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(Crouse/Nix)
March 26, 1992
Draft Seven
blk-fam7

PRESIDENTIAL REMARKS: COALITION FOR THE RESTORATION
OF THE BLACK FAMILY IN SOCIETY
ROOM 450 EVENT
THURSDAY, MARCH 26, 1992
3:00 P.M.

Thank you for that wonderful welcome. Meeting with you is always a memorable event. The kinship we feel grows out of the common values we share. As President, I've made it my mission to preserve three significant legacies: peace in the world, productive jobs for all Americans -- and strong families. I think Barbara said it best. "What goes on at the White House is not nearly as important as what goes on in your house."

I don't have to remind this group of deeply committed leaders of the disturbing trends we are bucking -- your hearts have already been stirred by the tragic forces which are overwhelming the family in American society. Let me put it this way -- if our government had set out determined to destroy the family, it couldn't have done greater damage than what we see today. Unwittingly, our welfare programs -- which were meant to provide temporary support -- have, instead, undermined responsibility, eroded dignity and robbed people of control.

No group in America is more aware of the necessity for character-based solutions and community-wide efforts than this Coalition. I want to assure you of my commitment to those same guiding principles. I want to assure you of my confidence in our partnership and my support of your leadership on the front-lines of this battle for our nation's families.

When we look to the forces for change -- the family, community and church -- we can't forget our schools. We've got to create new incentives for excellence -- like school choice. We have got to give parents the power to choose which schools serve their children best -- public, private or religious.

We have shown that when we work together we can get the job done. Together, we placed Clarence Thomas on the Supreme Court. Together, we have seen major walls come tumbling down because we yearn for what is just and we are determined to do what is right.

Now I want your help on another issue of vital importance to us all. Last week, Congress tried to push through a massive tax increase -- the kind that would have stopped our economic recovery dead in its tracks. I told Congress I'd veto that bill -- and I did. Yesterday, House Democrats tried to over-ride my veto. You may not have seen much coverage of this, but what was meant to be a show of strength simply put a spotlight on disarray. The Democratic leadership couldn't muster enough votes for simple majority. The veto stands. That is almost unheard of -- that has happened only twice in the last 60 years. And I want to thank every member of Congress -- from both parties -- who had the courage of their convictions to say no to more taxes on the American family.

That's a beginning -- but it's not enough. If Congress really wants to get this economy moving, create jobs and revive hope, then I say: pass my plan -- put America back to work.

But we know we can't wait for Congress to see the light. So I've asked Republican leaders -- beginning today -- I've asked Senator John McCain and Representative Harris Fawell to formally introduce our requests for rescissions: 68 federal projects we don't need, and I can't ask the American taxpayer to pay for. That gives the Congress

25 days, to uphold the cuts I want to make -- or to vote in broad daylight to forget about the deficit and keep the pork.

This week the leaders who control Capitol Hill did something else: they began a new effort to remove the only defense the taxpayer has against excessive government spending. We will see Congress resort to all sorts of parliamentary gimmicks, but we owe it to every American family -- everyone who works hard, and struggles to make ends meet -- to hold the line on government spending. And we will.

What we're seeing today is the beginning of the battle -- between those who want to change things, and those who want to stick with the status quo. Let the defenders of the status quo be warned: I stand for change.

America will be restored -- not through government interference, empty slogans and symbolic gestures -- but by strong, clear voices of reason and consistent acts of responsibility. America will be restored -- not by outsiders coming in with a so-called "better idea" -- but by people who are passionate about reclaiming their streets and rescuing their children from the forces that would destroy them. America will be restored -- not by political rhetoric -- but by people like you -- teachers and pastors, neighbors and friends who say, "I will answer the crying needs around me. I will do whatever it takes. I will pay the price of sacrifice and pain."

Today, I want you to know that your President is here as a full partner with you in caring and concern. Your President is committed to complete restoration of family -- until once again our families -- all our American families -- are vital and strong havens for those who will follow after us. May God bless our partnership and our endeavors.

problems we see today are sad proof that the old approaches are continuing to produce new failures.

The time has come for a change -- ~~for~~ far-reaching, fundamental reform -- not just in government, but across the board. That's why I've proposed school choice reform: so that choices about education can be made from the kitchen table, rather than the ^{halls of bureaucracy} ~~government desk~~. 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 talking about won't be easy. But if our kids deserve a better future, our conscience must demand a bigger change.

Supper,
I know.
Help!

and with: "Battle lines" language.

statutes v. change.

(Grossman/Smith)
March 25, 1992
Draft One
NAAG

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. \\
Don't forget to mention the state attorneys general

Bill has his forces moving on several fronts -- from tort
reform to relief of prison overcrowding to Weed and Seed. These
are crucial missions \ I am determined to see them achieved \ and
nothing will stand in our way. \\
Don't forget to mention the state attorneys general

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 will walk to school without fear of attack; where
innocent people can walk to the corner store who get caught in the crossfire;
families can have dinner undisturbed by gunfire; where the
It's on their porch
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 3 yrs now (?)*
I've
called on Congress to pass my Crime Bill. I want a bill I can
sign, one that gives real teeth to law enforcement -- because

one that makes it clear, : : : -

(4) too much
~~We're not going to take a bite out of crime by nibbling around the edges.~~

Law & order means 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, it's not efficient, it's not even compassionate. The lingering

NAAGNOT

- the system is no longer working
- the days of machine politics are over
- the old free-wheeling system has skidded off track, shot through with the rust of cynicism and corruption.
- family sitting at their dinner table watching the evening news
- the system is not accountable, not effective, not efficient, nor even compassionate.
- there are two paths before us. One is reform. The other protects the status quo.
- they make crime pay -- then make the taxpayer pick up the tab.
- riddled with abuse
- these are serious problems and they are getting immediate attention. But there's something else.

-polluters
-swindlers

THE WHITE HOUSE
WASHINGTON

DATE: 3-25

TO:

Jennifer Grossman

FROM: **DAVID J. BEIGHTOL**
Special Assistant to the President for
Intergovernmental Affairs
Room 160, OEOB, x7170

- ☐ FYI
- ☐ Appropriate Action
- ☐ Let's Discuss
- ☒ Per Our Conversation
- ☐ Per Your Request
- ☐ Please Return

COMMENTS:

1992

CONNECTICUT

New Haven Is Target Of Inquiry

Documents Seized In Raid at City Hall

By CONSTANCE L. HAYS
Special to The New York Times

NEW HAVEN, March 18 — Federal investigators swooped down on this city's municipal offices this week, taking away boxes of documents that may figure in a fraud inquiry focusing on the rehabilitation of a rundown commercial area.

It is the third Federal investigation of a major Connecticut city's government in three years, and some here are wondering why the state seems suddenly to be a favorite target for United States attorneys.

"Until a couple of years ago, a Federal municipal government corruption investigation was unheard of," said Hugh Keefe, a New Haven lawyer who is defending the former Mayor of Waterbury, Joseph J. Santopietro, against Federal corruption charges in a trial in Bridgeport. Mr. Keefe also defended the former Mayor of Danbury, James E. Dyer, in a 1990 Federal corruption case in which Mr. Dyer was convicted of filing a false income-tax return, but acquitted of other tax charges as well as racketeering and extortion.

