

ARTICLES

CIVIL JUSTICE REFORM IN AMERICA: A QUESTION OF PARITY WITH OUR INTERNATIONAL RIVALS

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1. INTRODUCTION

Foreign businesses, manufacturers, and litigants in general are wary of the American civil justice process.¹ They are unaccustomed to its free-form liability standards, broad-ranging discovery practice, civil jury system, and punitive damage awards²—all uniquely American conventions.³

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The authors wish to thank David M. Haug, Harvard Law School, 1992, James P. Gillespie, Associate, Kirkland & Ellis, and Lisa Western, Legal Assistant, Kirkland & Ellis, for their research assistance.

¹ Frank L. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 645 (1989); P.S. Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons*, 1987 DUKE L.J. 1002; Jeremy G. Epstein, *English Discovery: Simpler and Cheaper*, NAT'L L.J., Nov. 28, 1988, at 19. See also, Patrick Thieffry, *European Integration and Transnational Litigation*, 13 B.C. INT'L AND COMP. L. REV. 339, 352, 356 (1990); Diana L. Muse, *Discovery in France and the Hague Convention: The Search for a French Connection*, 64 N.Y.U. L. REV. 1073 (1989). The terms "America" and "American" in this Article refer to the United States of America.

² For an excellent discussion of the excesses of the American civil justice system, see WALTER K. OLSON, *THE LITIGATION EXPLOSION* (1991).

³ See generally, Dean, *The Japanese Legal System—A Step Into The Unknown*, NEW L.J., Feb. 23, 1990, 246 (describing the civil litigation process in Japan); Thieffry, *supra* note 1, at 352-58 (discussing litigation in the European Community); Joseph F. Weis Jr., *The Federal Rules and the Hague Conventions*, 50 U. PITT. L. REV. 903 (1989); Epstein, *supra* note 1, at 17-19 (describing the civil litigation process in England); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985); Harada, *Civil Discovery Under Japanese Law*, 16 LAW IN JAPAN: AN

Consequently, although foreign businesses actively seek expansion into American markets, they try to avoid coming under the rules and jurisdiction of American courts.⁴ They fear that they will fall victim to those aspects of our civil justice process that drive up legal costs while exposing them to a greater risk of liability.⁵

American businesses also are wary of our civil justice system,⁶ and might welcome being on a more even playing field with their foreign counterparts, who enjoy less costly and more efficient litigation systems in their own countries.⁷ Indeed, it would not be altogether unthinkable for some enterprising Americans to seriously consider diverting their

ANNUAL 21 (1983); Benjamin Kaplan et al., *Phases of German Civil Procedure I*, 71 HARV. L. REV. 1193 (1958) [hereinafter Kaplan, *German Civil Procedure*]; Benjamin Kaplan, *An American Lawyer in the Queen's Courts: Impressions of English Civil Procedure*, 69 MICH. L. REV. 821 (1971).

⁴ See *Société Nationale Industrielle Aerospatiale v. United States Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522 (1987); Douglas J. Besharov, *Forum-Shopping, Forum-Skipping and the Problem of International Competitiveness*, in *NEW DIRECTIONS IN LIABILITY LAW*, 139 at 143-45 (Walter K. Olson ed., Proceedings of the Academy of Political Science Vol. 37, 1988) (foreign companies have numerous opportunities to avoid U.S. jurisdiction, and even when jurisdiction is present, may be able to make themselves judgment proof).

⁵ See Easterbrook, *supra* note 1, at 645; Atiyah, *supra* note 1, at 1005; *Société Nationale Industrielle Aerospatiale v. United States Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522 (1987) (foreign corporation seeks to avoid discovery under the Federal Rules of Civil Procedure by invoking the Hague Convention); cf. Thieffry, *supra* note 1, at 353 (signatories to Lugano Convention unlikely to consent to U.S. becoming a signatory due to reluctance to be subject to U.S. litigation system). The likelihood of a foreign business being haled into an American court of law is increasing somewhat because a number of state courts have expanded the reach of their jurisdiction to encompass more suits against foreigners. See Besharov, *supra* note 4; OLSON, *supra* note 2, at 85-86.

