STATEMENT BY THE HONORABLE ROBERT F. PECKHAM

about

TITLE I OF S. 2648

Civil Justice Expense and Delay Reduction Plans

Introduction

Congressman Kastenmeier and other members of the Subcommittee on Courts, Intellectual Property and the Administration of Justice: I am Robert F. Peckham, United States District Judge for the Northern District of California. I appear in my capacity as chairman of the United States Judicial Conference's subcommittee on the Civil Justice Reform Act of 1990. I am joined in this statement by my distinguished colleagues, Chief Judge Aubrey Robinson, Judge John Nangle, and Judge Sarah Barker, who have expended extraordinary time and energy in helping analyze the proposed statute, learn the views of federal trial judges from around the country, and formulate Judicial Conference policies and programs on case management and cost and delay reduction.

I would like to begin by expressing, on behalf of all of the judges in the federal courts, our appreciation for being given the opportunity to share with your Subcommittee and its staff some of our thoughts about Title I of S. 2648. We appreciate the concern about cost and delay in civil litigation that you, Congressman Kastenmeier, and Senator Biden and the co-sponsors of Title I,

share with federal judges. Work on these kinds of problems is not glamorous, but thoughtful people understand its importance. As our daily experiences as judges demonstrate, one of the most fundamental functions of civilized society is to provide peaceful, respected, and efficient means for people to determine their rights and fairly resolve their disputes. Thus, one of the most telling measures of the quality of any society is the quality of its system of civil justice. In this country we are blessed with an adjudicatory system that is capable of sophisticated, reliable analysis of the most complex matters. As the overview of judicial initiatives that we offer in the next section clearly shows, for decades members of the federal bench have understood the fundamental importance of making the benefits of this system meaningfully available to all members of our society.

Initiatives by the Federal Judiciary

The federal judiciary has long been committed, unequivocally, to the values and concerns that inspire this proposed legislation. The very first of the rules that have shaped civil adjudication since 1938 announces that the objective of the system is to "secure the just, speedy, and inexpensive determination of every action." For the first two decades the system appeared to function well under the new rules. It was not until the 1960's that substantial concern about expense and delay began to surface. The judiciary responded with a series of initiatives, including major empirical studies of the discovery process in the late 1960's and, in 1970,

significant changes in the Federal Rules of Civil Procedure. There was a second surge of attention to these matters in the late 1970's and the early 1980's, culminating in the adoption in 1983 of extremely important amendments to Rules 11, 16, and 26.

The changes in Rule 11[1] and some of the changes in Rule 26 were designed to encourage more responsible, restrained, and cost-effective approaches by counsel to pleading, motion and discovery practices. The changes in Rule 16 and other changes in Rule 26 were designed (1) to assure that judicial officers "will take some early control over the litigation" in all categories of cases save those routine matters that are exempted by local rule, (2) to encourage courts to devote the appropriate level of management attention to different kinds of cases (avoiding "over-regulation of some cases and under-regulation of others"), (3) to assure that judges and magistrates have the authority and the procedural tools necessary to move their cases through the pretrial process as efficiently as the needs of justice permit, (4) to encourage "greater judicial involvement in the discovery process," and (5) to provide both counsel and court with additional, more direct means for preventing or correcting "redundant or disproportionate discovery."

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[1]Recognizing that Rule 11 has been the subject of much debate, the Advisory Committee on Civil Rules recently has launched a comprehensive review of the rule by issuing a nationwide call for papers, analysis, and comment. After digesting materials received in response to this call, the Advisory Committee will hold open hearings on this important subject early next year.

Inspired in part by the same concerns that prompted the recent changes in the rules, many district courts and many individual judges have initiated important new approaches to case management. While space does not permit us to acknowledge all of the many courts which have adopted creative approaches to case management, we point to a few examples here simply to suggest something of the spirit and of the range of ideas that the federal bench recently has brought to this field. In the late 1970's, district courts in Florida and California established new systems under which lawyers were required to propose sensible case-development plans prior to the initial status conference with the court and to exchange key information and documents before launching formal discovery. District judges in South Carolina decided to require plaintiffs and defendants, at the time they file their initial pleadings, to share with one another and with the court basic information about the case by responding to a set of questions drafted by the judges. Judges in San Francisco began experimenting with a two-stage approach to the case-development process. In the first stage, the court limits the parties' discovery and motion work to the core matters that they feel they must learn in order reasonably to ascribe a settlement value to the case. At the close of that first stage, before the parties are forced to spend the substantial additional sums necessary to prepare a case fully for a trial, the court schedules a settlement conference or invites the parties to participate in some alternative dispute resolution procedure. If

their good faith efforts to settle the case are not successful, the court permits the parties to proceed with the more expensive discovery and pretrial motion work that must be done to prepare for a full trial of the matter. In New York, judges appointed special committees of lawyers who helped the court design systems for containing discovery abuse and guiding lawyers toward the most cost-effective and productive use of certain discovery tools. Courts in Oklahoma and Virginia have adopted innovative strategies for moving cases rapidly toward disposition. And all over the country individual judges have become more assertive in their efforts to help counsel identify issues or areas of inquiry which, if actively pursued early in the pretrial period, could either dispose of the case in its entirety or equip the parties to resolve the matter more efficiently.

