

CIVIL JUSTICE REFORM

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It was at the annual Judicial Conference of the Federal Circuit during May 1991 that I first advanced some proposals for reforming the nation's civil justice system. That presentation was largely overshadowed by the publicity associated with my address to the annual meeting of the American Bar Association in Atlanta three months later. The report from the President's Council on Competitiveness, presented in conjunction with the ABA address, contained some fifty specific proposals for reform.¹ I am pleased, however, that it was the Judicial Conference of the Federal Circuit on the eve of its tenth anniversary that provided the first forum for the reform effort.

The Federal Circuit itself was the result of a reform effort to eliminate the problem of forum shopping in patent cases.² In 1982, Congress established the Federal Circuit as the single court to handle all appeals in patent cases by merging two previously existing courts with limited grants of jurisdiction.³ In its ten-year history, the court has established the type of consistency that litigants should expect from our court system by eliminating many of the inconsistencies that existed in patent law prior to 1982.⁴

It is in the same tradition of reform that I present some of my principal proposals here, including those that appear to have aroused the greatest interest. Among the proposals are those that will require changes to statutes at the federal and state level. Many of those changes would be accomplished by the Access to Justice Act of 1992, which was sent to Congress by the President on February 4,

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1. PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (Aug. 1991) [hereinafter AGENDA FOR CIVIL JUSTICE REFORM].

2. THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, A HISTORY 1982-1990 236 (1991).

3. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 37 (codified as amended at 28 U.S.C. § 1295 (1988)).

4. THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, A HISTORY 1982-1990 236-43 (1991).

1992.⁵ Others will require amendments to the Federal Rules of Civil Procedure and Federal Rules of Evidence. A number of reforms have already been implemented without changes to statutes or rules. Action on these reforms can begin immediately with the cooperation and assistance of the courts and federal agencies. To that end, President Bush signed Executive Order 12,778 on October 23, 1991, requiring federal agencies to take certain reform steps in litigation conducted on behalf of the Executive Branch.⁶

It bears emphasis that these reforms are procedural in nature—directed at reforming the process of resolving disputes. They are not intended to affect substantive rights. Furthermore, none of the proposals by the Council is designed to close the courthouse doors to any meritorious claim or to any person. Instead, the proposals seek to open those doors and create more doors for people to vindicate their rights by clearing court dockets to hear truly meritorious claims.

BACKGROUND

Few would dispute the proposition that America has become a litigious society and that the preferred method for resolving disputes and achieving social reform is to file lawsuits. In 1989, close to eighteen million new civil cases were filed in state⁷ and federal courts, amounting to one lawsuit for every ten adults. In the federal courts alone, the number of lawsuits filed each year has more than quadrupled in the last thirty years—from approximately 51,000 in 1960⁸ to almost 218,000 in 1990.⁹ According to a recent article in *Forbes* magazine, individuals, businesses, and governments spend more than \$80 billion a year directly in litigation costs and higher insurance premiums and up to \$300 billion indirectly, including the costs of efforts to avoid liability.¹⁰

The proliferation of litigation, however, does not only affect the domestic economy. A 1984 study commissioned by the U.S. Department of Commerce noted that product liability insurance costs of

5. 138 CONG. REC. S909 (daily ed. Feb. 4, 1992); see S. 2180, 102d Cong., 2d Sess., 138 CONG. REC. 911 (daily ed. Feb. 4, 1992) (containing text of bill presented to Senate); H.R. 4155, 102d Cong., 2d Sess., 138 CONG. REC. 260 (daily ed. Feb. 4, 1992) (containing text of bill presented to House).

6. Exec. Order No. 12,778, 56 Fed. Reg. 55,195 (1991).

7. STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1989 7 (Feb. 1991).

8. FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS 30 (June 1, 1990) (drawing data from Table 5).

9. DIRECTOR OF ADMIN. OFF. OF U.S. CTS. ANN. REP. 133 (1990) (drawing data from Table C).

10. Peter Brimelow & Leslie Spencer, *The Plaintiff's Attorneys' Great Honey Rush*, FORBES, Oct. 16, 1989, at 203.

foreign competitors were often twenty to fifty times lower than those of U.S. companies.¹¹ In addition, a survey of over 250 American companies revealed that more than three-quarters of the executives believe that the United States will be increasingly disadvantaged in world markets unless modifications are made in the liability system.¹²

