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THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release February 4, 1992

FACT SHEET

ACCESS TO JUSTICE ACT OF 1992

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

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

The Problem: An Overburdened System

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

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

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

"Access to Justice Act of 1992"

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

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

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

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

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

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

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

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

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

FOR IMMEDIATE RELEASE February 13, 1992

THE PRESIDENT'S COUNCIL ON COMPETITIVENESS

"AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA"

FACT SHEET

MODEL STATE PUNITIVE DAMAGES ACT

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

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

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

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

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

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

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

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

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

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

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

FOR IMMEDIATE RELEASE FEBRUARY 4, 1992

THE PRESIDENT'S COUNCIL ON COMPETITIVENESS

"AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA"

IMPLEMENTATION FACT SHEET

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

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

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

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

Executive Action

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

Federal Legislation

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

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

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

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

Federal Rules of Civil Procedure and Evidence

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

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

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

State Legislation and Rule Changes

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

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

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

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

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

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

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

FOR IMMEDIATE RELEASE February 13, 1992

THE PRESIDENT'S COUNCIL ON COMPETITIVENESS

"AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA"

FACT SHEET

CIVIL JUSTICE REFORM MODEL STATE AMENDMENTS

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

Over the past 30 years, our legal system has become burdened with excessive costs and long delays. Many features of the current legal system no longer serve to expedite justice or to ensure fair results. Instead, overuse and abuse of the legal system impose tremendous costs upon American society. Higher costs mean higher prices for American consumers for everything from household goods to medical treatment. Higher costs also reduce America's ability to compete in the global marketplace.

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

The Problem: An Overburdened System

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

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

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

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

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

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

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

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

FOR IMMEDIATE RELEASE February 13, 1992

THE PRESIDENT'S COUNCIL ON COMPETITIVENESS

"AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA"

FACT SHEET

MODEL STATE PUNITIVE DAMAGES ACT

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

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

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

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

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

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

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

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

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

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

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



Civil Justice Reform Model State Amendments

THE VICE PRESIDENT
WASHINGTON

February 1992

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

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



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MODEL STATE
PRE-COMPLAINT NOTICE ACT

MODEL STATE
PRE-COMPLAINT NOTICE ACT

Title

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

Notice As A Prerequisite to Bringing Suit

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

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

Definitions

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

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

Exceptions

Section 4. Pre-complaint notice is not required:

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

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

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

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

(e) in suits to foreclose liens; or

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

Pleading Requirement

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

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

Penalties

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

Severability

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

Effective Date

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

COMMENTARY ON MODEL STATE PRE-COMPLAINT NOTICE ACT

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

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

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

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

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

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

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

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

Section 8 establishes the Act's effective date.

MODEL STATE CIVIL MULTI-DOOR COURTHOUSE ACT

MODEL STATE CIVIL MULTI-DOOR COURTHOUSE ACT

Title

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

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

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

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

(A) procedures for limited discovery;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Severability

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

Effective Date

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

COMMENTARY ON MODEL STATE MULTI-DOOR COURTHOUSE ACT

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

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

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

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

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

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

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

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

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

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

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

Section 4 establishes the Act's effective date.

MODEL STATE CORE DISCLOSURE AND DISCOVERY PROVISIONS

MODEL STATE CORE DISCLOSURE AND DISCOVERY PROVISIONS

Disclosure

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

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

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

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

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

Discovery Limits

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

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

Admissions

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

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

Discovery Requests

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

Discovery Plans

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

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

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

Duty to Confer

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

Expenses of Motion

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

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

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

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

COMMENTARY ON THE MODEL STATE CORE DISCLOSURE AND DISCOVERY PROVISIONS

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

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

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

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

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

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

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

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

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

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

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

MODEL STATE
OFFER OF SETTLEMENT ACT

MODEL STATE
OFFER OF SETTLEMENT ACT

Title

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

Offer of Settlement Procedure

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

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

This rule shall not apply to class or derivative actions.

Severability

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

Effective Date

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

COMMENTARY ON THE MODEL STATE OFFER OF SETTLEMENT ACT

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

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

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

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

Section 4 establishes the Act's effective date.

MODEL STATE PRETRIAL SETTLEMENT CONFERENCE PROVISIONS

MODEL STATE PRETRIAL SETTLEMENT CONFERENCE PROVISIONS

Encouraging Settlement Opportunities through Settlement Conferences

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

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

COMMENTARY ON MODEL STATE SETTLEMENT CONFERENCE PROVISIONS

Pretrial settlement conferences provide an incentive for parties to evaluate their claims. These conferences promote earlier settlement because they require parties to review the dispute and focus on issues. Mandatory conferences may also overcome posturing by lawyers who perceive that initiating settlement discussions, even in the most appropriate cases, will be seen as a sign of weakness.

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

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

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

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

MODEL STATE AMENDMENTS FOR FACILITATING SUMMARY JUDGMENT

MODEL STATE AMENDMENTS FOR FACILITATING SUMMARY JUDGMENT

Summary Judgment

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

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

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

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

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

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

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

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

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

COMMENTARY ON STATE MODEL AMENDMENTS FOR FACILITATING SUMMARY JUDGMENT PROCEDURES

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

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

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

MODEL STATE
EXPERT TESTIMONY PROVISIONS

MODEL STATE
EXPERT TESTIMONY PROVISIONS

Expert Evidence

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

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

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

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

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

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

Expert Discovery

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

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

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

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

COMMENTARY ON MODEL STATE EXPERT TESTIMONY PROVISIONS

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

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

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

Section (B) bars contingency fees for expert witnesses.

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

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

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

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

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

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

Title

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

Entitlement to Award of Attorney's Fees.

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

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

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

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

Definitions

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

Severability

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

Effective Date

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

COMMENTARY ON THE MODEL STATE ATTORNEY FEES TO PREVAILING PARTY ACT

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

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

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

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

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

Section 3 sets forth applicable definitions.

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

Section 5 establishes the Act's effective date.

MODEL STATE
ACCURACY IN PLEADING PROVISIONS

MODEL STATE ACCURACY IN PLEADING PROVISIONS

Signing of Pleadings, Motions, and Other Papers; Sanctions

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

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

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

COMMENTARY ON THE MODEL STATE ACCURACY IN PLEADING PROVISIONS

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

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

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

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

MODEL STATE LEGISLATION AND REGULATION DRAFTING ACT

MODEL STATE LEGISLATION AND REGULATION DRAFTING ACT

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

Title

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

General Duty to Review Legislation and Regulations

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

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

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

general standard, and shall promote simplification and burden reduction.

Specific Issues for Review

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

(a) That all proposed legislation--

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

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

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

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

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

provisions subject to constitutional requirements;

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

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

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

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

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

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

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

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

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

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

(b) That the regulations--

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

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

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

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

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

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

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

Certification of Compliance for Agency Legislation or Regulations

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

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

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

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

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

Severability

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

Effective Date

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

COMMENTARY ON MODEL STATE LEGISLATION AND REGULATION DRAFTING ACT

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

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

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

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

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

Section 6 establishes the Act's effective date.

