

United States District Court

Post Office and Courthouse Building

Boston, Massachusetts 02109

CHAMBERS OF
JOSEPH L. TAURO
JUDGE

March 15, 1991

L. Ralph Meham
Director
Administrative Office of the
United States Courts
Washington, DC 20544

Dear Ralph,

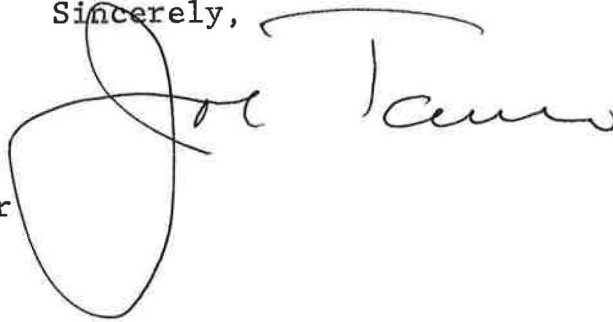
At Steve Breyer's suggestion, I am enclosing some information with respect to our efforts to implement the Civil Justice Reform Act. I sent this material to Senator Biden and Jeff Peck and received replies from them which are also enclosed.

The Committee and the Advisory Group have met. We are now awaiting written submissions from the Advisory Group that are due by the end of the month. We will then come up with a first draft which will serve as the "talking paper" for later meetings.

I will keep you advised as to our progress.

With best wishes,

Sincerely,

A handwritten signature in cursive script that reads "Joe Tauro". The signature is written in dark ink and is positioned to the right of the word "Sincerely,".

Enclosures

cc: Chief Judge Breyer

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ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

WASHINGTON, D.C. 20544

April 8, 1991

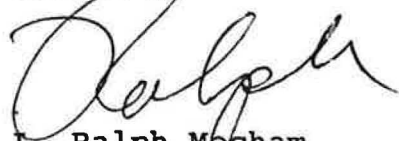
Honorable Joseph L. Tauro
United States District Judge
John W. McCormack Post Office
and Courthouse
Room 1615
Boston, Massachusetts 02109

Dear Judge Tauro:

Thank you very much for your letter and enclosures of March 15, 1991, regarding the work of your Civil Justice Reform Act advisory group. The membership of the group is extremely impressive.

I appreciate your keeping us advised of the court's progress in implementing the Act. The materials you enclosed, including the outline prepared by Arthur Miller, have been passed along to our CJRA coordinating committee, headed by Peter McCabe, Assistant Director for Judges Programs, and Abel Mattos, Chief of the Programs Branch of the Court Administration Division. They will be able to use the information to provide assistance to other courts.

Sincerely,



L. Ralph Mecham
Director

bc: Abel Mattos

United States District Court

Post Office and Courthouse Building

Boston, Massachusetts 02109

CHAMBERS OF
JOSEPH L. TAURO
JUDGE

February 21, 1991

Jeff Peck
Chief Counsel
224 Dirksen Building
Washington, DC 20510

Dear Mr. Peck,

At Steve Breyer's suggestion, I am sending to you directly a copy of material I provided to Senator Biden. Please call me if you have any suggestions.

With best wishes,

Sincerely,

Enclosure

cc: Judge Breyer

United States District Court

Post Office and Courthouse Building

Boston, Massachusetts 02109

CHAMBERS OF
JOSEPH L. TAURO
JUDGE

February 15, 1991

The Honorable Joseph R. Biden, Jr.
United States Senate
Washington, DC 20510

Dear Senator Biden,

I thought you would be interested in knowing that we in the District of Massachusetts have acted to implement the provisions of your Civil Justice Reform Act of 1990. Enclosed is a news clipping, as well as a list of the distinguished persons chosen to serve on our Advisory Group. We are particularly pleased that Professor Arthur Miller of the Harvard Law School has agreed to serve as our Reporter.

