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Collection/Office of Origin: Speechwriting, White House Office of
Series: Speech File Backup Files
Subseries: Chron File, 1989-1993

OA/ID Number: 13805
Folder ID Number: 13805-008

Folder Title:
National Association of Attorney Generals 3/30/92 [OA 7570] [1]

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THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release March 30, 1992

REMARKS BY THE PRESIDENT
IN ADDRESS TO THE NATION'S ATTORNEYS GENERAL

The Roosevelt Room

10:36 A.M. EST

THE PRESIDENT: Well, may I salute Ken Eikenberry and Jeff Amestoy and all the state attorney generals. And salute also -- whoops, there he is down there -- our own Bill Barr, who I think is doing an outstanding job. And I know he's working closely with everybody in this room.

Bill has his forces moving out on several fronts, from tort reform to relief of prison overcrowding. We've also started what we call the weed and seed initiative. Our plan to get the roots, rip them out of the inner-city violence and then plant seeds of hope with more educational opportunity, with more job training, with a new approach to health care. And then we are going to keep hammering away on the need for enterprise zones.

This plan joins federal, state and local forces to go after and to take back our hardest-hit neighborhoods. They're crucial missions, and I am determined to see them achieved and let nothing stand in the way. The efforts of the Justice Department help shape the kind of legacy that we leave for future generations. And our children must inherit a society that is safe, is sane and just.

And I've also spoken of other meaningful legacies like jobs and a world at peace and certainly strong families. The American heritage which I describe is one where children can sit on their porch without the fear of getting caught in an ugly cross fire, where decent people don't have to hide behind locked doors while gangs roam the streets. Where the message is clear -- when it comes to the law if you're going to take liberties you're going to lose your own, you're going to pay.

We cannot pass this legacy onto our children tomorrow unless we start going after tough crime legislation today. And for three years running, we have called on the Congress to pass a tough crime bill. We've pushed hard, many of you have been at our side in trying to get something done. I want a bill that won't tie the hands of the honest cops in trying to get their jobs done; one that shows less sympathy for the criminals and certainly more for the victims of crime. And most of all, I want to get a crime bill that I can sign.

But law and order mean more than just safe streets and bigger prisons. Reforming the system also means going after public corruption in our cities and our states, the rot that eats away at our institutions and at our trust. Over the past three years this administration has moved aggressively to hunt down corruption and stop it dead in its tracks.

For the record, in '89 and '90 alone the Department secured over 2200 convictions -- 2200 -- in public corruption cases. Judges, legislators and law enforcement officials, part-time crooks, full-time fakes, nobody is immune. And this kind of crime does society real harm because these swindlers aren't satisfied merely with making crime pay, they stick the taxpayer with the tab. And

MORE

millions and millions of hard-earned tax dollars are disappearing from public treasuries every single year and showing up in corruption's back pocket. And this is money that could be building roads or balancing budgets. I am preaching to the choir on this subject because you all are out there on the cutting edge, on the front line all the time trying to do something about the problem.

But the problem is greater than a few individuals who stopped caring -- the problem is a system that has stopped working. And the old bureaucratic system of big government has ground to a halt. And it's not accountable; it is not effective; and it is not efficient -- it's not even compassionate. And the chronic problems we see today are sad proof that the old approaches are producing new failures.

So in this election year, it's understandable, I'm sure, that we hear a lot of talk about change. You all have been fighting for change -- I think I have. And, yes, the time has come for change -- far-reaching, fundamental reform. That's the kind of change that this country needs in the fighting crime field. Not just in fighting crime, incidentally, and not just in government, but all across the board.

And that's why I've -- proposing school choice reform -- just finished almost an hour meeting with our Secretary of Education on that one. So the choices about education can be made from the kitchen table, not from the halls of bureaucracy. Where it's been tried, it has been effective in improving the schools that are not chosen as well as those that are.

And I've proposed a health care reform to improve access for those who need it the most. Legal reform, we need your help on. We've got good proposals up there on Capitol Hill. Our legal reform is shaped so that Americans can start solving their problems face to face instead of lawyer to lawyer. I'm amazed at the number -- the great increase in lawsuits that is really putting a damper on so many aspects in our society.

The kind of change that I'm describing is hard. It has its enemies, and the battle lines have been drawn. The allies have changed versus the defenders of the status quo. So I want to make it very clear which side I'm on; I know which side many of you are on.

So let the cynics say that this is only a fight for the next election. We know it's a battle for the next generation. And I'm very glad you all are here. And what we'll do is go over here, and I'd love to have suggestions from you as to how we might doing our job better down here. And, of course, I'd be glad to take questions and if they're technical, I'll kick them off to perhaps the most able Attorney General a guy could hope to have with him. (Applause.)

Thank you all very much.

END 10:43 A.M. EST

almost $ 16 billion. Now that's nearly 60 percent higher than when I took office in 1989.

My new budget will provide a half a billion dollars for an initiative that we call Weed and Seed. Not enthralled with the name, but listen to what it does. [Laughter] Today, our very able Attorney General, Bill Barr, point man in this new operation, is spelling out all its details. But let me say this much right now. Weed and Seed works this way. First, we join Federal, State, and local forces to weed out the gang leaders, the violent criminals, the drug dealers who plague our neighborhoods. And when we break their deadly grip, we follow up with part two: We seed those neighborhoods with expanded educational opportunities, job training, health care, and other social services. But the key to the " seed" concept will be jobs-generating initiatives such as enterprise zones to give people who call these neighborhoods home something to hope for.

There is more to do to win the final victory in our war on drugs. We are making progress: we are winning. Over the past 4 years, marijuana, crack, and cocaine use has definitely declined. And what's more, today kids aged 9 to 12 are the most antidrug remains 13- to 17-years-old. But last year, for the first time, 13-years-olds mirrored the behavior of preteenagers.

one sentence from here

DEPARTMENT OF JUSTICE COMMAND CENTER

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March 25, 1992
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92 MAR 26 P3:25

**PRESIDENTIAL REMARKS: NATIONAL ASSOCIATION OF ATTORNEY GENERALS
ROOSEVELT ROOM
MONDAY, MARCH 30, 1992
10:15 A.M.**

Ken Eikenberry, Jeffrey Amestoy, welcome to the White House. And to all the State's Attorneys General -- welcome. Attorney General Bill Barr, thanks for that introduction and thank you for the terrific job you're doing. \\

Bill has his forces moving on several fronts -- from tort reform to relief of prison overcrowding, to Weed and Seed. [handwritten: Your] These are crucial missions \ I am determined to see them achieved \ and nothing will stand in our way. \\

The efforts of our Justice Department help shape the kind of legacy we leave for future generations. They must inherit a society that is safe, and sane -- and just. I've also spoken of other legacies: meaningful jobs \ a world at peace \ and strong, healthy families. The American heritage which I describe is one where children can sit on their front porch without fear of getting caught in a crossfire; where decent people don't have to hide behind locked doors while gangs roam the streets; where the message is clear -- when it comes to the law: if you're going to take liberties, you're going to lose your own.

But we can't pass this legacy on to our children tomorrow, unless we start passing tough crime legislation today. For three years running, I've called on Congress to pass my Crime Bill. [handwritten: Fact check: when?] (*) I [handwritten: remember that one year ago, almost to the day, you joined me in the East Room when I transmitted my Crime Bill to Congress ~~and I made action~~ a 100 Day challenge to Congress for action. Well, not only has 100 days passed, but ... [illegible] ... Congress. (?)] [handwritten: was in MAR 6 speech to Cong.]

Like you, I want a bill ~~I can sign, one~~ that shows less sympathy for criminals and more for their victims. and one that does not turn the clock back by overturning Supreme Court decisions favorable to law enforcement. Most of all, I want a bill I can sign.

But law and order mean more than just safe streets. We're also going after the public corruption -- the rot that eats away at our institutions -- and our trust. Over the past three years, this administration has moved aggressively to hunt down corruption and stop it dead in its tracks. For the record: in '89 and '90 alone, the Department secured over 2,200 convictions -- 2,200 -- in public corruption cases. Judges, legislators and law enforcement officials -- part-time crooks and full-time fakes -- no one is immune.

This kind of crime does society real harm -- because these swindlers aren't satisfied with merely "making crime pay" -- they make the taxpayer pick up the tab. Millions and millions of hard-earned tax dollars are disappearing from public treasuries every year -- and showing up in corruption's back pocket. This is money that could otherwise be building roads or balancing budgets.

Think about it: corruption corrodes the quality of services going to those who need them most -- the hungry we want to feed \ the children we want to teach \ the people we want to empower. Corrupt officials aren't just raiding the public purse -- they're polluting the public trust.

You see, the problem is greater than a few individuals who stopped caring. The problem is a system that has stopped working. \\ The old bureaucratic system of big government has grinded to a halt -- it's not accountable, it's not effective,

Insert "A"

I know that having an expanded prison capacity is a priority of yours. Attorney General Bill Barr, is working to restore to you, at the state level, control of your prison systems, and I applaud his efforts. For too long, federal courts have intruded into the day-to-day operation of state facilities. Bill has told me he is open to talking to any of you who think you have lost control of your prison system. I hope you will take him up on that offer.

X?

short sentence?

it's not efficient, it's not even compassionate. The lingering problems we see today are sad proof that the old approaches are continuing to produce new failures.

The time has come for change -- far-reaching, fundamental reform -- not just in government, but across the board. That's why I've also proposed school choice reform: so that choices about education can be made from the kitchen table, rather than the halls of bureaucracy. I've proposed health care reform -- to improve access for those who need it most. Legal reform -- so that Americans can start solving their problems face to face -- instead of lawyer to lawyer.

The kind of change I'm describing is difficult, and it has it's enemies. The battle lines have been drawn: the allies of change versus the defenders of the status quo. I want to make it very clear which side I'm on: inch by inch and day by day I'm going to fight for change. Let the cynics say this is only a fight for the next election. We know it's a battle for the next generation. Thank you very much.

why here?

earlier portion: see Weed + Seed language

I think most of you are aware of our exciting and innovative partnership among federal, state and local law enforcement to combat violent crime in our nation's cities, Operation Weed & Seed. Existing as well as new Federal, State local and private sector resources will be for the first time coordinated and integrated to eliminate violent crime, drug trafficking and drug related crime. The goal is to provide a comprehensive and focused framework under which public agencies, community organizations and citizens can form partnerships to enhance public safety and the overall quality of life. I know Ernie Preate from Pennsylvania and Bob del Tufo of New Jersey have been leaders in this effort and have been working

[illegible] Department of Justice

FEDERAL CIVIL JUSTICE REFORM

TALKING POINTS

1. General Talking Points
2. General Background/Philosophy
3. "How This Helps the Average Litigant"
4. "Discovery"
5. "Expert Evidence Reform"
6. "Reform of Unlimited Punitive Damages"
7. "Modified English Rule for Attorney's Fees"
8. "Executive Order"

FEDERAL CIVIL JUSTICE REFORMS

Speech to American Bar Association House of Delegates
Atlanta, Georgia -- August 13, 1991

<u>Background</u>

- America is awash in a sea of litigation:

  Federal court filings up 300% in the last 20 years;

  With 5% of the world's population, the U.S. has over 70% of the world's lawyers; and

  Almost 50% of all businesses have taken products off the market due to the threat of lawsuits.

<u>Working Group</u>

- Council established a Working Group chaired by Solicitor General Ken Starr to address this "lawyer tax."

- Instructed to recommend <u>meaningful changes</u>, not more studies:

  Reduce cost and delay in the system;

  Try to make system more simple and final; and

  Encourage people to resolve disputes without going to court.

- No reform should limit access to the courthouse, but should make parties evaluate their cases with care.

<u>Council Recommendations</u>

- Council has endorsed approximately 50 recommendations.

- Some of the recommendations introduce market-type incentives:

  "Loser Pays" or English Rule for attorney fees;

  Requiring parties to pay for excess discovery;

  Limiting punitive damages;

  Require experts to use only "widely accepted" theories (no "junk" science); and

  45 other "good government" reforms

<u>Implementation</u>

- Will require combination of legislation and rule changes.

- Some should be applied to federal government immediately through Executive Order.

  Department of Justice is preparing appropriate list.

WHY DID THE COUNCIL LOOK AT CIVIL LITIGATION REFORM?

1. Litigation costs too much
2. Too many frivolous suits keep meritorious suits from being decided.
3. Needless Delay = Wasted Money
4. American companies are placed at a competitive disadvantage

WHAT WERE THE COUNCIL'S OBJECTIVES

1. Reduce costs and delay
2. Open the courthouse doors
3. Insure people their day in court, not endless delay
4. Look at PROCEDURE: Do Not Alter Substantive Law
5. Look at the incentives for litigation
   - apply market discipline
6. Give People greater CHOICE

WHO WORKED ON THE REFORM PACKAGE?

1. Department of Justice
2. Department of Commerce
3. Council of Economic Advisers
4. White House Staff Offices
5. Office of the Vice President

THE VICE PRESIDENT IS PERSONALLY INTERESTED IN THIS EFFORT

JUSTICE WILL BE DRAFTING IMPLEMENTATION DOCUMENTS

HOW THIS HELPS THE AVERAGE LITIGANT

Disputes will be settled earlier -- injured party will receive compensation with less costs and delay:

1. Pre-suit notice provides opportunities to resolve dispute prior to filing lawsuits.

2. Reforms encourage settlement. Parties will be required to attend settlement conferences, thereby overcoming posturing by some lawyers.

3. Other steps to reduce court backlogs will make the courts more accessible to the litigants (case management recommendations, etc.)

Parties will be given more choice in resolving their disputes:

1. "Multi-door courthouses" will provide quicker and less-costly alternatives to trials. Alternative Dispute Resolution options, such as mediation, can achieve effective results without the expense of trial.

2. Participation in ADR will be voluntary, so those wanting complete court proceedings will be able to go to trial.

Litigation will be less costly:

1. Each side will be required to provide basic information up front. It will no longer be necessary to make a formal request for names of witnesses, location of documents, etc.

2. Gamesmanship will be discouraged. The parties must plan their discovery requests within pre-set numerical limits. Unbridled discovery requests will be discouraged, because either the court would have to authorize additional inquiries not in the discovery plan or the requesting party would have to pay the opponent's "production costs."

Prevailing parties will be made "whole"

1. Usually the winner doesn't really win, because he or she still has to pay an attorney. Under the Council's "Loser Pays" recommendation, in some instances the loser will pay the winner's attorney's fees.

