed to adopt other, equally important recommendations. The legislation created a nominally unified Trial Court made up of seven separate court departments, but it also ignored a central Commission recommendation that the Trial Court operations be consolidated into two departments: one court of general jurisdiction and one of limited jurisdiction. The legislation allocated administrative responsibility over the entire Trial Court to the new Office of the Chief Administrative Justice (OCAJ) and to administrative offices in each of the Trial Court departments. The new structure in general, and the OCAJ in particular, have brought about significant improvements in the operation of the Trial Court system, particularly in the areas of financial management and controls and human resource management. Without some major changes brought about by the efforts of Chief Administrative Justice Arthur Mason and his staff, the Trial Court would have ground to a complete halt long ago.

Despite the efforts of the OCAJ, the problems currently plaguing the Trial Court make it clear that the 1978 legislation failed to resolve some fundamental problems facing the Trial Court. Although the trial court administrators must shoulder some of the blame for the present situation of the Trial Court, a number of the important contributing causes are simply beyond the ability of the court system to control. In particular, the Trial Court can control neither the increase in the number and complexity of cases filed before it nor the resources available to it.

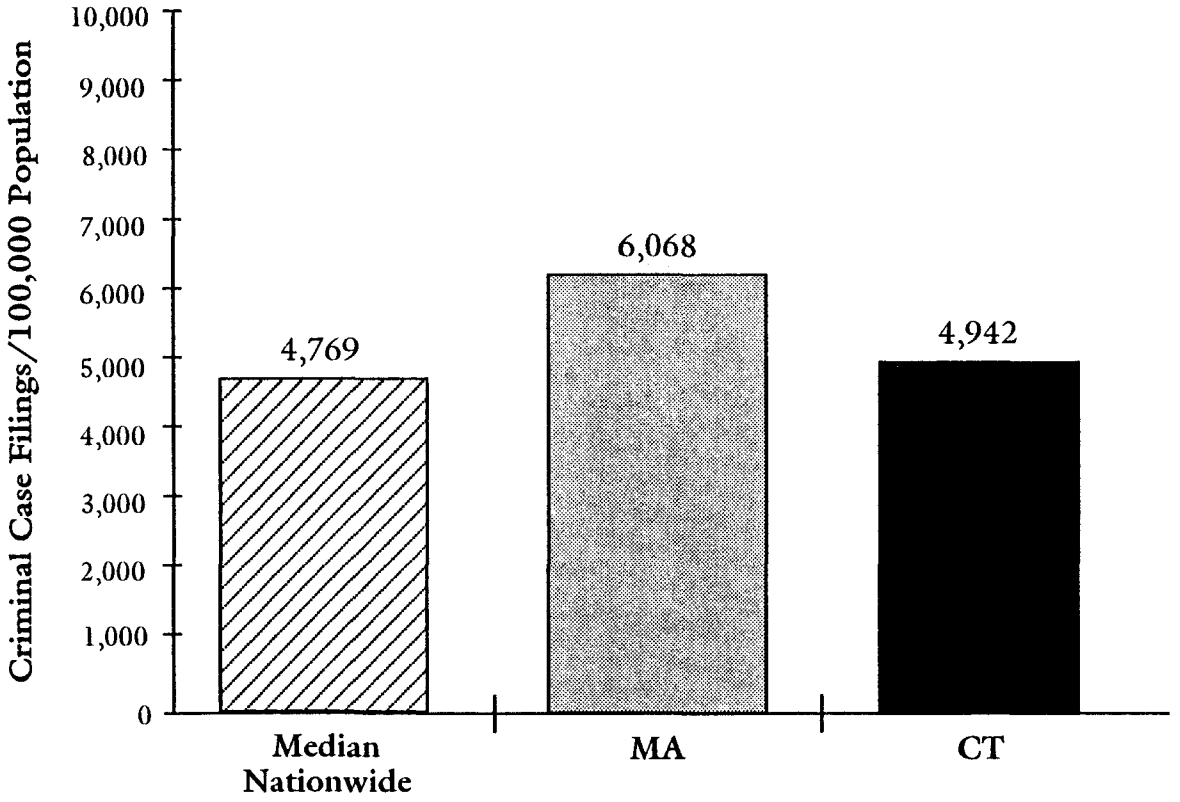
In comparison with other states, Massachusetts is a litigious state, which places large demands on a trial court system that has a disproportionately small number of trial judges (see Exhibits E-1 and E-2). Moreover, since the Cox Commission issued its findings, the jurisdiction of the Trial Court has been increased, particularly in areas that involve complex and emotionally charged issues and, hence, impose a large burden on the courts. For example, substantial changes in the Abuse Prevention Law, as well as the laws governing

Exhibit E-1
Comparative Statistics:
Civil Case Filings/Population
1988



Source: State Court Caseload Statistics Annual Report 1988, National Center for State Courts.

Exhibit E-2
Comparative Statistics:
Criminal Case Filings/Population
1988



Source: State Court Caseload Statistics Annual Report 1988, National Center for State Courts.

the trial and sentencing of drunk drivers, have added significantly to the Trial Court's workload. The Trial Court's burden has been further increased by mandatory annual reviews of children placed in foster care and the requirement of more detailed findings in divorce and child custody cases. Overall, the Commonwealth's commendable effort to protect juveniles have contributed to juvenile case filings per capita that exceed the national median by more than 70 percent (see Exhibit E-3). Compared to other states, however, Massachusetts ranks 48th in terms of trial court judges per capita (see Exhibit E-4).

Since the Trial Court can do little to affect either the external demands placed upon it or the resources available to it, when faced with an expanding caseload the Court must either improve its productivity or increase the delays experienced by litigants using the system.

Nonetheless, we believe it unlikely that additional resources will soon be made available to the courts. Given the Commonwealth's current financial condition and the decline in the public confidence in all branches of government, preserving the existing level of court funding should be considered a major achievement. We have thus assumed, for purposes of our analysis, that no additional funding will be available for the Trial Court in either the current or next fiscal year.

More important, we do not believe that additional resources alone can solve the most serious problems plaguing the courts because these problems do not result from a lack of resources. Unless these underlying problems are addressed, additional funding is unlikely to result in appreciable improvement in the functioning of the Trial Court.

We have found it useful to group the underlying problems of the trial courts into several broad categories described below.

PRINCIPAL FINDINGS

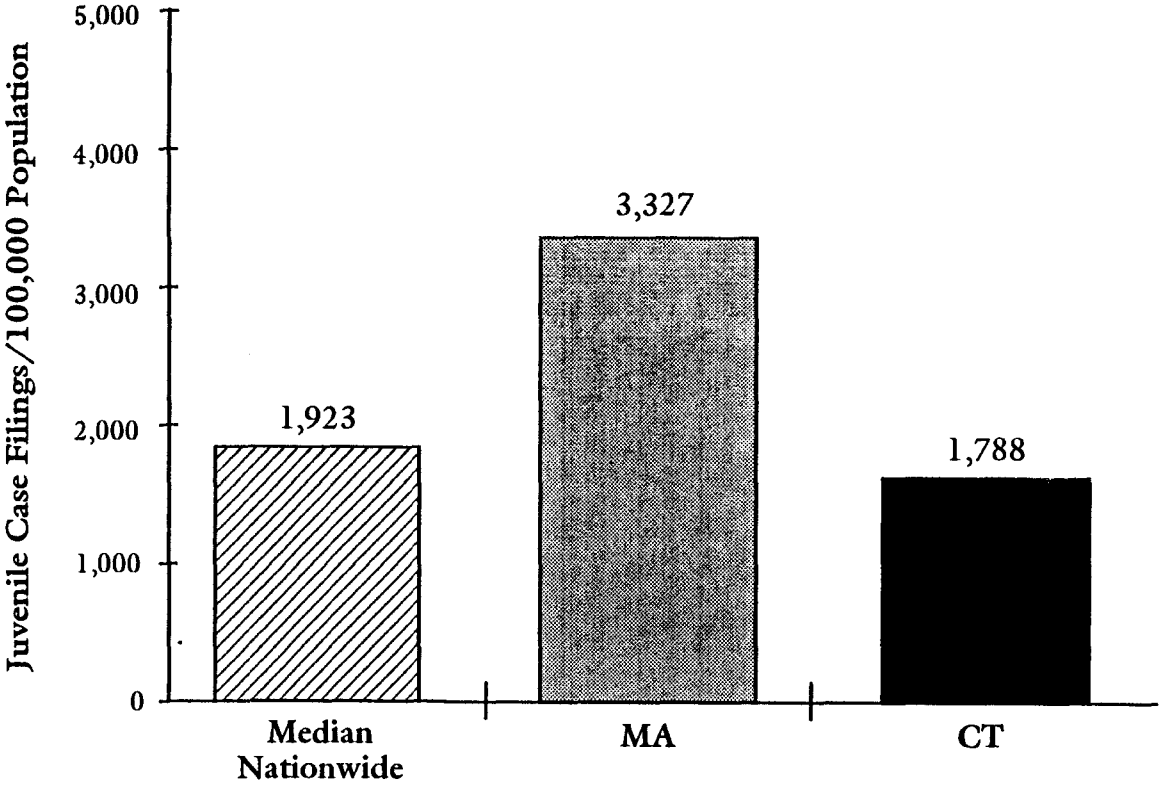
I. Organizational and Administrative Structure of the Trial Court

A. Efficient operation of the Trial Court is impaired by its existing fragmented and overly complex departmental structure.

Far from being the unified court envisioned by the Cox Commission, the Trial Court today bears more resemblance to a collection of medieval fiefdoms, each with its own rules and cultural norms, espousing varying degrees of fealty to the OCAJ. Overall, the departmental structure of the Trial Court promotes unnecessary administrative duplication, encourages wasteful administrative practices, and inhibits the effective utilization of both human and capital resources. It also encourages a "seven separate organizations" mentality that seriously impedes efforts to improve the functioning of the Trial Court.

The administrative duplication inherent in the current departmental structure of the Trial Court causes the deployment of a disproportionate share of its available personnel to back-office activities rather than "closer to the front" where they could be better utilized to assist judges, clerks, litigants, and lawyers in carrying out the real business

Exhibit E-3
Comparative Statistics:
Juvenile Case Filings/Population
1988



Source: State Court Caseload Statistics Annual Report 1988, National Center for State Courts.

of the courts. Elimination of duplicative administrative structures would permit the Trial Court to redeploy personnel to better serve the public and more efficiently conduct its business.

B. Administrative authority within the Trial Court is misallocated.

The aim of a court system should be to decide all matters committed to its jurisdiction justly, promptly, effectively, and efficiently. The process by which courts "produce" justice is, by nature, highly decentralized, with the key units of production dispersed throughout the Commonwealth. But there is also a need to maintain high quality, consistent justice throughout the entire system. Under such circumstances, the local managers should have substantial control over — and accountability for — local operations. At the same time, the need for consistent quality and the economies of scale attainable in certain functions (e.g., procurement) require some centralization. The critical question is which functions, activities, and responsibilities should be centralized and which should be decentralized.

Currently, management authority over Trial Court operations is too often placed at the wrong level with the result that the administration of the Trial Court is fundamentally inconsistent with sound management of the Court's decentralized "production process." Under M.G.L. Chapter 211, the Supreme Judicial Court (SJC) has the power of "general superintendence of all courts of inferior jurisdiction," but, at least in the area of administration, this power has remained largely unexercised. This result is unsurprising for several reasons. First, Supreme Judicial Court Justices have all been trained as lawyers, not as administrators, and were selected on the basis of legal rather than managerial skills. In addition, ambiguities resulting from the legislature's attempt to specify the allocation of administrative authority over Trial Court operations has reinforced the judicial tendency — on the part of both the SJC and the departmental Chief Administrative Justices — to avoid difficult administrative decisions. Finally, the legislature's retention of authority over certain key decisions that would, in other settings, be reserved to management precludes those responsible for managing the Trial Court from controlling significant aspects of the Court's operations.

Whether by design or default, administrative decision making in the Trial Court has too frequently been assigned to an inappropriate level of management, so that some decisions and activities that should be undertaken by a central administrative office are being carried out by individual courts while decisions that should be made at the individual court level are instead being made by the OCAJ. Examples of the latter problem can be found in a number of areas where the OCAJ currently exercises centralized control over a number of decisions that would be better made at the local courthouse level. The selection and retention of interpreters, or the use of masters, investigators, and psychiatrists, for example, are decisions that are more appropriately made by individual courts. Likewise, certain financial management practices adopted by the OCAJ also appear to have created a dysfunctional degree of centralization. Although Chapter 211 makes the Trial Court departmental Chief Administrative Justices responsible for "the administrative management of the personnel, staff services, and business of their departments, including financial administration and . . . purchasing . . .", in practice certain monies (e.g., travel, printing,

and postage) are controlled in centralized accounts by the OCAJ which must approve all expenditures. As a result, court operations are sometimes disrupted by a lack of funds to cover such basic necessities as postage or printing.

The procurement and implementation of computerized information technology systems illustrates another aspect of the misallocation problem — inappropriate allocation of authority below the level of the OCAJ. The ability of a central administrative staff to effectively coordinate and monitor the activities of a large, decentralized operation such as the Trial Court is critically dependent on access to reliable, consistent, and timely information. The experience of a plethora of private and public sector organizations makes it crystal clear that a strong element of centralized management both in the development of system standards and in the procurement of information technology systems is essential to insure that the systems provide managers with cost-effective access to the necessary information. But the design and acquisition of information systems in the Trial Court currently takes place under the effective control of individual court departments and offices with neither a system-wide plan for the use of information technology nor a set of common standards to insure compatibility.

In addition, the legislature has centralized control over a number of aspects of Trial Court operations under its own authority through the extensive use of line-item budgeting. Legislatively imposed restrictions on transfer of personnel, for example, deprive the Trial Court of important managerial authority that could be used to better match staffing to workload. Likewise, strict legislative control over the construction and consolidation of court facilities deprives management of valuable flexibility and results in increased operating costs for the Trial Court.

The creation of the Office of Chief Administrative Justice was an attempt by the legislature to address some of these problems. The OCAJ was designed to provide specialized support services and managerial oversight for the Trial Court system as a whole while the department administrative offices were designed to be the focus of mid-level, day-to-day management activities. But lack of clear authority in some areas, blurred lines of managerial responsibility in others, reservations of authority by the legislature and a general judicial reticence in administrative affairs have combined to paralyze the administration of the Trial Court. Despite the profusion of administrative responsibility — or perhaps because of it — there is a widespread feeling inside and outside of the system that no one is truly in charge of or accountable for the performance of the Trial Court.

C. The operations of the Trial Court are further impaired by poorly defined, ambiguous administrative relationships within the Trial Court.

According to an analysis prepared by the Senate Ways and Means Committee, "Vague or apparently conflicting provisions of the laws governing Trial Court Administration raise serious questions about the ability of the management system to hold accountable or discipline local managers." This results in a cumbersome and generally ineffective administrative structure where "lack of coordination appears to be the rule rather than the exception, especially in courts with elected clerks."

Thus, although the presiding judge is nominally the administrative head of the court, local court management in practice is impeded by a welter of conflicting statutory authority spread among one or more judges, clerks, and officers. Clerks who are nominally subject to the administrative authority of the presiding judge are either elected (Superior and Probate Courts) or appointed by the Governor. Since clerks enjoy substantial organizational and personal independence from the management of the Trial Court system, it is difficult for judges with administrative responsibility to exert control over operations performed by the clerk's office even though they are essential to the smooth functioning of the court for which the judge is administratively responsible. Based on our interviews, it is clear that tensions arising between clerks and judges over administrative matters are common. Lack of coordination between judges and clerks appears to be endemic.

The chief probation officers, in contrast, are appointed by presiding justices, but they must also report to the Office of the Commissioner of Probation. The position and responsibilities of the probation department are also replete with ambiguities. Although the probation officers are appointed by presiding justices, the Commissioner of Probation is responsible for "executive control and supervision of the probation service." Accountability of chief probation officers is so ambiguous that some chiefs feel they report to five separate supervisors.

II. Inadequate Management Systems and Processes

A. The failure to develop modern, computer-based information systems has crippled Trial Court operations.

The successful management of any complex organization depends on prompt access to reliable, timely information regarding both the internal performance of the organization and the external demands placed on it. But reliable information regarding the critical elements of the Trial Court's performance is virtually nonexistent. In particular, there is a serious lack of consistency in statistical reporting and case tracking methodologies within and across Trial Court departments. As a result, the Trial Court lacks reliable measures for both the volume and disposition of cases pending before it. Without that information, it is impossible to effectively manage the movement of cases through the Trial Court system.

Bureaucratic turf disputes (between the departments and the OCAJ) and poor management appear to be the principal reasons for the sad state of automation within the Trial Courts. The absence of overall policy, principles, and architecture and standards for Trial Court automation and the lack of coordination across Trial Court departments has resulted in separate procurements by individual departments. Although these procurements may produce substantial benefits for the individual departments' operations, the systems are often incompatible and rarely networked. As a result, the Trial Court has exploited fully neither the benefits of automation nor its investment in computer technology.

The failure to automate Trial Court operations has resulted in massive inefficiency, delay, and waste within the Trial Court. All too often, paperwork falls through the cracks or files are misplaced, contributing significantly to the problem of delay and imposing unnecessary costs on lawyers and litigants. In addition, literally hundreds of court employees are required to operate the current, paper-based system while other important Trial Court

functions suffer from inadequate staffing. It is no exaggeration to describe the Trial Court's continued reliance on a paper-based system as comparable to an airline attempting to serve today's market using the "Spirit of St. Louis."

B. Significant improvements could be made in the operation of the Trial Court in the area of caseflow management.

Most departments of the Trial Court have made major progress in reducing backlogs since 1978. In this regard, the establishment of time standards for processing cases has been particularly successful. Nonetheless, the Trial Court still falls well short of recognized standards for effective caseflow management.

As discussed earlier, the problem is due, in part, to the lack of timely information, But the single factor that is most responsible for the Trial Court's deficiencies in caseflow management is its continuing tolerance of the "cult of the continuance." Failure to control continuances is perhaps the largest single source of delay and frustration in the Trial Court; it imposes significant costs on the Trial Court as well as on taxpayers, litigants, and lawyers. The key appears to lie in shaping the expectations of the system's users, particularly lawyers. Federal courts, for example, strictly limit the grant of continuances. Since Federal judges are known to be unlikely to grant continuance requests, fewer requests are made and lawyers appear in court on time and prepared to try their cases. Where individual Trial Court judges have taken an aggressive approach to managing caseflow by strictly controlling continuances, the productivity of their courts has also improved significantly.

C. Poorly managed scheduling of cases and judges is also a major source of waste and inefficiency in the Trial Court.

Poor scheduling imposes large costs on Trial Court users. Because the ability of a judge to hear and decide cases depends on an efficient scheduling system, the effective utilization of Trial Court resources is significantly hampered by poor scheduling of cases and judges. Indeed, poor scheduling helps to explain the continued existence of underutilized courtrooms and judges within the Commonwealth's apparently overburdened Trial Court system.

Case scheduling is handled largely through clerks' offices except for criminal cases in Superior Court, which are handled by the local District Attorney's office. There is little consistency in the management of case scheduling. Scheduling in all departments of the Trial Court is currently a manual, paper-intensive process.

In fact, court business is scheduled largely for the convenience of the Trial Court and its employees rather than the public. All parties are often required to appear first thing in the morning despite the fact that the sheer number of cases called means that their cases will not be called until much later in the day. Such a system imposes enormous time and financial costs on the litigants, lawyers, the courts, and, ultimately, the public. In contrast, much of the business in Federal courts is scheduled at 15-minute intervals and generally operates on schedule, saving time and aggravation for all parties concerned.

D. The Trial Court could more effectively manage its caseflow by expanding the use of Alternative Dispute Resolution (ADR) techniques.

Although the Trial Court can do little to control the volume of cases filed before it, some changes could be implemented which would improve the performance, efficiency and cost-effectiveness of the Court. In this regard, we believe that far greater use could be made of alternative dispute resolution programs. Examples include programs such as the Middlesex Multidoor Courthouse (MMDC), the Superior Court Mediation Program (SCMP) in Suffolk County, and the Hampden County Superior Court ADR program. The District Court also offers a range of ADR services. In both Massachusetts and other states, when ADR programs like these have been adopted, they have improved case management by moving cases from the court room to the most appropriate, cost-effective forum for resolving the matters involved.

ADR covers a variety of mechanisms, either voluntary or mandatory, for resolving disputes outside of the courtroom. These include mediation, arbitration, case evaluation, case screening; it can also include the use of court-appointed special masters to conduct minitrials or other abbreviated procedures. All attempt to resolve disputes without the use of the court system's scarcest resource — judicial time. Some are conducted under the auspices of the Court while others (e.g., arbitration) are typically arranged by the disputants. Recently, a growing number of disputes have been tried outside the court system. These cases are typically tried before retired judges chosen by the parties and normally involve disputes between businesses that are willing to pay the added costs in order to obtain a speedy trial.

The principal virtues of ADR are threefold: First, because the financial and psychological costs of obtaining a judicial resolution of dispute are frequently very high, judicial resolution is often not in the best interests of the litigants or the court system. In such cases, referral to less costly, more appropriate forums can benefit both the disputants and the Court. Second, ADR provides litigants with their "day in court" and a neutral, third-party opinion as to the merits of the case. Often this is sufficient to satisfy the parties or to encourage a negotiated settlement. Finally, ADR programs such as those which mandate arbitration for certain disputes before a case is entitled to a jury trial, can be used to control the substantial costs imposed on the courts by jury trials.

E. Elimination of de novo trials would improve the operation of the Trial Court.

The issue of trial de novo has been extensively evaluated and debated. Virtually every major study that has examined the system — including the Cox Commission report, a 1976 study by the Massachusetts Bar Association Committee on Court Reform, and the February 1991 Report of Special Master and Commissioner Dean Paul Sugarman — has recommended the abolition of trial de novo. We agree with those who recommend its abolition. In our view, a system which entitles certain defendants to impose on the Courts and the Commonwealth's taxpayers, the economic burden of conducting two trials on the same facts and issues is indefensible. We are convinced that the level of professionalism in the District Court is sufficient today to assure defendants a fair trial without entitling them

to a "second bite at the apple." The number of de novo trials has been declining in recent years and we do not believe that its elimination is likely to result in an increase in jury of six trials sufficient to offset the benefits to the system of eliminating trial de novo.

III. Human Resource Management

Based on our interviews with lawyers, litigants, clerks, probation officers, jurors, and knowledgeable independent observers of other state judiciaries, as well as our own observations, we believe that the overall quality of the judiciary in Massachusetts, in terms of both professional qualifications and performance, compares favorably to other states.

Improvement in the judicial selection process, particularly the use of a Judicial Nominating Council, was frequently cited as a significant reason for the improvement in the quality of the Commonwealth's judiciary. A second reason often mentioned is the increased professionalization of the judiciary, particularly noticeable in several Trial Court departments, that resulted from the adoption of many recommendations contained in the Cox Commission Report.

Nonetheless, a number of problem areas must be addressed if these improvements in the quality of the judicial performance are to be maintained and future performance enhanced.

A. Initial and recurrent judicial training is insufficient to sustain the quality of the existing bench.

Despite the improvements in judicial quality over the past decade, several problems pose serious threats to both the quality of the bench and its performance. One is the inadequacy of both pre-bench and recurrent training. In the Trial Court today, most pre-bench training largely consists of sitting with an experienced judge for a limited period of time. Due to the large number of vacancies in the District Court, however, there is strong pressure on new judges to begin hearing cases immediately upon appointment. Based on our interviews, we are convinced that no amount of courtroom experience provides sufficient training for the role of a trial judge and that insufficient judicial training inevitably has a negative effect on the quality of justice.

The Flaschner Judicial Institute provides continuing education and training of the highest quality, but as a nonprofit organization with limited resources, Flaschner's ability to provide training is limited. Legislation enacted in 1988 established the Judicial Institute under the direction of the OCAJ to provide training for both judicial and non-judicial personnel. The Institute appears to have gotten off to a slow start and, to date, has done little to close the training gap. Finally, judges have little training in administration and management despite the importance of these skills to the functioning of the Trial Court.

B. Judicial performance evaluation is inadequate.

Our interviews revealed the fact that proposals designed to improve the administration of the Trial Court by granting more power to the top managers of the Court are being undermined by significant concerns about the judiciary's perceived lack of accountability. These concerns were raised by judges, legislators, clerks, officers, and lawyers practicing before the Court. Indeed, the breadth and depth of these concerns are such that we believe the issue of judicial accountability must be addressed if any meaningful reform of the Trial Court is to succeed.

Most of those we interviewed felt that, on the whole, judges work hard and conduct the court's business with integrity and fairness. Most also felt that the Judicial Conduct Commission has been effective in dealing with cases involving allegations of serious misconduct or ethical violations. But even those most sympathetic to the plight of the judiciary expressed serious concerns about the lack of systematic feedback to judges on their courtroom performance.

Although a number of judges we interviewed acknowledged that a well-constructed evaluation could be valuable in helping them to improve their performance, we were also struck by the apparent depth of judicial opposition to performance evaluation, particularly among administrative judges. Under instructions from the OCAJ, each Trial Court department is currently developing a judicial performance evaluation system. Until these systems have been fully implemented, it is not possible to evaluate their adequacy.