I will keep you informed as to our progress. If you plan a trip to Boston and would like to meet with our Group, we would be delighted to get together with you.

With best wishes,

Sincerely,

Enclosures

cc: Jeff Peck
Chief Counsel

Federal Court Names Civil Advisory Group

U. S. District Judge Joseph L. Tauro, chairman of the court's Civil Justice Reform Committee, announced the appointment of an advisory group last week that will assist the committee in implementing the Civil Justice Reform Act of 1990.

Tauro also announced that Professor Arthur Miller of Harvard Law School will serve as reporter to the committee.

The Civil Justice Reform Act, signed by President Bush Dec. 1, requires each federal district court to develop and implement a "civil justice expense and delay reduction plan."

The law required each court to appoint an advisory group within 90 days to help develop the plan. The group must be "balanced and include attorneys and other persons who are representative of major categories of litigants."

Tauro was appointed by U.S. District Chief Judge Frank Freedman as chairman of the committee. Serving with him on the committee are U.S. District Judges David Nelson and William Young.

In announcing the advisory group, Tauro said, "My colleagues and I are grateful to our advisory group members for their willingness to assist in this most important project.

"And we are particularly appreciative that Professor Arthur Miller is willing to

take time from his very busy schedule to serve in the key role of reporter to the committee.

"We now have in place a team that is ready to address the problems of undue delay and expense that face the federal court. Our purpose is to establish an administrative process that will continue to ensure an effective and efficient system of justice for all who rely on our federal court."

Members of the advisory group are: U.S. Magistrate Judge Lawrence P. Cohen, Boston; John P. Driscoll Jr., president, Boston Bar Association; attorney David Berman; Donald R. Frederics, McDermott, Will & Emery, Boston; Daniel B. Winslow, Sherin and Lodgen, Boston; U.S. Magistrate Judge Michael Ponsor, Springfield; Nicholas C. Theodorou, Foley, Hoag & Eliot, Boston; and Cynthia O. Hamilton, Hale and Dorr, Boston.

Also: Margaret H. Marshall, Choate, Hall & Stewart, Boston; Gordon T. Walker, McDermott, Will & Emery, Boston; Susan Garsh, Bingham, Dana & Gould, Boston; Scott E. Charnas, Feinberg, Charnas & Schwartz, Boston; Attorney General L. Scott Harshbarger; Nancy Gertner, Dwyer, Collora & Gertner, Boston; and Michael B. Keating, Foley, Hoag & Eliot, Boston.

Also: Robert J. Smith Jr., clerk, U.S. District Court, Boston; U.S. Attorney Wayne

A. Budd; Associate U.S. Attorney Judith S. Yogman; Michael E. Mone, Esdaile, Barrett & Esdaile, Boston; Leo Boyle, president, Massachusetts Bar Association; Louis M. Ciavarra, Bowditch & Dewey, Worcester; and Rudolph F. Pierce, Goulston & Storrs, Boston.

Also: Walter A. Costello Jr., president, Massachusetts Academy of Trial Attorneys; Louis Elisa, president, NAACP, Boston Branch; Richard S. Milstein, Ely & King, Springfield; Ronald E. Myrick, assistant general counsel, Digital Equipment Corporation, Maynard; and Gael Mahony, Hill & Barlow, Boston.



HARVARD LAW SCHOOL

CAMBRIDGE • MASSACHUSETTS • 02138

MEMORANDUM

TO: Members of the Civil Justice Advisory Group
FROM: Arthur R. Miller, Reporter
DATE: February 13, 1991
RE: February 19 Meeting

In anticipation of our meeting on Tuesday February 19 at 3:30, I thought it would be useful to record some random thoughts about our assignment in the hope that it might provide some guidance for discussion.

I. Duties of the Advisory Group

The Advisory Group is to submit to the Court a report that includes an assessment of the Court's dockets and carefully examines the circumstances and needs of our district.