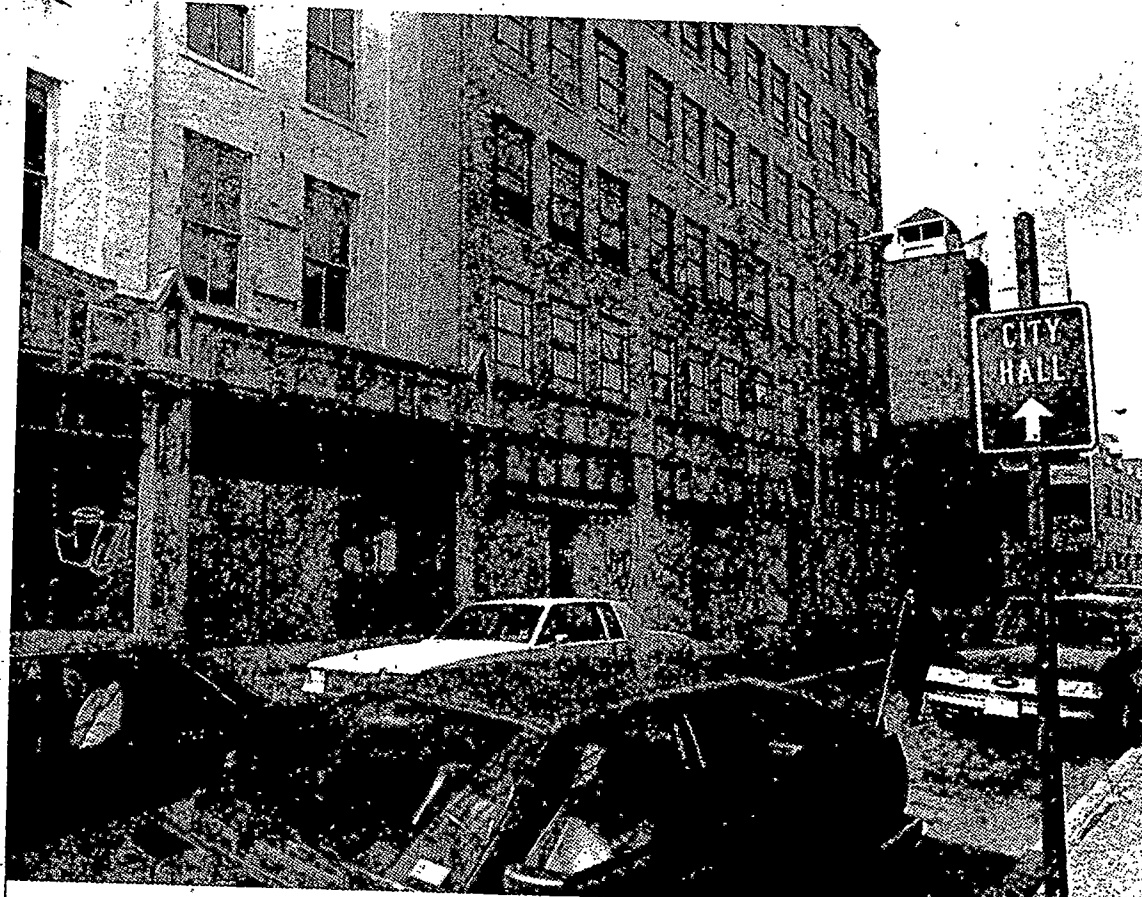
Cases Are a Priority

An expert with the American Bar Association in Washington said the recent rash of Connecticut cases may reflect a particular emphasis by the United States Attorney, Albert S. Dabrowski, but it also shows that such cases are a priority for the Department of Justice.

"Connecticut has no monopoly on public corruption," said the expert, Tom Smith, the associate director of the association's criminal justice section. "There has been a Federal presence in prosecuting local political corruption for many years that has reached high levels and low levels."

In 1989, 1,349 public officials were indicted nationwide and 1,149 of them convicted, said Doug Tillett, a spokesman for the Justice Department. Each case "involved abuse of the public trust," he said.

Details remain sketchy in the New



Federal officials have begun an investigation into a rehabilitation project in New Haven. Federal money was used to help businesses move out of the Ninth Square neighborhood, above, so it could be rebuilt.

3 investigations in 3 years of Connecticut cities by the U.S.

Haven case, since the United States Attorney's office and the Federal Bureau of Investigation refused to comment on it. They are conducting the investigation along with the Federal Department of Housing and Urban Development.

A subpoena served on Tuesday at City Hall demanded that officials turn over documents related to a business-relocation program that ran from 1987 to this year. Under the program, Federal money was used to help business owners move from the dilapidated Ninth Square neighborhood so that it could be rebuilt as a complex of apartments and stores.

The subpoena, dated March 12, also demands applications and requests made to the city for loans from the Small Business Administration and

the Women and Minority Business and Development programs from January 1987 to December 1989. It also demands documents "relating in any way to services performed or offered to be performed" by a local company called Fucci Construction, also between January 1987 and December 1989.

Daniels Pledges His Help

All documents requested predate the term of the current Mayor, John C. Daniels, who took office in 1990. Efforts today to reach his predecessor, Biagio DiLieto, who is also a former police chief here, were unsuccessful.

In a statement issued Tuesday, Mr. Daniels pledged his "continued cooperation" and added, "It is my sincere hope that this issue, as painful and difficult as it is, will be brought swiftly and equitably to a close."

Nancy A. Fucci, the owner of Fucci Construction, said, "I've been in contact with the U.S. Attorney's office and I've indicated that we're willing to cooperate in any way necessary to assist them in this investigation."

All work her 50-employee company did for the city, she said, was awarded because the company made the lowest bids. Most of the projects were for street improvements, such as installing benches and lights and replacing asphalt with brick paving.

John J. Sennett, a spokesman for the F.B.I. in New Haven, said, "No specific individual or individuals are being targeted in this investigation," and added, "we are only pursuing allegations of wrongdoing, and the investigation will take us where it takes us."

A state investigation of a similar city-financed program resulted in the arrests of 11 people last year. That program, known as the Neighborhood Commercial Revitalization Program, repaid people for up to \$15,000 in renovation work on properties in designated neighborhoods around the city.

Investigators charged that it became riddled with false applications for reimbursement from people applying on behalf of properties they did not own or inflating claims of how much they spent on renovations.

THE WHITE HOUSE
WASHINGTON

March 24, 1992

MEMORANDUM FOR RON KAUFMAN

Deputy Assistant to the President
and Director of Political Affairs

FROM:



DAVID J. BEIGHTOL
Special Assistant to the President
for Intergovernmental Affairs

SUBJECT: NAAG MEETING - MARCH 30, 1992

Next Monday, we have the Attorneys General in for a meeting with Sam Skinner, Bill Barr and the President in the Roosevelt Room. The tentative schedule includes:

10:00 Sam Skinner begins meeting

10:15 President arrives, spends 15 minutes
(informal talking points being developed)
[possibility of press pool in room while President
is in attendance.]

10:30 President departs

10:30 Attorney General Barr remarks
Q & A

11:00 Vice President Quayle hosts informal gathering
[OEOB office]

11:45 Stake-out

12:30 Bus returns to the Hall of States

Ken Eikenberry (R-WA) is the current President of the organization. I will be on a conference call with him and some of Barr's people tomorrow (1:30 pm) to discuss the White House events. As you know, Eikenberry is running for Governor. Please let me know if you have any concern/comments/wishes regarding the aforementioned.

I have attached the NAAG conference agenda for your information.

cc: Sherrie Rollins
Deb Anderson

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

3/13/92

1992 SPRING MEETING**Washington, D.C.****March 29-31, 1992***(all meetings are in the Hall of the States unless otherwise noted)***TENTATIVE AGENDA FOR ATTORNEYS GENERAL AND STAFF****SUNDAY, MARCH 29**

11:00 a.m. - 12:45 p.m.**Criminal Law Committee Meeting (Room 237/239)****11:00 a.m. - 11:10 a.m.****Opening Remarks***Attorney General Ernest D. Preate, Jr.***11:10 a.m. - 11:45 a.m.****Operation Weed and Seed (Roundtable)***Attorney General Ernest D. Preate, Jr., Moderator***11:45 a.m. - 11:55 a.m.****Crime Bill Update****11:55 a.m. - 12:25 p.m.****Precursors and Drug Diversion: Role of DEA***Robert Bonner, Administrator**Drug Enforcement Administration***12:25 p.m. - 12:45 p.m.****Roundtable on State Initiatives****1:00 p.m. - 1:45 p.m.****Executive Committee Meeting (Room 283/285)****1:00 p.m. - 1:20 p.m.****Call to Order and Report of the President-elect***Attorney General Jeffrey L. Amestoy*

- Report of the Budget Committee

- Report of the Site Selection Committee

1:20 p.m. - 1:30 p.m.**Update on 1992 Summer Meeting in Pittsburgh***Attorney General Ernest D. Preate, Jr.***1:30 p.m. - 1:45 p.m.****Report of the Executive Director***Christine T. Milliken*

- Supreme Court Advocacy

SUNDAY, MARCH 29 (continued)

2:00 p.m. - 5:30 p.m.**OPENING PLENARY SESSION (Room 283/285)****2:00 p.m. - 2:15 p.m.**

Report of the President and Announcements
Attorney General Ken Elkenberry

2:15 p.m. - 3:15 p.m.

Attorney General Roundtable on New State
Legislative Issues

3:15 p.m. - 3:30 p.m.

Break

3:30 p.m. - 4:30 p.m.

State Issues in Health Care Reform

Overview

*Ray Scheppach, Director, National
Governor's Association*

Issues for Attorneys General

*Attorney General Frankie Sue Del Papa,
NAAG Insurance Committee Chair*

4:30 p.m. - 5:30 p.m.