⁶ Frequently, the business community's complaints about the civil justice system are couched in terms of the need for tort or product liability reform. Cf. Charles W. Babcock, *Could We Alone Have This? Comparative Legal Analysis of Product Liability Law and the Case for Modest Reform*, 10 LOY. L.A. INT'L & COMP. L.J. 321 (1988); Alfred W. Cortese & 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. & COMM. 167 (1990).

⁷ See Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734, 739 (1987); Besharov, *supra* note 4, at 146-48 (calling for legal reforms to increase uniformity of legal costs in order to put American businesses on a more even footing with foreign competitors).

legal disputes to foreign soil in order to take advantage of the reduced litigation costs. However, this fantasy is not likely to become a reality. Even though many American businesses routinely engage in foreign transactions, most legal disputes involving American businesses are resolved in American courts.⁸ This is because our businesses sell and produce most of their goods within the United States,⁹ giving American courts jurisdiction in almost all cases. Conversely, foreign businesses sell and produce proportionately fewer goods and services within the United States than they sell abroad.¹⁰ As a result, even though foreign businesses will be subject to the U.S. civil justice system for a small share of their products and activities, American firms will be subject to it for most, if not

⁸ See, e.g., Thieffry, *supra* note 1, at 355.

⁹ JAPAN EXTERNAL TRADE ORGANIZATION, WHITE PAPER ON INTERNATIONAL TRADE JAPAN 1989: TRADE STATISTICS 49 (1989) [hereinafter JETA]. For example, in 1989 U.S. companies captured 91 percent of the domestic chemical market, 88 percent of the aerospace market, 89 percent of the drug market, 54 percent of the machine tools market, 95 percent of the food, drink, and tobacco market, 74 percent of the cars and light trucks market, 74 percent of the apparel market, 93 percent of the textiles market, 83 percent of the industrial machinery market, 87 percent of the household furniture market, 81 percent of the household appliances market, 79 percent of the tires market. Edmond Faltermayer, *Is Made in the U.S.A. Fading Away?*, FORTUNE, Sept. 24, 1990, 62, 64. Only a small percentage of total production and sales of American business occurs abroad. INTERNATIONAL TRADE COMM'N, U.S. DEP'T OF COMMERCE, U.S. INDUSTRIAL OUTLOOK: PROSPECTS FOR OVER 350 MANUFACTURING AND SERVICE INDUSTRIES 14 (1990).

¹⁰ If we review the export practices of the major U.S. trading partners, Japan and members of the European Community (EC), it is evident that these countries sell most of their products outside the United States. A majority of trade within EC countries traditionally is with other EC members. See JETA, *supra* note 9, at 52, 53. For example, in 1989 EC countries accounted for 55 percent of German exports and 51 percent of imports. German exports to the United States accounted for 7.3 percent of all German exports. INTERNATIONAL TRADE ADMIN., U.S. DEP'T OF COMMERCE, OVERSEAS BUSINESS REPORT: MARKETING IN THE FEDERAL REPUBLIC OF GERMANY 3 (1991). France exports approximately 7 percent of its exports to the United States. INTERNATIONAL TRADE ADMIN., U.S. DEP'T OF COMMERCE, OVERSEAS BUSINESS REPORT: MARKETING IN FRANCE 4 (1989). Even though the United States is Japan's number one trading partner, it receives only 35 percent of Japan's exports. Sixty five percent of Japanese export products are sold elsewhere. INTERNATIONAL TRADE ADMIN., U.S. DEP'T OF COMMERCE, OVERSEAS BUSINESS REPORT: MARKETING IN JAPAN 3 (1987). It is important to remember that exports account for a certain percentage of gross national product. Many products are sold in domestic markets.

all, of their products and activities. Absent reform of the American civil justice system then, American businesses will continue to incur disproportionately greater liability and legal costs than their international competitors.

Criticism of the high costs of the American civil justice process is not confined to the business community—it is broad based. Indeed, Congress and leaders within the court system itself have presented numerous major reform proposals in the last few years alone.¹¹ While the calls for reform have focused primarily on the need to reduce costs and delay as a means of improving the delivery of justice, recently some have raised the secondary argument that costs must be contained or reduced in order to vitiate the detrimental effect of the current system on American competitiveness.¹² Indeed, the amount of money and other resources devoted to legal costs inevitably affects the bottom line of a balance sheet. If American businesses uniformly have higher legal costs than their international rivals, it gives these rivals a competitive advantage. It follows that the closer America moves toward a less costly civil justice system, perhaps more similar to the systems used abroad, the less likely it is that our legal system will be a factor negatively impacting American competitiveness in the international marketplace.