A. An assessment of the court's dockets

The Civil Justice Reform Act of 1990 provides that the Advisory Group must make a "thorough assessment of the state of the court's civil and criminal dockets." Specifically, the Act requires us to:

- (1) Determine "the condition of the civil and criminal dockets."

Thus, the Advisory Group's report might include an analysis of court-wide and per-judge statistical data on:

- . case processing times
- . total disposition time
- . annual filings
- . cases pending
- . mix of cases in the court's workload ("routine cases" v. "complex cases")
- . cases that result in a jury trial v. those disposed of by other means
- . charging systems (prosecutor's information v. grand jury indictment system)

To aid us, we may want to reference the semi-annual reports on judicial statistics, mandated by Section 476(a).

- (2) The Advisory Group's report also might identify "trends in case filings and in the demands being placed on the court's resources."

The Group might direct its attention toward:

- . analyzing "general trend" data
 - . identifying categories of cases imposing special burdens on the court
 - . exploring causes that might underlie filing trends (e.g., conditions giving rise to particular kinds of civil litigation, charging and plea practices of the United States attorney, national economic conditions)
 - . determining whether the court has sufficient resources (including judicial personnel and administrative staff or space, facilities, and equipment)
- (3) The Group also should try to identify the "principal causes of cost and delay" in civil litigation.

We probably should consider examining the following subjects from the perspective of their impact on cost and delay:

- . current court procedures
 - . ways in which litigants and their attorneys approach and conduct litigation
 - . how litigation practices and procedures could be modified to reduce cost and delay
 - . the rules, orders, and practices of the court for processing litigation
 - . the practices of lawyers and clients (e.g., pleading or excessive claims and defenses)
 - . the conduct of discovery
 - . motion practice
 - . the degree of cooperation and communication between lawyers (including the voluntary sharing of information) and between lawyers and the court
 - . litigant's expectations of the system and instructions from their clients
 - . attorney billing practices
 - . the use of stipulations by counsel
 - . settlement practices by private litigants and governments
- (4) Finally, the Advisory Group is charged with exploring "the extent to which costs and delays could be better reduced by a better assessment of the impact of new legislation on the courts."

For example, we might address:

- . the role of the legislature in reducing civil delay and expense (e.g., failure of Congress to enact legislation that would ease the burden on courts or to express its intent clearly)
- . the impact on the courts of existing statutory schemes and the creation of new rights of action
- . Executive Branch contributions to cost and delay in the judicial system
- . steps that the Judicial Branch as a whole, or individual courts, can take to improve their ability to adapt to new legislation
- . procedural rules that encumber the courts and encourage litigation

Based on our assessment of these matters, the Advisory Group is then to make recommendations to the Court and assist it in developing and implementing a constructive, workable plan for cost and delay reduction. According to the 1990 Act, the report submitted by the Advisory Group should include:

1. The "basis for its recommendation that the district court develop a plan or select a model plan"
2. The "recommended measures, rulings and programs" themselves, and
3. An "explanation of the manner in which the recommended plan complies" with the "principles and guidelines" and the "techniques" of litigation management and cost and delay reduction that are set forth in section 473 of the Act.

II. Components of the Delay and Cost Reduction Plan

The Civil Justice Reform Act of 1990 calls for the Court to develop and implement a civil justice "expense and delay reduction plan." The Advisory Group needs to produce a draft plan that in general terms should include the following elements to comply with the Act. Many of them are well-established in existing practice under the Federal Rules of Civil Procedure, local rules, or the practice of individual judges.

A. Principles and Guidelines

The Act indicates that the following "principles and guidelines" be considered by the Court in formulating the provisions of its Plan. They also should be addressed by the Advisory Group in drafting a proposed plan.

1. Differential case management.

The Act indicates that the Advisory Group should consider procedures for the "systematic, differential treatment of civil cases" in which the level of individualized and case specific management is tailored to certain criteria, including:

- . "case complexity"
- . the "amount of time reasonably needed to prepare the case for trial," and
- . the "judicial and other resources required and available for the preparation and disposition of the case."