2. This experiment is limited to federal court cases where citizens of different states are suing each other, so the parties can always go to state court. Also, the loser will never pay more than what he spent on fees.

DISCOVERY

Recommendation: Reform the Pre-trial Discovery Process

1. Require Disclosure of "Core Information"
   (Parties must disclose basic information, such as the names and address of people with knowledge relevant to the dispute and the location of documents. This would make it easier for parties to plan their discovery need and eliminate some gamesmanship.)

2. Presumptive Numerical Limits on Discovery/ Pay-as-you-go for Additional Discovery
   (Parties must meet to plan their discovery needs subject to pre-set ceilings on the amount of inquiry allowed. Additional discovery would always be permitted as long as the requesting party paid the other side's "production costs." Judges would have some discretion to adjust the limits and review the costs.)

3. Penalize Abusive Discovery
   (There should be greater penalties for discovery abuse, or when a party withholds information. The penalties should be uniform and mandatory.)

4. Loser Pays in Discovery Motions
   (Parties should be encouraged to resolve their discovery disputes without court intervention. If it becomes necessary for the court to decide, the losing party should be required to pay the winner's costs and attorney's fees.)

5. Retain Protective Orders
   (Trade secret and other confidential information necessary for disposition of a lawsuit should not be used outside the case. Lawsuits should not be a vehicle for industrial espionage.)

EXPERT EVIDENCE REFORM

Recommendation: Reform the Rules Regarding Expert Witnesses

1. Require "Widely Accepted" Theories
   (Theories must be "widely accepted" by others in the field before a witness can testify as an expert. The expert's "theory" need not represent the majority view, but it must be independently corroborated. Independent corroboration will lead to more "mainstream" science because the parties will desire to avoid hiring multiple expert witnesses.)

2. Ban Contingency Fees for Expert Witnesses
   (Experts should be impartial aides in assisting the court find <u>facts</u>. However, when an expert's compensation is directly related to success at trial, his objectivity must be called into question. Experts should not become advocates.)

3. Require Courts to Find that Experts are Qualified
   (Judges should be active in protecting their courtrooms from spurious experts.)

4. Require Experts to Provide Credentials and Theories
   (Currently, parties cannot take an expert's deposition without leave of court. Experts should be subject to the same types of discovery as other witnesses.)

5. Avoid Attempts to Require Court-Appointed Experts
   (Some suggest that only the judge should be able to seek expert testimony. It is important that the parties retain the ability to call experts (subject to the Council's restrictions).) expert.

REFORM OF UNLIMITED PUNITIVE DAMAGES

Recommendation: Develop rational and consistent approach to punitive damages.

1. Eliminate Prayers for Specific Dollar Amounts
   (Plaintiffs currently make astronomical requests for damages. These requests, which inflame the jury, should be eliminated.)

2. Bifurcate Trials
   (The jury would award punitive damages -- but in a separate proceeding after liability has been determined. This would insure that imposing punitive damages is a measured decision, not one of passion.)

3. Require Higher Standards of Proof for Awards
   (Because punitive damages are "quasi-criminal," an award should be predicated on standards of proof requiring some form of intent.)

4. Judges Award Amount of Punitive Damages
   (After the jury finds that punitive damages are appropriate, the judge would determine amount that should be award. This would remove some prejudice from the system.)

5. Tie Punitive Damages to Amount of Actual Damages
   (Punitive damages would be capped at one times the actual damages. An injured party would still be entitled to full compensatory damages.)

MODIFIED ENGLISH RULE FOR ATTORNEY'S FEES

Recommendation: Adopt a "loser pays" rule for attorney's fees in federal diversity cases.

1. Loser pays the Winner's Attorney's Fees
   (This would encourage parties to evaluate their cases with greater care. Plaintiffs would consider whether they have a realistic chance of prevailing and thereby be discouraged from bringing frivolous or harassment suits. Defendants, too, would be encouraged to pay meritorious claims, as maintaining unreasonable defenses would result in paying the plaintiff's fees.)

   (The rule also is fair. It makes the winner whole.)

2. Limitations:

   a. Federal Diversity Cases Only

   (The "experiment" would apply only in federal court, and only when citizens of different states are contesting issues of state law. This means that cases brought under federal and state statutes, <u>i.e.</u> civil rights, environment, etc., would not be discouraged. It also means that the parties would have the option of going to state court if they did not want the loser pays rule.)

   b. Limited to amount loser spends

   (The most the loser would be required to pay is the amount he has spent on his own case. This means that if he spends $5,000 to bring a suit and the defendants runs a $500,000 bill, the loser would be required to pay the winner $5,000.)

   c. Judicial Discretion

   (The court would have the discretion to reduce the loser's obligations for good cause shown.)

Council on Competitiveness
Federal Civil Justice Reform
Talking Points - Executive Order

Working Group

- o Council established a Working Group chaired by Solicitor General Ken Starr to recommend solutions to the high costs of litigation.

- o Vice President instructed the Working Group to produce meaningful changes, not more studies:

  Reduce cost and delay in the system;
  Try to make the system more simple and final; and
  Encourage people to resolve disputes without the courts.

- o No reform should limit access to courthouse, but should make parties evaluate their cases with care.

Council Recommendations

- o Council has endorsed approximately 50 recommendations.

- o Some introduce market-type approaches:

  "Loser Pays" or English Rule for attorney fees;
  Requiring parties to pay for excess discovery;
  Limiting punitive damages;
  Require experts to use only "widely accepted" theories.

Implementation

- o Reforms will require legislation and rules changes at both the Federal and State levels.

- o To show that the recommendations are reasonable and workable, we should apply some of them to the Federal Government through an **Executive Order:**

  - Encourage ADR to resolve Government claims
  - Apply expert witness recommendations
  - Allow parties to elect "loser pays" or English Rule
  - Require "policy level" review of discovery requests
  - Increase use of Rule 11 by government
  - Adopt a "checklist" review to insure that statutes and regulations clearly set out statute of limitations, etc.

- o **Executive Order** would apply to civil litigation only.

- o **Executive Order** would be prepared with Department of Justice to insure that the requirements are workable and while government attorneys are held to higher standard, their ability to represent the client is not impaired.

FOR IMMEDIATE RELEASE FEBRUARY 4, 1992

THE PRESIDENT'S COUNCIL ON COMPETITIVENESS

"AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA"

IMPLEMENTATION FACT SHEET

> Excessive cost and delay in our civil justice system harm the American people and impair their ability to compete in the global marketplace.
>
> Vice President Dan Quayle

Many features of our civil justice system no longer expedite justice or insure fair results. Instead overuse and abuse of the legal system impose tremendous costs on American society.

To address these problems, the President's Council on Competitiveness, chaired by Vice President Dan Quayle, developed 50 recommendations for improving the civil justice system. Reported in the "Agenda for Civil Justice Reform in America," these recommendations help reduce the inordinate cost and delay found in the system. As most of the proposals have been tested in federal or state courts and have proven effective, the Agenda presents a comprehensive approach to effect meaningful change in our overburdened civil justice system.

The Administration is committed to the fair, efficient and early resolution of disputes. This commitment is demonstrated by efforts to implement reform at all levels: Executive branch action, Federal legislation, Federal rules changes, and model state packages.

Executive Action

As a catalyst for civil justice reform, the Administration has already implemented many of the Agenda reforms in the Federal government. To promote more efficient litigation in actions involving the United States Government, on October 23, 1991, President Bush signed Executive Order 12778. To help make the Government's litigators a model for the private sector, the President directed all Federal agencies to encourage voluntary dispute resolution, limit unnecessary discovery, avoid "junk science," and, where appropriate, use the "Fairness" or "loser pays" rule for attorneys' fees. The directive also provides a "litigation checklist" designed to reduce legislative drafting errors that cause uncertainty and unnecessary litigation.

Federal Legislation

On February 4, 1992, President Bush transmitted the "Access to Justice Act of 1992" calling upon Congress to enact reforms requiring federal legislation. Among the Act's provisions are:

Multi-Door Courthouse - Establishes alternative dispute resolution (ADR) programs to provide effective alternatives to trials. Parties would gain the opportunity to choose between several methods of resolving their disputes.

Pre-Complaint Notification - Encourages resolution at the earliest stages, in most cases the right to sue is conditioned upon giving notice to the intended parties of the nature of the dispute.

Fairness Rule - Adopts a "loser pays" rule in cases involving state law brought under the federal courts' diversity jurisdiction. This rule is grounded in the equitable principle that prevailing parties should be made "whole." The loser would pay the winner's legal expenses subject to limits, including when payment would be "unjust."

Federal Rules of Civil Procedure and Evidence

Through the Supreme Court's rulemaking process, the Administration is proposing amendments to the Federal Rules of Civil Procedure and Evidence to help make the system more rational and efficient:

Discovery Reform - Discovery consumes 80 percent of the time and money in litigation. Our proposal will require automatic disclosure of basic or "core information" and mandate discovery planning conferences. After presumptive numerical limits are met, additional discovery would be governed by market incentives.

Expert Evidence Reform - Experts, who unlike other witnesses, are allowed to present their opinions should be required to base their testimony on "widely accepted" theories instead of "junk science." Our proposal requires courts to determine that proposed witnesses are legitimate experts in their field and bans contingency fees paid to expert witnesses in return for a successful outcome.

State Legislation and Rule Changes

Most reforms proposed for the Federal system are equally applicable to the states. As a result, the Administration has published the Civil Justice Reform Model State Amendments and the Model State Punitive Damages Act to assist with reforms in the state systems. Reform at the state level could have a dramatic effect since that is where most litigation occurs.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release February 4, 1992

FACT SHEET

ACCESS TO JUSTICE ACT OF 1992

As promised in the President's State of the Union Address, the Administration today transmitted to Congress the "Access to Justice Act of 1992" to enact major reforms in the nation's civil justice system. The Act embodies the fifty recommendations contained in the report "Agenda for Civil Justice Reform in America," written by the President's Council on Competitiveness under the chairmanship of Vice President Dan Quayle. These proposals seek to restore fairness to our judicial system and to eliminate the economic burden placed on American society by excessive litigation.

The "Access to Justice Act of 1992" provides an opportunity to elect an alternative to litigation, seeks to make the prevailing party whole by providing compensation for legal fees, permits the opportunity for pre-trial settlement, and allows legal fees to be recovered in suits initiated by the United States. None of the reforms impairs any substantive legal rights. Instead, they will help ensure that deserving victims actually receive their compensation earlier and with less expense.

The Problem: An Overburdened System

With 70% of the world's lawyers, it is not surprising that America has experienced a litigation explosion. The number of civil lawsuits filed in the federal courts each year has more than tripled in the last thirty years.

This tremendous growth of civil litigation has overburdened our court system and imposed higher costs on small businesses, professionals, industry, and Government at all levels in the form of excessive legal fees, court costs, and wasted individual time and effort. Every year, our legal system costs Americans, directly and indirectly, an estimated $300 billion.

Higher costs mean higher prices for American consumers for everything from household goods to medical treatment. Higher costs also reduce America's ability to compete in the global marketplace.

"Access to Justice Act of 1992"

In order to reduce litigation costs, promote swifter justice, protect individual rights, and restore the integrity of our legal system, among the provisions of the "Access to Justice Act of 1992" are the following reforms:

Multi-Door Courthouse - To give consumers the opportunity to elect an effective alternative to court adjudication, federal courts would be required to establish multi-door courthouses for a three year period. Multi-door courthouses foster alternative dispute resolution (ADR) procedures rather than trials to settle disputes. The parties would be free to select from different ADR procedures such as early neutral evaluation, traditional mediation, outcome determinative mediation, mini-trials, summary jury trials, and arbitration.

Pre-Litigation Notice of Claims - In order to provide parties with the opportunity to settle their disputes at the earliest stages, the Act requires pre-complaint notice. Where appropriate, the right to sue in federal court is conditioned upon giving notice to intended parties of the nature of the dispute. This procedure will allow parties to reach an agreement and fashion appropriate remedies at lower costs without court involvement.

The Fairness Rule - The United States is one of the few countries which does not allow the winning party to recover the costs of litigation. Instead, winners and losers alike pay their own legal fees. The "loser pays" provision would help fund meritorious claims not currently initiated because the costs of pursuing the claim would have exceeded the expected recovery.

The Act proposes an experiment with the "Fairness Rule" for private parties in bringing state law claims under the Federal court's "diversity" jurisdiction. Litigants who desire the traditional arrangement, where each side pays its own attorney, may file the same cases in state courts. The Act also limits the amount the loser must pay to the sum it expended in litigating the suit and specifies that courts should not require the loser to pay if circumstances make payment "unjust." Finally, the Act allows parties the option to elect the Fairness Rule in suits initiated by the United States and disputes pursuant to the Contract Disputes Act of 1978.

Cost of Living Adjustments - The Act establishes a clear, uniform methodology for calculating federal court jurisdictional amounts and fees under the Equal Access to Justice Act.

Reform of the Judicial System - The Act re-establishes the immunity of state judicial officers. To facilitate swifter case handling, the Act encourages better case management, permits flexible assignment of federal district court judges, and clarifies appellate in banc procedures. Similarly, the Act amends the Civil Rights Act of Institutionalized Persons Act (CRIPA) to permit administrative resolution of inmate claims.

The "Access to Justice Act of 1992" will greatly reduce the burdens of excessive, needless litigation while protecting and enhancing every American's ability to vindicate legal rights through our legal system.

The "Access to Justice Act of 1992" results from the recommendations prepared by the Council on Competitiveness Working Group on Civil Justice Reform, chaired by Solicitor General Ken Starr. In August, 1991, the Council's chairman, Vice President Dan Quayle transmitted the recommendations to the President in the report "Agenda for Civil Justice Reform in America." Many of the proposals were implemented for litigation brought by the U.S. Government on October 23, 1991, when President Bush signed Executive Order 12778 on Civil Justice Reform. In addition to the Executive Order and the "Access to Justice Act of 1992," the Administration will continue to work to implement the Civil Justice Reform initiative at the federal and state level.

ACCESS TO JUSTICE ACT OF 1992

A BILL

To provide greater access to civil justice by reducing costs and delay and for other purposes.

1 Be it enacted by the Senate and House of Representatives of
2 the United States of America in Congress assembled, That this Act
3 may be cited as the "Access to Justice Act of 1992".
4
5 SEC. 101. FEDERAL DIVERSITY JURISDICTION; SUM IN
6 CONTROVERSY.