These and many other innovations in case management have been accompanied by similarly creative work in the field of alternative dispute resolution. In the late 1970's federal courts in Pennsylvania and California began important experiments with non-binding arbitration programs. Since those early beginnings seventeen additional courts have established non-binding arbitration programs. Recently completed studies by the Federal Judicial Center show that such court-annexed arbitration programs enjoy widespread support in the bar. Approaching problems of cost and delay in yet another fashion, district courts in western Washington, Kansas, Michigan, and the District of Columbia, working

with large groups of dedicated lawyers, have implemented very successful mediation programs. The non-binding summary jury trial procedures that were pioneered in the Northern District of Ohio have been used and refined in a number of courts. In addition to their innovations in case management, district judges in Oklahoma have extended the availability of the summary jury trial to many kinds of cases and have implemented a vigorous arbitration program. Judges in the District of Massachusetts refined the mini-trial concept, developed initially in the private sector, into various forms of non-binding summary bench trials. In Connecticut, judges set up machinery for impaneling teams of experts to render advisory opinions to help parties settle complex construction cases and other matters involving advanced technologies. Led by a task force of local lawyers, the Northern District of California established the first early neutral evaluation program in 1985. The District of Columbia and the Eastern District of California recently added similar ENE programs to the ADR services they offer. And all across the country judges and magistrates, responding to requests from counsel, have been devoting progressively more time and energy to settlement conference work.

While time does not permit us to cite all of the recent judicial innovations in case management and ADR, this brief overview suggests something of the energy and creativity that federal courts have committed to combating problems of cost and delay in civil litigation. We believe that these considerable

efforts account, in large measure, for the remarkable success the judiciary has enjoyed in coping with the staggering increase in civil filings that has occurred over the past two decades. As a recently completed study by the Rand Corporation shows, the "private civil caseload had grown more rapidly than either criminal or U.S. civil filings: there were 32,000 new private civil cases in 1950, 64,000 in 1970, and more than 161,000 in 1986." T. Dungworth and N. Pace, Statistical Overview of Civil Litigation in the Federal Courts, at vi-vii (Rand 1990). Most significantly, that same study concluded, after analysis of a great deal of data, that "**the aggregate performance of the federal district courts was remarkably stable during the 1970s and 1980s despite a substantial increase in caseload during that period**." (Id., at vii). Over the 16 year period on which the Rand study primarily focused, federal courts increased termination rates at a pace that matched increases in filings. On a system-wide basis, there was no real increase in length of time between filing and disposition of civil actions, again despite the dramatic increase in caseload volume. (Id., at vii-viii).

There is another aspect of the Rand study that we believe is relevant to the legislation under consideration here today. While the Rand investigators found that there were significant differences between districts in case processing speed, their effort to account for these differences by examining factors from within the court system failed: they could not find explanatory

correlations, for example, based on weighted filings, on percentage of cases that received judicial attention, or on the number of trials, conferences, or motions per judge. While the Rand investigators would acknowledge that their study was not sufficiently exhaustive to foreclose the possibility that differences in how judges manage their workload at least help account for inter-district differences in case processing speed, the authors felt constrained to point out that "**variation in case-processing speed may have determinants that are completely outside the court system**." (Id., at xii). This follows because courts work in environments that are composites of many different factors that, in the aggregate, make up what we call the "local legal culture," and there can be appreciable differences in such local cultures. It is partly for this reason that we believe so strongly that sensible approaches to the problems of cost and delay must be tailored to the particular circumstances of each individual district, must begin with broadly focused examinations of all the relevant conditions and practices, and must include inquiry into how the behavior of lawyers and clients (as well as judicial officers) affects the march toward disposition of civil actions.

We have described some of the recent efforts by judges to improve the delivery of judicial services, and we have cited findings from the Rand study, not to suggest that federal judges believe that no work remains to be done on the problems of cost and delay in civil litigation. The judicial branch recognizes that

feelings about the cost of civil litigation, in particular, justifiably run high in many quarters, and that it is very important to continue to search for ways to bring those costs down. That recognition is reflected not only in the current work by the Advisory Committee on Civil Rules, which is actively considering rule changes that would compel more direct, less expensive sharing of information early in the pretrial period, but also in two important actions recently taken by the Judicial Conference of the United States. On March 13th of this year the Conference unanimously adopted a policy statement that included an intensified commitment to individualized case management and a recommendation that each district court convene an advisory group to help isolate causes of cost and delay and to recommend possible solutions.