Thus, we should consider designing procedures that make an early assessment of each case filed and identify those cases that may be amenable to settlement or other alternative disposition techniques. The Group might consider some form of "tracking" or other method for systematically tailoring the level of judicial case management to the needs of the case.

In theory, the recommended procedures should:

- . be flexible and involve the exercise of judicial discretion in their implementation
- . be "event-oriented," since certain events in litigation are viewed as important benchmarks in ascertaining case progress
- . control the periods of time between case events and incorporate methods to supervise and control these intervals in order to make them more predictable
- . recognize that although cases may be classified by broad definitions, each case is unique; thus, procedures must be adaptable to fit the characteristics of each case

Elements of differential case management might be incorporated into a local rule with some of the following characteristics:

- case management conference before a judicial officer within 60 days of the filing of the action
- counsel confer in advance of a conference and submit to the court a case management plan tailored to the needs of the particular case
- case management plan be considered at the conference and incorporated in a case management order

- recognize categories of cases that involve little or no discovery (and require little judicial intervention -- e.g., government collection cases) and establish appropriate procedures for those cases
- identify categories of cases that generally would fall within a standard pattern (e.g., civil rights, habeas corpus)
- identify categories of cases that require a special docket (e.g., asbestos)

2. Early and ongoing judicial intervention.

The Act anticipates "early and ongoing control of the pretrial process through involvement of a judicial officer" in

- a. "assessing and planning the progress of a case,"
- b. "setting early, firm trial dates, so that the trial is scheduled to occur within eighteen months after the filing of a complaint, unless a judicial officer certifies that"
 - (i) "the demands of the case and its complexity make such a trial date incompatible with serving the ends of justice," or
 - (ii) "the trial cannot reasonably be held within such time because of the number or complexity of pending criminal cases,"
- c. "controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion," and
- d. "setting, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition."

3. Discovery/Case Management Conferences.

The Act suggests a scheme of "careful and deliberate monitoring" of "complex" or other "appropriate cases" through a discovery/case management conference or a series of conferences. At these discovery/case management conferences, the presiding judicial officer

- a. explores the possibility of settlement;
- b. identifies or formulates the principal issues in contention;
- c. in appropriate cases, provides for the "stages of resolution" or "bifurcation of issues for trial" consistent with Civil Rule 42(b) ("Separate Trials");
- d. prepares a discovery schedule and discovery plan
 - (i) to "identify and limit the volume of discovery available to avoid unnecessary or unduly burdensome or expensive discovery,"
 - (ii) to "phase discovery into two or more stages," and
 - (iii) that are consistent with any "presumptive time limits that a district court may set for the completion of discovery and with any procedures a district court may develop"; and
- e. sets deadlines for filing motions and a time framework for their disposition.

4. Control of Discovery.

The Act indicates that the Plan

- a. may encourage cost-effective discovery
 - . voluntary exchange of information among litigants and their attorneys
 - . use of cooperative discovery devices
- b. may contain procedures to conserve judicial resources
 - . prohibit consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion.

5. Alternative means of dispute resolution, including settlement.

The Act suggest that authorization be granted to refer appropriate cases to alternative dispute resolution programs. These programs may be ones that already have been designated for use in a district or ones that the court specifically provides for, and may include:

- . mediation
- . mini-trial
- . summary jury trial

B. Techniques

The Act also indicates that the Court should consider the following "techniques" in formulating the provisions of its civil justice expense and delay reduction plan. These techniques also should be addressed by the Advisory Group in preparing its report.

1. "a requirement that counsel for each party to a case jointly present a discovery/case management plan for the case at the initial pretrial conference, or explain the reasons for their failure to do so";
2. "a requirement that each party be represented at each pretrial conference by an attorney who has the authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters";
3. "a requirement that all requests for extensions of deadlines or completion of discovery or for postponement of the trial be signed by the attorney and the party making the request";
4. "a neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a nonbinding conference conducted early in the litigation";
5. "a requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference"; and
6. "such other features as the district court considers appropriate after considering the recommendations of the advisory group."

