Mr. Feidler

L. RALPH MECHAM
DIRECTOR

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ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

April 20, 1990

MEMORANDUM TO THE MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

SUBJECT: S. 2027, the proposed Civil Justice Reform Act of 1990 ("the Biden bill")

At last month's session, the Judicial Conference unanimously voted to oppose S. 2027 and its House counterpart, H.R. 3898, as introduced. The Conference also approved an analysis of the bill and a policy statment on case management, and directed me to send these items to all judicial officers in the system. The district judge representatives to the Conference agreed to obtain the views of the judicial officers in their circuits on this legislation. The responses received to date indicate overwhelming support for the Conference's position and opposition to the Biden bill.

Since the meeting of the Conference, the Subcommittee chaired by Judge Peckham (with Chief Judge Clark participating) has held numerous telephone conferences to discuss alternatives to enactment of S. 2027 as introduced. Additionally, on April 3, 1990, the Chief Justice met with Senator Biden. Correspondence between the Chief Justice and Senator Biden, reflecting the content of their discussion, is attached.

While there are indications that support for the original Biden bill may be eroding, it nevertheless remains probable that Chairman Biden has sufficient support to process some form of "civil justice reform" legislation in the Senate, particularly if accompanied by the creation of new judgeships and other judicial improvements. The House situation is less clear.

In view of all these factors, the Peckham Subcommittee and the Executive Committee have concluded that the best response of the judiciary is to propose the implementation by the judiciary of a civil case management program and not to submit alternative legislation. The attached 14-point "Program to Address the Problems of Cost and Delay in Civil Litigation and to Improve Case Management", with accompanying background, is proposed for your adoption.

The Executive Committee unanimously recommends that the full Judicial Conference approve the attached program, and has directed that Conference members be polled for their views. Since time is of the essence, please mail or fax (FTS 786-5395) the ballot to me (Attention: Office of the Judicial Conference Secretariat) by Friday, April 27, 1990; alternatively, if you prefer, you may telephone me (or Jim Macklin or Karen Siegel in my absence), at FTS 633-6097.

So that Senator Biden and his staff may be aware that the Judicial Conference is actively considering this matter, the Executive Committee has authorized Bob Feidler to discuss the proposed program with staff while this poll is conducted. Although administrative implementation would be by far the preferred approach, it is likely that Senator Biden will insist on some form of legislation. In that event, Bob Feidler will also be authorized to discuss endorsement of legislation which is not inconsistent with the 14-point program.[1]

L. Ralph Mecham

Attachments

[1] Chief Judge Nangle declined to go beyond administrative implementation of the 14-point program.

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

MEMORANDUM

TO: Mr. Chief Justice Rehnquist
FROM: Joe Biden
DATE: April 4, 1990
RE: S.2027, The Civil Justice Reform Act of 1990

I very much enjoyed our lunch yesterday and found our time together to be productive and informative.

As we discussed, I am eager to negotiate with the Judicial Conference in general and with Judge Peckham's task force in particular regarding the specific language of S.2027. It is important, as you know, for the task force to submit its specific suggestions to us in the very near future. I assure you that we will do our best to resolve our current differences.

You have my commitment that I will not move S.2027 out of the Judiciary Committee before May 1. Should negotiations be well under way and proceeding in a constructive and good-faith manner, I am willing to wait beyond May 1 to move the bill. In order to ensure consideration by the Senate and House during this Congress, however, it is my intention to move the bill no later than June.

I have no objection to your sharing with the Judicial Conference's Executive Committee information regarding negotiations over S.2027.

Thank you again, Mr. Chief Justice, for our lunch yesterday. I look forward to our continued work together on this subject and the others we discussed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 6, 1990

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

Dear Mr. Chairman,

I was pleased to learn from your memorandum of April 4th that you, too, found our lunch on Tuesday useful and productive. I found it the same, and enjoyed the opportunity to get to know you better.