7 Section 1332 of Title 28, United States Code, is amended by
8 redesignating subsection (d) as subsection (g) and inserting
9 after subsection (c) the following new subsections:
10 "(d) In determining whether a matter in controversy exceeds
11 the sum or value of $50,000, the amount of damages for pain
12 and suffering or mental anguish, punitive or exemplary
13 damages, and attorney's fees or costs shall not be included.
14 "(e) On February 1 of each year, the monetary amounts
15 referred to in subsections (a), (b), and (d) shall each be
16 adjusted to the nearest thousand dollars to reflect the
17 change in the Consumer Price Index for All Urban Consumers
18 (CPI-U), U.S. City Average, All Items, under its current
19 official reference base as designated by the Bureau of Labor
20 Statistics, U.S. Department of Labor. The adjusted amounts
21 shall be attained by multiplying the relevant monetary
22 amount by the annual average CPI-U for the most recent
23 calendar year, and then dividing that sum by the annual
24 average CPI-U for 1992.".

1 SEC. 102. DIVERSITY OF CITIZENSHIP JURISDICTION; AWARD OF
2 ATTORNEY'S FEES TO PREVAILING PARTY.

3 Section 1332 of Title 28, United States Code, is amended by
4 adding after subsection (e) the following new subsection:
5 "(f) For the purposes of this section:
6 "(1) The prevailing party shall be entitled to
7 attorney's fees only to the extent that such party prevails
8 on any position or claim advanced during the litigation.
9 The sum of entitled attorney's fees shall be paid by the
10 non-prevailing party but shall not exceed the attorney's
11 fees of the non-prevailing party with regard to such
12 position or claim. If the non-prevailing party receives
13 services under a contingent fee agreement, the sum of the
14 entitled attorney's fee shall not exceed the reasonable
15 value of those services.
16 "(2) Counsel of record in actions under this section
17 shall maintain accurate, complete records of hours worked on
18 the matter regardless of the fee arrangement with his
19 client.
20 "(3) The term 'prevailing party' means a party to an
21 action who obtains a favorable final judgment (other than by
22 settlement), exclusive of interest, on all or a portion of
23 the claims asserted during the litigation.
24 "(4) The court may, in its discretion, limit the fees
25 recovered under paragraph (1) of this section if the court
26 finds special circumstances that make payment of such fees
27 unjust.

1 "(5) This subsection shall not apply to any action
2 removed from a state court pursuant to Section 1441 of Title
3 28, United States Code, or to the United States or any
4 state, agency of the United States or any state, or any
5 official, officer or employee of a federal or state
6 agency.".

7 SEC. 103. AMENDMENT TO EQUAL ACCESS TO JUSTICE ACT.

8 (a) Subsection (d)(2)(A)(ii) of section 2412 of Title 28,
9 United States Code, is amended by striking out "or a special
10 factor, such as the limited availability of qualified attorneys
11 for the proceedings involved," and inserting in lieu thereof "as
12 reflected by the change in the Consumer Price Index for All Urban
13 Consumers (CPI-U), U.S. City Average, All Items, under its
14 current official reference base as designated by the Bureau of
15 Labor Statistics, U.S. Department of Labor.".

16 (b) Subsection (d) of section 2412 of Title 28, United
17 States Code, is amended by adding the following new paragraph
18 after paragraph (d)(5):

19 "(6)(A) If a court determines that the cost of living
20 adjustment permitted by paragraph (d)(2)(A)(ii) should be
21 made in a particular case, it shall calculate the adjustment
22 in accordance with this paragraph. When compensable
23 services are rendered in more than one calendar year, an
24 adjustment shall be made for each year in which compensable
25 services are rendered.
26

1 (i) When compensable services are rendered in the
2 present calendar year, the hourly rate shall be calculated
3 by multiplying $75 times the CPI-U for the month in which
4 the last compensable services were rendered, and then
5 dividing that sum by the CPI-U for October, 1981.

6 (ii) When compensable services are rendered in more
7 than one calendar year, the adjustment for services rendered
8 in the present calendar year shall be calculated using the
9 formula set forth in (i) above. The hourly rate for
10 services rendered in each previous calendar year shall be
11 calculated by multiplying $75 times the annual average CPI-U
12 for the year in which the services were rendered, and then
13 dividing that sum by the CPI-U for October, 1981.".

14 SEC. 104. PRIOR NOTICE AS A PREREQUISITE TO BRINGING
15 SUIT IN THE UNITED STATES DISTRICT COURT.

16 Title 28 of the United States Code is amended by adding a new
17 section 483 as follows:

18 "**Prior Notice To Suit.** (a) At least 30 days before filing
19 suit, a claimant shall transmit written notice to the
20 intended defendant or defendants of the specific claims
21 involved, including the amount of actual damages and
22 expenses incurred and to be incurred. The claimant shall
23 transmit such notice to the intended defendant or defendants
24 at an address reasonably calculated to provide actual notice
25 to each such party. For purposes of this section,
26 'transmit' shall mean to mail by first class-mail, postage
27 prepaid, or contract for delivery by any company which

1 physically delivers correspondence as a commercial service
2 to the public in its regular course of business. A
3 certificate of service evidencing compliance with this
4 subsection shall be filed with the court at the commencement
5 of the action.

6 "(b) In the event the applicable statute of limitations for
7 that action would expire during the period of notice, the
8 statute of limitations shall expire on the thirtieth day
9 from the date written notice was transmitted to the intended
10 defendant or defendants. The parties may by written
11 agreement extend the tolling period not to exceed 90 days.

12 "(c) The requirements of this section shall not apply --

13 "(1) in any action to seize or forfeit assets subject
14 to forfeiture or in any bankruptcy, insolvency,
15 receivership, conservatorship, or liquidation proceeding;

16 "(2) where the assets that are the subject of the
17 action or that would satisfy the judgment are subject to
18 flight, dissipation or destruction, or where the defendant
19 is subject to flight;

20 "(3) where a written notice prior to filing suit is
21 otherwise required by law, or where the claimant has made a
22 prior attempt in writing to settle the claim with the
23 defendant;

24 "(4) in proceedings to enforce a civil investigative
25 demand or an administrative summons;

26 "(5) in actions to foreclose liens; or

1 "(6) in actions pertaining to temporary restraining
2 orders, preliminary injunctive relief, fraudulent conveyance
3 of property, or in other types of actions which by their
4 nature compel immediate resort to the courts.
5 "(d) In the event the district court finds that the
6 requirements of subsection (a) of this section have not been
7 fulfilled by the claimant, and such defect is asserted by
8 the defendant within 60 days of service of the summons or
9 complaint upon such defendant, the claim shall be dismissed
10 without prejudice and the costs of such action, including
11 attorney's fees, shall be imposed upon the claimant.
12 Whenever an action is dismissed under this section, the
13 claimant may refile such claim within 60 days after
14 dismissal regardless of any statutory limitations period if:
15 (1) during the 60 days after dismissal, notice is effected
16 under subsection (a) of this section and, (2) the original
17 action was timely filed in accordance with subsection (b).".
18 SEC. 105. AWARD OF ATTORNEY'S FEES IN DISPUTES INVOLVING THE
19 UNITED STATES.
20 Title 28 of the United States Code is amended by adding a new
21 section 2412a following 28 U.S.C. §2412 as follows:
22 "**Award of Attorney's Fees in Disputes Involving The United**
23 **States.** (a) Except as otherwise specifically provided by
24 statute, the United States is authorized to enter into an
25 agreement which provides that attorney's fees may be awarded
26 against the United States or any other party to the
27 litigation --

1 "(1) where the United States commenced the suit or
2 "(2) in civil litigation involving disputes pursuant to
3 the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613,
4 including litigation before boards of contract appeals
5 pursuant to 41 U.S.C. §§ 606 and 607; or
6 "(3) where the United States and another party have
7 agreed to the use of outcome-determinative mediation, the
8 mediation has resulted in a determination, and the United
9 States or the other party has given notice pursuant to 28
10 U.S.C. § 484(b)(8), pertaining to outcome-determinative
11 mediation, that either party accepts the determination. In
12 this event, 28 U.S.C. § 484(b)(8)(A) - (8)(C), pertaining to
13 award of costs and attorney's fees, shall apply to the award
14 of attorney's fees.
15 "(b) The following standards shall apply to the award of any
16 attorney's fees pursuant to subsection (a) (1) or (2):
17 "(1) Attorney's fees may be awarded only to a
18 prevailing party in the litigation, subject to paragraphs
19 (b)(2) and (3). The prevailing party shall be entitled to
20 attorney's fees from the non-prevailing party with respect
21 to and only to the extent that such party prevails on any
22 claim advanced during the litigation, except that the sum of
23 entitled attorney's fees shall not exceed the attorney's
24 fees of the non-prevailing party with regard to such claim.
25 "(2) In determining the amount of attorney's fees for a
26 private party, the court or board shall take into account
27

1 the degree of success obtained by that party relative to its
2 original claim or claims, the prevailing market rates in the
3 area for the kind and quality of the legal services
4 furnished, and any other factors relevant to whether an
5 award of attorney's fees would be reasonable and, if so,
6 what a reasonable amount of attorney's fees would be.
7 "(3) In determining the amount of attorney's fees of
8 the United States, the court or board shall determine the
9 number of hours spent by the attorneys employed by the
10 United States on the litigation multiplied by the salaries
11 and benefits paid those attorneys, and an amount for
12 overhead, computed as an hourly rate.
13 "(c) A party who files an application for an award of
14 attorney's fees and expenses against the United States under
15 any other provision of law may not pursue an award of
16 attorney's fees under this section. A party who files an
17 application for an award of attorney's fees under this
18 section may not pursue an award of attorney's fees and
19 expenses under any other provision of law. A party who
20 agrees to mediation under 28 U.S.C. § 484 may seek an award
21 of attorney's fees only under this section and 28 U.S.C. §
22 484.
23 "(d) A party seeking an award of attorney's fees under this
24 section shall file an application for fees within thirty
25 days of final judgment in the action. The application shall
26 show that the party is eligible to receive an award under
27

1 this section and the amount sought, including an itemized
2 statement from any attorney appearing on behalf of the party
3 which sets forth the actual time expended and the rate at
4 which fees are computed. Within thirty days after service
5 of the fee application upon the party against whom the fees
6 are sought to be awarded, that party may file a response
7 setting forth its reasons why an award of fees would not be
8 reasonable or why the amount of fees should be reduced.
9 Where an award of attorney's fees is sought against any
10 party, the attorney for that party shall submit a statement
11 of the total amount of attorney's fees incurred in the
12 litigation in order that the court or board may determine
13 that the fees sought in the application do not exceed the
14 amount of fees incurred by that party.
15 "(e) As provided in appropriations acts, agreements may be
16 entered into as authorized by this section. Awards of
17 attorney's fees received by an agency on behalf of the
18 United States pursuant to this section shall be credited to
19 an appropriate account of that agency. To the extent
20 provided in advance in appropriation acts, such amounts
21 shall be available only to pay awards of attorney's fees
22 against that agency on behalf of the United States made
23 pursuant to this section. Each such agency is authorized to
24 pay any shortfall caused if amounts credited to such account
25 are insufficient to pay amounts awarded against such agency
26

1 on behalf of the United States from funds currently
2 available in such account.
3 "(f) For the purposes of this section:
4 "(1) 'United States' includes any agency and any
5 official of the United States acting in his or her official
6 capacity;
7 "(2) 'final judgment' means a judgment that is final
8 and not appealable; and
9 "(3) 'prevailing party' means a party to an action who
10 obtains a favorable final judgment other than by settlement,
11 exclusive of interest, on all or a portion of the claims
12 asserted during the litigation.".

13 SEC. 106. AVOIDANCE OF LITIGATION THROUGH MULTI-DOOR
14 COURTHOUSES.

15 Title 28 of the United States Code is amended by adding a
16 new section 484 as follows:
17 "**Multi-Door Courthouses.** (a) The chief judge of each
18 federal judicial circuit shall designate one district within
19 the jurisdiction of the Circuit to be a pilot Multi-Door
20 Courthouse district; provided, however, that the United
21 States Court of Appeals for the District of Columbia Circuit
22 shall not be included. The United States Court of Appeals
23 for the Federal Circuit shall designate the United States
24 Claims Court to be a pilot Multi-Door Courthouse. Such
25 designation, and the program established by this section,
26 shall terminate at the expiration of a three-year period

1 following such designation unless renewed by an Act of
2 Congress.
3 "(b)(1) Every court which has been designated as a Multi-
4 Door Courthouse, as set forth in subsection (a), shall, not
5 later than 6 months after the effective date of this Act,
6 establish an alternative dispute resolution plan.
7 "(2) The alternative dispute resolution plan
8 shall include, but not be limited to--
9 "(A) procedures for limited discovery;
10 "(B) confidentiality of proceedings as to possible subsequent
11 pretrial and trial actions; and
12 "(C) the selection, use, and payment of non-
13 judicial personnel (also referred to in this section as
14 neutrals, mediators, or arbitrators) who may be selected to
15 conduct alternative dispute resolution procedures.
16 "(3) The plan shall also establish standards for
17 determining which cases are appropriate for alternative
18 dispute resolution, considering such factors as whether
19 factual issues predominate over legal issues, whether the
20 case involves complex or novel legal issues requiring
21 judicial action, and any other factors the court considers
22 relevant.
23 "(4) Each plan shall provide that each federal judge
24 or, in a case assigned to a magistrate judge, magistrate
25 judge in a Multi-Door Courthouse established under
26 subsection (a) shall conduct a conference with counsel
27

1 within 120 days after a complaint is filed to review non-
2 binding, voluntary alternative dispute resolution procedures
3 that may be used in lieu of litigation to resolve the claims
4 in controversy.

5 "(5) Outcome-determinative mediation under this
6 section means a procedure in which either a single mediator
7 or a panel of three mediators selected by or under the
8 direction of a federal district court provides the parties
9 with a dollar amount determination that would be awarded if
10 the case is tried.

11 "(6) Each plan shall authorize the parties, if they
12 agree, to utilize non-binding alternative dispute resolution
13 procedures that may be used in lieu of litigation to resolve
14 the claims in controversy. These non-binding alternative
15 dispute resolution procedures shall include, but are not
16 limited to, early neutral evaluation, traditional mediation,
17 outcome-determinative mediation, minitrials, summary jury
18 trials, and arbitration.

