United States District Court
208 U.S. Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

Clarence E. Goetz
Chief United States Magistrate

Tele: 301-962-4560
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April 25, 1990

Honorable Frank A. Kaufman
Senior Judge
United States District Court
730 U.S. Courthouse
101 West Lombard Street
Baltimore, MD 21201

Dear Judge Kaufman:

The full-time magistrates of this district who are substantially involved in handling civil cases appreciate the opportunity to express their views on the Biden bill for your consideration.

In general, we are opposed to the legislation as currently written and agree with the opinions expressed in the letters of Judge J. Frederick Motz and Judge Frederic N. Smalkin (copies attached). In particular, we are concerned about the bill's apparent prohibition on the assignment of magistrates to conduct the initial "discovery-case management conference" in any case, even those designated as "expedited or simple litigation," and its further prohibition on the use of magistrates for the "monitoring conferences" to be scheduled in complex litigation. §471(b)(3) and (4). Based on our collective experience, we believe that management and resolution of discovery matters is an area where we have been able to provide substantial assistance to those district court judges who choose to refer discovery disputes to the magistrates. We believe it is also of assistance to counsel, particularly in complex cases, to have a magistrate involved in the management of discovery from the outset. Because we do not have the crowded trial calendar of a district court judge, we are often more readily available for disputes that need prompt resolution.

The magistrates in this district support the 14-point program proposed by the Executive Committee and would welcome the opportunity to be involved in formulating or evaluating the recommendations of any advisory group that may be established under an administrative program or by legislation. We also endorse the recent recommendations of the Federal Court Study Committee regarding magistrates, specifically that 28 U.S.C. §636(c)(2) be amended to allow the court to remind parties of the possibility of consent to civil trials before magistrates, and that a study be done analyzing the present duties and future role of magistrates.

In summary, we believe that flexibility in allowing individual district courts, through their Local Rules, and individual judges, through their referral decisions, to determine how best to use the assistance magistrates are able to provide, will serve the goals of efficient case management better than statutory mandates such as those proposed in the present Biden bill.

Thank you for your consideration.

Sincerely yours,

Clarence E. Goetz
Chief United States Magistrate

Daniel E. Klein, Jr.
United States Magistrate

Deborah K. Chasanow
United States Magistrate

Catherine C. Blake
United States Magistrate

Attachments

cc: Chief Judge Sam J. Ervin, III
Chief Judge Alexander Harvey II
L. Ralph Mecham, Director, AO

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
J. FREDERICK MOTZ
UNITED STATES DISTRICT JUDGE

101 W. LOMBARD STREET
BALTIMORE, MARYLAND 21201
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March 28, 1990

The Honorable Joseph Biden
Chairman
Senate Judiciary Committee
Washington, D.C. 21220

Dear Senator Biden:

I have reviewed with great interest the "Civil Justice Reform Act of 1990," which you have introduced in the Senate. I agree with you completely that the district courts should manage their cases effectively, and I think that I can say without undue pride that since I was appointed to the bench in 1985, I have been able to run my own docket well. I am writing to you, not because I am in opposition to what your proposed legislation seeks to accomplish, but because I fear that in certain respects its provisions would exacerbate rather than resolve the problems which the district courts face.

If I may, I would like first to describe briefly the manner in which I manage my own cases in order to establish a context for expressing the concerns which I have. I will then point out certain provisions in the proposed legislation which would interfere with the procedures which I follow, and conclude by recommending that the proposed legislation set goals for district courts to seek to attain instead of dictating specific management techniques. Obviously, I am speaking only for myself. Other judges and the Judicial Conference may have broader criticisms of the proposed legislation. However, I am reluctant merely to let others speak to what I think is a matter of the utmost importance to those of us who are laboring in the field.

My Present System

The system which I am about to describe is my own but it does not differ substantially from the systems used by many colleagues here in the District of Maryland. Our respective management techniques vary in only small respects (based upon our individual styles and experience).

