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Embargoed until delivered -- September 6, 1991 -- 7:55 p.m. CST

PREPARED REMARKS BY THE VICE PRESIDENT

INDIANA UNIVERSITY SCHOOL OF LAW ALUMNI DINNER
INDIANAPOLIS, INDIANA

In my remarks to this group of lawyers, let me start at the top of our profession: the Supreme Court of the United States.

Many years ago, Mr. Justice Holmes wrote that "a judge of the United States is expected to be a man of extraordinary firmness of character." And since the first of July, 1991, the American people have learned much about the fine character of a brilliant gentleman from Pinpoint, Georgia: Judge Clarence Thomas.

As far as material or economic advantages are concerned, Clarence Thomas grew up with none. But he had what's important: family members, and teachers, who cared; a strong faith; and an absolute resolve to build a better life. From the segregated South, he worked himself all the way to the second highest court in America.

As was expected, there has been some opposition to Judge Thomas. But, as was also expected, his distinguished record has easily withstood the ideological attacks. And last month, the President was very pleased that the American Bar Association found Judge Thomas "qualified" -- in their words, "at the top of the legal profession," with "outstanding legal ability and wide experience."

The confirmation hearings begin next week, and we look forward to them. But we are looking forward even more to the day when Clarence Thomas receives yet another confirmation by the United States Senate, and is seated as a member of the Supreme Court of the United States.

As you may be aware, I had the experience of speaking to the American Bar Association last month in Atlanta. My purpose there was to discuss litigation in America -- the impact of the legal system on our economy, and on our ability to compete abroad.

I asked the A.B.A. to join the President's Council on Competitiveness in implementing a package of needed reforms to improve the system for all Americans. Before I left the platform at the end of my remarks, the outgoing president of the A.B.A. stepped to the microphone and flatly disagreed with the competitiveness argument. He told me to focus on "real problems," and not to be "distracted by illusory ones." Well, if

I may again quote Mr. Justice Holmes: "This is not a matter for polite presumptions; we must look facts in the face."

The fact that we are the most litigious society in the world has obvious consequences in an age of global markets. It matters that, as one study found, foreign companies often have product liability insurance costs that are 50, 80, even 90 percent lower than their counterparts in the United States. It matters that liability concerns have caused dramatically higher prices for some everyday items -- from stepladders to medicines -- and that some beneficial products never reach the market at all.

Here is one person's outlook, from a letter I received two weeks ago: "As a businessman, I can tell you that the basic thrust of the law of the 1980's and 1990's is to discourage enterprise, keep new products off the market, [and impose] a general attitude of caution rather than creativity."

That letter is but one of the many I've received on this subject from all over the country. They've arrived by the hundreds, and run more than 50 to 1 in favor of the reforms I proposed to the A.B.A. The letters come from everyday working people, who have doubts that the system is serving their interests and the interests of their families. They come from top level managers, who spend as much as 25 percent of their time handling legal matters. From entrepreneurs that have left industry because it's simply not worth the risk; and from doctors who have stopped delivering babies. From these diverse voices, from their stories, one hears the same message: our system can be made better.

I am happy to say that I have also received favorable letters from many, many of our fellow lawyers. This may surprise a few cynics, but members of our profession do understand the problems that exist, and they're coming forward to participate in finding solutions. A practitioner from California expressed the view of many lawyers that "it is not only those in business who bear the brunt [of the problem] but rather most of the citizenry at large -- including, in particular, the beleaguered middle class."

Another lawyer, a litigator in the northeast, wrote that he has witnessed many "abuses ... inefficiencies ... ills and excesses," and went on to describe some of the things he's done, on his own, to develop alternative techniques for dispute resolution. This is exactly the kind of approach we need to turn the corner on some of these problems: attorneys who know the system taking measured steps to bring legal disputes to cheaper, faster resolution.

Of course, we also need system-wide policy reforms, starting

with issues of substantive law like product liability and medical malpractice, and we have sent legislation to Congress in both of these areas. Furthermore, we can forge ahead with the 50 civil justice reform proposals put together by the Council on Competitiveness -- reforms that directly address the biggest problems in the administration of justice.

Let me mention a few highlights of the reform package. They begin with discovery reform -- to eliminate the widespread use of discovery as a cost-free instrument of delay and even harassment, by requiring the requesting party to pay the compliance costs of discovery beyond pre-set limits.

- Then, empowering people by making the courthouse a place of real choice -- where parties have greater access to options other than formal litigation, and where mandatory conferences reduce the number of cases that need to go to trial.

- Experimenting with an incentive for more careful evaluation of cases, by instituting a modified English Rule in federal diversity cases.

- We also suggest placing a badly needed structure, and setting limits, on punitive damages -- to curtail the utter randomness with which they are now awarded. Our proposal would restore the quasi-criminal nature of punitive damages, and limit punitive awards to the amount of actual damages, while leaving unchanged the law of compensation.

The Council also recommends that we change the rules on expert evidence. Expert testimony should be based on widely accepted theories, not junk science. Beyond that, because an expert witness should not be an advocate, we propose eliminating altogether the idea of allowing contingency fees for experts.

There's another sentiment that I've seen over and over again in the letters from around America, and that is: "We like these proposals; please work hard to get them enacted." I can assure you we are doing just that. Proposed legislation is being drafted right now in the Department of Justice, and the President is preparing to issue an Executive Order that will apply some of these recommendations to the federal government when it engages in litigation. We've presented the recommendations to state legislators, and distributed more than 10,000 copies of the Report to judges, professors, and opinion leaders. We will also be making contact soon with state attorneys general, district attorneys, state bar presidents, and governors. We are serious about getting action on these proposals.

You know, it's been said that you can't accomplish much by

talking about serious matters with people who are in total agreement with your views. I don't expect that everyone in this room agrees wholeheartedly with all of my comments tonight. But I offer these considered views on reform to you, fellow alumni and friends, out of respect for our common profession, and for the unique role lawyers have played since the founding of our republic.

The American people have always looked to lawyers for leadership. In a nation of free people, there is no more respectable, no more noble calling than the practice of law. And the study of law, which is our common bond tonight, enriches the individual regardless of the direction he or she might choose in life. In law school we learned to think: with order, and with rigor. We learned to express ourselves with economy, to spot weaknesses in arguments, and to challenge the status quo. And, most importantly, if there is anything we learned from the professors here tonight, and from others now gone, it is this: there is no greater aspiration for a society -- and no greater responsibility for our profession -- than to assure the effective, fair, and early delivery of justice.

# # #

Embargoed until delivered -- October 1, 1991 -- 2:20 p.m. EDT

EXCERPTS FROM PREPARED REMARKS BY THE VICE PRESIDENT
AMERICAN BUSINESS CONFERENCE
WASHINGTON, D.C.

I'm here today to enlist your help in our newest project: reform in the area of civil justice. In August I gave a speech on this subject to the American Bar Association in Atlanta. I thought it was time to address the legal system's impact on our economy, and on our ability to compete. And make no mistake: that impact is serious. One study found that foreign companies often have product liability insurance costs that are 50, 80, even 90 percent lower than their counterparts in the United States. We also know that liability concerns have caused dramatically higher prices for some everyday items, from stepladders to medicines -- and some beneficial products simply never reach the market at all.

Moreover, we're the most litigious society in the world. We have 70 percent of the world's lawyers. The legal system now costs Americans an estimated 300 billion dollars a year, and it has far too many openings for abuse and delay.

All these factors have obvious implications in an age of global markets, and there are things we can do to deal with them. We can work together to fight new legislation that, though well-intentioned, will only make the litigation explosion worse. We can institute system-wide policy reforms, starting with issues like product liability and medical malpractice, and we have sent legislation to Congress in both of these areas. And we can move ahead with the Council's 50 civil justice reform proposals, which I outlined to the A.B.A.

These proposals include:

o Discovery reform: to eliminate the use of discovery for delay and harassment, by requiring the requesting party to pay the compliance costs of discovery beyond pre-set limits.

o Empowering people by making the courthouse a place of real choice -- a "multi-door courthouse" -- where parties have greater access to options other than formal litigation, and where mandatory conferences reduce the number of cases that need to go to trial.

o Adopting our experimental "fairness rule" in selected types of federal cases. The fairness rule is a simple, straightforward concept: the loser pays the winner's legal fees. The idea is to reduce the numbers of frivolous cases in the federal courts --

cases that have no business taking up the time and resources of the system. The fairness rule will work because it's a simple matter of incentives. People contemplating litigation may think more carefully about it if they are confronted with the notion of paying the other side's legal fees in a losing suit. This would go a long way toward reducing frivolous and nuisance lawsuits. Many would decide that it's better to settle, and many would decide not to file at all.

It is a matter of fair play that the American people should have some relief from lawsuits that harass and intimidate. Too often today, we tend to sue at the drop of a hat. Through this and other reform proposals, let us move toward a new American ethic: Make litigation the last resort, not the first.

o We also propose setting limits on punitive damages. Punitive damages are an effective punishment and deterrent for truly outrageous conduct. But the system has developed over centuries without any real structure or limits. Punitives can now be awarded in arbitrary, unpredictable, and disproportionately huge amounts. In California alone, estimates are that one in every ten jury awards now includes punitive damages, in amounts averaging more than $3 million. What we want to do is to curtail the randomness in the system, and restore some measure of certainty to commercial transactions.

o Another part of our reforms is to changing the rules on expert evidence: first, to get rid of the kinds of "junk science" that have no business in the courtroom; second, to eliminate contingency fees for experts. It is simply wrong to give the expert witness in a case a stake in the outcome.

The reforms we've proposed are sensible and well-considered. And I think the responses to our proposals are the best proof of that. Since my remarks to the A.B.A., I've received letters by the bushel from people across the spectrum: everyday workers, managers, academics, judges, entrepreneurs, doctors, and, yes, practicing lawyers. It won't surprise you that these letters have run at about a hundred to one in favor of our proposals. Huge numbers of Americans are saying, simply and directly: "we like these ideas. Now, please follow up!"

Well, we are. Here's what we are doing. We're working right now on federal legislation to implement some of the reforms, and we hope to submit it to the Congress within a few weeks. Among the items covered by the proposed legislation will be the fairness rule, the multidoor courthouse, and other provisions affecting federal courts. In addition, the President is planning to issue an Executive Order to apply some of the recommendations, when possible, to the federal government.

In areas like expert evidence and pretrial discovery, there

will need to be changes in the Federal Rules of Evidence and Civil Procedure. This will ultimately require action by the Supreme Court, after we go through a series of federal committees.

Now, it's just as important to move our reforms forward at the state level, because the states obviously have systems that parallel the federal system. So we're asking state attorneys general, district attorneys, and A.B.A. members around the country to help us implement the parts of the package that fall inside their areas of responsibility. And we're working on model state statutes that will give guidance to the governors and the state legislatures. I might add that I've already brought the civil justice reform issue personally to the National Conference of State Legislators.

The point is: We've gotten off to a good start, and I can tell you this: I am committed, and so is the administration, to a grass-roots campaign to finish the job. That's not to say it'll be easy -- I'm told there have already been fundraisers scheduled to stop us. But this is not a partisan issue, though some will try to make it one. Americans of all stripes -- Democrats and Republicans, lawyers and non-lawyers -- want to see changes in the system.

Special interest groups -- and now, some partisans -- will be out in full force. Already the Democratic Senatorial Campaign Committee has attempted to raise money off of my challenge to the status quo. Their fundraising letter gives an indication of the battle that lies ahead. Let me read you part of it: "If you understand politics, you will understand that the U.S. Senate with its unique rules of procedure may well end up being the last bastion for the protection of the justice system we cherish against an attack spearheaded by the Vice President of the U.S., who clearly intends to try to make a campaign issue of 'greedy' trial lawyers."

I am confident that citizens and legislators on both sides of the aisle will resist the special interest and partisan appeals, and join us in improving our system of civil justice. The public doesn't view this as a partisan issue, and politicians shouldn't either. And I know this about the American people. They understand the issues. They're tired of the excuses; tired of the complaints from those with a vested interest in the status quo.

# # #

PRESS RELEASE

THE VICE PRESIDENT

OFFICE OF THE PRESS SECRETARY

Embargoed until delivered -- August 13, 1991 -- 10:35 a.m. EDT

PREPARED REMARKS BY THE VICE PRESIDENT

ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION
ATLANTA, GEORGIA

The ABA is the largest voluntary professional association in the world. And you have many things to be proud of: from your early leadership in reforming and unifying American law, to your longstanding commitment to service through pro bono activities. Through his "Points of Light" program, the President has tried to reinvigorate the great American spirit of volunteerism. Many members of the ABA have been points of light since the day this organization was formed.

It is in the spirit of the early reformers in the ABA that I join you here today. Our goal, as was theirs, is to improve the administration of justice. Chief Justice Burger once termed this "a task never finished," and that is especially so in a country like ours. Madison's "vast and extended commercial Republic" is now more complex, diverse, and mobile than he could have ever imagined. But the ideals of the republic remain unchanged: the rights of the individual are fundamental in America. We take rights seriously.

So when we think about the command of our Constitution's Preamble, to "establish Justice," we have to start at the doors to the courthouse, and keep them open to every American. We owe them a system in which they can resolve their conflicts promptly, effectively, and fairly. And from the hundreds of county courts throughout America, to the Supreme Court in Washington, we also owe it to the people to maintain the independence and excellence of the third branch of government.

That is why we view it as so important that the Senate confirm President Bush's Supreme Court nominee, Judge Clarence Thomas. The ABA knows Judge Thomas. In fact, you've already considered his fitness to sit on the federal bench, and found him qualified just last year. And the Senate has confirmed him no less than four times for high positions in the federal government.

As you know, there's been a bit of opposition to Judge Thomas's confirmation from some interest groups. But in spite of this ideological opposition, I'm confident that my former colleagues in the Senate will consider this nomination fairly and on the merits. I think the great majority of senators will end up agreeing with the former national board chair of the NAACP,

Margaret Bush Wilson, who wrote last week that Judge Thomas's "record will speak for itself and will impress those willing to listen and look beyond misinformed rhetoric." Ladies and gentlemen, Judge Clarence Thomas is an outstanding nominee. He deserves to be confirmed, and I believe he will be.