With your permission, I am passing along to the members of the Executive Committee of the Judicial Conference our understanding that you will not move S.2027 out of the Judiciary Committee before May 1st; and that if at that date there are constructive negotiations going on as to the final content of the bill, you would wait beyond that date, although you intend to move the bill no later than June.

I am also advising the Executive Committee that you realize they, in their dealings with you and others on this matter, are not in a position to bind the Judicial Conference. I am also telling them of my remark to you that the Judicial Conference has a provision for mail ballotting if that procedure were appropriate.

Sincerely,

William H. Rehnquist

JUDICIAL CONFERENCE OF THE UNITED STATES

BALLOT

I hereby cast my vote on the "Program to Address the Problems of Cost and Delay in Civil Litigation and to Improve Case Management", as follows:

_____ Approve

_____ Oppose

_____
(Signature)

Date: _____

Please return to:

L. Ralph Mecham, Director
Administrative Office of the
United States Courts
ATTN: Judicial Conference Secretariat
Washington, D.C. 20544

Or FAX to FTS: 786-5393

Recommendations by the Executive Committee
of the Judicial Conference

Program to Address the Problems of Cost and Delay in Civil Litigation and to Improve Case Management

Recognizing that substantial concern has been expressed about expense and delay in civil litigation, the Executive Committee recommends that the Judicial Conference of the United States adopt a program that includes the measures and reflects the principles set forth in this statement.

1. The Chief Judge of each district court, after consulting the other judges of the district, shall appoint an advisory group of lawyers and representative clients that shall help the court assess current docket conditions and consider different measures that might be implemented to reduce cost and delay and to improve case management practices.

2. Working with guidelines that shall be established by the Judicial Conference, each advisory group shall promptly complete a thorough assessment of the civil and criminal dockets in its court, describing not only current conditions, but also trends in filings and in demands on the court's resources.

3. Each advisory group shall attempt to identify the principal sources of cost and delay in civil litigation, focusing not only on court procedures, but also on how lawyers and clients approach and handle the litigation process.

4. Having assessed current conditions and identified principal sources of cost and delay, each advisory group shall recommend measures which it feels, given the particular character of needs and circumstances in its district, hold some promise of reducing cost and delay and of improving the delivery of case management services. These packages of recommendations should be balanced to include significant contributions not only by the court, but also by lawyers and clients.

5. Each district court shall carefully consider the report of its advisory group and shall implement the recommendations that the court concludes would be feasible and constructive and that are authorized under 28 U.S.C. Sec. 2071.

6. The reports and recommendations of each advisory group, and a copy of the measures implemented by each district court, shall be forwarded to the Judicial Conference, the council of the circuit in which the district court is located, and to a circuit-wide committee composed of the chief district judges of the circuit (or a judge designated by them). The committee of chief district judges shall review the reports and recommendations, and shall

consider the measures implemented, then may suggest for the district court's consideration additional measures or modifications in procedures or programs that have been adopted.

7. If the Judicial Conference is not satisfied with the way a district court has responded to current conditions or to the report and recommendations of its advisory group, the Conference may request the court to take further action.

8. The responsibilities that have been the province of the Conference's Judicial Improvements Committee will be divided between two new committees, one on Automation and Technology and the other on Case Management and Dispute Resolution. The Committee on Case Management and Dispute Resolution will oversee development of the criteria (guides) that will aid the district court advisory groups in assessing current conditions. In addition, this committee will oversee the preparation of a document that describes and explains a wide range of different measures that courts might consider adopting in response to cost and delay problems, including different approaches to case management, cost containment, and alternative dispute resolution programs. As part of this process, the committee will develop two or more model civil expense and delay reduction plans. After the reports and recommendations from all the district advisory groups have been submitted, and the courts have decided which measures to implement, this committee will oversee the preparation of a comprehensive report that describes current conditions and trends in the district courts, the range of ideas that have been generated for responding to those conditions, and the measures that have been adopted. This committee will have continuing responsibility to study and recommend ways to improve case management and dispute resolution services in the district courts.