1. As soon as an answer is filed (either as the defendant's initial response or after the denial of a preliminary motion), I usually issue a scheduling order. The dates set in the order depend upon the nature of the case, i.e,. I "track" cases as your proposed legislation suggests. If the case is a relatively simple one in which I think it likely that no summary judgment motion will be filed (or will be denied, if filed), I set a rather short discovery and status report deadline (90 to 120 days from the date of the order), a summary judgment motions deadline (30 days thereafter) and a trial date. If the case is a slightly more complex one which I think may be resolved by summary judgment, I set a similar schedule except that I do not set a trial date. The reason that I do not do so is that the setting of trial dates which realistically will not be met confuses the scheduling process and, in my opinion, is counterproductive to effective case management.

2. If my preliminary review of the file discloses that the case is particularly complex, I immediately hold a conference with counsel to set an agreed upon schedule. Usually in such a case I do set a trial date (even though it is possible that the case will be resolved on summary judgment) since the trial is likely to be a year or more in the future and to wait to set its date would cause undue delay.

3. Occasionally, in complex cases where counsel think it advisable, I hold periodic conferences during the discovery period, as contemplated by the proposed legislation, to monitor the progress of the case and structure its development. However, such cases are the exception and not the rule. In most cases early conferences would be a total waste of time. I have found that discovery can be effectively managed by (1) our Local Rules which, for example, limit the number of interrogatories and requests for production which can be filed without court order, (2) prompt rulings (usually in short opinions in letter form) concerning written discovery disputes and (3) my making myself available by telephone when disputes arise during a deposition. Over the next year I intend to experiment with another discovery management technique: including in my scheduling order a limit on the number of hours (varying according to the nature of the case and the amount in controversy) of deposition testimony which can be taken.

4. At the discovery deadline counsel are required to submit a status report to me, stating, among other things, whether either side intends to file a summary motion (within the deadline which has already been set). If counsel indicate that a summary judgment motion will be filed, I ordinarily wait to set a conference with counsel until the motion has been filed, briefed and decided. (I customarily issue my decision within 30 days of the date after the last brief has been filed.) Otherwise, immediately after receiving the status report, I hold a conference at which I set a trial date (if one has not already been set), a pre-trial conference date and deadlines for the submission of the pre-trial order, motions in

limine, proposed jury instructions, etc. During the conference I also explore the question of settlement with counsel, asking them if they believe that a settlement conference (usually with a magistrate) would be helpful.

My experience has been that under the system which I have just outlined trials in routine cases are held within six to eight months of the date that they come to issue. I do not seek to impose an arbitrary deadline for trials in more complex cases (there is a risk of judges overmanaging as well as undermanaging their docket) but I think I can fairly say that these cases are reached for trial on a schedule which counsel and the parties find to be entirely acceptable.

My Concerns About Certain Aspects of the Proposed Legislation

Although it works extremely well for me, I do not believe that my case management system is perfect or that it should be imposed upon others. By the same token I do not believe that when I am already doing my job effectively, someone else's system should be imposed upon me. Thus, to the extent that the proposed legislation would have that effect, I think it is unwise. Furthermore, there are certain provisions in the proposed legislation which would directly interfere with effective techniques which I am presently employing.[1] These sections are as follows:

1. Section 471(b)(2) provides that the clerk of court (or other person to whom case tracking authority is delegated) will be responsible for initial case tracking and that disputes concerning case tracking will first be raised with the clerk. I am sure that I speak for most judges and knowledgeable lawyers when I say that clerks' offices tend to be bureaucratic and that cases are far more effectively managed by a judge and her or his staff than by a clerk's personnel. Moreover, counsel will be far more inclined to quarrel with the clerk than they would with a judge concerning scheduling matters, thereby increasing rather than decreasing the cost of litigation. If some judges would like to delegate scheduling responsibility to the clerk, they should be free to do so. However, such a practice should not be forced upon them. I am effectively "tracking" my own cases now by issuing scheduling

[1]Although our magistrates in Maryland are extremely able and provide great assistance to me in various respects, e.g., trying certain cases by consent of the parties, holding evidentiary hearings in prisoner cases and conducting settlement conferences, I do not ordinarily ask them to help me in resolving discovery disputes and in other case management matters. However, many of my colleagues both here in Maryland and in other districts do utilize magistrates in these respects, and to the extent that the proposed legislation discourages their use, I believe that it is ill-advised.

orders with different deadlines in different types of cases, and there is no reason to transfer that power and responsibility from me to someone who would not do as good a job.