CJR

CITIZENS FOR CIVIL JUSTICE REFORM

August 13, 1992

MEMORANDUM FOR: Richard Porter

FROM: Wayne Valis Wayne

SUBJECT: Promoting the Administration's Civil Justice Reform Proposals in Alaska

Citizens for Civil Justice Reform continues to use its grassroots base to help organize events across the country on the subject of legal reform.

Enclosed is a copy of Alaskans for Liability Reform's newsletter covering a roundtable event with Vice President Quayle that was held in Anchorage last May. By all accounts, the session was a big success. Alaskans for Liability Reform was honored and delighted to participate in the event and noted, "it was good for Alaskans fighting for tort reform to be recognized by the federal government."

Please let me know if you have any questions or need additional information. I'll be sure to keep you posted on our activities.

c/o Valis Associates
1747 Pennsylvania Avenue, N.W. • Suite 850 • Washington, DC 20006
Tel: 202/833-5055 • Fax: 202/833-9265

The Informer

Newsletter of the Alaskans for Liability Reform | June 1992 | Vol. 1 No. 5

ALR MEETS VICE PRESIDENT QUAYLE!

The White House called ALR President, Al Tamagni, extending an invitation to meet with Vice President Dan Quayle in Anchorage. The Vice President was eager to meet with ALR representatives to discuss liability reform issues.

On May 11, thirty-three businessmen and businesswomen representing diverse industries from all over Alaska met with the Vice President for an hour. Senator Frank Murkowski introduced the Vice President who outlined the Administration's "Agenda for Civil Justice Reform in America." (See the last issue of *"The Informer"* for specifics.) However, he told us that his real purpose in meeting with us was not to lecture but to receive comments and war stories from Alaskans on liability issues.

The Vice President was given feedback on our problems and concerns on a variety of issues including: the burdensome cost of health insurance, the escalating cost of general and professional liability insurance, lack of access to the legislative system to promote change, concern that small businesses have lost access to the justice system and, a special interest of the Vice President, Rule 82. The discussion was open and honest and well received by the Vice President.

The participants felt that the meeting with the Vice President was a special opportunity and were pleased with the amount of time the Vice President spent with us. He is genuinely concerned with civil justice reform. It was good for Alaskans fighting for tort reform to be recognized by the federal government.

ALR owes a special thanks to Al Tamagni, who quickly and efficiently coordinated this event. Thanks to Al's efforts, as many people as possible had the unique opportunity to discuss important liability issues face to face with the Vice President of the United States. Below is the list of attendees.

Alfred L. Tamagni, President
Financial Diversified

Douglas Arthur Stark, Owner
Alaska Engineering & Mngt Svcs

Frank L Thomas-Mears, President
Multiple Risk Managers

Mary A. Pierce, Owner
Insurance & Mngt Svcs Consulting

James H. Gingerich, Administrator
Fairbanks Memorial Hospital

Raymond G. Schalow, Exec Dir
Alaska State Medical Society

Arthur Roland Jacobs, Engineer
Anderson, Bjornstad, Kane, Jacobs, Inc.

Richard Lewis Cattanach, V.P.
Unit Company

Michael James Lockwood, Admin
Central Peninsula General Hospital

Dan M. Rowley, Regional Mngr
CH2M Hill

Frank J. Dillon, Exec Dir
Alaska Truckers Assoc, Inc

William C. Bivin, President / CEO
Bethel Native Corporation

Tom E. Roy, President
Ak State Chamber of Commerce

Edward Bernard Rasmuson, Chrmn
National Bank of Alaska

Elmer E. Rasmuson, Consultant
National Bank of Alaska

Mark A. Anderson, President
Alaska West Express, Inc

Harry W. McDonald, President
Carlile Trucking Company

Michael L. Lessmeier, Esq., Atty
Hughes, Thorsness, Gantz, Powell and Brundin

Bruce Eric Davison, Esq., Atty
Davison and Davison

Kimberly Sarah Daniels, Exec Dir
Alaska Air Carrier Association

Thomas Blaine Jensen, Dist Mngr
Alascom, Inc

Richard Earl Harding, Dir of Ops
Penair

James Edward Pfeifer, President
Alaska National Insurance Co.

Charles H. Selman, Chairman
Anch. Bev. & Rest. Assoc.

Edward E. McNally
Anchorage District Attorney

Rowe D. Redick
Associated Gen. Contractors of Ak

F. Atlee Dodge, President
F. Atlee Dodge Aircraft Svcs, Inc

Stephen L. Walsh
H2W Constructors Inc.

George N. Hayes, Esq., Attorney
Delaney, Wiles, Hayes, Reitman and Brubaker, Inc

Roxanna M. Horschel, President
ACME Fence Company

Julian Darley, President
British Pretroleum, Alaska

Bill Allen, President
VECO, Alaska

Wevley Wm. Shea
United States Attorney

Court Subcommittee meets on Rule 82

A court appointed subcommittee (see list below) met on Tuesday, May 19 to discuss possible revisions to Rule 82. ALR had asked for public representation on the committee and publicized hearings. We were informed that there would be no lay persons appointed to this committee. It took some pressure from us to be allowed to submit written comments and to be present at the committee meeting.

We offered language (see page 3, col. 1) that would return Rule 82 to what the rule was originally intended to accomplish. The language also restricts the rule from being applied to settlements - a recent erosion of the rule that needed correction.

ALR representative Al Tamagni was allowed to attend the subcommittee meeting. The committee discussed the responses they received as a result of a questionnaire distributed by the court to Alaskan attorneys (Yes / No tallies are on page 3, col. 2) and their own group's comments. Our comments were never addressed. Mr. Tamagni received the distinct impression the group was much more concerned with preserving the legal system than they were about applying justice to the general public.

We feel strongly that Rules of Court deserve public input. They effect us all. It is particularly reprehensible when a "fairness" rule which has a legal as well as economic impact on all parties is not afforded public comment.

When will our judges wake up to the fact that they serve the people and are, in fact, public servants? Let's start with their review of Rule 82.

Please, if you are in agreement that we need public review, contact the subcommittee members listed below and request publicized public hearings, not exclusive meetings of the legal profession!

Robert L. Richmond, 360 K St, Anchorage AK 99501

Eric Sanders, 500 L St #400, Anchorage AK 99501

Ann W. Resch, Muni of Anchorage, 632 W 6th Ave, 7th floor, Anchorage AK 99501

Craig F. Stowers, 420 L St. #500, Anchorage AK 99501

Jon R. Larson, PO Box 61, Nome AK 99762

Gail Voigtlander, Asst Atty General, 1031 W 4th Ave. #200 Anchorage AK 99501

James N. Reeves, Bogle & Gates, 1031 W 4th Ave. #600 Anchorage AK 99501

Roger Brunner, PO Box 527, Fairbanks AK 99707

James Parrish, 536-1/2 4th Ave., Fairbanks AK 99701

Robert Briggs, Sierra Club Legal Defense Fund Inc 325 4th St, Juneau AK 99801

Tom G. Batchelor, 105 Muni Way, #300, Juneau AK 99801

Trevor N. Stephens, 307 Bawden St., Ketchikan AK 99901

The Honorable Dana Fabe, Superior Court Judge

Christine Johnson, Reporter

Alaskans For Liability Reform

May 15, 1992

Justice Daniel A. Moore Jr.
303 K St. 5th Floor
Anchorage, Alaska 99501

Via: Fax to Christine Johnson, Court Rules Attorney

Enclosed is the proposed complete revision of Rule 82 as proposed by ALR, (page 1).