19 "(7) Each plan shall provide that--

20 "(A) the parties may agree as to the use of any
21 alternative dispute resolution procedure listed in the
22 alternative dispute resolution plan to effectuate prompt
23 resolution of the claims involved; and

24 "(B) the parties may choose to utilize the
25 alternative dispute resolution procedures and neutrals made
26 available by their court or may, if all parties and the
27

1 court agree, utilize the services of other neutrals not
2 designated in accordance with the court's alternative
3 dispute resolution plan.
4 "(8) Each plan shall also provide that if the parties
5 choose outcome-determinative mediation and in the event a
6 determination is reached--
7 "(A) either or any party may give notice that it
8 intends to accept that determination, while the other party
9 or parties remain free to reject the determination and
10 continue with the litigation. If all parties reject that
11 determination, no costs or attorney's fees shall be assessed
12 against any party;
13 "(B) a plaintiff, including the United States or
14 an officer or agency thereof, who rejects the determination
15 and fails to obtain a final judgment that is at least ten
16 percent greater than the determination shall pay the
17 defendant's costs, as set forth in 28 U.S.C. §1920, and
18 reasonable attorney's fees, as set forth in 28 U.S.C.
19 §2412a, incurred after the rejection of the determination;
20 and
21 "(C) a defendant, including the United States and
22 officers and agencies thereof, who rejects the determination
23 and fails to obtain a final judgment that is at least ten
24 percent less than the determination shall pay the
25 plaintiff's costs, as set forth in 28 U.S.C. §1920, and
26

1 attorney's fees, as established in 28 U.S.C. §2412a,
2 incurred after rejection of the determination.
3 "(9) In carrying out their plans, the district courts
4 are authorized to utilize the volunteer services of non-
5 judicial personnel (also known as neutrals, mediators, and
6 arbitrators) to conduct alternative dispute resolution
7 procedures. The courts are also authorized to establish and
8 pay, subject to amounts provided in advance in
9 appropriations acts and to limits set by the Judicial
10 Conference of the United States, the amount of compensation,
11 if any, that each neutral shall receive for services
12 rendered in each case.".
13 SEC. 107. FLEXIBLE ASSIGNMENT OF DISTRICT COURT JUDGES.
14 (a) Section 292(d) of Title 28, United States Code, is
15 amended by striking out "upon presentation of a certificate of
16 necessity by the chief judge or circuit justice of the circuit
17 wherein the need arises." and inserting in lieu thereof "whenever
18 the business of that court so requires.".
19 (b) Section 604(a) of Title 28, United States Code, is
20 amended --
21 (1) by striking out "; and" in paragraph (23) and
22 inserting in lieu thereof ";";
23 (2) by redesignating the two paragraphs currently both
24 designated as paragraph (24) as paragraph (25) and paragraph
25 (26), respectively;
26

1 (3) by striking the period at the end of new paragraph
2 (25) inserting in lieu thereof "; and"; and
3 (4) by adding the following new paragraph immediately
4 after paragraph (23):
5 "(24) Secure information as to the courts' need for
6 temporary judicial resources to ease overcrowded dockets
7 (including information on delays being encountered in the
8 maintenance of civil suits) and prepare and transmit
9 annually to the Chief Justice, the chief judges of the
10 circuits, the Congress and the Attorney General, statistical
11 data, reports and recommendations summarizing the results of
12 this inquiry;".
13 SEC. 108. IMMUNITY OF STATE JUDICIAL OFFICERS.
14 (a) Section 1988 of Title 42, United States Code, is amended
15 by inserting before the period at the end of the second sentence
16 the following: ", except that notwithstanding any other provision
17 of law, no state judicial officer shall be held liable for any
18 costs, including attorney's fees, in any proceeding brought
19 against such judicial officer for an act or omission taken in an
20 official capacity".
21 (b) Section 1983 of Title 42, United States Code, is
22 amended by adding before the period at the end of the first
23 sentence: ", except that in any action brought against a
24 judicial officer for an act or omission committed in such
25 officer's official capacity, injunctive relief shall not be
26

1 granted unless a declaratory decree was violated or declaratory
2 relief was unavailable".

3 SEC. 109. AMENDMENT TO THE CIVIL RIGHTS OF INSTITUTIONALIZED
4 PERSONS ACT.

5 (a) Section 1997e of Title 42, United States Code, is
6 amended by --

7 (1) amending (a)(1) to read as follows:
8 "In any action brought pursuant to section 1983 of Title 42,
9 United States Code, by any adult convicted of a crime con-
10 fined in any jail, prison, or other correctional facility,
11 the court shall continue such case for a period not to ex-
12 ceed 180 days in order to require exhaustion of such plain,
13 speedy, and effective administrative remedies as are
14 available.";

15 (2) redesignating paragraphs (b)(1) and (2) as
16 paragraphs (b)(2) and (3), respectively; and

17 (3) adding a new paragraph (b)(1) immediately after
18 paragraph (a)(2) to read as follows:

19 "(b)(1) Upon the request of a State or local corrections
20 agency, the Attorney General of the United States shall
21 provide the agency with technical advice and assistance in
22 establishing plain, speedy, and effective administrative
23 remedies for inmate grievances.".

24 (b) Subsection (d) of section 1915 of Title 28, United
25 States Code, is amended to read as follows:

26 "(d) The court may request an attorney to represent any
27 such person unable to employ counsel and may dismiss the

1 case if the allegation of poverty is untrue, or if satisfied
2 that the action fails to state a claim upon which relief can
3 be granted or is frivolous or malicious.".

4 SEC. 110. IMPROVEMENTS IN CASE MANAGEMENT.

5 Subsection (a) of Section 623 of Title 28, United States
6 Code, is amended --

7 (a) by redesignating paragraphs (5), (6), and (7) as
8 paragraphs (6), (7) and (8), respectively; and

9 (b) by adding the following new paragraph immediately after
10 paragraph (4):

11 "(5) study and determine ways in which case and docket
12 management techniques (including alternative dispute
13 resolution techniques) may be applied to improve the cost-
14 effectiveness of litigation and to eliminate unjustified
15 expense and delay, and include in the annual report required
16 by paragraph (3) of this subsection details of the results
17 of the studies and determinations made pursuant to this
18 paragraph;".

19 SEC. 111. ASSIGNMENT OF JUDGES; PANELS; HEARING; QUORUM.

20 (a) Subsection (c) of section 46 of Title 28, United States
21 Code, is amended to read as follows:

22 "(c) Cases and controversies shall be heard and determined
23 by a court or panel of not more than three judges (except
24 the United States Court of Appeals for the Federal Circuit
25 may sit in panels of more than three judges if its rules so
26 provide), unless a hearing or rehearing before the court in
27

1 banc is ordered by a majority of the circuit judges of the
2 circuit who are in regular active service. A court in banc
3 shall consist of all circuit judges in regular active
4 service, except that any senior judge of the circuit shall
5 be eligible to participate, at his election, and upon
6 designation and assignment pursuant to section 294(c) of
7 this title and the rules of the circuit, as a member of an
8 in banc court reviewing a decision of a panel of which such
9 judge was a member.".

10 (b) Section 6 of Public Law 95-486, 92 Stat. 1633, is
11 amended to read as follows:

12 "Sec. 6. Any court of appeals having more than 15 active
13 judges may constitute itself into administrative units
14 complete with such facilities and staff as may be prescribed
15 by the Administrative Office of the United States Courts.".

16 SEC. 112. SEVERABILITY.

17 If any provision of this Act or the amendments made by this
18 Act or the application of any provision or amendment to any
19 person or circumstance is held invalid, the remainder of this Act
20 and such amendments and the application of such provision and
21 amendment to any other person or circumstance shall not be
22 affected by that invalidation.

23 SEC. 113. EFFECTIVE DATE.

24 Except as expressly otherwise provided, this Act shall
25 become effective 90 days after the date of enactment. This Act
26 shall not apply to litigation commenced prior to the effective

1 date except that sections 108 and 109 shall apply to civil

2 actions pending in any court on the date of enactment.

ACCESS TO JUSTICE ACT OF 1992

SECTION-BY-SECTION ANALYSIS

ACCESS TO JUSTICE ACT OF 1992

SECTION-BY-SECTION ANALYSIS

This bill, the "Access to Justice Act of 1992" (the "Act"), provides for greater access to civil justice by reducing costs, delays, and excessive, needless litigation. The analysis below summarizes and explains various key provisions of the Act.

Section 101 provides that the amount in controversy required to invoke Federal court jurisdiction does not include the amount of damages sought for pain and suffering or mental anguish, punitive or exemplary damages, and attorney's fees or costs.

Section 102 adopts a "Fairness Rule" in cases brought under Federal courts' diversity jurisdiction. The rule will not apply where (1) the action is removed under 28 U.S.C. §1441; or (2) the United States or any State, agency of the United States or any State, or any official, officer or employee of a Federal or State agency is a party to the action. Under this system, the prevailing party is entitled to attorney's fees that it expended in order to prevail, limited to the amount of attorney's fees the non-prevailing party incurred. Awarded fees are also subject to limits imposed by judicial discretion in circumstances where requiring payment of all or a portion of the fees would be unjust. If the losing party received services under a contingent fee agreement, the reasonable value of those services is the award limit. The term "prevailing party" is defined for purposes

of this section and section 105 to mean a party to an action who obtains a favorable judgment, other than by settlement, exclusive of interest, on all or a portion of the claims asserted during the litigation.

Section 103 amends the Equal Access to Justice Act. Subsection (a) establishes a uniform methodology for calculating awardable fees based upon the Bureau of Labor Statistics' Consumer Price Index. Subsection (b) provides clear standards for calculating a cost of living adjustment for compensable services. No other adjustment to the uniform methodology is to be made.

Section 104 adds a new section to title 28 of the United States Code to require that a claimant give written notice of the specific claims and the amount of actual damages prior to filing suit in the United States District Court. A certificate of service showing compliance must be filed when an action is commenced. New subsection (b) tolls an applicable statute of limitations that would expire during the period of notice for thirty (30) days from the date the written notice is transmitted.

New subsection (c) sets out exceptions to the prior notice prerequisite, which include circumstances that compel immediate resort to the courts.

New subsection (d) provides that upon a finding that the claimant has not complied with the provisions of new subsection (a) and upon the assertion of such a defect by the defendant within 60 days of service of the summons or complaint, the claim will be dismissed without prejudice, and the costs of such action, including attorney's fees, may be imposed upon the claimant. The claimant may refile such claim within 60 days regardless of any statutory limitations if notice pursuant to new subsection (a) is effected and the original action was timely filed.

Section 105 provides for an award of attorney's fees in disputes involving the United States in specified types of cases and is only to be implemented when the parties have expressly agreed to shift fees in accordance with the provisions of this section. The specified cases are (1) civil litigation initiated by the United States; (2) disputes pursuant to the Contracts Disputes Act of 1978, including litigation before boards of contract appeals, or (3) cases where the United States and another party have agreed to use outcome-determinative mediation which has resulted in a determination that either party has given notice to accept. In those cases, an award of attorney's fees may be awarded to a prevailing party in the litigation only to the extent that such party prevails on any claim advanced during

the litigation. The amount cannot not exceed the attorney's fees of the party who did not prevail on such claim.

In determining the amount of attorney's fees awardable to a private party, factors including the degree of success obtained by that party relative to its original claim or claims and the prevailing market rates in the area for the kind and quality of the legal services furnished should be considered in determining whether an award of attorney's fees would be reasonable, and, if so, in what amount. The number of hours spent by the attorneys employed by the United States on the litigation multiplied by the salaries and benefits paid to those attorneys, and an amount for overhead, computed at an hourly rate, is determinative of the amount of attorney's fees awardable to the United States.

An application for an award of attorney's fees under this Act bars pursuit of an award of attorney's fees and expenses under the Equal Access to Justice Act. Likewise, an application under the Equal Access to Justice Act precludes an application for an award of attorney's fees under this Act. Thus, a party may not initiate proceedings under either Act without waiving all rights under the other Act.

This section sets forth the procedures by which to apply for and obtain an award of attorney's fees in certain disputes

involving the United States. It also states that fee-shifting agreements may be entered into, fees received by the United States may be credited to an agency account, and payments may be made from that account to pay fee awards against the United States.

"United States" is defined for purposes of this section to mean any agency and any official of the United States acting in his or her official capacity. "Final judgment" is defined to mean a judgment that is final and not appealable.

Section 106 adds a new section to title 28 of the United States Code which creates a multi-door courthouse program to be used in selected Federal district courts for a three-year period (unless renewed by Congress). This program will foster use of alternative dispute resolution ("ADR") procedures. The designated districts will adopt plans permitting the parties to choose among specific methods for resolving their disputes, without litigation.

New subsection (a) provides that the Chief Judge of each of the Federal Circuits, except the District of Columbia, will designate one of its districts to be a pilot multi-door courthouse.

New subsection (b) provides that each multi-door courthouse district will, within six months of the effective date of this Act, establish an ADR plan. The plan will include (1) procedures for limited discovery; (2) confidentiality of proceedings regarding possible pretrial and trial actions; (3) selection, use and payment of non-judicial personnel to conduct ADR; and (4) standards for determining which cases should go to ADR. The parties will be authorized, upon agreement, to utilize non-binding ADR in lieu of litigation. Approved forms of ADR include early neutral evaluation, traditional mediation, outcome-determinative mediation (one mediator or a panel of three mediators selected by or under the direction of a Federal district court to provide a dollar amount determination of the outcome of the case if tried), minitrials, summary jury trials, and arbitration. In addition, the ADR plan will provide for a conference with counsel conducted by the district judge or magistrate judge to whom a case is assigned within 120 days after a complaint is filed to review the use of non-binding, voluntary ADR procedures.

New subsection (b) further provides that the parties may agree to use any ADR procedure listed in the ADR plan. The parties may choose to use the ADR procedures and neutrals made available by their district court. In addition, if all parties and the court agree, the parties may use other neutrals, not

designated through their court's ADR plan. In the event that outcome-determinative mediation is selected and a determination is reached, new subsection (b) provides that any party may independently decide to accept or reject the determination and continue with the litigation, giving notice of such an intention. If all parties reject the determination, then no attorney's fees and costs will be assessed against any party. If any party rejects a determination and fails to obtain an outcome at least 10% more favorable than the ADR determination, that party will have to pay its opponent's reasonable expenses and attorney's fees incurred after rejection of the determination. This provision applies to the United States or any of its officers or agencies.