Today I want to talk about our legal system's impact on the American economy, on our ability to compete. Through the 1990s, we're going to face many obstacles in the global marketplace. Some will come from the outside; we're still seeing unfair practices on the part of some trading partners -- subsidies, nontariff trade barriers, and the like. But there are other stumbling blocks that we can't make excuses for -- because they're our own fault. And that's the way I think we should look at litigation in America today. Our system of civil justice is, at times, a self-inflicted competitive disadvantage.

Every year in America, individuals and businesses spend more than 80 billion dollars on direct litigation costs and higher insurance premiums. When you include the indirect costs, it may add up to more than 300 billion.

This is just one part of the problem. Look at the sheer number of disputes now flowing through our judicial system. One of the most insightful studies of the system is aptly titled, The Litigation Explosion. In 1989 alone, more than 18 million civil suits were filed in this country -- one for every ten adults -- making us the most litigious society in the world. Once in court, many litigants face excessive delays -- some caused by overloaded court dockets, others by adversaries seeking tactical advantage. In addition, many of the costs confronting our citizens are enormous, and often wholly unnecessary. And in resolving conflicts, Americans don't have enough access to avenues other than the formal process of litigation.

Isn't our legal system in need of reform? Can't we improve the delivery of justice to American citizens? With these questions in mind, the President's Council on Competitiveness, which I chair, assembled a Working Group on Civil Justice Reform. I was pleased that the Solicitor General, Ken Starr, agreed to serve as chairman, and he and his colleagues have done a wonderful job. Their Report, which was endorsed unanimously by the Council, puts forward solid reform proposals in a number of areas. We have 50 recommendations in all; some ambitious, others more narrow. But each will help reduce cost and delay in the system, and make it easier for citizens to vindicate their legal rights.

Many of the Working Group's deliberations centered on the issue of Discovery under Rule 26. This reflects the view of many that, as one corporate counsel told us, "discovery is 80 percent of the problem." Anyone who has ever sued or been sued knows

that discovery too often becomes an instrument of delay and even harassment. Unnecessary document requests and depositions can disrupt or put on hold a company's entire research and development program, and the very idea of limits on discovery is outdated. I'm told of one judge who has said his policy is "just to have the parties exchange filing cabinets."

Worse yet, discovery can be a virtually cost-free weapon for the requesting party. That is what we want to change. The Council suggests the following reform. First, to require disclosure of some basic, core information on both sides. Then, to have the parties meet to formulate a discovery plan, with pre-set quantitative limits, approved by the court and changeable only with good cause. Discovery beyond the set limits is permissible -- but only so long as the requesting party pays his adversary's production costs. We serve no purpose by allowing the extreme waste and expense of marginal and abusive discovery under the federal rules. It is time that we bring it to an end.

It's also time to give people a greater right to choose among methods of resolving disputes. We believe the system should provide a "multidoor courthouse," where parties have options other than formal litigation. This idea builds on much of the ABA's important work on this subject. The Council's recommendation is that before the machinery of litigation kicks in, both sides sit down together -- with a mediator, or in a conference where they tell their stories to an experienced lawyer volunteering his or her time. The object would be to probe the issues carefully but informally, and to weigh the chances for concluding the matter as quickly as possible and without a trial. In line with this procedure, alternative dispute resolution would be made more widely available.

Now, this idea will, of course, empower people with disputes, and it'll help unclog the courts. But it will also help preserve relationships that might be destroyed by the stresses of a courtroom fight, and this is something we should all take very seriously. The great Judge Learned Hand once said that he dreaded a lawsuit "beyond almost anything short of sickness and death." A lot of Americans see things the same way. They find the system bewildering, a little intimidating, and frightfully expensive. That is why the Council advises that we do our best to give the American people a multidoor courthouse. After all, the system belongs to them, and it ought to respond to their needs.

On the question of financing litigation, there's been a lot of discussion on the relative merits of a "loser pays" rule. From our law school days, we know it goes by the name, the English Rule. But in fact, it's the rule in virtually every other western country.

The English Rule is grounded in fairness -- in the equitable principle that a party who suffers should be made whole. Where the Rule operates, the parties are encouraged to look more carefully at the merits of their cases. And there's no doubt that it weeds out a lot of frivolous claims and specious defenses.

On the other hand, to apply the rule too broadly could discourage some suits with true merit -- in civil rights and the environment, to name two areas. For that reason, we propose an experiment: to apply the English Rule in federal diversity cases where the plaintiff elects diversity.

There would be two important features to this experiment with the English Rule. First, the amount to be paid by the losing party would not exceed the amount he spent on his own case. This will keep the other side from loading up expenses to penalize the loser. Second, the rule won't be a guillotine; there will be an element of judicial discretion in its application.

Another item of great concern to the Council is punitive damages. These damages, of course, become an issue only after an injury is found and a compensatory sum is calculated. By definition, punitives aren't essential to compensation; in fact, some jurisdictions don't even have them. Most do, though, because for centuries they've been viewed, I think properly, as an effective punishment and deterrent for outrageous conduct.

The problem is that the method of assessing punitive damages has developed over the years without any real structure or limits. Even a casual observer knows that, in the last several decades, punitive damages have grown dramatically in both frequency and size. What began as a sanction only for the most reprehensible conduct has now become almost routine. In California, estimates are that one in every ten jury awards now includes punitive damages, in amounts averaging more than $3 million. And as these awards become more common, so do the instances of their arbitrary, even freakish application.

Now, as Justice Blackmun wrote in the Pacific Mutual case, there are only modest due process limitations on punitive damages. So the tough issues of reform are left to the political branches. Here is the proposal agreed on by the Council. First, to restore the quasi-criminal nature of punitive damages, they should be awarded in a separate proceeding after the jury has determined liability, and only where there is some element of intent involved. Second, and most importantly, the trial judge would set punitive damages at an amount not to exceed the amount of the plaintiff's actual harm.

This reform will be good in every respect. For starters, it

will preserve the rights of plaintiffs to collect punitive damages in egregious cases, and continue to serve the goals of punishment and deterrence. But it will curtail the randomness of the system -- and restore some measure of certainty to commercial transactions. And, of course, it will leave unchanged the law of compensation.

I've covered for you only some of the high points of the Working Group's report. But the 50 recommendations touch quite a few other aspects of the administration of justice. For example:

- Changing the rules on expert evidence. We recommend that expert testimony be admissible only as far as it relates to a community of opinion or scientific thought. We think it is time to reject the notion that "junk science" is truly relevant evidence. We're also recommending that contingency fees for experts be eliminated. An expert witness should not be an advocate.

- Reforming summary judgment. Where it is appropriate to grant summary judgment, it should also be mandatory.

- Instituting greater flexibility in judicial assignments - to ensure that we have the judges in the places we need them.

A word now about implementation. The Working Group was formed in response to a system we believe is in danger of spinning out of control. For that reason, the Group worked intensively these last eight months, and received input from state and federal judges, scholars, practitioners, and laymen of varying backgrounds. And for the same reason, we have a strong plan for action on the recommendations.

Some of the proposals envision formal legislation, and we will take that to the Congress. In the same vein, we'll be making contact with appropriate officials at the state level, and encouraging them to adopt reforms in their systems. In fact, I'll be presenting some of our recommendations later today to the National Conference of State Legislators. We'll also be communicating with relevant policy groups, and proposed changes in the federal rules will be taken through the proper channels.

And in the executive branch, we intend to take our own advice. The President will soon be issuing an executive order that will apply some of these proposals to the federal government when it engages in litigation. Specifically: to follow the recommendations on expert witnesses; to allow parties in disputes with the government to elect the English rule; and to require a policy-level review of discovery requests.

I'm personally optimistic -- and I know Judge Starr and his colleagues share this view -- that many if not all of the Council's ideas will be adopted. Our inspiration came from the American people: they've seen the problems, they've told us to act, and now they expect us to follow through.

After all, let's ask ourselves: Does America really need 70 percent of the world's lawyers? Is it healthy for our economy to have 18 million new lawsuits coursing through the system annually? Is it right that people with disputes come up against staggering expense and delay?

The answer is no. We are serious about challenging the status quo, and the proposals I've just outlined are offered to inspire dialogue, discussion, and action. Should we succeed, the American people will be the beneficiaries. And so, too, I suggest, will be the legal profession.

This is no time to be timid. If we believe in progress, we must not fear change. And on this bicentennial of the Bill of Rights, we should remind ourselves of the memorable words of Justice Robert Jackson: "Civil liberties had their origin, and must find their ultimate guaranty, in the faith of the people." Our job in government, and your job as leaders in the law, is to strengthen the faith of the people -- in the resolute protection of their rights, and in the effective delivery of justice.

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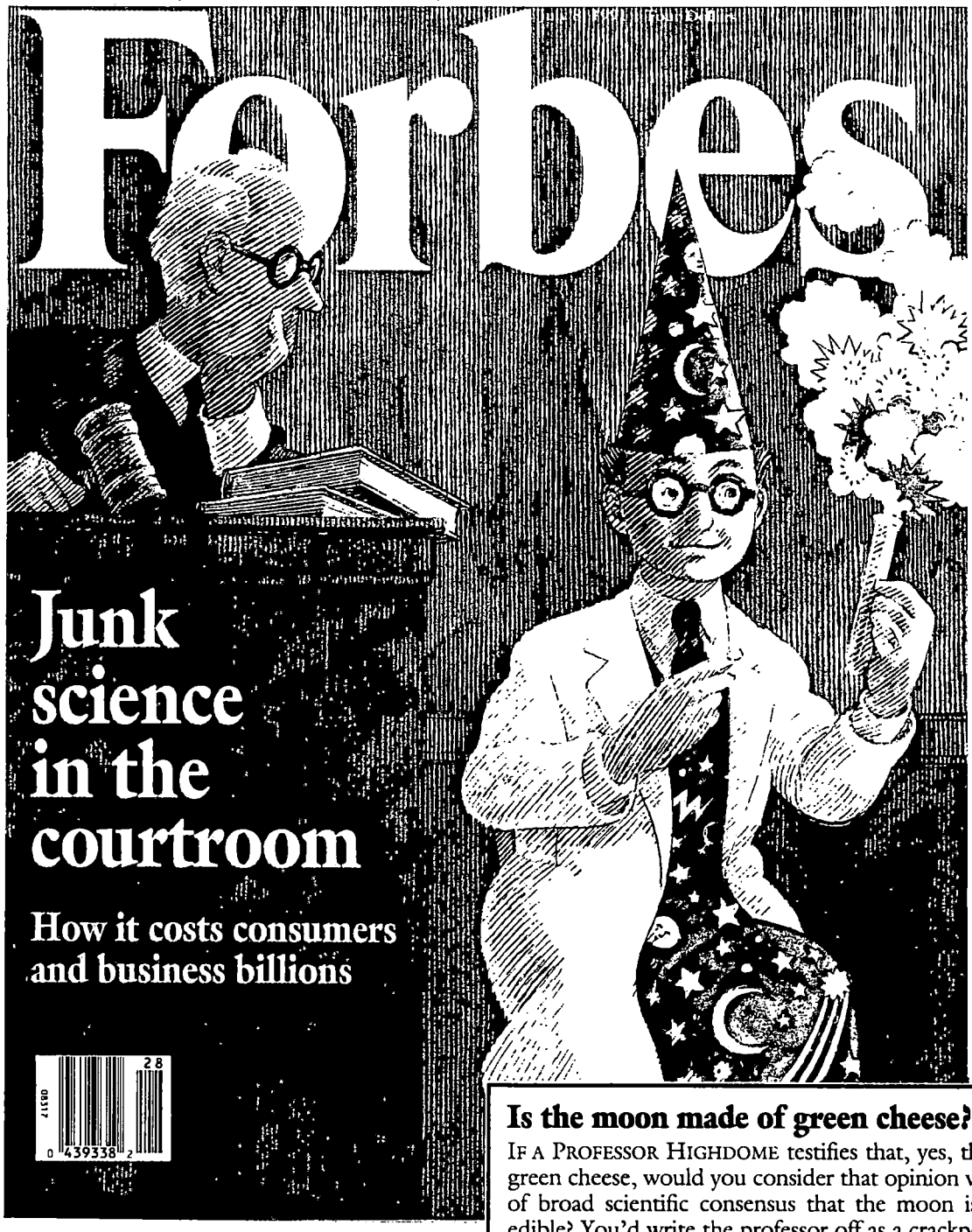


## Is the moon made of green cheese?

IF A PROFESSOR HIGHDOME testifies that, yes, the moon is made of green cheese, would you consider that opinion valid even in the face of broad scientific consensus that the moon is neither green nor edible? You'd write the professor off as a crackpot. But, writes Peter Huber in our cover story, American courts sometimes admit as valid evidence "scientific" testimony hardly more credible than that. Huber, a Ph.D. mechanical engineer with a Harvard law degree, is a senior fellow of the Manhattan Institute and a regular FORBES contributor. In "Junk science in the courtroom," he shows how some trial lawyers use junk science to advance their cases. Some of his anecdotes are funny, but the cost to American business and consumers is no laughing matter. Starts on page 68.

James W. Michaels

Editor

The New York Times Book Review
October 13, 1991
Section 7
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# Tarnished Testimony

**GALILEO'S REVENGE**
*Junk Science in the Courtroom.*
*By Peter W. Huber.*
*274 pp. New York: Basic Books. $23.*

By Elisabeth Rosenthal

IT'S hard to know whether to laugh or weep when reading "Galileo's Revenge," which shows how eagerly lawyers and judges embrace maverick scientists and pseudoscientists as expert witnesses, leaving juries to vote on what is fact and what is false. Peter W. Huber, a former law clerk to Justice Sandra Day O'Connor of the Supreme Court and a columnist for Forbes magazine, makes his case by example. We see lawyers claim that a woman's fall in a store caused her to get breast cancer, even though no medical link is vaguely imaginable. We watch owners of Audis testify that their cars have spontaneously accelerated into fatal crashes, even though a bevy of engineers can find nothing wrong with these cars. We see women attribute the birth defects of their children to a drug to combat morning sickness, even though every scientific study of the drug has shown it to be safe.

Some of these plaintiffs win and some don't, but their fate in court seems to have no connection with the scientific legitimacy of their claims, and that is what makes Mr. Huber so nervous. Scientific scrutiny should lead to consistency, but the jury system, in his view, too often makes malpractice a crapshoot. It reminds him of a child, who, when asked how you tell the sex of a frog, answers, "By voting."