9. The Judicial Conference will conduct a demonstration program in up to five volunteer 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.

10. The Judicial Conference will arrange to have careful evaluations done of as many of the measures adopted by district courts as possible. It also will evaluate the results of the demonstration programs. Building from these sources, the Conference will arrange to have published (and periodically updated) a Manual for Litigation Management and Cost and Delay Reduction, describing and analyzing the most effective techniques and programs.

11. Every three years, each district court shall reconvene its advisory group, which shall evaluate the impact of measures previously adopted, reassess current conditions, and recommend adjustments or additions to existing practices, rules, or programs. These reports and recommendations shall be given due consideration

by the district courts, shall be reviewed by the circuit-wide committees of chief district judges, and shall be forwarded to the Judicial Conference, for review by its Committee on Case Management and Dispute Resolution.

12. The Judicial Conference, working through the Federal Judicial Center and the Administrative Office of the United States Courts, will add substantial new training programs for judicial officers and appropriate court staff in case management techniques and in other measures that courts could implement to reduce the cost and to expedite the processing of civil litigation. These training programs will be updated regularly to reflect the most current learning from the various measures implemented by the district courts and from the Conference's demonstration programs. The Director of the Federal Judicial Center, or his designee, shall serve as an ex officio member of the Conference's Committee on Case Management and Dispute Resolution.

13. The Administrative Office of the United States Courts shall ensure that the district court's automated dockets provide ready access to complete data about the status of each case and the kinds of demands it has made on court resources.

14. The Conference's Committee on Case Management and Dispute Resolution should regularly communicate its findings and recommendations about programs, procedures and practices to the Conference's Advisory Committee on Civil Rules. The Committee on Case Management may suggest possible amendments of the civil rules for consideration by the Advisory Committee. For these two committees to work together most effectively, a member of the Advisory Committee on Civil Rules should also serve as a member of the Committee on Case Management and Dispute Resolution.

BACKGROUND

The goal of the federal system of civil justice, as articulated in Rule 1 of the Federal Rules of Civil Procedure, is "to secure the just, speedy, and inexpensive determination of every action."

Several forces, apparently growing in intensity over the past few years, may be threatening the capacity of the federal judicial system to achieve this important goal. While there are considerable variations in the circumstances facing different districts, there are several national trends that seem to have had similar effects on many courts. The decade just ended witnessed a dramatic increase in the number of criminal prosecutions filed in federal courts. There also has been a substantial increase, during that same period, in the number of civil suits filed. As significant as these increases have been, they tell only part of the story. Simultaneously, there has been a comparably dramatic increase in the complexity of much of the litigation, both criminal and civil, that federal courts have been asked to process. A larger percentage of cases involve multiple parties, multiple counts or causes of action, longer lists of affirmative defenses, multiple counterclaims and cross-claims, or multiple third party claims. On the civil side, there seem to be more "mega-cases," for example, suits involving thousands of claimants or massive alleged harms to the environment. And in some instances legislative action has created new, more complex predicates both for criminal prosecutions and for civil entitlements.

During this same period there has been a dramatic increase in the number of lawyers and in their concentration in major metropolitan areas. Lawyers are less likely to interact repeatedly, less likely to know each other, less likely to feel a sense of professional community and restraint. Competition among lawyers may have become more intense. These trends among lawyers may reflect larger trends in our society, trends that are reflected in more intense economic competition in general, greater willingness to use the judicial process simply as a weapon in economic combat, and more pressure to appear firm in resolve not to compromise claims.