Civil Justice Reform

*John Payton, D.C. Corporation Counsel
Attorney General Grant Woods*

6:00 p.m. - 8:00 p.m.

Attorneys General Emeritus Reception
(Washington Court Hotel, 525 New Jersey Avenue, N.W.,
walking distance from the Hall of the States)

MONDAY, MARCH 30

8:00 a.m. - 9:15 a.m.	Attorney General Breakfast/Roundtable and Briefing (La Colline)
9:15 a.m.	Board Bus for the White House
10:00 a.m. - 11:00 a.m.	WHITE HOUSE MEETING <i>President Bush; Chief of Staff Samuel K. Skinner; and Attorney General William P. Barr</i>
11:00 a.m. - 11:45 a.m.	Meeting with Vice President Quayle (Old Executive Office Building)
11:45 a.m.	Press Availability
12:30 p.m.	Board Bus to return to the Hall of the States
12:45 p.m. - 1:30 p.m.	Executive Session Lunch (Room 283/285).
1:00 p.m. - 4:00 p.m.	Soundbite Taping for NAAG/FTC/FDA Weight-Loss Consumer Education Campaign (Room 233/235) (will take only 5 minutes, stop by at your convenience)
1:30 p.m. - 3:00 p.m.	Telephone/Office Break and Informal Meetings
2:00 p.m. - 3:00 p.m.	Management and Leadership Committee Meeting (Room 283/285)
2:00 p.m. - 2:30 p.m.	Planning for the December 1992 Issues Management Retreat Meeting
2:30 p.m. - 3:00 p.m.	NAAG Standards of Excellence Proposal
3:00 p.m. - 4:30 p.m.	DEPARTMENT OF JUSTICE MEETING (Room 283/285)
3:00 p.m. - 3:30 p.m.	<i>George J. Terwilliger III, Acting Deputy Attorney General Robert S. Mueller III, Assistant Attorney General for Criminal Justice</i>
3:30 p.m. - 4:00 p.m.	<i>Kenneth W. Starr, Solicitor General</i>
4:00 p.m. - 4:30 p.m.	<i>Wayne Budd, Acting Associate Attorney General (tentative) John R. Dunne, Assistant Attorney General for Civil Rights</i>
4:40 p.m.	Board Bus for the Supreme Court
5:00 p.m. - 5:30 p.m.	Meeting with Justice Anthony M. Kennedy (West Conference Room)
5:30 p.m. - 7:00 p.m.	Annual Supreme Court Reception (Lower Great Hall)

TUESDAY, MARCH 31

8:00 a.m. - 9:00 a.m.	FDA Working Group (Room 235)
7:30 a.m. - 8:45 a.m.	Gaming Issues Roundtable (La Colline) <i>Attorney General James E. Doyle, Moderator</i>
9:00 a.m. - 12:00 Noon	PLENARY SESSION (Room 283/285)
9:00 a.m. - 10:00 a.m.	<i>FDA Commissioner David A. Kessler</i>
10:00 a.m. - 11:00 a.m.	To Be Announced
11:00 a.m. - 11:30 a.m.	Resolutions and Reports
11:30 a.m. - 12:00 Noon	<i>Representative Al Swift (D-WA), Chair, Subcommittee on Transportation and Hazardous Materials</i>
12:00 Noon	• Recess
12:30 p.m. - 3:00 p.m.	Environment and Energy Committee Meeting (Room 235)
12:30 p.m. - 12:40 p.m.	Opening Remarks <i>Attorney General Hubert H. Humphrey III, Chair</i>
12:40 p.m. - 1:25 p.m.	Panel Discussion: The Economics of Pollution Prevention and Control <i>Attorney General Gale A. Norton; EPA Deputy Administrator F. Henry Habicht II; and Jerry W. Ross, Managing Environmental Counsel, Chevron Corporation Law Department</i>
1:25 p.m. - 1:45 p.m.	Attorney General Roundtable on Market Incentives, Voluntary Compliance and Pollution Prevention
1:45 p.m. - 2:10 p.m.	EPA's Enforcement Priorities for the 1990's <i>EPA Assistant Administrator Herbert H. Tate, Jr.</i>
2:10 p.m. - 2:35 p.m.	The Federal Government's Position on Takings under the Fifth Amendment <i>Acting Assistant Attorney General Barry M. Hartman</i>
2:35 p.m. - 3:00 p.m.	Committee Business and Attorney General Roundtable
12:30 p.m. - 2:30 p.m.	Executive Working Group on Antitrust Meeting (Room 233)
2:30 p.m. - 3:15 p.m.	FTC Working Group (Room 237)

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WEDNESDAY, APRIL 1

8:30 a.m. - 12:00 Noon

Conference of Western Attorneys General Meeting
(Room 235)

8:30 a.m.

Continental Breakfast

9:15 a.m.

Depart for Meetings with Federal Officials

9:30 a.m. - 12:00 Noon

Meetings with *Manuel Lujan Jr., Secretary of the Interior; Thomas L. Sansonetti, Solicitor for Department of Interior; and Officials from FERC*

INSERT FOR N.A.A.G. SPEECH

*- 2 pages
- PMK, MK*

[Language about cooperation] ... One of the most important tasks of this new era of cooperation among federal, state and local law enforcement agencies is the continued priority to investigate and prosecute public corruption.

My Administration has moved aggressively over the past three years to root out corruption at all levels of government. The Department of Justice has been vigilant in investigating and prosecuting public officials -- both elected and appointed -- who violate the trust placed in them by the American people.

This record is excellent. During 1989 and 1990, the Department of Justice secured over 2,200 convictions in public corruption cases. Slightly more than half of these convicted were federal officials; one-quarter were state and local officials; the rest were others involved in corruption. Defendants included judges, legislators and law enforcement officials.

What is perhaps the most overlooked aspect of public corruption is its price tag. Untold millions of hard-earned tax dollars are being siphoned out of the public treasuries every year by corrupt officials -- money that could otherwise be used to help those who need it most. Think about it: every time orders are falsely inflated because of a county kick-back scheme ... or a federal contract is padded to cover a bribe ... or a pay-off is made for inside information from a state official ... the result is lost public services, higher prices for consumers, and lost revenues to the government. And there is also an even larger casualty: the basic civil right of all Americans to have honest government that works for them.

###

NAME: David Bergstad
7170

Sam → will make potus

Ken Zilberberg Pres of

Shenise Nolan at
Oughto

1:00 PM
conference
call
160

-- DRAFT --

NAAG TALKING POINTS

- Ken (Eikenberry), Jeffrey (Amestoy), welcome to the White House.
- And to all the State's Attorneys General -- welcome.
- I see you've just heard from my Chief of Staff Sam Skinner on...
- I've been sharing my five-part strategy for reform with a lot of folks recently, and one very important part of that will be of specific interest to you --
- I'm pushing for fundamental legal reform to put a stop to the epidemic of lawsuits in this country.
- And in that regard, I understand that you will be meeting with Vice President Quayle a little later today --
- I'm sure he'll be sharing some of his tort reform initiatives with you then.
- I also believe you will be hearing from Attorney General Barr when I'm finished here.
- Let me just tell you that I am thrilled to have Bill on board and am very excited about the initiatives he's putting in place.
- I know he's been working hard on several fronts:
- The Weed and Seed program is moving forward; and I know you will all be interested in his plans to help state and local governments deal with prison overcrowding.
- Ken, why don't I stop here and see what you have on your minds.

THE WHITE HOUSE

3/23/02

Jennifer—

Thanks for your note— and thanks especially
for all your help on a short time frame.

I enjoyed working with you (briefly!) on this.
Hope I wasn't + too intense.

Come visit

Thanks again —
Groady

THE WHITE HOUSE

WASHINGTON

personal

Jennifer Grossman

Speech writing / Rm
122

THE WHITE HOUSE

WASHINGTON

March 25, 1992

MEMORANDUM FOR: David Demarest
Dan McGroarty
Speechwriters
Researchers

FROM: Janice Shaw Crouse *Janice*

RE: Greek Independence Day Ceremony Speech

SETTING, AUDIENCE, ACKNOWLEDGEMENTS:

- ♦ Today was a beautiful Spring day -- ideal for a Rose Garden event.
- ♦ The audience was obviously thrilled to be there and the event was clearly meaningful for them. There was considerable camaraderie among the audience before and after the ceremony.
- ♦ The President arrived with Archbishop Iakovos. He was very upbeat in his opening remarks. He gave a very warm welcome to the group and talked about the beautiful day.
- ♦ In his off-the-cuff acknowledgements, the President said the Archbishop had gained his "most sincere respect." The audience applauded. He said that the Archbishop was a "true, spiritual leader who has earned enormous respect." Applause again.
- ♦ The President saluted the Prime Minister and spoke glowingly of his personal respect and friendship with Mr. Mitsotakis.
- ♦ It was most impressive to see the Archbishop standing with dignified bearing and inherent authority, holding a gold staff while the President signed the Proclamation. At the end of the signing, the audience stood and applauded.
- ♦ After the ceremony, the President came into the crowd to shake hands with many in the audience. Again, it was obvious that the audience was made up of long-standing friends and acquaintances.