¹¹ See, e.g., COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE 14 (Aug. 1991) (proposing the addition of a disclosure requirement to FED. R. CIV. P. 26) [hereinafter JUDICIAL CONFERENCE]; Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (requiring federal district courts to develop plans to expedite civil litigation through use of early, fixed trial dates and other techniques); FEDERAL COURTS STUDY COMM., REPORT (1990) (blue-ribbon panel appointed by the Chief Justice to study the Federal court system and make recommendations for improving it); TASK FORCE ON CIVIL JUSTICE REFORM, THE BROOKINGS INSTITUTION, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION (1989) [hereinafter BROOKINGS INSTITUTION]; S. 640, 102nd Cong., 1st Sess. (1991); S. 1400, 101st Cong., 1st Sess. (1989); H.R. 430, 100th Cong., 1st Sess. (1987); H.R. 1115, 100th Cong., 2nd Sess. (1988).

¹² See, e.g., Leslie Spencer, *The Tort Tax*, FORBES, Feb. 17, 1992, at 40; OLSON, *supra* note 2, at 85; Michael E. Porter, THE COMPETITIVE ADVANTAGE OF NATIONS 649, 729 (1990) (finding that the liability system inhibits American competitiveness); Cortese & Blaner, *supra* note 6, at 167; Besharov, *supra* note 1 at 139; see generally PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988).

The President's Council on Competitiveness (hereinafter "Competitiveness Council" or "Council") agrees that the current civil justice system hinders the competitiveness of American businesses engaged in international markets.¹³ To reduce the costs and delays that affect competitiveness, the Council has proposed an agenda of fifty civil justice reform recommendations to be implemented in both federal and state courts.¹⁴ The reform recommendations are the product of the Federal Civil Justice Reform Working Group, appointed by the Competitiveness Council and chaired by Solicitor General Kenneth Starr.¹⁵ The Vice President announced the reforms to the American public at the August 1991 meeting of the American Bar Association, and some segments of the legal community have already begun fund-raising efforts targeted at derailing the Council's reform agenda.¹⁶

¹³ See Vice President Dan Quayle, Prepared Remarks at the Annual Meeting of the American Bar Association (Aug. 13, 1991) [hereinafter Vice President's Remarks]; see also Besharov, *supra* note 4, at 145-46; see generally Porter, *supra* note 12, at ch. 12 (discussing the role of government in enacting laws and setting policies that facilitate or inhibit competitiveness).

¹⁴ See *A Report From the President's Council on Competitiveness: Agenda for Civil Justice Reform in America* (Aug. 1991) [hereinafter *Agenda for Civil Justice Reform*]; 28 U.S.C.A. § 519 (Supp. 1992) (codifying Executive Order No. 12778 implementing Competitiveness Council proposals in federal government litigation); the Vice President, the Civil Justice Reform Model State Amendments (Feb. 1992) (model reform legislation for consideration by state legislatures) [hereinafter Model State Plans]; the President's Council on Competitiveness, Model State Punitive Damages Act (Feb. 13, 1992) (Model legislation for reform of state punitive damages law) [hereinafter Model Punitive Damages Reforms].

¹⁵ Memorandum for the President from the Vice President (discussing President's Council on Competitiveness, *Agenda for Civil Justice Reform in America*. The working group included top legal counsel from those government agencies and offices charged with formulating America's legal and economic policies). See *Agenda for Civil Justice Reform*, *supra* note 14, at 28.

¹⁶ Many members of the bar responded to the reform proposals with sharp criticism. See, e.g., Ellen Pollock, *Quayle Calls for Changes in Legal System*, WALL ST. J., Aug. 14, 1991, at B6; David Margolick, *Address by Quayle on Justice Proposals Irks Bar Association*, N.Y. TIMES, Aug. 14, 1991, at A1; David S. Broder & Sandra Torrey, *ABA President Disputes Quayle on Litigation Proposal*, WASH. POST, Aug. 14, 1991, at A1. Commentators outside the legal community received the announcement more favorably. See *Cold Compress for the ABA*, WASH. POST, Aug. 15, 1991, at A20 (proposals deserve to be taken seriously); William F. Buckley Jr., *Litigation: Less Is More*, WASH. POST, Aug. 19, 1991, at A17 (criticizing those who

The Competitiveness Council's reform recommendations are striking in that they contain provisions that are similar to certain rules of civil justice already in place in Germany and Japan—our principal business rivals.¹⁷ Whether this is by design or by coincidence is not explained. Nevertheless, in recent years scholars have noted with approval several areas where the American civil justice system and the systems in effect in civil law countries are converging.¹⁸ Adoption of the Council's reforms, then, would continue this trend.

