U.S. DISTRICT COURT

TYLER, TX 75702

FACSIMILE TRANSMISSION SHEET

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
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TYLER, TEXAS 75702

CHAMBERS OF
ROBERT M. PARKER
CHIEF JUDGE

May 15, 1990

Mr. William Jones
General Counsel
House Judiciary Committee
2138 Rayburn Building
Washington, D.C. 20515

Re: SB 2027 and HR 3898

Dear Bill:

I appreciate very much the opportunity to critique the Civil Justice Reform Act of 1990. I am providing an extra copy for the Chairman and I will leave to your discretion regarding whether you wish to provide a copy to Mike Remington. I have taken the liberty of providing a copy to Jeff Peck, Chief Judge Charles Clark, and Bob Fiedler.

The opinions expressed here are my own. I do not purport to speak for any other judges or for the Judicial Conference in this critique. These comments address the provisions of the latest draft of the Biden Bill which is attached. In the event that I may have subsequent contact with you in some official capacity, I shall make that fact known to you at the time.

General observations:

1. This legislation circumvents the rule making process of the Federal Courts. In effect, the Congress is willing to

substitute the results of a handpicked task force for our well-established, rule making procedures. The reason our rule making procedures have been successful is the fact that they permit extensive scrutiny by bench, bar, and academia. They promote comment, deliberate consideration, and generally create a climate that permits rule changes to percolate through the system and evolve into a final product that is then well accepted by all concerned. This legislation shortcuts that process.

2. The Civil Justice Reform Act of 1990 will drastically alter a traditional role of the Federal Courts. We have traditionally respected private contractual arrangements between attorney and client. We will meet the objectives of this legislation only by interjecting ourselves into this contractual arrangement. <u>This is a cost containment Bill; it is not a justice delayed Bill</u>. If we are required to contain litigation costs by controlling the amount of discovery and preparation time, should we not also be obligated to control contingent fee agreements? I submit that the case cannot be made that it takes too long to resolve civil disputes except in districts heavily impacted by criminal cases. This Bill offers no solace to those districts. Granted, there are five percent of the judges who take too long for a variety of reasons. However, from an institutional standpoint delay is not the problem --cost is the problem. If we are to become activists in cost containment, we must have discretion and authority to determine which depositions may be taken, which

witnesses may be called at trial, and which pretrial motions may be filed. We cannot control costs without the discretion and authority to make decisions controlling litigation that have traditionally been left to lawyers and clients. Taken a step farther, we cannot contain costs without controlling attorney time. The Courts will be the ones who determine the amount of billable hours on a case.

If the Congress mandates it, we will do the best we can to bring litigation costs to an acceptable level. However, I just want to make sure that you proceed with the knowledge that this Bill has the potential to seriously alter the traditional role of the Courts in this respect.

Specific Comments:

Section 2 (A) and (B) - These are procedures widely utilized by the Courts at this time with the exception of the fact that controlling the discovery process is generally limited to addressing abuses and providing litigants with discovery cutoff dates. "Controlling the discovery process" goes far beyond the role of a neutral Court responding to a request made by one of the parties, it contemplates a supervisory role that will address the amount or extent of discovery consistent with § 413 or 2 (C).

Section 2 (C) - I presume this means Court initiated regular

communication which adds a dimension to the present system.

Section 2 (D) - I have utilized alternate dispute resolution to an extent greater than probably any judge in the Fifth Circuit over the past ten years in that I have referred more cases to ADR. My experience has been very disappointing. Voluntary ADR procedures in general are not favored by the bar. I question whether this Bill provides judges with the ability to mandate participation in ADR programs or to make the results of ADR binding on the parties.

§ 472 - The advisory group contemplated in this Section and § 477 is unnecessary. The Courts already know the state of the Courts' civil and criminal dockets. We have information at this time to identify trends in case filings and demands placed on the Courts' resources. We know the principal causes of costs and delay in civil litigation and we are well aware of the extent to which costs and delay have impeded access to the Courts. We will gain nothing by utilization of advisory groups to tell us what we already know.

§ 473 (A) (2) - The language used in this draft referring to "judicial officer" is far superior to the approach in the original bill which placed all these burdens on Article III Judges.

§ 473 (C) - Controlling the <u>extent</u> of discovery is one of the key elements of this legislation. This provision is consistent

with my comments in the second part of the general observations. Controlling the extent of discovery means determining the amount of discovery in a case, deciding which witnesses are utilized, which discovery tools are available to the attorneys, and is consistent with the provision of 3 (C) (i). There is no way for us to limit the volume of discovery without making decisions traditionally made by attorneys and clients.

Section 3 (A) Experience dictates that early settlement conferences are not productive. I have expended considerable time through the years with this procedure and have finally discarded it for this reason.

Sections 4 and 5 - These are procedures in wide use at the present time.

