United States District Court
District of Utah
Salt Lake City, Utah 84101

Chambers of
J. Thomas Greene
United States District Judge
U. S. Courthouse

March 16, 1990

Mark R. Disler
Minority Staff Director
Subcommittee on Patents,
Copyrights and trademarks
United States Senate Committee
on the Judiciary
Washington, DC 20510-6275

Dear Mr. Disler:

Thank you for your letter of March 9, 1990, together with enclosures.

It happens that I am very much involved in my capacity with the American Bar Association and the Judicial Administration Division thereof relative to the "Civil Justice Reform Act." In this regard, I serve as a member of the Board of Governors of the ABA, and as liaison to the National Conference of Federal Trial Judges of the JAD. I am also a member of the Judicial Council of the Tenth Circuit, the judges of which are deeply concerned about S. 2027.

I have read the statement of Senator Hatch dated March 6, 1990 in which he expresses concerns about the proposed legislation. The Senator's concerns are very well taken. The Bill would be a disaster to the federal judicial system and totally unworkable. Beyond that, it is wholly unnecessary and I believe unconstitutional. The National Conference of Federal Trial Judges has passed a Resolution opposing the legislation. I enclose a copy of that as well as the statement of Judge Barefoot Sanders, past Chair, to the President of the ABA setting forth reasons for such strong opposition. That letter expresses my sentiments as well as I could put it. I do intend to work for opposition to the legislation with the ABA Board of Governors, the JAD, the Standing Committee on Judicial Selection, Tenure & Compensation (of which I am past Chairman) and otherwise.

I understand that the Judicial Conference of the United States will be issuing its Task Force report concerning this

matter near the end of April. No doubt that will be a definitive and helpful document.

I hope the enclosures are helpful. I would appreciate any further information you may have on the legislation and a report as to the status and probable course thereof.

Yours very truly,

J. Thomas Greene

Enclosures

cc: Senator Orrin Hatch
Judge Barefoot Sanders
Judge Marvin E. Aspen
Judge Wm. M. Hoeveler
Judge Frank Kaufman
Judge Rodney Peeples
Judge Robert Peckham

RESOLUTION OF

NATIONAL CONFERENCE OF FEDERAL TRIAL JUDGES

BE IT RESOLVED: That for the reasons stated in the letter dated March 6, 1990 from Chief Judge Barefoot Sanders to Honorable L. Stanley Chauvin, Jr., President of the American Bar Association, the National Conference of Federal Trial Judges opposes the enactment of S.2027, the proposed Civil Justice Reform Act of 1990.

DATED: March 9, 1990.

NATIONAL CONFERENCE OF
FEDERAL TRIAL JUDGES

By: _____
BAREFOOT SANDERS
Immediate Past Chair, NCFTJ, and
Chair, Committee to Review S.2027

United States District Court

NORTHERN DISTRICT OF TEXAS
1100 COMMERCE STREET
DALLAS, TEXAS 75242

CHAMBERS OF
JUDGE BAREFOOT SANDERS

March 6, 1990

Mr. L. Stanley Chauvin, Jr.
President
Board of Governors
American Bar Association
P.O. Box 1748
Louisville, Kentucky 40201

RE: S.2027, Civil Justice Reform Act of 1990

Dear Mr. President:

As Immediate Past Chair of the National Conference of Federal Trial Judges, I write in behalf of the Conference to express our alarm and deep concern about the provisions of S.2027, the proposed Civil Justice Reform Act of 1990. I also write as the Chief Judge of a metropolitan area court, the Northern District of Texas. I am assigned about 500 civil (and 100 criminal) cases per year; 80% of my cases are less than one year old and I consider my docket to be current.