Then, in late April, the Conference adopted an ambitious 14-point program designed to assess and address cost and delay in every district court in the country. Recognizing the valuable contributions that thoughtful lawyers have made to the administration of justice in so many jurisdictions, this program accords a central role to local advisory groups, with balanced representation from a cross-section of the bar. Such groups already exist in many courts, e.g., under the Congressional mandate reflected in the 1988 amendments to 28 U.S.C. §2077, or in the form of federal practice committees. Under the Judicial Conference's 14-point program, each district retains the discretion to ask an already existing committee (perhaps augmented somewhat to assure

the appropriate representative balance) to perform the functions contemplated for the local advisory group, or to appoint a new committee for these purposes. While preserving in each court necessary flexibility in these matters, the Conference assumes that many courts will elect to combine the responsibilities imposed by §2077 and its program in one committee in order to avoid the resource drains that can attend the proliferation of committees with overlapping assignments.

Under the Conference program, each advisory group, working with district judges, will begin its work by conducting a systematic, detailed assessment of the court's civil and criminal dockets, focusing not only on current conditions but also on trends in filings and in demands on the court's resources. Then the group will attempt to identify the principal causes of any cost or delay problems that it perceives. By proceeding systematically, and by working with data that is specific to each individual court, these advisory groups will be well-positioned to determine whether changes are in order and, if so, what they should be. They will recommend any measures that they feel, given the particular character of needs and circumstances in their district, hold some promise of reducing cost or delay. Most significantly, the advisory groups will not confine their analyses and recommendations to court procedures, but also will examine how lawyers and clients handle litigation, searching for ways these players in the litigation drama can contribute to reducing expenses and delays.

Each district court will carefully review the assessments, analyses and recommendations submitted by its advisory group, and will implement the proposals that appear feasible and constructive. To enrich idea pools and to assure that all potentially useful solutions are considered, each district will share its advisory group's assessments and recommendations with a circuit-wide committee of district judges and with the Judicial Conference, both of which may recommend additional measures for consideration by individual courts.

In addition to these grassroots initiatives, the Judicial Conference will conduct demonstration programs in districts of different sizes and case mixes to experiment with different methods of reducing cost and delay (including ADR programs) and different case management techniques. Each demonstration program will be carefully studied, and lessons learned will be shared with all judicial officers in the country. Building from these sources, as well as the experiences of other courts, the Conference will arrange for publication of a Manual for Litigation Management and Cost and Delay Reduction that will describe and analyze the most effective techniques and programs. Another important part of the Conference program will emphasize education and training: we will establish substantial new programs to assure that all judicial

officers and appropriate court personnel understand the most current case management strategies and other programs for cost and delay reduction.

To coordinate this extensive, multi-dimensional effort, the Judicial Conference has created a new Committee on Court Administration and Case Management. The Director of the Federal Judicial Center, or his designee, will assist the Committee to assure appropriate integration of research and judicial education programs. To assure that the learning that is generated by this new Conference program appropriately flows into the Congressionally mandated rule-making process that has worked so well for more than 50 years, a member of Conference's Advisory Committee on Civil Rules will serve regularly on the Case Management Subcommittee of the new Committee on Court Administration and Case Management.

As this description of judicial initiatives makes clear, federal courts have made combating cost and delay in civil litigation one of their highest priorities for many years. Thus, when we respond to Title I of S. 2648 we do so against this extensive background of our own front-line efforts to address the concerns that inspire this proposed legislation.

The Evolution of the Judiciary's Position on the Proposed Legislation

Perhaps because no active judicial officer was asked to serve on the task force whose work informed the first version of this legislation, S. 2027 and H.R. 3898 (the predecessor to S. 2648) caught the vast majority of federal judges by surprise when it was introduced in late January of this year. Reacting quickly to set up machinery to examine this legislative initiative, the Executive Committee of the Judicial Conference appointed the subcommittee that I chair in early February. Despite our heavy trial schedules, we began immediately to study the proposed statute. While the very short time prior to the Senate Judiciary Committee's first hearings on March 6 did not permit us to complete a detailed analysis of the many components of the bill, Judge Robinson, speaking on that occasion for us, articulated some of our fundamental concerns about legislation that would reach into areas so clearly procedural, so clearly the province of the courts and the Congressionally mandated rule-making process.

By March 13th we had developed a substantial written analysis of some of the key provisions of S. 2027. On that day the Judicial Conference of the United States, during its regularly scheduled semi-annual meeting, voted unanimously to adopt the analysis we had prepared, to oppose S. 2027 as drafted, and to endorse a policy statement (alluded to above) re-affirming its commitment to

individualized case management. Because it was prepared under such time pressure, our written analysis focused primarily on those provisions of the bill that would have represented the most radical and troublesome departures from the approaches to case management that the judiciary had worked so hard over the preceding two decades to refine. Despite this necessary emphasis on unproven, detailed procedural prescriptions, our analysis of S. 2027 clearly articulated the view that this kind of legislation "imperils the vitality of the rule-making process."

