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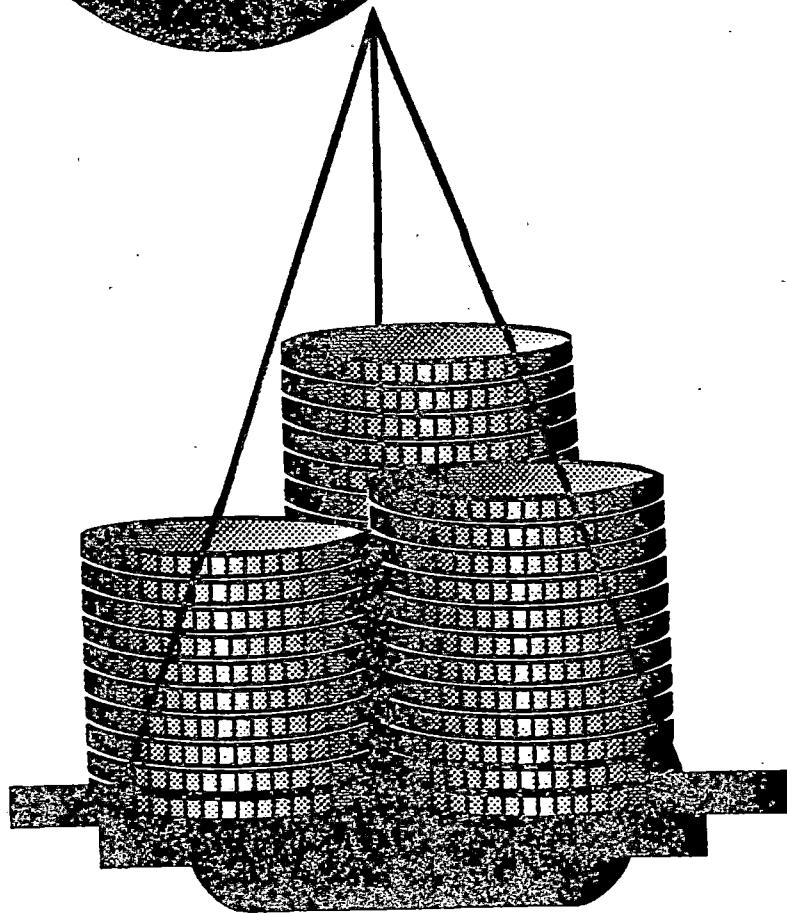
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# The Cost of Litigation: A New Perspective

with select bibliography



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September 1992

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# **The Cost of Litigation:**

## **A New Perspective**

### **With Select Bibliography**

**Prepared by the NAM Law Department**  
**Jan S. Amundson, General Counsel**  
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**The National Association of Manufacturers**  
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## **THE COST OF LITIGATION: A NEW PERSPECTIVE**

Last year, the NAM published a compendium of books, articles and other materials from the past decade about America's litigation explosion, its costs, its causes and possible solutions. In August 1991, the Council on Competitiveness, chaired by Vice President Dan Quayle, issued a report, the *Agenda for Civil Justice Reform in America*, that asserted the transaction costs in the legal system are too high. Debate continues over this report, as well as the assumption that cost and delay in the legal system affects America's competitiveness, as lawyers from the American Bar Association, the American Trial Lawyers Association, the American Corporate Counsel Association and other groups stake out different positions on the reform proposals.

The Council on Competitiveness quoted a *Forbes* article, citing Peter Huber's 1988 book, *Liability: The Legal Revolution and its Consequences*, estimating \$80 billion a year in direct litigation costs and higher insurance premiums, and a total of up to \$300 billion in indirect costs, including the cost of efforts to avoid liability. Law Professor Marc Galanter of the University of Wisconsin calls this calculation "casual speculation." A study by a consulting firm estimates the costs of the tort system in 1987 alone at \$117 billion. Another study pegs the cost of tort litigation in state and federal courts in 1985 at \$29 to \$36 billion. Close to \$24 billion more was spent in other courts or settlements.

The disparity of these estimates and the different cost components they address highlight the difficulty in arriving at a consensus about the cost of American litigation. This paper examines the components of the cost of the legal system in order to give some context to the significance of proposals to modify the system. Our goal is to present a set of cost figures that are objective and reliable.

That the costs are so high is not necessarily an indictment of the legal profession or the system. Obviously, much of the cost of legal services is beneficial to maintaining an orderly society and distributing assets properly to enforce contractual, statutory or common law obligations. Just as obvious is the need to make the system as efficient and cost-effective as possible. Efficiency and productivity are a day-to-day reality for manufacturers in a free-market economy, and the legal system also should shoulder its share of the responsibility to improve productivity to better serve its customers.

## TRADING CHARGES: ARE WE TOO LITIGIOUS?

It has even been given a name. *Hyperlexis*. Too many lawsuits. Too many laws. Too many lawyers. During the 1970s, Chief Justice Warren Burger and others began to decry the litigation explosion.<sup>1</sup> Now, we are hearing more and more charges and countercharges about the increasing number, cost and complexity of laws and litigation in this country. Litigation reform bills have come and gone, some implemented, some not.

Jack Anderson says "massive, mushrooming litigation has caused horrendous ruptures and dislocations at a flabbergasting cost to the nation."<sup>2</sup> *The Wall Street Journal* calls it the "most expensive disease in this country . . . ."<sup>3</sup> The NAM's chairman in 1986, Robert Dee, wrote, "Like a plague of locusts, U.S. lawyers with their clients have descended upon America and are suing the country out of business."<sup>4</sup>

On the other hand, Marc Galanter calls the debate over litigiousness "a litany of quarter-truths."<sup>5</sup> In 1986 he found that "[w]hile expenditures for the tort system have grown more rapidly than government as a whole or the gross national product, they have lagged behind other entitlement systems, such as public aid, government health care and social insurance. Nor have tort costs outpaced those of Workers' Compensation."<sup>6</sup>

This does not mean, however, that we shouldn't seek effective solutions to all of those financially draining programs, and the NAM is actively promoting such solutions. With respect to the many aspects of the issue of litigiousness, each

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<sup>1</sup>Rowe, Jr., Thomas D., *American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation: Background Paper*, 1989 DUKE L.J. 824, 840; Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975); Manning, *Hyperlexis: Our National Disease*, 71 NW. U.L. REV. 767 (1977).

<sup>2</sup>Anderson, *U.S. Has Become a Nation of Lawsuits*, Wash. Post, Jan. 25, 1985, at B8, col. 5.

<sup>3</sup>*The American Disease*, Wall St. J., Jan. 21, 1992, at A14, col. 1.

<sup>4</sup>Dee, *Blood Bath*, 10 ENTERPRISE 3 (Mar./Apr. 1986).

<sup>5</sup>Galanter, *Pick a Number, Any Number*, Legal Times, Feb. 17, 1992, at 26.

<sup>6</sup>Galanter, M., *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 37 (1986).

must be examined on its own merits. Are there more cases, or are there more cases per person? Are the cases taking longer and becoming more expensive? What kinds of cases are being filed more frequently? Where does the brunt of litigation fall? Who benefits from the current system?

Former Harvard President Derek Bok has said that rules governing affluent clients and large institutions are numerous, intricate and applied by highly sophisticated practitioners, and the cost of legal services grows much faster than the cost of living. For the bulk of the population, however, costs, delays and complications make access to legal services appear inequitable and inefficient.<sup>7</sup> In addition, although there has been a rapid growth in the number of complaints filed in court, the number of disputes actually litigated does not appear to be rising much faster than the population as a whole. At the same time, the complexity of litigation seems to be increasing.<sup>8</sup>

Most disputes are resolved without filing a suit, and increases or decreases in the number of filings may indicate changes in the propensity of plaintiffs or defendants to settle claims.<sup>9</sup> Much of the increase may be attributable to increases in certain sectors of litigation, such as divorce proceedings, which dominate state court dockets.<sup>10</sup> At the federal level, product liability suits increased 272 percent between 1975 and 1984, while veterans' overpayment cases increased more than 6,600 percent! At the same time, antitrust filings fell 18 percent and class actions fell nearly 68 percent.<sup>11</sup>

Beyond the volume of filings and the nature of claims are questions regarding the linkage between this data and other costs to society: the cost and availability of insurance; inhibited innovation, defensive medicine and lower-quality adjudication.<sup>12</sup> A cost-benefit analysis should take into account over-

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<sup>7</sup>Bok, Derek C., *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570 (1983).