PRESIDENT'S DELIVERY:

- ♦ President Bush's tone was sincere with appropriate emphasis to stress the meaning, for instance, on the line -- "The U.S. and Greece are the firmest of friends and the strongest of allies." (Applause)
- ♦ Throughout the speech, President Bush had a casual, firm tone of voice with strong delivery (in spite of sounding a bit hoarse).
- ♦ I was surprised that the only line the President rushed through was the one about "our ideals and values" being preserved at "high cost -- the valor and sacrifice of our nation's finest young men and women." (Perhaps he was self-conscious about press criticism of too much Desert Storm?) But he came back strong on the next line about Greek heritage being American heritage.
- ♦ The rest of the speech -- where he spoke of being moved by the importance of Independence Days and not letting our children forget -- were delivered with great feeling! He stressed the line about telling the "old stories in order to preserve that which we value so highly."
- ♦ **Special Note:** The President looked tan and rested, but he squinted after stepping into the sunlight which made him look somewhat worried.

CONTENT:

- ♦ During the "preserving traditions" section, I was watching the audience and saw many heads nod approval when he talked about the value that Greek-Americans place on "family and tradition."
- ♦ President Bush seemed to really get into the paragraph about passing values along from one generation to the next; about that not being a luxury, but the social capital necessary for greatness -- most especially for a country to be good.
- ♦ Toward the end of the short speech, President Bush recognized that this year is Archbishop Iakovos' 33rd year as Archbishop of the Americas. The Archbishop beamed and the audience applauded.
- ♦ The most enthusiastic applause of the day came when President Bush spoke of continuing to support a fair and permanent settlement to the Cyprus issue.

- ♦ After the speech, I overheard an audience member comment that the President's remarks had "touched all the bases that are important to Greek-Americans."

ROUGH SPOTS:

- ♦ President Bush seemed to have a bit of trouble with the phrase "necessary underpinning for continued democracy and freedom."
- ♦ The President departed from the text in describing the Archbishop's benediction at the 1988 Convention -- he referred to the benediction as "bipartisan" (seemed to be trying to insert a bit of humor, but the Archbishop and the audience remained solemn).
- ♦ As the President began reading the quote from the benediction, the wind whipped the American flag up around the headpiece of the Archbishop. Helen Thomas spoke out loud enough for all around her to hear, "Look at that flag!" And, she laughed. This produced some stirring in the audience which made the President somewhat uncomfortable, but the episode passed quickly and he moved on.
- ♦ The President stumbled through the Congressional greetings and seemed ill at ease. (When Specter's name was given, Helen Thomas proclaimed "He's not Greek!") President Bush settled down after he moved into the text of the speech and read it quite comfortably.
- ♦ Prior to the President's appearance, the black table cover, on which the Proclamation would be signed, kept blowing away to the consternation of press and advance personnel. Finally, it was taken off, folded and put away.

TOUCHING MOMENT:

In the Archbishop's response, he noted -- with a catch in his voice -- that the President had acknowledged his 33rd anniversary as Archbishop to the Americas. Since I was shamelessly eavesdropping after the speech, I overheard two members of the Greek press (definitely not cynical or blase) standing close to me talking about the President's "stroke of genius" in recognizing the Archbishop's anniversary.

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



Access To Justice Act of 1992

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.

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

"(6) in actions pertaining to temporary restraining orders, preliminary injunctive relief, fraudulent conveyance of property, or in other types of actions which by their nature compel immediate resort to the courts.

"(d) In the event the district court finds that the requirements of subsection (a) of this section have not been fulfilled by the claimant, and such defect is asserted by the defendant within 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, shall be imposed upon the claimant.

Whenever an action is dismissed under this section, the claimant may refile such claim within 60 days after dismissal regardless of any statutory limitations period if: (1) during the 60 days after dismissal, notice is effected under subsection (a) of this section and, (2) the original action was timely filed in accordance with subsection (b).".

SEC. 105. AWARD OF ATTORNEY'S FEES IN DISPUTES INVOLVING THE UNITED STATES.

Title 28 of the United States Code is amended by adding a new section 2412a following 28 U.S.C. §2412 as follows:

"Award of Attorney's Fees in Disputes Involving The United States. (a) Except as otherwise specifically provided by statute, the United States is authorized to enter into an agreement which provides that attorney's fees may be awarded against the United States or any other party to the 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

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

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

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 shall
8 include, but not be limited to--

9 "(A) procedures for limited discovery;

10 "(B) confidentiality of proceedings as to possible
11 subsequent 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

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

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

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;

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

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

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.



**CIVIL JUSTICE REFORM:
PROPOSED AMENDMENTS
TO FEDERAL RULES**

**PREFACE TO PROPOSED CIVIL JUSTICE
REFORM AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE**

This pamphlet contains the Administration's proposed revisions to the Federal Rules of Civil Procedure, Federal Rules of Evidence and Federal Rules of Appellate Procedure. These revisions were submitted to the Civil Rules Advisory Committee on February 7, 1992 to implement many of the Civil Justice Reform ("CJR") recommendations made by the President's Competitiveness Council. The Amendments were submitted in conjunction with comments on pending rules amendments proposed by the Advisory Committee. Consideration of proposed amendments to the Federal Rules of Civil Procedure by the Advisory Committee precedes further consideration by the Standing Rules Committee, the Judicial Conference of the United States, the Supreme Court, and Congress. Accompanying the proposed rule changes is a commentary explaining the suggested revisions. The commentary is located at the back of this pamphlet.

**AMENDMENTS TO THE FEDERAL RULES OF CIVIL
PROCEDURE TO IMPLEMENT THE AGENDA
FOR CIVIL JUSTICE REFORM IN AMERICA**

Rule 11 CJR Recommendations 37 - 39

Introduction

Proposed additions to Rule 11 of the Federal Rules of Civil Procedure to implement Recommendations 37 - 39 of the Agenda for Civil Justice Reform in America are underlined below and deletions to the present rules are bracketed.

Rule 11. 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.

**AMENDMENTS TO THE FEDERAL RULES OF CIVIL
PROCEDURE TO IMPLEMENT THE AGENDA
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Rule 16 CJR Recommendation 5

Introduction

Proposed additions to Rule 16 of the Federal Rules of Civil Procedure to Implement Recommendation 5 of the Agenda for Civil Justice Reform in America are underlined below and deletions to the present rules are bracketed.

Rule 16. Pretrial Conferences; Scheduling; Management

(a) Pretrial Conferences; Objectives. 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. In addition, [In any action,] the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such other purposes as

- (1) expediting the disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (3) discouraging wasteful pretrial activities; and
- (4) improving the quality of the trial through more thorough preparation, [, and;]
- [(5) facilitating the settlement of the case.]

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

- (1) to join other parties and to amend the pleadings;
- (2) to file and hear motions; and
- (3) to complete discovery.

The scheduling order also may include

- (4) the date or dates for conferences before trial, a final pretrial conference, and trial; and
- (5) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge or a magistrate when authorized by district court rule upon a showing of good cause.

(c) Subjects to be Discussed at Pretrial Conferences. In addition to discussing settlement and resort to alternative dispute resolution procedures as provided by section (a), [T]he participants at any conference under this rule may consider and take action with respect to

- (1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;
- (2) the necessity or desirability of amendments to the pleadings;
- (3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;
- (4) the avoidance of unnecessary proof and of cumulative evidence;
- (5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;
- (6) the advisability of referring matters to a magistrate or master;
- [(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;]
- (7) [(8)] the form and substance of the pretrial order;
- (8) [(9)] the disposition of pending motions;
- (9) [(10)] the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and
- (10) [(11)] such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

(d) **Final Pretrial Conference.** Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) **Pretrial Orders.** After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) **Sanctions.** If [a] an unrepresented party or a party's attorney fails to obey [a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a] 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 [a] 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 among others any of the orders provided in Rule 37(b)(2)(B), (C), (D).] 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 rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

**AMENDMENTS TO THE FEDERAL RULES OF CIVIL
PROCEDURE TO IMPLEMENT THE AGENDA
FOR CIVIL JUSTICE REFORM IN AMERICA**

Rule 26 CJR Recommendations 6-13; 21-22

Introduction

Proposed additions to Rule 26 of the Federal Rules of Civil Procedure to Implement Recommendations 6 - 13 and 21 - 22 of the Agenda for Civil Justice Reform in America are underlined below and deletions to the present rules are bracketed.

