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WASHINGTON, D.C. 20544

January 30, 1997

MEMORANDUM TO THE CHIEF JUSTICE AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

SUBJECT: RAND Report on the Civil Justice Reform Act

Attached for your information are two press releases. The first is from the RAND Corporation which has just completed a study for the Judicial Conference of the effectiveness of the Civil Justice Reform Act (CJRA). The second is a release issued by my office on the same subject.

The RAND Institute for Civil Justice elected to issue the report even though it had not been presented to the Judicial Conference which contracted for the study. Moreover, they issued the press release without permitting Judge Ann Williams or the AO to comment on it. It was described as an "inadvertence." Likewise, RAND has scheduled meetings on January 31 with the Attorney General and key congressional staffers to brief them even though the report paid for by the Judiciary has not been seen by the Judicial Conference. While RAND was within its legal rights under the contract, I find its conduct in relationship to the Federal Judiciary and the AO to be unprofessional, if not unethical. It is the first time in my experience that a contractor has ever behaved this way.

The RAND report, together with a report from the Judicial Conference Committee on Administration and Case Management, will be submitted to the Conference in March. The reports, of course, will speak for themselves. I re-read the RAND report carefully after receiving a copy of RAND's press release and could find little evidence for the second and third paragraphs which appear in the press release on page two.

Also attached are two articles, the first appearing in the *National Law Journal* for Monday, February 3. In spite the use of the expression "spin control," the article is much more informed and balanced than the *Associated Press* article, which also is attached.

Leonidas Ralph Mecham

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Attachments
cc: Honorable Ann C. Williams

RAND
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EMBARGOED

For release noon (EST), Wednesday, January 29, 1997.

REFORM ACT FAILS TO SLASH DELAY AND COSTS IN FEDERAL CIVIL COURTS
RESEARCHERS SUGGEST WAYS TO TRIM DISPOSITION TIME 30 PERCENT, SAY COST CONTROL IS LARGELY IN HANDS OF LITIGANTS, NOT COURTS

WASHINGTON, D.C., January 29 -- The 1990 Civil Justice Reform Act, an ambitious experiment aimed at cutting costs and delay in the federal courts, has failed to have much effect on either problem according to a massive, five-year evaluation by a RAND Institute for Civil Justice research team.

The researchers found that some strategies used in some courts did reduce delay to a degree. Drawing on this analysis, they recommend a package of procedures—including early case management, early setting of a trial date and a shorter discovery process—that could pare time to disposition by an estimated 30 percent. They caution, however, that swifter disposition will not necessarily slice costs.

"Litigation costs are primarily driven by factors, such as a case's complexity and stakes, that lie outside the court," explains lead researcher James S. Kakalik. "If the parties want to reduce litigation expenses, they will have to shoulder the main burden themselves. They can't look to judges to do it for them. Judicial case management procedures only explain about 5 percent of the variation in litigation costs."

Kakalik and his colleagues note that at least one feature of the Civil Justice Reform Act (CJRA) does appear to be productive. The Act requires a semiannual public report disclosing how many "old" (three years or more) cases remain on each judge's docket. That number has been declining since 1990 even though the total pending caseload has been rising.

In addition to requiring that each federal district court develop a plan to reduce costs and delay, the CJRA ordered ten district "pilot" courts to adopt a stipulated set of case management principles and techniques. These included differential case management (tailored to the individual case), early active judicial management (as opposed to leaving case management to the lawyers), time limits and other controls on discovery, and referral of appropriate cases to nonbinding alternative dispute resolution.

Another ten courts were designated as comparison districts. Together, these 20 representative districts encompass about a third of all federal judges and of all federal case filings. Finally, the Act mandated an independent evaluation of the pilot program's consequences.

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To perform that task, the seven-person research team and their survey staff, in cooperation with the judiciary, compiled the largest and most comprehensive database on the federal courts to date, including a random sample of more than 12,000 case histories, survey responses from judges in thousands of cases, from some 10,000 lawyers and from some 5,000 litigants, judges' time sheets, court records, and districts' plans.

The analysts found that while all of the pilot and comparison districts created plans that met the letter of the Act, some did not plan major changes, others never fully implemented what they had planned, and few judges changed their management style or the average amount of time they spent on civil cases.