The federal trial judges see S.2027 as an attempt by Congress to micro-manage the courts, and to require the courts to micro-manage lawyers. The bill has two apparent, and worthy, goals -- decreasing the costs of litigation and increasing the speed of resolution of civil cases. Unfortunately, the bill will serve neither of these goals; in fact, the problems are more likely to be exacerbated than ameliorated. I think I am typical of most federal judges when I state that S.2027 would permanently mangle my docket, increase the cost of litigation, and delay the disposition of civil cases. Moreover, because of the Speedy Trial Act requirements for criminal cases, passage of S.2027 would result in a head-on collision between the civil dockets and the criminal dockets in all federal district courts.

Underlying the bill seems to be an assumption that judges and lawyers are simpletons or worse, who must be closely monitored and carefully guided lest they disserve the public interest.

First, let me put in perspective some of the misconceptions motivating this bill. One of its announced goals is to reduce the cost of litigation. S.2027 assumes that the excessive costs of litigation are caused by the delay in resolution of civil litigation; that premise has not been documented and I doubt that it can be. Delay in trying a case rarely has an effect on the amount of time and money spent on the case since the amount of effort involved in preparing a case for trial is relatively finite. A longer period for discovery will rarely increase the cost of suit, unless one believes, as the bill assumes, that lawyers either prolong discovery to run up fees or wander aimlessly about pursuing whatever discovery comes to mind.

The second goal of S.2027 is to increase the speed with which civil cases are resolved. Yet the assumption that civil cases in the federal system drag on too long for lack of effective judicial management throughout the system is simply not supported by evidence. Indeed, a fair and in-depth review of the annual statistics compiled by the Administrative Office for the U.S. Courts will reveal that delay in civil dockets is not system-wide. Civil case delay comes from huge increases in criminal dockets in many districts, a shortage of judges in some districts, and the backlog of asbestos cases, and savings and loan-type cases, in a few districts. In more and more districts civil cases are being crowded out by the increasing volume of criminal cases, principally drug cases and, in my own district, bank and savings and loan fraud.

Yet the bill in no way addresses this problem. Instead, it imposes a number of requirements on district judges which will only add to our administrative workload, decreasing the amount of time we have available for actually deciding cases. I will address a few of the many areas of special concern which federal trial judges have about S.2027.

1. Track coordinator. (Section 471(b)(2)). Judges now can and do use Fed.R.Civ.P. 16 to set different schedules for different kinds of cases. Under S.2027 some functionary in the district clerk's office will perform this judicial task. Lawyers who disagree with the decision of the clerk's office can appeal to the judge, who can overrule the clerk, but only after holding a conference or filing a

statement of reasons within 30 days. All of this takes time and paper work, and will cause delay. Judges and lawyers do not need, and it is contrary to sound management principles to require, another level of decision making which scheduling by a track coordinator will create.

2. Mandatory scheduling conferences. (Section 471(b)(3)). Some judges now use these effectively. For others like myself they are a waste of time. In my experience, a written status report per Rule 16(b), followed by a scheduling order, suffices. I understand that the mandatory conference can be waived in all except complex cases, but why the uniform requirement that all such cases be the subject of a conference which must be presided over by a judge, regardless of other factors? In complex cases I suggest that it depends on the lawyers, and the type and complexity of the case, as to when and whether a scheduling conference should be held. An artificial time limit is obviously worse than useless. And, of course, personal attendance by attorneys at a scheduling conference increases the cost of litigation -- e.g., attorney's fees and the expense of a transcript of the conference.

Moreover, the bill ~~requires that the scheduling conference be~~ held within ~~45 days~~, but the matters the judge must decide at the conference may not be ripe then -- e.g., principal issues in contention, receptivity to settlement, calendaring future conferences. It is a rare complex case, indeed, where the parties know in the first 45 days (before any significant discovery) whether and how the case can be settled. Further, the judge will have to expend considerable time preparing for and holding these scheduling conferences if they are to be meaningful. In the meantime what happens to criminal trials? civil trials? decisions on pending motions? Scheduling conferences are best left to judicial ~~discretion,~~ as they now are.