A number of people also suggested that judicial accountability might be improved by eliminating life tenure. All judges in Massachusetts are currently appointed for life terms. The Commonwealth is one of only four states that appoint judges for life, and in one of those states, judges must serve a multi-year "probationary" term before becoming eligible for life tenure. The reason most often cited in support of life tenure is the independence it gives judges to make difficult and, perhaps, unpopular decisions without undue concern about job security. Based on our interviews, we found continued — but far from unanimous — support for retention of life tenure. We found considerable support for a system that granted life tenure only after an initial probationary term, and also for a system of renewable appointments with relatively long terms. (Connecticut, for example, provides for renewable eight-year terms.) We found little support for the popular election or retention of judges.

C. Training and performance evaluation for non-judicial personnel are also inadequate.

Currently, there is almost no training provided for non-judicial personnel in the Trial Court, and effective performance evaluation is non-existent. Poorly trained employees make the task of improving the operation of the Trial Court far more formidable under the best of circumstances, while the lack of a performance evaluation system invites poor performance. Without standards for job performance, it is easier for personnel to shirk responsibilities, abuse sick leave policies, and add to the burden already borne by the many honest and hard-working employees of the Trial Court.

IV. Inadequate Communication

A. An appalling lack of internal communication severely impedes the ability of the Court System to manage its own operations and has contributed to a breakdown in employee morale. It has also created a widespread perception that the Court is a ship without a rudder.

There is little substantive communication between the SJC and the Trial Court leadership on administrative matters. Strongly inculcated judicial behavior patterns — patterns that are entirely appropriate for handling legal matters — apparently have been carried over to the realm of administration where such behaviors are clearly dysfunctional. Even when faced with a compelling need to find solutions to problems of common concern, such as the current budgetary crisis, there have been few attempts at consultation between the SJC, the OCAJ and the administrative justices of the Trial Court departments; nor has there been sufficient, ongoing consultation among administrative justices, clerks, probation officers, and employee representatives. According to a number of people we interviewed, the OCAJ and the Chief Justices of the Trial Court departments knew in August of 1990 that layoffs would be necessary for the Court to operate within its budget. Yet the clerks were not notified until one week before they were required to submit final recommendations.

Unfortunately, judges too often make administrative decisions in the same way that they make judicial decisions — alone and with a degree of detachment that is both inappropriate and counterproductive for the sound management of an organization as complex as the courts. The negative reaction of those affected by such decisions is exacerbated by the lack of accountability on the part of the judges making these decisions since judges are appointed for life.

B. OCAJ has failed to provide information necessary to effectively manage the Trial Court.

Trial Court administrative justices are also hamstrung in managing their departments by the failure of the OCAJ to provide timely and reliable case management, personnel management, budgetary and expenditure data. In some cases, the failure to provide information to the departments appears to be a form of bureaucratic politics based on the premise that information is power. In other cases, it appears to result from a failure of OCAJ — and in many cases, departmental administrators — to recognize the importance of such information to effective management of the departments. In other instances, the data needed for sound management does not exist even within the OCAJ or has not been provided to it by the Trial Court departments.

C. The Trial Court does a poor job of communicating with its "customers" — the general public, lawyers, litigants, and jurors.

Based on our interviews, surveys, and first-hand observation of courthouse operations around the Commonwealth, it clear that the court system, its managers, and employees focus almost exclusively on the internal operations of the court with little or no attention to the needs of the users of the system. Unlike successful businesses in other service sectors of the economy, the courts have made few efforts to better understand and meet the needs of their users. Instead, it is often users such as public interest groups or

lawyers that initiate communications with the court in order to raise issues of concern. It would be inaccurate to suggest that the courts are any more culpable in this respect than other monopolies or government agencies. But is also clear that the judicial branch could do a far better job than it has to date, both in actively seeking to understand user requirements and in communicating its own needs to users, the legislature, and the general public.

PRINCIPAL RECOMMENDATIONS

The Trial Court's ability to resolve the underlying problems plaguing its operation is impaired by its own structural and managerial deficiencies and by legislatively imposed restrictions. In some respects, the Court is caught in a proverbial "Catch-22" situation: Attempts to operate the Trial Court under a highly centralized, "command and control" model of management are fundamentally inconsistent with the decentralized nature of the Trial Court's business. For the Trial Court system, like the economies of Eastern Europe, over-centralization will surely lead to the collapse of the Trial Court system. But successful management of a decentralized organization cannot be accomplished without effective management at the local level, proper allocation of both managerial authority and accountability, and reliable systems for information, financial control, human resources, and procurement.

In order to effectively manage its operations and deal with the problems it faces, the Trial Court needs more autonomy and less legislative management of court affairs. But the legislature is reluctant to grant additional autonomy to the Court for at least two reasons: First, some members claim that the Court's management to date gives them little confidence that additional powers will be used wisely and fairly. Second, many legislators argue that the Court system lacks sufficient accountability to justify the grant of largely unfettered authority over the expenditure of "taxpayers' money." According to the legislators and based on our own interviews, these concerns are shared by a significant number of judges and other court system employees.

The recommendations summarized here are part of a comprehensive, integrated reform package. It has been designed to resolve the Trial Court's current dilemma by substantially strengthening the administrative and management capabilities of the court, restructuring the court to better meet the demands being placed upon it, and by increasing the accountability of the management for the administration of the Trial Court system. Because the reform package is intended to be both comprehensive and integrated, we believe that it would be a mistake to pick and choose from among the major recommendations only those favored by one particular interest. For Trial Court reform to become a reality, we are convinced that all affected interests will have to surrender something they value in the current system. But we are also convinced that, with the changes we recommend, the benefits to all with far outweigh the costs.

A. Consolidate the existing seven departments of the Trial Court into a single unified Trial Court by 1996.

In our view, any program to improve the management of the Commonwealth's Trial Court runs a high risk of failure unless it includes substantial unification of the seven separate departments that now constitute the Trial Court. The current structure of the Trial Court is unnecessarily fragmented and complex, resulting in substantial administrative duplication and waste. It also produces an organizational ethos inconsistent with the sound administration of justice, one that puts the interests of individual Court departments over those of the Court as a whole.

The adoption of a unified Trial Court would simplify and improve the management of the Trial Court and, equally important, would reduce the level of court resources required for administration. As recognized by the American Bar Association and the numerous states that have already adopted unified trial courts, unification can attain these goals while retaining, as appropriate, the benefits of specialization within a unified Court.

The transition to a unified trial court will require careful planning and coordination among a wide range of constituent interests. Thus, the legislature should allow sufficient time for the Court to plan and execute the necessary changes. Likewise, the transition must involve the widespread and active involvement of all component elements of the Trial Court — judges, clerks, court and probation officers, administrative personnel, and so forth — as well as representatives of the organized bar.

To facilitate the transition, we suggest that, as an interim step, unification begin with the adoption of a two-tiered Trial Court — one court of general jurisdiction and another of limited jurisdiction — for implementation by year end 1993. Full unification should be accomplished not later than 1996. The proposed organization of the Trial Court is shown in Exhibit E-5.

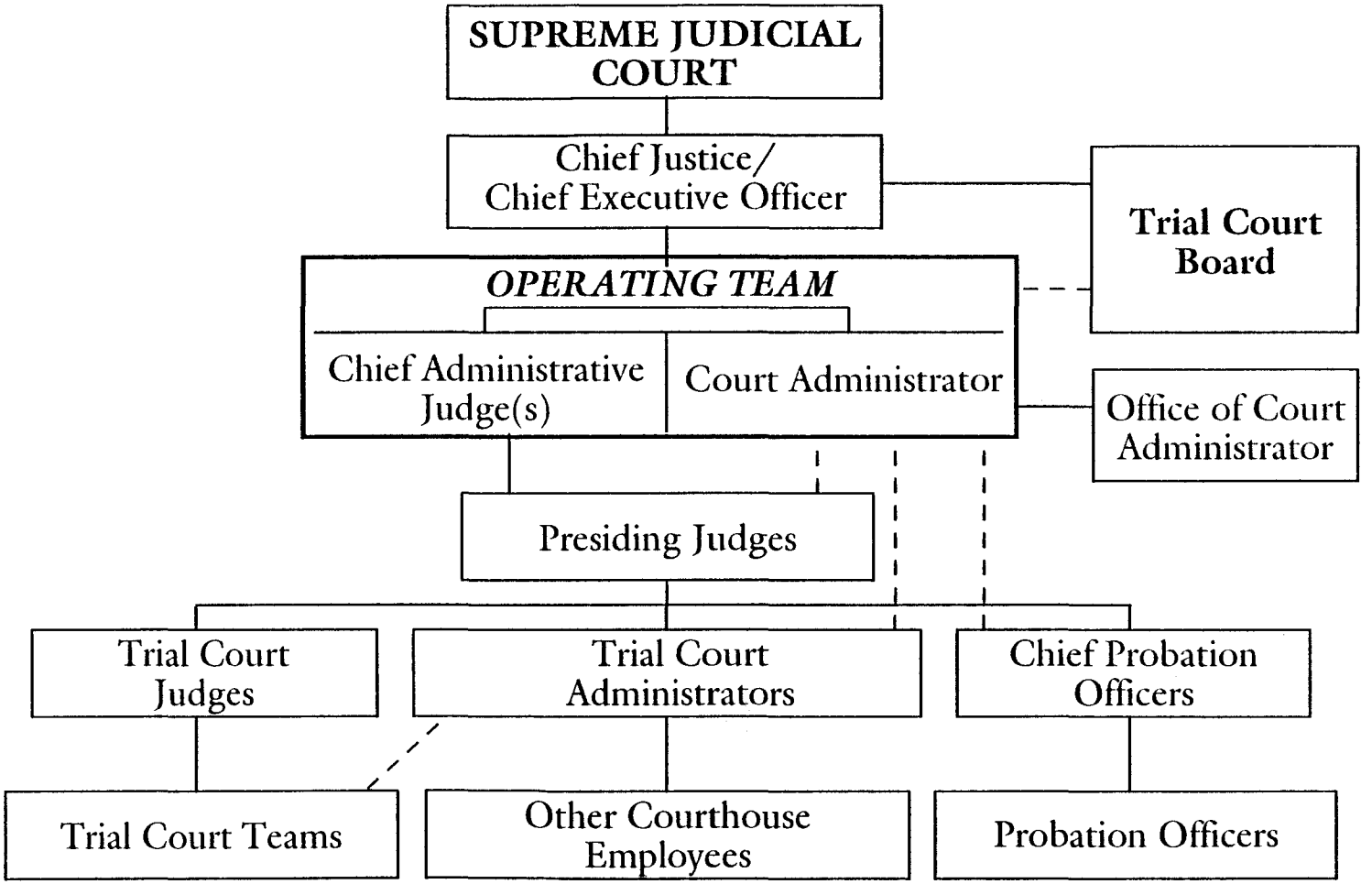
B. Establish the Chief Justice of the SJC as the Chief Executive Officer of the Trial Court.

One of the principal problems plaguing the Trial Court is the lack of clear authority and accountability. In the case of the Trial Court, the problem of a lack of authority and accountability starts at the top — with ambiguity about the role of the Chief Justice. To remove this ambiguity and clarify questions of management authority and accountability, we recommend that the Chief Justice be designated as the Chief Executive Officer of the Trial Court under the general superintendence powers vested in the SJC.

C. Replace the current, duplicative administrative systems within the Trial Court with a single, unified administrative structure under the direction of a newly appointed professional Court Administrator (CA).

The Court Administrator would be charged with identifying the administrative functions best performed centrally and those better carried out elsewhere in the organization. The Court Administrator would also be charged with creating immediately a single administrative structure so that even during the transition period, the court would not have duplicative administrative structures.

Exhibit E-5
Proposed Trial Court Organizational Structure



D. **Establish an Administrative Board, composed of both internal and external members, to advise the Chief Justice of the SJC on administrative matters and to review and oversee the administration of the Trial Court, under the general superintendence powers granted to the Supreme Judicial Court.**

We recommend an initial Board of 11 members. In addition to the Chief Justice, the Board would include the two Chief Administrative Judges and the Court Administrator, plus one justice elected from among the judges sitting in the court of general jurisdiction and one from among the judges sitting in the court of limited jurisdiction. The remaining five members would be citizens of the Commonwealth selected principally upon the basis of their ability to contribute to sound administration of the Trial Court. These members could be appointed either by the Governor or the SJC. When the courts are unified into a single Trial Court in 1996, the membership of the Board will be 10, including the Chief Administrative Judge of the Trial Court and two elected judges.

The use of boards of directors, governors, and trustees is well-established in both law and practice, and there is a considerable body of literature, by scholars and practitioners, analyzing both the theoretical and practical reasons for the use of such boards by organizations in the private, public and non-profit sectors. While there are many specific reasons why organizations establish such boards, two underlying, fundamental reasons recur consistently: First, boards are used to strengthen the capabilities of organizations in areas critical to their success. Second, because boards are separate from the management, legally responsible for advancing the best interests of the organization, and accountable to the appropriate constituents of the organization, they provide the essential mechanism for protecting the interests of the organization and its constituents, while granting management the broad autonomy needed to successfully administer the organization. We believe that both of these reasons are applicable to the Commonwealth's Trial Court.

A properly constituted Board will strengthen administration of the Court by providing its management — the Chief Justice, administrative justices, and court administrators — with a high level of management expertise and support. That the functioning of the Trial Court is plagued by serious management problems is beyond dispute; it has been widely recognized both within the Court itself and by those outside of the system. Although a number of factors — including some beyond the control of the Court — have contributed to these problems, based on our analysis and the views of virtually everyone we interviewed, ineffective management ranks high on any list of factors contributing to the Court's current problems.

Other organizations utilize boards to add strength in areas critical to the performance of their organizations. Examples abound in the private sector, but are also found in the public and non-profit sectors, as well, including health care and human services. In the case of the Trial Court, improved management is perhaps its most critical need, and it is a shortcoming that a Board could help remedy.

The task of reinvigorating and the Trial Court and motivating its 5,000-plus employees is gargantuan. It would be a serious mistake under any circumstances to underestimate the amount of managerial time or the level of management skills and organizational insight necessary to successfully accomplish the task. It would be particularly

inexcusable in circumstances where those with the ultimate authority for the operation of the Court consist principally of full-time jurists with neither significant training nor extensive experience in managing a large, complex organization like the Trial Court.

In addition, a Board will facilitate the grant of greater autonomy to the Trial Court by establishing a greater degree of accountability for the expenditure of public funds and by increasing both public and employee confidence in the management of the Court. Although there is widespread agreement that the management of the Trial Court needs substantial improvement, we found an almost equally pervasive concern about proposed solutions which are perceived as further concentrating administrative powers in the hands of unelected judges who are appointed with life tenure. In short, the underlying issue is one of accountability. Concerns ranged from inadequate accountability for the expenditure of public funds to a lack of safeguards for individual employees — both judicial and non-judicial — against the abuse of administrative authority.

We have also found that successful management of the Trial Court will require substantial autonomy — more than it currently enjoys. But the management record of the Court has been such that neither the legislature, its employees, nor the general public is anxious to vest still greater authority in the hands of judges appointed for life. In our view, the establishment of a strong Board would address legitimate concerns regarding accountability, thereby facilitating the grant of expanded management authority needed to reinvigorate the Trial Court.

One of the primary functions traditionally served by a board has been to help ensure, on behalf of the organization's relevant constituent interests, that management is acting in the best interests of the organization; in return, the organization's management is granted expanded power by its constituents. In the case of private sector corporations, stockholders are the principal constituent group represented by a board. In public and non-profit settings, boards are typically accountable to a somewhat broader group of constituents. But in all cases, the use of a board permits the management of an organization to exercise broad powers with the assistance and under the oversight of a body charged with responsibility for advancing the best interests of the organization. That is precisely the role we envision for a Board in the Trial Court. A detailed listing of the proposed duties and responsibilities of the Board, as well as the responsibilities delegated to others with major administrative roles under the new structure, may be found in Appendix I.

Finally, in considering the creation of a Board for the Trial Court, we have been sensitive to possible concerns regarding the separation of powers and have shaped our recommendations to meet such concerns. Based on the opinion of independent, outside counsel (see Appendix II), we believe that our recommendations are on firm ground both constitutionally and managerially.

E. Consolidate the functions of the OCAJ into a new Office of Court Administrator. The Administrator will be selected by the Chief Justice of the SJC subject to the approval of the Board.

The Trial Court is far too large and complex an organization to be operated without an administrator trained and experienced in court administration. The Court Administrator could be removed by the Chief Justice with the concurrence of the Board. The CA would be responsible for the administration of the Trial Court in cooperation with the administrative justices of the Trial Court.

F. Provide that Trial Court Chief Administrative Judge(s) be appointed for renewable five-year terms by the Chief Justice of the SJC with the advice of the Board. A Chief Administrative Judge could be removed from that Position by the Chief Justice, subject to the concurrence of the full SJC.

One of the major administrative flaws in the existing legislation is the lack of clear lines of managerial authority and accountability between the Chief Justice and the Supreme Judicial Court on the one hand, and the heads of the Trial Court departments on the other. The position of Chief Administrative Judge is a purely managerial one and, if the Chief Justice lacks the ability to hire and fire (subject to SJC concurrence) the managers reporting to him/her, it would be difficult to hold the Chief Justice accountable for the performance of the Trial Court. Nor would it be reasonable to expect any significant improvement in the operation of the Trial Court unless the Chief Justice of the SJC is given such authority. Chief Administrative Judges either removed from their positions or whose appointments were not renewed would, of course, retain their judicial appointments.

G. Provide that the authority for administration of individual courts be delegated by the Court Administrator to Trial Court Administrators (TCAs) located in those courts.

TCAs would be hired by the CA from a list of qualified candidates and would report to the appropriate Presiding Judge(s). Working in conjunction with Presiding Judges, TCAs would be responsible for managing the operations of individual courts. Evaluation of TCA performance will be conducted jointly by the CA and the appropriate Presiding Judge(s).

H. Provide that all Clerks would henceforth be appointed by the Court Administrator for five-year terms from a list submitted by the Governor containing the names of not fewer than six qualified residents of the area served by the court where such vacancy exists. Clerks would be accountable to the Court Administrator who could dismiss them for cause. Incumbent clerks and registers would receive life tenure in their current positions and, where qualified, should be considered for appointment as Trial Court Administrators.

Except for the clerks themselves, virtually everyone we interviewed believed that the election of clerks no longer serves any useful purpose and, in fact, has contributed in a number of counties to significant problems in the operation of the Trial Court. As in the case of Chief Administrative Judges and Court Administrators, the lack of clear authority by administrative judges over elected clerks and registers too often impairs the court operations. The experience of other states, the District Courts, and the Federal Courts lend substantial support to arguments in favor of eliminating the election of clerks and registers. Nonetheless, we found a number of clerks and registers doing an excellent job under very difficult circumstances. It was clear in such cases that these clerks (or registers) were highly effective managers, capable of playing a major role in the management of individual courts. Others appear to have management potential if provided with some basic management training. A few clerks appear to have little to offer the Trial Court in terms of management or efficient administration.

I. Make court automation a top priority issue for the Court Administrator.

The Administrator should review departmental information systems with a view to accelerating implementation schedules and ultimately integrating them into a fully automated case management system.

J. **Adopt and have in place by 1 January 1993 a performance evaluation system for all Trial Court judges.**

The performance evaluation system would be used for counseling judges to improve their performance. It should provide for input from a variety of sources including other judges, lawyers, jurors, court employees, and representatives of the general public such as victims and litigants.

K. **Institute immediate steps to improve internal communication within the court system.**

These steps should include regular working meetings between the Chief Justice, the Court Administrator, and the Trial Court Chief Administrative Judges, as well as meetings involving the Administrator and the managers reporting directly to him/her. Additional steps should include the establishment of periodic forums for judges, and meetings held at court facilities throughout the Commonwealth where local employees could communicate directly with the Administrator and other top-level managers.

L. **The budget for the Court system should have four sub-categories, one each for the Supreme Judicial Court, the Appeals Court, the Trial Court, and the Committee for Public Counsel Services. The budgets for each of these entities would be allocated among three line items — personnel, facilities, and other. The budget for the Trial Court should include the budget for the Office of the Court Administrator, the Jury Commissioner, and the Commissioner of Probation. The budget should be submitted directly to the legislature by the Chief Justice.**

At the request of the appropriate legislative committee(s), the Trial Court would provide to the legislature more detailed budgetary data including estimated expenditures for all accounts exceeding $500,000. Prior to the submission of its next budget, the Trial Court would be required to report to the legislature any transfers of funds between such accounts when the amount transferred to or from an account exceeded $50,000.

Sound administration of the Trial Court is not possible so long as the legislature continues to micro-manage the Court through specific, detailed line item budgeting. Bluntly stated, such detailed legislative intervention results in a serious misallocation of Trial Court resources and severely restricts the ability of the Court to deploy its limited resources in the most cost effective and efficient manner.

At the same time, the legislature has a legitimate interest in ensuring that tax dollars are not wasted by the judicial branch. It can fulfill that responsibility only if it has access to reliable budget estimates and ex post facto reviews. For many states and the Congress of the United States, such measures are considered sufficient for the legislature to forego detailed, line item budgeting.

Our recommendations are designed to provide the legislature with the information needed to oversee the expenditure of state funds while providing the Trial Court with sufficient managerial flexibility to make the most effective use of those funds.

I. METHODOLOGY

An illustration of the study methodology is provided in Exhibit I-1. A team of eight Harbridge House consultants served as staff to this effort, spending a total of over 1,700 hours on research and analysis. Background information on the team members, and on Harbridge House, may be found in Appendix III.

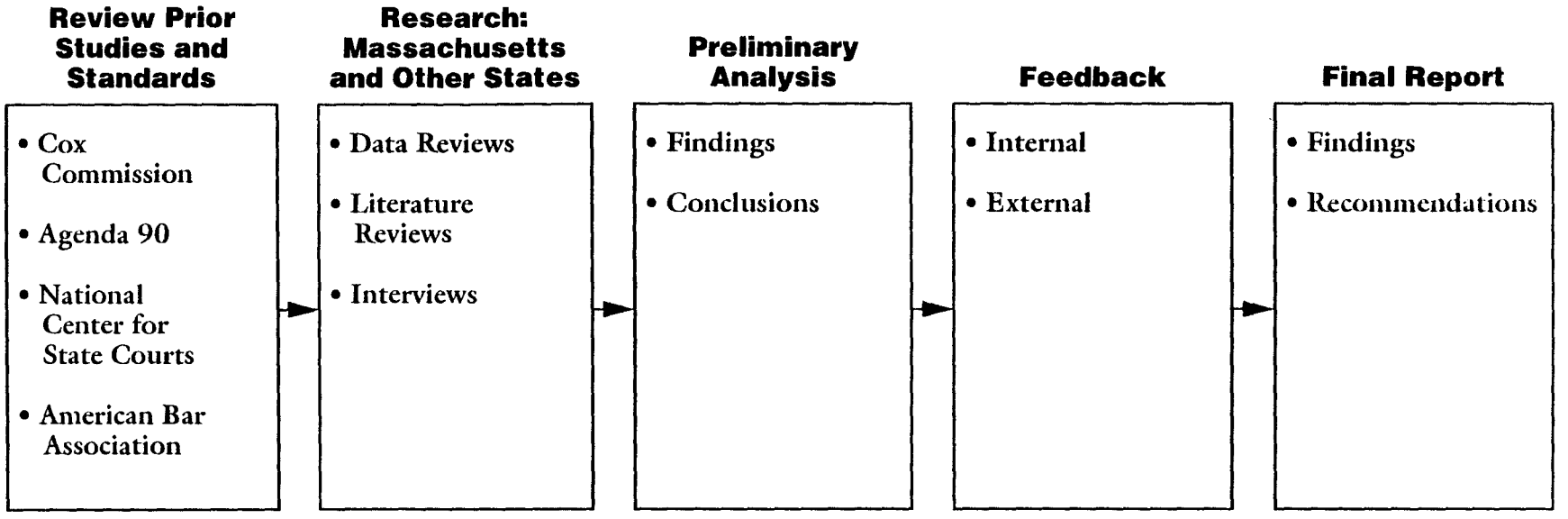
The study began with a thorough review of prior studies of and standards for court organization and management. Sources included the information services of the National Center for State Courts, the American Bar Association, the Conference of State Court Administrators, the National Association for Court Management, and the American Judicature Society. This was followed by extensive research into the current court structure and management in Massachusetts and selected other states. In total, we reviewed over 50 relevant studies of state court organization, management, financing, and operations, including both analyses of individual states and studies of national scope, to identify ideas that might be adapted to improve the efficiency of the Massachusetts courts. Based on its strong demographic similarity to Massachusetts, Connecticut was selected for more extensive analysis; two visits were made to Connecticut to interview top state court administration officials.

We reviewed a number of previous studies of the Massachusetts system, focusing on three in particular: "Report on the State of the Massachusetts Courts" by the Governor's Select Committee on Judicial Needs (December 1976); "Res Gestae: Recommendations and Final Report of the MBA Committee on Court Reform" (Fall 1976); and "Agenda 90," a 1987 study by the Senate Ways and Means Committee. In addition, we also performed a detailed analysis of the Massachusetts court system's budget, case load, and other operating data.

The balance of the research effort involved more than 70 in-depth interviews with key participants in the Massachusetts court system. The interviewees were selected by the Massachusetts Bar Association with assistance from Harbridge House to obtain the maximum understanding of current court structure and operations. The interviews were conducted on a "not for attribution" basis.