While the confluence of these developments has resulted in greater demands on judicial resources, and a greater need for the judiciary to play an active role as a source of economic discipline and common sense in the litigation process, federal courts have been given only a few additional judgeships. As the gap between judicial resources and demands placed on them has grown, so has the strain on the system. In part because of preferences that Congress has compelled district courts (through the Speedy Trial Act) to

give to criminal matters, a perception has grown that it is the cases on the courts' civil dockets that have been forced to bear the brunt of the shortfall in judicial resources. At least in some courts, the median time between the filing and the disposition of civil matters has increased in the last few years. And concern has grown that the cost of moving civil cases through the adjudicatory system has increased to clearly disproportionate levels.

The Judicial Conference of the United States, acting through its Advisory Committees and utilizing the Congressionally mandated rule-making process, promptly began responding to some of the perceived problems of cost and delay in 1980 by amending Federal Rule of Civil Procedure 26 so as to entitle parties who took prescribed steps to a judicially hosted "discovery conference," one purpose of which is to assure that the discovery process is limited and paced in a manner consistent with the particularized needs of individual cases. FRCP 26(f). The litigation bar, however, sought to employ this new tool only in a very small percentage of civil cases. In part for this reason, and in part because recent studies indicated the advisability of a broader, more multi-faceted approach to rationalizing and to containing the costs of the pretrial process, the Judicial Conference took much more significant steps in 1983, proposing to the Supreme Court and to Congress a battery of similarly spirited changes in the civil rules. As a result of Judicial Conference initiatives, major amendments to Rules 11, 16, and 26 became effective on August 1, 1983.

The changes in Rule 11 and some of the changes in Rule 26 [paragraph (g)] were designed to encourage more responsible, restrained, and cost-effective approaches by counsel to pleading, motion and discovery practices. The changes to Rule 16 and other changes to Rule 26 [paragraph (b)] 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."

Perhaps in part because the changes reflected in the 1983 amendments were so substantial, it appears that their full potential has not yet been realized by courts or counsel in some districts. Thus some people feel that additional steps, complementary and supplemental to the national rule making processes, should be taken. To increase awareness of the potential

that inheres in the rules, to invigorate implementation of their most recent amendments, and to search for measures or programs that might constructively supplement the formal processes dictated by the national rules, it would be helpful for groups of thoughtful, conscientious lawyers and client representatives to meet with representatives of district courts to consider how, in the circumstances specific to each particular district, bench, bar, and client groups could work together to attack the problems of cost and delay in civil litigation. Thoughtful, constructive dialogue between bench, bar, and client groups about these problems would be very healthy and could, in many districts, result in beneficial changes in or additions to local procedures and programs. Each district court should give careful consideration to recommendations submitted by its advisory group and should adopt appropriate measures through the procedures Congress has established for implementing new local rules.

Because the problems of cost and delay are so subtle, have so many sources, may vary so widely from district to district, and have yielded in the past so reluctantly to reform efforts, local attempts to attack these problems must be informed both by breadth of vision and carefully acquired, reliable data. Thus each local advisory group should begin by assessing systematically the state of the district's civil and criminal dockets, identifying not only current conditions, but also trends both in the nature of filings and in the kinds of demands being placed on the court's resources. In formulating recommendations, advisory groups must appreciate that the problems of cost and delay in civil litigation cannot be considered in isolation, but can be addressed constructively only in the context of the full range of demands made on the court's resources.

Acknowledging that all of the major players in the litigation community share responsibility for the problems of cost and delay, each local advisory group should search not only for steps the court could take, but also for ways that lawyers and clients could significantly contribute to solutions. Thus, while considering how judges and magistrates might manage cases more effectively, advisory groups also should consider how counsel and parties could contribute to the development of pretrial plans that are tailored to the needs of particular lawsuits and how they could exchange information and evidence more directly and efficiently. Advisory groups also might consider the extent to which stipulations by counsel to extend deadlines imposed by rule or court order affect the delay problem, and whether it would be advisable to require all such stipulations to be signed by the parties themselves and to be approved, on a standard of good cause, by the court.