Although the Competitiveness Council's reforms may have had their origins outside this country, they cannot be characterized as exotic imports. Many of them have been advanced by leading American jurists and scholars over the past few decades,¹⁹ and some already have been proposed formally by American legislatures or other official organizations charged with responsibility for the operation of the courts.²⁰ Although

objected to reform proposals).

Opponents of the reforms wasted little time in organizing the opposition and starting to raise money to fuel their activities. Not surprisingly, some of the key figures on the fund-raiser agenda include congressional opponents of tort reform, such as Senator Richard Bryan (D-Nev.), and Democratic leaders such as Senators George Mitchell (Me.), Lloyd Bentsen (Tex.), and Chuck Robb (Va.). L. Gordon Crovitz, *Lawyers Seek Senators as Advocates Against Quayle Reforms*, WALL ST. J., Sept. 18, 1991, at A15.

¹⁷ Porter, *supra* note 12, at 21 (Germany, Japan and United States are leading industrial rivals). Curiously, this similarity was not discussed in the package announcing the reforms or in Vice President Quayle's speech announcing them.

¹⁸ Langbein, *supra* note 3, at 858-66.

¹⁹ See, e.g., William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform* 50 U. PITT. L. REV. 703, 721-23 (1989) (proposing amendment of FED. R. CIV. P. 26 to create duty to disclose core information to opponent without a request); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1296 (1978) (proposing changes to discovery rules); Maurice Rosenberg, *Contemporary Litigation in the United States*, in LEGAL INSTITUTIONS TODAY: ENGLISH AND AMERICAN APPROACHES COMPARED 152 (Harry W. James ed., 1977) (collection of papers prepared for the Bicentennial Observance of the American Bar Association, Aug. 5-12, 1977) (suggesting increased use of arbitration, adoption of the English rule regarding attorney's fees, among other reforms).

²⁰ See, e.g., JUDICIAL CONFERENCE, *supra* note 11, at 14; Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (requiring federal district courts to develop plans to expedite civil litigation through use of early, fixed trial dates and other techniques); FEDERAL COURTS STUDY COMM., REPORT, *supra* note 11; BROOKINGS INSTITUTION, *supra* note 11.

the reform proposals are relatively mainstream ideas, some will meet strong opposition from the American bar.²¹ Nonetheless, the reform package injects some fresh air into the civil justice reform debate because it is the first reform package to specifically link decreasing the costs of the civil justice system with improving American competitiveness. Because many of the proposals have counterparts or corollaries in the civil justice systems of Germany and Japan, they provide the American legal community with a rather unique opportunity to evaluate them by examining German and Japanese experiences. In effect, some laboratory testing of many of these proposals has already taken place, yielding possibly relevant data from which we may draw conclusions about the merits of the Council's proposals.

This Article evaluates the Competitiveness Council's reform proposals from a pro-business perspective by comparing them to the German and Japanese systems. It starts with a description of the major themes of the Competitiveness Council reforms, and briefly explores the justification for the reforms. It identifies the changes that would result in the American civil justice process if those reforms are adopted. Next, it describes the civil justice systems of our toughest competitors, Germany and Japan, focusing on those components of the foreign systems which are most similar to the reforms proposed by the Council.

Because a nation's laws are a product of the society and culture which created them, this Article also considers certain cultural traits within the foreign countries examined, as well as within the United States, that may have influenced the development of the indigenous civil justice systems, and evaluates how these cultural differences may temper our adoption of components of foreign systems. The Article then compares the proposals to the German and Japanese systems to identify potential areas of convergence, and to help shed additional light on the likely impact that the proposals might have on the American civil justice process.