Section 6 - I see no provision for binding alternate dispute resolution although I think this section could be read to make reference mandatory. I am very familiar with the summary jury trial procedures. In general they have been unsuccessful in that it has not been established that they save time or reduce expense. Summary jury trials presuppose that the lawyers are unable to evaluate their case for settlement purposes. The verdicts are advisory. In the districts where such procedures have been widely utilized, costs have not decreased and case closings have not been materially affected.

Section 7 - I have no objection to 7 (A). I think this is an appropriate management technique that applies the appropriate amount of peer pressure. The only reason for the inclusion of 7 (B) is to embarrass members of the judiciary. The public has no particular interest in knowing, nor will the public understand what is disclosed. This section will be considered by a vast majority of the judiciary as insulting and demeaning. Our perception of the judiciary's image with the public is that it has suffered greatly over the past few years as a result of the low salary levels that have been in place, and the disparity between the income of bench and bar. This provision will contribute to an additional erosion of the respect for the Courts.

Section (B) (4) - I am not certain that I understand this provision or who is contemplated to conduct such a conference. If I am expected to hold conferences for another judge and that judge for me, it will be very time consuming. There is no way that any judicial officer can properly evaluate the legal and factual basis of a case without taking considerable time in preparation and in the presentation of the facts and legal questions. In my judgment, this provision will be very time consuming and produce a low level of benefit as far as closing cases are concerned.

S 474 (A) (1) - There is no reason for the Chief Judge of a Circuit Court to participate in a committee involving matters exclusively within the province of the trial court. In my

judgment, most appellate judges would certainly agree with this comment. We trial judges have no business in involving ourselves in the day-to-day administrative matters of the appellate court and vice versa. Any plans contemplated by this legislation can certainly be formulated at the district court level. I do agree with the notion that the Chief Judges of each District in a Circuit can sit as a committee to analyze the various plans and make suggestions in that respect.

Section 2 (B) - This provision places quite a burden on the Judicial Conference. It will be very time consuming to review each plan and report submitted by the 94 District Courts. Traditionally the Judicial Conference has been the policy making body of the federal courts.

§ 475 - I concur with periodic assessment and evaluation of expense and delay reduction plans. It occurs to me that review should occur annually as opposed to once every three years if this legislation is enacted. The shall provision in the last sentence should be changed to may.

§ 476 - The provision for a model plan is a good idea if this legislation enacted.

§ 477 - The Chief Judge of the Circuit should have no role in appointing any advisory groups that may be required. The Chief

Judge of the Circuit will not have sufficient local knowledge to make a meaningful contribution and is once again, impinging on what should be a trial court responsibility.

§ 478 - 479 - I commend the drafters of this Bill in this respect. These provisions will be most helpful in the event the legislation is enacted.

§ 480 - I brought to the attention of Jeff Peck, in an earlier letter, the problems that would be created in complying with any legislation of this nature without the assistance of fully implemented automation. Specifically, case management in either an Article III Judge's chambers or in the Magistrate's chambers must have the capacity to access all information in the district clerk's automated filings. That means the UNISYS computers must be installed and fully loaded in all clerk's offices, and modems must be installed in chambers to access that information. I have provided Chuck Nihan with an outline of a case management program that will permit in-chambers utilization of the district courts' computer contained data. He tells me that the Federal Judicial Center will give consideration to developing the necessary software to test the utility of such a case management system. If this legislation is enacted, the additional provisions contained herein can easily be added to the basic case management program.

§ 481 - I commend the drafters for incorporating the language

"judicial officer." Clearly, if the Courts must assume the role of managing litigation and actually controlling costs, the Magistrates are the proper persons within the court family to perform that task. We have a tremendous talent pool in the Magistrates and if we are going to undertake this task, they are the proper ones to perform the service. (B) If we are going to be required to comply with these provisions, it occurs to me that it is not necessary to take three years to develop a plan. I commend the drafters for providing incentive for early implementation; however, I strongly disagree with cost projections.

Section 5 - In my opinion, the cost projection of $20,000,000.00 for early implementation district courts should be tripled. This bill is incompatible with the five year plan for automation adopted by the Judicial Improvements Committee of the Judicial Conference and approved by the Conference. It will require greatly accelerated installation of the UNISYS computers, chambers' access to that data, software development, and training of court personnel in case management. The Bill apparently does not contemplate that our training centers where the district clerks personnel receive automation training are incapable of complying with the volume of training that will be required by this Bill.

Conclusion:

I would counsel that a better procedure for trying to get a

handle on cost containment would be to permit the Courts to embark on a test program that will involve a sufficient number of district courts who already have automation capabilities to experiment with various cost containment procedures under the supervision of the Judicial Conference and with the assistance of the Federal Judicial Center. These techniques can, of course, incorporate the substance of this legislation. It is less offensive to me, and I think less offensive to the judiciary as a whole, to participate in a test than to alter the traditional role of the Courts and to circumvent the rule making process. When the test results are in, those results can be evaluated by both the Courts and the Congress and the decision can then be made regarding society's interest in litigation cost and the role the Courts should play in cost containment of civil litigation.

With kindest regards,

Robert M. Parker