The district courts are authorized to use non-judicial personnel on a volunteer basis to conduct the procedures in carrying out the ADR plans. These volunteers, neutrals, mediators, and arbitrators may be compensated for services rendered by the district courts, subject to amounts provided in advance in appropriations acts and to limits set by the Judicial Conference of the United States.

Section 107 encourages more efficient use of judicial resources by requiring that information be obtained as to the courts' need for temporary judicial resources and that the

results of such inquiry be provided annually to the Chief Justice, the chief judges of the circuits, the Congress, and the Attorney General. Collection of this information will complement the efforts of other groups interested in the efficiency and structure of the Federal court system.

Section 108 applies to the immunity of State judicial officers. Subsection (a) restores judicial immunity to State court judges for the fees and costs they incur in defending their official actions. Subsection (b) provides that injunctive relief will not be granted in any action against judicial officers for their official actions unless declaratory relief was unavailable or such a decree was violated.

Section 109 amends section 7 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. §1997e) to remove unnecessary barriers to effective grievance procedures. The courts will be required to continue any action brought by an inmate pursuant to 42 U.S.C. §1979 for a period up to 180 days to require the exhaustion of any available administrative remedies. The Attorney General will provide States or local correction agencies with technical advice and assistance in establishing administrative remedies for inmate grievances, if requested. Subsection (b) provides that the court may dismiss a case if an attorney is appointed upon an allegation of poverty which is

untrue, or if the court is satisfied that the action fails to state a claim, or is frivolous or malicious.

Section 110 provides for the study and determination of methods of case and docket management techniques to improve the cost effectiveness of litigation and to eliminate unjustified expense and delay.

Section 111 changes current laws by eliminating "mini" in banc panels.

Section 112 is a severability clause which would preserve the balance of the Act if any portion of it is held to be invalid.

Section 113 specifies the Act's effective date.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release October 23, 1991

FACT SHEET

EXECUTIVE ORDER ON CIVIL JUSTICE REFORM

The President today signed an Executive order to apply immediately the reforms proposed in the Council on Competitiveness report "Agenda for Civil Justice Reform in America" to civil litigation involving the United States Government. The Executive order requires agencies to implement discovery and expert witness reforms and to adopt the Fairness Rule (also known as the English Rule), whenever feasible. The Executive order also requires agencies to attempt to settle disputes prior to litigation, and to employ settlement and Alternative Dispute Resolution (ADR) techniques in order to avoid prolonged litigation.

In August 1991, the President's Council on Competitiveness recommended 50 specific changes to our current civil litigation system. These recommendations were aimed at achieving swifter justice and reducing the costs of litigation. The proposals facilitate more timely and efficient handling of civil cases.

This Executive Order on Civil Justice Reform seeks to produce a more fair American legal system by making Federal litigators a model for parties in the private sector involved in dispute resolution. Although the Executive order requires the Federal Government to implement many of these legal reforms unilaterally, the Administration expects this Executive order to be a catalyst for civil justice reform in the Congress, State legislatures, and the courts.

Background

The tremendous growth of civil litigation in the past 30 years, including litigation involving the United States Government, has overburdened the American court system. Excessive litigation imposes high costs on American individuals, small businesses, industry, professionals, and government at all levels. With 70 percent of the world's lawyers, it is not surprising that the number of lawsuits filed in the Federal courts each year has more than tripled in the last 30 years -- from approximately 80,000 in 1960 to more than 250,000 in 1988.

- more -

Excessive litigation puts America at a competitive disadvantage internationally and results in higher prices for American consumers for everything from household goods to medical treatment. Every year our legal system costs Americans, directly and indirectly, an estimated $300 billion -- including wasted legal fees, court costs, and individual time and effort devoted to litigation.

Several current litigation practices add to these burdens and costs by prolonging the resolution of disputes, thus delaying just compensation and encouraging wasteful litigation. Although procedural changes alone cannot solve all of these problems, the excessive costs and long delays that have plagued our legal system may be reduced by encouraging voluntary dispute resolution, limiting unnecessary discovery, promoting judicious use of expert testimony and prudent use of sanctions, and where appropriate, modifying current fee arrangements.

Promoting Just and Efficient Civil Litigation

In order to promote more efficient litigation in actions involving the United States Government, the Executive order directs all Federal agencies with litigation authority to implement the following reforms:

- The Fairness Rule. Subject to appropriate legal authority, offer to adopt the Fairness Rule in contract disputes with the United States Government and in actions initiated by the United States, whereby the loser of the lawsuit pays an appropriate portion of the costs and fees incurred by the winner.

- Discovery Reform. Streamline and expedite discovery by offering to exchange core information with opposing parties, by eliminating needless discovery, and by discussing all discovery disputes with opposing counsel before seeking resolution in the courts.

- Expert Evidence Reform. Use expert testimony only if it is based on "widely accepted theories" and refrain from using contingency fees to compensate expert witnesses.

- Notice of Complaint. Where appropriate, notify parties whom the United States intends to sue, informing them of the nature of the dispute, before filing suit.

- Settlement Discussions. Attempt to resolve disputes by initiating settlement discussions.

- Alternative Dispute Resolution. Employ ADR techniques whenever appropriate.

- more -

Proposing Legislation and Regulations that Do Not Unduly Burden the Courts

The Executive order also contains provisions designed to reduce litigation caused by poorly drafted Federal legislation and regulations. Specifically:

- All legislation and regulations proposed by the Administration will be reviewed to eliminate drafting errors and to use clear and specific standards instead of more ambiguous general standards whenever practicable.

- All legislation and regulations will be reviewed against a "litigation checklist" of 15 specific issues (such as statutes of limitation, preemptive effect, retroactivity, etc.) that historically have led to needless litigation.

- Agencies proposing legislation and regulations must certify compliance with this checklist in their legislative submissions to the Office of Management and Budget.

Promoting Just and Efficient Administrative Adjudication

The Executive order also requires that, whenever reasonable and practicable, all agencies that adjudicate administrative claims employ more efficient case management procedures in administrative law proceedings.

Scope and Effective Date

This Executive order applies to civil matters only and is not intended to affect criminal matters. It shall become effective 90 days from the date of the President's signature, and will not apply to litigation commenced prior to the effective date.

# # #

FOR IMMEDIATE RELEASE February 19, 1992

THE PRESIDENT'S COUNCIL ON COMPETITIVENESS

"AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA"

FACT SHEET

FEDERAL RULES CHANGES

The Administration today announced proposed rules of procedure and evidence designed to reduce the costs and delay in civil litigation. The proposed rules changes were developed by the President's Council on Competitiveness, chaired by Vice President Dan Quayle, to help reduce the costs of overuse and abuse of the civil justice system. The Council's 50-point initiative to help reduce overburdened court dockets and control the rapidly escalating cost of litigation is contained in its report, "Agenda for Civil Justice Reform in America."

In submitting its suggested amendments to the Federal Rules of Civil Procedure and Evidence to the Supreme Court's Advisory Committee on Civil Rules, the Administration focussed on restructuring the civil justice process toward more cooperation by litigants. The proposed rule changes add incentives to the litigation process that will promote settlement and quicker, less costly, civil trials. The proposals will also make the system more rational and efficient by encouraging careful evaluation of disputes, timely handling of cases, and speedier judicial intervention.

Among the amendments presented by the Department of Justice on behalf of the Administration are:

Reform of the Discovery Process

The current discovery process allows lawyers to ask virtually limitless questions to force their opposition to spend enormous amounts of time and money in responding. The proposed amendments would place reasonable limitations on discovery -- in particular by requiring the parties to disclose core or basic information up front, having the parties negotiate a discovery plan, and setting limits on the extent of discovery after which the side requesting the extra information would have to pay the cost of obtaining it.

Elimination of Junk Science

Many of our courtrooms are burdened by testimony of alleged "experts" whose views are not supported by a significant number of the members of their scientific community. The Administration has suggested amendments to the rules which will require that an expert's

testimony must be "widely accepted" in the relevant field. In addition, experts would be barred from receiving payment based on the results of their testimony.

Settlement Alternatives

With the ever-growing number of cases in the civil system, there is an enormous need to reduce litigation. Therefore, the Administration proposed amendments to the rules which would require that a court direct litigants to appear before it to discuss settlement and use of alternative dispute resolution procedures. In addition, the rules would be amended to provide incentives for the giving and acceptance of settlement offers by plaintiffs and defendants.

Rule 11

The Administration suggests rules amendments requiring litigants and lawyers to correct statements later learned to be untrue and to provide additional information as they learn of it. Under the proposed amendments those who do not follow this rule would be subject to sanctions.

These recommendations were prepared by the Council's Working Group on Civil Justice Reform, chaired by Solicitor General Kenneth W. Starr. The Working Group was composed of experts from the Department of Justice, the White House Counsel's Office, the Office of the Vice President, and the Departments of Commerce, Treasury, Energy, and Health and Human Services, the Office of Management and Budget, and the Council of Economic Advisers.

The Administration's commitment to the fair, efficient and early resolution of disputes is demonstrated by efforts to implement reform at all levels. As a catalyst for civil justice reform, the Administration has already implemented many of the Council's recommendations in the Federal government through Executive Order 12778 (October 23, 1991). On February 4, 1992, President Bush transmitted the "Access to Justice Act of 1992" and called upon Congress to enact reforms requiring Federal legislation. And, since most reforms are equally applicable to the states, the Administration has published the Civil Justice Reform Model State Amendments and the Model State Punitive Damages Act.

FOR IMMEDIATE RELEASE February 13, 1992

THE PRESIDENT'S COUNCIL ON COMPETITIVENESS

"AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA"

FACT SHEET

MODEL STATE PUNITIVE DAMAGES ACT

Punitive damages are punishments in the nature of fines awarded in civil cases after the injured party has been fully compensated. While the award of noncompensatory, punitive damages can serve a useful purpose in deterring and punishing extreme or egregious misconduct, the current methods for awarding punitive damages often impose punishment in a random and capricious manner. Unfortunately, the specter of unlimited punitive damages encourages parties to try cases needlessly and frustrates early settlement, thereby delaying justice and impeding the swift award of compensatory damages to injured victims.

This type of inordinate cost and delay in the civil justice system was one subject of an extensive study by the President's Council on Competitiveness, chaired by Vice President Dan Quayle. As a result, the Council developed 50 recommendations for improving the civil justice system. Reported in the "Agenda for Civil Justice Reform in America," the recommendations will make the justice system more fair and accessible for all citizens. Among the Council's recommendations is the reform of unlimited punitive damages.

The current common law approach of unlimited punitive damages leads to indiscriminate awards. If punitive damages are to be an effective deterrent, they must be imposed in a rational and predictable manner. The Council's recommendations for punitive damages reform are now embodied in a Model State Punitive Damages Act. The Model Act establishes reasonable and fair standards that will promote predictability while insuring that punitive damages remain an effective deterrent.

The Model Act presents a six-part proposal for state legislative action for punitive damages reform. Each component has been proven effective in one or more states, but no state has enacted a comprehensive reform package containing all suggested measures. The Model State Punitive Damages Act is a rational and consistent approach to punitive damages that includes:

Pre-Litigation Notice of Claims - In order to provide parties with the opportunity to settle their disputes at the earliest stages, the Model Act requires pre-complaint notice when punitive damages may be requested.

Pleading Punitive Damages - To prevent inclusion of punitive damages merely for publicity and to ensure that punitive damages remain as an issue at trial only if there is sufficient evidence, the Model Act eliminates from the complaint requests for specific dollar amounts.

Standard of Proof - Before an award of punitive damages, the plaintiff must establish, by clear and convincing evidence, that the defendant acted with malice - specific intent to cause serious injury or a flagrant indifference to the potential harm.

Bifurcated Trials - The jury would award punitive damages in a separate proceeding after liability has been determined. This insures that punitive damages are measured decisions, not the product of passion.

Judicial Determination of Amount - After the jury finds that punitive damages are appropriate, the judge draws upon his or her experience with such cases and determines the amount of punitive damages to be awarded.

Ceiling for Punitive Damages - No award of punitive damages would exceed the amount of total compensatory damages award to the plaintiff. Capping the amount of punitive damages at one times the actual damages serves as a deterrent while insuring that the injured party is fully compensated for his or her injuries.

The Administration is committed to the fair, efficient and early resolution of disputes. In addition to the Model State Punitive Damages Act, the Administration has made available Civil Justice Reform Model State Amendments for additional reform at the state level. On the Federal level, the Administration has applied the civil justice reform recommendations through Executive Order 12778 and has transmitted to Congress the "Access to Justice Act of 1992." The Administration is also proposing amendments to the Federal Rules of Procedure and Evidence through the Supreme Court's rulemaking process.

FOR IMMEDIATE RELEASE February 13, 1992

THE PRESIDENT'S COUNCIL ON COMPETITIVENESS

"AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA"

FACT SHEET

CIVIL JUSTICE REFORM MODEL STATE AMENDMENTS

As part of the Administration's efforts to reform the civil justice system, Vice President Dan Quayle today presented the Civil Justice Reform Model State Amendments. The Amendments, which include both model legislation and model rules of procedure and evidence, would implement the recommendations proposed by the President's Council on Competitiveness Report, "Agenda for Civil Justice Reform in America."

Over 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. Higher costs mean higher prices for American consumers for everything from household goods to medical treatment. Higher costs also reduce America's ability to compete in the global marketplace.

To address these problems, the Council established a working group, chaired by Solicitor General Kenneth W. Starr. The resulting recommendations 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. The Administration's proposals seek to restore fairness to our judicial system and to eliminate the economic burden placed on American society by excessive litigation. None of the reforms impairs any substantive legal rights. Instead, they will help ensure that deserving victims actually receive their compensation earlier and with less expense.

The Problem: An Overburdened System

States reported the filing of 17,321,125 civil cases in 1989. Excessive and expensive civil litigation has overburdened our court system and imposed higher costs on small businesses, professionals, industry, and Government at all levels in the form of excessive legal fees, court costs, and wasted individual time and effort. Every year, our legal system costs Americans, directly and indirectly, an estimated $300 billion.

While every State has its unique legal system, each can benefit by applying the principles of fair, efficient, and early resolution of disputes.

In order to reduce litigation costs, promote swifter justice, protect individual rights, and restore the integrity of our legal system, among the provisions of the "Access to Justice Act of 1992" are the following reforms:

Multi-Door Courthouse - To give consumers the opportunity to elect an effective alternative to court adjudication, courts would be required to foster alternative dispute resolution (ADR) procedures rather than trials to settle disputes. The parties would be free to select from different ADR procedures such as early neutral evaluation, traditional mediation, outcome determinative mediation, mini-trials, summary jury trials, and arbitration.