The Article finds that adoption of many of the proposals should be given favorable consideration because they are likely

²¹ See Andrew Blum, *Quayle's Proposals Still Making Waves*, NAT'L L.J., Sept. 16, 1991, at 3.

to decrease costs and increase efficiency, while at the same time improving the quality of justice. Some of the proposals, however, may be more meritorious in the abstract, and may require certain modifications before they are implemented. The Article concludes that to the extent that overall litigation costs affect competitiveness, reforms that reduce these costs will be beneficial to the business community, the economy, and America as a whole.

2. THE PROPOSED COMPETITIVENESS COUNCIL REFORMS

The fifty individual recommendations contained within the *Agenda for Civil Justice Reform in America* are grouped into nine categories. These include increasing the use of voluntary dispute resolution, refocusing discovery, promoting more effective trial procedures, reforming the use of expert witnesses, overhauling punitive damages, improving the use of federal judicial resources, changing market incentives to control litigation, reducing burdens on federal courts, and eliminating litigation over poorly drafted legislation.²²

Because some American procedures and rules have no direct corollary in either the German or Japanese civil justice systems,²³ it is not always possible to make a direct comparison of the Competitiveness Council's individual reforms with specific rules or procedures in effect in these foreign systems. Consequently, to engage in a useful comparative analysis, it is necessary to move to a higher level of abstraction where the reforms and the German and Japanese systems share common characteristics. For example, the basic paradigm behind the reforms and the foreign systems involves private parties bringing legal disputes to a neutral government official, the judge, for resolution according to the applicable principles of substantive law. By focusing on three common elements—the parties, the judge, and the substantive law—an analysis can be undertaken to identify and compare the roles and responsibilities that each country assigns to them in the civil justice

²² The last two categories of reforms, reforming habeas corpus and eliminating litigation over poorly drafted legislation, along with proposals to reallocate work among certain courts of appeal, concern limited issues rather unique to the federal courts and will not be discussed in this article.

²³ See *infra* discussions in Sections 3.1 and 3.2.

process, and to evaluate the likely effect that the Competitiveness Council's proposed reforms would have on the American system. To begin then, it is necessary to describe the proposed reforms as they would affect the three main elements of this civil justice paradigm.

2.1. Reforms Affecting the Parties

The majority of the Competitiveness Council's reforms would have their most significant effect upon private parties—those individuals involved in the legal dispute.²⁴ Generally, all of the reforms applicable to the parties will force them to assume greater responsibility to each other, and to the system itself, for resolving the underlying dispute. This increased responsibility is placed on the parties in three different ways.

2.1.1. Increasing Consensual Resolution of Disputes Outside the Courts

Many of the proposals would require parties to increase efforts to resolve disputes consensually, outside the court altogether or with court involvement only as a last resort. The specific recommendations that can be classified in this group include increasing the use of alternative dispute resolution ("ADR") techniques;²⁵ requiring advance notice to an oppo-

²⁴ Because the civil justice process is a complex, integrated system of rules and procedures, it is impossible to change one aspect of it without affecting others, or to modify the parties' obligations without affecting the responsibilities of the court. Cf. Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 325 (1986) (procedural changes inevitably affect substantive law). Thus, although each of the recommendations has a primary effect, each often has secondary effects as well. For simplicity's sake, this article will focus on the primary effect of most provisions.

²⁵ Promoting increased use of ADR has been one element of most major civil justice reform proposals presented in recent times. See, e.g., FEDERAL COURTS STUDY COMMITTEE, REPORT, *supra* note 11, at 81-87; Civil Justice Reform Act of 1990, P.L. No. 101-650, 105 Stat. 5089 (1990). The proposed reforms would promote ADR through the use of mandatory pretrial conferences that focus the parties' attention on the potential for resolving their dispute through early neutral evaluation, mediation, arbitration, mini-trial and summary jury trial. For a brief explanation of each of these ADR techniques, see FEDERAL COURTS STUDY COMMITTEE, REPORT, *supra*, note 11 at 82; The Federal Courts Study Committee also suggested limited use of financial incentives to motivate parties to use ADR, *id.* at 83-85, a suggestion not included in the Council's reform package. See Model State

ment of a claim that may result in the filing of a lawsuit;²⁶ and requiring parties to attempt to resolve discovery disputes among themselves before turning to the court for help.²⁷