Rule 26. General Provisions Governing Discovery and Disclosure

(a) Mandatory disclosure. 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 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.

[(a)] (b) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Discovery at a place within a country having a treaty with the United States applicable to such discovery shall be conducted by methods authorized by the treaty unless the court determines that those methods are inadequate or inequitable and authorizes other discovery methods not prohibited by the treaty.

[(b)] (c) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of

persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in subdivision [(a)] (b) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision [(c)] (d).

(2) **Insurance Agreements.** A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) **Trial Preparation: Materials.** Subject to the provisions of subdivision [(b)] (c)(3) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision [(b)] (c)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of any attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) **Trial Preparation: Experts.** Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) 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.

(B) 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.

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

(D) Additional Discovery. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, [pursuant to subdivision (b)(4)(C) of this rule, concerning] including fees and expenses, as the court may deem appropriate.

(E)(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

[Current F. R. Civ. P. Rules 26(b)(4)(A)(i) and (C) are to be deleted.]

(5) 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 pursuant to Rule 30, upon written questions pursuant to Rule 31, or pursuant to any other provision of these rules.

(6) 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.

[(c)] (d) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any

party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

[(d)] (e) Sequence, [and] Timing and Contents of Discovery. (1) Sequence and Timing. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(2) 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.

[(e)] (f) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters; and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

[(f)] (g) Discovery Conference. At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, subject to the provisions of subdivision (c)(5) setting additional limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management

of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

[(g)] (h) **Signing of Discovery Requests, Responses, and Objections.** Every request for discovery or response or objection thereto made by 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 request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

(i) **Discovery plans.** After service of the disclosure statements pursuant to subdivision (a), the parties shall meet to formulate a discovery plan. The discovery plan shall be consistent with the provisions of subdivision (c)(5), 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.

The provisions of Rule 37(b) shall apply to any order entered under this subdivision.

**AMENDMENTS TO THE FEDERAL RULES OF CIVIL
PROCEDURE TO IMPLEMENT THE AGENDA
FOR CIVIL JUSTICE REFORM IN AMERICA**

Rule 37 CJR Recommendations 6 - 13

Introduction

Proposed additions to Rule 37 of the Federal Rules of Civil Procedure to Implement Recommendations 6 - 13 of the Agenda for Civil Justice Reform in America are underlined below and deletions to the present rules are bracketed.

**Rule 37. Failure to Make or Cooperate in
Discovery: Sanctions**

(a) **Motion for Order Compelling Discovery.** Upon compliance with subdivision (e),
[A] party, upon reasonable notice to other parties and all persons affected
thereby may apply for an order compelling discovery as follows:

(1) **Appropriate Court.** An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) **Motion.** If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to rule 26[(c)](d).

(3) **Evasive or Incomplete Answer.** For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) **Award of Expenses of Motion.** If the motion 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 [the opposition to the motion was substantially justified or that other] 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 motion 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 the making of the motion was substantially justified or that other] 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 [may] shall apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply with Order.

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26[(f)](g), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, [unless the court finds that the failure was substantially justified or that other] unless the court finds that special circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders

in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that [the failure was substantially justified or that other] special circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) ~~[[Abrogated]]~~

(e) Duty to Confer. The court shall not consider any motion brought pursuant to this rule or Rules 26 through 36, unless movant as part of the motion, shall make a written showing that, after personal consultation with counsel for opposing parties and good faith attempts to resolve differences, they are unable to reach agreement as to the 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. A party opposing a motion pursuant to this rule or pursuant to Rules 26 through 36 shall make a written showing that, after making a personal consultation with counsel for opposing parties and good faith attempts to resolve differences, they are unable to reach agreement as to the discovery at issue and shall recite, additionally, the date, time and place of each such conference and the names of all persons participating in the conference, unless the party opposing the motion expressly adopts the moving parties' written showing pursuant to this subdivision. Absent a written showing by moving or opposing counsel or express adoption of the moving parties' statement by the opposing party pursuant to the subdivision, the court shall decline to consider an opposition to a motion subject to this subdivision absent good cause shown.

(f) ~~[Repealed. Pub.L., 96-481, Title II, § 205(a), Oct. 21, 1980, 94 Stat. 2330.]~~

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26((f))(i), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

**AMENDMENTS TO THE FEDERAL RULES OF CIVIL
PROCEDURE TO IMPLEMENT THE AGENDA
FOR CIVIL JUSTICE REFORM IN AMERICA**

Rule 56 CJR Recommendations 16 - 17

Introduction

Proposed additions to Rule 56 of the Federal Rules of Civil Procedure to Implement Recommendations 16 - 17 of the Agenda for Civil Justice Reform in America are underlined below and deletions to the present rules are bracketed.

RULE 56. 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. The judgment sought [shall] must be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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 granted or denied, the court must set forth specific findings which support its ruling.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule 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 [if practicable] 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 rule, 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 rule, must set forth 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 affidavits 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 pursuant to this rule are presented 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.

**AMENDMENTS TO THE FEDERAL RULES OF CIVIL
PROCEDURE TO IMPLEMENT THE AGENDA
FOR CIVIL JUSTICE REFORM IN AMERICA**

Rule 68 CJR Recommendation 4

Introduction

Proposed additions to Rule 68 of the Federal Rules of Civil Procedure to Implement Recommendation 4 of the Agenda for Civil Justice Reform in America are underlined below and deletions to the present rules are bracketed.

Rule 68. Offer of Settlement

At any time more than 20 days [before the trial begins, a party defending against a claim] 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 [adverse party an offer to allow judgment to be taken against the defending party] 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 [or] property or [to the effect] relief specified in the offer [with costs then accrued.] and to enter into an agreement dismissing the claim or to allow judgment to be entered accordingly. [If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.] 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. [When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.]

This rule shall not apply to class or derivative actions.

**AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE
TO IMPLEMENT THE AGENDA FOR CIVIL JUSTICE
REFORM IN AMERICA**

Rule 702 CJR Recommendations 19 - 20; 23

Introduction

Proposed additions to Rule 702 of the Federal Rules of Evidence to Implement Recommendations 19 - 20 and 23 of the Agenda for Civil Justice Reform in America are underlined below and deletions to the present rules are bracketed.

Rule 702

[If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.]

(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 under Rule 702(a)(2) 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.

**AMENDMENTS TO THE FEDERAL RULES OF APPELLATE
PROCEDURE TO IMPLEMENT THE AGENDA
FOR CIVIL JUSTICE REFORM IN AMERICA**

Rule 35 CJR Recommendation 32

Introduction

Proposed additions to Rule 35 of the Federal Rules of Appellate Procedure to Implement Recommendation 32 of the Agenda for Civil Justice Reform in America are underlined below and deletions to the present rules are bracketed.

Rule 35. Determination of Causes by the Court in Banc

(a) **When Hearing or Rehearing In Banc Will be Ordered.** A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing [is not favored and] ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, (2) when a decision of the court is in conflict with the decision of another federal court of appeals on the same matter or resolves a federal question in a way in conflict with a state court of last resort, or [(2)] (3) when the proceeding involves a question of exceptional importance.

COMMENTARY ON PROPOSED AMENDMENTS

**COMMENTARY ON PROPOSED CJR
AMENDMENTS TO RULE 11 OF THE
FEDERAL RULES OF CIVIL PROCEDURE**

Rule 11 of the Federal Rules of Civil Procedure protects the integrity of submissions to the court. It requires that, on penalty of sanctions, pleadings, motions and other papers be based on a reasonable inquiry that the paper is well grounded in fact; be warranted by existing law or good faith argument for the extension, modification, or reversal of existing law; and that the paper not be interposed for any improper purpose. The proposed CJR amendment to Rule 11 broadens the court's power to impose sanctions to check these abuses.

Rule 11(a) extends the court's power to impose sanctions to include attorneys who are not signatories of papers but who are responsible for the truth of the content of the submission to the court.

Rule 11(b) imposes a continuing obligation to correct any errors or falsehoods in signed documents upon learning of the error or falsehood.