Commentary on the Proposal is addressed on Page 2.

The questions of frivolous lawsuits should be addressed under Civil Rule Number 11, exclusive of Rule 82.

The General Public and various other Consumer Legal Reform Groups, through polls and surveys, strongly support this concept.

We would strongly recommend its implementation for the fairness to All parties.

Very Truly Yours,

Al Tamagni Sr.

Support A Constitutional Convention

The Alaskans for Liability Reform's Board of Directors has studied the advantages and disadvantages of a Constitutional Convention and endorse a YES vote on Proposition #1 in November.

While Alaska's constitution is technically sound, we feel that there are too many issues that only changes to the constitution can cure. After all, our population, economic and political interest, and public to private sector ratio has changed dramatically since our constitution was written. It is time to revisit this very important document to have the opportunity to amend it.

There is currently a group of Alaskans entitled SHAREHOLDERS of ALASKA that are working to educate and encourage Alaskans to vote for a constitutional convention. There are many issues to raise during the constitutional convention process. Although we are not endorsing any positions outlined by this group, we are wholeheartedly in support of airing all issues and believe a constitutional convention is the only way to fairly accomplish this. We are therefore very supportive of any group whose goal is to call for a convention. If you want to join in supporting this effort, contact...

Shareholders of Alaska
PO Box 80707, Fairbanks AK 99708
Phone: 452-2746, Fax: 452-2690

We are looking for volunteers for a Court Rules Committee. This committee would strategize how to best work with the court on rules that effect the general public.

Please contact Al Tamagni at 562-7421 to volunteer.

ALR PROPOSED CHANGE

RULE 82

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

Entitlement to Award of Attorney's Fees

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

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

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

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

Definitions

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

Effective Date

Section 4. This Rule shall become effective___days after the date of enactment.

COMMENTARY ON PROPOSED RULE 82

ATTORNEY FEES TO PREVAILING PARTY

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

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

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

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

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

Section 3 sets forth applicable definitions.

Section 4 establishes the Rule's effective date.

Yes/No responses to the CIVIL RULE 82 questionnaire

1. Does Civil Rule 82 deter people of moderate means from filing valid claims?

	Yes	No	No Answer	Total
Plaintiffs' Atty	73	132	9	214
Defendants' Atty	16	140	12	168
Atty for Both	36	110	15	161
Total #1	**125**	**382**	**36**	**543**
Total in %	**23%**	**70%**	**7%**	

2. Does Civil Rule 82 put excessive pressure on moderate income people to settle valid claims?

	Yes	No	No Answer	Total
Plaintiffs' Atty	75	127	12	214
Defendants' Atty	21	136	11	168
Atty for Both	35	108	18	161
Total #2	**131**	**371**	**41**	**543**
Total in %	**24%**	**68%**	**8%**	

3. Is Civil Rule 82 needed in order to discourage frivolous litigation or do other factors, such as the litigant's own attorney's fees, litigation expenses, and the emotional stress of participating in a lawsuit, effectively discourage such cases?

	Yes	No	No Answer	Total
Plaintiffs' Atty	94	85	35	214
Defendants' Atty	93	57	18	168
Atty for Both	72	65	24	161
Total #3	**259**	**207**	**77**	**543**
Total in %	**48%**	**38%**	**14%**	

This was not a yes/no question on the survey. However, for purposes of compiling the results, "yes" means that the respondent believes Rule 82 discourages frivolous litigation.

4. Should Civil Rule 82 be rescinded?

	Yes	No	No Answer	Total
Plaintiffs' Atty	34	176	4	214
Defendants' Atty	30	135	3	168
Atty for Both	27	122	12	161
Total #4	**91**	**433**	**19**	**543**
Total in %	**17%**	**80%**	**3%**	

5. Should Civil Rule 82 be amended to allow the court to consider

   a. the non-prevailing party's ability to pay the prevailing party's attorney's fees?

	Yes	No	No Answer	Total
Plaintiffs' Atty	88	113	13	214
Defendants' Atty	15	146	7	168
Atty for Both	45	100	16	161
Total #5a	**148**	**359**	**36**	**543**
Total in %	**27%**	**66%**	**7%**	

5. Should Civil Rule 82 be amended to allow the court to consider

   b. the party's relative ability to pay attorney's fees?

	Yes	No	No Answer	Total
Plaintiffs' Atty	80	111	23	214
Defendants' Atty	13	147	8	168
Atty for Both	37	108	16	161
Total #5b	**130**	**366**	**47**	**543**
Total in %	**24%**	**67%**	**9%**	

Alaskans for Liability Reform

...NEED Your Help

Your contribution makes it possible for ALR to continue education and reform. Membership is $25.00 per year and includes a subscription to "The Informer."

Please make your contribution today!

Enclosed is my ☐ individual or ☐ business contribution of:

☐ $5,000 ☐ $1,000 ☐ $500 ☐ $100 ☐ $25 ☐ Other ____

Name: _____ Phone: _____

Fax: _____

Mailing Address: _____

City: _____ State: _____ Zip: _____

Make checks payable to *Alaskans for Liability Reform*
P.O. Box 201668, Anchorage, Alaska 99520
Phone (907) 561-6250

The Informer

Mary A. Pierce
Managing Editor

The material presented in *The Informer* is only the opinions of members of ALR, advisory in nature, and not meant to be construed as an offering of legal opinion.

Alaskans for Liability Reform

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Alaskans for Liability Reform
P.O. Box 201668
Anchorage, AK 99520

(F) Legal Reform

OFFICE OF THE VICE PRESIDENT
WASHINGTON

August 24, 1992

NOTE TO RICHARD PORTER
JOHN McCONNELL
JAY LEFKOWITZ

FROM: BILL KRISTOL BK/SS

FYI

August 12, 1992

NOTE FOR THE VICE PRESIDENT

FROM: JOHN HOWARD JH

RE: Trial Lawyers Solicitation

Last August, Mr. Lerach used your Civil Justice Reform speech to solicit funds for the Democratic Senatorial Campaign Committee. [The solicitation was reported by Gordon Crovitz in the Wall Street Journal.] Apparently, Lerach met with success, as he is now inviting "successful trial lawyers" to "help raise the money necessary to permit Democratic victories this November."

I have attached a copy of the current solicitation for your information.