Furthermore, a recent survey by the Conference Board, a group of 3600 organizations in over fifty nations, reported that potential liability concerns caused 47% of U.S. manufacturers to withdraw products from the market, resulted in 25% of U.S. manufacturers discontinuing some forms of product research, and prompted approximately 15% of U.S. companies to lay off workers as a direct result of product liability experience.¹³

As noted above, a report to the President issued by The Council on Competitiveness in August 1991 contained recommendations for changes to the current civil litigation process. The proposals for reform were derived from the efforts of a working group established under the umbrella of the Council which I chair. The working group, chaired by Solicitor General Kenneth W. Starr, was chartered to examine the existing civil justice process and prepare recommendations. These recommendations are geared toward reducing excessive and unnecessary litigation and decreasing the costs and time associated with resolving disputes under the process.¹⁴ The working group was composed of representatives from the White House Counsel's Office, the Domestic Policy Council, the Office of the Vice President, the Office of Management and Budget, the Council of Economic Advisors, the Environmental Protection Agency, and the Departments of Justice, Commerce, Treasury, and Energy. The report contains some of the following proposed reforms.

VOLUNTARY DISPUTE RESOLUTION

To reduce the amount of unnecessary litigation, the Council recommends increasing the use of several procedural techniques and providing greater access to alternative dispute resolution (ADR)

11. AMERICAN TEXTILE MACH. ASS'N, U.S. DEP'T OF COMMERCE, COOPERATIVE AGREEMENT NO. 99-26-07151-10, AN INTERNATIONAL STUDY OF PRODUCT LIABILITY COSTS AND SYSTEMS FOR FIVE DOMESTIC MACHINERY INDUSTRIES 299 (1984).

12. E. PATRICK MCGUIRE, THE CONFERENCE BD., RES. REP. NO. 908, THE IMPACT OF PRODUCT LIABILITY 6 (1988).

13. *Id.* at 20 (drawing data from Table 30).

14. AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 1, at 7-9.

techniques, making them routinely available as a substitute for litigation.

Because the vast majority of civil lawsuits are settled or otherwise disposed of prior to trial, the Council encourages mandatory settlement conferences soon after the commencement of any litigation. Mandatory settlement conferences would compel the parties to reevaluate their claims and litigation positions. These required meetings promote settlement earlier in the process because there are more opportunities to narrow issues. Mandatory conferences can also reduce posturing by lawyers who perceive that initiating settlement discussions will be seen as a sign of weakness. Furthermore, ADR encourages parties to evaluate their claims closely and attempt to settle their dispute. Settlement offers advanced prior to trial should be reinforced with financial incentives such as requiring the party who rejects the compromise to bear the additional costs of trial unless the outcome at trial exceeds the settlement offer.

The Council suggests that, before resorting to the courts, litigants should be required to notify the opposing parties of their intention to file suit. A pre-complaint notice requirement provides both parties with an opportunity to resolve the dispute at the earliest stage. The parties would have the opportunity to reach an agreement and fashion an appropriate remedy at lower transaction costs and without the constraints of court rules or requirements. At the same time, the dispute would be resolved without burdening the court.

These steps and the use of ADR techniques such as early neutral evaluation, mediation, arbitration, and summary jury trials, should greatly reduce the burden on the courts. Requiring the parties to explore ADR options at the initial stages of the proceedings would motivate attorneys to analyze the case and prepare basic investigative homework at a much earlier point than required by the traditional system. Although the parties would be given opportunities to choose ADR, they would not be required to do so. This voluntary approach avoids the danger of creating an additional, and costly, obstruction through which litigants must first travel before they enter the litigation system.

The primary advantage of ADR is that it allows parties to avoid the time and expense of formal court proceedings. Unfortunately, these benefits may not be adequately publicized. Only when lawyers, business leaders, and government officials take the initiative in disseminating the important message that ADR achieves justice will the full advantages be realized.

The Council also encourages the private sector to employ contract provisions establishing non-judicial means of dispute resolution in order to introduce ADR into the corporate process.¹⁵

DISCOVERY

Rather than narrowing issues for trial, pretrial discovery is frequently the source of needless delay and expense. Currently, litigants have virtually unlimited ability to take sworn depositions of witnesses, request documents, and submit written questions to parties. The current rules governing discovery permit parties relatively free access to the most private documents of their adversary. An especially burdensome part of discovery is the taking of depositions, which often last for several days and occasionally even weeks. Use of interrogatories is also potentially intrusive and burdensome. The most onerous aspect of discovery, however, is the document demand whereby litigants can force the opposing party to open all of their filing cabinets to inspection. Although discovery requests are relatively inexpensive to make, the responding party's costs can be staggering, involving the time of employees to produce materials, attorney fees for review of materials to be produced, and the physical copying or recording costs. Under the current federal rules, there are no limits to the number of requests a party can make for discovery items as long as the requests are at least tenuously related to the action. In one antitrust case, for example, the discovery stage lasted almost a decade; the plaintiff's final pretrial statement was over 10,000 pages long and cross-referenced approximately 250,000 pages of documents.¹⁶