At enactment, expectations were high that CJRA would make substantial inroads on delay and costs alike. Why didn't the Act generate more change? In part, the authors suggest, because the Act was loosely worded, allowing many judges to meet its requirements by continuing their past case management procedures, and because it lacked effective mechanisms for ensuring that district plans were carried out. In addition, many judges regarded the Act as congressional infringement on their Constitutional independence or as emphasizing speed and efficiency over justice.

The analysis of case management efforts showed that early judicial management lowered the median time to disposition by about 1.5 months but significantly increased the direct cost of litigation. Why? Because lawyers continued their old work habits, added additional hours in response to judicial management, and did it all in a shorter period. In contrast, shortening the time span allowed for discovery (the process by which each side demands and receives information about the other side's case) reduced time to disposition about 10 percent while cutting lawyer work time about 25 percent. Mediation and early neutral evaluation, the two types of alternative dispute resolution studied, had no significant effect on litigation cost or delay.

The CJRA broke new ground in calling on every federal district court to establish an advisory group of court users, including some nonlawyers, to address key issues of court management. The districts all complied and the authors' assessment of the results is upbeat: "The advisory groups provided a model of how courts can engage the public in assessing and responding to the needs of the civil justice system."

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Copies of the executive summary, *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (MR-800-ICJ, $8); and the supporting documentation, *Implementation of the Civil Justice Reform Act in Pilot and Comparison Districts* (MR-801-ICJ, $20); *An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (MR-802-ICJ, $20); *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (MR-803-ICJ, $20) are available from RAND Distribution Services, P.O. Box 2138, Santa Monica, CA, 90407-2138; Telephone: 310-451-7002; FAX: 310-451-6915; Internet: order@rand.org. They are also available from the National Book Network (Telephone: 800-462-6420; FAX: 301-459-2118).

Advance Notice

RAND
Institute for Civil Justice

January 29 Press Briefing

EFFECTS OF THE CIVIL JUSTICE REFORM ACT

Congress enacted the 1990 Civil Justice Reform Act with the goal of reducing costs and delay in the federal courts. The legislation required each district court to develop a plan for case management, set up special pilot programs in ten districts, and more. Hopes for substantial improvement were high.

Did it work? RAND's Institute for Civil Justice has just completed a comprehensive, five-year evaluation of the entire effort.

Lead researcher James Kakalik and ICJ Director Deborah Hensler will present and explore the findings at a 10 a.m. briefing, followed by Q&A. The story is embargoed until noon (EST), Wednesday the 29th.

10 a.m.
Wednesday, January 29

RAND Washington Office
1333 H Street, NW
8th Floor

Continental Breakfast

To RSVP and for further information call the RAND Public Information Office (310-451-6913) or send e-mail to PIO Director Jess Cook (jess_cook@rand.org).

Complete copies of the four-volume study will be available at the briefing.

NEWS RELEASE

Administrative Office of the U.S. Courts

January 29, 1997

Contact: David Sellers

Rand Study of CJRA Finds 95% of Cost in Civil Litigation Outside Courts' Control

The Judicial Conference of the United States welcomes the study issued today by the RAND Institute for Civil Justice as an important first step in the Conference's statutory responsibility to evaluate the Civil Justice Reform Act (CJRA) and make recommendations for its future implementation.

"We are pleased to receive RAND's study on CJRA. It will assist the Judiciary with its review of this statute," said Leonidas Ralph Mecham, Secretary to the Judicial Conference. "After reviewing RAND's findings, federal judges, who daily face the challenges of case management, will make significant contributions to the Judicial Conference's report. I am confident that the final report we submit to Congress on June 30, 1997, as required by statute, will accurately and thoroughly reflect the courts' experience in implementing CJRA."

Throughout the history of the U.S. civil justice system, independent judicial officers have been called upon to strike the balance between efficiency and justice. It is this balance that will be addressed as Congress and the Judiciary discuss the ramifications of the RAND study and the recommendations of the Judicial Conference on civil justice reform.

RAND confirms that many of the case management practices long employed by federal judges and incorporated into the federal rules are effective in reducing delay. The median disposition time for civil cases in U.S. district courts is approximately eight months, and has remained fairly constant over the past seven years, never exceeding ten months. The study also notes the limitations of procedural reform in reducing the cost of civil litigation. According to RAND, issues unrelated to judicial case management account for 95 percent of the

(MORE)

variation in litigation costs. Specifically, the study found that attorney perceptions, rather than case management procedures, drive most litigation costs; and case management techniques account for only half of the reduced "time to disposition."