Attachment

cc: Bill Kristol ✓
Al Hubbard
David Beckwith

WILLIAM S. LERACH
600 West Broadway, Suite 1800
San Diego, CA 92101
619/338-4550

July 29, 1992

Dear SDTLA Member:

We hope you share our enthusiasm for the prospect of a Democratic victory this November. The Clinton/Gore Democratic Party ticket scored a smashing success at the Democratic Convention and leads in every national poll and California poll. The Bush/Quayle administration has consistently fought to limit victims' rights and remedies. So-called "legal-tort reform" is to be a major theme of their re-election effort -- which is nothing more than cover for more restrictions and burdens on victims of unsafe products, toxic waste, fraud and unfair business practices who seek to use the legal system to vindicate their rights. We must do all we can to help elect national leaders like Bill Clinton and Al Gore who care about victims and respect our nation's justice system. We, as successful trial lawyers, must help raise the money necessary to permit Democratic victories this November in order to help insure the continued integrity of our judicial system.

Bill Clinton is coming to San Diego on Saturday, August 15, 1992, for what we hope will be a very successful fundraiser. The event will be held at Bill Lerach's home in Rancho Santa Fe. A map is enclosed. Senatorial candidates Dianne Feinstein and Barbara Boxer will also be present. Senators John Breaux of Louisiana and David Pryor of Arkansas will be there as well. We hope you will

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support this event and attend if you can.

There will be a "Major Donor" reception from 6:30-7:30 p.m. for those able to give and/or raise $25,000-$100,000. Immediately following this private reception, there will be a buffet dinner from 7:30-9:30 p.m. Tickets for the main event are $1,500 per person. Contributions are not tax deductible.

Please make your check payable as follows: "DNC Victory Fund 1992 - Federal Account." Please send your check to Bill Lerach at the above-stated address. If you have any questions call K.L. at (619) 338-4550.

We must raise the funds necessary to permit Democratic candidates for the Presidency, Vice Presidency and the two Senate seats up in California to win their races. Please give us your help.

William S. Lerach

David S. Casey, Jr.

Virginia C. Nelson

Dwight Ritter

R. Craig Clark

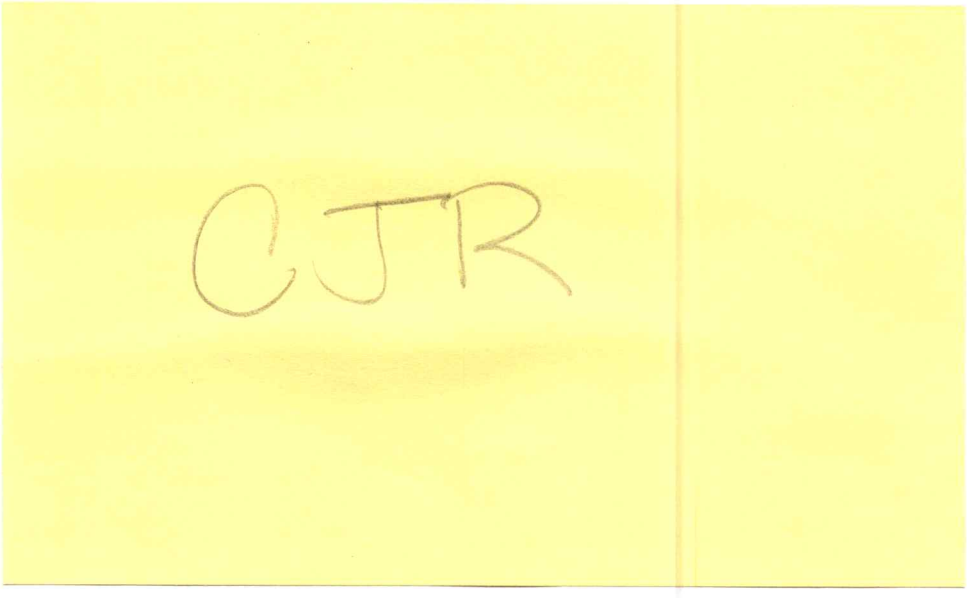
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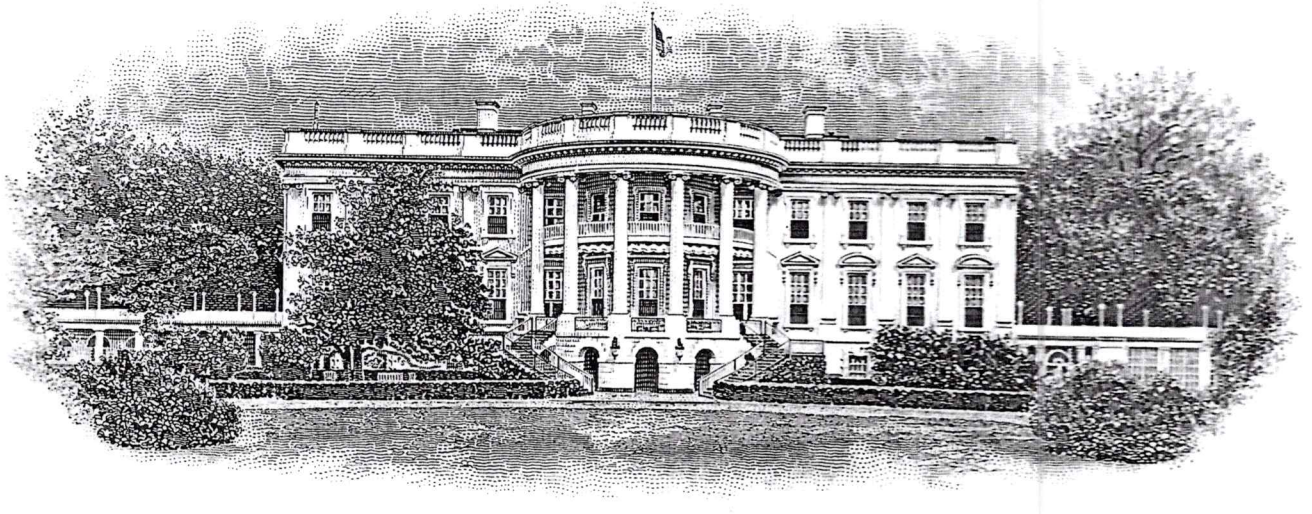
Mark P. Robinson, Jr.

William Turley



Document Originally
Attached to
Following Page

The White House



Bush Library Photocopy

John - Hope you can do this. It's a key meeting

Richard is speaking to this group. DS

BUSH ★★★ QUAYLE 92

July 23, 1992

The Honorable John Howard
Counselor to the Vice President
The White House
Washington, D.C. 20501

– D. Van Dongen –

Dear Mr. Howard:

On July 28 and 29, the National Steering Committee of the Bush-Quayle '92 Independent Business Coalition (IBC) will be gathering at the University Club in Washington for its first organizational meeting. The coalition has been designed to mobilize the American small and independent business communities on behalf of the Bush-Quayle ticket.

The day and a half schedule will feature issues discussions, campaign strategy briefings, and roundtables on the President's record. As the Senior Advisor to the IBC, I would like to invite you to be our guest speaker on the topic of Civil Justice Reform sometime between 1:00 and 3:30 p.m. on Tuesday, July 29. 3-4:30

As you may know, the Independent Business Coalition has been identified as one of the seven key coalition groups in this campaign. As such, there is a strong possibility that President Bush will be sitting down with the IBC National Steering Committee some time on Wednesday afternoon for an "Ask George Bush" session. Civil Justice reform is one of the top concerns of the small business community, and these business leaders would welcome the opportunity to hear about the details of the Administration's reform agenda before meeting with the President. If your schedule permits, you will be part of an afternoon of issues discussions. We will also hear from officials on tax and regulatory policy, and health care reform.