During the latter half of March and the first half of April we continued to consider how best to respond to the concerns and purposes that inspired Senator Biden's legislative initiative. Two dominant themes emerged from our many hours of work during this period: (1) responsibility for the kinds of procedural matters covered by S. 2027 should remain in the judiciary, and (2) the most constructive course was not to superimpose nationally one uniform and unproven new system, but to ask each district to assess its own needs and to tailor appropriate responses to them, while simultaneously committing the Judicial Conference to conducting, in a limited number of volunteer courts, carefully designed experiments that would assess the effectiveness of a range of different approaches.

These themes play major roles in the comprehensive, 14-point program that the Judicial Conference adopted in late April, a

program designed explicitly to achieve the purposes and to promote the underlying values that Chairman Biden articulated in introducing S. 2027. We presented and explained the Conference's program to the Chairman's staff in late April and early May, hoping that adoption of this ambitious, unprecedented undertaking would persuade the sponsors of S. 2027 that legislation in this area was unnecessary. While the Chairman and the Committee's staff listened and responded to many of our concerns about S. 2027 as introduced, we failed to persuade the Chairman that legislation was not necessary. Given that failure, the Executive Committee authorized the legislative specialists in the Administrative Office of the United States Courts to submit to the Committee's staff various proposals that the subcommittee felt would improve the proposed legislation.

The Committee's staff responded positively to many of these suggestions, and on May 17 the Chairman and Senator Thurmond introduced, as Title I of S. 2648, a substantially modified version of the original bill. In ways we specify in a subsequent section of this statement, some of the significant provisions in the revised version of the proposed statute are consistent with the Judicial Conference's policies and its 14-point program. There remain, however, important respects in which the two approaches differ (we discuss some of these matters in some detail in a subsequent section). Moreover, even the modified version of the statute would **compel** the judiciary to adopt programs and to develop

practices or local rules that conform to principles set forth in the proposed statute, principles that are undeniably "**procedural.**"

Our subcommittee tried to persuade the Senate sponsors of the bill not to insist on mandating conformity with specific procedural principles. For reasons we elaborate below, the failure of that effort leaves the bill in a posture that the strong majority of federal judges disfavor. For example, the Conference's Committee on Judicial Improvements, which has judicial representatives from each of the federal circuits, voted unanimously in June of this year to oppose the revised bill, in part because its members believe that the statute would represent a legislative intrusion into matters that should remain the province of the judiciary.

We also must report that many judges have expressed to us their deep personal concern that the proposed statute seems to reflect a fundamental lack of confidence by the Congress in the federal judiciary. These judges feel strongly not only that any such lack of confidence is unfounded and unfair, but also that before it enacts any statute that carries that imputation, Congress should be quite confident that the measure really is necessary. Given the judicial initiatives described above, especially the Judicial Conference's 14-point program, it is difficult for judges to understand why Title I of S. 2648 is necessary.

In light of the sentiments that it now perceives to be shared by the majority of federal judges, the Executive Committee has concluded that the Conference's 14-point program is the appropriate vehicle for pursuing the objectives underlying Title I of S. 2648 and that legislation in this procedural arena is not in the interests of sound judicial administration.

Fundamental Concerns About the Legislation

Before discussing specific provisions of the proposed statute, we would like to elaborate some of the fundamental concerns that underlie the Executive Committee's position. In doing so, we address the most sensitive issues raised by this kind of legislative initiative. We speak respectfully and in a spirit that we hope will be perceived as constructive.

We fear that enactment of this statute could result in real harm to the rule-making process that has served both Congress and the courts so well for so long. As you fully appreciate, Congress recently reviewed and re-codified that process, taking care to build into it procedures that assure that before nationally applicable rules of procedure are imposed they are considered most deliberately by thoughtful and experienced judges, lawyers, and law professors over a substantial period of time, and that the lawyers and litigants into whose world the new rules would intrude are

given ample opportunity to articulate their reactions, point out potential problems, and add suggestions. As we who have sat on the bench for some time have discovered, sometimes painfully, procedural matters are extraordinarily complex. They can not only influence, but fix, the outcome of litigation. New rules can have a great many unforseen consequences. And it takes the most considered deliberation to be sure that the dynamic between new programs and established practices is constructive. Thus it is crucial that inputs from all affected quarters be sought before new procedural principles are mandated or new rules adopted. For reasons we do not understand, Title I of S. 2648 has not been drafted through such a process. Thus one of the primary bases for our opposition to the statute is our belief that nationally applicable procedural norms should be imposed only through that rule-making process.