<sup>8</sup>*Id.*

<sup>9</sup>Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 7 (1986).

<sup>10</sup>*Id.* at 10.

<sup>11</sup>*Id.* at 16.

<sup>12</sup>Rowe, Jr., Thomas D., *American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation: Background Paper*, 1989 DUKE L.J. 824, 844-45.

reaction to court verdicts by individuals exercising an abundance of caution, as well as the benefits of positive changes in behavior that might accrue from litigation.<sup>13</sup> One must also look at the costs and benefits to different sectors of society, since additional benefits for plaintiffs come at the expense of defendants, lawyers or society, and vice versa.<sup>14</sup>

The NAM's role at this point is to take a critical look at the quantifiable cost of litigation and claims settlement in this country today. We have a strong policy position in favor of product liability reform because the current system is neither predictable, consistent nor fair, resulting in the withdrawal of certain products from the market and soaring prices for others to cover the cost of fluctuating insurance premiums. But product liability litigation is a subset of a much larger litigation picture, which raises significant cost and resource allocation issues. The research below will quantify the current costs for all litigation and related claims settlement. Although not the direct focus of this study, we will also begin to examine non-monetary costs, such as opportunity costs or the costs of the litigation experience itself.<sup>15</sup>

## RESEARCH RESULTS

A number of studies have examined various components of the costs associated with resolving disputes. It is important to recognize the differences between each of these studies and what conclusions can be drawn from them. Listed below are the costs implicated in resolving disputes in this country. Each of the studies examines some, but not all, of these components.

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<sup>13</sup>However, a new Brookings Institution study suggests that improvements in product safety result more readily from regulation and bad publicity than from litigation. See Huber, P. & R. Litan, eds., *THE LIABILITY MAZE*, at 15, The Brookings Institution (1991).

<sup>14</sup>See Trubek, D., et al., *The Costs of Ordinary Litigation*, 31 *UCLA L. REV.* 72, 78 (1983).

<sup>15</sup>See *id.* at 79.

- Compensation to the plaintiff
- Legal fees and expenses for the plaintiff
- Court costs
- Insurance company legal fees
- Other defendants' legal fees and expenses
- Opportunity costs, the cost of avoiding liability and the value of time

A 1982 study by Kakalik & Robyn began work by the Rand Institute for Civil Justice to create a "cost map" for the civil justice system.<sup>16</sup> It dealt with the third component of cost above, and shows that government expenditures in FY 1982 for federal district courts and the 50 states' courts of general jurisdiction for processing tort cases amounted to \$320 million.

A 1983 study by Kakalik & Ross estimated the total annual price tag for *processing* all civil cases at \$2 billion.<sup>17</sup>

A 1986 study by Kakalik & Pace estimated the total nationwide expenditure for all tort litigation terminated in state and federal courts of general jurisdiction in 1985 at \$29 to \$36 billion.<sup>18</sup> This includes expenditures for compensation, legal fees and related expenses, insurance company claims-processing costs for claims in suit, the value of litigants' time and the costs to the court system of processing these cases. An additional \$1.8 billion was spent on cases filed in courts of limited jurisdiction, plus \$22 billion more was paid on claims that did not involve lawsuits.

Tillinghast, a Hartford-based actuarial consulting company, released studies in 1985 and 1989, estimating the costs of the tort system in 1987 at \$117 billion, *quadrupling every 12 years since 1950*.<sup>19</sup> This study computes costs by adding together liability insurance costs, medical malpractice self-insurance costs and

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<sup>16</sup>Kakalik, J.S. & A. Robyn, *Costs of the Civil Justice System: Court Expenditures for Processing Tort Cases*, Inst. for Civil J., No. R-2888-ICJ (1982).

<sup>17</sup>Kakalik, J.S. & R.L. Ross, *Costs of the Civil Justice System: Court Expenditures for Various Types of Civil Cases*, Inst. for Civ. J., No. R-2985-ICJ (1983).

<sup>18</sup>Kakalik, J.S. & N.M. Pace, *Costs and Compensation Paid in Tort Litigation*, Inst. for Civ. J., No. R-3391-ICJ (1986).

<sup>19</sup>Sturgis, R.W., *The Cost of the U.S. Tort System*, Tillinghast, Nelson & Warren, Inc., Nov. 14, 1985; Tillinghast, *Tort Cost Trends: An International Perspective* (1989).

“alternative” (other self-insured) costs. [It does not include plaintiffs’ costs, if any, for suits that are not filed or not won, nor does it include the amounts of any recoveries over the insurance coverage limits, nor does it include the value of time lost or opportunity costs.]

The 1989 report shows that tort cost growth “far outstripped GNP growth since 1930, increasing 300 times over this 57-year period, compared with a 50-fold increase for GNP.”<sup>20</sup> In addition, tort cost escalation showed similar trends when analyzed in “real” terms, adjusted for inflation and compared in constant dollars. Since 1950, according to the report’s author, tort costs increased by a factor of 13.8, GNP grew by a factor of 3.3, and the U.S. population increased by a factor of only 1.6.<sup>21</sup> Other components of the economy rose by the following factors:

Social Security expenditures	17.3
Tort costs	13.8
Government health expenditures	12.8
Public welfare expenditures	9.7
Workers compensation costs	9.7
U.S. government expenditures	5.3
GNP	3.3
Disposable income	2.7
U.S. population	1.6

The 1989 report also shows that cost escalation has moderated for all social systems except torts. Between 1980 and 1987, tort costs rose at an annual rate, adjusted for inflation, of 10.6 percent, while government health expenditures rose 5 percent, workers compensation costs rose 4.5 percent, Social Security expenditures rose 4.2 percent and GNP rose 2.7 percent.<sup>22</sup>

In addition, tort costs have risen from just over 1 percent of GNP in 1965 to 2.5 percent of GNP in 1987, compared to relatively constant levels of approximately .5 percent in other free world economies.<sup>23</sup>

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<sup>20</sup>Tillinghast, *supra* note 19, at 4.

<sup>21</sup>*Id.* at 7.

<sup>22</sup>*Id.* at 10.

<sup>23</sup>*Id.* at 13.

The Tillinghast studies on tort costs are based on written premiums for liability insurance, combined with costs associated with self-insuring for medical malpractice and an "alternative" cost for expenditures in the nature of self-insurance. Not included in the scope of the studies are costs associated with non-tort-related litigation. Thus, the entire criminal justice system, domestic relations, contracts, employment discrimination and other types of litigation are additional costs to be factored in.

## **ECONOMIC CONCEPTS AND SOURCES OF DATA**

The NAM has conducted research into expenditures for legal services from information available from the U.S. government. In general, expenditures for legal services take place at two levels: (1) expenditures by consumers at the final sales or gross domestic product (GDP) level, and (2) expenditures by business at the inputs-to-production or intermediate level. These statistics do not take into account legal costs for in-house counsel, the value of litigants' time, awards of damages and indirect costs such as the cost of avoiding liability.

### **EXPENDITURES BY CONSUMERS**

The source for personal consumption expenditures (PCE) is the national income accounts. Consumption spending for legal services is available in both current and constant 1987 dollars for 1980 to 1990.

In 1990, Americans spent \$3,742.8 billion (in current dollars) for personal consumption. Legal services, a component of personal consumption expenditures, totaled \$49.2 billion, or 1.31 percent of the total.

The following table gives personal consumption expenditures for legal services alone in current and constant 1987 dollars, and the ratios of spending for legal services to total personal consumption expenditures. In addition, forecasts are provided for 1991 to 1992, based on projections of total PCE.