Our goal is to have the Steering Committee leave Washington energized and ready to work for the President's re-election. A session with you would be an important step towards accomplishing that goal. Please call David Waller, the Deputy Director of National Coalitions for Business & Industry, at (202) 336-7900 if you have any questions. I hope you will be able to join us.

Sincerely,

Mike

James D. "Mike" McKevitt
Senior Advisor
BQ '92 Independent Business Coalition

University Club

* you should cover product liability reform also —

1030 15th St. NW, Washington, DC 20005
Paid for by Bush-Quayle '92 Primary Committee, Inc.
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TALKING POINTS AND ANALYSIS

for the

AGENDA FOR CIVIL JUSTICE REFORM

1. Background on Civil Justice Reform (CJR)
2. How CJR Helps the Average Litigant
3. Alternative Dispute Resolution
4. Discovery
5. Punitive Damages
6. Expert Evidence Reform
7. Fairness Rule for Attorney's Fees
8. Implementation Status

PRESIDENT'S COUNCIL ON COMPETITIVENESS
FEDERAL CIVIL JUSTICE REFORM

Background

America is awash in a sea of litigation.

In 1990, there was one lawsuit for every ten adults.

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

Why did the Council look at Civil Justice Reform?

Litigation costs too much money.

Frivolous suits keep meritorious suits from being decided.

Needless delay in the courts means wasted money.

American companies are placed at a competitive disadvantage.

Council Objectives

Reduce costs and delay in the civil justice system.

Make the system more simple and final.

Provide choice: open the courthouse doors to all Americans.

Insure people their day in court, not endless delay.

Require people to evaluate their cases with care.

Remove the hidden lawyer tax imposed by excess litigation.

Council Recommendations

Council has proposed 50 reforms.

Some recommendations introduce "market-type" incentives:

Fairness or "loser pays" rule for attorney's fees.

Limitations on punitive damages.

Remove "junk science" from the courtroom.

Reduce discovery costs.

Implementation

Federal government applied recommendations to itself.

Most recommendations require legislation or rules changes.

Access to Justice Act of 1992 introduced in Congress.

Model State Statutes sent to all states.

HOW THIS HELPS THE AVERAGE LITIGANT

Reforms encourage settlement -- injured party will receive compensation with less costs and delay:

Pre-suit notice provides opportunities to resolve disputes without filing lawsuits.

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

Case management recommendations will reduce court backlogs and make the courts more accessible.

Litigation will be less costly:

Prevailing parties will be made whole - Fairness Rule (or loser pays rule) will encourage people to bring only meritorious cases.

Disclosure of "core information" will speed the process. Each side will be required to provide basic information without a formal request for names of witnesses or location of documents.

People will be given more choice in resolving their disputes:

"Multi-door courthouses" will provide quicker and less costly resolutions. Alternative Dispute Resolution options, such as mediation, can be a cost-effective alternative to trial.

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

People will be made "whole":

Usually the winner doesn't really win, because attorney's fees must be paid. Under the "Fairness Rule" recommendation, the winner will be made whole because the loser will pay the winner's attorney's fees.

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

ALTERNATIVE DISPUTE RESOLUTION

Almost 95 percent of all civil lawsuits are settled. Unfortunately, most settlements are reached only moments before trial. Alternative Dispute Resolution (ADR) seeks to resolve controversies earlier, at less cost to the parties.

Recommendation: Promote Voluntary Dispute Resolution

The Multi-door Courthouse

A multi-door courthouse permits people to choose between several different methods for resolving their disputes. Shortly after filing the judge would require the parties to meet to discuss settlement. At this conference the parties will be informed that they have the option of electing ADR or proceeding to trial.

Pre-suit Notice

Pre-litigation notice provides parties with the opportunity to settle disputes at the earliest stages and the flexibility to reach an agreement and fashion appropriate remedies at lower costs without court involvement.

Expanded Settlement Opportunities

Mandatory settlement conferences compel the parties to reevaluate their claims and litigation position. They promote settlement by providing occasions to focus on the issues. Making the conference mandatory also helps eliminate some posturing by lawyers.

Incentives for Earlier Settlement

Both parties should be encouraged to evaluate their claims closely and attempt to settle their disputes. A party continuing to maintain an improper or unrealistic claim would be forced to pay the expenses of continuing prosecution after receiving a reasonable settlement offer.

Status

Executive Order No. 12778 on Civil Justice Reform instructs government litigators to give pre-suit notice, to offer to participate in settlement conferences and to explore ADR options.

The Access to Justice Act of 1992 (now pending in Congress) would implement the Multi-door Courthouse, pre-suit notice, and some financial incentives for earlier settlement.

The Civil Justice Reform Model State Amendments contain similar provisions and have been distributed to all Governors, state Attorneys General, and legislatures.

DISCOVERY

Approximately 80 percent of the time and expense of a lawsuit involves pre-trial investigation of the facts. The current rules allow discovery to be used as a weapon to impose cost and delay rather than a tool to help find facts.

Recommendation: Reform the Pre-trial Discovery Process

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

Limits on Discovery/ Pay-as-you-go for Additional Discovery
Parties must meet to plan discovery within pre-set numerical limits. Additional discovery would always be permitted at the judge's discretion or when the requesting party pays the other side's "production" costs.

Penalize Abusive Discovery
There should be uniform, mandatory penalties for discovery abuse, or when a party withholds information.

Fairness or Loser-pays rule in Discovery Motions
People should be encouraged to resolve their discovery disputes without court intervention. If the court must decide, the losing party should be required to pay the winner's costs and attorney's fees.

Retain Protective Orders
Lawsuits should not be a vehicle for industrial espionage. Trade secrets information necessary for disposition of a lawsuit should not be used outside the case.

Status

The Executive Order on Civil Justice Reform instructs government litigators to offer to participate in a mutual exchange of core information.

The Administration's proposed amendments to the Federal Rules of Civil Procedure have been presented to the Supreme Court's Advisory Committee. Among the proposals endorsed by the Committee are the initial disclosure of "core" information and the requirement that attorneys meet and confer early in the litigation.

The Civil Justice Reform Model State Amendments provide pattern rules of procedure to implement the recommendations.

PUNITIVE DAMAGES

Punitive Damages are private punishments in the nature of fines awarded in civil cases. When warranted in egregious cases, punitive damages can provide an appropriate expression of public disapproval for conduct that is truly shocking. Unfortunately, punitive damages are awarded arbitrarily without any balance between deterring extreme misconduct and encouraging reasonable activity.

Recommendation: Develop rational and consistent approach to punitive damages

Eliminate Prayers for Specific Dollar Amounts
Plaintiffs routinely make unfounded requests for astronomical damages. These requests, which inflame the jury, should be eliminated.

Bifurcate Trials
The jury should determine whether punitive damages are appropriate in a separate proceeding only after liability has been proven. This would insure that imposing punitive damages is a measured decision, not one of passion.