Those interviewed included the Chief Justices of the Supreme Judicial Court, the Appeals Court, and all seven departments of the Trial Court, as well as the Chief Administrative Justice. Associate judges from most of the Trial Court departments were also interviewed, as well as clerks and other non-judicial staff; key administrative personnel, including information systems, budget, and human resource managers in selected court organizations; representatives of the Jury Commissioner and the Commissioner of Probation; state officials and legislators; law enforcement officials; private attorneys; and long-time court observers. Study team members also met with several sections of the Massachusetts Bar Association, including the Judicial Administration, Civil Litigation, Criminal Justice, and Probate and Family Law sections, to solicit the views of their constituents on the issues covered by the study. A survey was also administered to citizens using the court.

Exhibit I-1
Study Methodology



Based on the research and interviews, a set of preliminary findings and recommendations was developed for discussion and review. In developing our recommendations, we assumed no overall reduction in case load for the system as a whole and no increase in either the financial or human resources now allocated to the system. This final report incorporates feedback from members of the study team, Coalition members, judges who attended a presentation of the preliminary findings, and selected outside reviewers.

II. ORGANIZATIONAL AND ADMINISTRATIVE STRUCTURE OF THE MASSACHUSETTS COURTS

The Cox Commission recommended a number of structural reforms for the court system that were intended to address a system they characterized as "fragmented in organization, jurisdiction, administration, physical facilities, and finance."[1] Despite the implementation of some of the Commission's recommendations, in many ways the courts today remain as fragmented structurally and administratively as they were 1976. The act of defining the various trial courts as departments of a unified Trial Court operating as a single administrative unit has not broken down the barriers between the individual courts. Indeed, it may have encouraged each court to take actions that maintain its separate identity. Instead of a unified court, the Trial Court is a collection of fiefdoms and subcultures, each with its own rules and cultural norms. The current organization of the Massachusetts Trial Court is shown in Exhibit II-1

Administrative responsibility for the court system in Massachusetts is distributed among various offices. Despite the profusion of administrative responsibility, or perhaps because of it, there is a widespread feeling that no one is really in charge of the whole system.

Central administrative responsibility for the courts is delegated to the Office of the Chief Administrative Justice (OCAJ), which was established to provide centralized support services and general management oversight for the Trial Court system. Additional administrative responsibility is vested in the Chief Justices of each Trial Court department, who are empowered to provide mid-level management as required to meet the special needs of each court department; as well as in the Presiding Justices (also known as First Justices), who are designated as the administrative heads of the individual courts. Despite the intent of the Cox Commission's reforms, this multitiered administrative structure has not prevented the diffusion of administrative responsibility and the confusion that arises from blurred lines of authority and multiple reporting relationships.

Further complications are provided by the additional regional administrative structure created in the Superior and District Courts. The many layers of administration are often cumbersome and duplicative, serving more to separate responsibility from authority than to enhance operating efficiency.

Administrative responsibility in the system is often delegated to those with no demonstrated interest in or capability for management. Presiding justices, for example, are designated based on seniority alone. Moreover, there is little attempt to ascertain the administrative capabilities of candidates for the positions carrying the most administrative authority, the Chief Administrative Justice and the Chief Justices of the Trial Court departments. Most judges have little or no administrative background, training, or interest in the

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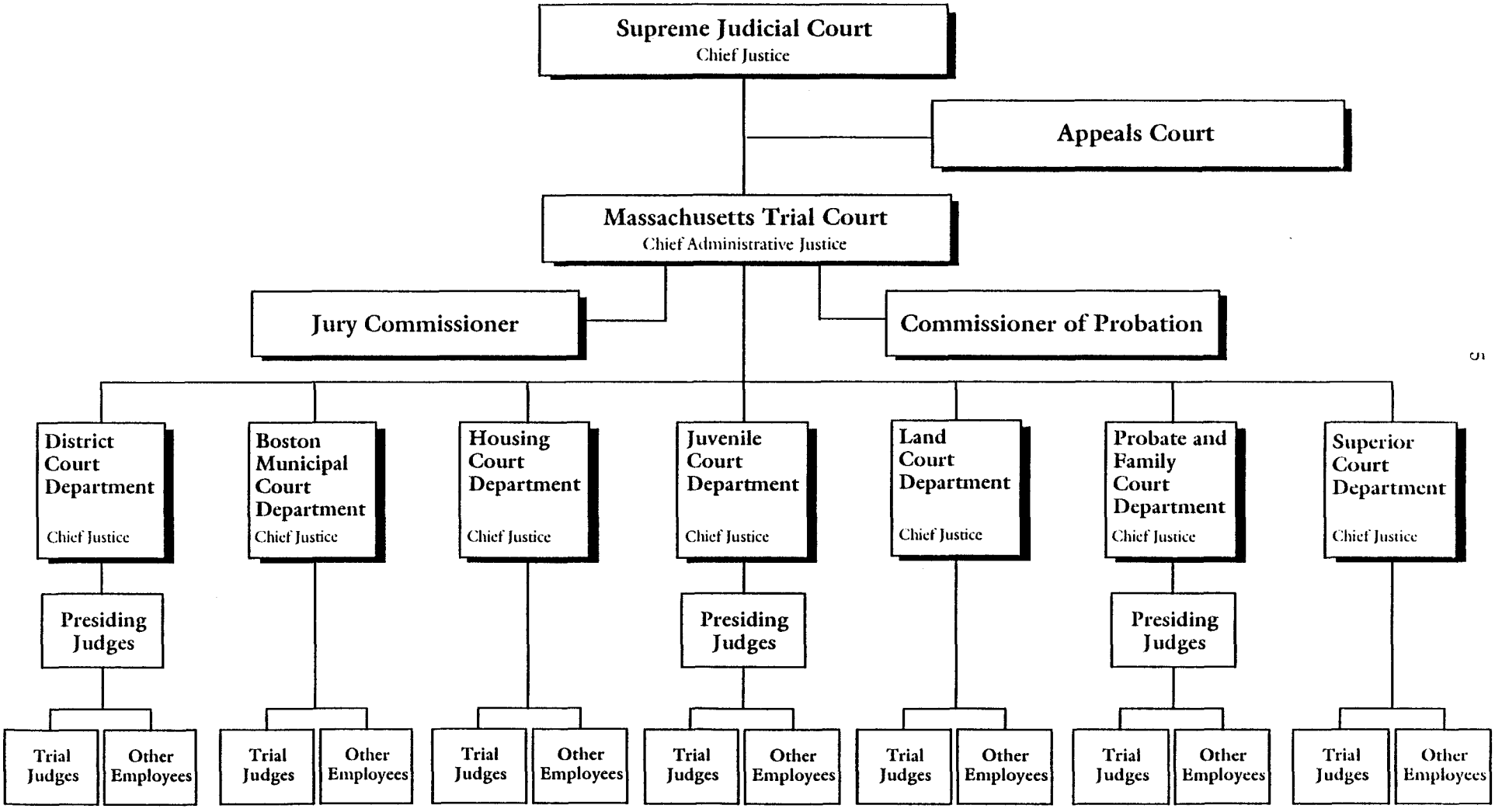
[1] Governor's Select Committee on Judicial Needs, Report on the State of the Massachusetts Courts (December 1976), p. 3.

Exhibit II-1
Existing Trial Court Organizational Structure



tools of managing people and resources. Many judges are more afraid of making a bad decision than no decision at all, which paralyzes the administration of the system. Judges see themselves as judicial decision makers, not administrative managers. Consequently, administration becomes a low priority — in the words of one judge, it is "everybody's second job."

A. The Supreme Judicial Court's Administrative Authority

One factor frequently cited as a reason for the Trial Court's continued fragmentation is lack of administrative leadership provided by the Supreme Judicial Court (SJC). The SJC is the oldest continuously sitting court in the Western Hemisphere. It is one of the most highly regarded appellate courts in the country — in the words of one attorney, it is "noted for the exquisite fineness of its judicial opinions." However, it has not been equally noted for its managerial ability. Previous SJC leadership encouraged all of the Trial Court chiefs to take action to protect their own territories. As one department chief noted, "we took this seriously and are now in trouble."

Under M.G.L. Chapter 211, Section 3, the SJC has the power of "general superintendence of all courts of inferior jurisdiction," but this power appears to remain largely unexercised except in matters of jurisprudence. The SJC is widely perceived as taking a "hands-off" approach to court management, partly due to being removed from the daily routines and realities of the Trial Court's business and partly due to an unwillingness to provide support or leadership to the Trial Court. Meetings between the entire SJC and the Trial Court leadership are generally infrequent; one justice claimed there had been only four such meetings in the past 13 years.

Many judges are frustrated by what they see as a lack of leadership exercised by the SJC in general, and the Chief Justice in particular. One judge bitterly noted that "real leadership would have increased funds for cleaning up the busy court facilities that are physical disgraces, rather than allowing $1 million to be spent on a new facility for Newburyport; you get a new courthouse by being friends with a legislator, not through the Chief Justice."

There is little substantive communication between the SJC and the Trial Courts on administrative matters, and few attempts at consultation with Trial Court judges when required to find solutions to problems of common concern, such as how to achieve the required cost savings during the current budget crisis. There is further discord caused by a sense within the Trial Court that the SJC and its own administrators enjoy "privileged" status; the fact that dental benefits were dropped for the Trial Court as a cost-saving measure but were retained for the SJC is an example of the actions that contribute to this problem.

The SJC also has missed opportunities to call the impact of proposed legislation on the court system to the attention of the legislature. For a number of years, the SJC was sent legislation from subcommittees to review for judicial impact, but their response was submitted after the deadline for filing comments has passed.

B. The Office of the Chief Administrative Justice's Authority

The OCAJ is the administrative head of the trial court with responsibilities in the following areas:

- Fiscal Affairs — submitting a detailed budget for the Trial Court as a whole; equipment purchasing; reviewing and processing expenditures and revenue collections; performing internal audits; processing payroll; and probation receipt accounting.

- Human Resources — developing and implementing personnel policies and procedures; collective bargaining; benefits administration; ensuring diversity (i.e., affirmative action/equal employment opportunity) in hiring practices; managing court officers (outside of the Superior Court department); and determining needs for and providing training, through the Judicial Institute.

- Facilities — managing the daily operations, maintenance, and security of state-owned court facilities.

- Information Systems — establishing standards for and monitoring the automation of the case management system and other appropriate data processing operations.

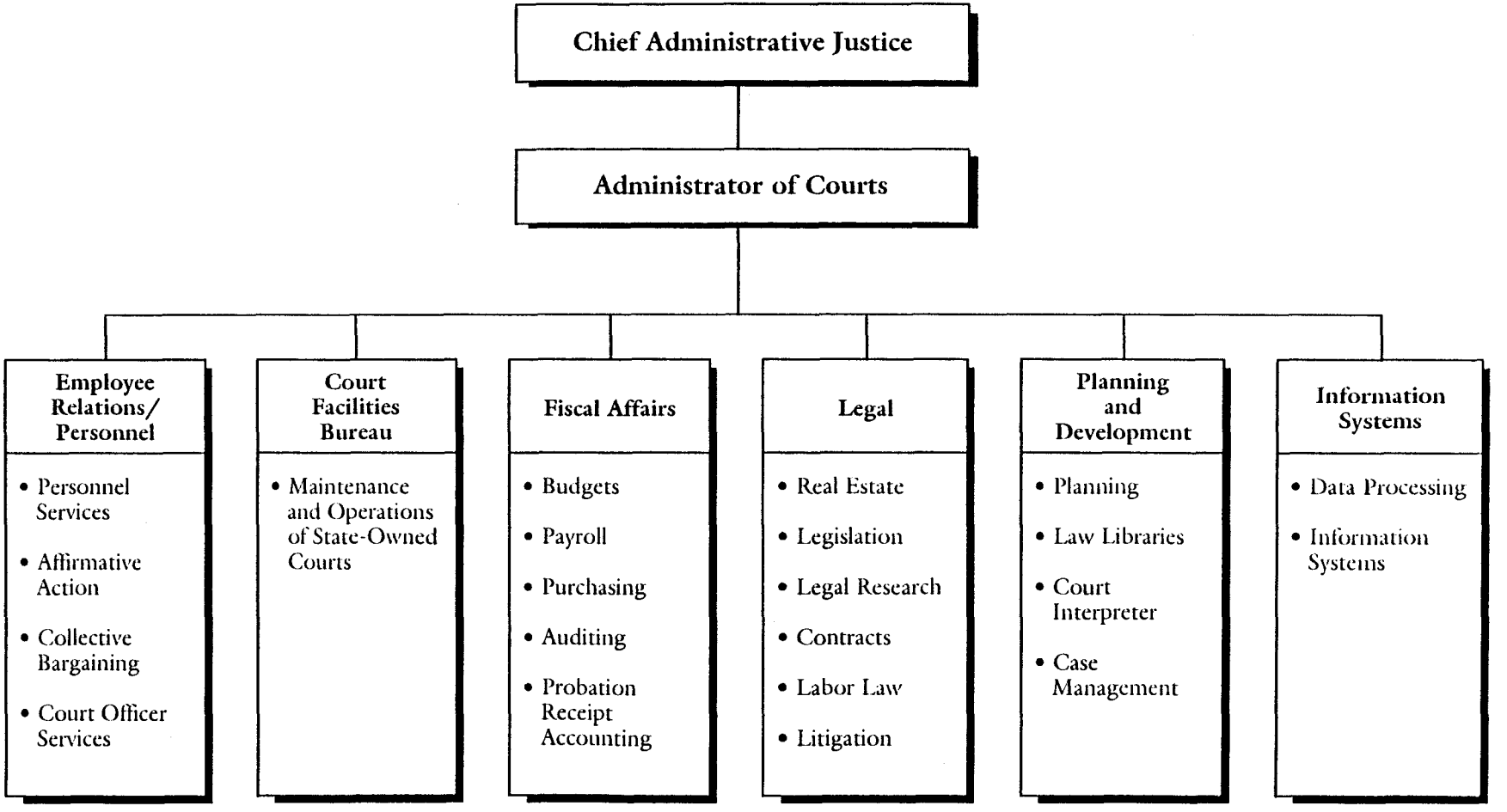
- Planning and Development — case management, administration of the Law libraries, court interpreter services, and Trial Court Department planning.

An organization chart for the OCAJ can be found in Exhibit II-2.

The OCAJ is to be commended for the numerous management improvements it has overseen or implemented. Generally, these efforts have been in the areas of human resource management and fiscal affairs. Examples of these improvements include: simplifying the personnel classification system by substantially reducing the number of job descriptions; standardizing the work week, work days, benefits, and salary schedules across the Trial Court; overseeing a substantial increase in minority employment (from 2.5 percent to 12.5 percent over the last 10 years); establishing standard personnel policies and procedures; establishing the Judicial Response System (through which volunteer judges are on call 24 hours a day to respond to emergencies); providing training on stress management, and financial procedures; effective collective bargaining; problem solving for employee grievances; budget consolidation; and general financial oversight, including the conduct of internal audits.

Nonetheless, there is substantial dissatisfaction and frustration among court system participants with many of the services being provided, or not being provided, through the OCAJ. In the eyes of many who are connected with the system, "the OCAJ simply doesn't work." Part of the problem lies in the distribution of management responsibility: each Trial Court department chief has independent powers, and it is difficult for the OCAJ to impose its will on managers who believe they are more in touch with the needs of

Exhibit II-2
Office of the Chief Administrative Justice



their courts than is a central administrative office. This situation is exacerbated by the lack of active encouragement and support by the SJC for the Trial Court department chiefs to cooperate with the OCAJ.

In addition, the OCAJ is accused of misplacing priorities as a result of not really understanding the business of the courts. For example, preventing judges from ordering copies of law books or U.S. Supreme Court decisions may save money in the short term, but may have a detrimental effect on the quality of justice provided. Closing court clinics that facilitated the resolution of cases outside of the courtroom may result in more cases being handled at trial, which ultimately costs more money.

The OCAJ has low credibility among court employees, many of whom have been alienated by what they perceive to be an arrogant attitude and a passiveness when crises arise. For example, several cited the OCAJ's failure to provide sufficient postage to local courts. This resulted in cases being defaulted or delayed because the parties involved were not given sufficient notice. In such ways, the OCAJ's extreme centralization of control over the Trial Court purse inhibits the fundamental daily administration of justice at the local court level.

Some activities have been delegated to an inappropriate level of centralization. The procurement of information systems and technology, for example, has been carried out not in a uniform, centralized fashion by the OCAJ's Information Systems Division, but instead has been done independently by the various Trial Court departments, resulting in a collection of independent, incompatible systems. Even when procedures have been appropriately centralized, too often they become overly complex and burdensome on the Trial Court. For example, most purchasing is done through central accounts controlled by the OCAJ. Local courts and Trial Court departments wishing to get access to these accounts must go through laborious procedures spelled out in the OCAJ's annual Budget and Operations Memo — its description of the procedure for obtaining printing funds alone fills 19 pages.

Sometimes, attempts by the OCAJ to increase central control backfire in terms of the services available to the Trial Court. For instance, court interpreters used to be hired based on local needs and standards until the OCAJ decided to manage them and certify them centrally. One attorney described the impact of this decision on one local court: "There were always a few reliable interpreters. Then the OCAJ decided to certify them, and we lost the services of one of our best interpreters — a native Spanish speaker who was disqualified for not passing the English requirement." Another attorney told a similar story: "I tried to get an interpreter for a case a few weeks ago. Mason's office sent one to Springfield all the way from Boston — and they sent a different one every day, so there was no continuity in the case."

In some areas, the OCAJ departments appear to add little value. For example, the OCAJ has failed to set and monitor common standards and statistical methodologies which will guide effective case management for the Trial Court Department as a whole. Similarly, the "planning" done at the OCAJ appears to consist primarily of publishing the Trial Court Department's Annual Report, a compilation of information submitted by the various parts of the Trial Court Department. The distribution of support technology and

equipment appears to be done without a systemwide plan; how else would one Nantucket court facility, housing units of the Probate, District, and Superior Courts, be allocated three fax machines, while other busier courts have none available, ostensibly for lack of funds. In the words of one judge, "that office never helps us — I don't know what they do with all those people — they must stuff them under chairs — when we need help, we have to go to the politicians."

Many attempts made by court personnel to improve court management have gone ignored. One manager developed performance evaluation standards but was told by the OCAJ not to conduct formal evaluations; no feedback was provided on extensive studies regarding job design and selection criteria.

C. The Trial Court Departments' Administrative Responsibility

The seven-department Trial Court operates in many ways as if it were seven separate organizations. This inhibits the effective utilization of personnel and encourages wasteful administrative practices. Judges are technically transferable across departments, but because there is strong judicial resistance to this practice, judges are rarely assigned to sit in a court department other than the one to which they were appointed. Fragmentation and turf battles prohibit unity among the judiciary. There is "territorial tunnel vision" in each department which, combined with the divisiveness in the Trial Court, creates resistance to innovation and change. Each department has its own administrative standards and practices.

The lack of Trial Court uniformity in administrative procedures also makes it difficult when an employee is brought in to fill a position that is temporarily vacant due to illness or vacation. Because procedures can vary so widely among courts, temporary personnel are forced to spend time learning the correct local protocols for processing business. This variation also affects those doing business with the courts. For example, one Superior Court requires that papers be clipped together, while another one located nearby wants them stapled. Attorneys assert that constantly having to adjust to different administrative procedures and paper systems is draining and frustrating. And, they noted, "the clerks get angry if you do it [the paperwork] wrong." Certainly, some flexibility in operating procedures benefits the particular needs of the local community. However, without some basic standards and expectations, lawyers and litigants have no advance way of knowing what is considered "wrong."

The current structure promotes administrative duplication. Each of the seven Trial Court departments, each regional office, and each of the individual courts maintains its own administrative structure. Furthermore, even when courts from different departments are physically located in multiuse facilities, each maintains its own administrative structures; there are no formal provisions for sharing resources across departmental lines, and strong cultural norms that discourage it. In brief, there is an abundance of administrative layers and barriers. This discourages the promotion of standardization across the departments, thus making it difficult to move and share non-judicial personnel, even if it were practical to do so.

These problems are compounded by overlapping jurisdictional boundaries between court departments. Juvenile Court, for example, shares jurisdiction over juvenile cases in some parts of the state with the District Court. This makes it difficult to standardize practices in handling juvenile matters. In other cases, such as the termination of parental rights, Juvenile Court jurisdiction overlaps with that of the Probate and Family Court. A delicate balancing of interests is required to ensure that cases do not bounce back and forth in battles over concurrent jurisdiction and unnecessarily endanger the affected children.

Similarly, the Boston Municipal Court Department has concurrent jurisdiction with the district courts within Suffolk County on those civil cases which originate in Suffolk. And, recently, concurrent equitable jurisdiction has been conferred upon the BMC and the District Court departments for small claims, sanitary code and residential nuisances, family abuse prevention, and lead poisoning prevention, to name a few. The administrators of the BMC and the District Court departments claim to have "very different businesses" from each other and therefore, maintain their own administrative procedures. In fact, much of their business does overlap and both could benefit from administrative consolidation.

D. Recommendations Regarding the Organizational and Administrative Structure of the Trial Court

1. Consolidate the existing seven departments of the Trial Court into one court of general jurisdiction and another of limited jurisdiction by year end 1993, and into a single unified Trial Court by 1996. The transition should involve the widespread and active involvement of all component elements of the Trial Court — judges, clerks, court and probation officers, administrative personnel, and so forth — as well as representatives of the organized bar, business interests, and the general public. The court of general jurisdiction will subsume the current Superior, Housing, Land, and Probate and Family Courts. The court of limited jurisdiction will subsume the current Boston Municipal, District, and Juvenile Courts.

2. Establish the Chief Justice of the Supreme Judicial Court as the Chief Executive Officer of the Trial Court.

3. Establish a Board to oversee the administration of the Trial Court. The Board will be chaired by the Chief Justice of the Supreme Judicial Court and composed, initially, of 10 additional members. Two will be the Chief Administrative Judges of the courts of general and limited jurisdiction. The Court Administrator will also be a member of the Board. In addition, one judge from each of the two Trial Courts will be elected to membership by all the judges of that court. When the courts are unified into a single Trial Court in 1996, the membership of the Board will be 10, including the Chief Administrative Judge of the Trial Court and two elected judges. The remaining five members will be citizens of the Commonwealth selected for their demonstrated experience in the administration of large, complex organizations. These members will be appointed either by the Governor or the Supreme Judicial Court.

4. Provide that Chief Administrative Judge(s) of the Trial Court be appointed for a renewable term of five years by the Chief Justice of the Supreme Judicial Court, with the advice of the Board. A Chief Administrative Judge could be removed from that position by the Chief Justice, subject to the concurrence of the SJC.

5. Upon the retirement of the incumbent Chief Administrative Justice in January 1992, consolidate the functions of the Office of the Chief Administrative Justice into a new Office of Court Administrator. The Administrator will be selected by the Chief Justice of the SJC subject to the approval of the Board, and may be removed by the Chief Justice with the concurrence of the Board. The Court Administrator will be responsible for the administration of the Trial Court in cooperation with the Chief Administrative Judge(s) of the Trial Court.

6. Require the Court Administrator to establish the administrative functions needed to implement the policies of the Board regarding the administration of the Trial Court. Moreover, the Court Administrator will be required to create a single administrative structure immediately. The courts of limited and general jurisdiction during the transition period until 1996 will not have separate administrative structures, systems, policies, or procedures.

7. Locate the Office of the Court Administrator with all staff in Worcester to support all of the geographic areas of the state more effectively.

8. Provide a Presiding Judge in all courts (of both limited and general jurisdiction). Judges will be appointed to these positions by, and serve at the pleasure of, the appropriate Chief Administrative Judge. Removal of Presiding Judges must be approved by the SJC. Presiding Judges will be chosen on the basis of their interest in and aptitude for administrative responsibility rather than seniority.

9. Authority for administration of individual courthouses will be delegated by the Court Administrator to Trial Court administrators (TCAs). There will be a TCA responsible for each courthouse. The larger, busier courthouses will have a dedicated TCA; less busy courthouses will share a TCA. TCAs will be appointed by the Court Administrator from a list of qualified candidates. Working in conjunction with the Presiding Judges, TCAs will be responsible for managing the operations of individual courthouses. Evaluation of TCA performance will be conducted jointly by the CA and the appropriate Presiding Judge(s). TCAs will also supervise the clerical staff, manage discretionary administrative budgets and assure the smooth administrative functioning of the courthouse. They will be professional administrators, and will not be required to have law degrees.

10. Delegate responsibility and authority to the lowest appropriate level. Other recommendations later in this report will detail specific assignments of responsibility to various people in the individual courts but it is important to articulate

now the general principle that the people in the courthouses must have control over the management of those courts in order to assure efficient, effective, and fair justice.

11. The budget for the Court system should have four sub-categories, one each for the Supreme Judicial Court, the Appeals Court, the Trial Court, and the Committee for Public Counsel Services. The budgets for each of these entities would be allocated among three line items — personnel, facilities, and other. The budget for the Trial Court will include the budget for the Office of the Court Administrator, the Jury Commissioner, and the Commissioner of Probation. The budget should be submitted directly to the legislature by the Chief Justice.