As I consider S.2027's enthrallment with paper and procedure, I think of one judge in my district who has tired of Rule 16(b). Soon after a responsive pleading is file he sets discovery and pretrial order deadlines, and a trial date, and leaves the case alone unless requested by counsel to intervene. He is current in his docket; he has no complaints from lawyers or litigants. Importantly, he has observed no change in the speed of case dispositions since he abandoned status reports and detailed scheduling orders. There is a lesson in this, I believe.

3. Motions. (Section 471(b)(13)). A report listing the number of motions pending more than 60 days before each judge in a circuit is now circulated to all judges in the circuit every quarter. I assume this section of the bill is designed to encourage some sort of publicity about delays in deciding motions. If so, it is silly. Who will read it? Might it not be counterproductive? Of course, the easiest way to stay current on motions (if that is considered to be an end in itself) is simply to deny any motion which takes more than a few minutes to decide.

It seems to me that the very notion of exerting pressure on a judge by the threat of adverse publicity is antithetical to the purpose of Article III of the Constitution.

4. Discovery. (Section 471(b)(7)). S.2027 would (presumably) curtail excessive and expensive discovery by requiring constant and minute supervision by the judge. I find it ridiculous for the court to be compelled to tell lawyers how and when to conduct discovery. The lawyers know the case better than the judge; if the lawyers agree on a reasonable discovery program (and most do) why should the judge interfere? Currently, if the lawyers do not agree on discovery, the court can intervene and any dispute can be heard by the court or a designated magistrate. Experience teaches that the way to control discovery is to fix a firm, credible trial date after consulting with the lawyers, as most judges now do. S.2027 will not further this.

The bill demeans magistrates, who are an essential element of good case management, by providing that only the judge can hold discovery or case management conferences, monitor complex cases, etc. This is a damaging step backward in judicial administration.

My experience -- and yours also, I suspect -- is that accelerated discovery (which would often be required by the bill), actually drives up litigation costs. It is also my experience that most lawyers conduct discovery in a professional and orderly way. When discovery gets out of hand, motions for protective orders and sanctions, if appropriate, are now available.

5. Backlogs. (Section 474). The notion that cases more than 12 months old are automatically part of a "backlog" is foolish. Some cases simply should not be tried within 12 months of being filed. Granted, a complex, multi-party case can be prepared and tried within 12 months but only with great expense incurred in accelerated discovery, and with tremendous hardship on small firms and less well-to-do clients.

6. The Human Factor. S.2027 wholly fails to recognize that some judges simply move cases faster than other judges. The proposed detailed procedures and paperwork required by the bill will not change this one whit. I am personally familiar -- no doubt you are, too -- with court situations where all judges receive the same type and number of case assignments, yet some judges, though working long hours and following identical pretrial procedures, will dispose of half as many cases as others.

The thesis of S.2027 is that mandated and exotic procedures and more paperwork will make all judges equally competent as managers and produce equal results. This proposition simply does not accord with common sense and judicial experience.

S.2027 makes no distinction between districts and judges that are current, regardless of the procedures they are using, and those that are not. All will be forced to wear the same hair shirt of additional conferences, additional procedures, and additional paperwork. I reiterate -- the problem of delay is not a system-wide problem, but one which is attributable to ascertainable causes, which do not include lack of case management.

If S.2027 is enacted, lawyers, clients and judges will all be the losers. The lawyers will spend more time on useless matters for which they will charge and for which clients will pay. And the judges will spend more time on procedure than on substance.

S.2027 is shallow and misbegotten. The American Bar Association should oppose it.

Sincerely yours,

BAREFOOT SANDERS
CHIEF JUDGE
NORTHERN DISTRICT OF TEXAS

cc: Judge William M. Hoeveler
Chair, National Conference of Federal Trial Judges

Judge Marvin E. Aspen
Chair-elect, National Conference of Federal Trial Judges

Ms. Marina B. Jacks
American Bar Association, Chicago

Ms. Irene Emsellem
American Bar Association, Washington, D.C.