Some thoughtful judges also have suggested that when Congress considers enactment of legislation that covers the kinds of procedural matters that are at the core of the judicial function, it ventures into areas of constitutional sensitivity. Rather than explore the constitutional arguments that are raised by this suggestion, we wish to emphasize our view that simply as a matter of wisdom of policy it would not be sensible to pass legislation that could deprive judges of the discretion they need to determine in individual cases how best to use procedural tools to reduce delay and litigant expense.

Similarly, we are deeply concerned by the fact that the legislation, even as it emerged from the mark-up process in the Senate, would compel every district court to include in its cost and delay reduction plan the several procedural components that are set forth in § 473(a). While many of the principles and case management tools that are set forth in that section might well be appropriate in some cases, we firmly believe that it is not wise policy to require their implementation in every district in the country before the advisory groups and judges in each district have completed a thorough assessment of local conditions and identified and analyzed all the different measures that might be constructive. We believe that the advisory groups and district courts should not be constrained in advance to conform their plans to any such prescriptions, but, instead, should be encouraged to think as openly and creatively as possible in designing the most effective means for improving local conditions. It is significant that important bar association groups, including the American Bar Association and the Federal Bar Association, share this view with us.

Some of the More Detailed Provisions of the Bill Which Require Specific Comment

There are several detailed provisions of the revised statute about which we feel a special need to comment. The first to which we direct the Subcommittee's attention appears in subparagraph (B)

of section 473(a)(2), which apparently would require judicial officers to fix firm trial dates early in the life of each action and that such dates be no more than 18 months after the complaint was filed unless the assigned judge certifies that trial cannot be commenced within that period either because of the complexity of the case or the pendency of criminal matters. Many of our most effective case managers feel that approaching the setting of trial dates in this manner is both unrealistic and unwise. They point out, among other things, that a case's complexity is only one of a great many reasons for which it might not be feasible, early in the pretrial period, to fix a sensible trial date. Damages may not be ascertainable in that time frame, injuries may not have stabilized, interlocutory appeals may not have been resolved, necessary tests may not have been completed, key witnesses may not be available, information discoverable only overseas may remain unknown. The unpredictable flow of criminal cases before a judge may make the setting of an early trial date unrealistic. In short, there are many different reasons, in addition to case complexity, for which it could be quite unfair to compel a trial to go forward within 18 months of the filing of the complaint. It also is important to point out that cases evolve in unpredictable ways, assuming shapes as parties and causes of action are added or changed over the course of the pretrial period that are wholly unforeseeable at the outset. This fact of litigation life means

that in some cases a judge cannot determine what an appropriate trial date might be until the matter has evolved into something approaching the form it will take at the trial.

Lawyers and litigants respond most constructively to assertive case management that is realistic. They are not impressed by generic, formula based scheduling orders. Nor are they long moved by the imminence of false dates. They learn quickly what a court or judge can and cannot do. Recent experience with fast-tracking in some state courts shows that setting trial dates that the court cannot honor, and that lawyers know cannot be honored, is devastating both to lawyer morale and to the overall case management credibility of the court. Simply put, lawyers will not prepare for an event that they know will not happen on the date fixed. Thus, it is imperative that the trial dates that are set be realistic. And realistic means assuring at least two things: (1) that the informational needs of the case can be satisfied within the time frame allowed, and (2) that there is a reasonable prospect that the court will be in a position to commence the trial on the date set. The approach in the revised version of the bill fails adequately to take into account the complexity, fluidity, and unpredictability of a federal court's work. As a constant fact of their professional lives, individual judges are compelled to try to balance and blend literally hundreds of competing and sometimes unforeseeable demands for their time.

These considerations persuade us that a provision like this must give judges more flexibility in fixing the trial date, for example, by requiring that early in the pretrial period they fix **either** the date for trial or a date or specific juncture by which the trial date will be set.

A second troublesome provision of the revised statute appears in subparagraph (D) of section 473(a)(2), which would require the setting of "target dates for the **deciding** of motions." Apparently this provision would be satisfied either by a local rule that created presumptive time frames within which all motions would be resolved or by a requirement that in each case individual judges set such target dates. One difficulty with either approach derives from the fact that there can be huge differences between different motions. Deciding a motion for summary judgment in a case involving 15 causes of action, some of which sound in antitrust laws, some of which sound in securities laws, some of which arise under patent rights, and some of which rely on civil RICO, obviously will require the commitment of vastly greater resources, and take much more time, than deciding a discovery motion about where a deposition is to be taken. There can be vast differences even between various kinds of discovery motions, some of which, for example, call for careful elucidation of privilege law and then its application to thousands of documents. Given the great range of demands that motions can make, court-wide targets for the deciding of motions, even by category, would have to be too broad to be of

much use. Artificially narrow time frames, by contrast, would pressure courts to sacrifice quality of analysis and reliability of results for the sake of compliance with abstract mandates. It would be unseemly, at best, thus to pit justice against a false form of efficiency.

