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FAX

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United States Senate
Committee on the Judiciary
224 Dirksen Building
Washington, DC 20510

Dear Jeff:

S. 2027 is heartening evidence that Senator Biden and other respected members of the Senate understand the seriousness of the problems of cost and delay in the federal courts and are ready to take significant steps to remedy the problems. If launched as judicial branch initiatives, instead of via detailed legislation many of the proposals in S.2027 would be significant improvements. Let me first comment on the insights and initiatives that in my opinion are the most promising.

1. The bill assesses the cost and delay problems in a wholly realistic way. It recognizes that not all cases present problems; and that those that are troublesome present a great diversity of problems. It is essential to treat different types of cases in ways that respond to their differences.

2. In this vein, the bill sensibly provides for differential treatment of cases according to their needs and probable litigation careers. Simple cases do not call for close monitoring, tight scheduling and attentive judicial management in their pretrial stages. Complex cases may require all those activities.

3. Effective channeling ("tracking") of cases to provide different processing regimes requires early, sensitive judicial intervention. Many cases, although not all, need skillful case management. One of the strongest features of the bill is its recognition in Section 479 that training programs for judges must emphasize case management. Despite varying native talent for management, even the least skillful judicial managers can benefit from training in administration.

4. The companion provision for production of a Manual for Litigation Management is also a constructive initiative. Many of the management details spelled out in the bill should go into the Manual. This would spare the bill from undue clutter and would blunt the criticisms of judges and others who reasonably object to congressional micromanagement of the judiciary.

5. The call for a comprehensive program of alternative dispute resolution procedures in appropriate cases is another initiative that those who care about improving federal court justice should warmly welcome. Court-annexed alternatives to full adjudication must be used more widely where they give promise of producing solutions that are more satisfactory to the disputing parties.

6. The proposal in Section 474 for development of a "backlog index" has great potential. While it no doubt requires fine tuning -- for example, to take account of the fact that in low-volume districts a large influx of cases at the end of the fiscal year might otherwise produce a misleadingly high backlog ratio -- this certainly can be done.

7. There is sound recognition that although discovery is a valuable process, in some cases unrestrained discovery may be too much of a good thing. Sensitive monitoring of discovery is essential to avoid its running out of control. The bill's proposals for multi-phase discovery to allow assessments at successive stages is yet another promising idea.

8. On a different level, the proposal to bring automation to courts that lack it, and to provide necessary funding, is a gratifying demonstration of the sponsors' sense of resource responsibility. Similarly welcome is the bill's insistence on continuing congressional review of the courts' efforts to overcome the delay and expense problems.

As we know, the bill has not lacked for critics, including judges who, although working toward the same goals Senator Biden and his colleagues seek to achieve, disagree with the means provided in S. 2027. The judges are not, I believe, mindlessly protecting judicial prerogatives from congressional attention. They and others -- and I am among these -- are concerned lest S.2027 infringe basic separation-of-powers principles and impair the vitality or effectiveness of the national rule-making process. In its first half century this process has given this country an excellent, forward-looking set of litigation procedures. So highly are these civil rules regarded that a number of states have adopted them virtually

in toto and most states have accepted major parts of them. If the Congress desires to monitor the rules more closely than through the veto power accorded it in the Rules Enabling Act, this can be done by requiring periodic reports from the Judicial Conference on how the rules are working. Congress would thus recognize the worth of the Enabling Act approach and the value of joint efforts by the Congress and the judiciary. On the other hand, a statutory codification containing extensive, precise details on matters so intrinsically within the purview of rule-making would be construed as a vote of no-confidence in the Enabling Act's design. This would be unfortunate and unnecessary for a number of reasons.

First, since not every district needs a delay reduction plan, there seems no use in requiring every district to adopt one. From one district court to another caseloads vary enormously in kind and quantity. Custom-designed plans would have to diverge greatly. Probably most districts would adopt local plans responding to their particular needs, spiralling away from each other in their procedures. Lawyers litigating in a district away from home would need to acquaint themselves with a new and probably unfamiliar set of rules. Added expense to clients would be the result, defeating one of the main aims of the bill.

If, on the other hand, districts were compelled to adopt a model plan, the mandating of uniform periods for disposition of motions, discovery limits and the like might burden some districts with an entirely unrealistic and unsuitable program. The prospects of both rampant localism and excessive uniformity are not agreeable to contemplate.

Another set of difficulties could result from enacting into statutory form a highly detailed set of mandatory procedural rules. Losing litigants might lodge appeals based on alleged failures of district courts to follow one or another of the detailed legislative provisions. Certainly, no such spur to expanded litigation is desired in a measure that was designed to reduce litigation delay and expense.

My suggestion is that the many strong features of S.2027 identified at the start of this letter be promoted in a way that does not supersede or compromise the processes contemplated by the Rules Enabling Act and does not impinge on the courts' hour-to-hour functioning. Although I have no concrete proposal at this time, I shall be glad to work with you in developing one if you wish me to.

I very much appreciate the opportunity to communicate with you about S.2027 and will be more than ready to discuss it further with you and your colleagues.

Best regards.

Sincerely,

Maurice Rosenberg

MR:cm