Core Disclosure and Discovery - Discovery consumes 80 percent of the time and money in litigation; it should be reformed to enable the parties to proceed to the central issues without extraneous, costly, and unproductive practices. The Model proposals will require automatic disclosure of basic or "core information" and mandate that the parties confer at discovery planning conferences. Discovery would also be partially governed by market incentives.

Expert Evidence Reform - Unlike ordinary witnesses who may offer only factual testimony, expert witnesses are allowed to testify as to their opinions. Therefore, it is necessary that the expert's opinion testimony be based on "widely accepted" theories instead of "junk science." The Model proposals will require courts to determine that proposed witnesses are legitimate experts in their field. The Model also bans contingency fees for experts.

The Fairness Rule - The United States is one of the few countries which does not allow the winning party to recover the costs of litigation. Instead, winners and losers alike pay their own legal fees. The "loser pays" rule would help those who have legitimate claims, particularly those who effectively barred from the courts because the costs of pursuing the claim would have exceeded the expected recovery. The legislation would limit the amount the loser must pay and specifies that courts should not require the loser to pay if circumstances make payment "unjust."

The Civil Justice Reform Model State Amendments also include other provisions to encourage settlement and reduce costs. This package of state legislation and rules changes, in conjunction with the Administration's proposed "Access to Justice Act of 1992" will greatly reduce the burdens of excessive, needless litigation while protecting and enhancing every American's ability to vindicate legal rights through our legal system.

Model State Punitive Damages Act

THE VICE PRESIDENT
WASHINGTON

February 1992

The Model State Punitive Damages Act incorporates reforms proposed by the President's Council on Competitiveness in its report "Agenda for Civil Justice Reform in America." The Council's recommendations result from an extensive study of the civil justice system in America. The President urges that punitive damages be reformed in order to eliminate randomness and unpredictability in the system, while continuing to punish egregious and intentional misconduct.

Consistent with the principles of federalism, to which our Administration is committed, we believe punitive damage reforms should be adopted by each state's legislature. The Model State Punitive Damages Act will assist state policymakers in implementing the Council on Competitiveness' recommendations.

Model State Punitive Damages Act

Title

Section 1. This statute is entitled "The Punitive Damages Act."

Preamble

Section 2. The legislature finds and declares that --

(a) the specter of unlimited punitive damages encourages plaintiffs and defendants to try cases needlessly and frustrates early settlement, thereby delaying justice and impeding the swift award of compensatory damages to victims;

(b) reasonable and fair standards will promote predictability in the award of punitive damages in a manner fully consistent with the objective of deterrence;

(c) private enterprise has been hampered unduly by the threat of unreasonable punitive damages awards, with the consumer paying the ultimate cost in higher prices and insurance costs;

(d) punitive damages are private punishments in the nature of fines awarded in civil cases;

(e) when warranted in egregious cases, punitive damages can provide an appropriate expression of public disapproval for conduct that is truly shocking;

(f) current procedures for the award of punitive damages do not properly protect those accused of serious wrongdoing nor provide sufficient guidance for the imposition of these penalties; and

(g) it is in the public interest to strike a balance between deterring egregious misconduct and encouraging reasonable activity.

Definitions

Section 3. For the purposes of this Act, the meaning of the terms specified shall be as follows:

(a) "Clear and convincing evidence" means evidence which leaves no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is more than a preponderance of evidence, but less than beyond a reasonable doubt.

(b) "Compensatory damages" means damages intended to make good the loss of an injured party and no more. The term includes general and special damages and does not include nominal, exemplary or punitive damages.

(c) "Defendant" means any party against whom punitive damages are sought.

(d) "Malice" means either conduct which is specifically intended by the defendant to cause tangible or intangible serious injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in tangible or intangible serious injury.

(e) "Nominal damages" are damages that are not designed to compensate a plaintiff and are less than $500.

(f) "Plaintiff" means any party claiming punitive damages.

(g) "Punitive damages" includes exemplary or vindictive damages and means damages awarded against a party in a civil action because of aggravating circumstances in order to penalize and to provide additional deterrence against a defendant to discourage similar conduct in the future. Punitive damages do not include compensatory damages or nominal damages.

**Pleading Punitive Damages;
Pre-Suit Notice**

Section 4. (a) An award of punitive damages must be specifically prayed for in the complaint.

(b) The plaintiff must specifically plead either:

(1) that at least 30 days in advance of filing the complaint, that the plaintiff has given notice of seeking damages pursuant to this Act and that in good faith a reasonable settlement could not be reached; or

(2) that such 30 days notice under this section could not be given because of exigent circumstances.

(c) The plaintiff shall not specifically plead an amount of punitive damages, only that such damages are sought in the action.

(d) The prayer for punitive damages shall be stricken prior to trial by the court, unless the plaintiff presents prima facie evidence sufficient to sustain an award of punitive damages under this Act to the court at least 30 days prior to trial.

Procedure for Award of Punitive Damages

Section 5. (a) All actions tried before a jury involving punitive damages shall, if requested by any defendant, be conducted in a bifurcated trial before the same jury.

(b) In the first stage of a bifurcated trial, the jury shall determine liability for compensatory damages and the amount of compensatory damages or nominal damages. Evidence relevant only to the issues of punitive damages shall not be admissible in this stage.

(c) Punitive damages may be awarded only if compensatory damages have been awarded in the first stage of the trial. An award of nominal damages cannot support an award of punitive damages.

(d) In the second stage of a bifurcated trial, the jury shall determine if a defendant is liable for punitive damages.

(e) Where a jury decides that the defendant is liable for punitive damages, the court alone shall determine the amount of punitive damages.

(f) In all cases involving an award of punitive damages, the court, in determining the amount of punitive damages, shall include in its consideration prior damage awards for the same

wrongful act, the effect on other potential claimants of a punitive damages award, the deterrent provided by compensatory damages in the case, and the potential or prior criminal and administrative penalties against the defendant for the same wrongful act.

(g) The amount of punitive damages shall be reduced pursuant to the contributory or comparative fault principles of the law of this state. In any action in which there are two or more defendants, an award of punitive damages must be specific as to a defendant, and each defendant is liable only for the amount of the award made against that defendant.

Proof Required for Award of Punitive Damages

Section 6. Before a plaintiff may recover punitive damages in any civil action, that plaintiff must establish, by clear and convincing evidence, all of the facts that are relied upon to support the recovery of punitive damages. The plaintiff must establish that the defendant's actions showed malice. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence.

Ceiling for Punitive Damages Award

Section 7. No award of punitive damages shall exceed the amount of total compensatory damages awarded to the plaintiff in the action.

Availability of Punitive Damages

Section 8. Nothing contained in this Act is to be construed as creating any claim for punitive damages which is not now present under the law of this state.

Severability

Section 9. If any provision of this Act or the amendments made by this Act or the application of any provision or amendment to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of such provision and amendment to any other person or circumstance shall not be affected by that invalidation.

Effective Date

Section 10. This Act shall be effective as to any civil suit for damages commenced on or after 120 days from the date of enactment of the Act regardless of whether the claim arose prior to the date of enactment.

Commentary on Model State Punitive Damages Act

Section 1. The title of the Act should conform to state practice.

Section 2. The preamble is intended to be a guide to construction of the Act in accordance with its purpose to provide fair procedures for the award of punitive damages and to provide limits on such awards.

Section 3. Section 3 contains definitions for the Act.

Section 4. Section 4 is designed to ensure early resolution of cases seeking punitive damages through consultation by the parties prior to filing suit in all but the most extraordinary circumstances.

The pleading requirements are also designed to avoid the inclusion of punitive damages merely for publicity and to ensure that punitive damages remain as a potential issue at trial only if there is sufficient evidence to support consideration of an award.

Section 5. Section 5 provides for bifurcated trials at the defendant's motion. Upon motion for bifurcation, the jury shall determine if compensatory damages are to be awarded in the first stage of the trial. In the second stage of trial, if necessary, the jury shall determine whether punitive damages should be assessed.

Section 5(b) ensures that only evidence relevant to the first stage of a bifurcated trial will be used.

Section 5(c) permits an award of punitive damages only when the jury has returned a verdict awarding the plaintiff compensatory damages and the award exceeds nominal damages.

Section 5(f) provides guidance for courts in those cases in which other persons have sought or will likely seek punitive damages for the same wrongful act.

Section 5(g) provides guidance to make the statute consistent with the rules of contributory or comparative fault as well as the allocation of damages in multiple defendant cases.

Section 6. Section 6 requires that all proof submitted by the plaintiff on the issues for liability and amount of punitive damages be established by clear and convincing evidence.

Section 6 also clarifies the requisite action and mental state needed for an award of punitive damages.

Section 7. Section 7 limits punitive damages so that the maximum possible punitive damages award bears a direct relationship to the injury suffered, as measured by compensatory damages.

The punitive damages award may not exceed the award of compensatory damages. Thus, the maximum total damages available to a plaintiff when punitive damages are awarded is double the amount of compensatory damages awarded.

Section 8. The Act provides guidance for the award of punitive damages. The Act does not, however, supply substantive authority for the award of punitive damages. The Act itself makes no additional actions subject to punitive damages beyond those actions for which punitive damages are available at the time of enactment of this Act.

Section 9. Section 9 provides for the severability of any provision that may be held invalid.

Section 10. Section 10 provides an effective date which will permit persons who possess claims to bring suit under the present legal standards for a reasonable period.

Civil Justice Reform Model State Amendments

THE VICE PRESIDENT
WASHINGTON

February 1992

The Civil Justice Reform Model State Amendments incorporate reforms proposed by the President's Council on Competitiveness following an extensive study of the civil justice system in America. The President has stated that civil justice reform is absolutely essential to our country's well-being because it means a return to fairness. Reducing the cost and delay in the system will make it easier for all citizens to vindicate their legal rights.

Consistent with the principles of federalism, to which our Administration is committed, we believe civil justice reform initiatives should be adopted by each state's legislature. The Civil Justice Reform Model State Amendments will assist state policymakers in implementing the Council on Competitiveness' recommendations.

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MODEL STATE PRE-COMPLAINT NOTICE ACT

Model State
Pre-Complaint Notice Act

Title

Section 1. This Act is entitled the "Pre-Complaint Notice Requirement Act."

Notice As A Prerequisite to Bringing Suit

Section 2. (a) At least thirty (30) days before filing suit, a claimant shall transmit written notice to the intended defendant(s) of the specific claims involved including the amount of actual damages and expenses. Claimant shall transmit such notice to the intended defendant(s) at an address reasonably calculated to provide actual notice to each such party.

(b) Any applicable statute of limitations which would expire during the period of notice shall expire on the thirtieth day from the date written notice was transmitted to the intended defendant or defendants.

Definitions

Section 3. For the purposes of this Act, the word "transmit" shall mean to mail by first-class mail, postage prepaid, or to contract for delivery by

any company which physically delivers correspondence as a service to the public in its regular course of business.

Exceptions

Section 4. Pre-complaint notice is not required:

(a) in any action to seize or forfeit assets subject to forfeiture or in any bankruptcy, insolvency, receivership, conservatorship, or liquidation proceeding;

(b) where it is reasonable under the circumstances to believe that (i) the assets that are the subject of the action or that would satisfy the judgment are subject to flight, dissipation or destruction, or (ii) the defendant is subject to flight;

(c) where a written notice prior to filing suit is otherwise required by law, or where the claimant has made a prior attempt in writing to settle the claim with the defendant;

(d) in proceedings to enforce a civil investigative demand or an administrative summons;

(e) in suits to foreclose liens; or

(f) in actions pertaining to temporary restraining orders, preliminary injunctive relief, or fraudulent conveyance of property.

Pleading Requirement

Section 5. (a) When notice is provided pursuant to subsection 2(a), a copy of such notice shall be filed as an appendix to the plaintiff's original complaint.

(b) When notice pursuant to subsection 2(a) is not provided, the complaint shall set forth the reason for such failure, referencing the relevant rationale under section 4.

Penalties

Section 6. If the court determines that the claimant failed to comply with the notice requirements set forth in this Act, and such defect is asserted by the defendant(s) within sixty (60) days of service of the summons or complaint upon such defendant, the claim shall be dismissed without prejudice and the costs of such action, including attorney's fees, may be imposed upon the claimant. Whenever an action is dismissed under this section, the claimant may refile such claim within sixty (60) days after dismissal regardless of any statutory limitations period if, during the sixty days after dismissal, proper notice is effected and the original action was timely filed.

Severability

Section 7. If any provision of this Act or the amendments made by this Act or the application of any provision or amendment to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of such provision and amendment to any other person or circumstance shall not be affected by that invalidation.

Effective Date

Section 8. This Act shall become effective ___ days after the date of enactment.

Commentary on Model State Pre-Complaint Notice Act

Requiring that notice be provided prior to initiating a lawsuit provides all parties with an opportunity to resolve the dispute at the earliest stages. Pre-suit notice can encourage parties to reach agreements and fashion appropriate remedies at lower costs.

Section 2 establishes the pre-suit notice requirements. The party alleging a cause of action must transmit notice of the grievance, stating the claim with enough specificity to allow meaningful settlement discussions, at least 30 days prior to filing a complaint.

Subsection 2(b) provides for a 30-day extension if the time allowed for filing the suit would have expired during the pre-suit notice period. This extension insures that there is an opportunity for the parties to resolve the dispute while not foreclosing resort to the court.

Section 3 specifies the requirements for delivery of the pre-suit notice.

Section 4 sets forth exceptions to the pre-suit notice requirement, which include *only* those circumstances that compel immediate resort to the courts. The exceptions may be added to or otherwise modified consistent with state law and practice by listing specific instances where pre-complaint notice would not be required.

Section 5 establishes the procedures for demonstrating compliance with the pre-suit notice requirements.

Section 6 provides that complaints filed without complying with the pre-suit notice requirements shall be dismissed but may be refiled under some circumstances.

Section 7 provides for the severability of any provision that may be held invalid.

Section 8 establishes the Act's effective date.

MODEL STATE CIVIL MULTI-DOOR COURTHOUSE ACT

Model State Civil Multi-Door Courthouse Act

Title

Section 1. This Act is entitled the "Multi-Door Courthouse Act."