The life of the average civil lawsuit in federal court from filing to completion is fourteen months.¹⁷ One result of this lengthy process is that attorney fees account for a substantial portion of all recoveries. In fact, when all the expenses of the litigation process are added up, the claimants in tort cases often end up with compensation that amounts to only a small percentage of the total money spent. For example, Professor O'Connell of the University of Virginia Law School estimated that only fourteen cents of the automobile tort liability insurance dollar actually goes to cover economic loss.¹⁸ A study by the Rand Corporation's Institute for Civil Justice found that in 1985 the legal system incurred a total of \$16-19 billion

15. AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 1, at 7-9.

16. *Cf. United States v. American Tel. & Tel.*, 642 F.2d 1285 (D.C. Cir. 1980).

17. David Gergen, *America's Legal Mess*, U.S. NEWS & WORLD REP., Aug. 19, 1991, at 72.

18. Jeffrey O'Connell, *An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries*, 60 MINN. L. REV. 501, 511 (1976).

in transaction costs to deliver \$14-16 billion to plaintiffs in net compensation.¹⁹

PUNITIVE DAMAGES

In the past, punitive damages were assessed only in cases where the defendant was proved to have had a quasicriminal intent to harm the plaintiff. Today, however, plaintiffs in civil lawsuits routinely ask juries to award not only compensatory damages for their economic or out-of-pocket losses, but also punitive damages. Juries have responded with enthusiasm. A 1987 study by the Institute for Civil Justice, examining 24,000 jury trials in Cook County, Illinois, found that the average punitive damage award increased, in inflation-adjusted dollars, from \$43,000 in 1965-1969 to \$729,000 in 1980-1984—a jump of 1500%.²⁰ In personal injury cases, the rise has been even more dramatic.

A prominent lawyer in Washington said that punitive damages “have made civil litigation sort of like the lotteries you have in so many states.”²¹ Justice O’Connor observed that the “wholly standardless discretion” of punitive damages “appear[s] inconsistent with due process.”²² Now-retired Justice Brennan also noted that juries “are left largely to themselves in making this important, and potentially devastating, decision.”²³ Commenting on one particularly shocking case, Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit speculated: “I suppose next we will be seeing lawsuits seeking punitive damages for maliciously refusing to return phone calls or adopting a condescending tone in interoffice memos.”²⁴

The common law method of assessing punitive damages developed virtually without restriction. Lacking a unifying structure, the current approach to punitive damages will continue to generate disproportionately high awards in a random and capricious manner.

19. James S. Kakalik & Nicholas M. Pace, *Cost and Compensation Paid in Tort Litigation*, The Institute for Civil Justice (RAND) No. R-3391-ICJ, at vii, ix (1986) (drawing data from Table S.1, S.2, and S.3).

20. Mark A. Peterson et al., *Punitive Damages: Empirical Findings*, The Institute for Civil Justice (RAND) No. R-3311-ICJ, at 4, 15 (1987) (drawing data from Table 2.7).

21. Ruth Marcus, *Are Punitive Damage Awards Fair to Firms?: Supreme Court Finally Agrees To Referee High-Stakes Disputes*, WASH. POST, Sept. 23, 1990, at H1 (quoting Theodore B. Olson, Esq.).

22. *Banker's Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring in part and concurring in judgment).

23. *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring).

24. *Oki America, Inc. v. International, Inc.*, 872 F.2d 312, 315 (9th Cir. 1989) (Kozinski, J., concurring).

Because punitive damages are "quasi-criminal," an award should be predicated on a standard of proof requiring some element of intent.

Other limitations are needed to restrict the measure of punitive damages that can be levied in any single case. Plaintiffs seeking punitive damages should not be able to assign specific dollar amounts to their request. Rather, punitive damages should be awarded in a separate proceeding. A jury should determine whether punitive damages are warranted based only on clear and convincing evidence supporting an award; the trial judge should determine the amount of punitive damages. The perceived benefits of punishment and deterrence can still be achieved by limiting the amount of punitive damages to the full amount of compensatory damages. Punitive damages reform reduces the threat of runaway jury verdicts, promotes settlements, and increases certainty in commercial transactions by establishing reasonable boundaries for awards. This six-step approach will ensure that punitive damages are effective in deterring and punishing extreme or egregious conduct.