The goal of these proposals is to reduce the number of cases entering the courts in the first place, which logically would decrease litigation costs for the parties and societal costs for administering the court system. In addition, if the number of cases entering the system decreases, court dockets would be less crowded, reducing the delays that stem from overcrowding rather than inadequate procedures. All three proposals have a common-sense appeal to them. The conflict underlying the lawsuit, after all, belongs to the private parties. It is they who benefit from resolution of the dispute, and it should be they who bear the burden in the first instance of attempting to resolve the underlying dispute on their own, as well as satellite disputes that occur in the course of the litigation. Recourse to the courts and litigation should be the last resort, not the first.²⁸

2.1.2. Changing Market Incentives

Some of the reforms aimed at the parties would inject market incentives into the civil justice process by imposing costs on individuals who inaccurately judge the merits of their positions and by providing additional rewards for those who prevail.²⁹ Specifically, the Competitiveness Council has proposed requiring the party that rejects a reasonable settlement offer to pay the subsequent costs of trial if the outcome at trial does not exceed the amount offered in settlement,³⁰

Plans, *supra* note 14, "Model State Civil Multi-Door Courthouse Act," at 11-17.

²⁶ *Agenda for Civil Justice Reform*, *supra* note 14, at 15-16; Model State Plans, *supra* note 14, "Model State Pre-Complaint Notice Act," at 1-8.

²⁷ *Id.* at 18.

²⁸ Cf. Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1644 (1985) (evaluation of fairness of the civil justice system should include consideration of the costs imposed on others, as well as on the litigants); Elliott, *supra* note 24, at 333.

²⁹ See Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 427-29 (1973).

³⁰ *Agenda for Civil Justice Reform*, *supra* note 14, at 16; Model State Plans, *supra* note 14, "Model State Offer of Settlement Act," at 31-35. This provision is intended to force litigants to evaluate their claims more

and allowing parties to exceed pre-determined limits on discovery and to depose expert witnesses only if they agree to pay the costs that the additional discovery imposes on the opponent.³¹ Imposing costs in this way is intended to force litigants to evaluate their claims more accurately and to shift the cost of erroneous evaluations from the opponent and the system itself to the party making the improper evaluation.³²

Another reform proposal would preclude contingency fees for expert witnesses.³³ Some forceful arguments have been made recently that expert witnesses can be found to testify to a whole range of issues that have little or no empirical support within the scientific community.³⁴ Clearly, the willingness of a so-called expert to provide such testimony is likely to increase if the expert is given a financial stake in the outcome of the litigation. Consequently, the Council's proposal is intended to make this practice less lucrative and to foster more objective expert testimony.

A final proposal that falls into this category is a recommendation for adopting a "loser pays" rule in federal court cases

accurately and to reward the party that made a good-faith effort to settle the dispute before trial. *Compare with* FED. R. CIV. P. 68; *Delta Air Lines v. August*, 450 U.S. 346 (1981); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 441-42 (1982). Similar rules are in effect in some states. *See, e.g.,* CAL. CIV. PROC. CODE § 998 (West 1990).

³¹ *See* Model State Plans, *supra* note 14, "Model State Core Disclosure and Discovery Provisions," at 23-24. Existing rules allow litigants to pursue discovery until the point at which the party resisting discovery can demonstrate affirmatively that the discovery requests have become oppressive or abusive, or are not reasonably calculated to lead to the discovery of admissible information. *See* FED. R. CIV. P. 26(b)(1) and (c). *But see* JUDICIAL CONFERENCE, *supra* note 11, Rule 30. Depositions Upon Oral Examination (proposed amendment would permit only ten depositions per party without leave of the court). In addition, it is exceedingly rare for a court to impose an opponent's production costs on the party requesting discovery. *See* FRIEDENTHAL ET AL., CIVIL PROCEDURE § 7.7, at 396 (1985) (parties generally bear their own expenses); FED. R. CIV. P. 26 (discovery may be denied if it creates undue expense); *compare with* *National Union Elec. Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1257, 1259 (E.D. Pa. 1980) (defendant offered to pay for opponent's costs in preparing computer tape of information requested in discovery).

³² *Cf.* Easterbrook, *supra* note 1, at 644-45.

³³ *Agenda for Civil Justice Reform, supra* note 14, at 21; Model State Plans, *supra* note 14, "Model State Expert Testimony Provisions," at 49.