Politicians, the courts and the news media are perhaps all guilty of paying more attention to what people fear than what they really should fear (witness the current paranoia about getting AIDS from your surgeon). And, as Mr. Huber points out, many people suffer on account of such misplaced vigilance. For example, drug companies, afraid of lawsuits, now refuse to make the morning sickness drug, even though thousands of women might benefit from it.

By combining legal history, psychology and sociology, Mr. Huber perceptively traces how the situation got out of hand. He believes there is a peculiar American impulse to find someone to blame when life isn't perfect. He notes, for example, the case of a man who smoked heavily all his life and then sought in court to attribute his lung cancer to smoke exposure from his job as a fireman.

Mr. Huber also introduces us to the sometimes sleazy world of expert witnesses. He tells us of the Medical Legal Consulting Service of Rockville, Md., which, according to him, promises lawyers, "If the first doctor we refer doesn't agree with your legal theory, we will provide you with the name of a second." And we meet a doctor who failed his board certification exams in internal medicine five times and "testified eight times, under oath," that he took them only once; his shoddy science was sufficient to persuade a jury to award $49 million to people who he said suffered from immune damage from pollution.

The book's most serious flaw is that Mr. Huber makes his case powerfully in the first 100 pages — and then makes it over and over again. While the many case studies make good reading, the editorials interspersed among them are at best unnecessary (we get the point) and are often painfully rambling and repetitive.

Buried in the last section of the book, where Mr. Huber states his argument yet again, is a simple solution for getting junk science out of the courtroom: judges, he writes, should require expert witnesses to represent currently accepted scientific theories rather than their own, sometimes fringe beliefs. □

**Elisabeth Rosenthal** contributes articles about medicine and science to The New York Times and is an emergency room doctor at New York Hospital.

**Judicial Studies Program**
*at the Manhattan Institute*

GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM
*by Peter W. Huber*
published October 1991 by Basic Books, Inc.

*Galileo's Revenge* was sponsored by the Judicial Studies Program at the Manhattan Institute, a not-for-profit research organization committed to informing and broadening public debate. This packet contains some of the early press clippings generated by the book, which is available at bookstores for $23.00. To order directly from the Manhattan Institute call 212/599-7000 or fax to 212/599-3494. Mail orders should be directed to:

JUDICIAL STUDIES PROGRAM, c/o MANHATTAN INSTITUTE
52 Vanderbilt Avenue, New York, NY 10017

# *Greedy Lawyers and 'Expert' Witnesses*

By MICHAEL FUMENTO

In recent years, there has been much talk about a litigation explosion in this country. Why? Lawyers are greedy. Americans like a good fight. Litigants are pursuing a risk-free society.

Still, rare is the writer who can make a case for reining in lawyers that is fair, important and original. Such is Peter W. Huber, author of "Galileo's Revenge: Junk Science in the Courtroom," (Basic, 274 pages, $23). The worst part of the book is the title, catchy enough but with little


*"Galileo's Revenge: Junk Science in the Courtroom"*

*By Peter W. Huber*

relevance. For no one would be more horrified than poor Galileo himself at how some American lawyers have bastardized science to make a buck.

Mr. Huber's indictment of the system as a whole falls on judges who bear ultimate responsibility for what takes place in their courtrooms, but it comes down more directly on "expert" witnesses and personal injury attorneys. For the right price, he writes, an expert witness will blame any injury on any deep pocket. Says one criminal and personal injury lawyer: "You get a professor who earns $60,000 a year and give him the opportunity to make a couple of hundred thousand dollars in his spare time and he will jump at the chance." Adds the lawyer, "They are like a bunch of hookers in June."

Some even operate out of bordellos of sorts. The Medical Legal Consulting Service of Rockville, Md., promises lawyers: "If the first doctor we refer doesn't agree with your legal theory, we will provide you with the name of a second."

Yet there would be no prostitution without a steady supply of Johns. "Galileo's Revenge" is replete with horror stories of products and defendants hounded, sometimes into oblivion, by unscrupulous attorneys with dreams of dollar-coated sugar plums dancing in their heads.

One example is that of Bendectin, a drug used since 1956 to prevent morning sickness during pregnancy. In October 1979, the National Enquirer, apparently prompted by the notorious litigator Melvin Belli, broke the story of "what could be far larger than the thalidomide horror," of "untold thousands of babies" born "with hideous birth defects."

Providing the "scientific" basis for the allegations against Bendectin were two obscure scientists who would again fall back into obscurity, though not before collecting huge expert-witness fees. In the worst incident in this feeding frenzy, a jury would award $95 million to the family of an alleged Bendectin victim (a decision later reversed), and the drug's manufacturer, Merrell Dow Pharmaceuticals Inc., would agree to a $120 million class action settlement that was voided only because greedy plaintiffs' attorneys thought they could make more on a case-by-case basis.

In the end, true science may catch up with junk science, in part because the professional colleagues of one of the two scientists has revealed that his work in that area was fraudulent. But Merrell Dow, tiring of the bad publicity and attorneys' fees of upward of $100 million, has taken the expedient route and dropped the drug. It still faces legal action: Just this week, a court awarded $34 million to the parents of a girl born with birth defects after her mother took Bendectin. The Journal of the American Medical Association, meanwhile, has reported a doubling of hospitalizations due to morning sickness and concluded that as a result of the abandonment of the drug, "Birth defects may well increase."

While some may view such problems as simply part of the price of doing business, the ultimate victim, Mr. Huber notes, is the consumer. "Junk science verdicts raise prices, lower production, and deter consumption," he writes.

One defense of product liability litigation is that it serves as a deterrent to unscrupulous or careless businesses by punishing them for malfeasance. But, as Mr. Huber points out, the path-breaking scientific work in areas where there really were problems (occupational exposure to asbestos, the Dalkon Shield intrauterine device and the Ford Pinto, for instance), litigation began years *after* the problem was discovered and after corrective steps were taken.

What should be done? For one thing, Mr. Huber says, courts should apply to witnesses the same standards applied to defendants. "If people who really design cars or deliver babies are to be judged by professional standards in court, those who accuse them must be held to similar account."

But how? Mr. Huber notes that in modern times, "science in the West has been built up through collegiality and consensus," and then makes the questionable suggestion that peer-reviewed medical and science journals may serve this purpose. But, as with science in general, the medical and science journals, including the most prestigious, are being steadily politicized. At the current rate of decay, these journals may be, in a few years' time, almost as much a haven for junk science as are American courtrooms today.

Still, his suggestion that American judges begin consulting their own experts, as they are allowed to do and as European judges routinely do, is certainly a realistic, effective counter to those who would solicit those June hookers.

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*Mr. Fumento is an attorney and journalist who specializes in science issues.*

**BOOK REVIEW**

# Driving Junk Science From the Courts

By BETTYANN KEVLES
SPECIAL TO THE TIMES

A lawyer recently asked if I knew "why researchers had begun using lawyers instead of laboratory rats?" Why? "Because there are so many of them, they are predictable and there are some things rats just won't do."

Rats, for instance, would not risk the public health by accusing the whooping cough vaccine of causing brain damage after 30 years of epidemiological studies have shown it to be safe. Lawyers did.

Unscrupulous lawyers are a cliche, and everybody hates them, especially other lawyers.

Peter W. Huber is an anti-lawyer lawyer, and his "Galileo's Revenge," ostensibly about schlock science, is really an attack on a trendy school of legal theory that, Huber argues, allows lawyers to twist bad science to their will.

Huber presents a lively history of how courts have tried to come to grips with sophisticated medicine and technology. We learn that expert witnesses originally testified on behalf of the court itself until, in the early 20th Century, they began to be hired and paid by the contesting parties.

The caliber of an expert was defined in 1923 in *Frye v. the United States*. The Frye rule, which said that an expert was someone whose testimony was founded on theories, methods and procedures "generally accepted" as valid among other scientists in the same field, dominated the American courtroom for 50 years.

But even this expert testimony wasn't always believed. In 1942, for example, a woman filed a paternity suit against Charlie Chaplin. Experts testified that blood tests showed Chaplin could not have been the father of her child, but the court ruled that he was and ordered him to pay support.

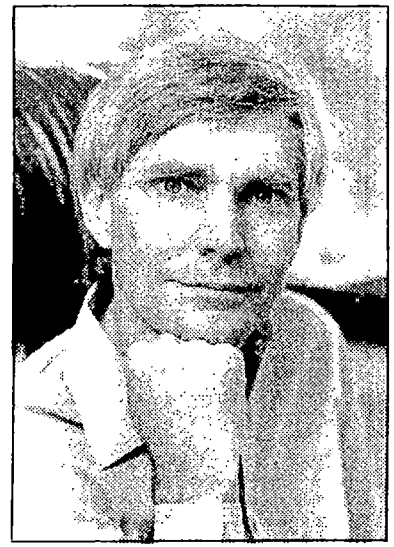
GALILEO'S REVENGE
Junk Science in the Courtroom
*by Peter W. Huber*
Basic Books
$22.95, 304 pages

Since the mid-'70s, Huber tells us, the Frye rule has been largely set aside. Under the new theory of "liability science," anyone is an expert—including fringe scientists.

"Galileo's Revenge" is full of horror stories of junk science testimony that has been accepted in courts, destroying careers and distorting the market place. Charlatans masquerading as modern Galileos—misunderstood geniuses who see wonders where no one else can—have bamboozled juries, leaving the public the big loser.

Remember the aggressive Audi—a car reputed to be so computerized that from time to time it went crazy and accelerated suddenly, causing death and injury? What started out as a few complaints went national on "60 Minutes" in 1986. After that, it was all downhill for Audi. No evidence of a mechanical defect was ever found, but sales declined drastically. After three years—too late—the NHTSA concluded that the drivers probably had their feet on the wrong pedals.

Or take Bendectin. Developed by Merrell laboratories, the drug alleviated severe morning sickness. Like thalidomide, it was used in the first trimester of pregnancy. Then in 1980, a Florida mother sued Merrell, asserting that her son, born with malformed arms, was a victim of the teratological effects of Bendectin.



©1991 JANET FRIES

Peter W. Huber

Other law suits followed, but no connection was found between the drug and birth defects. Nevertheless, Merrell took it off the market. Like Audi, Merrell was eventually vindicated, but today there are no medications available for morning sickness.

"Nauseated?" says a chemist. "See your lawyer."

Huber is very convincing when he describes the histories and techniques of the lawyers who exploited these cases. Their "experts" scrupulously avoid using all scientific evidence such as quantifiable data, controlled tests or publication in peer-reviewed journals.

He is less convincing when he discusses other products, for instance, the Dalkon Shield, an intrauterine birth control device that turned out to be an incubator for bacteria.

Huber maintains that the sexual revolution increased the number of some women's sex partners and that the shields became wicks for venereal diseases. But he does not explain that with another kind of birth control, including other IUDs, these women would have been less likely to develop the pelvic inflammatory diseases that left them sterile.

It is too bad that Huber does not dwell on instances where products—like asbestos, like the Dalkon Shield—have been truly injurious, and the courts a venue for justice. All issues are not black and white.

It is also too bad that he never suggests that a citizenry—jurors, judges and lawyers—better educated in science might not be so easily duped by frauds.

Pleading for a return to Frye standards, or even court-appointed experts, Huber argues that "the rule of law is a completely empty promise if key facts are infinitely plastic, and if there is no external and immutable reality."

I don't see how anyone can disagree with that.

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**Next:** *Jonathan Kirsch reviews "From the Ground Up: The Business of Building in the Age of Money," by Douglas Frantz (Henry Holt).*

# Asbestos Jr.

COMMENTARY BY PETER HUBER

Peter Huber, a senior fellow of the Manhattan Institute, is the author of the just published *Galileo's Revenge: Junk Science in the Courtroom* (Basic Books).

SKIN CANCER is one thing; a freckle is quite another. Getting a difference like that one straight is what it's going to take to solve the asbestos mess—the mother of all messes in our legal system today.

It entangles a couple of hundred thousand claimants, dozens of leading corporations, almost every major liability insurer and reinsurer, and an army of lawyers far larger than any ever assembled before (FORBES, *Feb. 18*). In late July, after 14 years and five previous rulings the other way, a panel of federal judges finally agreed to consolidate pretrial proceedings for over 26,000 pending claims in a single Philadelphia courtroom. Many more cases have been filed in state courts, which are vying among themselves to grab the asbestos dollars while they last. Two new claims are being filed for each old one that is resolved.

There's no denying that asbestos has caused many devastating injuries. Nonetheless, the 2-for-1 figure—which accounts for the inexorable buildup of unresolved claims and the panicky scramble for money—is as much a result of legal astigmatism as of asbestos itself.

Half of all asbestos claims today involve only "pleural plaques"—freckles on the lung. In themselves, these plaques are harmless. They don't seriously affect lung function. They don't grow. They don't indicate any heightened risk of cancer, except in that they do reflect prior exposure to asbestos.

So why then are so many pleural-plaque lawsuits being filed? In the wonderland of our modern legal system, freckle litigation can go a long way. "Exposure," "impact," "emotional distress" or "cancerphobia" can all be good for cash, even in the absence of any tangible physical injury. Our legal system takes maybe-tomorrow injuries far more seriously than it should.

Plaintiffs' lawyers therefore round up pleural plaque plaintiffs with great energy and enthusiasm; people who had no inkling of any problem before being approached by a lawyer are persuaded their days are numbered afterward. Claims are traded, sold and bartered in packages: One or two mesotheliomas (a serious cancer) plus a dozen or so cases of serious asbestosis (lung impairment) and several dozen pleural plaques are exchanged for a settlement check to be divvied up later. The plaques are fillers: They add a lot of bulk and so help boost payouts considerably.

Of all our many strange legal concoctions, the recent unleashing of distress claims has proved to be one of the most misguided. Legal process itself can now generate an almost endless new supply of legal claims. A judge and jury take a distress claim seriously; the public then infers that the distress is well grounded. The overall level of public anxiety grows, giving judges and juries more reason to take distress claims seriously. The it's-serious-if-you-say-so logic becomes completely circular; litigation itself can transform a spark of anxiety into a conflagration.

This is precisely what has happened at the margins of asbestos litigation—to the point where the margins are swamping everything else, and half or more of the cases filed involve no concrete injury at all.

In every other age, and in every other country, the law has dealt with speculative injury by telling claimants to come back when (and if) the speculation ends and some real injury becomes apparent. This takes care of countless claims. Many just disappear; time passes, no injury materializes and fear abates. A few fears turn out to be well founded: What gets compensated then is the actuality of real injury, not just its gloomy anticipation.