12. At the request of the appropriate legislative committee(s), the Trial Court would provide to the legislature more detailed budgetary data including estimated expenditures for all accounts exceeding $500,000. Prior to the submission of its next budget, the Trial Court would be required to report to the legislature any transfers of funds between such accounts when the amount transferred to or from an account exceeded $50,000.

III. TRIAL COURT MANAGEMENT SYSTEMS AND PROCESSES

A. Information Systems and Technology

The leadership of the Massachusetts Trial Court has strongly supported the automation of the court system. In fact, in 1988 a new director of the Information Resources Division was hired for the OCAJ with the direction to develop an overall plan and strategy for court automation. The difficulty in achieving the goal of automation is the result of a lack of sufficient resources and subsequent authorization to proceed with badly needed projects, as well as the fractionated management culture of the court system at large. Indeed, the inability of the OCAJ to effectively coordinate and direct court automation for the good of the entire court system in many ways illustrates, in microcosm, the management failures of the court system as a whole. The diffusion of authority, the lack of common direction and goals, poor interorganizational communications, weak or ineffective management institutions and policies, the absence of accountability and performance standards, and the complete lack of a common vision of how the Trial Court system as an institution needs to be managed have combined to thwart the development and implementation of a common strategy and plan for the management of court automation.

With the exception of the highly successful jury selection and probation management systems, court automation in Massachusetts was essentially non-existent prior to the recent solicitations by the Superior and District Court departments of proposals for case management systems. The court system lacks the key judicial and case management systems that are long established in other states. Major administrative systems are either missing or badly in need of updating. In addition, the systems that do exist are fragmented, often obsolete, and dependent on a wide variety of vendors for service.

Much of the work of Massachusetts courts, including statistical recordkeeping, case filing, scheduling, and docketing is still done using manual, paper-based systems. More than one judge stated that court automation "was still in the 18th century." With some exceptions, those running the court system seem not to appreciate or understand the enormous impact that strategic information systems and networks can have on overall operations and productivity. In addition, the technical expertise and resources dedicated to information systems and technology are extremely limited, and in total not of the level or quality of other comparable organizations. This is especially significant given the enormous challenge of automating Massachusetts Trial Court departments virtually from ground zero. Further, there is very little investment in training or technical updating of existing staff with respect to advanced technology, which is critical to a well-run information systems organization today.

Unfortunately, current automation efforts continue to be highly independent and uncoordinated, using a variety of vendors — a practice which is considered to be wasteful and ill-advised today. As a result, these independent efforts ignore the overriding needs for systemwide networking and important linkage not only across the court system, but with important outside agencies, such as the Police and the Registry of Motor Vehicles. If allowed to continue without a plan for integration, these independent systems will either

have to be scrapped, or they will, in and of themselves, dictate the limits of court structure and management in the future.

Despite its earnest attempts, the OCAJ has had great difficulty implementing an overall court automation plan and strategy. Such a plan should include automation policies, principles, architecture (including plans for applications, data management, technology and human resources) and standards considered essential to guiding the development and management of the information technology investment today. Without agreement on where the investment is going and how it will benefit the court system as a whole, it is impossible to manage it effectively. As a result of the inability to achieve agreement on common systems, communication between the Superior and District Court departments and the OCAJ on these issues has essentially broken down. Therefore, rather than facilitating internal communications, the development of the current information technology (IT) infrastructure, such as it is, has brought out the worst in the current organizational culture.

Thus, the fragmented culture and lack of effective management of the court system overall is preventing it from taking a rational, enterprise-wide view of automation needs and is jeopardizing opportunities for fuller productivity gains and cost savings through IT applications. What should be the central driver of information systems efforts throughout the court, the OCAJ, lacks sufficient staff in this area, is technically limited, and lacks the authority, acceptance, and purview required for a successful court-wide automation program to be developed. As a result, various courts have begun developing independent automation systems purely out of frustration with the inability of the OCAJ and the organization at large to address the overall systems issue.

To make matters worse, the two major procurements now outstanding are being driven essentially by a single, albeit capable person in each case. While these efforts should result in operational improvements for both courts, there is virtually no in-house staff to support either system. Furthermore, it is clearly beyond the capability of any single individual, no matter how capable, to successfully manage the rollout and implementation of a statewide system of such importance, much less support it adequately once in operation.

B. Case Management

A recent study by the National Center for State Courts identified the following elements of an effective caseflow management system:[2]

- Judicial commitment to the concept of court control.
- Explicit case processing goals.
- Effective communication with the bar.

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[2]Steelman, David C., Samuel D. Conti, Maureen Solomon, and David W. Orrick, Elements of Effective Caseflow Management, National Center for State Courts (January 7, 1987).

- Early and continuous court supervision of case progress.
- Trial-date certainty.
- A functional case management information system.
- A plan for attacking the case inventory.

Although great progress has been made in many areas, the Trial Court clearly falls short of meeting many of these standards. The most notable improvement has been the establishment of time standards for the processing of civil cases. Some progress, albeit slow and uncoordinated, is also being made towards improving the flow of information required for effective caseflow management.

However, the single factor that is most responsible for the court system's failure to meet these standards is its tolerance of the "cult of the continuance." This is reflected in the general lack of judicial commitment to "moving the business" of the courts, the ineffective communication between the judiciary and the bar with regard to case processing and trial readiness, and the inability of the system to ensure that trials will commence on schedule.

The Massachusetts Rules of Civil and Criminal Procedure specify the circumstances under which continuances may be granted. In the case of a criminal proceeding, the rule also provides the judge with the discretion to impose financial penalties on parties requesting continuances which cause costs to be incurred by the opposing party. Nonetheless, the granting or denial of requests for continuances remains within the discretion of individual judges, and the imposition of penalties for requesting continuances is virtually unknown. The costs of failing to manage and control the use of continuances include both the direct costs incurred by all parties for multiple court appearances plus the indirect costs of frustration, delay, and diminished public confidence in the judicial system.

The routine granting of requests for continuances sets up a vicious cycle of continuing delay, reduced productivity, and increasing cost and frustration. If a judge grants too many continuances during a session, there will be an insufficient supply of cases to keep the judge busy. To counteract this, the court must schedule an unrealistically high number of cases, which creates the expectation that cases low on the list will not be reached for trial. Attorneys for those cases may arrive at court unprepared and without the appropriate witnesses. If those cases are reached, continuances are granted and the cycle begins anew.

Individual judges who have taken an aggressive approach to the management of continuances, including the imposition of financial penalties where applicable, have been successful in breaking this cycle. The key appears to lie in managing the expectations of the system's users. This has proven to be effective in the Federal courts, where a strict continuance policy contributes to substantial trial-date certainty. Counsel who know that a particular judge is unlikely to grant a continuance are less likely to request one and more likely to show up prepared to go to trial as scheduled. In the interest of full disclosure, one District Court has stated its policy regarding the consideration of continuances in the Massachusetts Lawyers Diary and Manual®:

> "All requests for continuances shall, after consultation with the District Attorney's Office, be presented to the Judge presiding in the first session at least 2 working days before the trial date. Failure to comply will result in actual costs for continuances being imposed." (bold in original) (p. 60)

Such tough continuance policies have proven effective not only in moving current court cases but also in reducing case backlog.

1. Case reporting and tracking

A case is the "unit of measurement" for the court system and is an important tool for evaluating the productivity of a court system. Consistency in counting cases and dispositions, which is necessary for understanding the length of time a case remains in the court system, is critical to understanding how well case flow is being managed and where resources should be allocated. There has been a serious lack of consistency in statistical reporting and case tracking methodologies both within and across the Trial Court departments. For example, cases can be counted in three different ways: as the number of defendants, the number of complaints, or the number of charges. Often, there is more than one charge per complaint and/or per defendant. The unit of count has varied across the court departments and over time, particularly at the local court level in the District Court department. In addition, some courts have counted cases on a fiscal year basis, while others have used a calendar year. Also, despite the fact that cases are numbered sequentially on an annual basis, some individual courts have had inflated counts of case entries because they inexplicably dropped sequences of numbers (e.g., jumping from case 2004 to case 2600, with no explanation). Consequently, the Trial Court departments lack a consistent measure of their incoming business volume.

The method of counting case dispositions also varies. The problem of tracking dispositions in the District Court department was deemed to be so severe that case disposition figures were not reported for the Trial Court's 1990 Annual Report. For criminal cases, the issuance of a continuance without a finding (CWOF) generally means that no further action is expected and that the case will be dismissed one year from the date on which the CWOF is ordered. However, for all practical purposes, the case is over as of the date that the CWOF is ordered; in fact, the defendant may not even be brought to court on the technical dismissal date.

Some District Courts waited until the technical dismissal date to count such cases as disposed. Other courts considered the disposition to occur when the CWOF was issued; if such "disposed" cases resume activity, they may be entered as "new" filings, thus double counting the original cases. As of January 1, 1990, however, all such cases will be considered disposed of on the date that the CWOF is ordered. This practice is appropriate so long as the flow of such cases remains steady; inaccuracies will arise if the caseflow significantly increases or decreases from one year to the next.

On the civil side, the disposition counting problem is less one of ambigious dates than of recording outcomes. When cases are settled with the help of the court (e.g., at a pre-trial conference), it is in the plaintiff's interest to enter this as an agreement for

judgement, which creates enforcement powers in case the agreement breaks down. Technically, it is the entry of this judgement that settles the case. If the agreement for judgement is not entered, and this occurs often, the case is carried as pending even though it has been settled. Cases settled informally outside the court also will be carried as pending if the court is not notified that the case has been resolved. All similar pending cases will remain on the court's books until they eventually are identified as inactive, at which point notices are sent to the parties involved that the case will be dismissed unless they initiate further action.

2. Case Scheduling

The predictability of trial dates lies at the heart of an effective case scheduling system, in which there is a reasonable expectation that all cases scheduled for a particular day will actually reach trial on that day. For this to occur, there must be a reasonable overset factor (i.e., "overbooking") to allow for the cases that inevitably will settle or must be continued. Thus, continuance policies and calendar practices are critical factors in the case scheduling process.

Case scheduling generally is a manual, paper-intensive process largely handled through the clerks' offices. In the Superior Court, however, the District Attorney's offices are responsible for scheduling criminal cases. Each court schedules its own cases with the exception of the Boston Municipal Court's jury-of-six cases, which are scheduled by the District Court Department. When a case overlaps the jurisdictional boundaries of more than one Trial Court department (e.g., a case beginning as a child abuse action in Juvenile Court that proceeds to a termination of parental rights, which is usually handled in Probate and Family Court), the OCAJ may take steps to consolidate the case under the control of one court department. This both increases the efficient administration of the case and reduces confusion among the parties as to who has the ultimate decision making authority for that matter. Unfortunately, such action is taken on an ad hoc basis; there is no regular system for identifying cases that would benefit from such consolidation.

Different case scheduling protocols are used by various court departments and individual courts. Some are primarily driven by the desires of judges, others by clerks, and still others by factors outside of the courts' control. For example, District Attorneys are available only on certain days of the week in some courts; activities requiring their presence must be scheduled on those days.

Some courts generally schedule trials for the mornings while other business, such as hearing motions and holding conferences, is scheduled for the afternoon. In other courts, the pattern is reversed, or it may vary by day of the week. The issue here is not "which is the correct method," but rather access: do the participants necessarily benefit from having a set and determined time for particular types of court business, particularly given that judges may move before the business is settled. A strict lack of flexibility in scheduling can contribute to delay. For example, in one court, motions are scheduled to be heard only one day each week; hearings must be delayed a full week if they cannot occur on the day for which they were originally booked.

In general, court business is scheduled largely at the convenience of the courts, rather than the public. Parties to cases often are required to appear first thing in the morning despite the fact that their cases may not be called until much later in the day. Such a system may be designed to avoid judicial "down time" caused by a lack of scheduled business due to defaults (e.g., approximately 35 percent of scheduled BMC cases default each day), but it imposes enormous time and financial costs on the parties involved. For example, when an attorney must wait from 9 A.M. until noon to argue a motion for 20 minutes, the cost of that waiting time often must be paid by clients. In Federal courts, business is scheduled at 15-minute intervals and generally operates on schedule, saving time and aggravation for all parties concerned.

Each individual court can determine its own degree of flexibility. Unfortunately, judges and clerks often do not agree how to use their scheduling flexibility to improve resource utilization. Some judges prefer to use downtime between cases to hear motions; others refuse to conduct hearings when trials are scheduled. Any scheduling pattern a clerk has set up can be disrupted when a judge prefers to hear cases all day long. When trials spill over from morning to afternoon, for example, clerks must scramble to reschedule the business formerly assigned to the afternoon, or ask the parties to wait on the chance that the judge may be able to "squeeze in a motion here or there" (e.g., if a judge decides to hear a civil case motion while waiting for a jury to finish deliberating a criminal case). In some instances, such flexibility and initiative on the part of the judge improves the speed with which cases move through the system and greatly benefits the system participants. However, it can also be perceived as creating more work and lack of coordination for those managing the courts' administration.

3. Time Standards

In April, 1986, the Supreme Judicial Court issued an order for all civil cases entered on or after July 1, 1988 to be disposed of within 24 months from date of entry in the Superior Court, District Court, or Boston Municipal Court. In November, 1989, the SJC extended the deadline to 36 months. The Probate and Family Court Department Implementation Order requires that contested cases be disposed of within three months from request for trial, while uncontested matters have one month from date of request for hearing. Under the SJC order, each court department established a committee to plan its own case management strategy. These plans were reviewed by the OCAJ and the Special Advisory Committee on time standards for consistency.

In some courts, the use of a time standards system has significantly reduced the backlog of civil cases and has improved the effectiveness of case flow management. In others — typically those courts already very short on resources — the opposite has been the case.

The department most affected by the SJC order has been the Superior Court, where the most time-consuming major civil and felony criminal cases are heard. To implement time standards, this department developed a "Tracking Order" for civil cases entering their system. Immediately upon filing, cases are placed on one of three tracks, depending upon the type and severity of the case. These tracks specify time to disposition required for cases. Specifically, the "X Track" monitors cases to be disposed of within six months, the "F

Track" monitors cases to be disposed of within 12 to 14 months, and the "A Track" monitors complex cases, such as medical malpractice and product liability cases, which may require up to 36 months from entry to disposition. When cases are filed, all parties are informed as to which track applies to their case; the deadlines for completion of pre-trial motions and discovery, and the dates of their pre-trial conferences are also communicated. In this way, the expectations of all parties involved are managed from the beginning.

As may be expected, such procedures have had a dramatic impact on the operations of the Superior Court at the local court level. Clerical procedures, judicial administrative responsibilities, the scheduling of civil sessions, the accepted legal practices, and the local culture have all been affected by the department's time standards implementation plan. The potential benefits from a case tracking system in improving the management of case flow are clear. However, in practice, the effectiveness of the system varies from court to court. This variation is driven by the level of resources allocated to the court as well as the volume and mix of the court's case flow.

Of all counties now operating under the time standards tracking system, only the Suffolk and Middlesex courts, the pilot sites of the original time standards experiment, are automated. Automation has greatly improved the effectiveness of tracking civil cases in the Superior Court department. "Next scheduled events" in the case management process can be scheduled and tracked more efficiently. However, the courts that lack sophisticated information management technology have found themselves burdened with more paperwork, and thereby more clerical work, since the implementation of time standards. This is particularly true for those courts outside of the Boston metropolitan area that often are staffed at minimal levels. For some of these courts, the time standards tracking methodology has actually slowed the processing of business. Consequently, some administrators have requested that cases in their courts not be placed on the department's tracking system.

Once the Superior Court's case management system is fully automated, a major benefit will be improved accountability. When system users know that they will be held to the time standards, there is greater motivation for early intervention to push cases toward resolution. Some administrators are experimenting with the system to find out just how much case flow can be accelerated. For example, in November, 1990, cases assigned to a Suffolk county Superior Court time standards session during the previous month were set for pre-trial hearings in December. Attorneys, expecting the usual six- to eight-month delay after filing, asked if a mistake had been made; they were told that there had been no mistake and that the cases would be dismissed if they did not appear. As a result, approximately 15 percent of these cases settled less than two months after filing.

Some users of the current tracking system caution that as the case flow increases and pressures mount to use every means possible to reduce delay, the temptation will be to make the standards even more strict. They fear that under such a scenario, justice may get short shrift. Then, the disparity in resource levels and automation capability will truly jeopardize effective case management. In the meantime, alternative methods for case disposition, both within and outside the formal court system, have attempted to ease the burden of increasing case flow.

4. Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution (ADR) is a rubric that covers a variety of mechanisms for settling disputes outside of the primary court system. The most widely used ADR processes include mediation, case evaluation, and arbitration; other processes, such as mini-trials and summary jury trials, are offered more sporadically. Mediation assists the parties in identifying and setting priorities for case issues but does not include a neutral recommendation for resolution; case evaluation involves an informal, abbreviated presentation of case facts to an attorney evaluator who assigns a value to the case that may be used as a basis for settlement; arbitration, similar to a trial, involves presenting the facts of a case to an arbitrator who determines how the case will be resolved and whose decision is binding on all parties.

In Massachusetts, several approaches are being taken to ADR in the Superior Court department. One extensive ADR program is in Middlesex County, which is operating one of four national experimental "multidoor courthouses" (the others are in New Jersey, Texas, and the District of Columbia). The "doors" refer to the means of entry to the various dispute resolution options available through the program, which include case evaluation, mediation, and both non-binding and binding arbitration. The Middlesex Multidoor Courthouse (MMDC) began processing cases in March, 1990 and is scheduling over 80 cases per month for individual screening conferences.

Through the MMDC, Superior Court civil time standards cases are selected for screening to determine whether an ADR option is appropriate for resolution through an evaluation of the case facts and a discussion of the various dispute resolution processes that are available. Participants have the choice of electing whether or not to pursue an ADR process, whatever the recommendation of the MMDC screener.

Originally scheduled to last 18 months, the experiment has been extended through the end of calendar 1991. Funding for the MMDC is provided from a number of sources including the National Institute for Dispute Resolution, the OCAJ, the Massachusetts and Boston Bar Foundations, and major Boston law firms, as well as user fees.

The Superior Court Mediation Program (SCMP) in Suffolk County is a "single door" program that provides mediation sessions for contract and tort cases. This program is a joint effort of the Superior Court and the Massachusetts Mediation Service, an executive agency of the Commonwealth. Superior Court staff and mediation specialists screen more than 1,000 cases each year, more than half of which are identified as cases that should be removed from the Court's docket because they have been settled, remanded to the District Court, or otherwise resolved. In more than 40 percent of the remaining cases, the parties choose mediation. Now in its fourth year, the program continues to expand; from 1989 to 1990, the number of mediations grew by 50 percent. Funding for this program is provided by user fees, the OCAJ, and the Massachusetts Mediation Service.

In addition to these efforts, the Hampden County Superior Court has operated an ADR program that offers both case evaluation and mediation to litigants. Through this program, a retired judge screens cases and provides an evaluation of the simpler cases; more

complex cases are referred to mediation. Also, an evaluation program for motor vehicle tort cases recently completed a six-month trial run in Suffolk County.

In the District Court department, the central Administrative Office coordinates a wide range of ADR services throughout the District Court system. The goal is to let each local court operate the ADR mechanism most in keeping with community needs and resources. Consequently, various ADR efforts are conducted and supported through an informal network of court staff throughout the state.

The use of ADR mechanisms can result in cost savings both for individual litigants and the system as a whole by resolving disputes more quickly and without involving the most expensive resource in the system, judicial time. An evaluation of the SCMP completed by the Crime and Justice Foundation in 1989 estimated that plaintiff and defense attorneys together saved an average of more than $10,000 per case by using mediation to improve their trial preparation or by completely eliminating the need for a trial.[3] No definitive, formal evaluation has been made of the MMDC's impact on the effectiveness or efficiency of the court system. However, it appears that the MMDC, the SCMP, and other ADR efforts serve an important case management function by identifying those cases which can be diverted from the primary court system.

In attempts to reduce the backlog or to relieve judges from dealing with less complex cases, some courts have created their own ADR mechanisms, such as hiring retired judges or special masters, or by using volunteer attorneys. These programs have been generally well received, but funds to pay for these resources are dwindling. In addition, frustrating delays have sparked an increase in private ADR, including the use of private mediation services and the practice of hiring a retired judge (a "rent-a-judge") to privately adjudicate disputes.

A number of concerns have been raised about the use of public and private ADR. These include the fact that ADR programs may provide the judgements available through the primary court system without offering sufficient protection to the parties involved; the unsuitability of ADR for situations in which there is a substantial imbalance of power, such as in child abuse or domestic violence cases; the potential for improved access to dispute resolution resulting in an increase in the number of disputes brought to the court system; and the question of how to pay for the services. With regard to private ADR, special concerns are raised regarding the potential for a two-tiered justice system, where those who can afford to go outside of the system do so, and what the impact on the primary system would be.

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[3] Brophy, Cynthia, Mary Jo Meenen, John J. Larivee, Lin Adrian, Review and Evaluation: Suffolk County Superior Court Mediation Program, Prepared for the Office of the Chief Administrative Justice, Trial Court of the Commonwealth, by the Crime and Justice Foundation (January 1989).

5. De Novo

Under the "de novo" system, individuals who are dissatisfied with the result achieved in a first trial are entitled to a second trial. Two hundred years ago, trial de novo (literally, "anew") was justified on the grounds that a defendant who committed a minor offense would receive only "rough justice" from a primary court and therefore should be given the opportunity to have a more formal trial. The system continues within the District and Boston Municipal Court departments, where a criminal defendant can have a case heard by a judge at a bench trial and, if unsatisfied, have the case heard de novo by a jury of six. De novo now accounts for only a small number of cases; only five percent of all cases are heard by a jury of six, and some of those are "first instance" jury trials which were not proceeded by bench trials.

The value of continuing the de novo system has been the subject of extensive study and debate. It is clear that primary courts in Massachusetts operate with a degree of professionalism that simply did not exist when the de novo system originated. Consequently, the need for a "second bite at the apple" to assure that all the legal and procedural issues have been covered has abated.

Some proponents of the current system argue that the existence of the de novo system serves a case management function by reducing the number of jury trials that would otherwise occur, thus conserving system resources. However, the current experiment with the elimination of de novo suggests that a one-trial system does not necessarily result in increasing the number of jury trials conducted. One reason is that unlike bench trials in a de novo system, a one-trial system can use pre-trial conferences to move cases toward settlement. Such conferences require fewer resources and generally are conducted more efficiently than bench trials in primary courts. In the one court where the number of jury trials did increase during the experiment, the cause may not be the lack of de novo so much as poor case management.

Indeed, standardized case management procedures and practices are likely to be better tools than the de novo system for effective case screening. In addition, the costs to all parties to the case, particularly to victims and witnesses, of having to participate in two proceedings cannot be ignored.

C. Recommendations Regarding Management Systems and Processes

1. Make court automation a top priority issue for the Court Administrator. The Administrator should review departmental information systems with a view to accelerating implementation schedules and ultimately integrating them into a fully automated case management system.

2. Develop an overall systemwide plan and strategy for information systems and technology. This strategy should include information/data requirements, key applications, technology standards including hardware and software (non-vendor based as much as possible), and human resource/organizational considerations. This plan should consider the current and planned applications and

technology, but should be based on open systems to the maximum extent possible. It should contain a list of priorities for automation, identifying key issues, implementation needs and target dates.

3. Review the requirements for both the current Superior and District Court case management systems to ensure that they will be compatible with and implementable within the new organizational structure. They should communicate with one another, produce common data elements, utilize common data bases and mainframe storage facilities as needed, and operate in a common, integrated, and properly networked environment.

4. Reporting to the Court Administrator, create a central Information Resources Management (IRM) Department, headed by an experienced, well-qualified professional, with full authority and responsibility for a unified court automation program. All information systems professionals in the Trial Court system will report to the head of the IRM Department.

5. Within the new IRM, specialists will be dedicated to servicing the entire Trial Court activities to ensure that user needs are well served.

6. Create an automation training and systems support function within the IRM to assist and support the implementation of the new case management systems and produce user documentation and manuals as needed. Assign key technical professionals, including appropriate members of user organizations, to project teams which will be responsible for their respective automation programs.

7. Reconstitute the existing automation steering committee with appropriate managers from the new organization to review automation efforts, elicit management support, and assist on issues involving system implementation in their respective departments.

8. Reconstitute the Information Systems Advisory committee into a primary user's committee, including representatives of various key information system user groups.

9. Review the current IRM resources to ensure proper staff levels and technical depth in key technologies such as networking and communications, fourth generation languages and relational data bases, training and documentation, project management, applications planning, and court operations and management. It is imperative for the IRM to be properly staffed in order for the Trial Court system to realize the potential gains from information technology.

10. Develop central procurement and purchasing policies and procedures to prevent the duplication of redundant and incompatible technology, multiple procurements for the same technology, appropriate use of the State's blanket procurement contract, and to ensure that the Trial Court system maximizes the value gained from each acquisition. Representatives from the Bureau of Information Technology and management should be called upon to help construct these policies and procedures as needed.

11. Require the Court Administrator to set standards for administrative procedures for all trial courts. Individual courts will not be allowed to develop their own set of procedures.

12. Enforce the Massachusetts Rules of Civil and Criminal Procedure regarding continuances. It should be the responsibility of the Chief Administrative Judge(s), working through the appropriate Presiding Judges, to see that this is done.

13. Require the Chief Administrative Judge(s) to establish and enforce guidelines for the granting of continuances and to track judges' performance in meeting the guidelines. Results should be provided to all judges, the Court Administrator and the Board.