Under CJRA, which was enacted by Congress in 1990, the Judicial Conference is required to submit, on June 30, 1997, a report to Congress assessing the case management principles of the Act and making recommendations regarding their future implementation. For its report to Congress, the Judicial Conference will consider the RAND Corporation's study of the Act's principles, guidelines, and techniques as implemented in the pilot courts; a report regarding the results of the demonstration program established under the Act; and the experiences of the 94 district courts in implementing their CJRA plans. The Conference will consider its report to Congress at its March meeting.

The CJRA established the most comprehensive review ever performed of the civil litigation process in the federal courts. It provided the federal courts with a format to conduct a helpful and thorough evaluation of their dockets and case management procedures, and had a direct impact on each of the 94 federal district courts. An enormous amount of time, energy, and input was given by the entire Judiciary as well as over 1,700 attorneys and other litigant representatives from all 94 districts.

The RAND report correctly notes that the CJRA "has raised the consciousness of judges and lawyers and brought about some important shifts in attitude and approach to case management on the part of the bench and bar." During its implementation, the Judiciary adopted many of the Act's suggested procedures. The amendments to the Civil Rules that took effect on December 1, 1993, addressed many of the CJRA's suggestions, and other non-rules related issues were later addressed in 1995 by the *Long Range Plan for the Federal Courts.*

A statistical review of U.S. district court caseload processing presents further evidence of the impact of CJRA. From 1990, the year of CJRA's enactment, to 1995, the percentage of civil cases over three years old has dropped from 10.6 percent to 5.6 percent of all cases and the actual number has been reduced from 25,672 to 13,538.

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Case Management Reform Ineffective

ADR, other reform-act fixes don't save time or money, CJRA study says.

By Darryl Van Duch
NATIONAL LAW JOURNAL STAFF REPORTER

ALTERNATIVE DISPUTE resolution and other case management measures mandated by the Civil Justice Reform Act of 1990 have "failed to have much effect" on either time delays or costs in the federal courts.

That's the stunning conclusion reached by the RAND Institute for Civil Justice in the most comprehensive delay/cost study in U.S. court history, which was done for the Judicial Conference.

RAND researchers found that some federal courts, in implementing the CJRA reforms, did reduce delay "to a degree." In fact, the researchers recommended a package of procedures—including early setting of a trial date and a shorter discovery period—that "could pare time to disposition" by an estimated 30 percent. Still, researchers cautioned, "swift disposition will not necessarily slice costs."

Most shocking is the study's judgment on ADR: "Our study detected no major effects of mediation or early neutral evaluation on time, costs, views of fairness, or attorney satisfaction," RAND concludes in an executive summary of the multivolume report. And whenever ADR of any kind was a voluntary tool, the summary says, it "was not used extensively."

'Six Principles'

Besides ADR, reforms mandated by the CJRA's "six principles" include disclosure discovery, which imposes an affirmative duty on the parties to give opponents relevant documents, whether asked for or not. The CJRA principles also encouraged judge-imposed early trial dates and timelines for discovery and pretrial motions. While 10 pilot districts set up to implement the reforms in the early post-enactment years, the CJRA also required all federal districts to develop and implement their own time-and-cost-reduction plans by Dec. 31, 1993.

The spin control on the CJRA's apparent ineffectiveness in key areas began even before the RAND report's scheduled Jan. 29 release. The Administrative Office of the U.S. Courts issued a statement Jan. 23 that, in interpreting RAND's CJRA disturbing conclusions, placed much of the blame on practitioners: "Issues unrelated to judicial case management account for 95 percent of the variation in litigation costs...attorney perceptions, rather than case management procedures, drive most litigation costs [as for reducing trial delays] case management techniques account for only half of the reduced 'time to disposition.'"

In a prepared statement, RAND's lead researcher, James S. Kakalik, agreed. "If the parties want to reduce litigation expenses, they will have to shoulder the main burden themselves," he stated. "They can't look to judges to do it for them [because] judicial case management procedures explain only about 5 percent of the variation in litigation costs."