Nor is the solution to require each judge to set, in each case, individualized target dates for deciding the motions that counsel might file. At no point in the life of a case can a judge reliably predict the number or the kinds of motions that will be filed or, more importantly, what the character of particular motions might be. For example, without being able to foresee their specific character, and the demands they would impose, a promise by a judge to decide all discovery motions in a given case within 15 days simply would not be meaningful. Moreover, experienced judges understand that they cannot predict the nature of demands that will be made on them by other cases, civil and criminal. Demands for immediate consideration of applications for temporary restraining orders, for approval of wiretaps, for review of detention orders, or for last minute consideration of habeas corpus petitions in capital cases are just some examples of the kinds of substantial and unforeseeable interruptions to which the best laid plans of conscientious judges are vulnerable. Nor can judges predict with certainty how long individual trials will last. Of

course, judges also have no control over the rate or nature of civil and criminal filings. And a spate of criminal arrests can force a judge's attention away from civil work.

The point should be clear: to establish artificial time frames within which judges should rule on motions would be neither realistic nor helpful. Worse yet, it could unfairly damage the morale and the reputation of the conscientious judicial officers who refuse to cut big quality corners simply to create an appearance of punctuality. Finally, such a system might foster an instinct in some judges simply to deny even potentially well made motions, especially motions for summary judgment, when they feel that under the relevant time frames they cannot devote the attention to such matters that they deserve. If we adopt rules that encourage judges to deny motions that should be granted, simply because that is the least risky course, we both delay disposition of cases and compel litigants to incur completely unjustifiable expenses. Thus we strongly oppose any provision that calls for the setting of "target dates for the **deciding** of motions."

As the discussion above makes clear, even cases in the same subject matter category can vary dramatically in complexity and seldom fit a standard pattern. Moreover, there can be great differences in the circumstances of counsel and parties in otherwise similar cases. In some instances, there are truly

compelling professional or personal matters that courts must be in a position to accommodate if they are to be fair. The flexibility they must have to adjust schedules to fit are the real needs of individual cases.

The judicial community also has several concerns about the provisions that appear in § 476 of the marked up version of the bill. Before turning to the substance of these provisions we feel compelled to comment on the unfortunate implications of the title of this section. By entitling this section "Enhancement of judicial accountability through information dissemination" the drafters of this legislation imply that there is a shortfall in judicial accountability and that it is sufficiently significant to warrant being highlighted and addressed in a federal statute. We would badly disserve the hundreds of federal judicial officers who work extraordinarily long hours in order to provide the highest quality judicial services if we failed to record how hurtful these implications have been. That hurt is intensified by the fact that the drafters of this legislation have pointed to no empirical study, no data systematically gathered, that would support their suggestion that there is anything approaching a serious shortfall in judicial accountability. In fact, the most recent systematic review of the performance of federal courts, the study by the Rand Corporation alluded to earlier in this statement, suggests just the opposite. We believe it ill-befits the Congress of the United States to impugn the character of the entire judicial branch on the

basis of merely anecdotal evidence that is contradicted by the only comprehensive data available. We do not suggest that every federal judicial officer has disposed of each piece of his or her judicial business as promptly as we would like, but we feel strongly that the vast majority of judges complete their work expeditiously, and that they do so only because they are totally dedicated and devote such long hours to their jobs. We also point out that different judges may attack the same kinds of judicial tasks in different ways, each working conscientiously, but one taking longer to reach a disposition. It hardly seems fair to suggest that the judges who devote more time to their tasks because they struggle to assure themselves that they have done everything reasonably feasible in order to achieve correct results somehow have an "accountability" problem.

Turning to the substance of § 476, we note that it would require semiannual public disclosure, for each judicial officer, of the number of motions and court trials pending longer than six months and of the number of cases that remain on the docket three years or more after filing. We will not repeat here the points we made earlier in this statement about the untoward effects that the setting of artificial deadlines can have on the quality of judicial work and on the morale of the conscientious, but we would be remiss if we failed to note that we have many of those same concerns about this provision. In addition, we must emphasize the importance, in the implementation of any such system, of developing sophisticated,

sensitive criteria for identifying the circumstances in which particular motions, trials, or cases fall within these categories. It would be quite unfair and misleading, for example, to consider a case to have been pending for three years if, during that period, all proceedings in the district court had been stayed for two years by virtue of the defendant's bankruptcy. Similarly, interlocutory appeals can effectively freeze a case at the trial court level for a substantial period. These and many other similar matters must be carefully accounted for in any fair reporting system. At a minimum, any provision such as this should explicitly authorize the Director of the Administrative Office, in consultation with the appropriate committees of the Judicial Conference, to establish sophisticated criteria for determining the length of time during which cases or motions should be deemed "pending."