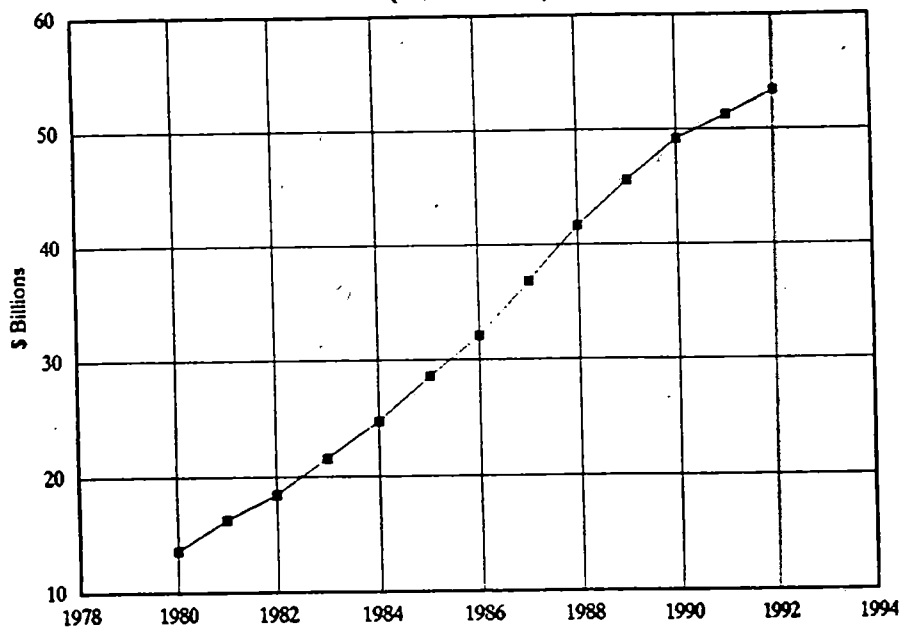
TABLE 1: PERSONAL CONSUMPTION SPENDING FOR LEGAL SERVICES

<u>Year</u>	<u>Current \$ (billions)</u>	<u>Ratio, Legal to total PCE</u>	<u>Constant \$ (billions)</u>	<u>Ratio, Legal to Total Real PCE</u>
1980	13.6	0.78%	26.6	1.09%
1981	16.3	0.85%	28.2	1.14%
1982	18.4	0.89%	28.0	1.12%
1983	21.5	0.95%	28.9	1.10%
1984	24.7	1.00%	30.4	1.11%
1985	28.6	1.07%	32.8	1.14%
1986	32.1	1.12%	34.6	1.17%
1987	36.8	1.21%	36.8	1.21%
1988	41.7	1.27%	40.0	1.27%
1989	45.6	1.30%	41.3	1.28%
1990	49.2	1.31%	41.6	1.28%
1991	51.3*	1.32%*	41.7*	1.28%*
1992	53.4*	1.31%*	42.5*	1.28%*

\* NAM econometric estimate.

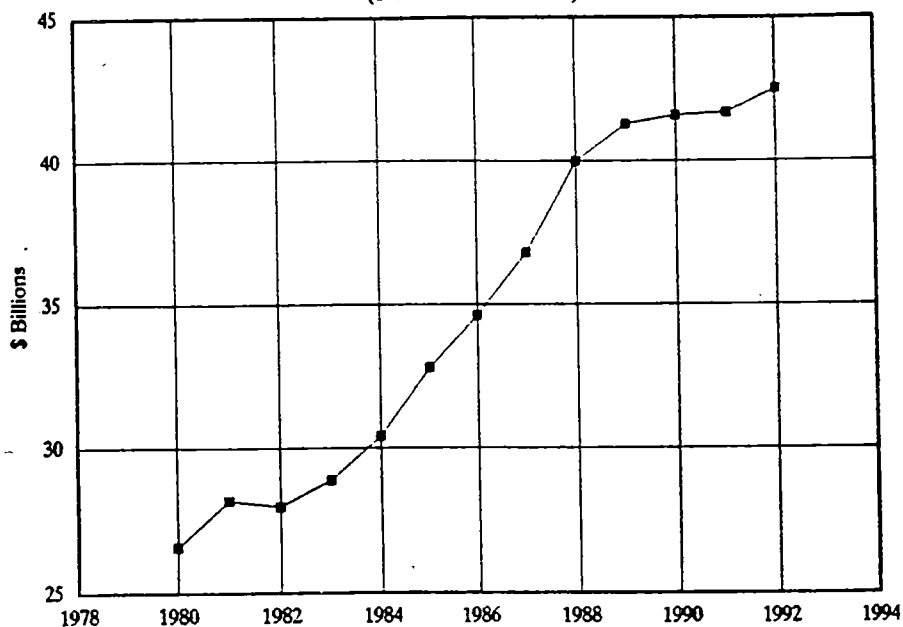
Some trends are immediately apparent. Between 1980 and 1990, personal consumption expenditures for legal services, in current dollars, increased by 261 percent, and stood at \$49.2 billion in 1990.

PERSONAL CONSUMPTION OF LEGAL SERVICES  
(Current Dollars)



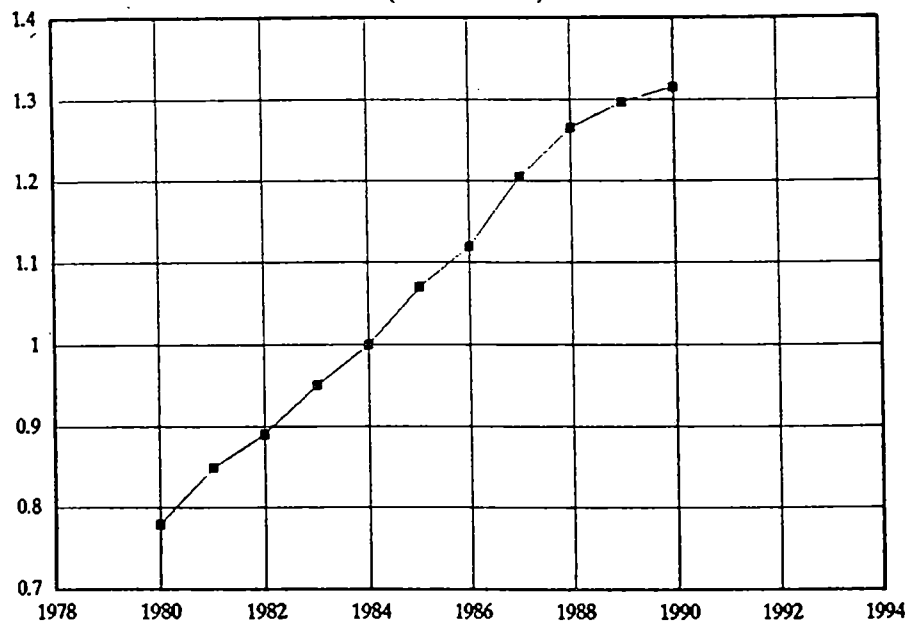
Even after taking inflation into account, personal consumption expenditures for legal services, in constant 1987 dollars, increased by 56 percent during this period, or an average rate of 5.6 percent per year, considerably faster than the growth rate of the overall economy. By comparison, total personal consumption expenditures increased at an average annual rate of 3.0 percent during the same period. Thus, while overall expenditures were rising at 3 percent a year, payments to lawyers were rising at more than 5 percent a year, taking resources from other expenditure areas and allocating them to legal services. The following chart graphically displays this increase.

PERSONAL CONSUMPTION OF LEGAL SERVICES  
(1987 Constant Dollars)

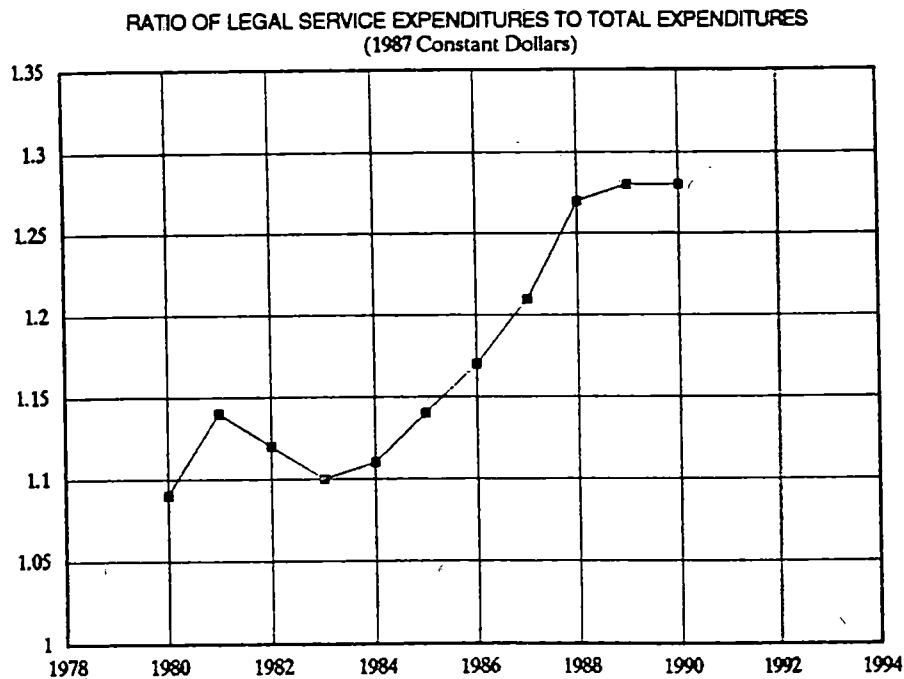


Similarly, from 1980 to 1990, the ratio of current dollar personal consumption expenditures for legal services as a percent of total PCE increased from .78 percent to 1.31 percent, or about 68 percent. Thus, individuals in 1990 spent much more of their total personal consumption expenditures for legal services.