Expected Cross-Examination

Such finger-pointing, however, is likely to trigger much angst in the national bar as well as the broader legal community. Alternative theories that challenge the RAND report's disappointing conclusions are likely to surface.

Many legal scholars, for instance, had long argued that the CJRA invited confusion by not detailing its cost/delay reforms. Indeed, court administrators, researchers, judges and practitioners in the 10 pilot districts parted ways soon after the CJRA was enacted on the question of what the new law itself really stands for—and how it should be implemented.

RICH PEDRONCELLI

Alex Aikman: *Federal courts never really accepted mandates on case management.*

"[Some] found them so vague and permissive...that pilot districts can comply with legislative requirements by retaining most of their existing policies and arguing that they conform to the thrust of the six principles," noted RAND's own preliminary analysis in 1994.

On the other hand, wrote the RAND researchers at the time, "some commentators think that they are overly rigid and controlling."

Practitioners, in particular, have in recent years put much of the blame for longer and costlier trials, the CJRA notwithstanding, on ineffectual case management skills on the part of the nation's jurists.

Even the "preliminary" RAND study suggested that the federal courts may not have fully complied with the 1991 congressional delay-reduction mandates. As a result, it warned, the new law might not be netting the expected cost savings.

Indeed, some practitioners go so far as to say federal judges half-heartedly implemented the CJRA reforms because they are miffed at Congress' pre-emption of their traditional control over procedure.

"I myself don't believe the federal courts have ever changed their attitudes" toward the need for mandated delay-reduction legislation, said Alex Aikman, a former vice president of the National Center for State Courts, Western Regional Office, and now a private consultant. Mr. Aikman said federal judges have never gotten over what they perceive in the CJRA to be a violation of the Constitution's separation-of-powers provisions.

Common Ground

And yet, almost since the day the CJRA was enacted, there has been near-consensus grumbling on the part of state and federal jurists as well as administrators to the effect that the law might be based on faulty premises. Indeed, a 1993 American Judicature Society editorial warned that reducing litigation time may not reduce costs in cases in which litigants can marshal greater resources to do the same amount of discovery in a shorter period.

"Court-imposed schedules that place shorter time limits on [such things as discovery] may push counsel into discovery they otherwise would not have conducted and thus into higher costs," the AJS also argued at the time. NLJ

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Republicans urged to speed Clinton judge confirmations

Associated Press

WASHINGTON - The Senate Judiciary Committee's ranking Democrat is demanding that the Republican majority speed up confirmation of President Clinton's appointments to federal judgeships.

The Senate compiled an "abysmal record" last year, filling only 17 judicial vacancies, Sen. Patrick Leahy, D-Vt., said. The Senate confirmed an average of 51 nominees each year since 1980, he said.

Democrats have accused Republicans of dragging their feet on Clinton's nominations for political reasons. During last year's presidential campaign, GOP nominee Bob Dole accused the president of undermining confidence in the courts by appointing only liberal judges.

Leahy asked the committee to bring all 20 of this year's nominations to a Senate vote before Congress recesses in February.

"We are approaching a real crisis," Leahy said Thursday. "We must begin to fulfill our responsibilities to the third, coequal branch of our federal government and quit acting for narrow ideological or partisan purposes."

Judiciary Committee Chair- man Sen. Orrin Hatch, R-Utah, pledged his cooperation, but noted that Clinton put 202 judges on the federal bench during his first term, more than former Presidents Nixon, Reagan or Bush.

He also said confirmations were slowed when Republicans raised concerns about activist judges. But Hatch aide Jeanne Lopatto said Hatch will "continue to conduct a fair, bipartisan confirmation process."

On Jan. 1 there were 83 vacancies - 21 on circuit court benches and 62 District Court judgeships. That number has risen to 91, Leahy said.

Some jobs have remained vacant for more than 18 months, causing case backlogs, he said. Backlogs in each of 19 courts with openings labeled "judicial emergency vacancies" have reached an average of 3,840 cases, exceeding the national average by 35 percent, he said.

Twenty-eight of Clinton's nominations expired when the 104th Congress adjourned in October without taking action on them.

Clinton so far has renominated 20 of them. Last year, the committee held hearings on seven and sent them to the Senate, but the Senate never voted on them.
OTHER TERMS: republican speed clinton judge confirmations