**COMMENTARY ON PROPOSED CJR
AMENDMENTS TO RULE 16 OF THE
FEDERAL RULES OF CIVIL PROCEDURE**

Rule 16 of the Federal Rules of Civil Procedure authorizes pretrial conferences to permit courts to manage litigation effectively. The proposed amendments to Rule 16 require early pretrial conferences and strengthen the court's management of cases through pretrial conferences. The proposed amendments revise Rule 16(a), Rule 16(c) and Rule 16(f).

Rule 16(a) requires an early pretrial conference before the court or a neutral third-party appointed by the court to discuss settlement, possible use of alternative dispute resolution procedures, and such other subjects as the court deems appropriate.

Rule 16(c) is amended to specify settlement and use of alternative dispute resolution procedures as subjects to be discussed at pretrial conferences.

Rule 16(f) permits sanctions against unrepresented parties and attorneys representing them for failure to participate in a settlement conference in good faith. This subsection also is amended to clarify that refusal to agree to any proposal made by

a party, standing alone, does not constitute failure to participate in good faith in a settlement conference.

**COMMENTARY ON PROPOSED CJR
AMENDMENTS RULE 26 OF THE
FEDERAL RULES OF CIVIL PROCEDURE**

Rule 26 of the Federal Rules of Civil Procedure is the rule containing general provisions governing discovery. The CJR amendments to Rule 26 are designed to facilitate exchange of limited basic information useful in formulating a discovery plan. They will also permit the parties to reach the central issues in dispute without extraneous, costly and unproductive disputes and filings. Discovery subsequent to initial core disclosures is limited, subject to exceptions specified in the rules, to avoid abuse, and expert discovery is expanded to facilitate resolution of the central issues. In addition, these amendments to Rule 26 add a flexible mechanism for developing discovery plans to streamline and expedite litigation.

Subdivision (a) requires automatic early disclosure of "core information" (i.e., the names of potential witnesses and the location of directly relevant documents). Failure to disclose the core information will bar a party from pursuing any discovery absent a court order. The terms for relevance and personal knowledge set forth in subdivision (a) are taken directly from the Federal Rules of Evidence, and are intended to be interpreted analogously. All persons known by the parties to have knowledge of any fact of consequence must be identified. The fact that a

party does not intend to call a person as a witness is not meant to be grounds for failure to make disclosure.

Subdivision (c)(4)(A), as amended, permits a more comprehensive inquiry into expert witnesses' qualifications. Under the amended rule a party may serve expert witness interrogatories to determine the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert will testify, the expert's formal training, and the expert's publications as well as the cases in which the expert has testified or given a deposition. This subdivision also allows for discovery of the expert's compensation, publications, and expected testimony prior to trial.

Subdivision (c)(4)(B) allows a party to take an expert's deposition prior to trial without court order.

Subdivision (c)(4)(C) permits a party to request all documents the expert relies upon or has reviewed in preparation for his testimony.

Subdivision (c)(4)(D) authorizes the court to order further discovery subject to restrictions, including payment of fees and expenses.

Subdivision (c)(4)(E) is the text of current Rule 26(b)(4)(B).

Subdivision (c)(5) establishes reasonable presumptive numerical limits on the number of interrogatories (15) and depositions (10). The suggested limits may be waived by agreement of counsel or modified by the court for good cause.

Subdivision (c)(6) relates to admissions of facts and confines discovery to matters that are actually in controversy, thereby helping to guard against discovery abuse.

Subdivision (e)(2) requires parties to explain the relevance of requested materials through specific references to their pleadings.

Subdivision (i) requires the parties to design a discovery plan consistent with the numerical limits imposed by subdivision (c)(5), unless other parameters have been agreed upon by the parties or ordered by the court on good cause shown. Discovery beyond that set forth in the plan may be taken only if the requesting party pays all of the producing parties' reasonable costs (including reasonable attorney's fees) caused by the request.

**COMMENTARY ON PROPOSED CJR AMENDMENTS
TO RULE 37 OF THE FEDERAL RULES
OF CIVIL PROCEDURE**

Rule 37 of the Federal Rules of Civil Procedure sets forth specific powers of the court to compel discovery and to impose discovery sanctions. The CJR amendments provide a "Fairness Rule" requiring the loser in discovery motion proceedings to pay the prevailing party's attorney's fees. This result is achieved by deleting language in subdivisions (a), (b) and (d) that bars an award if a party's position is "substantially justified." The proposed rule includes an exception that would permit the court to bar or limit fee-shifting if "special circumstances" would make it "unjust."

An amendment to subdivision (e) requires the parties to confer prior to seeking court intervention in a discovery dispute.

Taken together, these changes encourage both sides to evaluate carefully their claims and defenses.

**COMMENTARY ON PROPOSED CJR AMENDMENTS
TO RULE 56 OF THE FEDERAL RULES
OF CIVIL PROCEDURE**

Summary judgment is a well recognized and useful method for terminating litigation when there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. Under the current Rule 56, some parties urge the court to decline to enter summary judgment even if there is no genuine issue of material fact. As amended, Rule 56(c) precludes this argument; the amended rule makes it plain that summary judgment is mandatory in such cases.

Another amendment to subdivision (c) requires that judges make explicit findings of fact. This amendment will encourage judges to examine cases closely before granting or denying summary judgment and will help focus issues for trial when summary judgment is not granted. The amendments to subdivision (c) also give greater weight to the trial court's findings when a material fact exists by establishing a "clearly erroneous" standard for reversal on appeal.

**COMMENTARY ON PROPOSED CJR AMENDMENTS
TO RULE 68 OF THE FEDERAL RULES
OF CIVIL PROCEDURE**

Rule 68, as amended, is intended to encourage dispute resolution by giving parties incentives to offer and accept reasonable settlement terms prior to trial. The revised Rule 68 provides that either party may, before trial, serve on the opposing party an offer to settle the dispute. It rewards careful evaluation of settlements by requiring that the party rejecting the compromise bear the opponent's additional costs of litigation, including reasonable attorney's fees, unless that party obtains a judgment that is 10 percent more favorable than the settlement offer (for money claims) or is more favorable than the rejected offer (in other than money claims).

This Rule does not apply to class or derivative actions.

**COMMENTARY ON PROPOSED CJR
AMENDMENTS TO RULE 702 OF THE
FEDERAL RULES OF EVIDENCE**

Unlike ordinary witnesses, who generally may offer only factual testimony, expert witnesses are allowed to testify as to their opinions. Expert opinion testimony, however, ought not to contain unsupportable speculation. The expert's role as an impartial and objective witness is fundamental. Thus contingency fee arrangements with experts should be barred so an expert witness will not have any direct financial interest in the outcome of the trial. The CJR Amendments effect these reforms by amending Rule 702 of the Federal Rules of Evidence.

Subdivision (a) sets forth the requirements for testifying as an expert in civil cases. Under the amendment, expert testimony may be admitted if the court finds that specialized knowledge will substantially aid the trier of fact. To testify as an expert, a witness must be 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 too far afield from current knowledge. It is contemplated that this requirement may be satisfied by expert testimony that is accepted by at least a substantial minority of experts in the relevant field.

Subdivision (b) bars contingency fees for expert witnesses.

**COMMENTARY ON PROPOSED CJR AMENDMENT
TO RULE 35 OF THE FEDERAL RULES
OF APPELLATE PROCEDURES**

Rule 35 of the Federal Rules of Appellate Procedure would be amended to delete the rule that rehearing in banc is disfavored. The amended rule (subdivision (2)) would authorize rehearing in banc when a decision of the court is in conflict with the decision of another federal court of appeals or resolves a federal question so as to conflict with a state court of last resort.

A Report from the
President's Council on Competitiveness

Agenda for Civil Justice Reform in America



August 1991

A Report from the
President's Council on Competitiveness

Agenda for Civil Justice Reform in America

August 1991



THE VICE PRESIDENT
WASHINGTON

MEMORANDUM FOR THE PRESIDENT

FROM: THE VICE PRESIDENT

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

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

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

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

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

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

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

Introduction

Litigation and the American Economy

America has become a litigious society. In 1989 nearly 18 million new civil cases were filed in the state and federal courts. This amounts to one lawsuit for every ten

adults. In the federal courts alone, the number of lawsuits filed each year has almost tripled in the last thirty

years — from approximately 90,000 in 1960 to more than 250,000 in 1990.