RATIO OF LEGAL SERVICE EXPENDITURES TO TOTAL EXPENDITURES  
(Current Dollars)



Accounting for inflation, the ratio of spending for legal services to total PCE increased from 1.09 percent in 1980 to 1.28 percent in 1990, or more than 17 percent (see graph below). This increased ratio represents real growth for the legal services industry, all attributable to personal consumption. It indicates that more legal services were used.



During 1982 and 1983, this ratio actually dropped by 3.5 percent, then began a steep rise that began to level out at about 1.28 percent from 1988 to 1990. Coincidentally, as the economy has slowed during this period, law firms have felt considerable pressure to moderate increases in their fees, and competitive pressures have influenced restructuring in the legal profession. In addition, some companies have focused additional attention on bringing legal work in-house, and professional legal fee auditors have gained increased prominence scrutinizing the quality and quantity of legal services provided.

## BUSINESS SPENDING

The source for business spending is the Commerce Department (Bureau of Economic Analysis) input-output tables for the economy. These are produced only at five-year intervals. The most recent data, for 1987, is still unpublished; the

NAM has obtained the preliminary estimates. Prior data is from the 1982 input-output table. All the business data is in current rather than constant dollars.

Business spent \$38.8 billion for legal services in 1982, and \$75.8 billion in 1987, an increase of 95.4 percent in five years. In 1982, business spending for legal services came to 1.42 percent of total spending for intermediates (*i.e.*, spending in the production of goods or services for the final sales level). In 1987, this figure had increased to 2.16 percent (see table below). Thus, just as with personal consumption expenditures, legal services constituted a higher share of business expenditures from 1982 to 1987.

**Business Expenditures (\$ Billions)**

	1982	1987
Legal Services	38.8	75.8
All Intermediates	2,732.2	3,502.8
Ratio	1.42%	2.16%

*Source:* U.S. Dept. of Commerce, Input-Output Tables, published in "Survey of Current Business," July 1991 at 49 and April 1992 at 71.

If the increased rate of spending for legal services in the business sector increased between 1987 and 1992 at the same rate as it did in the 1982 to 1987 period, business in 1992 will spend \$148.1 billion for legal services. However, this calculation must be regarded as purely speculative because business spending was substantially affected by different economic conditions in the latter period. One useful way to check the plausibility of estimates of this type is to compare the growth rate of business to personal consumption expenditures.<sup>24</sup>

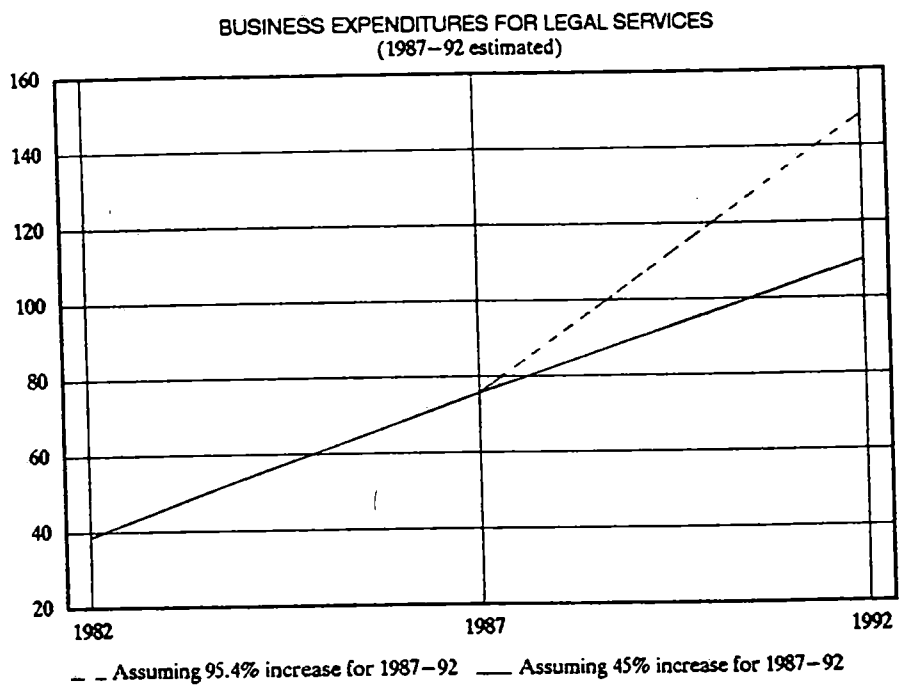
From 1982 to 1987, personal consumption expenditures for legal services in current dollars increased by 100 percent, clearly the same order of magnitude as the 95.4 percent increase in business spending for legal services.<sup>25</sup> However,

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<sup>24</sup> Since business spending is available only in current dollars, the appropriate comparison is PCE in current dollars.

<sup>25</sup> Since PCE for legal services in constant dollars increased by only 31.2 percent from 1982 to 1987, the real magnitude of the increase for business was also in the same general range.

using the NAM projections, PCE for legal services in current dollars increased at a slower rate between 1987 and 1992: 45.1 percent. If business spending increased by the same order of magnitude, the implied figure for 1992 is in the area of \$110 billion. The following chart summarizes these estimates.



These two estimates, \$110 billion and \$148 billion, can be taken as parametric boundaries for business spending on outside legal services in 1992. While business spending increased by the same order of magnitude as consumer spending from 1982 to 1987, it is not known if this was also the case from 1987 to 1992. Overall personal consumption expenditures slowed sharply from 1988 onward, reflecting factors such as high levels of debt and a deterioration in balance sheets. On the other hand, business spending on legal services may have increased more rapidly, since the causes of demand for legal services by business include factors that do not affect consumers, such as compliance with federal statutes and regulations and increased litigation in such areas as employment discrimination and product liability.

These statistics encompass direct transfers to law firms for services, including photocopying, travel and miscellaneous items. They do not include payments to in-house counsel, such as insurance company lawyers working within those companies to handle claims without the assistance of outside counsel. They also do not include payments by companies to in-house counsel in other business

sectors. The Bureau of Labor Statistics estimates that in 1990 there were 586,581 lawyers working in this country, but it is impossible to tell how many of these were in-house counsel not included in the input-output tables of the Department of Commerce.<sup>26</sup> Suffice it to say that millions were spent on in-house legal counsel that do not appear in the figures above.