This is exactly how judges should be dealing with pleural plaques. They should establish what have come to be called "pleural registries," to take note of who has claimed injury of this kind, and then put the claim on hold. Wait-and-see is the one certain way to distinguish injury in the lung from injury that exists only in the mind. More important, it's the only way to stop the legal system from creating the very injuries—distress, phobia and such—that it claims to be correcting.

Do judges have the power to slow-roll marginal claims with registries? As discussed in a forthcoming article by Yale Law Professor Peter Schuck, judges have broad power to control their own dockets. Given the size of the asbestos backlog, long delays are inevitable in any event. It's perfectly reasonable in these circumstances to focus on serious injuries first. And no matter how intense cancerphobia may be, there's no way it can be as serious as cancer itself. Registries would also increase fairness all around: The package settlement of serious and trivial claims almost always overpays trivial injuries and underpays serious ones.

We learned the lessons of the World War II shipyards years ago: At least some forms of asbestos can be very toxic at high exposures. The asbestos mess tying up the courts now constitutes a second scandal, a mirror image of the first.

The law indiscriminately certifies "victims" of the tiniest of exposures, and compensates "injuries" from the most trivial bodily insults. Year by year, technology grows more adept at measuring exposures and insults from everything—radon or rat poison, bubble gum or botulism, arsenic or asbestos. Thus, we constantly expand our supply of impacts, fears and phobias. The inevitable result is a 2-for-1 mushrooming of all things legal. It is a cancer in itself, which saps resources, clogs the courts and corrodes public confidence.

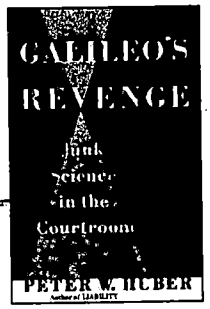
Something must be done. The federal consolidation order is a modestly hopeful sign. ■

FORTUNE
October 7, 1991

**BOOKS & IDEAS**

## LEGAL ALCHEMY IN AMERICA

BY DOUG BANDOW




■ In *Galileo's Revenge: Junk Science in the Courtroom* (Basic Books, $23), Peter W. Huber, a senior fellow at the conservative Manhattan Institute, skewers the growing willingness of gullible juries, swayed by dubious experts and flawed research, to award huge damages to plaintiffs.

Junk science, Huber writes, "is the mirror image of real science, with much of the same form but none of the same substance." It's like relying on an astrologer instead of an astronomer. Guess who's leading the charge to open America's courts to this "hodgepodge of biased data, spurious inference, and logical legerdemain," not to mention "outright fraud"? Right. Lawyers, who have welcomed, in Huber's words, the opportunity to turn "scientific dust into gold."

What such legal alchemy costs society is tough to quantify. But Huber maintains that the price is high and goes far beyond oddball cases, like that of a Philadelphia psychic who was awarded $1 million by a jury because she allegedly lost her powers after a CT scan. (A judge later tossed out that verdict.)

Remember a few years back, when Audi was pilloried on CBS's *60 Minutes* for the alleged "sudden acceleration" of its model 5000-S? Lawyers and their hired experts soon unleashed a slew of lawsuits. What you may not recall, however, is that no plaintiff ever proved a single instance of sudden acceleration. An extensive investigation by the National Highway Traffic Safety Administration blamed driver error—things like stepping on the gas pedal instead of the brake—for the problem. But while Audi didn't lose every case, it lost two-thirds of its U.S. sales.

REMEMBER dioxin, whose presence in waste oil dumped on roads prompted the evacuation of Times Beach, Missouri, and gave rise to many multimillion-dollar legal judgments and settlements? Impressed by new evidence suggesting that dioxin is at worst a weak carcinogen, the Environmental Protection Agency is now reviewing its policy toward the chemical. Several top scientists have stepped forward to label the Times Beach evacuation unnecessary. Even so, the parade of similar legal cases, in which so-called clinical ecologists persuade juries to assess massive damages against companies by ascribing almost every human ill to one chemical or another, marches on undeterred.

According to Huber, judges have encouraged these modern-day witch hunts by loosening the rules that once limited expert testimony. Reversing that trend will require, among other things, raising the standards for professional witnesses and treating work carried on outside the mainstream scientific community with greater skepticism. This is a valuable and timely look at a crucial aspect of America's litigation explosion. ■

DOUG BANDOW *is a senior fellow at the Cato Institute and a Stanford law school graduate.*

THE BOSTON GLOBE
September 27, 1991

# Throwing 'junk science' out of court

By Louise Kennedy
GLOBE STAFF

**Book Review**

GALILEO'S REVENGE
Junk Science in the Courtroom
*By Peter W. Huber*
*Basic Books, 274 pp., $23*

Everybody knows about the Audis that accelerate suddenly for no apparent reason. Or about Bendectin, the drug for morning sickness that causes birth defects. Or about people who are so sensitive to environmental pollutants that they develop "chemically induced AIDS."

The only problem, writes Peter W. Huber, is that all of these things, things that everybody knows, simply aren't so. Audis accelerate unexpectedly because people put their feet on the wrong pedals. Bendectin doesn't cause birth defects. You can't get AIDS from chemicals.

So why did we think otherwise? Because, as Huber explains it, lawyers managed to persuade juries that their clients had been harmed. With the PR campaign of one plaintiff's lawyer, the Audis even made it onto "60 Minutes." After several suits, the manufacturer of Bendectin withdrew it from the market – only confirming the public perception that it was a dangerous drug.

All these cases, and the several others Huber studies in this ferocious and highly readable book, are the product of what he calls "junk science." The plaintiffs' claims rely on the testimony of "expert witnesses," who, as Huber documents with devastating clarity, often have no real expertise in the relevant specialty. A chief proponent of "chemically induced AIDS," for instance, has a medical degree but hasn't practiced for 20 years; he has failed board exams in internal medicine five times; he heads a firm that specializes in ... expert testimony. In short, he's expert only at being an expert – and his "research," Huber says, is as shoddy as you would expect.

Why would any judge let him in a courtroom? The problem, Huber argues, is the abandonment of traditional rules requiring "experts" to be generally recognized in the relevant scientific community. Modern distrust of science, and the accompanying openness to nonscientific ways of analyzing the world, have led to a "let-it-all-in" philosophy that, in the hands of unscrupulous trial lawyers, can put almost any crackpot with a degree on the witness stand. And because the rules of evidence give experts greater leeway than other witnesses – experts may, for example, express opinions and draw conclusions – that crackpot may end up wielding a lot of power over a jury.

In short, Huber – who holds degrees in law and mechanical engineering and is a columnist for Forbes magazine – paints a disturbing picture of the modern legal system, and his passionate argument for a return to "the rule of fact" is eloquent and compelling. But there are moments when his faith in science seems as risky as the superstitions and pseudo-scientific fads he so effectively debunks: Even good scientists can be wrong. And though it's true, for instance, that you can't get AIDS from chemicals, pollutants may well have long-term toxic effects that science simply can't know about yet. To err on the side of caution in such matters, even in the absence of scientific proof of harm, is not paranoia but common sense.

Huber also weakens his case by slipping into easy sarcasm – a temptation that's understandable, given the chicanery of his villains, but nonetheless distracting. And an editor should have helped him eliminate a few redundancies and overemphasized anecdotes: The story of "N-rays," a phenomenon that was "discovered" in France at the turn of the century and then found to be illusory, is entertaining and helps to clarify what he means by "junk science," but it doesn't deserve a whole chapter and several other references in a book about the modern American legal system.

Perhaps Huber was trying to use the repeated references to N-rays, like those to witch hunts and other pseudoscientific crusades of the past, as a metaphor, a running theme to unify what was originally a collection of separate articles into a book. It doesn't quite jell. But Huber is a lively enough writer (and his cited outrages are extreme enough) to keep you reading – and, more important, to keep you thinking about the junk in the courtrooms and how to clear it out.

The Philadelphia Inquirer

# VIEW

Sunday, Sept. 29, 1991 The Philadelphia Inquirer 3-C

## BOOKS

# When scientific quackery takes the witness stand

**GALILEO'S REVENGE**
**Junk Science in the Courtroom**
By Peter W. Huber
*Basic Books. 274 pp. $23.*

A Philadelphia jury awarded $986,000 in damages to a soothsayer who "lost her psychic powers following a CAT scan."

Rhode Island's Supreme Court decided that a woman hit with a large can of orange juice "developed breast cancer as a result."

An M.D. who hadn't practiced medicine in 20 years failed his board certification exam five times, withdrew from it two other times, then testified eight times under oath that he'd sat for the exam only once. He went on to a lucrative career as a medical "expert."

Call it "junk science in the courtroom," and weep. Then dry your eyes and read Peter W. Huber's brilliant and incisive *Galileo's Revenge*.

Huber, a 38-year-old former law clerk to U.S. Supreme Court Justice Sandra Day O'Connor and regular columnist for Forbes, violates your peace of mind in this book. He's like Paul Revere on a desperate paper chase, warning us that big trouble is coming.

By CARLIN ROMANO


Like Rachel Carson's *Silent Spring* on pesticides, and Ralph Nader's *Unsafe at Any Speed* on risky cars, *Galileo's Revenge* sounds the alarms on a nutsy tort system that seemingly belongs to its inmates — one in which second-rate scientists and ambulance-chasing attorneys team up to bilk us all out of big money and a scientifically sound society.

"Junk science cuts across chemistry and pharmacology, medicine and engineering," Huber writes. "It is a hodgepodge of biased data, spurious inference and logical legerdemain, patched together by researchers whose enthusiasm for discovery and diagnosis far outstrips their skill."

The story Huber tells requires superb analytic skills, and he clearly has them. He's comfortable with complexity, capable of weaving abstract legal theory together with oddball newspaper court reports. His punchy Menckenesque prose (he writes of "malpractice by mouth from the witness stand") explains obscure matters without dodging hard intellectual issues.

In his introduction and first two chapters, Huber traces the sources of junk science in the courtroom. Things started downhill when "experts hired by the disputing parties slowly replaced court-appointed experts in nineteenth-century America." Although that change automatically produced greater scientific dispute in the courtroom, a 1923 federal appellate decision, *Frye v. United States*, partly muted the impact by allowing "experts into court only if their testimony was founded on theories, methods, and procedures 'generally accepted' as valid among other scientists in the same field."

According to Huber, *Frye* held sway until the rise of what he calls "liability science." In the late 1960s and 1970s, the so-called "economic theory of law" prodded some influential legal thinkers to seek a more "efficient" tort system. A landmark book by Yale Law School's Guido Calabresi, *The Cost of Accidents*, argued for a social-control view of torts. He urged that courts "charge" accidents to "the person who might have prevented it most cheaply," Huber says.

As Huber lucidly shows, that kind of thinking opened up a scavenger hunt for the "cheapest cost avoider" within a trail of causes. Science would "trace out for the jurist all the antecedent causes of a calamity, from the crushed sports car at the intersection, to the accommodating bartender who had poured drinks for the driver, to the great-aunt who had lent the car, to General Motors which had designed it, to the municipality that had planted the hedge near the traffic light, to the psychiatrist who had counseled the driver on alcoholism."

Economics, in turn, "would reveal where the disaster might have been most cheaply controlled." Unfortunately, determining the "cause" of an event is as much a semantic and philosophical decision as a scientific discovery. And bad science stands ready to muddy both causation and economics, usually in some variation of the "Post hoc, ergo propter hoc" fallacy ("After this, therefore because of this").

What "liability science" actually accomplished, Huber maintains, was to spur ambitious personal-injury lawyers to find causes of harm with deep pockets. It also pushed courts toward watering down the *Frye* rule.

Gradually, he writes, judges have given up on "drawing firm lines between serious science and junk," and have become more willing "to tolerate quackery on the witness stand." Some legal observers call entrepreneurial experts "saxophones" because "the lawyer calls the tune and the expert plays it."

Today, he asserts, "virtually any doctor armed with a medical degree is qualified to testify." And "the new, let-it-all-in standards of evidence" perfectly match "the new go-after-everyone possibilities of liability science."

Huber knows his material like a prepped bar-exam candidate, and the bulk of *Galileo's Revenge* fascinatingly examines areas where junk science runs wild. He explores legal attempts to prove that simple trauma causes cancer (It does not, says Huber), that Audi 5000s "accelerate at random, even when frantic drivers stand on the brakes" ("People sometimes get their foot on the wrong pedal," counters Huber), that "incompetence by obstetricians causes cerebral palsy" (It doesn't, Huber reports.)

He also debunks the "clinical ecology" movement as "medical fantasy," and attacks the lawyers who tried to show that the morning-sickness drug Bendectin caused birth defects ("False," he reports).

In the end, Huber rejects "junk science" as "science without rigor, science without the details." He urges that courts return to respect for community consensus in science, and abandon the principle of letting the most persuasive experts prevail, regardless of scientific truth.