We also would like to point to what we believe would be the most constructive course for dealing with the rare problem of unjustifiable delay in disposition of motions or other submitted matters. First, we would ask each local advisory group and district court to assess carefully (on the basis of systematically gathered data) the nature and magnitude of the problem in their court. The data thus collected, and discussion of it with lawyers on the local advisory group, certainly would intensify awareness of the importance of prompt dispositions in the mind of any judicial officer who might not recently have focused on this aspect of his or her work. Moreover, we believe that before any rigid

approaches are adopted, it is essential not only that the district-specific dimensions and sources of the problem be carefully identified, but also that a whole range of locally appropriate solution options be thoughtfully examined. For instance, in the Central District of California if a judge has a motion under submission for more than 120 days, a local rule requires counsel for all parties to join in a letter (copying the Chief Judge) bringing this fact to the judge's attention. The local rule further provides that if the judge does not render a decision within 30 days, he or she shall inform counsel of the date by which the decision will be made. The District of Oregon has a similar rule. We mention this approach not to suggest that it is appropriate for other jurisdictions, but to emphasize that local initiatives offer substantial promise in this arena. We are especially concerned that rigidly mechanical approaches might result in counterproductive pressures, e.g., pressures whose effect could be to sacrifice quality of decision-making for the appearance of efficiency.

Shifting our focus to another aspect of this legislative initiative, we note that the Senate sponsors of S. 2648 appropriately have added to their findings an acknowledgement that responsibility for cost and delay is shared not only by lawyers, litigants, and courts, but also by Congress and the executive branch. In recent years, in particular, Congress has imposed additional burdens on the federal courts in both civil and in

criminal matters, e.g., through ERISA, imposition of mandatory minimum sentences and Sentencing Guidelines. Actions by the executive branch also can exacerbate cost and delay problems, e.g., when the Department of Justice elects to prosecute routine drug cases in federal court (instead of permitting such matters to proceed in state courts). There also have been numerous instances of extreme delay in making nominations for judicial vacancies. We would hope that as part of a truly comprehensive effort to attack the problems of cost and delay, Congress would undertake to identify how its actions (and inactions), as well as those of the executive branch, adversely affect the adjudicatory process as well as docket conditions in federal courts.

There are obvious ways in which Congress and the Executive could contribute meaningfully to solutions. Congress could create the additional judgeships for which the need is so pressing, and the Executive could promptly fill judicial vacancies. Similarly, Congress should continue to fund adequately the work of the federal courts. Because the problems of cost and delay are so complex, have so many sources, and have yielded in the past so reluctantly to reform efforts, we cannot hope to launch meaningful assaults on them without significant augmentation of already strained resources. We should note here that while we appreciate the funding provisions of Title I in its current form, we have reason

to fear that the monies there contemplated may fall short of the real cost of meaningful compliance with the various provisions of the statute.

Finally, we note that the current version of Title I identifies by name the five district courts in which the demonstration program would be conducted. Without in any way reflecting on the districts there named, which we know would bring creativity and great competence to the work contemplated by the statute, we feel that the selection of districts for participation in any such demonstration would be better left with the Judicial Conference and the district courts. A host of considerations should play roles in the selection of these districts in order to maximize the learning potential of these procedural experiments. It is essential, for example, that the courts selected represent the widest possible range of caseload and lawyer-culture mixes. The Judicial Conference, working with representative district judges, the Administrative Office, and the Federal Judicial Center, has the resources and data necessary to make the wisest decisions in these kinds of matters.

Important Respects in Which the Judicial Conference's 14-Point Program Largely Anticipates the Current Version of the Bill

In this section we point to several of the respects in which the current version of Title I and programs and policies already adopted by the Judicial Conference largely converge. Noting these

several areas of convergence should make it clearer why we feel that the proposed legislation is unnecessary.

The statute would firmly endorse the notion that case management should be case specific and tailored to meet the specific needs of individual cases and would acknowledge, at least implicitly, that circumstances and problems may vary greatly from district to district, so that, within certain parameters, the approaches to case management and cost containment that are most appropriate and effective may vary considerably in different areas.

The latter insight obviously informs what is perhaps the most significant difference between the legislation as originally proposed and the current version of the statute. S. 2027 would have imposed one largely untested, detailed, and quite expensive system on all courts simultaneously. Perhaps as a result of the dialogues that ensued after the bill was first introduced, its sponsors have opted for a quite different program. Instead of imposing one system from the top down on all courts, the current version of the legislation would build much more sensibly from the bottom up, asking a limited number of courts to experiment intensively with a range of management and ADR systems, while simultaneously permitting all other courts to fashion measures they feel will be specifically responsive to their own circumstances and the needs of their own litigants. Were these undertakings not constrained by the mandatory principles that are set out in section

473(a), these provisions would parallel rather closely the Judicial Conference's approach.