³⁴ *See generally,* PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM (1991) [hereinafter HUBER, JUNK SCIENCE].

based on diversity jurisdiction.³⁵ Although the imposition of fees on the loser, known in this country as the "English Rule," is not uncommon in the civil justice systems of other nations,³⁶ adoption of such a rule here has long been resisted by those who favor the contingency fee system.³⁷ The proponents of the contingency fee system insist that it ensures access to the justice system for those who have meritorious claims, but who lack the financial wherewithal to retain an attorney and pay by the hour or task.³⁸ The Competitiveness Council's recommendations to shift to rules that require the loser to pay are intended to force litigants to assess their claims more thoroughly and accurately early on, and to discourage the filing and pursuit of marginal causes.³⁹ Under current law, the court system itself bears the cost of unnecessary or frivolous actions, giving the parties a free ride by allowing them to make requests and argue positions that have little likelihood of success. Some federal rules, Rules 11 and 37 for example, already permit courts to impose costs on parties who use the civil justice system in a frivolous or abusive manner, and the Council has recommended strengthening these sanctions because of uneven or overly lenient enforcement.⁴⁰ Although fully warranted on the merits, these recommendations would usher in a fundamental shift in

³⁵ *Agenda for Civil Justice Reform*, *supra* note 14, at 24.

³⁶ See the discussion of fees in the German and Japanese justice systems that follows *infra* in Sections 3.1.7 and 3.2.7.

³⁷ See Rosenberg, *supra* note 19, at 165. See also OLSON, *supra* note 2, at 32-50.

³⁸ Resnik, *supra* note 30, at 441-42; Rosenberg, *supra* note 19, at 165. See generally Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982).

³⁹ *Agenda for Civil Justice Reform*, *supra* note 14, at 24-25. See also Richard S. Miller, *Apples vs. Persimmons—Let's Stop Drawing Inappropriate Comparisons Between the Legal Professions in Japan and the United States*, 3 VICTORIA U. WELLINGTON L. REV. 201, 209-10 (1987) [hereinafter *Apples vs. Persimmons*]; Langbein, *supra* note 3, at 845 n.78; Resnik, *supra* note 30, at 441-42 (legislation imposing costs on losers suggested as one way to reduce systemic costs and inefficiencies); Kaplan, *supra* note 3, at 821-22; Posner, *supra* note 29, at 427-28.

⁴⁰ *Agenda for Civil Justice Reform*, *supra* note 14, at 25.

American philosophy about access to the courts, and thus are likely to meet strong opposition.⁴¹

2.1.3. *Modifying the Gathering of Information*

A number of reforms aimed at the parties would require the production of information to take place in a more controlled and focused environment. No other aspect of American civil procedure is as prone to controversy and debate as the legally sanctioned “fishing expedition”⁴² known as discovery, wherein the parties battle mightily over the exchange of information.⁴³ Under current discovery rules, there is no obligation to disclose anything to an opponent until the opponent requests it.⁴⁴ Under the proposed reform, a duty would be created to identify basic information that would be helpful to an opponent and to disclose it voluntarily without waiting for a request. The Council recommended that upon the filing of a lawsuit, the parties be required to voluntarily “disclose basic (or ‘core’) information, such as the names and addresses of people having knowledge likely to bear on the claims and defenses and the location of documents most relevant to the case.”⁴⁵ This proposal, if adopted in its

⁴¹ See L. Gordon Crovitz, *Lawyers Seek Senators as Advocates Against Quayle Reforms*, WALL ST. J., Sept. 18, 1991, at A15; Andrew Blum, *Quayle's Proposals Still Making Waves*, NAT'L L.J., Sept. 16, 1991, at 3, 28.

⁴² See *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). See also Langbein, *supra* note 3, at 845 n.78.

⁴³ One indicator of the depth of dissatisfaction with the modern discovery system is the unusual dissent of now retired Supreme Court Justice Lewis Powell from 1980 amendments to Rule 26 of the Federal Rules of Civil Procedure that, according to Justice Powell, did not go far enough to stop discovery abuses. Amendments to the Federal Rules of Civil Procedure, 446 U.S. 995, 998 (1980) (Powell, J., dissenting, joined by Stewart, J., and Rehnquist, J.). See, e.g., William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective Than Discovery?*, 74 JUDICATURE 178 (1991) [hereinafter *Slaying the Monster*]; Schwarzer, *supra* note 19, at 703; Easterbrook, *supra* note 1; Maurice Rosenberg & Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough Is Enough*, 1981 B.Y.U. L. REV. 579; Brazil, *supra* note 19, at 1296.