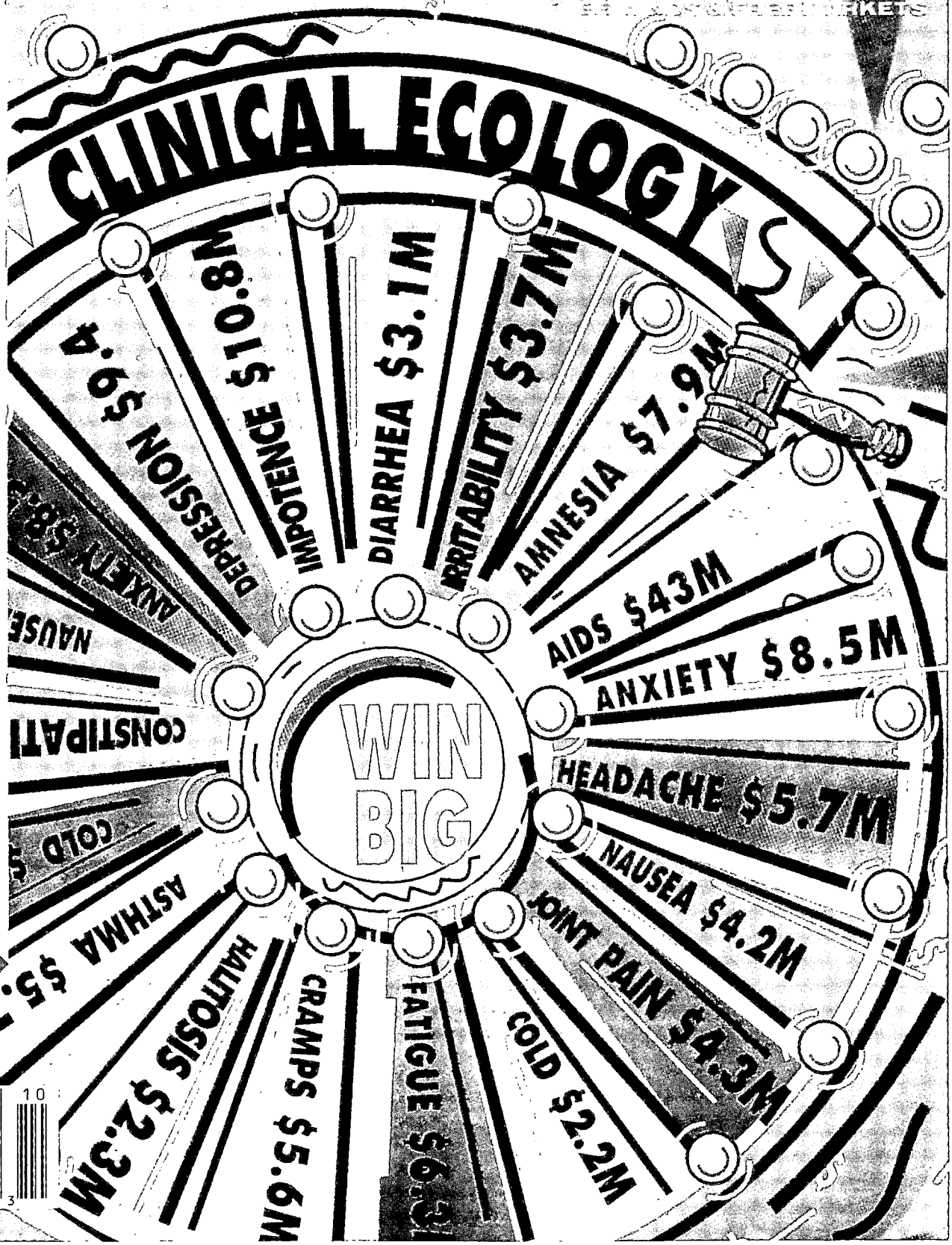
Huber writes so confidently, with such command, that the book can overwhelm critical sensibilities. In fact, later sections of the book, where Huber reveals his free-market leanings ("Junk science verdicts raise prices, lower production, and deter consumption") and his devout faith in science ("Causes just *are*, whether or not we understand them. . . . ), suggest vulnerabilities in his position. Few philosophers of science would buy his latter claim that "causes" don't require interpretation.

No matter. *Galileo's Revenge* is a brilliant expose, though not airtight, and one suspects Huber could raise multiple defenses to any objection.

Since crying "Fire!" in a crowded legal system is no way to make the best-seller list, Huber faces an uphill climb in attracting attention. One wishes him well. *Galileo's Revenge* is demanding, erudite and challenging. But as Galileo muttered to his church inquisitors about that big, heavy, seemingly stationary Earth, "Nonetheless, it moves."

# SPELL OF FORTUNE

## HOW BAD SCIENCE WINS BIG JUDGMENTS

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A Report from the
President's Council on Competitiveness

# Agenda for Civil Justice Reform in America


August 1991

A Report from the
President's Council on Competitiveness

# Agenda for Civil Justice Reform in America

August 1991

THE VICE PRESIDENT
WASHINGTON

MEMORANDUM FOR THE PRESIDENT

FROM: THE VICE PRESIDENT

SUBJECT: PRESIDENT'S COUNCIL ON COMPETITIVENESS
AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA

On behalf of the President's Council on Competitiveness, I am pleased to transmit our report, "Agenda for Civil Justice Reform in America."

Throughout our history, the United States has cherished our system of civil justice as one of the cornerstones of our free and democratic society. It is our civil justice system that protects the individual's rights to life, liberty and property by providing all Americans an opportunity to be heard in an impartial court of law.

In the past 30 years, our legal system has become burdened with excessive costs and long delays. Many features of the current legal system no longer serve to expedite justice or to ensure fair results. Instead, overuse and abuse of the legal system impose tremendous costs upon American society. Each year the United States spends an estimated $300 billion as an indirect cost of the civil justice system.

To address these problems, the Council established a special working group, chaired by Solicitor General Kenneth W. Starr. The working group's recommendations, which were unanimously accepted by the Council, provide concrete steps that can be taken to restore our civil justice system as an institution that is fair to all and serves the ends of justice.

To implement these changes, the Council has recommended fifty specific changes to our current civil litigation system. These changes can be implemented through legislation, by amendment to the rules of civil procedure and evidence, and through administrative actions including an executive order. The Justice Department is preparing the documents necessary for implementation and will coordinate the Administration's civil justice reform effort.

I am confident that these reforms will greatly reduce the burden of excessive, needless litigation, while at the same time protecting and enhancing every American's ability to vindicate legal rights through our judicial system.

# Introduction

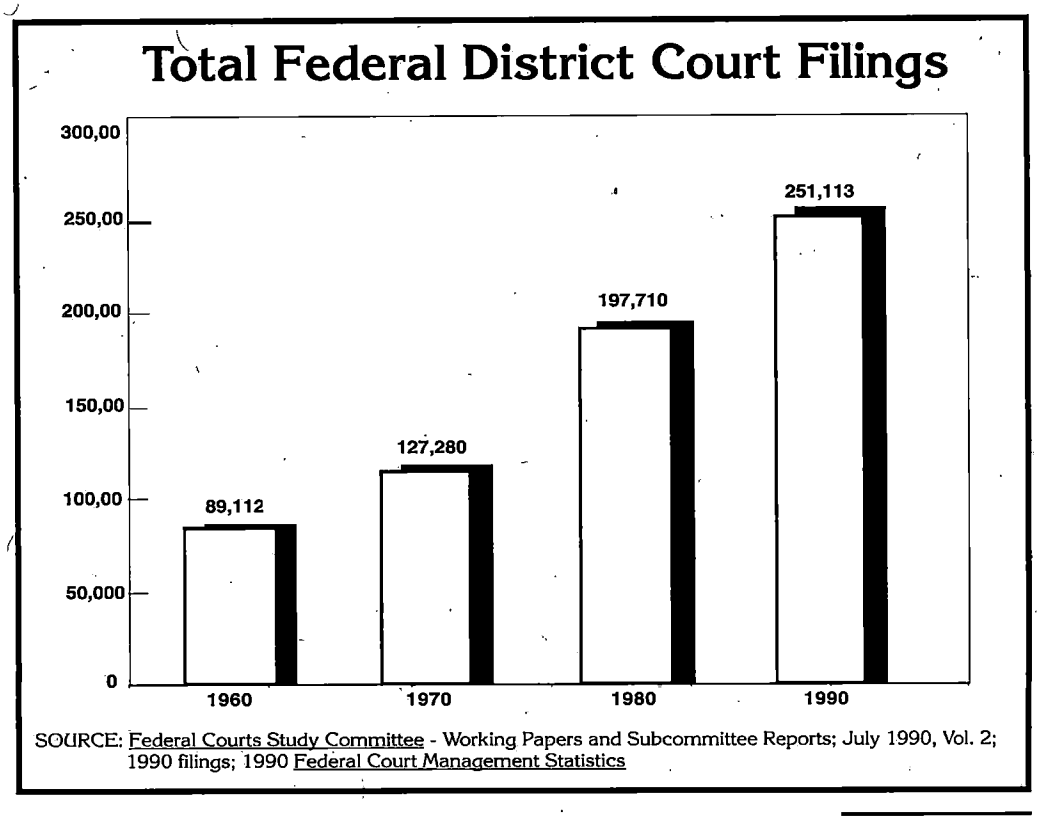
## Litigation and the American Economy

America has become a litigious society. In 1989 nearly 18 million new civil cases were filed in the state and federal courts. This amounts to one lawsuit for every ten adults. In the federal courts alone, the number of lawsuits filed each year has almost tripled in the last thirty years — from approximately 90,000 in 1960 to more than 250,000 in 1990.

This dramatic growth in litigation carries with it very high costs for the U.S. economy. A recent article in *Forbes* estimates that individuals, businesses and governments spend more than $80 billion a year on direct litigation costs and higher insurance premiums, and a total of up to $300 billion indirectly, including the cost of efforts to avoid liability.

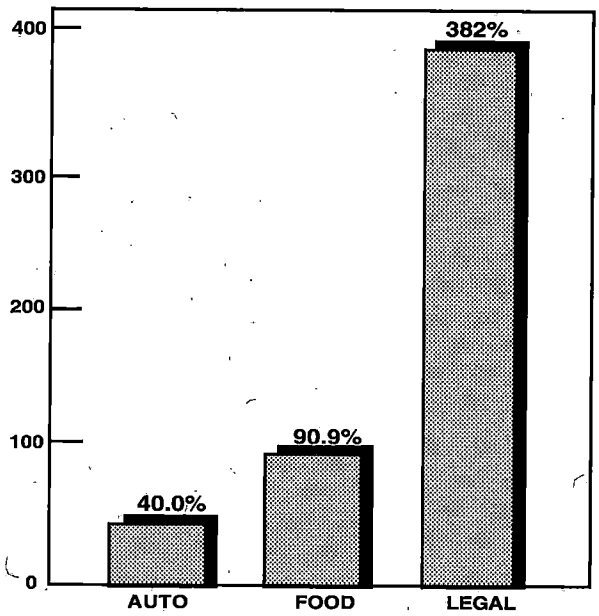
Unrestrained litigation necessarily exacts a terrible toll on the U.S. economy. According to a recent report by a Professor of Finance at the University of Texas, it is estimated that the average lawyer takes $1 million a year from the country's output of goods and services. These baleful effects are

***Businesses and governments spend more than $80 billion a year on direct litigation costs . . .***



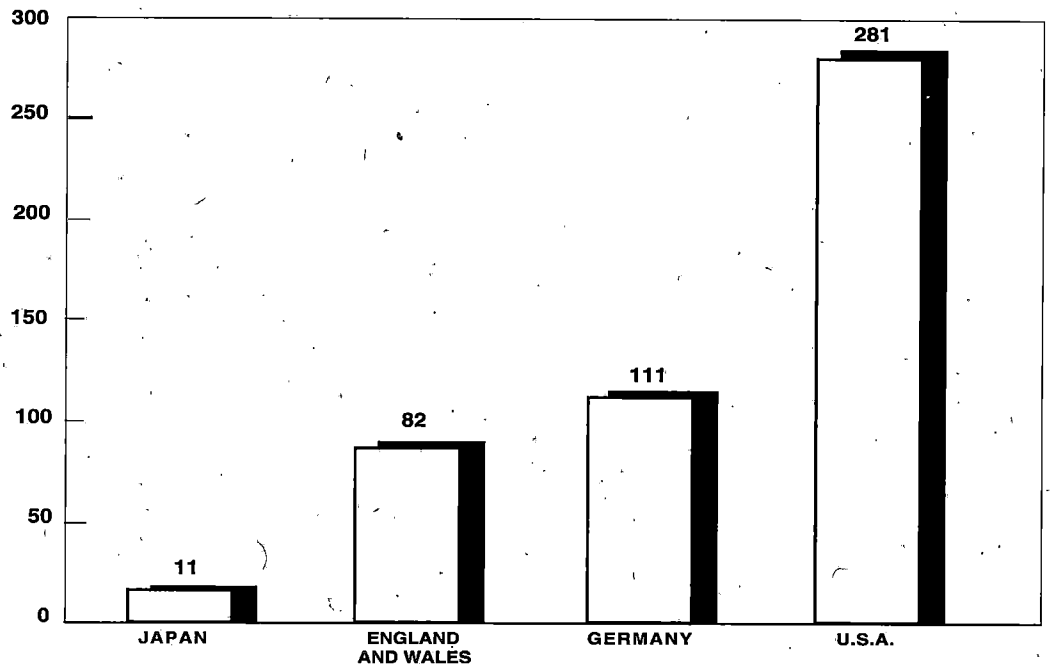

SOURCE: Federal Courts Study Committee - Working Papers and Subcommittee Reports; July 1990, Vol. 2; 1990 filings; 1990 Federal Court Management Statistics

## Growth of the Legal Industry 1977-1989




SOURCE: Survey of Current Business, April 1991; U.S. Department of Commerce.

## Lawyers per 100,000 Population




SOURCE: Cambridge Law Journal, July 1990, Vol. 49 (2); Intro to Research in Japan,1991.

not limited to the domestic economy. According to a 1984 study commissioned by the U.S. Department of Commerce, foreign competitors often have product liability insurance costs that are 20 to 50 times lower than U.S. companies. In a survey of over 250 American companies, more than three-quarters of the executives said they believe that the United States will be increasingly disadvantaged in world markets unless modifications are made in the liability system.

The adverse effects of unconstrained litigation are legion. A recent survey by the Conference Board, a group of 3,600 organizations in over 50 nations, reports that due to potential liability concerns:

- 47 percent of U.S. manufacturers have withdrawn products from the market;
- 25 percent of U.S. manufacturers have discontinued some forms of product research;
- Approximately 15 percent of U.S. companies have laid off workers as a direct result of product liability experience.

While some of these consequences result from meritorious lawsuits, the unnecessarily high cost of litigation is undoubtedly a major factor as well. The current *procedural* system adds costs by prolonging resolution of disputes and encouraging wasteful litigation.

## Discovery

Over 80 percent of the time and cost of a typical lawsuit involves pretrial examination of facts through discovery. Discovery is the stage of the lawsuit where the parties are supposed to obtain and preserve information regarding the pending action, for later use as evidence in the trial. The current rules governing discovery permit parties to roam unfettered through their opponent's most private documents.

***The life of the average civil lawsuit in federal court - - from filing to completion - - is fourteen months.***

An especially burdensome part of discovery involves the taking of depositions — interviews of witnesses taken under oath, often lasting several days and occasionally even weeks. Another potentially intrusive and burdensome discovery practice is the use of interrogatories. The most onerous aspect of discovery, however, is the document demand, whereby litigants can force their opponents to open all of their file cabinets to inspection. Although discovery requests are relatively inexpensive to make, the responding party's costs can be staggering, involving the time of employees to produce materials, attorneys' fees for reviewing materials to be produced, and the physical copying or recording costs.