Require Higher Standards of Proof for Awards
Because punitive damages are "quasi-criminal," an award should be predicated on clear and convincing evidence of malicious intent.

Judges Award Amount of Punitive Damages
After the jury finds that clear and convincing evidence of malicious intent, the judge should determine the amount of the damage award. This measure will remove some prejudice from the system.

Tie Punitive Damages to Amount of Actual Damages
Punitive damages should be capped at one times the actual damages. While guaranteeing that an injury is compensated, the 1x cap will reduce the "jackpot" mentality and encourage realistic case evaluation.

Status

The Administration has drafted the Model State Punitive Damages Act and has distributed it to all Governors, state Attorneys General, and legislatures.

EXPERT EVIDENCE REFORM

The uncontrolled use of Expert Witnesses has led to longer and more expensive litigation. When expert opinions and theories are not supported by sound professional practice or scientific knowledge, trials are no longer fair and rational mechanisms for conflict resolution.

Recommendation: Reform the Rules Regarding Expert Witnesses

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

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

Require Courts to Find that Experts are Qualified
Judges should protect their courtrooms from spurious science by making initial findings regarding the expert's qualifications.

Require Experts to Provide Credentials and Theories
Currently, parties must seek court approval before taking an expert's deposition. Experts should be subject to the same types of discovery as other witnesses.

Avoid Attempts to Require Court-Appointed Experts
Some suggest that only judges should be able to call experts. To insure that the jury remains the finder of fact, parties should retain their ability to identify appropriate experts.

Status

Executive Order No. 12778 on Civil Justice Reform instructs government litigators to use only reliable expert testimony.

The Administration's proposed amendments to the Federal Rules of Evidence have been presented to the Supreme Court's Advisory Committee. Among the proposals endorsed by the Committee is the expanded discovery of expert witnesses.

The Civil Justice Reform Model State Amendments provide pattern rules of evidence for states wishing to eliminate junk science.

FAIRNESS RULE FOR ATTORNEY'S FEES

The loser-pays rule for attorney's fees is grounded in fairness -- in the equitable principle that a party who suffers should be made whole. The "Fairness" or loser-pays rule will encourage more careful case evaluation as well as providing a choice of methods to finance litigation.

Recommendation: Adopt a "Fairness Rule" for attorney's fees in federal diversity cases

Loser pays the Winner's Attorney's Fees

Eliminates frivolous or harassment suits by encouraging careful case evaluation. Plaintiffs would consider whether they have a realistic chance before filing. Defendants would be encouraged to pay meritorious claims, as maintaining unreasonable defenses would be costly.

Limitations:

Federal Diversity Cases Only

The Fairness Rule would apply only in federal court, and only when citizens or different states are contesting issues of state law. Therefore, cases brought under federal statutes, i.e. civil rights, environment, etc. would not be discouraged. If they did not want the "Fairness" Rule, plaintiffs could bring their cases in state courts rather than instituting a diversity case in federal court.

Limited to amount loser spends

The most the loser would be required to pay is the amount he has spent on his own case. This means that loser spends $5,000 to bring a suit and the winner incurs $500,000 in fees, the most the loser would be required to is $5,000.

Judicial Discretion

Courts would have the discretion to reduce the loser's obligations for good cause.

Status

Section 102 of the Access to Justice Act of 1992 (now pending in Congress) would implement the Fairness Rule.

The Civil Justice Reform Model State Amendments provide model legislation for states wishing to enact the Fairness Rule.

IMPLEMENTATION

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

Executive Order

On October 23, 1991, President Bush signed E.O.12778, to promote more efficient litigation in actions involving the United States. To make the Government a model for the private sector, all Federal litigators were directed to:

- offer to participate in Alternative Dispute Resolution,
- limit unnecessary discovery, and
- avoid "junk science."

The E.O. also provides a "litigation checklist" designed to reduce drafting errors that cause unnecessary litigation.

Federal Legislation

On February 4, 1992, President Bush transmitted the "Access to Justice Act of 1992," calling upon Congress to help reform the Civil Justice System. Among the Act's provisions are:

- Multi-door Courthouse with alternative dispute resolution (ADR) programs to provide effective options to trial, and
- Fairness Rule for Attorneys Fees to make the prevailing party in diversity suits "whole" because the loser will pay the winner's fees.

[The Act is now pending and has 10 Senate co-sponsors.]

Federal Rules of Civil Procedure and Evidence

The Administration has submitted proposed rule changes through the Supreme Court's rulemaking process. Among the rules to help make the system more efficient are:

- Discovery Reform to require automatic disclosure of "core information" along with mandatory planning conferences, and
- Expert Evidence Reform to eliminate "junk science" by requiring "widely accepted" theories.

[Core disclosure and many other of our recommendations were accepted; "widely accepted" expert evidence was not.]

State Legislation and Rules Changes

Most reforms proposed for the Federal system are equally applicable to the states. Therefore, the Administration has published the Civil Justice Reform Model State Amendments and the Model State Punitive Damages Act to assist with reforms in the state systems.

[The model legislation has been introduced in 18 states.]

CIVIL JUSTICE REFORM

Increased Court Backlog

- According to a recently released report from the National Center for State Courts, "the caseload total [of civil **and** criminal cases] in 1990 was equivalent to one court case for every other adult in the United States."[1]

- The National Center for State Courts reported recently that

  - 18.4 million new civil cases were filed in state courts in 1990, which is an increase of more than 5 percent from the 1989 figure; and

  - since 1984, civil filings in state courts have increased by 30 percent, compared to a population increase of just 5 percent.[2]

- Since 1955, the number of lawsuits filed in federal court each year has more than tripled, from 59,375 in 1955 to 207,742 in 1991.

Delays

- The disposition time -- from filing to termination -- for the average civil lawsuit in federal court is fourteen months.[3]

- The increasing backlog of cases in the federal courts is evidenced by the increasing ratio of pending to terminated cases - from .75 in 1960 to .97 in 1989 in the district courts and from .60 to .80 in the same years in the courts of appeals.[4]

- A General Accounting Office study found that product liability cases in five states took an average of 2 1/2 years from the filing of the complaint to the beginning of the trial, an additional 12 days for the trial and an average of 10 months to conduct an appeal.[5]

- For large product liability cases, the delay is even greater. Fewer than 7 percent of such cases were closed (by jury verdict, settlement, or dismissal) within one year. Just over one half were terminated within three years, but **31 percent took four years or more to be resolved.**[6]

- The following chart shows the increase in the number of cases pending in the federal district courts for more than three years:

Cases Pending 3 Years and More

	Number	Percent of Total Pending Civil Cases
1987	19,782	8.1
1988	21,487	8.8
1989	22,390	9.2
1990	25,207	10.4
1991	28,421	11.8[7]

- From 1988 to 1991, the increase in cases pending three years or more was over 34 percent.