This dramatic growth in litigation carries with it very high costs

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

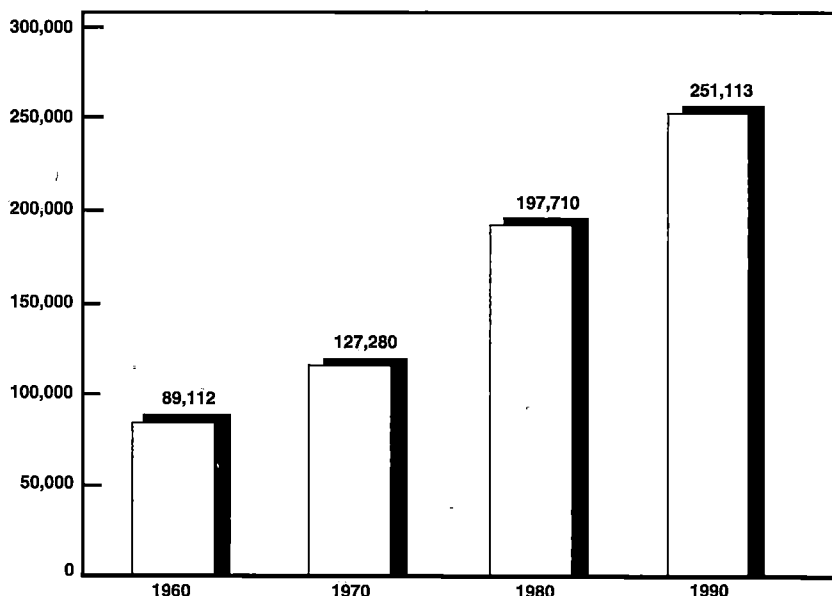
Unrestrained litigation necessarily exacts a terrible toll on the

U.S. economy. According to a recent report by a Professor of Finance at the University of Texas, it is esti-

imated that the average lawyer takes \$1 million a year from the country's output of goods and services. These baleful effects are

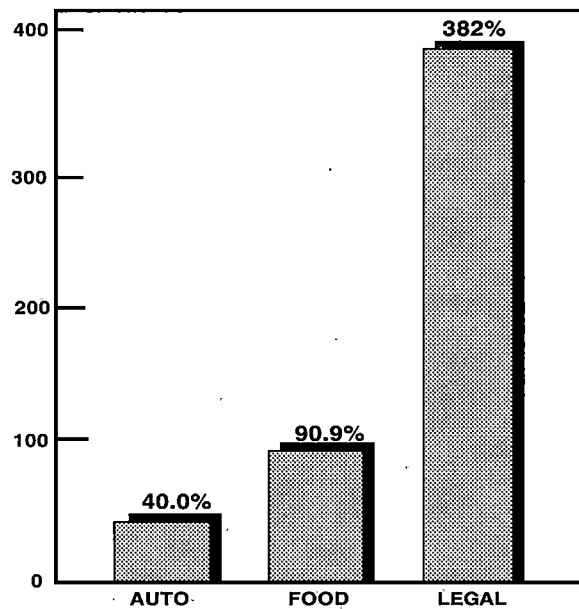
***Businesses and governments
spend more than
\$80 billion a year on direct
litigation costs . . .***

Total Federal District Court Filings



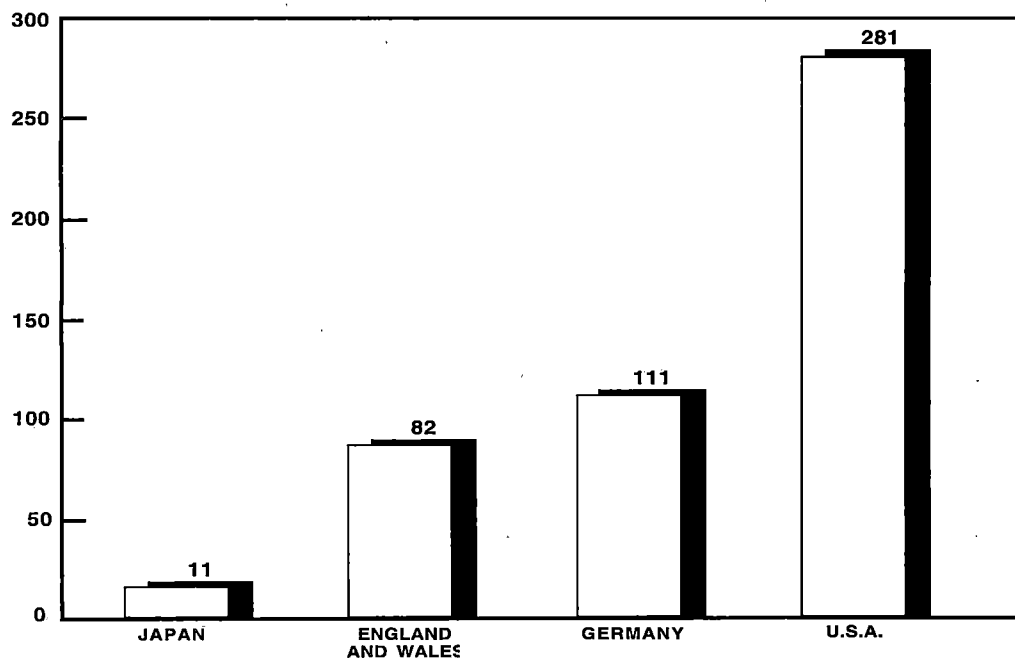
SOURCE: Federal Courts Study Committee - Working Papers and Subcommittee Reports; July 1990, Vol. 2; 1990 filings; 1990 Federal Court Management Statistics.

Growth of the Legal Industry 1977-1989



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

Lawyers per 100,000 Population



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

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

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

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

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

Discovery

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

permit parties to roam unfettered through their opponent's most private documents.

An especially burdensome part of

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

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

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

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

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

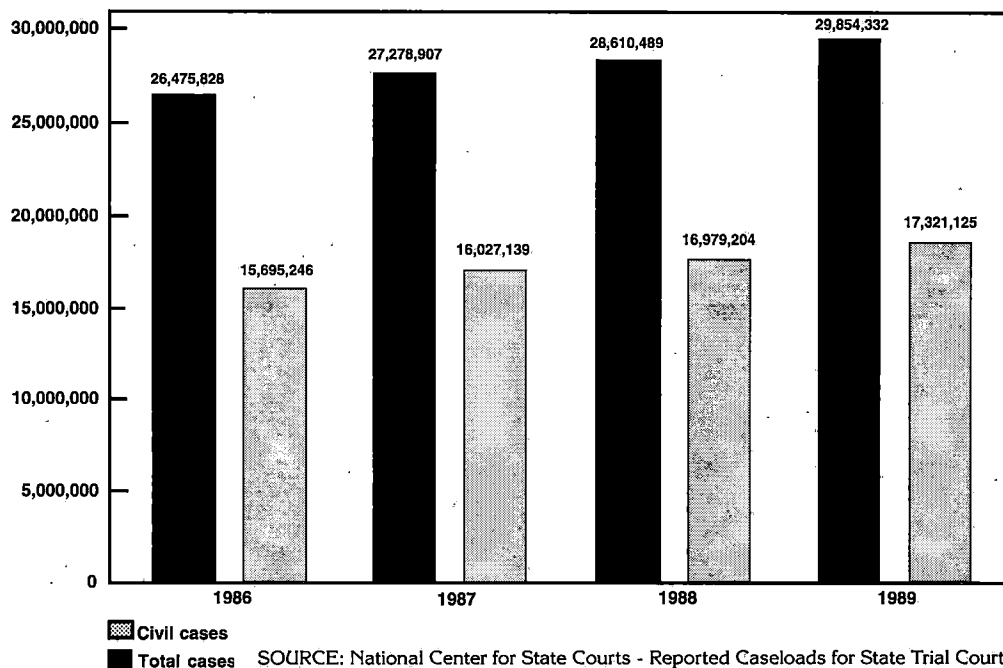
found that in 1985 the legal system incurred a total of \$16-\$19 billion in transaction costs to deliver \$14-\$16 billion to plaintiffs in net compensation.