There are currently no limits to the number of requests that a party can make for discovery items, as long as the requests are at least tenuously related to the action. In one antitrust case, the discovery stage lasted almost

a decade; the plaintiff's final pretrial statement, which was over 10,000 pages long, cross-referenced approximately 250,000 pages of documents.

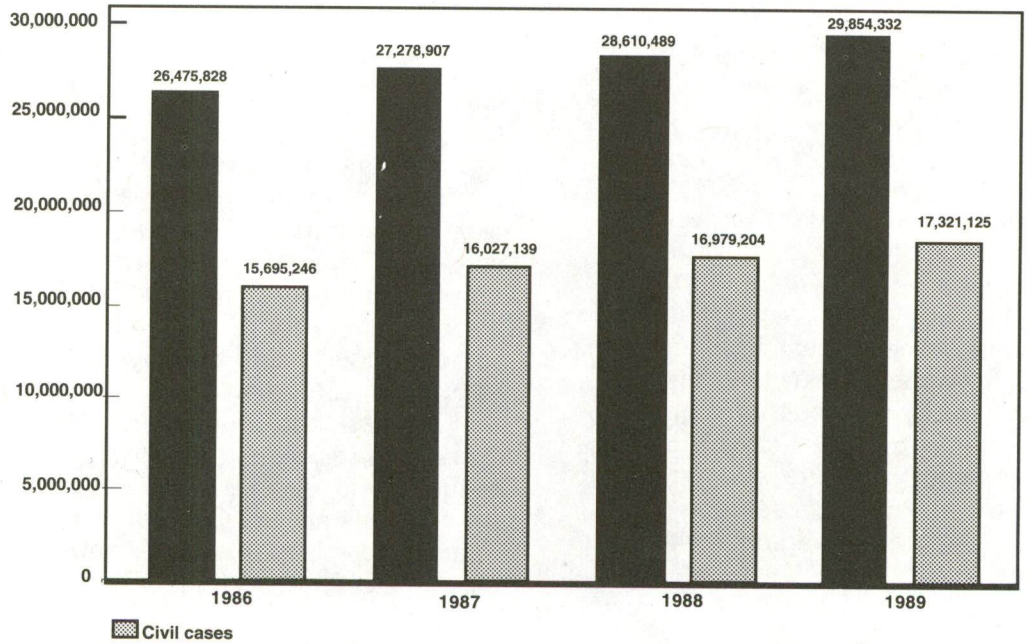
The life of the average civil lawsuit in federal court -- from filing to completion -- is fourteen months. Fully 77 percent of litigators in one large American city acknowledged in a 1988 survey that they had used discovery as an economic weapon against their opponents. One result of this lengthy process is that attorneys' fees account for a substantial portion of all recoveries. In fact, when all of the expenses of the litigation process are added up, the claimants in tort cases often end up with compensation that amounts to only a small percentage of the total money spent. Professor O'Connell of the University of Virginia Law School estimates this figure to be about 15 percent of total litigation costs. A study by the Rand Corporation's Institute for Civil Justice found that in 1985 the legal system incurred a total of $16-$19 billion in transaction costs to deliver $14-$16 billion to plaintiffs in net compensation.

## Expert Witnesses and "Junk Science"

An area of the law particularly ripe for reform is expert witness practice. The Federal Rules of Evidence, which govern most expert testimony, eliminated many of the common law restrictions on the use of expert witnesses. The resulting uncontrolled use of expert witnesses has led to longer trials, more expensive litigation, and a reduction in the quality of expert testimony in many cases.

It has also allowed "junk science" to tarnish the legal process. Peter Huber,

### Caseload for State Trial Courts




SOURCE: National Center for State Courts - Reported Caseloads for State Trial Courts

a leading observer of American courtrooms, has written recently that "scientific frauds . . . are attempted almost daily in our courts, and many succeed." Huber wrote that "the most fantastic verdict recorded so far was worthy of a tabloid:"

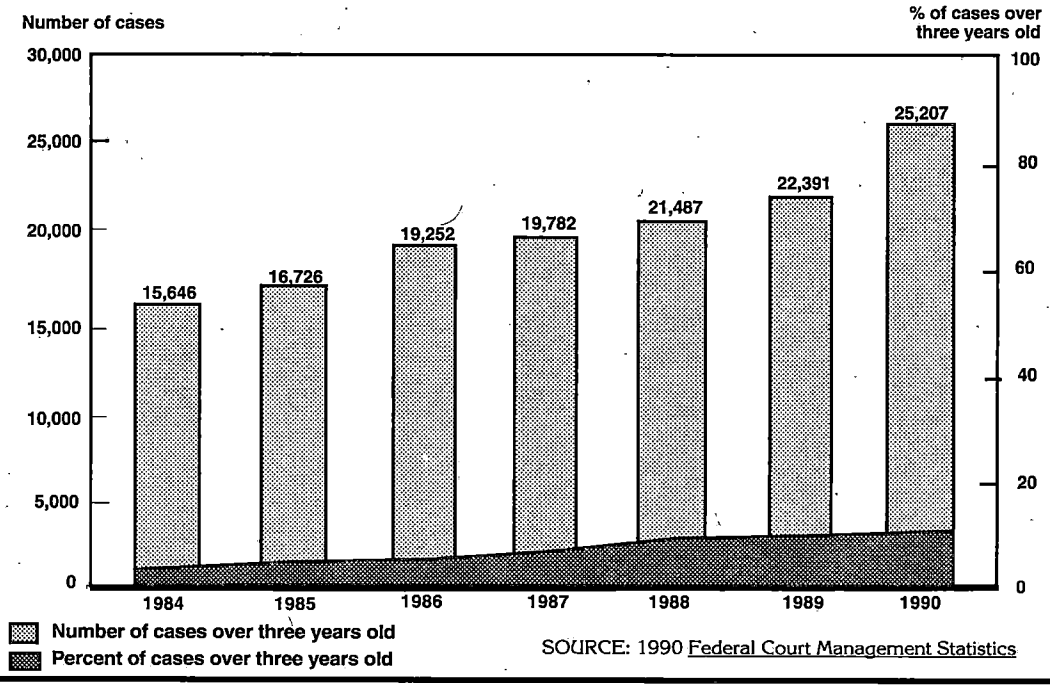
"With the backing of 'expert' testimony from a doctor and police department officials, a soothsayer who decided she had lost her psychic powers following a CAT scan persuaded a Philadelphia jury to award her $1 million."

Stories such as this are becoming almost commonplace. "Expert" witnesses regularly offer their "scientific" opinions on the connections between automobile accidents and breast cancer or environmental pollutants and "chemically induced AIDS". As if the ability to fashion almost any opinion into expert testimony were not enough, there is considerable use of contingency fees to pay expert witnesses. Although expert witnesses are supposed to give objective testimony based on scientific evidence in order to help judge and jury resolve complex matters, this practice easily turns too many expert witnesses into "hired guns."

## Punitive Damages

In the past, punitive damages were assessed only in cases where the defendant was proved to have had a quasi-criminal intent to harm the plaintiff. Today, however, plaintiffs in civil lawsuits routinely ask juries to award not only compensatory damages (for their economic, or out-of-pocket losses) but also punitive damages. And juries are responding with enthusiasm. A 1987 study by the Institute for Civil Justice,

### U.S. District Courts - Number (and %) of Civil Cases Over Three Years Old




SOURCE: 1990 Federal Court Management Statistics

which examined 24,000 jury trials in Cook County, Illinois, found that the average punitive damage award increased, in inflation-adjusted dollars, from $43,000 in 1965-69 to $729,000 in 1980-84 -- a jump of 1,500%. In personal injury cases, the rise has been even more dramatic.

A prominent insurance lawyer in Washington has said that punitive damages "have made civil litigation sort of like the lotteries you have in so many states." Justice O'Connor and Justice Scalia have observed that the "wholly standardless discretion" of punitive damages "appear[s] inconsistent with due process." And former Justices Brennan and Marshall noted that juries "are left largely to themselves in making this important and potentially devastating decision." Commenting on one particularly shocking case, federal appeals court Judge Alex Kozinski speculated: "I suppose next we will be seeing lawsuits seeking punitive damages for maliciously refusing to return phone calls or adopting a condescending tone in interoffice memos."

## The Federal Civil Justice Working Group

In January 1991, a working group on Federal Civil Justice Reform was established under the aegis of the Council on Competitiveness, chaired by Vice President Dan Quayle. The working group, chaired by Solicitor General Kenneth W. Starr, was asked to examine the federal civil justice process and to recommend efficient and effective modifications to reduce unnecessary litigation and to decrease the costs and time required to resolve legal disputes.

The working group was composed of representatives from the White House Counsel's office, the Domestic Policy Council, the White House Office of Policy Development, the Office of the Vice President, the Office of Management and Budget, the Council of Economic Advisers, the Environmental Protection Agency, and the Departments of Justice, Commerce, Treasury and Energy. In June and July 1991, the Council acted on the working group's recommendations and formulated 50 proposals for the nation's civil justice system.

Implementing the reforms proposed by the Council will bring direct economic benefits to the United States. The reforms will allow lawsuits to be resolved quickly so that individuals and companies will be able to redirect assets that were formerly wasted on frivolous and often defensive litigation. Our economy and our country will benefit.

# Council Recommendations: An Overview

## Voluntary Dispute Resolution

Most potential litigants consider only two avenues for dispute resolution: informal negotiation and litigation. The Council on Competitiveness recommends providing greater access to alternative dispute resolution (ADR) techniques that would routinely be available as a substitute for traditional litigation. These techniques include (1) early neutral evaluation, (2) mediation, (3) arbitration, and (4) summary jury trials. The Council also encourages the private sector to employ contract provisions establishing non-judicial means of dispute resolution in order to introduce ADR into the corporate process.

Because more than 92 percent of all civil lawsuits are settled or otherwise disposed of prior to trial, the Council encourages mandatory settlement conferences soon after the commencement of any litigation. The Council suggests that litigants be required to notify the opposing parties of their intention to file suit before resorting to the courts. These actions will enhance the possibility that disputes may be resolved amicably without the courts.

***More than 92 percent of all civil lawsuits are settled . . . prior to trial . . .***

## Discovery

Pretrial discovery is frequently the source of needless delay and expense. Currently litigants have virtually unlimited ability to take sworn depositions of witnesses, request documents and submit written questions to parties.

The Council recommends several fundamental reforms to the discovery process, including disclosure of basic information and an initial round of discovery that would continue to be "free" to the requesting party. This would include an extensive document request, a limited set of depositions and written questions. Beyond this initial round, however, the requesting party would have to pay for additional discovery. The Council also recommends that greater sanctions be imposed if materials are wrongfully withheld.

## More Efficient Trials

Litigation is sometimes necessary when the parties are unable to resolve a dispute through less formal means. The Council recommends several reforms designed to make trial practice more efficient, including urging courts to set early trial dates and to employ summary judgment procedures more frequently to eliminate disputes that can be properly resolved by legal rulings alone.

## Expert Evidence Reform

Reform of expert witness practice is also essential if trials are to remain fair and rational mechanisms for conflict resolution. One of the Council's principal recommendations in this regard is to require expert testimony to be based on "widely accepted" theories. This would eliminate testimony unsupported by professional practice or scientific knowledge. The Council also recommends banning contingency fees for expert witnesses. This should prevent expert witnesses from becoming mercenaries or advocates, instead of impartial and objective witnesses.

## Punitive Damages

The current common law approach to punitive damages frequently distributes awards in a random and capricious manner. While some states have attempted limited reform, the Council recommends a comprehensive package designed to limit and restrict punitive damages.

The Council recommends that punitive damages be awarded in a rational and consistent manner as part of a coherent system. Plaintiffs seeking punitive damages should not be allowed to assign a specific dollar amount to their requests. Where there is clear and convincing evidence of the defendant's intent to cause injury, then punitive damages may be awarded in a separate phase of the proceeding. In any event, however, the amount of punitive damages should not exceed the plaintiff's actual damages.

## Improved Use of Judicial Resources

The Council encourages courts to employ more efficient case management techniques, including flexible assignments of federal district judges. The Council also encourages greater emphasis on resolving intracircuit conflicts. The Council has proposed that circuit courts be maintained at a manageable number of judges, and that the Ninth Circuit, which has almost thirty sitting judges, be split into two circuits.

***The Council recommends that greater sanctions be imposed if materials are wrongfully withheld.***

## Enhanced Incentives for Reduced Litigation

In order to promote more disciplined and less wasteful litigation, the Council proposes to strengthen the current rules which authorize judges to sanction attorneys who file frivolous lawsuits.

The Council also recommends a test of a modified two-way fee-shifting

arrangement whereby the loser of a lawsuit pays the costs incurred by the winner. Although limitations would be built into this system to safeguard equal access to the courts, this reform would encourage pretrial settlements and impose market discipline on the litigation process.

The Council further proposes a moratorium on the more than 150 one-way fee shifting statutes under which victorious plaintiffs recover their fees from losing defendants, while victorious defendants get no such recovery.

## Reducing Unnecessary Burdens on Federal Courts

The federal district and appellate caseloads have skyrocketed in the past decade, creating endless delays and adding substantially to the cost of litigation. The Council has proposed several reforms designed to unclog the federal courts, including revising the threshold for federal diversity jurisdiction, restoring judicial immunity to state court judges for official actions, and reducing abuse of habeas corpus petitions.

## Eliminating Litigation Caused by Poorly Drafted Legislation

The Council recognizes that the federal government bears a great deal of responsibility for the rise in litigation caused by poorly drafted federal statutes. The Council proposes that the Executive Branch closely review all legislative proposals against a "litigation hazards" checklist.

# Council Recommendations: Implementation

The civil justice reforms proposed by the Council may be implemented through one of several approaches. The five principal methods of implementation are (1) federal legislation, (2) revisions to the federal rules of civil procedure and evidence, (3) judicial action, (4) model state legislation and rules, and (5) executive action. Some of the proposed reforms can be implemented through more than one approach. Changes to the discovery process, for example, may be accomplished either by federal statute or through rule changes. Most reforms are also suited to model state statutes, particularly because they permit reforms suggested for the federal systems to be applied in the state courts.