Creation of Multi-Door Courthouses for Use of Alternative Dispute Resolution Procedures

Section 2. (a) (1) The Chief Justice shall establish within each court of general jurisdiction a Multi-Door Courthouse program not later than six months after the effective date of this Act. Such program shall include an alternative dispute resolution plan.

(2) The alternative dispute resolution plan shall include, but not be limited to--

(A) procedures for limited discovery;

(B) confidentiality of proceedings as to possible subsequent pretrial and trial actions; and

(C) the selection, use and payment of non-judicial personnel, also referred to as neutrals, mediators or arbitrators, who may conduct alternative dispute resolution procedures.

(3) The plan shall also establish standards for determining which cases are appropriate for alternative dispute resolution, considering such factors as whether factual issues predominate over legal issues, whether the case involves complex or novel legal issues requiring judicial action, and any other factors the court considers relevant.

(4) Each judge shall conduct a conference with counsel within 120 days after a complaint is filed to review voluntary alternative dispute resolution procedures that may be used in lieu of litigation to resolve the claims in controversy.

(5) Each plan shall authorize the parties, if they so choose, to utilize alternative dispute resolution procedures that may be used in lieu of litigation to resolve the claims in controversy.

(A) These voluntary alternative dispute resolution procedures shall include, but are not limited to, early neutral evaluation, mediation, outcome-

determinative mediation, minitrials, summary jury trials, and arbitration.

(B) Outcome-determinative mediation under this section means a procedure in which either a single mediator or a panel of three mediators selected by or under the direction of a court provides the parties with a dollar amount determination that the mediator(s) believe(s) would be awarded if the case were tried.

(6) The parties may choose to utilize the alternative dispute resolution procedures and neutrals made available by the court or may, if all parties and the court agree, utilize the services of other neutrals not designated in accordance with the court's alternative dispute resolution plan.

(7) Each plan shall also provide that if the parties choose outcome-determinative mediation and in the event a determination is reached--

(A) Any party may give notice that it intends to accept that determination, while the other parties remain free to reject the determination and continue with the litigation;

(B) A plaintiff, in an action seeking monetary relief, who rejects the determination and fails to obtain a final judgment that is at least ten percent greater than the determination, shall pay the defendant's reasonable costs and reasonable attorney's fees incurred after the rejection of the determination; and

(C) A defendant, in an action seeking monetary relief, who rejects the determination and fails to obtain a final judgment that is at least ten percent less than the determination, shall pay the plaintiff's reasonable costs and reasonable attorney's fees incurred after rejection of the determination.

(b) **Implementation.** In carrying out its plan, the Multi-Door Courthouse is authorized to utilize the volunteer services of non-judicial personnel (also known as neutrals, mediators or arbitrators) to conduct alternative dispute resolution procedures. The courts are also authorized to establish and pay the amount of compensation, if any, that each neutral shall receive for services rendered in each case.

Severability

Section 3. If any provision of this Act or the amendments made by this Act or the application of any provision or amendment to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of such provision and amendment to any other person or circumstance shall not be affected by that invalidation.

Effective Date

Section 4. This Act shall become effective ___ days after the date of enactment.

Commentary on Model State Multi-Door Courthouse Act

The Multi-Door Courthouse provides parties to a lawsuit with choices for resolving their disputes that save time and money, when compared to formal court proceedings, by encouraging alternative dispute resolution (ADR) procedures. Also, ADR procedures are often more flexible than trials.

Section 2(a)(1) requires that an ADR plan be established in each trial court of general jurisdiction through order of the Chief Justice of the highest court of the state.

Section 2(a)(2) sets forth the basic requirements for effective ADR -- limited discovery, confidential proceedings, and non-judicial assistance in evaluating the parties' claims. These are minimum requirements, however, and creativity is encouraged to develop procedures to suit the particular jurisdiction.

Section 2(a)(3) provides for standards to be established for determining which cases are appropriate for ADR.

Section 2(a)(4) establishes a mandatory conference for the parties to explore ADR options.

Section 2(a)(5) permits the parties to choose from a variety of alternative dispute mechanisms, including early neutral evaluation, mediation, arbitration, minitrial, and summary jury trial. Choice is an essential feature of the Multi-Door Courthouse. Although the parties may elect from an

assortment of ADR procedures, they are not required to do so. This voluntary approach avoids the danger of creating an additional, and costly, barrier to justice in those instances when ADR is inappropriate.

Section 2(a)(6) provides the parties maximum flexibility to tailor ADR procedures to best suit their case and circumstances.

Section 2(a)(7) allows parties to elect an ADR procedure which produces a determination that can serve to limit the costs of proceeding to trial. If one party rejects the proposed settlement, that party must pay its opponent's additional fees and costs should subsequent litigation fail to provide the party with at least a ten percent improvement over the proposed settlement.

Section 2(b) provides funding authority for hiring necessary personnel. Appropriations will be needed in accordance with state law.

Section 3 provides for the severability of any provision that may be held invalid.

Section 4 establishes the Act's effective date.

MODEL STATE CORE DISCLOSURE AND DISCOVERY PROVISIONS

Model State Core Disclosure and Discovery Provisions

Disclosure

(A) **Mandatory Disclosure.** To assist in the development of the discovery plan in section (E) below, unless the court otherwise directs or the parties otherwise stipulate with the court's approval, a disclosure statement shall be filed (i) by a plaintiff within 15 days after service of an answer to its complaint; and (ii) by a defendant within 30 days after serving its answer to the complaint. Except in actions exempted by local rule or order, the disclosure statement shall include:

(1) the names (and, if known, the addresses and telephone numbers) of all persons then known to have personal knowledge of any material fact directly relevant to the particularized allegations of the pleadings, including any claim or defense, briefly indicating (if not obvious from an identification of the person) the subjects to which such personal knowledge pertains; and

(2) a general description of the location of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are then known to be directly relevant to any claim or defense.

This requirement shall apply in all civil cases involving adverse parties, including multiple party suits, third party claims and counter and cross actions. Information subject to a claim of privilege need not be disclosed. However,

notice must be given to the opposing party that a privilege is asserted. If the court determines that a party has in bad faith failed to make adequate disclosure pursuant to this rule, the court shall bar a party from engaging in discovery absent a showing of good cause. The disclosure statement shall be accompanied by a certification by counsel that reasonable inquiry has been made and that the disclosures set forth in the disclosure statement will be supplemented promptly if additional information otherwise required to be disclosed becomes known to counsel.

Discovery Limits

(B) **Limits on Discovery.** Unless otherwise permitted by the court for good cause shown, or by agreement of counsel, no party shall serve upon any other party, at any one time or cumulatively, more than fifteen (15) written interrogatories, including all parts and sub-parts.

Unless otherwise permitted by the court for good cause shown, or by agreement of counsel, no party shall take more than ten (10) depositions, whether upon oral examination, upon written questions or pursuant to any other section.

Admissions

(C) **Admissions.** After a party has admitted a fact, by response to a request for admissions, by stipulation or in any other manner of record, discovery by the party that obtained the admission as to matters relevant to

establishment of that fact is barred absent an order of the court for good cause shown.

Discovery Requests

(D) **Contents of Discovery Requests.** Each separate discovery request shall designate the specific portion of the complaint, answer or other pleading to which the discovery request is directed and shall constitute a certification that the discovery request is reasonably calculated to be relevant to the subject matter of the designated pleading.

Discovery Plans

(E) **Discovery Plans.** After service of the disclosure statements pursuant to section (A), the parties shall meet to formulate a specific discovery plan. The discovery plan shall be consistent with the provisions of section (B), absent agreement by the parties, or an order of the court for good cause shown. The parties shall submit their proposed discovery plan to the court for approval. Absent agreement, the parties shall jointly move the court for a discovery conference and shall file each party's proposed discovery plan with the motion.

Discovery beyond that authorized under the plan approved by the court may be taken by a party only if that party agrees to pay the reasonable costs and reasonable attorney's fees of the person or party to whom the discovery is directed. An unconditional commitment to pay these reasonable costs and reasonable attorney's fees, signed by

counsel and by an authorized representative of the party, shall be forwarded with any such discovery request. The court may waive the requirement for payment for good cause shown.

Duty to Confer

(F) **Duty to Confer.** A party bringing or opposing a discovery-related motion must include, as a part of such motion, or opposition thereto, a written showing that after personal consultation with counsel for opposing parties and good faith attempts to resolve differences, counsel are unable to reach agreement as to the disclosure or discovery at issue. The showing shall recite, additionally, the date, time and, if not conducted by telephone, place of each such conference and the names of all persons participating in the conference. The party opposing the motion may expressly adopt the moving party's written showing pursuant to this section. Absent compliance with this section, the court shall decline to consider a disclosure or discovery-related motion, or opposition thereto, absent good cause shown.

Expenses of Motion

(G) **Award of Expenses of Motion.** If a contested motion pertaining to disclosure or discovery is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the

court finds that special circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the moving party or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that special circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court shall apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

Commentary on The Model State Core Disclosure and Discovery Provisions

Discovery is the stage of a lawsuit where the parties obtain information about the opponent's position for later use at trial. The current discovery rules permit parties to roam virtually unfettered through all their opponent's documents. Discovery should be reformed to enable the parties to proceed to the central issues without extraneous, costly, and unproductive practices. The proposed disclosure provisions are designed to facilitate exchange of limited basic information that will be useful in formulating a discovery plan. These provisions differ from the proposed changes to the Federal Rules of Civil Procedure (FRCP) recommended by the Advisory Committee on Civil Rules of the Judicial Conference of the United States.

These provisions may be implemented as a statute or as a change in state rules of civil procedure. If rules changes are pursued and the state rules are patterned after the FRCP, reference should be made to FRCP 26 and 37 in order to place these provisions in context.

Section (A) requires early disclosure of "core information," such as the names of witnesses and locations of relevant documents then known, without requiring a specific request to the opponent or judicial intervention. Absent a court order, failure to disclose the core information will bar a party from pursuing any discovery.

The standards for relevance and personal knowledge are patterned after those found in the Federal Rules of Evidence. Disclosure of all persons known by the parties to have knowledge of any fact of consequence is required. The fact that a party does not intend to call a person as a witness is not grounds for failure to make disclosure.

Section (B) establishes reasonable presumptive numerical limits on the number of interrogatories and depositions. While the suggested limits may be waived by agreement of counsel or by the judge, the limits should not be superseded absent a good reason.

Section (C) confines discovery to matters that are actually in controversy, thereby helping to guard against discovery abuse.

Section (D) requires parties to explain the relevancy of requested materials through specific references to their pleadings.

Section (E) requires the parties to design a discovery plan consistent with the numerical limits imposed by Section B, absent agreement by the parties or a court order based on good cause. Additional discovery may be taken only if the requesting party incurs all of the opponent's reasonable costs (including attorney's fees) caused by the request.

Section (F) establishes a duty upon the parties to confer prior to seeking court intervention in a discovery dispute.

Section (G) provides that the "Fairness Rule" for attorney's fees will be applied in contested disclosure or discovery

disputes. Requiring the loser to pay the winner's fees and costs involved with seeking court intervention will encourage both sides to evaluate carefully their claims and defenses. The court retains authority to refuse to award attorney's fees when "special circumstances" make an award unjust.

MODEL STATE OFFER OF SETTLEMENT ACT

Model State Offer of Settlement Act

Title

Section 1. The Act is entitled the "Offer of Settlement Act."

Offer of Settlement Procedure

Section 2. At any time more than 20 days after the service of the summons and complaint on a party but not less than 30 days (or 20 days if it is a counter offer) before trial, either party may serve upon the other party, but shall not file with the court, a written offer, denominated as an offer under this rule, to settle a claim for the money, property or relief specified in the offer and to enter into an agreement dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 30 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree. Acceptance or rejection of the offer by the offeree must be in writing and served upon the offeror. An offer that is neither withdrawn nor accepted within 30 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to

determine sanctions under this rule. When the complaint sets forth a claim for money, if the offeree rejects the offer and the judgment finally obtained by the offeree was not at least ten percent more favorable than the last offer, the offeree shall pay offeror's reasonable attorney's fees and reasonable costs incurred after the rejection of the last offer. When the complaint sets forth a claim for property or other non-monetary relief, if the offeree rejects the offer and the judgment finally obtained by the offeree is not more favorable than the last offer, the offeree shall pay offeror's reasonable costs and reasonable attorney's fees incurred after rejection of the last offer.

This rule shall not apply to class or derivative actions.

Severability

Section 3. If any provision of this Act or the amendments made by this Act or the application of any provision or amendment to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of such provision and amendment to any other person or circumstance shall not be affected by that invalidation.

Effective Date

Section 4. This Act shall become effective ___ days after the date of enactment.

Commentary on The Model State Offer of Settlement Act

The offer of settlement mechanism encourages dispute resolution by creating incentives for reasonable settlement offers advanced prior to trial. It rewards careful evaluation of settlements by requiring that the party rejecting the compromise bear the opponent's additional cost of going to trial, including reasonable attorney's fees, unless the party obtains a judgment that exceeds the settlement offer by ten percent for a money claim or is more favorable than the rejected offer in other claims.

While the offer of settlement provision is presented here as a model act, state practice may instead require implementation by amendment to the state rules of civil procedure. To the extent that the state rules follow the Federal Rules of Civil Procedure (FRCP), reference should be made to FRCP 68 in order to place these proposed changes in context.

Section 2 provides that either party may, before trial, serve on the opposing party an offer to settle the dispute. The section includes incentives for careful evaluation of an offer.

Section 3 provides for the severability of any provision that may be held invalid.

Section 4 establishes the Act's effective date.

MODEL STATE PRETRIAL SETTLEMENT CONFERENCE PROVISIONS

Model State Pretrial Settlement Conference Provisions

Encouraging Settlement Opportunities through Settlement Conferences

(A) **Pretrial Settlement Conferences.** In any action, as soon as practicable, but in no event more than 120 days after the filing of the complaint, the court shall direct the attorneys for the parties and any unrepresented parties to appear before the court, or a neutral third party appointed by the court, for conferences to discuss settlement and possible resort to alternative dispute resolution procedures.

(B) **Sanctions.** If an unrepresented party or a party's attorney fails to obey an order of the court directing participation in a settlement conference, if an unrepresented party or a party's attorney is substantially unprepared to participate in the conference, or if an unrepresented party or a party's attorney fails to participate in good faith, the judge, upon motion of either party, or upon the judge's own initiative, may make such orders with regard thereto as are just and appropriate. Refusal to agree to any proposal made by any party, standing alone, shall not constitute failure to participate in good faith. In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this section, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Commentary on Model State Settlement Conference Provisions

Pretrial settlement conferences provide an incentive for parties to evaluate their claims. These conferences promote earlier settlement because they require parties to review the dispute and focus on issues. Mandatory conferences may 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.