14. Require the Court Administrator to set uniform standards for case tracking and statistical reporting, and to see that these standards are met.

15. Require the Court Administrator to set uniform standards for case scheduling, and to see that these standards are met. Scheduling will be done as part of the automated case management system.

16. Retain and refine the use of time standards throughout the trial court system, as part of the automated case management system.

17. Maintain and expand the use of ADR.

18. Abolish the trial de novo system as part of an overall program to improve the operation of the Trial Court.

IV. HUMAN RESOURCE MANAGEMENT

A. Assignment of Responsibilities

In the private sector, efforts are made to ensure that work is generally assigned to the most cost-effective unit of production, and that the scarcest, most expensive resources perform only those tasks that cannot be delegated downward. Through a combination of tradition and legislative mandate, however, this practice is not frequently followed in the Trial Court.

For example, those who have been arrested have the right to be arraigned at the next available session. Arraignments are relatively routine and straightforward proceedings, involving informing the defendants of the charge, advising them of their rights, and selecting the next event to occur. By law, arraignments must be performed by judges, but many judges believe these proceedings could be conducted by clerks with no loss of effectiveness. Similarly, there appears to be no reason why District Court clerks should not be permitted to set bail during court hours. Currently, they are allowed to do this when court is not in session, but during court hours judges must perform this function. A few of the busiest courts now allow clerks to perform these functions during court hours on an ad hoc basis purely out of necessity. In addition, because of the limits on the jail populations in Middlesex and Suffolk County, every bail that is set in the District Court is reviewed by a Superior Court judge. In the words of one judge, "there's no reason why two $80,000 per year judges should be involved in this." Some judges note, however, that the cost savings made possible by shifting certain responsibilities away from judges must be balanced against the virtues of a judge's presence at certain proceedings.

The problem of inappropriate assignment of responsibilities is not limited to judges alone. Clerks and probation officers also perform tasks that could be more efficiently done by other employees, often without any additional training. Inappropriate assignment occurs at this level because of the lack of clearly defined responsibilities for various categories of court employees. Consequently, the system encourages the use of high-priced resources to perform low-level tasks.

It is important to note that part of the problem of inappropriate responsibilities is related to the lack of certain kinds of resources. For example, judges often must do their own filing and perform other administrative services because they lack sufficient clerical support. Also, in some cases, court officers or clerks may not always be available to support sessions; this increases the burden on the judge in the courtroom.

B. The Judiciary

1. Selection Process and Length of Term

All judges in the Massachusetts courts are appointed for life terms by the Governor. The procedure for filling judicial vacancies was recently revised by Governor Weld. These changes enhance the concept of the Judicial Nominating Council by creating four regional Judicial Nominating Councils (one each for the Western, Central, Southeastern, and Eastern regions) under an expanded Executive Committee. The Judicial

Nominating Council was established as an entity of nonpaid individuals to solicit, screen, and make recommendations to the Governor for judicial appointments based on merit. The goal of both the regional Councils and the Executive Committee is to create a pool of qualified applicants for vacancies that are expected to occur over the next 12-18 months. The idea behind the regional Councils is to ensure local input into the judicial selection process.

Under the new procedure, the names of candidates for judicial positions in the District Court (including the Boston Municipal Court), Juvenile Court, Probate and Family Court, and Housing Court departments are submitted to one of four regional Judicial Nominating Councils. These regional Councils are charged with evaluating, conducting background and reference checks, and recommending well-qualified candidates to the Executive Commitee. Screening of candidates for the SJC, Appeals Court, Superior Court, and Land Court is handled directly by the Executive Committee. Regional input into the recommendations for these courts will come through the head of each regional Council, who will sit on the Executive Committee.

When a judicial vacancy occurs, the Governor will consider candidates from the pools and make a recommendation for selection. The name of that nominee is submitted to the Joint Bar Committee on Judicial Appointments, which includes representatives of the Massachusetts and Boston Bar Associations, as well as the county bar associations. The role of this committee is to review the application of the nominee and make a confidential recommendation to the Governor as to whether the proposed candidate is unqualified, qualified, or well qualified for appointment. Once the nominee has passed this screening, the Governor submits the name to the Executive Council (an elected body also known as the Governor's Council), which reviews the application and holds a public hearing on the nomination. Finally, the Executive Council confirms or rejects the Governor's nominee.

Judges in Massachusetts are appointed for life terms. Massachusetts is one of only three states (the others are New Hampshire and Rhode Island) to have life tenure for judges. In a fourth state (New Jersey), judges receive life appointments following the successful completion of a limited term appointment. Judges in most states are selected through either appointments or elections to serve for a term of years, after which they may be retained through either reappointments or elections.

Most judges in Massachusetts support the continuation of lifetime appointments. The primary concern related to a possible change to either limited term appointments or election revolves around the potential loss of judicial insulation from outside influences, which the judges consider critical to maintaining judicial independence. Indeed, many attribute the outstanding reputation of the Massachusetts judiciary to this very independence. There is also concern regarding the detrimental effect that limited term appointments may have on the ability of the judiciary to attract qualified candidates. Joining the judiciary requires leaving the practice of law behind. With reappointment uncertain, the prospect of having to start over after a period of years on the bench may provide a powerful disincentive for attracting exactly those candidates whose qualities would make them best suited to be judges.

There is little support for the popular election of judges, but there is substantially more support for a system of renewable appointments with relatively long terms. The problem most frequently cited in connection with life terms is the lack of accountability inherent in a lifetime appointment, and the difficulty in getting consistently poor performers to improve or leave the bench. It appears that this problem can be managed through the implementation of an effective protocol for performance management, including regular evaluation and feedback, and sanctions for judges whose performance fails to meet clearly defined standards.

Another less widely discussed problem connected with life terms is that of judicial burnout. The stressful conditions under which judges operate have been well established. One judge summarized the situation facing judges on a daily basis: "Trial courts are all about violence. You are required to stay cool and calm over long hours working in a system whose essence is verbal violence — attorneys fight — listening to people talk about violent actions while under intense pressure and scrutiny to ensure that justice is done and that your emotions are separated from the facts of the case." The recent legislation allowing judges to take unpaid leaves of absence is seen as providing a means of welcome, albeit temporary, relief. Some judges suggested that it would be desirable to remove some of the disincentives to early retirement and provide for some form of outplacement so that judges who wish to leave the bench can do so with dignity.

Since 1978, the Chief Justices of each Trial Court department have been appointed by the SJC to serve five-year nonrenewable terms, although several of the current Chief Justices were "grandfathered in" for life terms as heads of their departments. Most judges approve of the concept of a fixed term because it facilitates effective planning; five years is considered to be sufficient time for the benefits of administrative changes to be realized. There is substantial support for making the terms renewable, however, so that a court need not lose the contributions of a judge proven to be a successful administrator.

Presiding judges currently attain their positions through seniority. Many judges who come into this position find themselves unprepared for the administrative responsibilities that constitute a significant part of this office. As one judge wryly noted, "the Governor never tells you about this part of the job." Some judges resent these responsibilities and would welcome the opportunity to pass them along to a judge who was more interested in administration.

2. Assignment Process

Judges rotate on a periodic basis among the courts within each department. Superior Court judges rotate on a regular circuit within a region; in Middlesex, Suffolk, and Essex counties, some judges have rotations lasting six months, while others rotate monthly. In the other counties, all judges typically move every month. Unlike the Superior Court judges, District Court judges do not rotate on a regular circuit. Judges are assigned to one of the five regions; the Regional Administrative Justice (RAJ) makes monthly assigments that specify the days of the week on which each judge sits in a particular court.

Each Trial Court department is responsible for assigning its own judges to particular sessions. This convention by itself hampers the assignment of judicial resources across departmental lines. Scheduling is a complicated process, including considerations of both likely workload and individual judge's commitments, such as planned vacation or educational leave. All scheduling is done manually. In most Trial Court Departments, the Chief Justices are primarily responsible for scheduling justices and are generally assisted by their Executive Secretaries. In District and Superior Courts, scheduling is done by the Regional Administrative Justices for the judges assigned to their regions by the Chief Justices.

Rotations must be short enough to guard against the development of an unhealthy familiarity between a judge and the local bar, as well as the perception that a particular judge, rather than the system, embodies the law. However, rotations that last only one month, as is often the case for Superior Court judges, impair continuity and limit the judge's ability to develop good working relationships with the staff of the local courts. Short rotations also frustrate attorneys — "if circuit turns were less frequent, at least you wouldn't expect to see a new judge on the bench every time a motion came up for one case."

The situation is even more complicated for the District Court judges, who often move on an almost daily basis. Many judges find this frustrating; as one judge noted, "there is no ratonale for moving on a day-to-day basis; it is simply unproductive and unprofessional, as well as personally and professionally unsatisfying." Short rotations also make it more difficult to develop a feeling of involvement with local communities.

In addition, too frequent rotations inhibit accountability and create administrative inefficiency in the movement of cases. The fingerprints of several different judges, each of whom must be educated on the facts and the surrounding procedural issues, may be found on any one case. When one judge rarely hears a civil case all the way through, there is little incentive for any individual judge to "move the business" — to make decisions or take other actions that drive a case toward final resolution. This creates opportunities (and some incentives) for delay on the part of both the judge and the parties involved.

The American Bar Association recommends that judicial assignments last for at least one year. In Connecticut, assignments are reviewed every six months; typically, judges remain on one assignment for 18 months.

3. Performance Evaluation

It is generally agreed that most judges in the Massachusetts courts work hard and are dedicated to conducting the court's business with integrity and fairness. Concerns have been raised, however, about the lack of a feedback mechanism for judges to learn what things they do well and what needs improvement; without such feedback, judges may lose perspective on their own performance.

In addition to improving judicial performance both in the courtroom and as administrators, the existence of routine performance feedback may ensure that any instances of poor judicial performance that do occur will not go unchecked. Although such instances may be infrequent, many long-time court observers have been appalled by the behavior of some judges, ranging from rudeness to falling asleep on the bench to "dismissing cases early

so everyone can play golf." One attorney bitterly noted that "judges regularly get away with being unfair, imposing outrageous sentences, and being sexist or racist, without any sanctions."

In response to the concerns regarding the lack of performance feedback, which were heightened by allegations of judicial misconduct in a Fall 1990 Boston Globe Spotlight series, each Trial Court department is developing a performance evaluation process for its judges. After each process has been pilot tested and assessed, the expectation is that one method will be adopted for use by the entire Trial Court. The goal of this effort is to improve the overall performance of the court system by improving the operating performance of individual judges. Various combinations of performance evaluation methodologies are being explored. These methodologies include observation in the courtroom by other judges; input from attorneys, jurors, clerks, probation officers, and other court system personnel who work with judges; and self-assessment.

Some judges fear any performance evaluation system, but most openly welcome the opportunity to receive feedback. As one judge commented, "judges need more input on how they are doing. This is an easy job to fall into the feeling that you are a smart guy because no one is allowed to disagree with you. You must keep reminding yourself that you don't know it all. It would help if you knew that people thought you were a stuffed shirt, or asked too many questions." Most would probably agree that periodic performance reviews can provide valuable feedback as long as they are based on clearly established criteria and are administered both fairly and privately.

The major concerns expressed by judges about performance assessment focus on the qualifications of the reviewers and the confidentiality of the findings. With regard to qualifications, some judges insist that only judges are qualified to evaluate other judges' performance, while others prefer that observers from outside the court system are best suited to assess judicial behavior. As for confidentiality, most judges contend that unless the findings are kept confidential, the potential for politicization and abuse of the system is considerable. Thus far, none of the Trial Court departments has made any plans to disclose the results of the evaluations to anyone other than the judge being evaluated and the Chief Justice of the department to which the judge belongs.

The state of Connecticut was one of the first to establish a judicial performance review system. That system was several years in development and is still in the process of being refined. The Connecticut system also follows principles set out by the American Bar Association: it is controlled by the judiciary, rather than the legislative or executive branches; its primary goal is to improve judicial performance; and it addresses skills and attributes that should be expected of a judge; the methodology is clearly established and incorporates multiple information sources; and the dissemination of results is consistent with specific uses.[4]

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[4]American Bar Association Judicial Administration Division, Standards Relating to Court Organization, Standards of Judicial Administration, Volume 1 (February 1990), pp. 71-76.

Under Connecticut's current system, both attorneys (with a certain amount of experience in front of a particular judge) and jurors complete questionnaires relating to various aspects of the judge's performance. Attorneys are asked to comment on judicial demeanor, courtroom management skills, and legal ability as demonstrated both during the proceeding and by the quality of the final written decisions or rulings. Questions for jurors focus on the judge's demeanor and conduct in the courtroom. The responses of all parties are tabulated on a computer, so that various statistical reports can be produced. The confidentiality of the individual data and the identity of responding attorneys have been protected. However, because judges in Connecticut are appointed for limited terms, a statute was enacted to ensure that judicial performance data is made available to Connecticut's version of the Judicial Nominating Council for consideration during the reappointment process.

We understand that many Connecticut judges were initially skeptical about the value of such a process, contending that the mere existence of such a system "casts a shadow" on the judiciary. However, over time most judges apparently have become more comfortable with the process, perhaps because the results have been helpful and largely positive.

4. Training

Many Massachusetts judges believe that both pre-bench training and support for continuing education are insufficient. In most Commonwealth courts, pre-bench training is limited to sitting with an established judge for a relatively limited period of time. New judges in the District Court department, for example, are supposed to sit with another judge for two weeks prior to taking the bench on their own. However, due to the continuing existence of judicial vacancies (i.e., during the year beginning in the fall of 1989, there were continually nearly 40 vacant judicial positions), there is pressure for new judges to take the bench as soon as possible. In one instance, a judge was called to the District Court bench after only four days of pre-bench exposure. Judges who come from other parts of the public sector and have little exposure to civil proceedings are at a particular disadvantage without adequate pre-bench training. One judge likened the process to "being thrown into the sea without swimming lessons." Another commented, "you can't convert a person in a week or two; that's not enough time to handle their fears about being a judge."

With respect to continuing education, the main source of training is the Flaschner Judicial Institute, a private nonprofit organization operating as an independent division of the Massachusetts Bar Foundation. Flaschner provides several different kinds of training for both new and experienced judges, including a multi-day orientation program for new judges, which is offered periodically; an annual All Court Conference, in which approximately 90 percent of the state's judges participate; and specialized training on legal and management skills, as well as special interest courses (e.g., using personal computers). All of these programs are offered at no cost to the participating judges; support is provided through voluntary contributions and a sizeable endowment.

The programs offered through the Flaschner Institute are widely praised. Judges cite both the technical knowledge they receive and the opportunity to interact with and learn from their peers as benefits of Flaschner programs. Positive feedback provided to

the Flaschner Institute on individual programs, as well as the fact that they are regularly filled to capacity, suggests that judges are thirsting for more training.

Some training opportunities also are being provided through the Judicial Institute established in 1988 and run by the OCAJ. The legislation charges the Judicial Institute to provide for the training of both judicial and nonjudicial personnel. The Institute is just beginning to offer programs to judges. One Institute program brings new judges together each month to discuss issues; several judges commented that they appreciated this opportunity to learn from their peers, and that this program helps to ease their transition into the judiciary. In addition, most Trial Court departments provide some form of orientation for new judges, and a Mentor Judge Partnership Program teaming new judges with experienced judges for support and guidance is getting underway.

However, many judges are frustrated by the limited amount of funds available for training through the OCAJ. There is general consensus that more time should be dedicated to continuing education, but there is also strong resistance to closing down a courtroom so that a judge will be free to attend a program. One District Court judge noted that "although by statute, we have 15 educational days each year, there is no way that we can each take more than a few. Each time a program is announced, our region limits attendance to five of the more than 30 judges in the region so that sessions can be covered." Some judges believe that one reason for the lack of urgency surrounding the availability of training is that judges' responsibilities remain, in many ways, not clearly defined. One judge noted that "we don't train because we don't know what we should be training judges to do, particularly with respect to administration."

The National Judicial College in Reno, Nevada is the nation's leading facility for judicial education; their courses are attended by justices from nearly every state, but in Massachusetts there is a statutory prohibition on providing support for judges to attend their courses. Many judges expressed regret that there was no financial support available for attending these courses because they provide a unique opportunity for exposure to different ways of handling common problems related to both legal and administrative issues.

C. The Staff

1. Selection, Job Descriptions, and Reporting Relationships

Clerks, Clerk-Magistrates, and Registers of Probate are the court system's primary administrators, case managers, and recordkeepers. (For the purposes of this discussion, the term "clerk" refers to all clerks, clerk-magistrates, and registers, unless otherwise indicated.) The head clerks for the Superior Court department, as well as Registers of Probate and the Suffolk County SJC clerk, are elected; head clerks in all other Trial Court departments are appointed by the Governor in a process similar to that for judges. The Suffolk Superior Court and the Boston Municipal Court have separate head clerks for civil and criminal cases; in all other Superior courts and Trial Court departments, one clerk has responsibility for both types of cases.

The responsibilities of clerks vary widely across the Trial Court departments, as does the process by which assistant clerks and registers of probate are appointed. There is no established job description setting out responsibilities and expected performance levels for

clerks and their assistants, and no consistent set of administrative requirements that must be met before a person can become an elected or appointed clerk. Consequently, there is no guarantee that the personnel in charge of the clerks' offices will have the administrative skills and ability that are essential to a well-run court system.

Superior Court clerks are elected to serve six-year terms. The process by which assistant clerks are appointed varies by county in the Superior Court department. In Dukes and Nantucket counties, there are no assistant clerks. In Berkshire, Hampshire, and Franklin counties, the Clerk of the Courts may appoint only one assistant clerk, who serves a one-year term. In all other counties, the SJC appoints a First Assistant Clerk, who serves a three-year term; the Clerks of the Courts appoint all other assistant clerks, who may be removed for cause but have otherwise unlimited terms. There are strong misgivings among some Superior Court employees concerning the selection of assistants by someone other than the Clerk of the Courts, whom they are supposed to be assisting. These employees believe that the head clerk is in the best position to determine what is required of an assistant, and that having a separate supervisory official complicates the reporting relationship of the assistants.

Similar problems with lines of authority are evident in the Probate and Family Court department, where assistant registers are appointed by the presiding justices of the county courts, subject to the approval of the OCAJ. In some Probate courts, the personnel holding the positions of assistant registers actually function as assistants to the presiding justices who appoint them; in some cases, they actually rotate with the justices. This requires the Register to scramble for dedicated assistance from among the clerical staff, under the table, who cannot be guaranteed to have the skills necessary to function as an assistant register.

In the District Court department, the Clerk-Magistrate for each local court appoints assistants subject to the approval of that court's presiding judge and the Chief Justice of the District Court. In addition to their traditional recordkeeping, administrative, and case management responsibilities, all Clerks in the District Courts received the designation of "magistrate" and added magisterial responsibilities as a result of the 1978 court reform legislation: they may determine whether criminal complaints, arrest warrants, and search warrants are issued, and hold certain kinds of hearings. These duties were entrusted to the clerks as part of a strategy to reduce the court's substantial backlog, which was composed largely of simple cases (e.g., civil motor vehicle infractions), by removing some of the case processing burden from judges.

Since 1978, the Clerk of each District Court in the District Court department carries the title of Clerk-Magistrate; all assistant clerks have the authority in their own right to issue arrest and search warrants, but only those specifically granted authority as assistant clerk-magistrates have full magisterial authority. Most courts did not get additional clerks or provide for an increase in compensation despite the significant expansion of the position's responsibilities.

The expansion of responsibilities has raised particular concerns among some District Court department personnel about the lack of action being taken to "professionalize" this important office in terms of setting minimum qualifications and performance standards for clerk positions. In one county, for example, it is apparently common

knowledge that one out of every four head clerks simply refuses to do work. Since these clerks have gubernatorial appointments, the presiding justices have no authority to compel them to work despite the fact that their failure to perform compromises the judge's ability to conduct the court's business.

The only other Trial Court department in which the clerks have any magisterial responsibilities is the Superior Court department, where they are limited to the authority to issue summonses, although they also bail on an ad hoc basis. Criminal indictments in the Superior Court department are issued by Grand Juries; judges issue arrest warrants.

Elected clerks support the continuation of elections for Superior Court clerks and Registers of Probate. They contend that the election process enhances their accountability to the public, and that it promotes greater communication with the public regarding the business of the courts. However, the very fact that such clerks see themselves as responsible to the electorate, rather than to the courts, impedes the establishment of clear lines of authority and accountability that would enhance the efficiency of court operations.

The concern is that the lack of congruity between the selection process and the daily reporting relationships diffuses accountability at the local court level. The accountability and control problem is most acute in the Trial Court departments that have elected clerks. Many judges in these courts complain bitterly about the control battles they must endure to secure the cooperation of the clerks, whose role should be to support the judiciary. In the words of one judge, "to have one body of people at the heart of the system not responsible to the system is absurd; it isn't working." Clearly, effective case management at the individual court level requires a redefinition of the relationship between judges and clerks.

The problems in the clerk-judge relationship can be illustrated by examining the support required for the implementation of time standards. These problems were highlighted in a recent study of the Suffolk County Superior Court by the National Center for State Courts.[5] In order for time standards to be effectively implemented, they must be supported by active case management policies and procedures in the office of the Clerk-Magistrate. The session clerks who staff the time standards sessions provide a critical link between the Clerk-Magistrate and the courtroom. Their role is critical in ensuring case handling continuity, given that judges rotate in and out of time standards sessions.

The session clerks have dual reporting responsibilities: they work under the direction of the judge to whom they are assigned, but are also subject to the authority and supervision of the Clerk-Magistrate. It is up to the Clerk-Magistrate to ensure that sufficient support, in the form of session and other assistant clerks, is provided to the time standards sessions. For example, under the Time Standards implementation plan, the Clerk-Magistrate should assign the same session clerk and administrative clerk to a particular session "as far as practical" to provide the continuity and accountability that are critical for effective caseflow

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[5]Bakke, Holly, Barry Mahoney, Richard Vandiver, An Analysis of the Suffolk County Clerical Support System, National Center for State Courts (December 1989, revised August 1990), p. 8.

management. However, that level of support is not being provided in Suffolk County; currently, each time standards session has two clerks assigned for only two weeks each month, and no commitment has been made by the Clerk regarding how long any individual session clerk will be assigned to a particular session. Such a lack of support may compromise the efficiency of that session, especially when the variation in procedures among the sessions is considered.

2. Performance Evaluation

The Massachusetts court system in 1990 had nearly 5,000 non-judicial employees. For the most part, both judges and non-judicial staff are trying to do their best while working under extremely stressful conditions. Hard work and dedication are evident system-wide. Among many of the workers on the front lines, however, morale is low and indifference has set in. This manifests itself in poor work habits such as leaving work early, careless performance, or treating the public with arrogance or indifference instead of consideration.

It is difficult for the court system to address such behavior because of the diffusion of administrative authority and because it lacks a clearly defined system of performance standards, measurement, and feedback for non-judicial personnel. The lack of clear expectations, combined with a lack of incentives and sanctions, places the burden of efficiency only upon the self-motivated. Without a basic performance management system, the task of improving the efficiency of the system becomes more formidable.

Performance management begins with the hiring process. Non-judicial staff are hired by the individual Trial Court departments, following procedures set by the OCAJ in the Trial Court Personnel Policy and Procedures Manual. The departments submit the names of nominees for particular positions to the OCAJ, who reviews the documentation provided to ensure that the appropriate procedures regarding job posting, interviewing, and candidate selection have been followed, especially with regard to work force diversity. If everything is in order, the hire is approved in the name of the hiring official, be it a judge, clerk, or chief probation officer. The hiring officials also have the authority to discipline and fire poor performers, provided that just cause is demonstrated and that proper procedures have been observed. Grievance and administrative appeals procedures are available to employees who are the subject of adverse personnel actions.

Despite the guidelines provided in the Personnel Policy and Procedures manual for disciplining non-performing employees, and the complaints of many managers about "deadwood," few managers in the court system take actions that would compel such employees either to improve or be terminated. In the current budget crisis, a decision may be made that even a poor performer is better than no staff at all. Also, many managers believe that the procedure which must be followed to terminate a unionized employee is so onerous as to discourage its use.

More important, the manager with a poorly performing employee may not have the authority to discipline that employee. For example, a judge has no authority to discipline personnel in the clerk's office even if their lack of performance has a direct impact

on the judge's ability to carry out the court's business. Thus, the question of responsibility for hiring and reporting directly affects the efficient administration of justice within the courts.

Effective performance management systems should include incentives for good performance as well as sanctions for poor performance. One explanation given for the lack of a performance measurement system for non-judicial employees is the lack of financial or other incentives available to reward good performance. Under the current system, each job classification has seven pay levels. Employees get promoted up the seven steps, with pay increases attached to each new level. Thus, pay raises are available only upon promotion; there is no provision for merit raises. As one former employee commented, "there is no incentive for excellence in the system. You get appointed to a job, move up seven steps, and wait to retire. There's no reason to do anything but come in at ten in the morning and leave at four in the afternoon; it is unreasonable to expect any different behavior."

Resource constraints are often cited for the lack of performance incentives. At the same time, the Trial Court has almost totally failed to use the types of non-economic rewards that have proved successful in other not-for-profit organizations, such as public recognition ceremonies and the opportunity to attend special training programs.