We note that the statute's call for a demonstration program, while not identical to the Conference's position, reflects a similar spirit and set of objectives. We believe that thoughtfully designed, carefully controlled, adequately supported, and thoroughly analyzed experiments with a series of different approaches to case management and other programs that are designed to reduce cost and delay offer an extraordinary opportunity for real breakthroughs in our understanding of the litigative process and how to bring it closer to fulfilling the promise of Rule 1.

Another important point of consistency between the proposed legislation and the Judicial Conference's 14-point program is the significant role that would be accorded to local advisory groups. Structuring these groups so that the lawyers who serve on them reflect the perspectives of major categories of litigants will enable the groups to recommend solutions that include, in the words of the bill, "significant contributions by the court, the litigants, and the litigants' attorneys." It is important to emphasize here that many of the most constructive programs that have been implemented by federal courts in the last decade are the products of local committees of practitioners working with judges. Lawyer groups have helped design and staff innovative case management procedures or court-sponsored ADR programs in Seattle,

San Francisco, Kansas City, Philadelphia, Detroit, New York, Raleigh, and Washington, D.C. In these and many other cities, members of the bar have volunteered countless hours to improving local discovery practices and case management procedures and to supplying the person-power for settlement, mediation, arbitration, and early neutral evaluation programs.

There are several additional components of the proposed statute that are substantially similar to provisions of the Judicial Conference's 14-point program. For example, the legislation would establish machinery for dialogue about the nature of cost and delay problems and the best approaches to solutions between each district court and a circuit-wide committee of district judges. For each district, the circuit-wide committee, in which the chief judge of the court of appeals also would participate, would review the assessments and recommendations prepared by the advisory group, as well as the measures implemented by the court. Then, drawing on what it has learned in the reports from and actions by other courts, the circuit-wide committee would offer its own perspectives and suggestions for consideration by the district court. Thus the statute would provide a vehicle for communication among courts in the same circuit that is substantially similar to the vehicle created by the Conference's program.

Also like the Conference's program, the bill contemplates a national clearinghouse of information about conditions and solutions. It asks the Conference, acting through the appropriate committees, the Administrative Office of the United States Courts, and the Federal Judicial Center, to bring together and to review not only the reports and recommendations made by the local advisory groups, but also the responsive procedures and programs that the district courts adopt. The statute also calls upon the Conference to prepare, within four years, a comprehensive report, describing the steps taken by the district courts. Building on this extensive data base, as well as the lessons learned from the demonstration districts, the Conference would arrange for publication and widespread dissemination of a Manual for Litigation Management and Cost and Delay Reduction. Periodically updated and refined, this Manual would become an invaluable resource for all district courts, describing and analyzing a host of different approaches to expense and delay reduction through innovative case management and ADR techniques.

The current version of the bill also shares with the Judicial Conference's program a clear commitment to the importance of vigorous, sophisticated programs for educating and training both judicial officers and court staff. The Conference, like the sponsors of the bill, seeks implementation of a "comprehensive education and training programs to ensure that all judicial

officers, clerks of court, courtroom deputies and other appropriate court personnel are thoroughly familiar with the most recent available information and analyses about litigation management and other techniques for reducing cost and expediting the resolution of civil litigation." If Congress provides the substantial additional financial support that will be necessary to make such an undertaking meaningful, the Judicial Conference and the Federal Judicial Center will be well positioned to carry out this mandate. The Conference already has established the means to guide and coordinate this important educational effort through its new Committee on Court Administration and Case Management, a committee with which the Federal Judicial Center, the Administrative Office, and the Advisory Committee on Civil Rules all are directly involved.

The Conference and the sponsors of the bill also agree about the importance of extending the capabilities of electronic dockets so that in all courts the judges and clerks will have ready access to the information they need not only to monitor and manage their cases but also to understand how both counsel and the court are expending their resources in each individual matter. This is yet another area in which we urge the Congress to appropriate the funds necessary to permit the courts to achieve goals that we clearly share.

Conclusion

The Executive Committee of the Judicial Conference recognizes that many of the purposes of the proposed legislation are consistent with the Judicial Conference's March 13 policy statement and its 14-point program. However, the Executive Committee cannot endorse Title I of S. 2648 because:

1. The Judicial Conference has adopted and is presently implementing a program which will accomplish the purposes of Title I of S. 2648;

2. The legislation would represent unwise legislative intrusion into procedural matters that are properly the province of the judiciary;

3. The statute would circumvent the procedures established and recently re-endorsed by Congress in the Rules Enabling Act; and

4. The mandatory nature and the rigidity of some of the provisions of the bill would impair judges' ability to manage the dockets most effectively and would tend to defeat the aims of cost and delay reduction.

Thank you for affording us this opportunity to express our views.