III. Additional Suggestions

Finally, a perusal of the literature uncovered the following ideas and techniques. I am including the list simply to provide some addition pre-meeting thinking.

- . lower presumptive interrogatory limit (to limit its use as a tactical weapon)

- . a requirement that certain "routine" discovery occur "automatically" (e.g., copies of contracts, lab tests, etc.), including a motion that requires "mandatory disclosure packets" be produced by each side that includes these routinely discoverable materials
- . a local rule to the effect that certain categories of cases are exempt from Rule 16 scheduling conferences unless a conference is elected by a judge in that judge's discretion
- . standard scheduling forms
- . standing orders that are to be observed unless the judge elects otherwise
- . a mandate that requires a greater use of stipulations on the part of counsel
- . a mandate that courts maintain a firm policy against continuations in all stages of litigation
- . the collection and maintenance of statistics on a court-wide and per-judge basis for basic data about litigation to determine the efficacy of the proposed cost and delay reduction plan
- . a series of short deadlines to expedite the process
- . insist that events occur when they are scheduled
- . facilitate communication between courts and litigants to accommodate attorneys' schedules
- . shuttle cases to underutilized courthouses in the district
- . effective early screening by judicial officers and steps taken in cooperation with the court
- . employing impartial medical witnesses
- . active judicial involvement to shorten voir dire.
- . patterned jury instructions
- . early resolution of motions.

At our meeting next Tuesday, I anticipate that we will have to take care of some administrative duties and then begin to determine how the group should function and discuss the best way to integrate the group's contributions into a coherent plan. Of course, before we recommend measures, rules, and procedures we need to think about our first objective -- assessing the court's dockets and how best to do that.

At this early stage, we should begin gathering information about reasons for cost and delay in our district. But it would not be too early, in my opinion, to begin thinking about whether the causes of cost and delay that we identify would be fully addressed by the "guidelines, principles, and techniques" already dealt with in existing sources, such as the Act itself, the district's local rules, and the Manual for Complex Litigation. If not, how should we supplement that material?


Arthur R. Miller

JOSEPH R. BIDEN, JR., DELAWARE, CHAIRMAN

EDWARD M. KENNEDY, MASSACHUSETTS
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RONALD A. KLAIN, CHIEF COUNSEL
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TERRY L. WOOTEN, MINORITY CHIEF COUNSEL
AND STAFF DIRECTOR

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

March 6, 1991

The Honorable Joseph L. Tauro
United States District Court for the
District of Massachusetts
John W. McCormack Post Office
and Courthouse
Boston, Massachusetts 02109

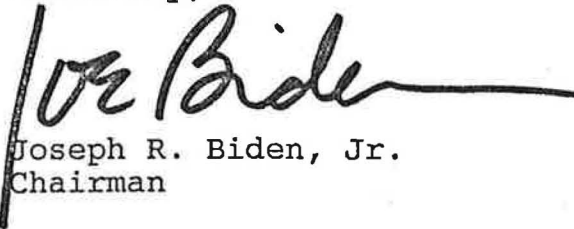
Dear Judge Tauro:

I would like to take this opportunity to thank you for the important and positive steps you have undertaken in appointing the advisory group for the District of Massachusetts.

Your appointments to the advisory group are impressive. The group is exactly what I had in mind in drafting the legislation. I, too, am pleased that Professor Arthur Miller of Harvard Law School has agreed to serve as the Reporter of your group. I am sure that his knowledge and expertise will assist you tremendously in your task.

I look forward to following the implementation of the Civil Justice Reform Act in your district. Please contact me if I can be of any assistance.

Sincerely,



Joseph R. Biden, Jr.
Chairman