## INDUSTRY SECTOR STATISTICS

The input-output tables showing business expenditures for legal services are broken into subcategories based on Standard Industrial Classifications (SICs). In 1982, the largest sectors using legal services were (in millions of dollars):

<u>Classification</u>	<u>Industry</u>	<u>Expenditures</u>
69.0200	Retail trade, except eating and drinking	5,900.3
69.0100	Wholesale trade	1,578.9
71.0201	Real estate	971.0
74.0000	Eating and drinking places	807.7
71.0100	Real estate: owner-occupied dwellings	694.9
70.0400	Insurance carriers	574.4
70.0100	Banking	452.4
73.0303	Accounting, auditing & bookkeeping, & misc. serv. n.e.c.	324.5
73.0105	Management & consulting services, testing & research labs	287.6
73.0302	Engineering, architectural & surveying services	272.2
99.3009	State & local gov't purchases, other gen'l gov't activities	267.8
70.0200	Credit agencies other than banks	249.6
70.0500	Insurance agents, brokers & services	236.3
77.0200	Hospitals	233.0
97.0000	Federal government purchases, non-defense	223.9
26.0100	Newspapers	217.8
66.0000	Communications, except radio & TV	213.4
84.0000	Exports	181.5
77.0100	Doctors and dentists	180.5
72.0100	Hotels and lodging places	170.4

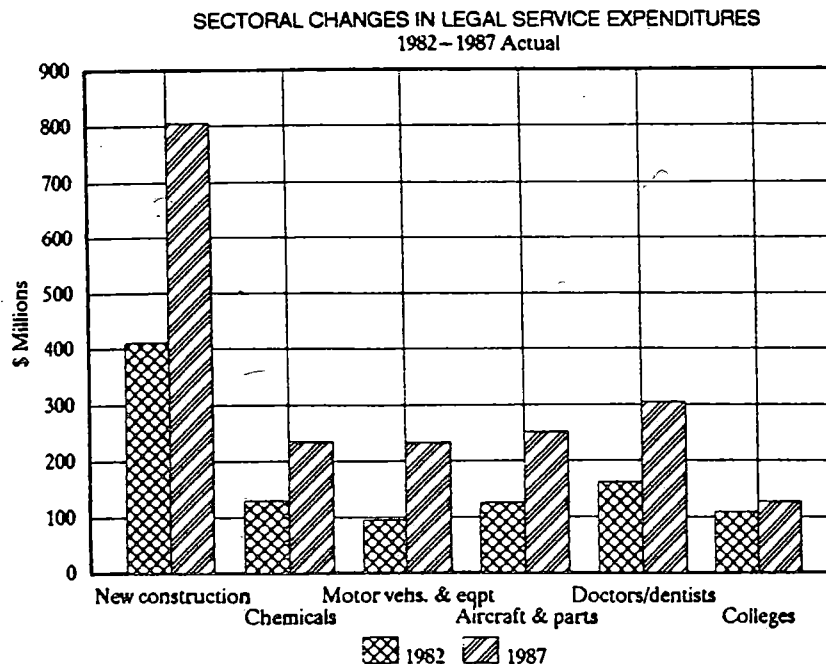
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<sup>26</sup> Of all lawyers, the Bureau of Labor Statistics reports that 388,581 are waged or salaried and 198,000 are self-employed. Not all of the 388,581 salaried lawyers are employed as in-house corporate counsel; we assume that a large number of them are employed by their law firms. They would therefore be counted by the BLS as salaried, but their income would be counted by the Department of Commerce as a payment to a third party. Further information about the number of in-house counsel is unavailable from the government. *Prentice Hall Law & Business* will be publishing a report shortly about the nation's largest corporate law departments.

<u>Classification</u>	<u>Industry</u>	<u>Expenditures</u>
51.0101	Electronic computing equipment	154.3
98.0001	State & local gov't purchases, elementary & secondary schools	153.1
70.0300	Security and commodity brokers	152.7
8.0000	Crude petroleum and natural gas	135.3
73.0104	Computer and data processing services	135.0
96.0000	Federal gov't purchases, national defense	133.5
67.0000	Radio and TV broadcasting	129.7
65.0300	Motor freight transportation and warehousing	129.4
73.0109	Other business services	123.2
68.0100	Electric services (utilities)	111.0
77.0402	Colleges, universities and professional schools	109.7
26.0501	Commercial printing	106.3
11.0201	New construction: industrial buildings	102.7

These input-output tables do not include payments to in-house counsel, nor transfers in the nature of damage awards, since such awards are not payment for services *per se*. Payments to law firms include payments for such things as photocopying, travel and miscellaneous items.

We have also examined recent trends within specific industries to see how their legal cost increases compare with those of all standard industrial classifications (including non-industry sectors). The following chart shows how some industries compare.



## UNQUANTIFIABLE COSTS

In his book, Peter Huber guessed that indirect costs account for up to \$300 billion in costs attributable to America's liability system. This was based on the assumption that "doctors spend \$3.50 in efforts to avoid additional charges for each \$1 of direct tax [liability] they pay." It is impossible to accurately quantify the indirect costs that society incurs to avoid liability. Nevertheless, there are recognizable manifestations of such avoidance: Doctors are criticized for practicing excessive "defensive medicine," manufacturers discontinue businesses that are too risky and companies settle questionable claims to avoid the expense of litigation.

In addition, there are direct costs from claims and litigation that actually occur. Lawsuits sometimes take over the lives of the defendants. Lengthy discovery requests, depositions, interrogatories and other behind-the-scenes maneuvering can consume tremendous amounts of time, taking employees and management, including chief executive officers, away from other productive activities. More time spent in the courtroom or the lawyer's office means less time spent on the plant floor, in the laboratory or at the drafting table.

## CONCLUSION

In 1992, consumer spending on legal services will total approximately \$53 billion, while business will spend between \$110 and \$148 billion. The NAM estimates that, together, business and consumers will spend between \$163 and \$201 billion on legal services in 1992.<sup>27</sup> Countless billions more are paid to salaried workers, management and in-house lawyers, redirecting productive

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<sup>27</sup> It is to be emphasized that business spending for legal services does not enter in GDP. Outside the economics profession, it is not widely known that GDP is not a total production measure, but a final sales or value-added concept. Technically, GDP is equal to total production less all intermediate inputs. This becomes clearer when it is borne in mind that GDP is the sum of PCE, plus business investment (structures, equipment and inventories), plus government purchases, plus exports, less imports. None of these categories includes any intermediate production.

For this reason, it is best to consider consumer and business expenditures for legal services separately. It is equally obvious in this context that the two cannot be added together and expressed as a share of GDP, since business spending on intermediate legal services is netted out in the calculation of GDP.

resources away from business to claims resolution. And finally, claims that are actually paid sometimes include substantial amounts for punitive damages.

These estimates are the most precise that the NAM can obtain. They are based in each instance on Commerce Department data, obtained from a broad survey of firms in every sector of the economy. They should, therefore, be regarded as more accurate than anything provided by private studies relying on smaller samples of firms.

The appendix is a select compilation of research and other publications from the past five to ten years relating to the components of the cost of the legal system.

# APPENDIX OF RESEARCH MATERIALS RELATING TO COSTS

## LEGAL PERIODICALS

- Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975).
- Blake, Eliot M., *Rumors of Crisis: Considering the Insurance Crisis and Tort Reform in an Information Vacuum*, 37 EMORY L.J. 401 (1988).
- Bok, Derek C., *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570 (1983).
- Brunet, Edward, *Measuring the Costs of Civil Justice*, (Book Review), 83 MICH. L. REV. 916 (1985) (reviewing Kalakik & Ross, *Costs of the Civil Justice System: Court Expenditures for Various Types of Civil Cases*).
- Civiletti, Benjamin, *Zeroing In on the Real Litigation Crisis: Irrational Justice, Needless Delays, Excessive Costs*, 46 MD. L. REV. 40 (1986) (comment on Galanter article).
- Crampton, *The Trouble with Lawyers (and Law Schools)*, 35 J. LEGAL EDUC. 359 (1985).
- Cutler, *Conflicts of Interest*, 30 EMORY L.J. 1015 (1981).
- Dobbs, Dan B., *Can You Care for People and Still Court the Costs?* 46 MD. L. REV. 49 (1986) (comment on Galanter article).
- Galanter, Marc, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986).
- Galanter, Marc, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).
- Galanter, Marc, *The Life and Times of the Big Six; or, the Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921.
- Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977).
- Miller, Arthur R., *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1 (1984).
- Nye, David J. & Donald G. Gifford, *The Myth of the Liability Insurance Claims Explosion: An Empirical Rebuttal*, 41 VAND. L. REV. 909 (1988).
- Roper, *The Propensity to Litigate in State Trial Courts, 1981-1984, 1984-1985*, 11 JUST. SYS. J. 262 (1986).
- Rosenberg, *Let's Everybody Litigate?*, 50 TEX. L. REV. 1349 (1972).
- Rowe, Jr., Thomas D., *American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation: Background Paper, 1989* DUKE L.J. 824.
- Saks, *In Search of "The Lawsuit Crisis,"* 14(2) L. MED. & HEALTH CARE 77 (1986).
- Saks, Michael J., *If There Be a Crisis, How Shall We Know It?* 46 MD. L. REV. 63 (1986) (commenting on Galanter article).
- Samuelson, Robert J., *The Litigation Explosion: The Wrong Question*, 46 MD. L. REV. 78 (1986) (commenting on Galanter article).
- Sanders J., & C. Joyce, *Off to the Races: The 1980's Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. (1990).
- Schuck, Peter & Robert L. Rabin, *Tort System on Trial: The Burden of Mass Toxics Litigation. Agent Orange on Trial: Mass Toxic Disasters in the Court* (enlarged ed.), 98 YALE L.J. 1281 (1989).
- Silberman, *Will Lawyering Strangle Democratic Capitalism?*, REGULATION 15 (Mar.-Apr. 1978).
- Trubek, David M., Austin Sarat, William L. F. Felstiner, Herbert M. Kritzer & Joel B. Grossman, *The*

*Cost of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983).