The lack of a performance evaluation system may actually create perverse performance incentives. For example, no attempt is made to control the use of sick leave by court personnel; this may result in abuse, as in the case of one court employee said to have charged the equivalent of a full year (out of two year's employment) to "phony sick time." In addition, without standards for job performance, it is easier for personnel to shirk responsibility. Employees who refuse to perform their duties increase the burden on those who are willing to work hard. Examples of this process in action were cited for all levels of court system employees.

3. Training

The limited training that has been provided for non-judicial staff has been done primarily on an ad hoc, informal basis. This is partly because the OCAJ has not established a coordinated, comprehensive training strategy, and partly because the resources available for training are so limited. In 1990, for example, less than $400,000, or 0.15 percent, of the $251.5 million court system budget was available for education and training of both judges and non-judicial staff.

Through the Judicial Institute, first-time clerks receive one day of training; for many of them, it is the first exposure they receive to the scope of their job responsibilities. On occasion, other training programs have been conducted, such as one-day conferences on case management and public access to court records for clerks, as well as workshops on communications skills for court officers and supervisory training for clerical personnel. Some technical training is also provided, such as continuing education for court interpreters.

The OCAJ controls the allocation of funds for training; the departments of the Trial Court, and associated organizations such as the Law Libraries, essentially must compete for the available funds. Many within the system are frustrated by what they perceive as "penny-wise but pound-foolish" training fund allocation decisions. For example,

funds may be provided to hold a training session in Boston, when many of the staff who should be attending are based in the western part of the state and no provision is made to compensate them for travelling to the program location.

At the individual court level, training opportunities depend greatly on the initiative of local managers. Some head clerks, for example, try to provide in-house training for their assistants and clerical staff. One response to the lack of administrative training being provided on a systemwide level has been the development of an informal "apprenticeship" program in the District Courts, through which some new employees will spend a few weeks observing how their jobs are done in "host" courts that are recognized for being well run.

The lack of training available to non-judicial staff also frustrates the judges. In one instance, a judge mentioned that because the administrative assistant who is supposed to handle the budgeting has no training, he must sit with the assistant each month to review the monthly statement of expenditures. Clearly, this is not an efficient use of the scarcest, most expensive resource in the system: judicial time.

D. Recommendations Regarding Human Resources

1. There will be no elected positions in the Trial Court system. There will be a position in both the courts of limited and general jurisdiction of Magistrate, which will be responsible for magisterial matters under the direction of judges in that court. Magistrates will be appointed by the Governor from a list submitted by the Chief Justice. They will serve at the pleasure of Chief Administrative Judge(s). Current elected Superior Court Clerks and Registers of Probate will receive life tenure in their positions as record keepers for their respective courts. Where qualified, they should be considered for appointment as TCAs.

2. Create session teams for each courtroom. The teams will be composed of the sitting judge, an assistant (or session) clerk, a probation officer (where appropriate), a court officer, and a member of the clerical staff. The team will be accountable to the Presiding Judge for managing the case flow in its courtroom.

3. All TCAs, Chief Administrative Judge(s), Presiding Judges, and Magistrates will be responsible for assuring that work is performed by the lowest level person qualified to do it. In some instances this will require changes in legislation to accomplish; in all instances it will require rethinking the judicial work process. A special Task Force representing all key personnel will be created immediately to prepare detailed recommendations for reassignment.

4. Assignment of all trial judges to a particular courthouse will be for a minimum of six months. The assignment and scheduling of judges will be the joint responsibility of the Chief Administrative Judge(s) and the Court Administrator. Assignments will be made with full regard to the fact that particular expertise may be required to hear certain matters.

5. Provide trial judges with an opportunity for a voluntary three- to six-month sabbatical at half pay for every seven years of service on the bench. All requests for sabbaticals will be approved by the appropriate Chief Administrative Judge and reviewed by the Board.

6. Create a uniform performance evaluation system for trial judges. A small task force of judges from both courts will be given the responsibility for making final recommendations regarding the specifics of the system. The system will be in place by 1 January 1993.

7. Expand the training available to judges. Newly appointed trial judges require a minimum of two weeks of training before sitting on the bench. Such training should include observation of several other experienced judges as well as classroom sessions on court procedure and administration. Continuing education should include both judicial topics and administrative ones. The Court Administrator will negotiate with the Flaschner Institute to undertake responsibility for all judicial training. The current Judicial Institute will be renamed and will focus on providing skills training for non-judicial employees.

8. Create a performance appraisal system for all non-judicial personnel. The Court Administrator will be responsible for developing and implementing the system in consultation with a small task force representative of the non-judicial staff. The system will be in place by 1 January 1993.

V. ALLOCATION AND MANAGEMENT OF COURT RESOURCES

A. Trial Court Resource Levels and Allocation

The barriers between the departments, combined with administrative fragmentation and the nearly complete inability to transfer non-judicial personnel, make it nearly impossible to allocate Trial Court resources where they are most needed. An analysis of three major resource factors, courtrooms, staff, and judges, confirms that wide discrepancies exist in court resource levels. The courtroom is the appropriate unit of business because this is where the processing of court business occurs.[6]

One indication that resources are not being utilized efficiently is the wide variance in caseload per courtroom, and in courtroom utilization at various court facilities. Differences in case mix and complexity may explain some, but not all, of this variation within the District Court department. Across the 69 districts of the district Court and Boston Municipal Court Departments, the average caseload per courtroom ranges from 1,083 in Winchendon to 10,000 in West Roxbury; weekly courtroom utilization ranges from 21 percent in Orange to 95 percent in Lawrence (see Exhibits V-1 through V-4). Excluding the outlying Dukes and Nantucket counties, in the Superior Court there is less variance in average caseloads per courtroom (see Exhibits V-5 and V-6).

Caseload per staff varies widely across the Trial Court departments and within the two largest departments, Superior Court and District Courts. In the District and BMC departments, the average caseload per staff varies from 258 to 1,850; in the Superior Court, the range is 32 to 102. This suggests that the volume of business is not the primary factor in determining how personnel are allocated to various courts (see Exhibits V-7 and V-8).

Compared to other states, Massachusetts has a high volume of business in terms of the number of cases filed per capita. In civil, criminal, and juvenile case categories, the number of cases filed per capita in Massachusetts considerably exceeded the nationwide median (see Exhibits E-1 through E-3). Yet, Massachusetts has ranked 48th in the nation with respect to the number of judges per population. Connecticut, a state considered to be relatively similar in demographics to Massachusetts, was in line with the national median in terms of case filings per capita, and considerably above Massachusetts in terms of population per judge, ranking 35th. As of 1988, Massachusetts judges still cover an average of nearly twice the number of people as Connecticut judges (see Exhibit E-4).

The variations in court resource allocations suggests that greater flexibility is needed in the ways in which jurisdictional lines are drawn and facilities are utilized. For example, courts must be staffed and open five days a week, even if sessions are held only

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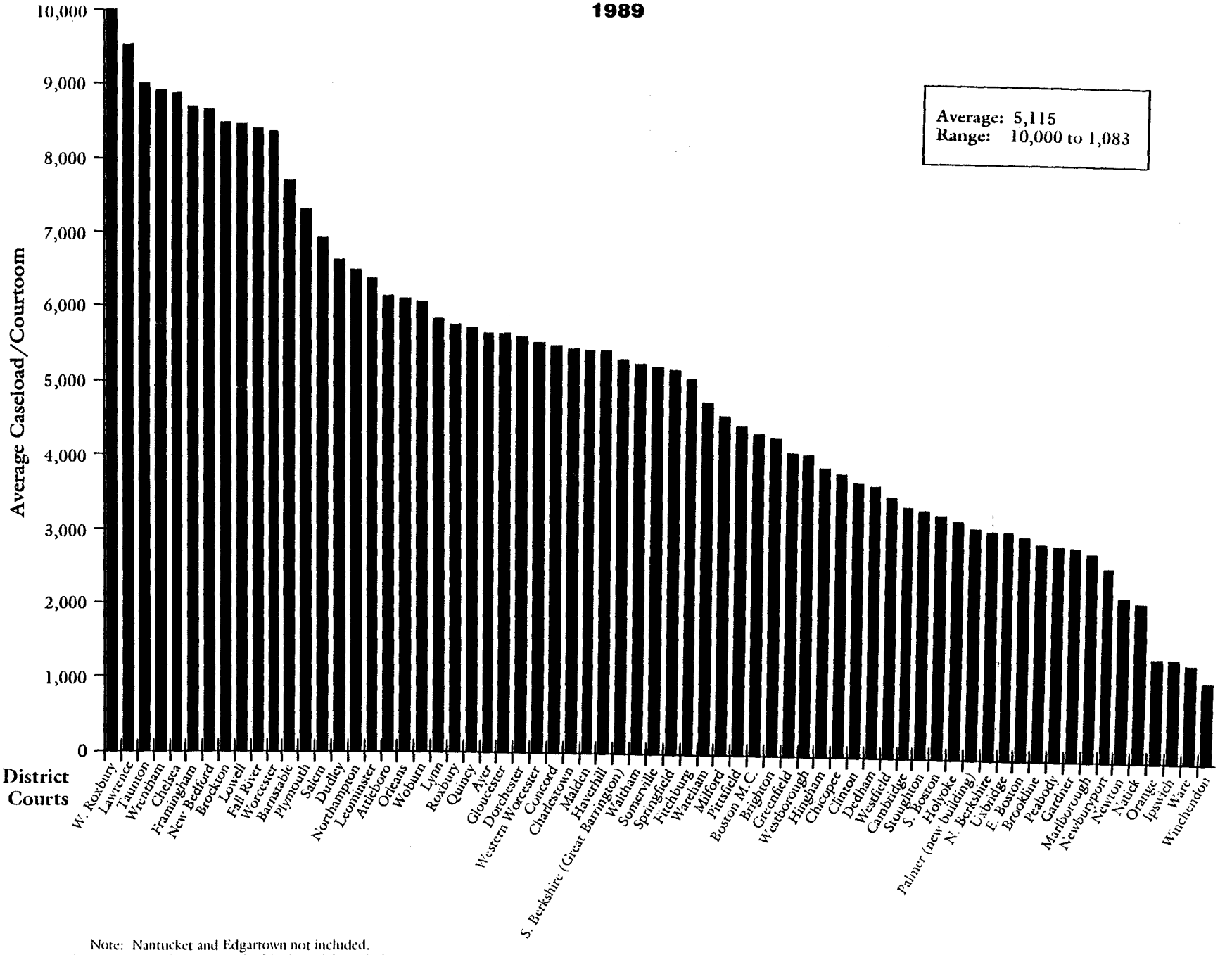
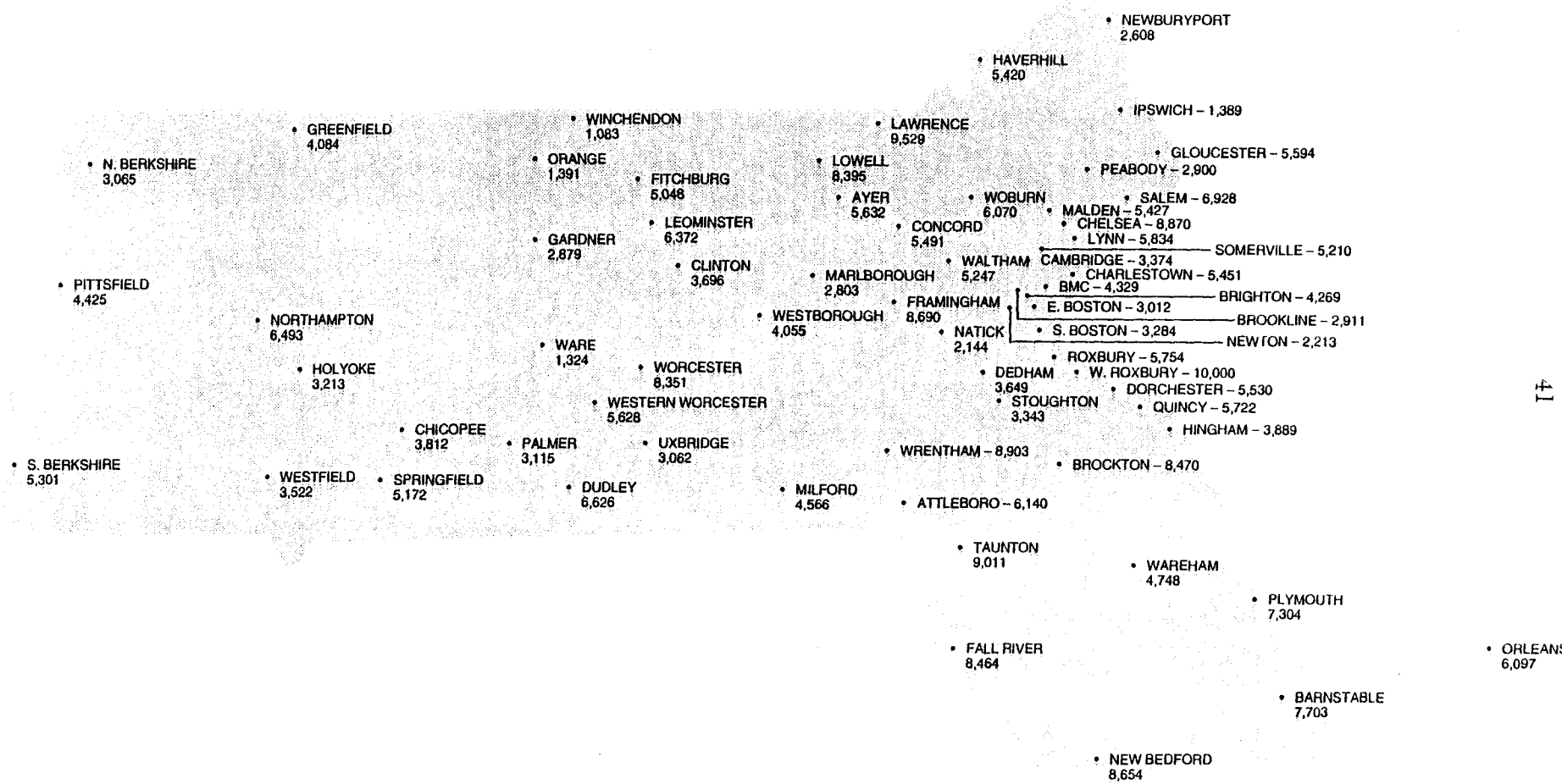
[6]Note that statistics for the Boston Municipal Court and the District Court departments were consolidated, and decriminalized motor vehicle citations were excluded from the case count. The utilization and allocation of these resources was assessed by comparing the average level of resources across and within Trial Court departments for 1989, the year for which we had the most complete information.

Exhibit V-1
Average Caseload/Courtroom: District Court and Boston Municipal Court
1989



Note: Nantucket and Edgartown not included.
Sources: Court Facilities Unit, Division of Capital Planning and Operations; Annual Report of the Massachusetts Trial Court, 1989, Office of the Chief Administrative Justice.

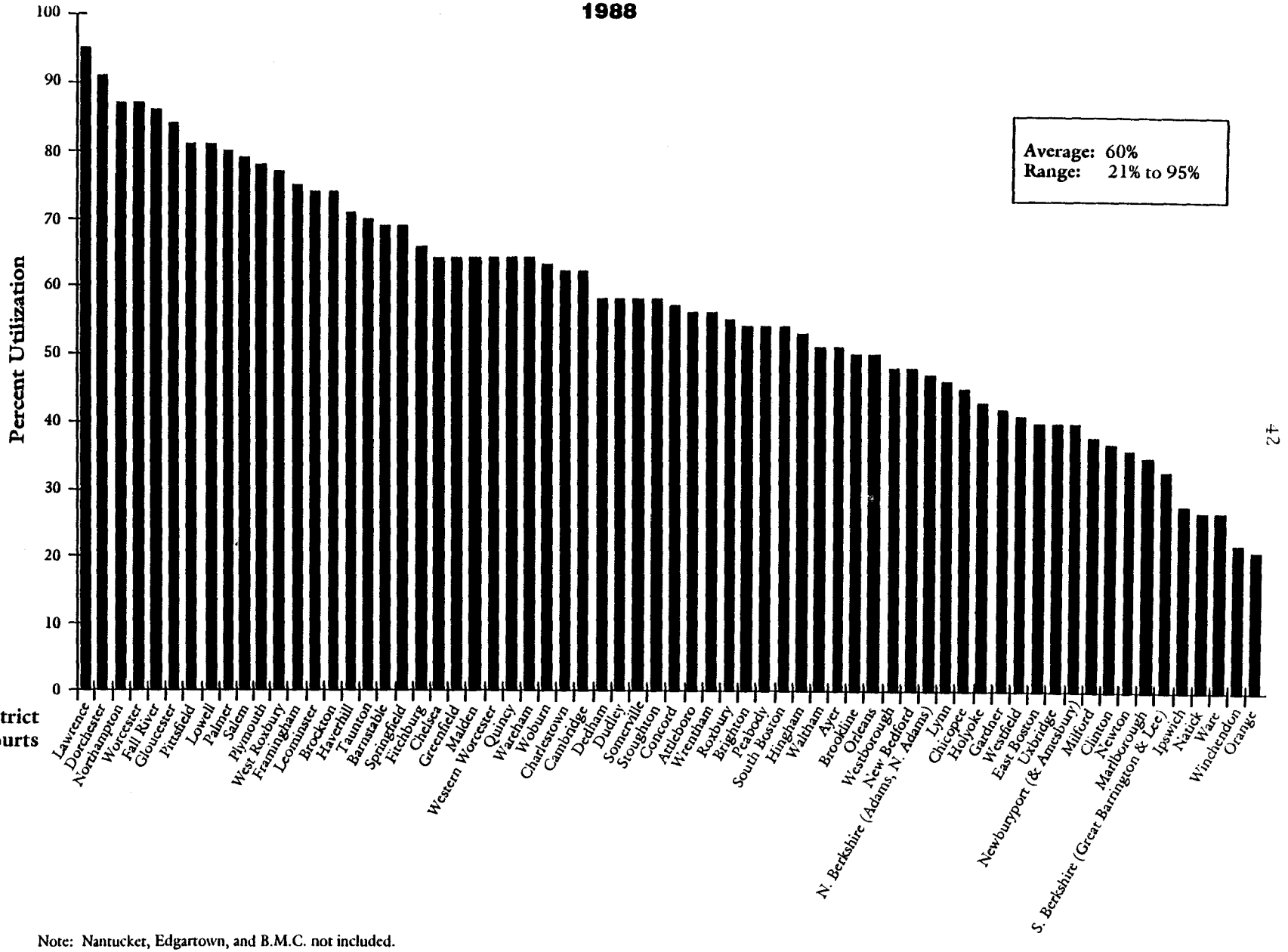
Exhibit V-2
Geographic Distribution of Average Caseload Per Courtroom: District Court and BMC



Note: Nantucket and Edgartown not included.

Sources: Court Facilities Unit, Division of Capital Planning and Operations; Annual Report of the Massachusetts Trial Court, 1989, Office of the Chief Administrative Justice.

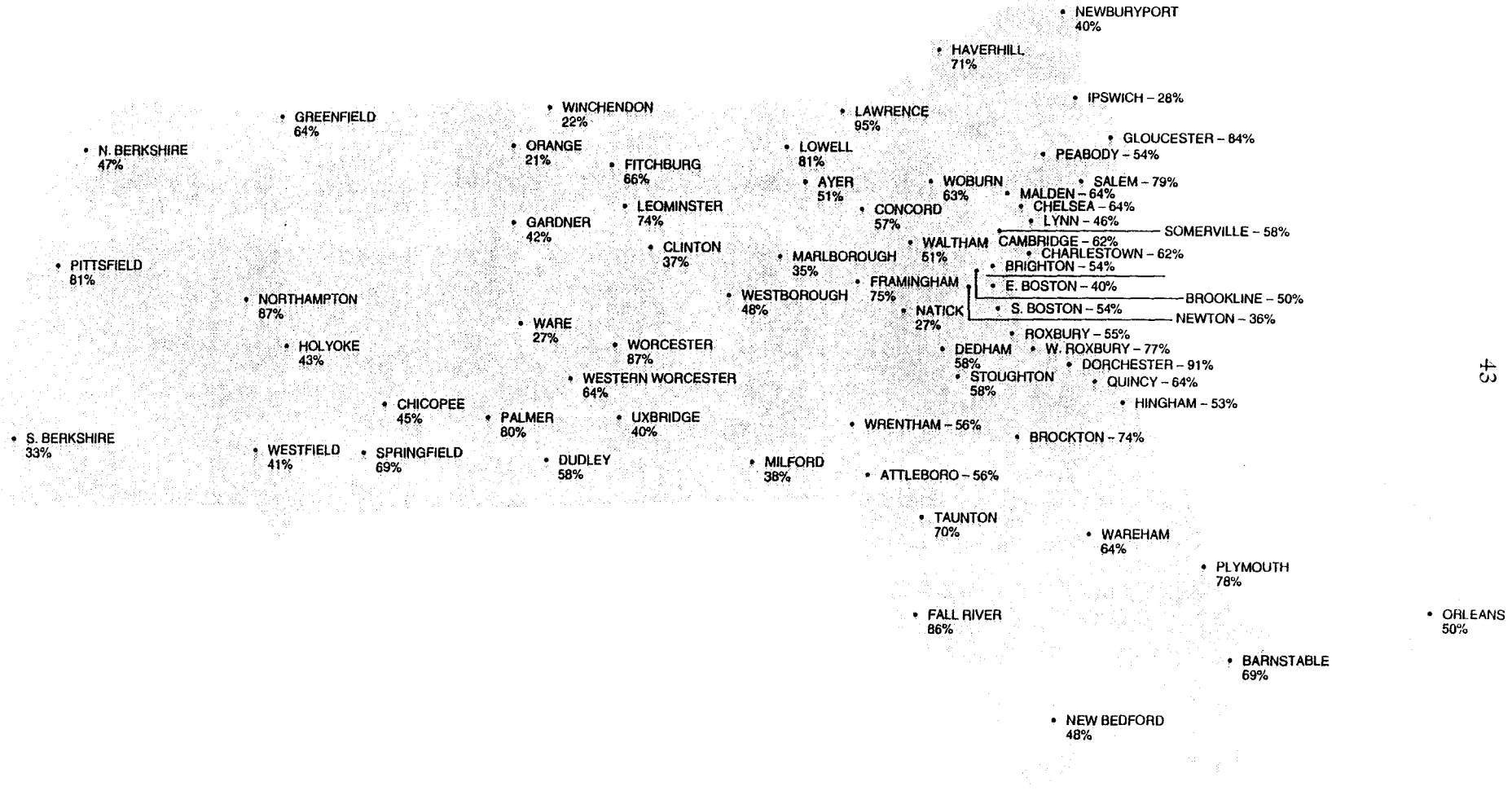
Exhibit V-3
Courtroom Utilization: District Court
1988



Note: Nantucket, Edgartown, and B.M.C. not included.

Sources: Court Facilities Unit, Division of Capital Planning and Operations; Annual Report of the Massachusetts Trial Court, 1989, Office of the Chief Administrative Justice.

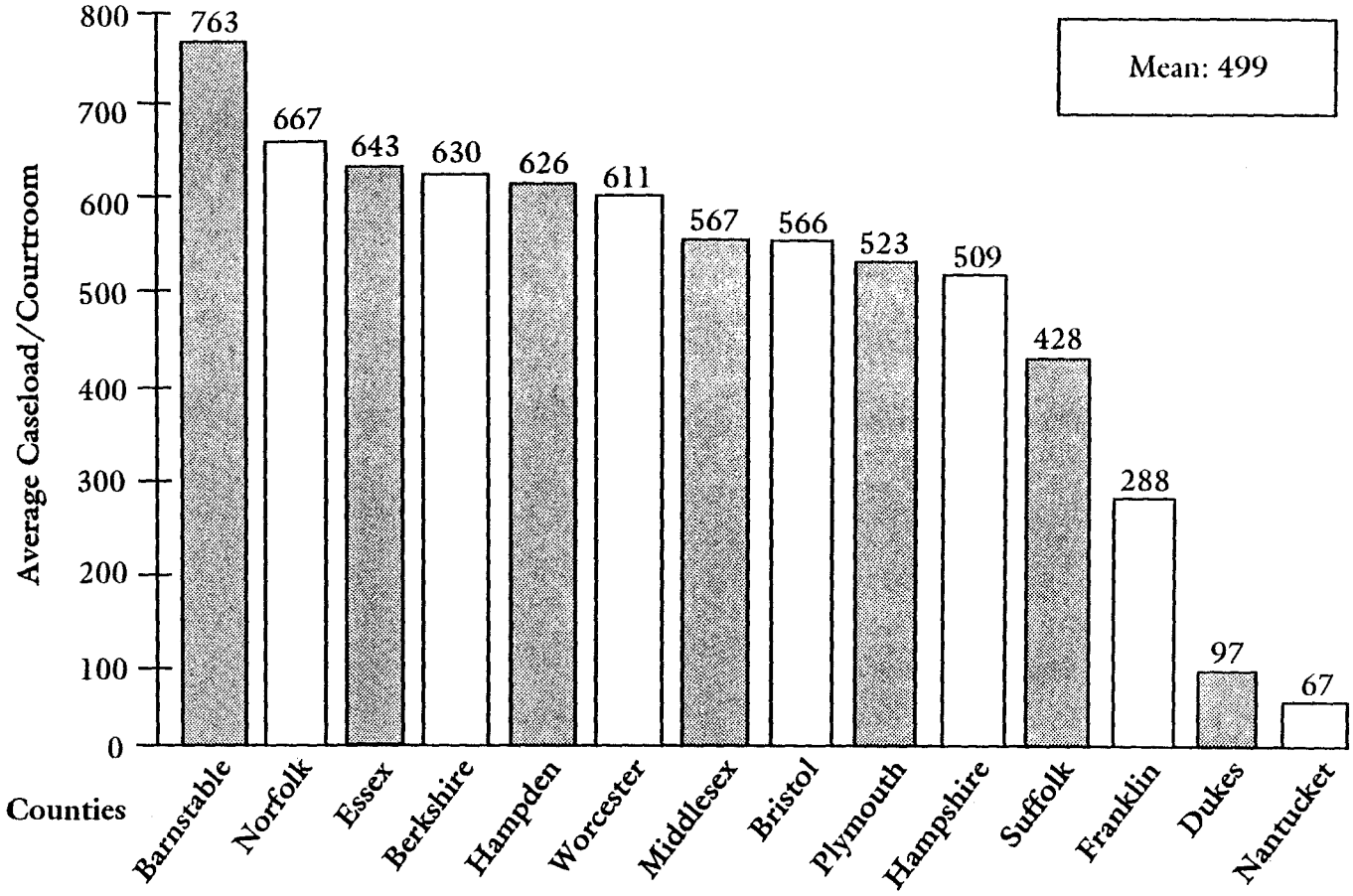
Exhibit V-4
Geographic Distribution of Courtroom Utilization: District Court



Note: Nantucket, Edgartown, and B.M.C. not included.