The Administration will draft legislation to implement these recommendations and will work with Congress toward reform. Other changes will require amendment to the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and the Federal Rules of Appellate Procedure. The Administration will draft proposed rules changes and submit the proposals to the Supreme Court's Rules Advisory Committees.

Some reforms can also be accomplished locally by the efforts of individual judges. The Administration will make available innovative management procedures and provide technical assistance to support these suggestions.

Although the reforms contemplate Federal law and rules changes, many of the reforms may be equally applicable to state court systems. The Administration will draft model legislation and model rules changes so that these reforms may be implemented at the state level.

The Administration is committed to the fair, efficient, and early resolution of disputes. To underscore this commitment, the Administration will apply many of the suggested reforms to the conduct of litigation by federal agencies.

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# Recommendations

## VOLUNTARY DISPUTE RESOLUTION

### 1. Promote Voluntary Use of Alternative Dispute Resolution (ADR) Techniques

#### *Provide a Choice for Resolving Disputes: Create "Multi-door Courthouses"*

**Recommendation:** *Create a "multi-door courthouse" to permit the parties to choose between several different methods for resolving their dispute. Before the contest would be set for trial, the parties would attend a mandatory conference to identify the areas in controversy. At this conference the parties would be given the opportunity to resolve their claims through a variety of alternative dispute resolution mechanisms, including early neutral evaluation, mediation, arbitration, minitrial, and summary jury trial. (1)*

Alternative Dispute Resolution (ADR) seeks to resolve controversies with less cost and burden imposed upon the parties. Remedies fashioned through ADR may be more flexible than the restricted relief available through the courts. Because ADR frequently relies upon consensus, its use may foster continuing relationships.

Requiring the parties to explore ADR options at the initial stages of the proceedings will motivate attorneys to analyze the case and prepare basic investigative homework at a much earlier point than would be required by the traditional system. Because this approach can help promote settlement, there could also be a reduction in transaction costs.

Although the parties would be given opportunities to elect ADR, they would not be required to do so. This voluntary approach avoids the danger of creating an additional, and costly, obstruction through which litigants must first travel before they enter the litigation system.

**Action Required: Encourage and facilitate judicial action.**

#### *Promote Greater Awareness of ADR*

**Recommendation:** *Members of the legal, business, and government communities should advocate dispute resolution techniques as an alternative to litigation. (2)*

The primary advantage of alternative dispute resolution is that it allows parties to avoid the time and expense of formal court proceedings. Unfortunately, this benefit may not be adequately publicized. Lawyers, business leaders, and government officials should take the initiative in disseminating the important message that ADR achieves justice.

**Action Required: Executive Branch applies recommendation to federal agencies. Encourage actions to increase public awareness.**

### 2. Require Notice Prior to Filing a Lawsuit

**Recommendation:** *In most cases, the right to sue should be conditioned on a showing that the parties have attempted, and failed, to resolve their dispute. The party alleging harm would be required to prove that it gave timely notice of the grievance prior to filing the suit, except where emergency or*

*other circumstances require immediate resort to the courts without prior notice to the opposing party. (3)*

A pre-complaint notice requirement provides both parties with an opportunity to resolve the dispute at the earliest stages. The parties would have the opportunity to reach an agreement and fashion appropriate remedies at lower transaction costs and without the constraints of court. At the same time, the dispute would be resolved without burdening the court.

**Action Required: Propose legislation to amend appropriate federal statutes.**

## 3. Encourage Earlier Settlement of Contested Cases

### *Provide Incentives for Settlement Offers*

**Recommendation:** *Both parties should be encouraged to evaluate their claims closely and attempt to settle their dispute. Settlement offers advanced prior to trial should be reinforced with financial incentives such as requiring the party who rejected the compromise bear the additional costs of trial unless the outcome at trial exceeds the settlement offer. (4)*

The party continuing to maintain an improperly evaluated claim would be forced to pay the expenses of continuing prosecution after receiving a reasonable settlement offer. This reform creates incentives to make settlement offers early and compensates parties who make good faith offers that are nonetheless rejected.

**Action Required: Propose amendments to Federal Rule of Civil Procedure 68 and Title 28 of United States Code.**

### *Expand Settlement Opportunities Through Settlement Conferences*

**Recommendation:** *Once a lawsuit has been filed, the parties should be required to attend regular conferences to discuss settlement. (5)*

Mandatory settlement conferences would compel the parties to reevaluate their claims and litigation position. These required meetings are currently used with success in several judicial districts. They promote settlement earlier because there are more opportunities to focus issues. Mandatory conferences also overcome posturing by lawyers who perceive that initiating settlement discussions, even in the most appropriate cases, will be seen as a sign of weakness.

**Action Required: Encourage judicial action.**

# DISCOVERY

## 4. Reforms to the Pre-Trial Discovery Process

### *Require Disclosure of "Core Information"*

**Recommendation:** *Parties should be required to disclose basic (or "core") information, such as the names and addresses of people having knowledge likely to bear on the claims and defenses and the location of documents most relevant to the case. This requirement would obligate the parties to make disclosure on their own initiative. Should the core information not be provided, the offending party would not be able to engage in any additional discovery. (6)*

Mandatory early disclosure of core information recognizes that in the vast majority of cases there are basic facts that should be exchanged by the parties in order to reach a satisfactory resolution and that this exchange should be accomplished without gamesmanship or expense. This early exchange would increase the opportunity for effective discovery planning and early settlement discussions.

Providing early disclosure of core information eliminates unnecessary filings and delays in exchanging basic information. Disclosure would be accompanied by the attorney's certification that reasonable inquiry had been made and that the information will be supplemented if additional details become known.

**Action Required: Propose amendments to Federal Rule of Civil Procedure 26.**

### *Presumptive Numerical Limits on Discovery, with Additional Discovery Governed by Market Incentives*

**Recommendation:** *After the disclosure of core information, discovery should be conducted within presumptive quantitative limits and a market-based framework. The parties would be required to formulate a discovery plan within predetermined numerical limits. The parties would then be entitled to conduct any additional discovery, provided that each party would pay the opponent's "production" costs. Judges would be permitted to change the pre-set limits and review costs for good cause. (7-8)*

Parties should have access to relevant information but should not be able to use discovery to impose needless costs upon an opponent. After reviewing the core information exchanged, the parties would meet to formulate a plan that would limit and direct discovery efforts within preset limits. Presumptive quantitative limits on discovery, established in the rules, would set the outer boundaries of the plan unless good cause for additional inquiry is established. The parties would then submit a discovery plan to the court for approval. Either party would be able to pursue additional discovery by paying the costs its opponent would incur in producing the information.

This approach would require the litigants to evaluate carefully their additional discovery requests because paying production costs would discourage marginal or abusive discovery. It also allows the parties significant opportunities to conduct discovery without judicial intervention.

**Action Required: Propose amendments to Federal Rule of Civil Procedure 26.**

### *Penalize Abusive Discovery*

**Recommendation:** *Amend the Federal Rules of Civil Procedure to establish clear standards for imposing sanctions upon attorneys who abuse the system. The party whose conduct necessitated the discovery motion would bear the burden of establishing that its position was substantially justified. Sanctions would be automatic in instances where the court finds an unreasonable, vexatious, or abusive discovery practice. (9)*

While the current rules allow the court to impose penalties upon attorneys, judges should be encouraged to make greater use of sanctions for discovery abuse. At present, judges have the

authority to impose costs (including attorney's fees) incurred in responding to an abusive discovery request, but most judges remain reluctant to levy sanctions for unreasonable or vexatious discovery. Making the imposition of sanctions mandatory provides a further disincentive to litigants who would abuse the discovery process.

**Action Required: Propose amendments to Federal Rules of Civil Procedure 26, 37. Recommend judicial efforts to make discovery sanctions more uniform and predictable.**

### *Encourage Parties to Admit Facts Not in Dispute.*

**Recommendation:** *After a party has admitted factual information, further discovery should not automatically be allowed. The court should have authority, where appropriate, to prevent further inquiry regarding the area admitted. (10)*

Admissions sharpen the dispute by narrowing the contested issues. Parties should be encouraged to admit facts or authenticate documents. Only the most marginal purpose would be advanced by allowing further inquiry once reliable factual information has been admitted. Preventing discovery of admitted facts will eliminate the potential for repetitive and abusive inquiry.

**Action Required: Propose amendments to Federal Rule of Civil Procedure 26(b).**

### *Tie Discovery Requests to the Pleadings*

**Recommendation:** *In making discovery requests, the parties should be compelled to supply the rationale for the discovery by referring to the portion of the complaint, answer or other relevant pleading to be addressed in the desired discovery. (11)*

Requiring parties to explain the relevancy of materials being sought in discovery encourages them to assess whether the request is necessary. This also provides the responding party the ability to evaluate the request in light of the issues in the case. Additionally, this procedure would help focus areas in controversy should resort to court be necessary to decide the discovery dispute.

**Action required: Propose amendments to Federal Rule of Civil Procedure Rule 26.**

## 5. Resolving Discovery Disputes: Reform of Discovery Motions

### *Require Parties to Consult Before Seeking Court Intervention in Discovery Disputes.*

**Recommendation:** *Before requesting that the court resolve a discovery dispute, counsel should be required to certify that they have conferred with their opponent and, despite good faith negotiations, are unable to agree upon a resolution. (12)*

This proposal, currently used in many federal and state courts, would require efforts by attorneys to avoid burdening the court with resolving unnecessary discovery disputes. It recognizes that discovery should be structured to minimize judicial intervention to resolve most pre-trial disputes. As the certification requirement places a

premium upon cooperation, acceptable compromises often result.

**Action Required: Propose amendments to Federal Rule of Civil Procedure 26. While awaiting full rule amendment, encourage judicial action, through adoption of local rules or standing orders.**

### *"Loser Pays" Rule for Discovery Motions*

**Recommendation:** *When the court decides a discovery motion, the losing party would pay to the winner the costs and attorney fees to vindicate the prevailing position. As with the other "loser pays" provisions, this cost and fee shifting could be limited by judicial discretion where appropriate. (13)*

Requiring reimbursement to the prevailing party encourages both sides to evaluate carefully their claims and defenses. This is particularly true for discovery, which is intended to be self-enforcing. Under the previous recommendation, discovery motions could only be pursued after the parties certified their inability to resolve their dispute. Fee-shifting for discovery motions will be an added incentive for the parties to limit unnecessary discovery and should help discourage abusive discovery practices.

**Action Required: Propose amendments to the Federal Rules of Civil Procedure.**

## 6. Maintain Safeguards for Trade Secrets

**Recommendation:** *Courts should retain the ability to preserve confidential and trade secret information. These safeguards should not be eroded by legislative action or rules changes. (14)*

Most courts have broad authority to grant "protective" orders that forbid the disclosure of confidential or trade secret information required to be divulged in preparation for trial. Protective orders enable the parties to learn confidential information necessary to their cases while prohibiting them from using the knowledge outside the lawsuit. Legislatures should resist efforts to limit the ability of courts to grant this relief because these orders allow parties to discover the facts necessary to prepare and evaluate a case for trial, but protect the legitimate confidentiality interest of the parties.

**Action Required: Oppose repeal efforts. Propose amendments to state codes where authority has been restricted.**

# MORE EFFECTIVE TRIAL PROCEDURES

## 7. Early Trial Dates

**Recommendation:** *Judges should establish an early trial date immediately after the initial pleadings are completed. Once established, the trial date should be delayed only for compelling reason or the needs of the court. (15)*

One of the most effective remedies to the costs of the litigation system is establishment of rigid trial dates. Trial dates have a galvanizing effect on attorneys and parties alike; establishing the date promptly and firmly reduces the occasions for delay and

gamesmanship. A side-benefit of this cost-free reform is more efficient use of discovery and the potential reduction of other litigation expenses. This reform need not mean that a "rocket docket" with very small allowances for discovery would be utilized.

**Action Required: Encourage judicial action.**

## 8. Summary Judgment Reform

### *Mandatory Summary Judgment*

**Recommendation:** *Courts must grant summary judgment when there is no genuine dispute as to any material fact and the party is entitled to prevail as a matter of law. The presiding judge must state reasons for denying or granting a motion for summary judgment. (16).*

Summary judgment is a method for resolving cases where the facts are not in dispute. Under Supreme Court precedent, federal courts are compelled to grant summary judgment when there is no genuine issue of material fact. Under the current rule, however, even when it is determined that there is no valid factual disagreement, the judge may refuse to dispose of the case. In addition to conforming the rule to Supreme Court precedents, it would eliminate unnecessary litigation expenses if judges were required to make explicit findings concerning the existence of a factual dispute and to grant summary judgment when no conflict exists. Because the judge would be required to make specific findings even when factual questions remain, the finding will help focus the factual issues for trial.

**Action Required: Propose amendments to Federal Rule of Civil Procedure 56.**

### *Provide Appropriate Deference to Trial Court Findings*

**Recommendation:** *Courts of appeals should accord greater deference to the trial court findings whether a genuine issue of material fact exists. (17)*

The trial court's discretion in reviewing the factual record should be more extensively recognized by the appellate courts. This acknowledgment would not only demonstrate an appreciation that trial judges are more knowledgable about the dispute than appellate judges, but, more importantly, would also assist the court system in disposing of nonmeritorious cases at an earlier stage in the proceedings.

**Action Required: Propose amendments to Federal Rule of Civil Procedure 56.**

## 9. Hands-On Docket Management

**Recommendation:** *Judges should take a hands-on approach to case management. Their active involvement in the discovery process and other pre-trial matters should be encouraged. (18)*

By adopting a "hands-on" policy towards case administration, including the management of discovery, trial judges can play a vital role in expediting litigation and reducing costs. Active involvement by judges early in the proceedings is one of the most effective ways to reduce the time required to resolve a dispute. When judges efficiently manage their cases,

they assist the parties in resolving their disputes. Hands-on management policies have resulted in increasing settlements within nine months of filing to nearly 85 percent in some courts.

At the same time, the Council's recommended system of discovery incentives should make the judge's job easier. The market-based approaches are designed to be largely self-enforcing.

**Action: Encourage greater judicial involvement.**

# EXPERT EVIDENCE REFORM

## 10. Reform the Rules Regarding Expert Witnesses.

### *Require "Widely Accepted" Theories*

**Recommendation:** *Require expert testimony to be based on "widely accepted" theories. A party would have to prove that its expert's opinion is based on an established theory that is supported by a significant portion of experts in the relevant field. (19)*

This revision is designed to eliminate testimony that is far afield from mainstream professional practice or current scientific knowledge. Currently, "expert" witnesses are permitted to offer testimony even if their theories are unproven and are not corroborated by other experts. The Council's recommendations would allow testimony based on respected minority or majority theories while excluding fringe theories.