Van Valkenburg, E. Walter, *Inside the Litigious Society* (Book Review), 85 COLUM. L. REV. 216 (1985) (reviewing JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?*).

Winter, R.A., *The Liability Crisis and the Dynamics of Competitive Insurance Markets*, 5 YALE J. ON REG. 455 (1988).

#### NEWSPAPERS/PERIODICALS

Graneli, *Long Trials Play Havoc With Courts*, Nat'l L.J. 1, Dec. 27, 1982.

Magee, S., *A Taxing Matter: The Negative Effects of Lawyers on Economic Activity*, *Economic Insights*, (Jan/Feb. 1991).

Olson, W., *California Counts the Costs of Lawsuit Mania*, Wall St. J., June 3, 1992, at A15.

*American Competitiveness*, Wall St. J., Aug. 14, 1991.

*Do We Have Too Many Lawyers?*, Time, Aug. 26, 1991.

*Less Litigation, More Justice*, Wall St. J., Aug. 14, 1991.

*Courting Disaster: Is America's Civil Liability System Totally Out Of Control?* World, Apr. 1986, at 30.

*Enough Is Enough*, Forbes, Apr. 20, 1987, at 56.

*The Liability Crisis: Who's At Risk?*, Chief Executive, Summer, 1986, at 29.

*Modern Tort Law and the Current Insurance Crisis*, Time, March 24, 1986, at 18.

#### RAND INSTITUTE ABSTRACTS

(available from The Institute for Civil Justice, The RAND Corporation, 1700 Main Street, P.O. Box 2138, Santa Monica, CA 90407-2138 (310) 393-0411, ext. 6686 or 7433.

R-2881-ICJ *The Civil Jury; Trends in Trials and Verdicts, Cook County, Illinois, 1960-1979*. M.A. Peterson, G.L. Priest. 1982.

R-2881/1-ICJ *The Civil Jury: Trends in Trials and Verdicts, Cook County, Illinois, 1960-1979*. Executive Summary. M.A. Peterson, G.L. Priest. 1982.

R-2888-ICJ *Costs of the Civil Justice System: Court Expenditures for Processing Tort Cases*. J.S. Kakalik, A. Robyn. 1982.

R-2985-ICJ *Costs of the Civil Justice System: Court Expenditures for Various Types of Civil Cases*. J.S. Kakalik, R.L. Ross, 1983.

R-3042-ICJ *Costs of Asbestos Litigation*. J.S. Kakalik, P.A. Ebener, W.L.F. Felstiner, M. Shanley. 1983.

R-3084-ICJ *Regulating the Content and Volume of Litigation: An Economic Analysis*. G.L. Priest. 1983.

R-3391-ICJ *Costs and Compensation Paid in Tort Litigation*. J.S. Kakalik, N.M. Pace. 1986.

R-3410-ICJ *New Evidence on the Frequency and Severity of Medical Malpractice Claims*. P.M. Danzon. 1986.

R-3421-ICJ *Costs and Compensation Paid in Aviation Accident Litigation*. J.S. Kakalik, E.M. King, M. Traynor, P.A. Ebener, L.O. Picus. 1988.

R-3466-ICJ *Civil Juries in the 1980s: Trends in Jury Trials and Verdicts in California and Cook County, Illinois*. M.A. Peterson. 1987.

R-3583-ICJ *Trends in Tort Litigation: The Story Behind the Statistics*. D. Hensler, M.E. Vaiana, J.S. Kakalik, M.A. Peterson. 1987.

R-3668-ICJ *Product Liability and the Business Sector: Litigation Trends in Federal Courts*. T. Dungworth. 1988.

R-3885-ICJ *Statistical Overview of Civil Litigation in the Federal Courts*. T. Dungworth, N.M. Pace. 1990.

P-5921 *Costs and Benefits of the Tort System if Viewed as a Compensation System*. P. Munch. June 1977.

P-7210-ICJ Summary of Research Results on the Tort Liability System. D. Hensler. March 1986.

P-7243-ICJ Costs and Compensation Paid in Tort Litigation: Testimony Before the Joint Economic Committee of the U.S. Congress. J.S. Kakalik, N.M. Pace. July 1986.

P-7271-ICJ Summary of Research Results on Product Liability. D. Hensler. Oct. 1986.

P-7287-ICJ Trends in California Tort Liability Litigation. D. Hensler. March 1987.

### SCHOLARLY PAPERS

American College of Trial Lawyers, *Recommendations on Major Issues Affecting Complex Litigation*, 90 F.R.D. 207 (1981).

Tort Policy Working Group, *Report of the Tort Policy Working Group on the Causes, Extent, and Policy Implications of the Current Crisis in Insurance Availability and Affordability* (U.S. Dept. of Justice 1985).

### TRADE ASSOCIATION PUBLICATIONS

*An Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance*, Nat'l Ass'n of Att'ys Gen., Gail E. Tverberg (May 1986).

*Civil Justice Reform Data*, AAI, AIA, Nat'l Ass'n of Ind. Insurers (1986).

*Documenting the Case for Tort Reform: The Cost of Expanding Tort Liability Doctrines Beyond Traditional Common Law*, Nat'l Ass'n of Ind. Insurers (May 16, 1986).

*Federal Tort Policy Report: An Update on the Liability Crisis*, Ins. Information Inst. (Mar. 30, 1987).

*The Insurance Crisis: A Study in Deception*, Ass'n of Trial Lawyers of Am.

*Legal Defense: A Large and Growing Insurance Cost ISO Insurance Issues Series*, Ins. Services Office, Inc. (Dec. 1989).

*Memorandum on MCSC Data*, Alliance of Am. Insurers, Greg Heidrich (Apr. 25, 1986).

*Public Policy Considerations Underlying Insurance Data Reporting*, Ins. Acctg. & Systems Ass'ns (June 1987).

### BOOKS

BRODEUR, PAUL, *OUTRAGEOUS CONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (N.Y.: Pantheon Books, 1985).

FERGUSON, ALBERT, *THE LIABILITY CRISIS AND HOW TO SOLVE IT* (Pittsburgh, Pa.: Claymore Press, 1987).

FLANGO, V., R. ROPER & M. ELSNER, *THE BUSINESS OF STATE TRIAL COURTS* (1983).

HUBER, PETER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (N.Y.: Basic Books, 1988).

LIEBERMAN, J., *THE LITIGIOUS SOCIETY* (1981).

*LIABILITY: PERSPECTIVES AND POLICY* (Washington, D.C.: The Brookings Institution) (Litan, R.E. & C.M. Winston, eds. 1988).

MCLAUCHLAN, W., *FEDERAL COURT CASELOADS* (1984).

O'CONNELL, JEFFREY & C. BRIAN KELLY, *THE BLAME GAME*, (Lexington, Mass.: Lexington Books, 1987).

OLSON, WALTER, *THE LITIGATION EXPLOSION* (N.Y.: Penguin Books, 1991).

SCHUCK, P.H., *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (Cambridge: Harv. U. Press, enlarged edition 1987).

SCHUCK, P.M., *TORT LAW AND THE PUBLIC INTEREST* (N.Y.: W. W. Norton, 1991).

SUGARMAN, S., *DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS* (N.Y.: Quorum Books, 1989).


## GAO REPORTS

*Liability Insurance: Effect of Recent "Crisis" on Business and Other Organizations* (Washington, D.C.: GPO, July 1988).