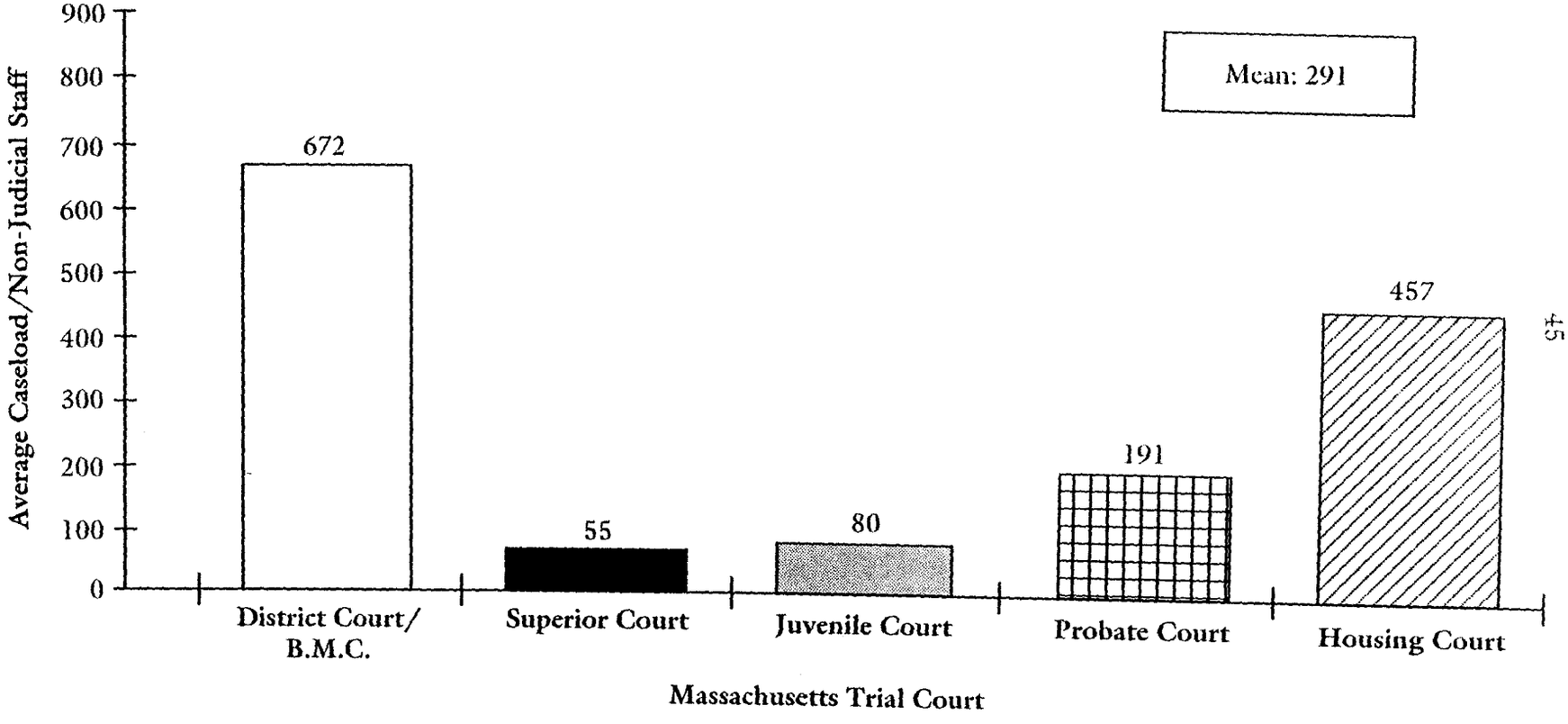
Sources: Court Facilities Unit, Division of Capital Planning and Operations; Annual Report of the Massachusetts Trial Court, 1989, Office of the Chief Administrative Justice.

Exhibit V-5
Average Caseload/Courtroom: Superior Court
1989
(Ranked in Descending Order)



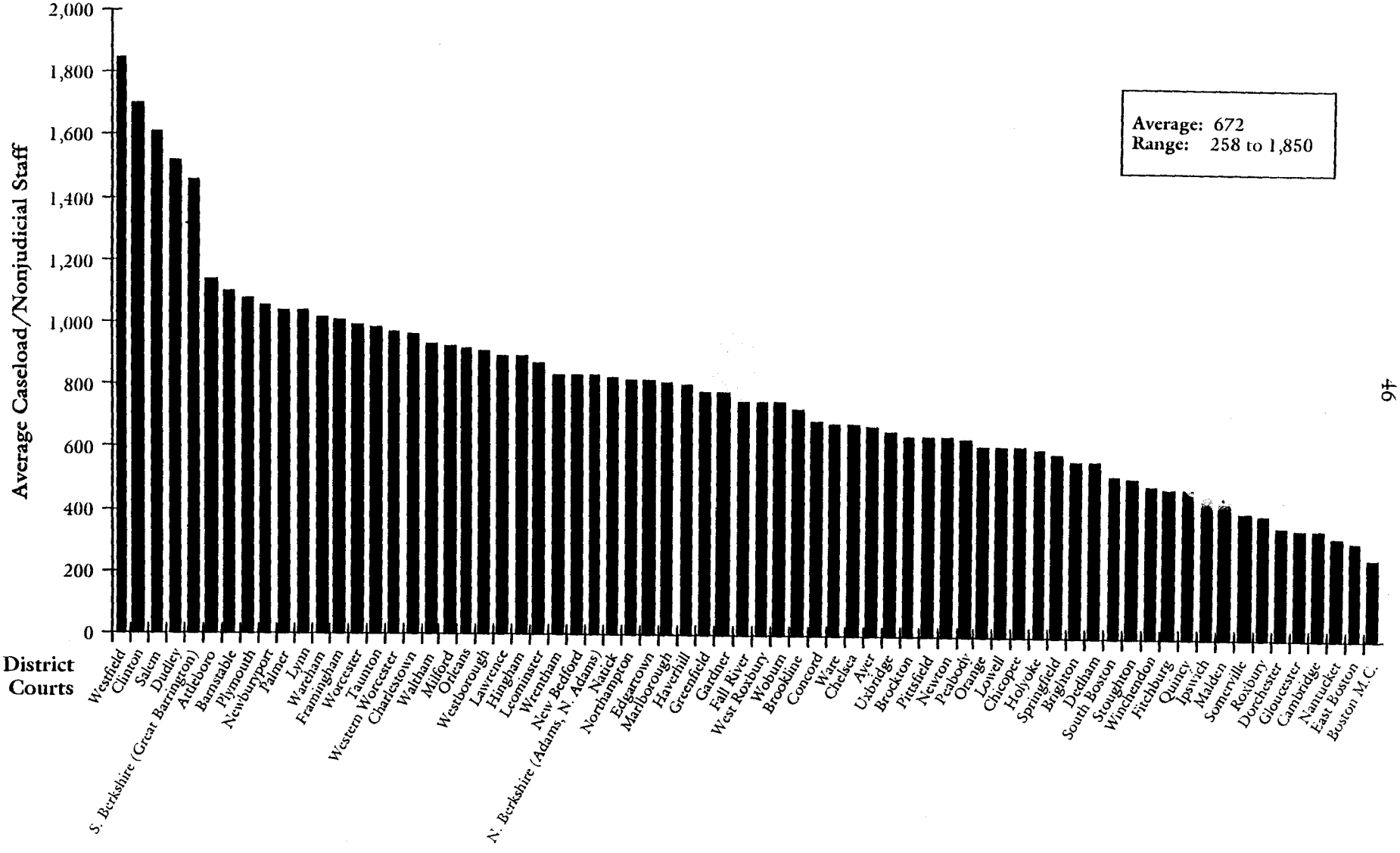
Note: does not include decriminalized motor vehicle citations.
Sources: Court Facilities Unit, Division of Capital Planning and Operations; Annual Report of the Massachusetts Trial Court, 1989; Office of the Chief Administrative Justice.

Exhibit V-6
Average Caseload/Non-Judicial Staff: Trial Court Overview
1989



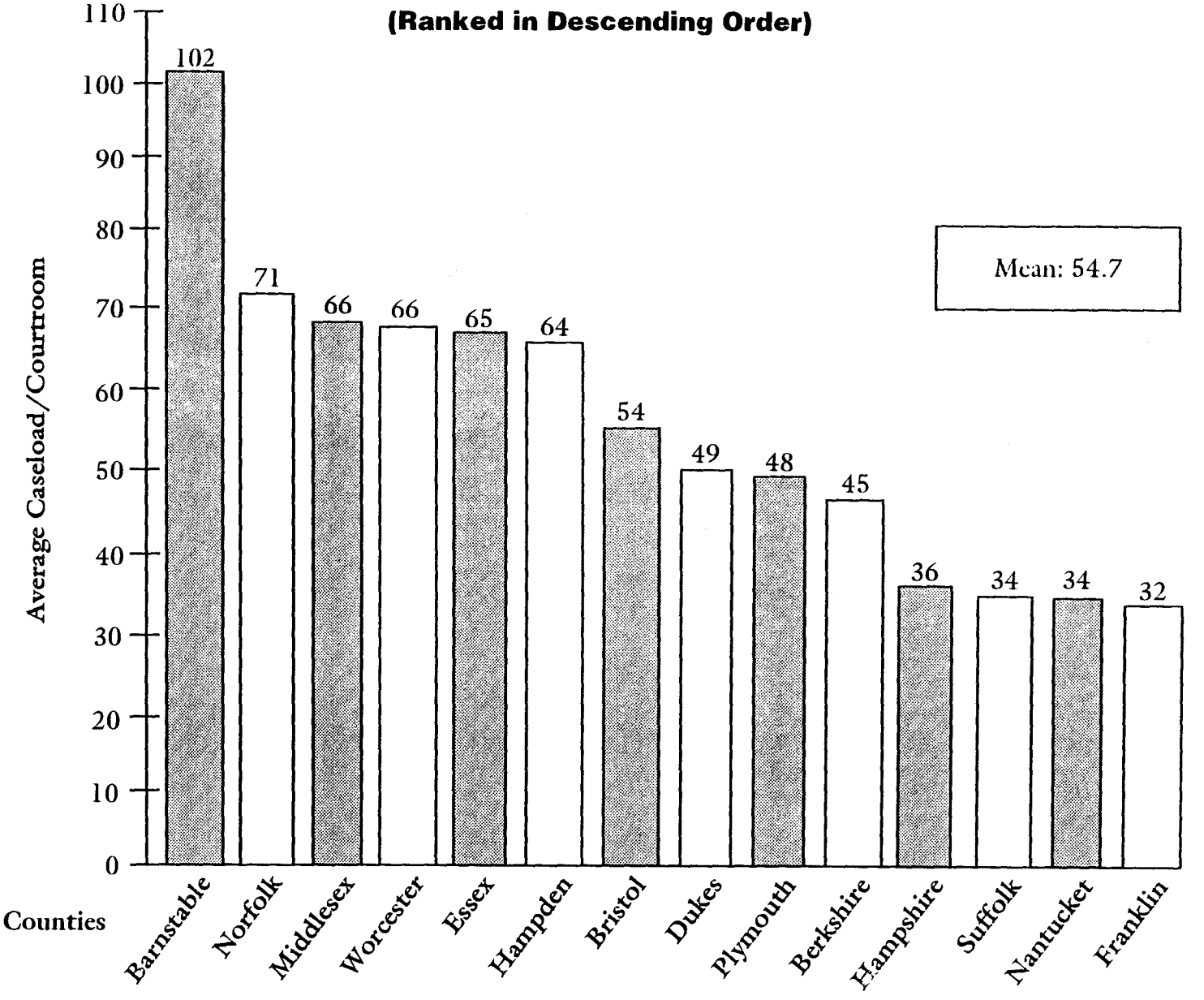
Note: does not include decriminalized motor vehicle citations.
Sources: Court Facilities Unit, Division of Capital Planning and Operations; Annual Report of the Massachusetts Trial Court, 1989; Office of the Chief Administrative Justice.

Exhibit V-7
Average Caseload/Non-Judicial Staff: District Court
1989



Sources: Court Facilities Unit, Division of Capital Planning and Operations; Annual Report of the Massachusetts Trial Court, 1989, Office of the Chief Administrative Justice.

Exhibit V-8
Average Caseload/Non-Judicial Staff: Superior Court
1989
(Ranked in Descending Order)



Note: does not include decriminalized motor vehicle citations.

Sources: Court Facilities Unit, Division of Capital Planning and Operations; Annual Report of the Massachusetts Trial Court, 1989; Office of the Chief Administrative Justice.

three days per week, as is the case in Charlestown. Currently, there are no provisions for transferring sessions from overloaded District Courts to underutilized facilities nearby, nor is it possible to easily move the non-judicial personnel to overloaded facilities where they could provide assistance.

Multicourt complexes provide opportunities for more efficient resource utilization. In the words of one judge, "two judges work more efficiently in the same house than in two separate houses" — it improves courtroom utilization, and makes it possible for staff from one court to cover for another when necessary. For example, when the District and Superior Courts share a facility, a courtroom that is not being used for a jury-of-six session may be used for other trials or conferences. Currently, 225 courtrooms (64 percent of the total) are located in 21 multicourt complexes, thus providing significant space-sharing opportunities that are not being fully exploited at this time.

B. Facilities

The Trial Court conducts business in 353 courtrooms located in 97 buildings covering a total of approximately 3.0 million square feet of judicial space. As of July 1, 1990, 24 courthouses are owned by the Commonwealth, 57 are leased from counties, 10 are leased from cities and towns, and six are privately leased. Leasing costs have amounted to approximately $3.6M per year. Due to the budget crunch, the state has fallen behind in lease payments for some of the facilities; in some cases, the state's failure to pay rent has resulted in lawsuits brought by the landlords.

The condition of many courthouse facilities in Massachusetts is lamentable. Nearly 30 percent of the state's courthouses are over 90 years old. The 11 buildings taken over by the state in October, 1988 were in terrible shape; the cities and counties had anticipated the state takeover and many had not made capital improvements in "decades." In 1988, the Courthouse Improvement Act allocated $300 million (to be spent over 10 years) to the Division of Capital Planning and Operations (DCPO) Court Facilities Unit for the renovation of state-owned courts and for the design and construction of new state-owned courts.

Also as part of the Courthouse Improvement Act, the Court Facilities Bureau was created within the OCAJ to maintain and provide the security of state-owned courts. The Court Facilities Bureau has made safety-related improvements as its highest priority in courthouse repairs, and with good reason. The fact that as state-owned facilities, the courthouses are exempt from safety regulations, means that the safety of the people working in those facilities is in constant jeopardy. For example, the Suffolk Courthouse has no sprinkler system, and lacks working smoke detectors and fire exits.

The state of disrepair in much of the physical plant hampers the efficient conduct of business. For example, because of the lack of proper ventilation, proceedings in some facilities must be carried on in courtrooms with open windows; noise from the outside sometimes makes the proceedings difficult to hear and understand. In addition, and perhaps more importantly, the courthouse is often the citizen's first introduction to the court system. With the deterioration of the state's courthouses, many have witnessed a growing lack of confidence in and respect for the justice system in Massachusetts. Many of the courts

physically located in Boston, including the Boston Municipal Court and the entire Suffolk courthouse facility, were singled out as neglected, ill-maintained facilities. This has taken a considerable toll on employee morale and productivity as well.

Space constraints in many courthouses seriously hinder productivity. Lack of sufficient space for private conversations hampers the ability to settle cases in privacy and with dignity. In one District Court facility, a teenage girl, who was required to be secured, had to be handcuffed to the door of the women's rest room because there was nowhere else to secure her. Some of the assistant clerks in the Suffolk County Superior Court have as an "office" the space under a stairwell. Lack of sufficient storage facilities results in piles of papers and boxes serving as obstacles to free movement. In addition, part of the old Suffolk courthouse remains on DC current, making it impossible to automate.

Another facilities problem relates to the fact that many court offices are located in private facilities, for which rent must be paid, despite the fact that there may be sufficient space in underutilized state-owned facilities for these offices. For example, the main offices of the Committee for Public Counsel services are located "off the premises," as are the administrative offices of the District Court department and the OCAJ. The Court Facilities Unit (of the DCPO) is responsible for developing a long-range plan for improvement of the court facilities. They are being assisted by the Judicial Facilities Council, chaired by District Court Chief Justice Zoll, which will make recommendations to the OCAJ for realignment of court jurisdictions and improving the use of existing facilities. As part of their effort, they are conducting a facilities inventory, which may identify the potential savings from facility consolidation.

C. Technology and Equipment

As previously discussed, there has been an almost total lack of coordination across the Trial Court departments to institute good management information systems. The lack of automation generates inefficiency through the effort required in managing the monumental (and growing) amount of paper required to administer the courts. The amount of paper generated by the system is enormous; each piece must be considered a critical document, representing people's lives and families, that should be kept safe and carefully monitored. All too often, however, paperwork falls through the cracks or files are misplaced, causing case activities to be delayed. A person granted bail at 10 A.M. may not be released until late in the afternoon due to the extensive manual paperwork required. Some lawyers find that unless they come to court with copies of their case's paperwork, procedural delay related to problems retrieving the court's copy of the documents is inevitable.

Successful information systems demonstrate that automation can significantly improve productivity. For example, prior to 1984, when it began to automate, the Office of Probation processed 240,000 requests per year on 3" x 5" index cards. Today, with the support of information technology, the office can process 245,000 requests per month.

But technology is useful only if it is properly planned, reliable, user friendly, and accessible. Full value cannot be obtained from the technology, for example, when computer terminals used by clerks are located in judge's lobbies, or when users lack proper

training. The provision of terminals without general computer training or training in the specific applications to be used in a particular court, or without adequate user support prevents the timely and complete utilization of the technology's capabilities. Moreover, inadequate user support and poorly implemented systems run the risk of exacerbating the problem of court administration by alienating clerks and other end users rather than helping them.

The lack of widespread availability of fax technology also hampers the flow of information. The physical transport of paper between courthouses requires dedicating staff time that could otherwise be used for in-court duties; the use of image processing technology could relieve some of this burden. Budget cuts that reduce the investigation, piloting, and availability of new technology sometimes backfire. For example, when the Law Libraries were forced to discontinue electronic communications, the memoranda sent instead had to be filed and categorized, requiring more resources and adding costs to the system.

D. Financial Resource Management

The current fiscal crisis has brought long-standing problems of the court system's fiscal administration and management to a head. Conflict between the Legislature and the Trial Court over budgetary appropriations is as old as the system of checks and balances itself, but is especially vehement in Massachusetts. While the Legislature views its budgetary appropriations as an important control mechanism, the Trial Court views the current degree of legislative involvement as inappropriate meddling. The question is one of the appropriate degree of legislative involvement.

In the current budgeting process, the budget requests from the individual Trial Court departments are compiled by the OCAJ. The OCAJ's budget recommendation is based on the previous year's budget plus inflationary increases and additional line items requests as considered necessary. This recommendation includes requests from each Trial Court department for a dollar amount and a number of funded positions. The District Court department appropriation delineates requests for funds and positions for each of the 69 individual courts; in contrast, there is a single apprpropriation for the entire Superior Court, within which are specified minimum amounts to be allocated for overall Superior Court administration as well as to each local court.

The OCAJ submits its budget recommendation to the Executive Office of Administration and Finance in the Governor's office, where it is reviewed and adjusted as deemed appropriate. The Governor then forwards the recommendation to the legislature as part of the overall state budget request. The appropriate House and Senate committees then develop line-item recommendations for each department or court, which are forwarded to the floor for ratification. After the budget is passed, it goes to the Governor, who has the power to veto individual line items.

Once ratified, the court departments are required to remain within the constraints of their line item allocations of dollars and positions, with no ability to transfer funds or positions within or between departments. The Trial Court petitions the legislature each year for the ability to make such transfers between departments; the right to transfer

ability is usually granted in the last quarter of the fiscal year as a "clean-up" mechanism. This system encourages those responsible for managing each budgetary line item to spend or "hide" dollars during the first three quarters so that funds will not be transferred away in the fourth quarter. It also encourages closer ties between Trial Court personnel and the legislators from their communities as a way of securing the safety of particular line items.

In the current system, the Trial Court departments have every incentive to protect and fully spend their own resources. This encourages duplication, misallocation of funds, and serious competitive rivalry among courts. The recent fiscal crisis has magnified the need for transferability: certain Trial Court departments were able to use protected funds to preserve positions, while other departments were faced with serious layoffs; only last-minute transferability enabled the layoffs to be spread somewhat more equitably across the entire Trial Court.

The delegation to the legislature of the power to specify the number of particular positions to be made available to individual courts also reinforces the tendency toward "turf" battles among Trial Court departments. Trial Court departments are reluctant to share personnel with one another, even temporarily. While one court may have a far greater need for additional staff than another, no individual or group has taken responsibility for authorizing the transfer of staff. In theory, non-judicial staff can be transferred with the consent of the staff member and the presiding justices or head clerks of the originating courts. Some question whether the OCAJ actually has the legal right to transfer staff, but this has never been seriously tested. Since personnel costs account for nearly 80 percent of the Trial Court budget, the transferability of personnel is a central issue.

Another problem relates to the financial impact of legislation on the court system. Currently, the legislature has no provision for formally evaluating and quantifying the implications of new laws on courts. When legislation calls for mandatory sentencing, it is placing additional demands on an already burdened court system which may not be funded or able to properly manage additional caseload. These "extra" cases are often dismissed on technicalities or plea-bargained into reduced sentences as a way to dispose of them quickly and keep the system moving. In many instances, this reduces the number of defendants tried and results in sentences that are more lenient than the legislation intended. In attempting to strengthen the delivery of justice, the current system may actually weaken it.

The Trial Court's second major fiscal problem is the way in which it manages its spending once funds are allocated. Currently, the OCAJ manages most of the accounts centrally, dispersing these funds upon request and review to each Trial Court department and, where line items specify, to each individual court. The degree of skill in managing those funds varies widely among the courts and departments. When combined with the lack of integrated automation equipment, the potential for mismanagement and confusion multiplies. Different courts jockey for central funds, submitting requests to the OCAJ for approval. Remarkably, the system has continued to function, largely due to dedicated and scrupulous staff at all levels of financial management. But the current system is far from an ideal control at any level.

E. Recommendations Regarding the Allocation and Management of Court Resources

1. The Court Administrator, in cooperation with the Chief Administrative Judge(s), will prepare a report at least once every three years assessing the case loads of all courts. If necessary to improve the distribution of work, the Court Administrator will include in the report recommendations regarding changes in the geographic jurisdictional boundaries for all the courts. The report will be submitted for approval to the Board. The first such report will be due January 1993.

2. The Court Administrator and the Chief Administrative Judge(s) together will be responsible for maximizing the utilization of courtrooms as well as personnel. They will have the authority to transfer both judicial and non-judicial staff among courthouses based upon work load. These transfers may be either short- or long-term. Wherever possible, volunteers will be solicited for transfer to other locations, and all transfers should be done so as to minimize the travel required by transferred employees. The Chief Justice and the Board will evaluate the Court Administrator and the Chief Administrative Judge(s) annually on their performance in this area.

3. The state will take over the courthouses currently leased from counties (57 in number) and from cities and towns (10 in number).

4. Require the Court Administrator to develop a report and recommendations to be submitted to the Board by January 1993 regarding facilities management. The report should address capital improvements to existing courthouses as well as ongoing maintenance and security. It should also consider the possibility of using private contractors to provide maintenance and security services.

5. The Court Administrator and Chief Administrative Judge(s) will annually develop and submit a single unified budget for the trial court system to the Chief Justice of the SJC for approval and submission to the Board. The Court Administrator will have the authority subject to the concurrence of the Chief Justice and with Board approval, to transfer funds from one category to another based upon changing needs during the fiscal year. The Board will be responsible for reviewing and approving the annual budget request, and for presenting it to the legislature.