**Action Required: Propose amendments to Federal Rule of Evidence 702.**

### *Bar Contingency Fees for Expert Witnesses*

**Recommendation:** *Ban contingency fees (compensation in return for a "successful outcome") for expert witnesses. (20)*

An expert witness should have no financial interest in any outcome of a case in which he or she testifies. This reform is designed to keep expert witnesses from becoming mercenaries or advocates, instead of remaining impartial and objective.

**Action Required: Propose amendments to Federal Rule of Evidence 702.**

### *Require Additional Disclosure from Expert Witnesses*

**Recommendation:** *Permit more comprehensive inquiries of proposed "expert" witnesses through interrogatories and disclosure of additional core data, including a list of the expert's publications and a description of the compensation arrangement. (21)*

Compared to the discovery of other witnesses, discovery of experts is very limited. Litigants should be able to scrutinize experts by obtaining more information about them automatically - - namely, a list of publications and a description of the expert's compen-sation arrangement, without cost to the opposing party.

**Action Required: Propose amendments to Federal Rule of Civil Procedure 26.**

### *Permit Depositions without Leave of Court*

**Recommendation:** *Additional expert discovery such as depositions for expert discovery should be permitted, subject to the market incentives regime outlined above. (22)*

Currently, discovery of experts requires a court order if accomplished through deposition. The Federal Rules of Civil Procedure should provide for deposition of experts without need for motion of court. Depositions are particularly useful for civil expert witnesses.

**Action Required: Propose amendments to Federal Rule of Civil Procedure 26.**

### *Expressly Require Courts to Determine that the Expert is Qualified in the Field of Testimony Offered*

**Recommendation:** *Require courts to determine that proposed expert witnesses are legitimate experts in their field before they are permitted to testify. (23)*

This revision would involve judges directly in protecting cases in their courtrooms from unqualified experts. It should have the effect of discouraging parties from retaining unqualified experts

**Action Required: Propose amendments to Federal Rule of Evidence 702.**

### *Resist Efforts to Make Use of Court-Appointed Experts Mandatory*

***Recommendations:*** *Resist attempts to take the review of expert testimony away from juries or force the use of court-appointed experts. (24)*

Judges already have the ability to call on experts. Mandating their use could lead to concerns about judicial favoritism, particularly in jury trials.

**Action Required: Oppose repeal efforts.**

# PUNITIVE DAMAGES

## 11. Reform of Unlimited Punitive Damages

**Recommendations:** *Punitive damages should be awarded in a rational and consistent manner as part of a coherent system. Plaintiffs seeking punitive damages should not be able to assign specific dollar amounts to their request. Rather, punitive damages should be awarded in a separate proceeding. A jury should determine whether punitive damages are warranted based only on "clear and convincing" evidence supporting an award; the trial judge should determine the amount of punitive damages. The amount of punitive damages should not exceed the full amount of the compensatory damages. (25-29)*

The common law method of assessing punitive damages has developed virtually without restriction. Lacking a unifying structure, the current approach to punitive damages will continue to generate disproportionately high awards in a random and capricious manner. Because punitive damages are "quasi criminal," an award should be predicated upon standards of proof requiring some element of intent. Other limitations are needed to restrict the measure of puni-

tive damages that can be levied in any single case.

These reforms reduce the threat of runaway jury verdicts, promote settlements, and promote certainty in commercial transactions by establishing reasonable boundaries for awards. This unified approach will insure that punitive damages are effective in deterring and punishing extreme or egregious conduct.

**Action Required: Encourage state legislative action by means of a model state code.**

# IMPROVED USE OF FEDERAL JUDICIAL RESOURCES

## 12. Flexible Assignments for District Court Judges

**Recommendation:** *Encourage more efficient use of judicial resources through temporary judicial reassignments. Judges from less busy districts should be assigned to districts where there is a more crowded docket. (30)*

Many district courts experience a disproportionate influx of cases from time to time. The result has been significant backlogs in some areas and underutilization in others. The judiciary can address this problem by creating a flexible system that would temporarily transfer judges in response to high caseload demand.

**Action Required: Propose legislation to amend Title 28 United States Code.**

## 13. Enhance Case Management Techniques

**Recommendation:** *To ensure cost-effectiveness, federal judges should utilize procedures to speed management of cases after a lawsuit has been filed. (31)*

Many courts have adopted procedures for speeding the processing of cases and for resolving disputes earlier. Continued innovation should be encouraged within the judiciary to process cases efficiently and fairly. The Federal Rules of Civil Procedure should continue to retain the flexibility to permit tests of promising case management approaches.

**Action Required: Encourage judicial action. Provide necessary technical support.**

## 14. Encourage Use of En Banc Panels to Resolve Conflicting Decisions

**Recommendations:** *Eliminate restrictions that prevent en banc panels where all sitting judges on a federal appeals court jointly decide important legal issues. The use of "mini-panels" with less than a full compliment of judges as a substitute for en banc panels should be eliminated. (32-33)*

En banc hearings occur infrequently because they are discouraged by the current rules. As both the number of appellate judges and cases have increased, most cases are decided by 3-judge panels. All too frequently, separate 3-judge panels in the same circuit answer the same questions differently. The resulting uncertainty from these conflicting decisions

increases litigation. Eliminating the restrictions from the current rule to encourage more frequent use of the en banc process would help promote consistency in the law.

**Action Required: Propose amendments to Federal Rule of Appellate Procedure 35.**

## 15. United States Courts of Appeals Should be Maintained at Manageable Levels/ Reducing the Size of the Ninth Circuit

**Recommendations:** *To avoid the potential for inconsistent decisions within the same judicial circuit, the number of judges on each federal circuit court of appeals should be maintained at a manageable level. The Ninth Circuit should be divided into smaller circuits. (34-35)*

Beyond a certain number of judges, the ordinary operation of a circuit court of appeals becomes unwieldy. The ability to issue clear guidance is often diminished in relation to the number of different decisionmakers. A limit on the number of judges assigned to a single circuit would help ensure a more manageable — and more productive — court. For example, the Ninth Circuit Court of Appeals, currently stretching from Montana to Guam with twenty-eight judges, should be divided in smaller circuits. Previously, other circuit courts of appeals have been split when the number of judges became unmanageable.

**Action Required: Propose legislation to amend Title 28 United States Code, Section 44.**

# ENHANCED INCENTIVES FOR ENCOURAGING MERITORIOUS LITIGATION

## 16. "Loser Pays" Rule for Attorney Fees in Diversity Cases

**Recommendations:** *Adopt a "loser pays" rule in cases involving state law brought under the federal courts' diversity jurisdiction. The loser would pay the winner's costs of vindicating its prevailing position, subject to two limitations: 1) fee shifting would be restricted to the amount of fees the loser incurred and 2) could be further limited by judicial discretion where appropriate. (36)*

Adopting a "loser pays" rule for payment of attorney's fees will provide those bringing suit with a choice of methods to finance their litigation. The rule would help fund meritorious claims not currently initiated because the cost of pursuing the claim would have exceeded the expected recovery. The "loser pays" rule (sometimes called the English Rule) is grounded in fairness — in the equitable principle that a party who suffers should be made whole. Where the rule operates, it also prompts more realistic case evaluation. Because the losing party will be obligated to pay the winner's fees, this approach will encourage litigants to evaluate carefully the merits of their cases before initiating a frivolous claim or adopting a spurious defense.

The "loser pays" rule approach recommended would limit the amount a losing party might have to pay to the sum it expended in litigating the suit.

This would prevent a party from incurring disproportionate expenses for the purposes of penalizing the loser. Limiting the application of the "loser pays" rule to federal diversity cases provides an option for those litigants desiring that each party pay its own attorney fees to pursue their cases in the state courts. Thus, this recommendation will not impact federal statutory rights such as civil rights and environmental protection statutes.

**Action Required: Propose legislation to amend Title 28 United States Code.**

## 17. Strengthen Sanctions Against False Court Filings: Rule 11 Reform

**Recommendations:** *The present attorney sanctions provision, Rule 11, should be retained. Courts should have the power to penalize those responsible for making unfound-ed assertions in filings with the court, not merely the attorney who signs the document. All parties and their counsel should be required to correct any unfounded assertion immediately upon learning of the inaccuracy. Courts should apply sanctions in a uniform manner. (37-40)*

Rule 11 is an important reminder to litigants to avoid filings with insufficient legal or factual support. The rule provides an important deterrent to frivolous conduct and should be retained and strengthened.

Some courts currently construe Rule 11 to apply only to knowledge at the time the document was filed, while other courts require parties to correct filings when they learn of error. Whenever an error or falsehood is discovered, the parties should be obligated to supply correct information. Further, Rule 11 should apply not only to the lawyer who signs the pleading, but also to any other lawyers responsible for the falsehood.

**Action Required: Propose amendments to Federal Rule of Civil Procedure 11**

## 18. Towards More Efficient Attorney's Fees Statutes

### *Moratorium on One-Party Pay Statutes*

**Recommendation:** *Impose a moratorium on statutes that award attorney fees only to the party who initiated the lawsuit and subsequently prevails. Pending a review of the current statutes, subsequent statutes with attorney fees provisions should be advanced only with substantial policy justification, including cost-benefit analysis. (41)*

Over 150 different federal statutes provide attorney's fees and costs if the party bringing the suit prevails, yet fail to compensate the party who has to defend itself from nonmeritorious allegations. The potential award of fees may well increase the likelihood of frivolous litigation. No additional "one-way" statutes should be enacted without a thorough examination of the benefits and burdens they may cause.

**Action Required: Executive Branch imposes recommendation on all federal agencies; encourage Congressional restraint.**

### *Reduce Time Spent Litigating Attorney's Fees*

**Recommendations:** *Amend the Equal Access to Justice Act (EAJA) to provide clear standards for the award of attorney's fees caused by vague and conflicting statutory guidance. The statute should specify that a uniform fee rate be applied absent exceptional circumstances. The uniform rate should be indexed to the rate of inflation. (42-43)*

The Equal Access to Justice Act (EAJA) allows the award of attorney's fees to those who prevail in litigation against the government. Because the statute does not provide clear guidance, additional court hearings are required to set the proper amount of fees. This needless satellite litigation could be eliminated by amending EAJA to replace its vague and conflicting standards. The rate of attorney compensation should be consistent, clearly set forth in the statute, and altered only in limited instances for good cause. Adjusting the uniform fee awardable in relation to a national index would eliminate the need for annual revision.

**Action Required: Propose legislation amending the Equal Access to Justice Act, Title 28, United States Codes, Section 2412.**

# REDUCING UNNECESSARY BURDENS ON FEDERAL COURTS

## 19. Reforming Diversity Jurisdiction

**Recommendations:** *The amount in controversy required to invoke the diversity jurisdiction of the federal courts should be based on the amount of economic damages alleged. This jurisdictional amount should be indexed to the rate of inflation. (44-45)*

The jurisdiction of federal courts extends to cases involving state law only when the parties are citizens of different states. The statute establishing jurisdiction based on diversity of citizenship now requires that at least $50,000 be in dispute to ensure that only the more significant cases are heard in federal court.

Resort to the federal court should be based on the possibility of demonstrable economic harm rather than speculative wrongs. In addition, indexing the monetary threshold to the rate of inflation would eliminate the need for repeated congressional action to revise the jurisdictional amount.

**Action Required: Propose legislation to amend Title 28 United States Code, Section 1332.**

## 20. Restore Full Judicial Immunity to State Court Judges for Judging Cases

**Recommendation:** *Enact legislation to restore judicial immunity to state court judges for the fees and costs they incur in defending their official actions. (46)*

The Supreme Court has held that state court judges may be held liable for attorney's fees and costs under the Civil Rights Attorney Fees Awards Act of 1976. The threat of this liability places an enormous and needless burden on state judges who fear personal liability for decision they make in their official capacity as judges.

**Action Required: Propose legislation to amend Title 42 United States Code section 1983.**

## 21. Reduce Frivolous and Protracted Prisoner Litigation

**Recommendations:** *States should be encouraged to use administrative procedures to resolve inmate grievances. Abusive prisoner litigation should be limited by restricting the number of habeas corpus petitions an inmate may file and by waiving court filing fees only when the petitioner demonstrates a substantial chance of prevailing. (47-49)*

In 1988 over 10 percent of the federal civil docket were prisoner civil rights cases. Many prisoners use the federal courts to harass prison officials or to delay their sentencing.

The vast majority of these cases challenge conditions of confinement in state institutions and can be resolved without resort to the federal court. States should be encouraged to adopt grievance dispute measures that adequately substitute for judicial hearings. The Civil Rights of Institutionalized Persons Act ("CRIPA") should be amended to remove unnecessary barriers to effective grievance procedures.

Inmates also abuse the writ of habeas corpus (which allows federal courts to review state court convictions) by repeatedly filing repeated almost identical actions. Reasonable standards, requiring the consolidation of all issues, are needed. As another method to discourage abusive filings by inmates, courts should also examine closely requests to waive filing fees.

**Action Required: Propose legislation to amend Title 42 of the United States Code, section 1997e; Title 28 of the United States Codes, Sections 1915, 2244, 2254, and 2255.**

# ELIMINATE LITIGATION OVER POORLY DRAFTED LEGISLATION

## 22. Reduce Poor Draftsmanship in Legislation

**Recommendations:** *All proposed laws should undergo a "litigation hazards" review to insure that poor drafting of legislation does not create unnecessary litigation. (50)*

Each year thousands of laws are proposed. Too frequently, poor drafting leaves routine areas *e.g.*, statute of limitations or standards of proof, unaddressed. These ambiguities and omissions result in uncertainty andcourt challenges.

The federal government should develop a list of errors to be avoided in legislation and should apply the checklist to all proposed laws. Where appropriate, the government should make more consistent use of bright-line tests to reduce ambiguities which may lead to litigation. These steps will help promote certainty and will reduce the work of the courts.

**Action Required: Executive Branch imposes recommendation on federal agencies and adds screening to current legislative review efforts; encourage Congressional restraint.**

# The Federal Civil Justice Reform Working Group

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