EXPERT WITNESSES AND "JUNK SCIENCE"

An area of the law particularly ripe for reform is expert witness practice. The Federal Rules of Evidence, which govern most expert testimony, eliminated many of the common law restrictions on the use of expert witnesses.²⁵ The resulting uncontrolled use of expert witnesses has led to longer trials, more expensive litigation, and a reduction in the quality of expert testimony in many cases. It has also allowed "junk science" to tarnish the legal process. Peter Huber, a leading observer of American courtrooms, has written recently that "scientific frauds . . . are attempted almost daily in our courts, and many succeed."²⁶ Huber wrote that "[t]he most fantastic verdict recorded so far was worthy of a tabloid: with the backing of expert testimony from a doctor and police department officials, a soothsayer who decided she had lost her psychic powers following a CAT scan persuaded a Philadelphia jury to award her \$1 million in damages."²⁷

25. See *Zenith Radio Corp. v. Matsushita Elec. Indus.*, 505 F. Supp. 1313, 1322 (E.D. Pa. 1980) (discussing differences between common law and Federal Rules of Evidence pertaining to testimony of expert witnesses). Contrary to common law, Rule 703 permits an expert to testify to opinions formed on the basis of inadmissible evidence, provided that evidence is of a type that an expert in a particular field would reasonably rely on in forming opinions or inferences pertaining to that subject. *Id.*

26. PETER W. HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 4* (1991).

27. *Id.* at 3-4.

Stories such as this are becoming almost commonplace. "Expert" witnesses regularly offer their "scientific" opinions on the connections between automobile accidents and breast cancer or environmental pollutants and "chemically induced AIDS."²⁸ As if the ability to fashion almost any opinion into expert testimony were not enough, there is considerable use of contingency fees to pay expert witnesses. Although expert witnesses are supposed to give objective testimony based on scientific evidence in order to help judge and jury resolve complex matters, this practice easily turns too many expert witnesses into "hired guns."

To eliminate testimony that is far afield from mainstream professional practice or current scientific knowledge, expert testimony should be admitted only when it is based on "widely accepted" theories. A party should have to prove that its expert's opinion is based on an established theory that reflects a community of opinion. Currently, "expert" witnesses are permitted to offer testimony even if their theories are unproven and not corroborated by other experts. The Council's recommendations would allow testimony based on respected minority or majority theories while excluding fringe theories.

Contingency fees that award compensation in return for a "successful outcome" in a case should be banned for expert witnesses. A testifying expert witness should have no financial interest in the outcome of the case. This reform is designed to keep expert witnesses from becoming mercenaries or advocates instead of remaining impartial and objective evaluators.

More comprehensive inquiries should be permitted of proposed "expert" witnesses through interrogatories and depositions. Compared to the discovery of other witnesses, discovery concerning experts is very limited.²⁹ Litigants should be able to scrutinize experts by obtaining more information about them. To this end, disclosure of additional core data should be required—namely, a list of the expert's publications and a description of the expert's compensation arrangement—without cost to the opposing party. Contrary to the current rule requiring a court order before an expert witness can be deposed, additional discovery through the use of depositions should be permitted. The Federal Rules of Civil Procedure should be

28. *See id.* at 1 (stating that when subject of expert witness testimony has been discredited by science, it is inappropriate to allow that testimony in courtroom).

29. *See* FED. R. CIV. P. 26(b)(4) (noting limitations on discovery of facts and opinions of expert witnesses). Through interrogatories, a party only may be required to identify experts to be called at trial, state the subject matter of their testimony, state the substance of the facts and opinions of the testimony, and summarize the grounds for those opinions. *Id.*

amended to provide for the deposition of experts without resort to a court motion.

Finally, courts should be required to determine that proposed expert witnesses are legitimate experts in their field before they are permitted to testify. This revision would involve judges directly in protecting cases in their courtrooms from unqualified experts. It should also have the effect of discouraging parties from retaining unqualified experts. Furthermore, any attempt to mandate the use of court-appointed experts should be discouraged to prevent the proliferation of the practice.