Expert Witnesses and "Junk Science"

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

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

Caseload for State Trial Courts



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

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

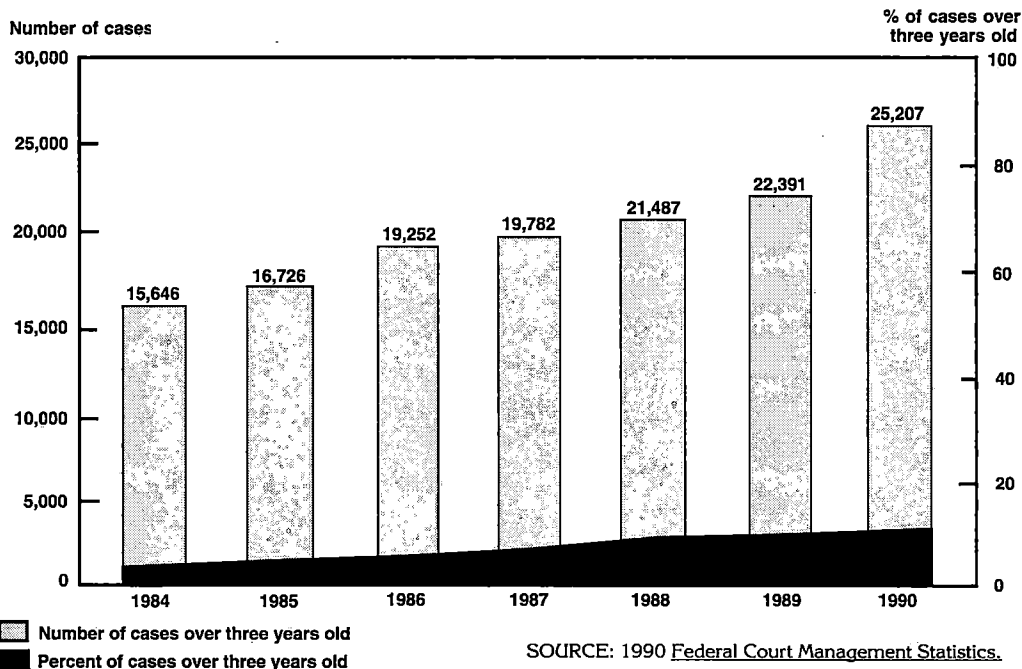
Stories such as this are becoming almost commonplace. "Expert" witnesses regularly offer their "scientific" opinions on the connections between automobile accidents and breast cancer or environmental pollutants and "chemically induced AIDS". As if the ability to fashion almost any opinion into expert testimony were not enough, there is considerable use of contin-

gency fees to pay expert witnesses. Although expert witnesses are supposed to give objective testimony based on scientific evidence in order to help judge and jury resolve complex matters, this practice easily turns too many expert witnesses into "hired guns."

Punitive Damages

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

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



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

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

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

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

The Federal Civil Justice Working Group

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

Council Recommendations: An Overview

Voluntary Dispute Resolution

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

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

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

Discovery

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

The Council recommends several fundamental reforms to the discovery

process, including disclosure of basic information and an initial round of discovery that

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

More Efficient Trials

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

Expert Evidence Reform

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

allowed to assign a specific dollar amount to their requests. Where there is clear and convincing evidence of the defendant's intent to cause injury, then punitive damages may be awarded in a separate phase of the proceeding. In any event, however, the amount of punitive damages should not exceed the plaintiff's actual damages.

Improved Use of Judicial Resources

The Council encourages courts to employ more efficient case management techniques, including flexible assignments of federal district judges. The Council also encourages greater emphasis on resolving intracircuit conflicts. The Council has

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

proposed that circuit courts be maintained at a manageable number of judges, and that the Ninth Circuit, which

Punitive Damages

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

The Council recommends that punitive damages be awarded in a rational and consistent manner as part of a coherent system. Plaintiffs seeking punitive damages should not be

has almost thirty sitting judges, be split into two circuits.

Enhanced Incentives for Reduced Litigation

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

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

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

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

Eliminating Litigation Caused by Poorly Drafted Legislation

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

Reducing Unnecessary Burdens on Federal Courts

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

Council Recommendations: Implementation

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

The Administration will draft legislation to implement these recommendations and will work with Congress toward reform. Other changes will require amendment to the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and the Federal Rules of Appellate Procedure. The

Administration will draft proposed rules changes and submit the proposals to the Supreme Court's Rules Advisory Committees.

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

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

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

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Recommendations

VOLUNTARY DISPUTE RESOLUTION

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

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

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

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

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

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

Action Required: Encourage and facilitate judicial action.

Promote Greater Awareness of ADR

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

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

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

2. Require Notice Prior to Filing a Lawsuit

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

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

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

Action Required: Propose legislation to amend appropriate federal statutes.

3. Encourage Earlier Settlement of Contested Cases

Provide Incentives for Settlement Offers

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

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

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

Expand Settlement Opportunities Through Settlement Conferences

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

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

Action Required: Encourage judicial action.

DISCOVERY

4. Reforms to the Pre-Trial Discovery Process

Require Disclosure of "Core Information"

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

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

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

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

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

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

Parties should have access to relevant information but should not be able to use discovery to impose needless costs upon an opponent.

After reviewing the core information exchanged, the parties would meet to formulate a plan that would limit and direct discovery efforts within preset limits. Presumptive quantitative limits on discovery, established in the rules, would set the outer boundaries of the plan unless good cause for additional inquiry is established. The parties would then submit a discovery plan to the court for approval. Either party would be able to pursue additional discovery by paying the costs its opponent would incur in producing the information.

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

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

Penalize Abusive Discovery

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

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

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

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

Encourage Parties to Admit Facts Not in Dispute.

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

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

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

Tie Discovery Requests to the Pleadings

Recommendation: *In making discovery requests, the parties should be compelled to supply the rationale for*

the discovery by referring to the portion of the complaint, answer or other relevant pleading to be addressed in the desired discovery. (11)

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

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

5. Resolving Discovery Disputes: Reform of Discovery Motions

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

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

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

premium upon cooperation, acceptable compromises often result.

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

"Loser Pays" Rule for Discovery Motions

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

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

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

6. Maintain Safeguards for Trade Secrets

Recommendation: *Courts should retain the ability to preserve confidential and trade secret information. These safeguards should not be eroded*

by legislative action or rules changes. (14)

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

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

MORE EFFECTIVE TRIAL PROCEDURES

7. Early Trial Dates

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

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

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

Action Required: Encourage judicial action.

8. Summary Judgment Reforms

Mandatory Summary Judgment

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

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

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

Provide Appropriate Deference to Trial Court Findings

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

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

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

9. Hands-On Docket Management

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

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

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

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

Action: Encourage greater judicial involvement.

EXPERT EVIDENCE REFORM

10. Reform the Rules Regarding Expert Witnesses.

Require "Widely Accepted" Theories

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

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

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

Bar Contingency Fees for Expert Witnesses

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

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

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

Require Additional Disclosure from Expert Witnesses

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

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

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

Permit Depositions without Leave of Court

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

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

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

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

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

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

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

Resist Efforts to Make Use of Court-Appointed Experts Mandatory

Recommendations: *Resist attempts to take the review of expert testimony*

away from juries or force the use of court-appointed experts. (24)

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

Action Required: Oppose repeal efforts.

PUNITIVE DAMAGES

11. Reform of Unlimited Punitive Damages

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

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

tive damages that can be levied in any single case.

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

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

IMPROVED USE OF FEDERAL JUDICIAL RESOURCES

12. Flexible Assignments for District Court Judges

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

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

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

13. Enhance Case Management Techniques

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

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

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

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

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

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

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

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

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

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

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

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

ENHANCED INCENTIVES FOR ENCOURAGING MERITORIOUS LITIGATION

16. “Loser Pays” Rule for Attorney Fees in Diversity Cases

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

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

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

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

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

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

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

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

Some courts currently construe Rule 11 to apply only to knowledge at the time the document was filed, while other courts require parties to correct filings when they learn of error. Whenever an error or falsehood is discov-

ered, the parties should be obligated to supply correct information. Further, Rule 11 should apply not only to the lawyer who signs the pleading, but also to any other lawyers responsible for the falsehood.

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

18. Towards More Efficient Attorney's Fees Statutes

Moratorium on One-Party Pay Statutes

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

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

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

Reduce Time Spent Litigating Attorney's Fees

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

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

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

REDUCING UNNECESSARY BURDENS ON FEDERAL COURTS

19. Reforming Diversity Jurisdiction

Recommendations: The amount in controversy required to invoke the

diversity jurisdiction of the federal courts should be based on the amount of economic damages alleged. This jurisdictional amount should be indexed to the rate of inflation. (44-45)

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

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

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

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

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

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

Action Required: Propose legislation to amend Title 42 of the United States Code, Section 1983.

21. Reduce Frivolous and Unnecessary Prisoner Litigation

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

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

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

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

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

ELIMINATE LITIGATION OVER POORLY DRAFTED LEGISLATION

22. Reduce Poor Draftsmanship in Legislation

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

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

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

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

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