*Product Liability: Extent of Litigation "Explosion" in Federal Courts Questioned* (Washington, D.C.: GPO, Jan. 1988).

*Product Liability Verdicts and Case Resolution in Five States* (Washington, D.C.: GPO, Sept. 1989).

**National Association of Manufacturers  
1331 Pennsylvania Avenue, NW  
Suite 1500 - North Tower  
Washington, DC 20004-1703  
(202) 637-3000**





Via Teletcopy

July 15, 1992

TO: Steve Provost

FROM: Fred Malck

Here are a few lines that may be helpful in your speech preparation.

*Factor -- manuf. sector log of fact by  
to year ago*

*- largest + most productive economy*

Possible Lines for POTUS for July/August :30s

These lines envision GB in interview format, living room setting, leaning forward toward interviewer, speaking with passion.

America is still the greatest nation on earth, but we face some big problems. I know we can solve those problems by returning to the values that made us great. Promoting the family as the basic unit of society. Teaching respect for law and order and enforcing the law with speed and certainty. Promoting thrift among our citizens and making the government live within its means. That's what I believe.

I believe in three basic principles and I will use them to lead this nation. Number one, we won't have a healthy, growing economy until we balance the federal budget. Number two, government policies should encourage family values and provide incentives for families to come together and stay together. And number three, we are a nation of laws. Every citizen must respect the law and the President must enforce it. That's what I'll do, if the American people support these principles.

Government can't solve all our problems. You can trace this country's problems to the fact that some people have lost sight of their basic morality. There are absolute standards of right and wrong that we know and recognize in this country. Our children must be taught the difference in right and wrong and our adults must be held accountable if they don't respect the difference in right and wrong. I'm going to speak out for the basic moral code that unites us, whether certain cultural elites like it or not.

When I say I believe in family values I don't just mean that candidates should travel with their children. I mean that children should have the right to pray in their public school. That parents should have the right to choose what school their children attend. That government policy should discourage single mothers from having more children, not encourage it. And, yes, that parents have a right to know if their teenaged daughter decides to have an abortion.

Let's face the facts. You and I both know, and the American people know, that this recession and all our economic problems are caused by the federal government spending too much money and running a deficit. We will have a healthy, growing economy over a long period again only when the federal government balances its budget. I'd like to have Congress'

help in balancing the budget. But, I will cut federal spending. I will reduce this deficit. With or without their help.

I have said from the very beginning that we will only have a growing economy when the federal government stops spending more than it takes in. Congress disagrees. I've compromised with them--at great political cost to myself--I've cajoled them and I've confronted them. But, the spending keeps right on growing. No more. I'm using my veto to cut federal spending and to do it right now. That's what I believe in and that's what I'm going to do.

You know, you can trace a lot of our social problems directly to the vicious cycle of welfare dependency we have created in this country. I have strong views about changing that system and we're doing it right now. My welfare plan is based on family values. We will give families the incentive to stay together. Fathers will be financially responsible for their children. I will cut welfare benefits for single mothers who have more children. Everyone on welfare will receive mandatory job training, then we'll get them a mandatory job. From now on, welfare is a temporary helping hand. Not a permanent way of life.

You watched the riots in Los Angeles with the same horror that I did. Who was responsible? The individual criminals who did the killing and burning. A generation in our cities has grown up without being taught respect for law and order, the difference in right and wrong. Well, now we're going to teach them. The Civilian Training Corps will teach them the difference, teach them to respect the law, and give them the discipline and work ethic needed to succeed in life. That's my program, based on my basic belief in traditional American values.

- intel. underpinnings
- anecdotes

Solzenitsyn

THE WHITE HOUSE

WASHINGTON  
June 26, 1992

MEMORANDUM TO ALL WRITERS/RESEARCHERS

FROM: DAN MC GROARTY *DMG*  
SUBJECT: MEETING WITH HENSON MOORE

Henson praised the following "formula" used in the Texas State Convention speech:

Americans want families -- strong and united. Good schools, safe neighborhoods, a job-creating economy -- and a world at peace.

Henson points out that the campaign shares his enthusiasm for this formulation. This shorthand should be built into each speech.

# # #

Members Who Voted  
For BBA in 1990 and  
Cosponsored Stenholm bill  
But Voted AGAINST BBA

---

Annunzio  
Eustamante  
Klecza  
Lantos  
Murphy  
Neal (MA)  
Olin  
Tallon

Members Who Voted  
For BBA in 1990  
Didn't Cosponsor Stenholm  
And Voted AGAINST BBA

---

Coleman (TX)  
Gaydos  
McNulty  
Mfume  
Rose  
Slaughter

Members Who Cosponsored  
Stenholm bill  
But Voted AGAINST BBA

---

Horn  
Martinez  
Schroeder  
Traficant

Members Voting Against  
the BBA in 1990 but  
Cosponsored Stenholm bill  
and Voted FOR BBA

---

Anderson  
Glickman  
Kennedy

Members Voting Against  
the BBA in 1990  
Didn't Cosponsor Stenholm  
And Voted FOR BBA

---

Bruce  
Donnelly  
Feighan  
Frost  
Hoyer

**Members Who Voted  
For BBA in 1990 and  
Cosponsored Stenholm bill  
But Voted AGAINST BBA**

---

Annunzio  
Bustamante  
Klecicka  
Lantos  
Murphy  
Neal (MA)  
Olin  
Tallon

**Members Who Voted  
For BBA in 1990  
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And Voted AGAINST BBA**

---

Coleman (TX)  
Gaydos  
McNulty  
Mfume  
Rose  
Slaughter

**Members Who Cosponsored  
Stenholm bill  
But Voted AGAINST BBA**

---

Horn  
Martinez  
Schroeder  
Traficant

**Members Voting Against  
the BBA in 1990 but  
Cosponsored Stenholm bill  
and Voted FOR BBA**

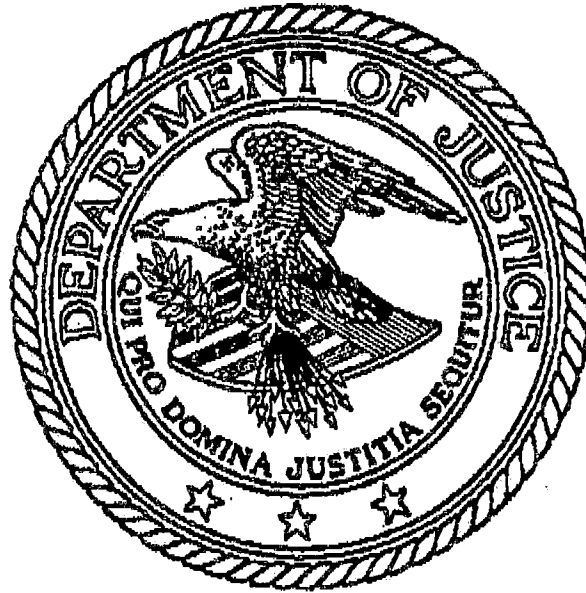
---

Anderson  
Glickman  
Kennedy

**Members Voting Against  
the BBA in 1990  
Didn't Cosponsor Stenholm  
And Voted FOR BBA**

---

Bruce  
Donnelly  
Feighan  
Frost  
Hoyer



Office of Policy Development  
United States Department of Justice  
10th Street and Constitution Avenue, N.W.  
Washington, D.C. 20530

July 2, 1992; 11:13 am

TO: Ed Walters  
White House Speechwriter

FAX: 456-6218  
Telephone: 456-7750

FROM: Kevin R. Jones  
Deputy Director

Voice: (202) 514-4604  
FAX: (202) 514-8639

Room 4245, Main

Total Pages (excluding this cover): 5

**Additional Message:**

Attached as you requested is the Department's most current statement on the Freedom of Choice legislation, which was signed by the Attorney General and sent to Congress yesterday.



Office of the Attorney General  
Washington, D. C. 20530

July 1, 1992

Honorable Edward M. Kennedy  
Chairman  
Committee on Labor and Human Resources  
U.S. Senate  
Washington, D.C. 20510-6300

Dear Mr. Chairman:

This letter presents the views of the Department of Justice concerning the amended versions of the "Freedom of Choice Act of 1991," introduced as companion bills H.R. 25 and S. 25 (collectively "the bill"). The Department strongly opposes enactment of this legislation. The recent amendment introduced by Senator Mitchell, making minor changes to the bill, fails to confront the bill's most serious flaws. For the reasons below, if the bill were presented to the President, I and the President's other senior advisors would recommend that he veto this legislation.