2. Section 471(b)(3) contemplates that "discovery-case management conferences" will be the norm. They should be the exception. I know that district judges are sometimes viewed as being constant complainers, but, in truth, we are extremely busy. In addition to our civil docket, we carry heavy criminal caseloads, and in the civil area itself we not only have many cases to try but also many weighty motions to decide.[2] We simply do not have time to hold conferences for the sake of holding conferences, and in most cases "discovery-case management conferences" are unnecessary. If scheduling orders are issued promptly, if judges are recognized as having the authority to limit the amount of discovery[3] and if judges (or magistrates) are available to resolve discovery disputes as they arise, most cases will be effectively managed without more. Front-end conferences should be reserved for the few cases in which they genuinely will assist the progress of the litigation.

3. Several subsections of section 471(b) provide that trial dates should be set early on. As I indicated above, I agree that in some types of cases (routine ones where successful summary judgment motions are unlikely or very complex ones where a trial date a year or more away must be set), this is appropriate. However, trial calendars become meaningless if they contain dates for trials unlikely to be held, and therefore I believe that in cases which may well be resolved by motion it is not conducive to sound management to set a trial date at too early a stage.

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[2]Any analysis of the crisis in civil litigation must include a realistic assessment of the burdens imposed by the federal courts' extensive criminal docket. This is not to say, however, that it is at all inappropriate to focus upon improved management of the civil caseload. To the extent that district judges can enhance their performance, they should do so.

[3]I note in that respect that the "Local Rules Project" of the Judicial Conference's Committee on Rules of Practice and Procedure has taken the position that local rules adopted by fifty-nine district courts (including Maryland) limiting the number of interrogatories are invalid as being inconsistent with the Federal Rules of Civil Procedure which contain no such limitation. If the Project's view were to prevail, district judges would be stripped of one of the important tools which they have to prevent discovery abuse. Moreover, the Project's position epitomizes the danger of an overly rigid approach to management questions and of curtailing (by national rule or legislation) the power of individual district courts - confronted with the day-to-day reality of docket management - from adopting management techniques which they find to be valuable.

4. Section 471(b)(10) requires that each district court have "a comprehensive alternative dispute resolution plan." I certainly have no objection to alternative dispute resolution procedures. However, I do believe that the current enthusiasm for alternative dispute resolution is somewhat inflated. My experience demonstrates that although most meritorious claims are eventually settled, it is the imminence of trial which is the final catalyst to settlement. This is not to say that alternative dispute resolution procedures do not have an important role in the process. In Maryland we use settlement conferences, conducted by our magistrates and attended by representatives of the parties as well as by counsel, to great effect.[4] However, it is the certainty that issues not amicably settled will be judicially decided which ultimately results in dispute resolution. Therefore, management and reporting procedures should not be so rigid and cumbersome that they require judges to spend substantial time outside of the courtroom or away from their motions work. In other words, we should control our system of management rather than being controlled by it.

5. Unlike, I am sure, many of my colleagues, I have no objection to section 471(b)(13) which would require the establishment of "procedures for the regular publication of pending undecided motions and caseload progress for each individual judge . . . ." Although such procedures might have the unfortunate effect of discouraging judges from helping one another (as we do here in Maryland) because of concern about their individual statistics, I agree that, particularly because we have life tenure, we should be held publicly accountable. However, there is another provision which I find somewhat offensive. Section 471(b)(6)(B) requires that if two or more extensions of a discovery deadline are granted, "the judges granting such extensions shall report the case to the Administrative Office of the United States Courts." As a practical matter, this reporting requirement is not onerous. However, it symbolizes one of the things which I think is wrong with government today: it appears to suggest that constitutional officers are responsible to the bureaucracy, not that the bureaucracy is responsible to constitutional officers. It is this which I believe

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[4] I note, however, that for the past year Judge Joseph Young, one of our senior judges, has on an experimental basis held settlement conferences in a number of cases shortly after they have been filed. His experiment has confirmed what our general experience has been: that cases hardly ever can be resolved at that juncture. Since this is so, the considerable time which would be consumed in the front-end discovery management conferences contemplated by the proposed legislation, see section 471(b)(3)(A), is not justified as an early effort to achieve settlement.

many judges find to be the most demeaning aspect of the proposed legislation.