- Certain state courts also suffer from the problem of civil trial delay. In the Los Angeles Superior court system, for example, the time from filing to jury trial has reached **five years.**[8]

- Similarly, the backlog of personal-injury, product-liability and other civil damage suits in the Law Division of the Cook County Circuit Court reached 67,776 cases in 1990, 20 percent of them 5 years old or older. According to one commentator, **delays of 6 to 10 years** between filing and trial are common.[9]

ENDNOTES

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3. The President's Council on Competitiveness, Agenda for Civil Justice Reform in America 4 (August 1991).

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5. U.S. General Accounting Office, Report to the Chairman, Subcommittee on Commerce, Consumer Protection, and Competitiveness of the Committee on Energy and Commerce, House of Representatives: Product Liability, Verdicts and Case Resolution in Five States, H.R. Doc. No. 89-99, Sept. 1989, at 4.

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CIVIL JUSTICE REFORM

Perceptions of The Problem - Polls

- A survey of more than 2,000 Americans in 1987 showed
  - **71 percent** believe that the overall cost of lawsuits is too high, and
  - **57 percent** believe that the system fails to provide resolution of disputes without delay.[1]
- A poll of business executives conducted for Business Week by Louis Harris in 1992 found
  - **83 percent** of executives polled believe corporate decisionmaking is more affected by the fear of litigation today than they were 10 years ago;
  - **62 percent** of those polled believe that the U.S. civil justice system significantly hampers the ability of U.S. companies to compete with Japanese and European companies;
  - **40 percent** of respondents said that the high cost of defending the company in litigation has a major impact on the business, while **only 11 percent** of those who responded said that the cost did not have even a minor impact on their company;
  - **97 percent** of respondents favored much greater use of alternative dispute resolution methods; and
  - **91 percent** favored judicial screening of cases to eliminate apparently frivolous or very weak claims.[2]
- According to a 1990 survey conducted by Lawyers Alert, most lawyers oppose limitations on punitive damages and ceilings on medical malpractice awards.[3] Citizens disagree.
  - Although the Kansas Supreme Court struck down tort reform in 1988, 61 percent of Kansans polled by Central Research Corporation in 1988 favored a $250,000 cap on non-economic damages and 52 percent favored a $500,000 cap on punitive damages.[4]
  - According to the Dallas Morning News, of 1,004 Texans polled in 1987 when the Texas legislature was debating tort reform, 85 percent were in favor of limiting attorney contingency fees, and 51 percent favored limiting civil damage awards.[5]

ENDNOTES

1. S. Rep. No. 416, 101st Cong., 2d Sess. 6 (citing Louis Harris and Associates, Inc., Public Attitudes Toward the Civil Justice System and Tort Law Reform, 15, 19 (1987)).

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CIVIL JUSTICE REFORM

Competitiveness

- According to a survey by the Conference Board, **half of the CEOs** responding to the questionnaire believe that the product liability system is having a major impact on the ability of U.S. firms to remain competitive in world markets.[1]

- The Conference Board found that **almost half of all U.S. manufacturers** surveyed have withdrawn products from world markets because of stringent product liability laws.[2]

- The costs of the U.S. tort system are far greater than for any of the twelve foreign economies studied (Australia, Austria, Belgium, Canada, Denmark, France, Italy, Japan, Spain, Switzerland, Great Britain, and West Germany), ranging between **three and eight times** the relative cost of tort systems in those countries.[3]

- In 1965, U.S. tort costs were slightly more than one percent of GNP, which was approximately double the average of other economies. Since then, while the costs in other economies remained stable, those in the U.S. have grown to 2.5 percent of GNP, or almost **five times the average of other countries.**[4]

- America spends between **three and eight times** as much as its major industrial competitors on personal injury wrangling as a share of its economy, and the gap is widening rather than narrowing.[5]

- Several government agencies, numerous research organizations, trade associations, academics and private business persons believe current U.S. product liability laws not only force manufacturers to increase the prices charged for their products to cover costs stemming from the liability laws but also decrease business innovation by making management unduly adverse to risk taking.[6]

- The product liability insurance costs of foreign machinery manufacturers are **20 to 100 times lower** than those of their U.S. competitors. In addition, foreign competitors are not burdened with all of the other product liability related costs.[7]

ENDNOTES

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3. Robert W. Sturgis, Tort Cost Trends: An International Perspective 12 (Tillinghast Co., 1989).

4. Robert W. Sturgis, Tort Cost Trends: An International Perspective 13 (Tillinghast Co., 1989).

5. Robert W. Sturgis, Tort Cost Trends: An International Perspective 12 (Tillinghast Co., 1989).

6. Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game?, 9 J. L. & Com. 167, 169 (1989) (citing, inter alia, Committee for Economic Development, E.P. McGuire, Conference Board Report, Project on Civil Justice Reform, and Manhattan Institute for Policy Research).

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CIVIL JUSTICE REFORM

Costs of the American Tort System Today

General

- "For the middle class of this country . . . the courthouse door is rapidly being slammed shut. Access to courts, once available to everyone, has become for middle-class Americans a luxury that only others can afford."[1]

- Four out of ten companies responding to one survey said that the product liability system has had a major adverse effect on their direct costs.[2]

- "[T]he indirect costs -- the efforts of commercial and governmental bodies to avoid litigation -- exceed insurance premiums, which essentially reflect past litigation costs. American business is now so sensitized to tort suits and expanding concepts of liability in appellate court decisions that corporate legal departments and product managers see a plaintiff attorney behind every bush and post."[3]

Cost Estimates

- A study by Tillinghast, an actuarial consulting firm, found the gross cost of the U.S. tort system in 1987 to be **$117 billion**, almost three times the 1980 estimated gross cost of $40 billion.[4]

- "The total [public] price tag for processing all the various types of civil cases is estimated at **$2 billion** [for 1982], including **$1.7 billion in state courts and $0.3 billion** in the federal courts--all of which is on top of what the litigants themselves pay."[5] This price tag includes the estimated salaries and benefits of judges and court personnel and the costs of related court operations.

- According to the Administrative Office of the U.S. Courts, the total daily cost of a civil jury trial is **$2,549.** This figure includes the salaries of judge and staff, facilities, security, jurors' expenses and administrative office cost. It does not include attorneys' fees.[6]

- "American corporations spend more than **$20 billion** annually on outside counsel defending lawsuits. The outside counsel expenses for some Fortune 100 companies exceed $30 million annually, and in one case exceed $100 million annually."[7]

- One 1989 study concluded that between 1950 and 1987, the cost of injury litigation rose 138 percent (quadrupling every 12 years), while the size of the real U.S. economy rose only 33 percent.[8]

Costs vs. Compensation Paid to Plaintiffs

- Professor Jeffrey O'Connell of the University of Virginia has estimated that when all costs are counted, only approximately **15 percent** of the cost of injury litigation actually compensates claimants.[9]

- "[In 1985], the system spent **$16-19 billion** in transaction costs to deliver **$14-$16 billion** to plaintiffs in net compensation. Of all the money paid in compensation and legal fees and expenses, the successful plaintiff received about **56 percent** in net compensation, with the system consuming the rest. Adding the value of time spent by the litigants makes the costs even higher; injured parties' net compensation is reduced to **46 percent** of the total cost."[10]

- "[In 1985], [p]laintiffs' net compensation as a percentage of total expenditures was **52 percent for auto torts and 43 percent for all other torts**, reflecting higher defendants' litigation costs for nonauto torts. Defense legal fees and expenses for nonauto tort cases were 28 percent of total compensation paid, compared with 16 percent for auto tort cases. However, litigation costs paid by plaintiffs as a percentage of total compensation were essentially the same for auto tort (31 percent) and nonauto tort cases (30 percent)."[11]

ENDNOTES

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10. Institute for Civil Justice, Rand Corporation, Annual Report April 1, 1991 - March 31, 1992, 52 (1991) (citing James S. Kakalik & Nicholas M. Pace, Institute for Civil Justice, Rand Corporation, Costs and Compensation Paid in Tort Litigation) (emphasis added).