ATTORNEY FEES

The Council proposes an experiment in federal diversity cases with a "Fairness Rule," based on the "English Rule," which requires the losing party in a lawsuit to pay the prevailing party's attorney fees. The proposal is grounded in fairness and the equitable principle that a party who suffers should be made whole. Adopting a "loser pays" rule would provide those bringing a suit with a choice of methods to finance their litigation and, at the same time, would encourage the parties to evaluate their cases with greater care. Before filing suit, parties would be compelled to consider whether they have a realistic chance of prevailing. The Fairness Rule thereby operates to discourage frivolous or harassment suits. On the other hand, the rule would help fund meritorious claims not currently initiated when the cost of pursuing the claim exceeds the expected recovery.

The loser would pay the winner's costs of vindicating its prevailing position subject to three limitations. First, fee shifting would be restricted to diversity jurisdiction cases in federal court. Second, the amount of fees would be restricted to those the loser incurs. This is to prevent a party from incurring disproportionate expenses for purposes of penalizing the loser. Third, the court would have the discretion to further limit fees where appropriate. Limiting the application of the rule to federal diversity cases provides an option for those litigants desiring that each party pay its own attorney fees to pursue their cases in state courts. Thus, these recommendations will not affect federal statutory rights that already provide for the allocation of attorney fees in suits against the Government.

IMPLEMENTATION OF REFORMS IN THE EXECUTIVE BRANCH

Executive Order 12,778 implements many of the reforms described above in the executive branch of the Federal Government.

Under the Executive order, federal agencies and litigation counsel participating in civil litigation in federal court on behalf of the United States are directed to follow certain guidelines.

Although the Executive order addresses numerous proposals, several are of particular relevance to this discussion. First, no complaint initiating civil litigation shall be filed without first making a reasonable effort to notify all disputants and attempting to settle the dispute.³⁰ Second, settlement conferences shall be held and alternative dispute resolution procedures utilized where appropriate.³¹ Third, litigation counsel on behalf of the Government is to make efforts toward streamlining and expediting the discovery process, including the disclosure of core information.³² Fourth, only testimony based on widely accepted theories is to be presented and then only from experts in the field who are not paid on a contingency arrangement.³³ Finally, subject to reasonable limitations, fee shifting agreements between the Government and other parties are encouraged whereby the losing party pays the prevailing party's fees and costs.³⁴

On February 4, 1992, the President transmitted the Access to Justice Act of 1992 to the Congress.³⁵ Its principal provisions call for federal courts to establish alternative dispute resolution procedures as an option for settling controversies³⁶ and require pre-complaint notices as a condition of the right to sue in federal court.³⁷ The Act also permits experiments with the Fairness Rule for attorney fee awards.³⁸

CONCLUSION

The use of litigation as a preferred means in our society for resolving disputes and achieving social reforms has burdened the courts and has resulted in significant economic detriment. The President's Council on Competitiveness has proposed fifty specific changes to the current process for civil litigation. Among them is an increased emphasis on voluntary dispute resolution, including vol-

30. Exec. Order No. 12,778, 56 Fed. Reg. 55,195 (1991).

31. *Id.* at 55,195-96.

32. *Id.* at 55,196.

33. *Id.* at 55,197.

34. *Id.*

35. 138 CONG. REC. S909 (daily ed. Feb. 4, 1992).

36. S. 2180, 102d Cong., 2d Sess. § 7, 138 CONG. REC. 911, 912; H.R. 4155, 102d Cong., 2d Sess. § 7, 138 CONG. REC. 260, 261 (daily ed. Feb. 4, 1992).

37. S. 2180, 102d Cong., 2d Sess. § 5, 138 CONG. REC. 911, 911; H.R. 4155, 102d Cong., 2d Sess. § 5, 138 CONG. REC. 260, 260 (daily ed. Feb. 4, 1992).

38. S. 2180, 102d Cong., 2d Sess. § 3, 138 CONG. REC. 911, 911; H.R. 4155, 102d Cong., 2d Sess. § 3, 138 CONG. REC. 260, 260 (daily ed. Feb. 4, 1992).

untary settlements. Limits are proposed for what has become a time-consuming, burdensome, and expensive pretrial discovery process. Punitive damages are restricted by requiring a higher standard of proof in a separate proceeding before a trial judge in which specific dollar amounts cannot be requested and where the amount of punitive damages is limited to the amount of compensatory damages awarded. The use of expert witnesses is restricted to those who are truly experts in widely accepted theories prevalent in the relevant professional field. In awarding attorney fees, the Fairness Rule or "loser pays" rule is to be adopted in federal diversity cases with some limitations.

The process of adopting these reforms, where appropriate, in litigation involving the Federal Government has already begun with guidelines in Executive Order 12,778, signed recently by President Bush and in the transmittal to Congress of the Access to Justice Act of 1992.