These provisions may be implemented as a statute or as a change in state rules of civil procedure. If rules changes are pursued and the state rules are patterned after the Federal Rules of Civil Procedure (FRCP), reference should be made to FRCP 16 in order to place these provisions in context.

Section (A) requires the court to direct the parties to meet before trial to discuss settlement. Similarly, the court is required to discuss with counsel (See Model State Civil Multi-Door Courthouse Act, page 9) the possibility of alternative dispute resolution under the Multi-Door Courthouse plan. The court must convene the settlement conference as soon as practicable but no later than 120 days after the filing of the complaint in order to encourage the earliest possible settlement. The court retains the flexibility to appoint a neutral third-party to conduct the pretrial.

Section (B) provides authority for sanctions, including attorney's fees, against parties or attorneys who refuse to participate in settlement conferences or who participate in bad faith. It is important to note, however, that simple

refusal to agree to a settlement proposal or resolution procedure, standing alone, does not constitute bad faith.

MODEL STATE AMENDMENTS FOR FACILITATING SUMMARY JUDGMENT

Model State Amendments for Facilitating Summary Judgment

Summary Judgment

(A) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(B) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may at any time, move with or without supporting affidavits, for a summary judgment in the party's favor as to all or any part thereof.

(C) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. A motion for summary judgment must be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. The district court's finding regarding

whether a genuine issue of material fact exists shall not be set aside unless clearly erroneous. Whenever a motion for summary judgment is rendered or denied, the court must set forth specific findings which support its ruling.

(D) **Case Not Fully Adjudicated on Motion.** If a motion for summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and evidence before it and by interrogating counsel, shall ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(E) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the adverse

party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth or as specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(F) **When Affidavits Are Unavailable.** Should it appear from the affidavit of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(G) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented are made in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Commentary on State Model Amendments for Facilitating Summary Judgment Procedures

Summary judgment is a useful method for terminating litigation where there is no material issue of fact. Under the current federal or similar state rule, however, even when it is determined that there is no factual disagreement, the judge may refuse to dispose of the case. Requiring that judges make explicit findings of fact will help focus issues for trial even when summary judgment is not granted.

These provisions may be implemented as a statute or as a change in state rules of civil procedure. If rules changes are pursued and the state rules are patterned after the Federal Rules of Civil Procedure (FRCP), reference should be made to FRCP 56 in order to place these provisions in context.

Section (C) provides greater deference to the trial court's findings as to material facts by establishing a "clearly erroneous" standard for reversal on appeal. Section C also makes explicit the judge's duty to grant meritorious motions for summary judgment and to set forth the specific findings which support the ruling.

MODEL STATE EXPERT TESTIMONY PROVISIONS

Model State
Expert Testimony Provisions

Expert Evidence

(A) **Qualification of Expert Testimony.** If the court finds:

(1) that scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue;

(2) that a proffered witness is qualified as an expert in the field for which the expert is called to testify by knowledge, skill, experience, training, or education; and

(3) that the proffered witness' testimony is based on a widely accepted explanatory theory;

then the witness may testify thereto in the form of an opinion or otherwise.

(B) **Prohibition on Contingent Fee for Expert Witness.** A witness shall be qualified to testify as an expert witness only if the court finds that any compensation to the witness directly or indirectly will not vary as a result of any outcome of the case.

Expert Discovery

(C) **Interrogatories.** A party may, through interrogatories, require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, to list the expert's formal training and the expert's publications and the cases in which the expert has testified or given a deposition, and to state the compensation fee for the expert.

(D) **Deposition.** A party may, without the necessity of a court order, depose each person the other party has given notice it may call as an expert witness at trial, at a reasonable time prior to trial as long as the party requesting the deposition pays the expert a reasonable fee for the time spent in the deposition, unless by motion a court determines the payment of such fees would result in manifest injustice, or the parties agree otherwise.

(E) **Document Requests.** A party may, without the necessity of a court order, request all documents upon which the expert relies or has reviewed in preparation for his testimony.

(F) **Additional Discovery.** Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, including fees and expenses, as the court may deem appropriate.

Commentary on Model State Expert Testimony Provisions

Unlike ordinary witnesses who may offer only factual testimony, expert witnesses are allowed to testify as to their opinions. Therefore, it is necessary that the expert's opinion testimony be supported by recognized professional practice or scientific knowledge. Because the expert's role as an impartial and objective witness is fundamental, contingency fee arrangements should be barred; an expert witness should not have any financial interest in the outcome of the trial.

These provisions may be implemented as a statute or as a change in state rules of evidence. If rules changes are pursued and the state rules are patterned after the federal rules, reference should be made to Federal Rule of Evidence 702 and Federal Rule of Civil Procedure 26, in order to place these provisions in context.

Section (A) states the requirements for testifying as an expert. Expert testimony may be admitted only if the witness is qualified in the "field for which the expert is called" and the testimony must be "based on a widely accepted explanatory theory." This requirement eliminates testimony that is far afield from current knowledge. Testimony would be permitted only when based upon respected, independently corroborated, theories. This requirement may be satisfied by expert testimony that is accepted by at least a substantial minority of experts in the relevant field.

Section (B) bars contingency fees for expert witnesses.

Section (C) permits a party to serve expert witness interrogatories to obtain information regarding the subject matter on which the expert is expected to testify, the substance of the expert's facts and opinions, a list of the expert's formal training, and a list of the expert's publications as well as the cases in which the expert has testified or given a deposition. Section C also requires a statement of the expert's compensation fee.

Section (D) allows a party to take an expert's deposition prior to trial without court order. The current practice in most states requires court approval.

Section (E) permits a more comprehensive inquiry of the expert's qualifications, publications, and expected testimony prior to trial.

Section (F) authorizes the court to order other discovery subject to restrictions including payment of fees and expenses.

MODEL STATE
AWARD OF ATTORNEY'S FEES
TO PREVAILING PARTY ACT

Model State
Award of Attorney's Fees
to Prevailing Party Act

Title

Section 1. This provision is entitled the "Award of Attorney's Fees to Prevailing Party Act."

Entitlement to Award of Attorney's Fees.

Section 2. (a) The prevailing party shall be entitled to attorney's fees from the non-prevailing party with respect to, and only to the extent that party prevails on, any claim advanced during the litigation, except that the sum of the entitled attorney's fees shall not exceed the attorney's fees of the non-prevailing party with regard to such claim. If the non-prevailing party received services under a contingent fee agreement, the sum of the entitled attorney's fees shall not exceed the reasonable value of those services.

(b) The court may, in its discretion, limit the fees recovered under paragraph (a) if such payment of fees is deemed unjust.

(c) Counsel of record in actions under this section shall maintain accurate, up-to-date records of hours worked on the matter regardless of the fee arrangement with his or her client.

(d) Nothing in this Act shall affect the right of a prevailing party to be awarded costs under applicable law.

Definitions

Section 3. For the purposes of this provision, the term "prevailing party" means a party to an action who obtains a final judgment (other than by settlement), exclusive of interest on all or a portion of the claims asserted during the litigation.

Severability

Section 4. If any provision of this Act or the amendments made by this Act or the application of any provision or amendment to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of such provision and amendment to any other person or circumstance shall not be affected by that invalidation.

Effective Date

Section 5. This Act shall become effective ___ days after the date of enactment.

Commentary on The Model State Award of Attorney's Fees to Prevailing Party Act

Under what is known as the "Fairness Rule" the loser pays the prevailing party's attorney's fees and costs. Also known as the "English Rule," the "Fairness Rule" is grounded in the equitable principle that a prevailing party -- either as plaintiff or defendant -- should be made whole. Where the rule operates, it also prompts more realistic case evaluation -- the obligation to pay the winner's fees encourages litigants to evaluate carefully their cases before initiating a frivolous claim or adopting a spurious defense.

Subsection 2(a) provides that the prevailing party can be made whole through an award of attorney's fees. The attorney's fees to be awarded the winner is limited, however, by the amount expended by the losing party. If the losing party received services under a contingent fee agreement, the reasonable value of those services is the award limit. This provision prevents the prevailing party from penalizing the loser by incurring disproportionate expenses.

Subsection 2(b) specifies that the court, in the interest of justice, has discretion to limit the attorney's fees to be paid by the losing party.

Subsection 2(c) requires counsel to maintain an accurate accounting of time expended in litigation subject to the Fairness Rule. This recordkeeping is necessary for an equitable assessment of fees when representation has been obtained through a contingency fee agreement.

Subsection 2(d) specifies that the Act does not affect the right of a prevailing party to be awarded costs under applicable law.

Section 3 sets forth applicable definitions.

Section 4 provides for the severability of any provision that may be held invalid.

Section 5 establishes the Act's effective date.

MODEL STATE ACCURACY IN PLEADING PROVISIONS

Model State Accuracy in Pleading Provisions

Signing of Pleadings, Motions, and Other Papers; Sanctions

(A) **Incorrect or False Court Filings.** Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative,

shall impose upon the person who signed it, a represented party, or both, or any other attorney who is not a signatory but who is responsible for the veracity of the content of the pleading, motion, or other paper, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(B) **Correction of Subsequently Detected False or Incorrect Statements.** If after the filing of a document the attorney or party who signed pleadings, motions or other papers discovers or obtains knowledge, information, or belief that the document signed contains an error or falsehood, the party is obligated to provide corrected information within a reasonable period of time of learning of the error or falsehood.

Commentary on The Model State Accuracy in Pleading Provisions

This provision is an important deterrent to litigants who would make filings with insufficient legal or factual support. The proposed rule, when applied uniformly, will lead to more disciplined and less wasteful litigation.

These provisions may be implemented as a statute or as a change in state rules of civil procedure. If rules changes are pursued and the state rules are patterned after the Federal Rules of Civil Procedure (FRCP), reference should be made to FRCP 11 in order to place these provisions in context.

Section (A) gives judges the power to penalize all those responsible for making unfounded assertions, not only the attorney who signed the document.

Section (B) requires the correction of any falsehoods or unfounded assertions upon learning of the inaccuracy.

MODEL STATE LEGISLATION AND REGULATION DRAFTING ACT

Model State Legislation and Regulation Drafting Act

Principles to Enact Legislation and Promulgate Regulations Which Do Not Unduly Burden The Court System

Title

Section 1. This Act is entitled the "Improved Legislation and Regulation Drafting Act."

General Duty to Review Legislation and Regulations

Section 2. Each state agency that is promulgating new regulations, reviewing existing regulations, developing legislative proposals concerning regulations, and developing new legislation shall adhere to the following requirements:

(a) The agency's proposed legislation and regulations shall be reviewed by the agency to eliminate drafting errors and ambiguity.

(b) The agency's proposed legislation and regulations shall provide a clear and certain legal standard for affected conduct rather than a

general standard, and shall promote simplification and burden reduction.

Specific Issues for Review

Section 3. In conducting the reviews required by Section 2, each agency formulating proposed legislation and regulations shall make every reasonable effort to ensure:

(a) That all proposed legislation--

(1) Specifies whether all causes of action arising under the law are subject to statutes of limitations;

(2) Specifies in clear language the preemptive effect, if any, to be given to the law;

(3) Specifies in clear language the effect on existing state law, if any, including all provisions repealed or modified;

(4) Provides a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction;

(5) Specifies whether private arbitration and other forms of private dispute resolution are appropriate under enforcement and relief

provisions subject to constitutional requirements;

(6) Specifies whether the provisions of the law are constitutionally severable, if appropriate;

(7) Specifies in clear language the retroactive effect, if any, to be given to the law;

(8) Specifies in clear language the applicable burdens of proof;

(9) Specifies in clear language whether it grants private parties a right to sue and, if so, the relief available and the conditions and terms for any authorized award of attorney's fees, if any;

(10) Specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative proceedings;

(11) Sets forth the standards governing the assertion of personal jurisdiction, if any;

(12) Defines key statutory terms, either explicitly or by reference to other statutes that explicitly define those terms;

(13) Specifies whether the legislation applies to the State government and its agencies;

(14) Addresses other important issues affecting clarity and general draftsmanship of legislation set forth by the [Attorney General or other applicable official under state law] after consultation with affected agencies, that are determined to be in accordance with the purposes of this order; and

(15) Provides for a date on which the legislation becomes effective; and

(b) That the regulations--

(1) Specify in clear language the preemptive effect, if any, to be given to the regulation;

(2) Specify in clear language the effect on existing state law or regulation, if any, including all provisions repealed or modified;

(3) Provide a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction;

(4) Specify in clear language the retroactive effect, if any, to be given to the regulation;

(5) Specify whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(6) Define key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items; and

(7) Address other important issues affecting clarity and general draftsmanship of regulations set forth by the [Attorney General or other applicable official under state law] after consultation with affected agencies, that are determined to be in accordance with the purpose of this Act.

Certification of Compliance for Agency Legislation or Regulations

Section 4. When proposing legislation or regulations, a state agency must certify that:

(a) It has reviewed such draft legislation or regulation in light of this Act, and

(b) Either (i) the draft legislation or regulation meets the applicable standards provided in Sections 2 and 3 of this Act, or (ii) it is unreasonable to require the particular piece of

draft legislation or regulation to meet one or more of those standards.

Where the standards are not met, the agency certification must include an explanation of the reasons for the departure from the standards.

Severability

Section 5. If any provision of this Act or the amendments made by this Act or the application of any provision or amendment to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of such provision and amendment to any other person or circumstance shall not be affected by that invalidation.

Effective Date

Section 6. This Act shall become effective ___ days after the date of enactment.

Commentary on Model State Legislation and Regulation Drafting Act

Too frequently, poor legislative drafting leaves important areas in statutes or regulations unaddressed. These ambiguities and omissions often result in uncertainty and needless court challenges.

Section 2 requires that state agencies developing new regulations or legislation review the proposals to eliminate drafting errors. These agencies would also be required to provide clear and certain legal standards for affected conduct.

Section 3 provides a "litigation hazard" checklist intended to identify and remedy common drafting errors found in statutes and regulations.

Section 4 requires state agencies to certify compliance with the checklist and review process.

Section 5 provides for the severability of any provision that may be held invalid.

Section 6 establishes the Act's effective date.