6. Require the Information Resource Management Department (IRM), working with the TCAs, to provide regular, timely training to courthouse employees regarding the use of information technology. Such training will cover both system-specific applications and commercially available software packages.

VI. COMMUNICATIONS

Successful organizations are characterized by clear and open communications. In an organization with a fragmented structure, effective communication is often impeded by the existence of invisible but very real barricades that separate the organization's subgroups. Such "glass barriers" appear to be a fact of life in the nominally unified Massachusetts court system. They divide the individual courts within each Trial Court department; the Trial Court departments from each other; the court leadership from the associate judges and the non-judicial staff; and the courts from other justice system entities (such as the Law Library, the Parole Board, and the Probation Department).

In addition, the court system appears to communicate poorly with other branches of government and with the general public. This lack of communication has serious repercussions for the court system's ability to secure the resources required to ensure the effective administration of justice.

A. Communication Within the Courts

Few opportunities exist for formal or informal interaction among Trial Court judges. Together with the implicit competitiveness within and among Trial Court departments, there is little opportunity for the communication that leads to the development of true collegiality. This imposes significant costs on the system not only with respect to judicial morale, but also in terms of the efficiency and effectiveness with which the system operates. Concern over this issue is widespread among judges.

It is with sadness, regret, and disappointment that judges discuss the lack of communication with their colleagues. As one judge remarked, "the culture discourages interaction, which is a shame. Basically, we don't speak to each other, not even within our own department." Other judges commented on the "cloistered life" and isolation of individual judges, and on how difficult it was to get enough time together for meaningful communication. Still another judge cited the absence of communication and collegiality as "the main source of inefficiency in the court system."

Few Trial Court departments provide regular opportunities for their judges to meet and discuss legal or administrative issues. This deprives the judges of the opportunity to communicate their concerns to the leadership, and to share experiences with their colleagues that may improve both the quality of decisions made from the bench and the administration of the court's business. The lack of exposure to judges in other Trial Court departments also helps to perpetuate the tensions and divisiveness among the departments and impairs the development of a more unified culture. Many judges blame the leadership for the divisiveness in the courts, citing a "divide and conquer" attitude.

Judges are forced to create their own opportunities for interaction and communication. One judge said that the best opportunity for interaction was "informally over lunch, but only if you work in a facility that has more than one judge." It was also suggested that many judges agree to sit on committees because it gives them a chance to get together with their colleagues.

Judges also want to work with the court leadership to develop approaches for solving the problems facing the court; they do not want policies and decisions imposed on them by fiat. Many judges complain bitterly that most administrative decisions are made by the court leadership without their input. For example, judges were upset that the leadership asked them to forego one day's pay per month (to alleviate systemwide layoffs) without consulting them or the Judicial Conference, which represents the judges. For many judges, the contrast between their power in the courtroom and what they see as their peonage in the operation of the system causes significant psychological stress.

The failure of the leadership to consult with the "working" judges creates resentment toward the leadership, which many judges believe is not in touch with the realities that they face on a daily basis. One judge commented that the "judges at the working and administrative levels have totally different objectives, and sometimes there is no way to harmonize them." Communication from the leadership to the other judges sometimes conveys the message that the judges exist to support the leadership, and that the leadership has more important things to do than to tend to the judges' concerns.

There also are few vehicles for communication between the leadership and the non-judicial staff. When the leadership overlooks the organizational and operational knowledge resident in those involved in the delivery of court services, they lose valuable input that could lead to better administrative decisions. For example, decisions were made to lay off court employees without asking for their ideas on alternative ways to address the budget crisis that would avoid or mitigate the layoffs. Attempts to improve communication, such as holding regular meetings of clerks and judges on a regional basis, are met with enthusiasm by court staff. One staff member commented that such activities create a feeling that "we're all in this together — that's how it should be."

B. Communication Within the Justice System

The Massachusetts court system administrative structure, as shown in Exhibit II-1, includes various entities in addition to the courts themselves. These include the Law Libraries, the Commissioner of Probation, and the Jury Commissioner. In addition, there are other components of the justice system, such as the Parole Board, the District Attorneys, and the sheriffs, with which the courts have significant interaction. Many of these constituents are frustrated by communications problems with the courts.

A major problem centers around the transfer of information between the various parts of the system. For example, complaints filed against the Parole Board are sometimes lost between the court where they are filed and the Board, which is required to respond to them. In one case, a complaint filed in December, 1988 was received in the mail by the board in February, 1991. When information is not communicated promptly and completely, sentences may not be properly executed.

Sometimes the frustration goes in the other direction. One judge, for example, complained that he had not been informed by the Commissioner of Probation that a decision had been made to lay off one of the probation officers in his court, despite the fact that presiding judges technically are the ones with the authority to hire and fire probation officers.

C. Public Information and Communication

The public is increasingly turning to the courts to resolve community and social problems that used to be the province of other institutions such as schools, churches, and families. Nonetheless, the courts maintain a distance from the community, and provide little education to the public on the role of the court system. As a result, there is little understanding of the value of the services delivered by the courts, and limited public confidence in the justice system. Under these circumstances, it is not surprising that there is insufficient public support for ensuring that the court system has the resources it needs to perform its critical public service effectively and efficiently.

Part of the problem is the lack of a comprehensive strategy for public outreach and education. One observer commented, "the public is shielded more from the operations of the judiciary than they are from other branches of government." The court system pays a high price for this. One judge summed it up as follows:

> "People don't understand what we do, so they don't see why we need to change. We have taken no steps to reach out and educate the public, we don't tell them what the system can and cannot do, and we don't say why we need their support. Then, when we get ambushed by the talkmasters, we can't respond. We can't have it both ways — can't go on being insulated and silent and then complain when something blows up."

What the public senses is some arrogance on the part of the court system, that it is in some sense "above the law." "Communication is not encouraged — they tell you to write to your Senator, but not your chief justice," commented one attorney. People are generally intimidated by this attitude, which increases their sense of being powerless in a system ostensibly designed to serve the citizenry.

In addition, the court system in many ways is less than "user friendly." Finding one's way around the court system can be a formidable and frightening experience for those who are not used to dealing with the system. One attorney commented, "it is easy for lawyers to understand the system because we went to law school, but that doesn't help our clients, particularly those who have problems reading English or may be new to this country." Efforts to explain court proceedings through the use of films and other media at the courthouse level are welcomed for their ability to "demystify" the business of the courts.

Another court observer remarked, "endless continuances and scheduling disasters are demoralizing, reduce public confidence, and communicate disorganization and a lack of regard for citizens." This perspective is widespread among citizens who have dealings with the courts. However, when the courts must process a highly publicized case, extraordinary efforts are usually exerted to ensure that matters are handled with efficiency and that all parties are treated with courtesy. The fact that routine cases do not receive equivalent attention communicates a sense of inequality and unfairness, the very opposite of what the court system should embody.

The courts also communicate ineffectively with the legislature and the executive branches of government. Because of the courts' failure to communicate its needs and mission effectively, the judiciary is perceived by many as equivalent to an executive agency,

rather than being recognized as a co-equal branch of government. Many court system participants expressed particular frustration over the lack of mutual understanding that persists between the judiciary and the legislature. They also understand that the respect desired by the courts cannot be demanded, but must be earned by demonstrating their ability to manage themselves.

D. Recommendations Regarding Communications

1. At least twice a year, the Board will conduct an open forum meeting for all interested employees of the Trial Court system. The purpose of these meetings is to provide direct communication between the Board and employees on topics affecting the Trial Court and its performance. These meetings will be held in different locations around the Commonwealth to assure that all employees have the opportunity to participate.

2. Institute quarterly meetings between Chief Administrative Judge(s) and the appropriate Presiding Judges reporting to him/her to review the performance of the court.

3. Require all Presiding Judges to convene twice a year in a to discuss matters of common interest regarding the administration of the trial court. Trial Court Administrators will participate in these forums as well.

4. Under the auspices of the Flaschner Institute, create a series of voluntary symposia on a variety of legal and judicial topics, open to all judges, magistrates, and clerks. These symposia would be less formal than the training sessions currently offered by the Institute, and would be designed primarily as a means of exchanging ideas and experiences.

5. Under the direction of the Information Resources Management (IRM) Department, assure that all courthouses, and all judges, are linked through an electronic mail network.

6. Hold accountable the TCA in each courthouse for the quality and quantity of communication about court business at that location.

7. Assign to TCAs the responsibility for ensuring that brochures describing services and procedures of the court are readily available in all courthouses for citizens. These brochures will be available in all the major languages of the community where the courthouse is located. Where funding permits, develop videos explaining court procedures to litigants, witnesses, and jurors to be made available at local courthouses.

APPENDIX I
PROPOSED DELEGATION OF ADMINISTRATIVE DUTIES AND RESPONSIBILITIES WITHIN THE MASSACHUSETTS TRIAL COURT SYSTEM

I. CHIEF EXECUTIVE OFFICER

A. Has overall responsibility for administration of Trial Court — under general superintendence power of the Supreme Judicial Court (SJC).

B. Nominates/removes Chief Administrative Judge(s) [CAJ(s)] subject to advice of Board and the concurrence of the Supreme Judicial Court (SJC).

C. Nominates/removes Court Administrator (CA) subject to approval of the Board.

D. Submits annual budget for Trial Court.

II. THE BOARD

A. Reviews and approves the Trial Court budget.

B. Reviews and approves construction of new or closing existing court houses.

C. Reviews and approves appointment and removal of the Court Administrator.

D. Advises the Chief Justice regarding the appointment of CAJs.

E. Evaluates administrative performance of CAJ(s) and CAO.

F. Reviews and approves changes in judicial districts and venue proposed by Court Administrator.

G. Evaluates and recommends improvements in the administration of the Trial Court

H. Sets policies and standards for the administrative performance of the Trial Court.

I. Publishes an annual report for the Trial Court. The report should include detailed statistics, reported on a consistent basis across the entire Trial Court, that show the administrative performance of the Court in meeting a number of recognized performance measures such as backlog reduction; case dispositions in aggregate, as a percentage of case backlog, per judge, per court system employee; and so forth.

J. Assists CEO in presenting the Trial Court budget to, and supporting its adoption by, the legislature.

K. Establishes public outreach objectives for the Trial Court and evaluates performance against those objectives. These objectives should include regular, scientifically validated surveys of the court systems users and employees.

III. THE COURT ADMINISTRATOR

A. Supervises the preparation of an annual budget for the Trial Court.

B. Pursuant the authority vested in the Chief Justice as CEO of the Trial Court, assumes overall management responsibility for the administration of the Trial Court, including the following:

1. Supervises the preparation of a Trial Court Annual Report for review and approval by the Board.

2. Supervises, establishes standards for, and monitors the automation of the case management system and other operations of the Trial Court.

3. Supervises the conduct of labor negotiations between the Trial Court and various employee groups.

4. Supervises the operation of systems for financial administration and personnel; the latter should include the effective implementation of a program to ensure that the diversity of the Trial Court work force accurately reflects the minority populations of the respective judicial districts.

5. Establishes appropriate skills training programs for non-judicial personnel.

6. Assumes overall responsibility for the management of facilities used by the Trial Court.

7. Appoints Trial Court Administrators (TCAs).

8. In consultation with the PJs and TCAs, assigns all non-judicial personnel within the Trial Court.

9. Performs such further administrative duties as necessary to fulfill the management responsibilities of the Court Administrator.

10. In conjunction with the CAJ(s), promulgates administrative rules dealing with the transfer of cases within the Trial Court.

11. In consultation with the CAJ(s), submits recommended changes in venue to the Board for approval.

12. Assists the CAJ(s) in the assignment and scheduling of judges.

C. Shares joint accountability with the CAJ(s) for the overall performance of the Trial Court.

IV. CHIEF ADMINISTRATIVE JUDGE(S)

A. Manage judicial personnel:

1. With the assistance of the CA, assign judges within the Trial Court.

2. Manage case flow and continuances.

3. Evaluate the performance of individual judges under his/her supervision and consult with each to improve that individual's judicial performance.

4. Ensure that judges have adequate pre-bench and recurrent education on both legal and, where appropriate, administrative matters.

5. With the assistance of the CA, establish and maintain a judicial wellness program.

6. With the assistance of the CA, review administrative performance of judges with respect to established standards.

B. Appoint and remove, subject to the review and approval of the SJC, Presiding Judges and other administrative judges.

C. Share joint accountability with the CA for the overall performance of the Trial Court.

V. PRESIDING JUDGES

A. Exercise overall responsibility for the operations of the court over which he/she presides.

B. Manage judicial personnel and law clerks in the court over which s/he presides, including assignment of sittings at the court, performance evaluation of judges under his/her supervision, and management of continuances.

C. In conjunction with the TCA and the CAJ, be responsible for case flow management in that court.

D. In conjunction with the TCA, be responsible for the preparation of an annual budget for the court and such periodic reports as may be required by the CA or CAJ(s).

E. Bear overall administrative responsibility for the operation of the court over which s/he presides.

F. Hire, manage, and remove, subject to review by CAJ, of law clerks.

VI. TRIAL COURT ADMINISTRATORS

A. TCAs are responsible for the administrative management of individual courts and for supporting the activities of PJs and sitting judges in the Trial Court.

1. Hiring, performance evaluation, and removal — in consultation with the PJ and subject to CA concurrence — of all non-judicial personnel in the court.

2. Management of all non-judicial personnel in the court, including clerks, assistant clerks, probation and court officers, interpreters, and all other non-judicial personnel except law clerks.

3. Management of the information and other systems in the court.

4. Financial administration and budget preparation for the court.

5. Case flow management.

6. Management of court facilities.

B. Administrative responsibility for all non-judicial aspects of the court's operation and, in conjunction with the PJ, overall administrative responsibility for the operation of the court.

APPENDIX II
OPINION OF COUNSEL ON THE BOARD

APPENDIX III
BACKGROUND ON HARBRIDGE HOUSE AND ON THE COALITION FOR THE COURTS CONSULTING TEAM

Harbridge House is an international management consulting firm, headquartered in Boston with offices in Chicago, Washington, New York, and London. Founded in 1950, it is one of the oldest and largest consulting firms in the United States. The firm assists large, complex organizations with defining and implementing change in order to improve their performance. Its clients include Fortune 500 companies, major European corporations, and agencies of government at all levels.

Harbridge House has worked on behalf of non-profit and public sector organizations since its founding. Assignments have been conducted for every major executive agency of the federal government, for agencies of governments in several other countries, and for several states. The firm has also worked on behalf of other institutions concerned with the law and the judiciary, including a major nonprofit Massachusetts legal institution.

Members of the firm work with clients on a range of assignments. Recent examples include the development of a strategic plan for a large packaging business; a study of the organizational effectiveness of the Office of the Secretary of a cabinet-level federal department; an evaluation of the market positioning of a significant specialty insurance company; and an assessment of organizational structure, systems, and culture for a global chemical company.

The Harbridge House staff currently includes nearly 100 consultants holding graduate degrees from leading universities in such disciplines as business administration, law, economics, public affairs, engineering, operations research, psychology, and computer science. Virtually all of the staff have prior working experience in government and/or industry.

The assignment for the Coalition for the Courts was conducted by eight members of the firm. They are:

Adrienne Burns	Research Consultant	B.A., University of Cincinnati A.M., Harvard University
Carol Colman	Senior Associate	B.A., University of Michigan M.P.A., Woodrow Wilson School of Public and International Affairs, Princeton University
Monica Higgins	Consultant	B.A., Dartmouth College M.B.A., Amos Tuck School of Business, Dartmouth College
Dan Kasper	Principal	A.B., University of Kansas J.D., M.B.A., University of Chicago

Kim Kennedy	Research Consultant	B.A., Wheaton College
Jennifer Raiser	Consultant	B.A., Harvard-Radcliffe College M.B.A., Harvard Business School
Frank Remley	Vice President	B.S., Princeton University M.S., Stanford University M.B.A., Boston University
Don Roberts	Principal	A.B., Harvard College M.B.A., Harvard Business School

GOODWIN, PROCTER & HOAR
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
COUNSELLORS AT LAW
EXCHANGE PLACE
BOSTON, MASSACHUSETTS 02109-2881

TELEPHONE (617) 570 1000
TELECOPIER (617) 523-1231
TELEX 94-0640
CABLE • GOODPROCT BOSTON

April 15, 1991

Daniel M. Kasper, Principal
Harbridge House, Inc.
11 Arlington Street
Boston, MA 02116

Dear Mr. Kasper:

You have asked us to advise Harbridge House, Inc. whether certain aspects of a proposal for reordering the administration of the Trial Court of the Commonwealth to be proposed by Harbridge House comply with the dictates and requirements of the Constitution of the Commonwealth of Massachusetts.

As we understand it, Harbridge House proposes that there be created a Trial Court Board ("Board") which would, subject to the superintendence power of the Supreme Judicial Court, be given specified powers and authorities relating to the administration of the Trial Court. Initially, the Board will consist of eleven members, six of whom would be from the judicial department. The Board would be chaired by the Chief Justice of the Supreme Judicial Court. In addition to the Chief Justice, the other members of the Board from the judicial department would include two Chief Administrative Judges, the Court Administrator, and two Trial Court judges selected by the other judges of the Trial Court. The remaining five members of the Board would be appointed by the Governor according to a set of qualifications and criteria to be established by statute. Alternatively, some or all of the remaining members would be appointed by the Supreme Judicial Court. The five members of the Board appointed by the Governor or the Court would have fixed terms of office. Any Board member would be removable for cause by a majority of the Supreme Judicial Court.

The complete scope of the Board's administrative powers has yet to be determined, but would include the power to review and approve the budget submitted to the legislature, review and approve the construction, renovation and closing of courthouses, review and approve changes in judicial districts and venue, evaluate and make improvements in the administration

of the Trial Court, and review and approve the appointment and removal of the Court Administrator. An operating team of administrators, consisting of the Trial Court Chief Administrative Judges and the Court Administrator, reporting to the Chief Justice, would manage the administration of the Trial Court under the supervision of the Board.

In an Opinion of the Justices, 365 Mass. 639, 640 (1974), the Court described the Massachusetts doctrine of separation of powers.

> "[T]he concept of a separation of powers is fundamental to our form of government. While not explicitly delineated in the Federal Constitution it is implicit in the structure of the government there created and finds its expression, in varying forms, in the Constitutions of most States. The Massachusetts version, like those of only a handful of other States, is in a most explicit form, and on its face calls for a complete and rigid division of all powers among the three branches."

In the same Opinion the Court made it clear that "an absolute division of the three general types of functions is neither possible nor always desirable." Id. at 641.

There is inherent in the common law and the constitutional powers of the Supreme Judicial Court, the power "to protect and preserve the integrity of the judicial system and to supervise the administration of justice." Matter of DeSaulnier (No. 1), 360 Mass. 757, 759 (1971). Implicit in the constitutional grant of judicial power is the "authority necessary to the exercise of . . . [that] power." Opinion of the Justices, 279 Mass. 607, 609 (1932). "Such authority is not limited to adjudication, but includes certain ancillary functions, such as rule-making and judicial administration, which are essential if the courts are to carry out their constitutional mandate." O'Coin's, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 510 (1972).[1/]

/1/ "It is axiomatic that, as an independent department of government, the judiciary must have adequate and sufficient

(Footnote continued)

While the inherent powers of the court are clearly recognized, there is no inconsistency in having legislation enacted for the purpose here contemplated. It is "well recognized that the General Court, pursuant to its general police powers, may enact legislation which declares or augments the inherent powers of the judiciary." Id. at 513.

The Supreme Judicial Court has in the past considered the constitutional propriety of proposed changes in the administration of the Trial Court of the Commonwealth. One such proposal made by the "Cox Commission" in 1976 would have vested in the Chief Justice of the Supreme Judicial Court many of the powers that Harbridge House's current proposal presently seeks to vest in the Board. In considering whether the Cox Commission proposal violated Part 1, art. 29, of the Constitution by vesting powers in the Chief Justice that should only be wielded by the Court as a whole, the Supreme Judicial Court stated:

> "The powers and duties that would be conferred on the Chief Justice with regard to administration of the Superior Court and the District Courts are powers the Legislature could confer on any appropriate State officer under its constitutional authority 'to erect and constitute judicatories and courts of record, or other courts'."

/1/ (Footnote continued)

resources to ensure the proper operation of the courts. It would be illogical to interpret the Constitution as creating a judicial department with awesome powers over the life, liberty, and property of every citizen while, at the same time, denying to the judges authority to determine the basic needs of their courts as to equipment, facilities and supporting personnel. Such authority must be vested in the judiciary if the courts are to provide justice, and the people are to be secure in their rights, under the Constitution.

"We hold, therefore, that among the inherent powers possessed by every judge is the power to protect his court from impairment resulting from inadequate facilities or a lack of supplies or supporting personnel." O'Coin's, Inc. v. Treasurer, 362 Mass. at 510.

Opinion of the Justices, 372 Mass. 883, 889 (1977).[2] The Court concluded that the Cox Commission's proposal would be constitutional so long as the Chief Justice did not improperly attempt to exercise powers reserved by the Constitution to the full court. Id. at 891.

We understand that the Harbridge House proposal to create and empower the Board described above addresses the constitutional concern noted by the Court in the Cox Commission case by expressly stating that any powers granted to the Board shall be subject to the inherent superintendence powers of the Supreme Judicial Court. This structuring of authority, which follows the model that currently exists under the Massachusetts statutes (see, e.g., G.L. c. 211B, § 9), guarantees that the ultimate and inherent superintendence power continues to reside in the entire Supreme Judicial Court. The Board's exercise of administrative powers under the Harbridge House proposal, therefore, would not invade the constitutional authority of the Supreme Judicial Court.

The Court had occasion in the Cox Commission case to determine whether the exercise of certain administrative powers by an officer within the judicial branch would violate the constitutional command in art. 30 of the Declaration of Rights that "the judicial [department] shall never exercise the legislative and executive powers, or either of them." Id. at 891. The Court reiterated the words of Justice Holmes that "separation of powers does not require three 'watertight compartments' within the government." Id. at 892. Officials within the judicial department may be granted administrative powers by the legislature when the delegated power is "closely related to the customary judicial activities or to the operation of the courts," or where the powers "although partaking of some aspects of legislative functions, are so

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/2/ The Supreme Judicial Court also noted that the Chief Justice could be given the power to appoint a court administrator to supervise the day to day administration of the courts. The Court observed: "Since the Legislature has the constitutional power to create courts and civil offices . . . it has authority to create an office which would be responsible for the administration of all statutory courts and to give the power of appointment to the Chief Justice of this court." Opinion of the Justices, 372 Mass. at 899.

strongly implicated in judicial administration as to be properly exercised by the courts." Id. at 893.

The Harbridge House proposal would vest in the Board or in any judicial officer only powers that are solely related to the administration of the Trial Court. The exercise of powers such as these within the judicial department would not, we believe, constitute an improper exercise of legislative or executive powers by the judicial department.

> "'The creation of a public office is a legislative function, but the appointment of a particular person to an office is the function of the executive department.' Commissioner of Admn. v. Kelley, 350 Mass. 501, 505 (1966). The Legislature may confer this power of appointment on the Governor or on another public officer or board within the executive branch. Brown v. Russell, 166 Mass. 14, 25 (1896). Sheridan v. Gardner, 347 Mass. 8 (1964). The Legislature may also make a particular public officer an automatic member of a newly created board or commission as that in effect merely confers new powers on that officer. Opinion of the Justices, 302 Mass. 605, 620 (1939).
>
> 'It is settled, however, that this power of appointment may not be conferred by the General Court upon the courts--the judicial department--with respect to officers or boards not exercising a function that is judicial or incidental to the exercise of judicial powers . . ..' Opinion of the Justices, 302 Mass. 605, 622 (1939). See Opinion of the Justices, 300 Mass. 596, 599 (1938)."

Opinion of the Justices, 365 Mass. 639, 643 (1974).

The Harbridge House proposal to create a Board of six members from the judicial branch and five appointed by the Governor raises a question regarding the art. 30 prohibitions against the executive or judicial departments exercising the power reserved to the other. Protection against one department's interference in the exercise of the power of another is provided under the Harbridge House proposal. A

majority of the Board's members consist of judicial officers. The members appointed by the Governor cannot be influenced by the executive department through the threat of removal. See, e.g., Opinion of the Justices, 365 Mass. at 643 (1974); Bradley v. Board of Zoning Adjustment, 255 Mass. 160 (1926).[3] Moreover, the Board's authority is solely administrative in nature and is always subject to the general superintendence powers of the Supreme Judicial Court.

Since precise details regarding the composition and powers of the Board remain to be worked out in legislation, we do not in this letter provide an exhaustive or definitive analysis of all the issues, constitutional or other, raised by the Harbridge House proposal. We are of the view, however, that the general framework of the Harbridge House proposal to create a Trial Court Board to oversee the administration of the Trial Court, as outlined herein, and subject to the general superintendence powers of the Supreme Judicial Court, does not conflict with the Constitution of the Commonwealth of Massachusetts.

Sincerely yours,

Goodwin, Procter & Hoar

Goodwin, Procter & Hoar

MS/cah

/3/ "A statute designed to secure [persons] of eminent sagacity for the performance of these duties is entitled to every presumption in its favor." Bradley v. Board of Zoning Adjustment, 255 Mass. at 166.