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CIVIL JUSTICE REFORM

Effect on Innovation; Discontinued Activities/Products/Businesses

General

- According to Phyllis Eisen, Director of Risk Management for the National Association of Manufacturers, the fear of litigation cuts back the motivation to develop new products.[1]

- Industries for which liability costs (as reported to their insurers) are not a major burden relative to their sales actually increased their innovative activities (measured by R&D expenditures and new products introduced).[2]

- In a 1988 survey of manufacturers, the Conference Board found

  - more than one-third of firms surveyed had decided against introducing new products due to liability concerns;

  - 25 percent of companies responding had discontinued some form of product research;

  - 47 percent of firms reported withdrawing products from the market;

  - 15 percent of manufacturers had laid off workers as a direct result of experience with the product liability system; and

  - four out of ten chief executive officers reported that the product liability system has had a major impact on their companies, affecting how they plan and do business in addition to imposing costs unique to the U.S. business environment.[3]

- Mary Kaynor, director of the Risk Management Foundation at Harvard University, testified before Congress that one of the reasons universities are not giving research grants to small businesses is that this makes the university, perceived by plaintiffs as having "deep pockets," the target of subsequent lawsuits.[4]

Specific Examples

- "The median company in the machine tool industry is forced to spend seven times more on product liability costs than it is able to spend on new product research and development."[5]

- WEPCO, Inc., a small business originally started to develop

hand and foot driving controls for the handicapped, was forced to close its doors because it was unable to secure product liability insurance, despite the fact that the company was certified by the Veterans Administration, and had never had a product liability suit filed against it.[6]

- According to Jerry J. Pullen, corporate director-Washington for Cessna Aircraft Co, "we have not built a single-engine airplane for five years, and [product liability costs are] the reason." Mr. Pullen said that from 1977 to 1981, the industry built 34,000 airplanes, compared to 10,000 from 1981 to 1989. Not surprisingly, employment in the period declined from 22,800 workers to 6,000.[7]

- The McJunkin Corporation of Charleston, West Virginia, has decided to sell its coal-mining equipment division because the company's product liability insurance increased by 500 percent in 1985.[8]

- Foster-Miller, Inc. has refused to accept contracts to build equipment to produce football and hockey helmets, calling these products "lawyers' dreams."[9]

- Lawrence Livermore National Laboratory in California discovered that a particle accelerator, developed for a weapon system, could be used instead of harmful pesticides on newly harvested crops to kill insects, larvae and parasites. Livermore decided that the technology was too risky at least in part because of current product liability laws so the potential new use was abandoned.[10]

- A research scientist at the Lawrence Livermore National Laboratory in California who has worked on a number of new product ventures claims that "There's clearly a chilling effect. It's becoming difficult to get venture capital for new ideas. People are afraid of potential liability."[11]

- Bill Fay, a Washington lobbyist, reports that ladder manufacturers and hardware store owners confirm that 17 percent of the cost of a ladder is attributable to product liability insurance costs. "There have been many cases where people have sued--and won--after a fall from a perfectly good ladder, including people who had been drinking."[12]

- Dyneet Corporation stopped production of its helicopter clutches, although it had not had any product liability claims filed against it, because it could no longer afford to purchase liability insurance for the clutch.[13]

ENDNOTES

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CIVIL JUSTICE REFORM

Impact on Our Health System

Doctors and Malpractice Suits

- The American Medical Association estimates:
  - the average number of malpractice claims filed per 100 doctors rose from 5 in 1975 to 16 in 1983;
  - forty thousand malpractice claims were filed in 1983, triple the 1975 number; and
  - the average settlement in California was $5,000 in 1970, $26,000 in 1975, and $333,000-$650,000 in 1986 (the California legislature has since capped the amount a lawyer can make in a contingency fee malpractice suit.[1]
- The average jury verdict award for plaintiffs in medical malpractice cases was close to $1.76 million in 1990.[2]
- The Journal of the American Medical Association reports that 12 percent of obstetricians have stopped delivering babies and 38 percent of surgeons avoid high-risk cases because of liability concerns.[3]
- According to the American College of Obstetricians and Gynecologists, as of 1990 of ob/gyns nationally:
  - 12.2% had given up obstetrics due to liability concerns;
  - 77.6% have been sued at least once; in New York, the number is 83.4%;
  - on average, three suits have been filed against each ob/gyn; the average in New York is almost four; and
  - 24.2% had decreased the level of high-risk obstetric care that they provided.[4]

Drugs/Vaccines

General

- The American Medical Association concluded that product liability issues are having a profound negative effect on the development and utilization of potentially life-saving medical technologies.[5]

- "Liability fears have helped drive U.S. firms out of manufacturing vaccines -- DPT [a combined vaccine for diphtheria, pertussis, and tetanus] in particular -- explaining sharp increases in vaccine costs."[6]

- One source attributed $11 of the $12 cost of one dose of the DPT vaccine to liability expenses.[7]

- Merck & Company continues to be the only U.S. producer of a measles vaccine for American schoolchildren, continuing production solely out of a sense of social responsibility.[8]

AIDS

- The National Academy of Sciences stated that "given the extremely high cost of vaccine-related injuries, many manufacturers may be unwilling to initiate or pursue the derivation or distribution of a vaccine to prevent AIDS."[9]

- The general counsel of Johnson & Johnson recently indicated that, because of the substantial liability costs to which the company would be exposed, he would urge his company to withhold an AIDS vaccine until Congress passed protective legislation.[10]

- "A careful examination of AIDS vaccine research by *Science* shows that liability concerns have had negative effects, which include:

    - pushing a major pharmaceutical company with a successful AIDS vaccine project all but out of the AIDS vaccine business;

    - postponing human trials of an old-fashioned vaccine approach that has had the most success in monkey experiments;

    - compelling a leading California biotechnology company to scuttle its promising AIDS vaccine program, only to revive it when the state's legal climate changed, in part because of liability concerns;

    - scaring yet another company away from testing a vaccine in pregnant, infected women until a state law was changed."[11]

Discontinued Product

- Union Carbide developed a suitcase-sized kidney dialysis machine that could be used at home. Due to the company's analysis of the potential liability from marketing the machine, Union Carbide decided not to market the machine and sold it to a foreign company. Union Carbide also decided not

to develop a line of medical devices related to intravenous treatment.[12]

ENDNOTES

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