All things being equal, I would probably prefer that Congress leave entirely to the courts the question of managing their own cases. However, I appreciate the concerns which have led to the proposed legislation and agree that the problems which it seeks to address are matters of significant public interest. I also am enough of a realist to suspect that I would have little hope of convincing you that no Congressional action in the area is advisable. However, I do hope that what I have said may persuade you that the proposed legislation should be somewhat modified to delete the provisions mandating the adoption of particular management techniques and to substitute in their stead specific goals, e.g., differential case tracking, the prompt decision of motions, the expeditious scheduling of trials and increased control over discovery, for the district courts to reach by management techniques of their own choosing. I think that this modification would in the long run result in far better caseload management and be more compatible with the doctrine of the separation of powers.

I very much appreciate your consideration of my views.

Respectfully,

J. Frederick Motz
United States District Judge

Attachment 2 to April 25, 1990 Letter

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
FREDERIC N. SMALKIN
UNITED STATES DISTRICT JUDGE

101 W. LOMBARD STREET
BALTIMORE, MARYLAND 21201
(301) 962-3840
FTS 922-3840

March 22, 1990

Hon. Joseph R. Biden, Jr.
Chairman
Senate Judiciary Committee
Washington, D.C. 20510

Re: Civil Justice Reform Act of 1990, S. 2027 & H.R. 3898

Dear Senator Biden:

I (and many of my colleagues) have been following with great interest your bill to "reform" the federal courts' handling of civil cases. I am writing to give you my views on the bill, as someone with over three years' experience as a District Judge, ten years' experience as a federal magistrate, and a current (and, I think, well-managed) civil caseload. (Of my civil cases that do not settle or go out on motions, almost all are tried within a year to fourteen months of filing.)

The first aspect of the bill that, frankly, upsets me is that it attempts to micro-manage the process of judging, by forcing all federal courts into a mold that some judges have found useful, but that might not have validity in all courts and in all places throughout the country. With all due respect to the participants in the Brookings study (none of whom, I note, was an active judge), the data are simply insufficient to support this attempt at legislative usurpation of the judicial case management function.

The second aspect of the bill that is very upsetting is that neither it, nor the study from which it derives, takes into account the fact that a system that depends for its validity upon the assignment of firm trial dates (as does that proposed in the bill) is a fantasy, given the reality of today's federal criminal caseload. That caseload, given priority by the Speedy Trial Act and ever-increasing as the result of the Drug War's new statutes, agents, and prosecutors, is simply wiping out the civil trial calendar in many districts, as it will soon do in all of them. Until we have adequate judicial resources to deal with this problem, or until the recommendations of the Federal Courts Study Commission can be implemented, firm civil trial dates are no more than wishful thinking in almost every district in this country, and legislation will not make it otherwise.

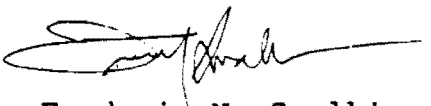
A third troubling aspect of the bill is its denigration of the role of the magistrate in the management of civil trials. This is uncalled-for, and it does a great disservice to the dedicated corps of magistrates, many of whom are experts in civil case management and very effective at it.

Finally, the bill debases the entire judiciary, treating us as if we were inferior functionaries. The members of the Article III trial judiciary are persons, who, if the words of their commissions are to be believed, were chosen for their "Wisdom, Uprightness, and Learning." We have already had our sentencing discretion gutted by the enactment of guideline sentencing, which has immensely complicated and prolonged criminal cases. Now, our management discretion in civil cases is to be gutted by enforced and burdensome tracking, conferencing, and reporting procedures that will waste valuable judge time that could be better used for the actual trial of cases. This is not even to mention the waste of money and the encouragement of pettifogging over clerical matters that would grow out of the bill.

I most strenuously urge that this bill not be enacted as introduced. It is based upon faulty premises, and it unjustifiably demeans the constitutional officers of a co-ordinate branch of the Government.

I respectfully request that this letter be made a part of the bill's legislative history.

Sincerely yours,



Frederic N. Smalkin
United States District Judge

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