Since only a small percentage of cases are disposed of by trial, and since processing criminal matters makes it difficult for many courts to offer early, firm trial dates to civil actions, it is essential that systems be designed that (1) move litigants to

acquire efficiently the information they need to resolve their case, and (2) then provide litigants with an opportunity either to resolve the matter by motion or to select an appropriate procedure through which to attempt promptly to settle their case. In this connection, each local group should consider whether bench, bar and client groups should work together to establish one or more of the alternative dispute resolution procedures that appear to have such promise as tools for reducing expense and delay, e.g., early neutral evaluation, mediation, court-annexed arbitration, non-binding summary jury or bench trials, panels of special masters with expertise in settlement techniques, and mini-trials.

Each district also should assess whether it is devoting appropriate judicial resources to hosting settlement conferences. The issues that should be addressed in such an assessment include, among others, how much judicial time should be devoted to settlement efforts, which are the most effective techniques and formats for settlement conferences, and which judicial officers should conduct such conferences: the assigned judge, a judge who would not preside at trial if the case were not settled, or a magistrate?

To generate deeper, more reliable data about the current conditions in district courts, and to develop a rich pool of ideas about how bench, bar and client groups might respond to the problems of cost and delay, each district court should submit a report to the Judicial Conference setting forth its assessment of its civil and criminal dockets and of trends in demands on judicial resources, as well as describing the steps it has decided to take to respond to the problems of cost and delay. The Judicial Conference will digest and analyze these reports, then prepare a comprehensive account of conditions in district courts and measures being taken to improve them. This account shall be made available to all district courts and to Congress. The Judicial Conference also will direct each of its advisory committees that has responsibility for matters covered by the district reports to consider whether the information they generate suggests that changes should be made in national rules or in Conference policies.

During the same period that each district court is working with its advisory group to assess local conditions and to consider appropriate responses to them, the Judicial Conference would undertake two related efforts. The first such effort would consist of describing a wide range of procedures and measures that districts might consider when deciding how to respond to cost and delay problems and preparing two or more model plans that would illustrate alternative ways that different discrete measures might be integrated into coherent programs. The second component of the Judicial Conference's work would consist of sponsoring demonstration or experimental programs in five volunteer districts of different sizes and case mixes. Each such demonstration would be designed to assess the relative effectiveness of different

methods that might be used to reduce cost and delay and of different case management techniques. The programs in the demonstration districts would be carefully monitored and evaluated, then the Judicial Conference would publish a report that described what was learned. Thereafter, the Congressionally-mandated rule making process would be used to implement any measures that were proven successful in the demonstration programs and that were suitable for national implementation by procedural rule. The Judicial Conference might implement other programs by Conference policy, and would recommend to Congress any legislation that might be appropriate. In considering whether to implement new rules, policies or programs on a national basis, the Conference and its committees, and the Congress, will bear in mind that conditions may vary dramatically between different districts and that no one single plan or set of prescriptions will be appropriately responsive to the needs of every district.

To coordinate the several different dimensions of the work contemplated here, the Judicial Conference has decided to create a new Conference committee on Case Management and Dispute Resolution. (The responsibilities that formerly were the province of the Judicial Improvements Committee will be divided between two new committees: one on Automation and Technology and the other on Case Management and Dispute Resolution.) The Conference has given its new Committee on Case Management and Dispute Resolution a broad charge, directing it to assume responsibility for implementing the programs described here and to study, on a continuing basis, how the legal community, drawing on contributions from courts, counsel, and clients, might better assure "the just, speedy, and inexpensive determination of every action."

Because of the intensified demands on judicial resources that have been described above, district courts cannot experiment with and identify the most effective and appropriate measures for reducing cost and delay, and cannot implement the most successful case management techniques, without infusions of substantial additional resources. It is essential that courts have fully automated dockets, ready access to more complete data about the status of each case, more support personnel, and an adequate number of new judicial officers. It also is essential that intensified commitments be made at both the national and local levels to training all judicial officers, clerks of court, and courtroom deputy clerks in case management techniques.