The revised bill would still prohibit States from enacting reasonable regulatory restrictions on abortions clearly permitted under Roe v. Wade and its progeny. It would also represent a doubtful exercise of Congress' power under the Fourteenth Amendment and would rest on a questionable link to Congress' power to regulate interstate commerce.

I. The Revised Bill

The bill is described by its sponsors as a "codification" of much of the complex regime of abortion legislation erected by the Supreme Court since its 1973 decision in Roe v. Wade, 410 U.S. 113 (1973). The bill as revised expressly states its purpose to be "to achieve the same limitations as provided, as a constitutional matter, under the strict scrutiny standard of review enunciated in Roe v. Wade and applied in subsequent cases from 1973 to 1988." Section 2(b). Because of its sweeping language, however, the bill would enact a federal statutory regime of abortion regulation that leaves the States with substantially less regulatory authority than under Roe or the Supreme Court's decision earlier this week in Planned Parenthood of Southeastern Pa. v. Casey.

The essence of the bill remains substantially unchanged: "a State . . . may not restrict the freedom of a woman to choose whether or not to terminate a pregnancy before fetal viability," and after viability the State may not restrict abortion if the abortion "is necessary to protect the life or health of the woman." Section 3(a)(1) and (2).

The revised bill would thus still allow abortions for any reason, even sex selection, before the fetus becomes "viable." With no definition or standards for viability, it appears that the bill could leave that determination to the person performing the abortion. Thus a single health care professional's judgment that a particular fetus was not "viable" would be conclusive and binding on the State, whether or not the fetus satisfied other objective criteria of "viability" such as a test for weight. It is not even clear that the professional judgment must be rendered by a medical doctor.

Even after fetal viability, with no standards for determining what constitutes the "health of the woman" justifying an abortion, the revised bill would still go well beyond merely "codifying" Roe. As we have explained in earlier statements and testimony, we believe that the term "health" in section 3(a)(2) would likely be construed broadly. See Doe v. Bolton, 410 U.S. 179 (1973). The Court there noted that the medical judgment must be made in light of all factors, including "emotional, psychological, [and] familial" factors. Id. at 192. It is likely, therefore, that even after viability an abortion performed for any reason that a medical professional (who, again, apparently need not be a licensed physician) deemed "relevant to the well-being" of the woman, id., would probably be protected under the bill as "necessary to preserve the life or health of the woman." Section 3(a)(2).

The revised bill purports to address a few of the concerns the Department has raised previously. These changes, however, do not fully meet the Department's concerns on the issues they address, and leave many more serious flaws unaddressed.

For example, the revised bill allows some degree of parental participation in the decision of a minor to undergo an abortion. However, it provides only that the State could require the minor to "involve" the parent in the decision. Section 3(b)(3). The term "involve" is left undefined. It is troubling that the bill's authors chose an inherently vague term over more definite words such as "notify" and "consent." It is simply unclear whether the bill would exclude parental consent requirements. The bill could thus be read to invalidate laws in the twenty-one States that require some form of parental consent, including the Pennsylvania abortion statute upheld this week by the Supreme Court in Casey.

So read, the bill would go well beyond Roe and later cases. In Bellotti v. Baird, 443 U.S. 622, 647 (1979), for example, a plurality of the Court ruled that a parental consent requirement for abortions by minors would be constitutional if it contained a judicial bypass provision. And in Planned Parenthood Association v. Ashcroft, 462 U.S. 476, 493-94 (1983), the Court upheld another parental consent provision with a judicial bypass. The bill could be read to overrule these cases to the extent they permitted such consent provisions. The bill would not, therefore, codify Roe as "applied in subsequent cases from 1973 to 1988," as it claims to do. Section 2(b).

Although the revised bill would permit States to protect the rights of unwilling individuals to refrain from performing abortions, the bill does not permit institutions to refuse to perform abortions. Thus, a hospital whose board or sponsoring organization was opposed to abortions could nevertheless be held liable for refusing to perform them. Indeed, the bill could now be read to require institutions to hire willing individuals in order to provide abortion services. Similarly, although the Senate bill has been amended to allow a state to refuse to pay for abortions, section 3(b)(2), nothing in that provision or any other part of the bill appears to permit a state to deny the use of a state facility to a woman who was willing to pay for the abortion. The bill might even be construed to require the states to provide state facilities for abortions where private facilities are unavailable.

Further, the revised bill contains no exception for informed consent and waiting periods. State laws requiring that factual information concerning the nature of the abortion procedure and available alternatives be made available to a woman twenty-four or forty-eight hours prior to an abortion would thus be invalidated. Thirty-two states currently have such laws. The purpose of such provisions is typically to ensure that the woman's decision to abort is free, reflective and informed. That state purpose would be illegitimate under the bill.

## II. Congressional Authority

The bill has been significantly revised to address the Congress' power to adopt it. The bill asserts that Congress has the authority to enact the bill under both the Commerce Clause (Art. I, § 8) and section 5 of the Fourteenth Amendment of the Constitution. See section 2(a)(4). We continue to doubt whether Congress has authority to enact this legislation on the proffered grounds.

In commenting on earlier versions of this legislation, we criticized the suggested reliance on Congress' power under Section 5 of the Fourteenth Amendment, arguing that the Section 5 authority does not extend to fixing the content of the

amendment's substantive provisions. We are therefore pleased that the bill now acknowledges that "Congress may not by legislation create constitutional rights" and purports to create only "statutory rights."

Having recognized that Congress may not create constitutional rights or alter their content, the bill's drafters have now sought to assert a connection between recognized constitutional rights and the statutory right to abortion that the bill would adopt. That assertion, however, is unpersuasive.

For example, the bill suggests that the statutory rights it creates would protect "liberty." Section 2(a)(4). The Fourteenth Amendment, however, prohibits only certain deprivations of liberty, for instance those that have no rational relationship with a legitimate state interest; were it to prohibit all deprivations of liberty, it would forbid an enormous range of laws including laws against homicide. Thus, to say that a proposed federal statute prevents the States from restricting liberty in general is to say almost nothing about whether the federal statute in any way implements the commands of the Fourteenth Amendment. The bill also asserts that state restrictions on abortion interfere with women's exercise of constitutional rights unrelated to abortion. Section 2(a)(2)(D). The bill does not say what these other rights are, so it is impossible to tell how it would keep the States from interfering with them.

As we have noted with respect to earlier versions of this legislation, Congress' power under the Commerce Clause has been held to be quite broad. It is likely that Congress could enact some legislation concerning abortion pursuant to that power. The arguments now put forward to support this legislation under the Commerce Clause, however, are still troublesome. For example, the bill finds that restrictions on abortion "burden interstate commerce by forcing women to travel from States in which legal barriers render contraception or abortion unavailable or unsafe to other States or foreign nations." Section 2(a)(2)(A)(ii). We fail to see how any increased interstate travel resulting from diverse State laws regulating abortion would constitute a burden on commerce. Moreover, the argument that travel from one jurisdiction to another justifies a single national abortion law on commerce grounds proves too much, for it could justify uniform federal laws on any subject, which is inconsistent with the notion of the federal government as a government of limited powers.

Finally, in our view Congress' intervention in this area would usurp a field of legislation traditionally reserved to the States. As must be obvious from the public reaction this week to the Supreme Court's Casey decision, the policy choices in this area are difficult and national consensus is elusive. The

political outcomes of fifty distinct state processes would be far more likely to represent the genuine diversity of views that exists on this subject than would a uniform federal code entrenching a more restrictive regime than that of Roe and Casey. Observance of federalism is thus particularly desirable with respect to abortion regulation.

In keeping with the President's position that "[a]s a nation, we must protect the unborn," Message to the House of Representatives Returning Without Approval the District of Columbia Appropriations Act, 1990, 25 Weekly Comp. Pres. Doc. 1801 (Nov. 20, 1989), and for the reasons explained above, the Department of Justice opposes the enactment of the bill, and if the bill were presented to the President in its current form, I and the President's other senior advisors would recommend a veto.

Sincerely,



William P. Barr  
Attorney General