⁴⁴ *Slaying the Monster*, *supra* note 43.

⁴⁵ *Agenda for Civil Justice Reform*, *supra* note 14, at 16. An amendment that would create a somewhat broader requirement was proposed to Federal Rule of Civil Procedure 26 and public comment was solicited. See, e.g., Judicial Conference, *supra* note 11, at 14; *Slaying the Monster*, *supra* note 43, at 180; Schwarzer, *supra* note 19, at 703; Brazil, *supra* note 19, at 1332-

current form, represents a profound philosophical deviation from current discovery practice, which gives wide berth to the parties to determine how much information they need to examine in order to prepare their case. Indeed, some have suggested that imposing an affirmative duty on the parties to disclose certain information is nothing short of a change in the adversarial nature of discovery.⁴⁶

Another proposal that would affect the discovery process involves preserving rules to protect confidential information produced in litigation.⁴⁷ This proposal stems from a recent movement in state legislatures to limit the use of confidentiality and make information from the courts more accessible to the media and the public at large.⁴⁸ Litigants are often required to produce trade secrets and other confidential information in discovery in order to resolve the underlying litigation.⁴⁹ Because our courts are widely accessible to the public, production of sensitive information in litigation often creates a risk of public disclosure and a resultant loss of the value of the trade secret.⁵⁰ The Council's proposal encourages courts to maintain strong protection for trade secrets and other confidential information because of the competitive advantage that it often provides to its owner.

Two other reforms that would affect discovery would force the parties to analyze and prepare their cases more carefully and completely during the pretrial phase. Specific recommendations in this area require litigants to tie discovery requests

36. Due to the overwhelmingly negative response to the proposal, the Judicial Conference, Civil Rules Advisory Committee reportedly has deferred action on the proposal pending further study. See Ann Pelham, *Judges Make Quite A Discovery*, LEGAL TIMES, Mar. 16, 1992, at 1.

⁴⁶ See *Slaying the Monster*, *supra* note 43, at 183; Brazil, *supra* note 19, at 1359-60.

⁴⁷ *Agenda for Civil Justice Reform*, *supra* note 14, at 19.

⁴⁸ See generally Arthur R. Miller, *Private Lives or Public Access*, A.B.A. J., Aug. 1991, at 65 [hereinafter *Private Lives*]; Alfred W. Cortese Jr., *ATLA's Protective Order Campaign: Undermining Confidence in the Courts*, 18 Prod. Safety & Liab. Rep. (BNA) 465, Apr. 19, 1991.

⁴⁹ See *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 107 F.R.D. 288 (D. Del. 1985) (Coca-Cola ordered to produce trade secret formula for soft drink).

⁵⁰ Cf. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984) (public disclosure of trade secret results in loss of value).

to the pleadings,⁵¹ and adopt quantitative limits on the amount of discovery allowed.⁵²

The Competitiveness Council's recommendations place greater responsibility on the parties to resolve conflicts by negotiation and consensus in lieu of trial, to assume new financial risks as the cost of using the court system, and to increase specificity and voluntariness in the gathering of information to be used to resolve the dispute. As discussed in Section 3 of this article, each of these proposed modifications to the current American civil justice process has a counterpart, or embraces a comparable value, in the civil justice systems of Germany and Japan.

⁵¹ *Agenda for Civil Justice Reform*, *supra* note 14, at 18; Model State Plans, *supra* note 14, "Model State Core Disclosure and Discovery Provisions," at 21-29.

⁵² See sources cited *supra*, note 51. Current rules permit what is called notice pleading, a practice wherein a plaintiff can make vague, conclusory allegations of harm without alleging specific facts that support the claims. If the pleadings themselves lack specificity, it stands to reason that discovery requests based on these pleadings will be equally vague, and more important, unnecessarily far-reaching. See Easterbrook, *supra* note 1, at 644-45.

For example, if a complaint in a product liability case only alleges that a defectively designed bicycle caused the plaintiff's injury, discovery requests might seek information about the design of the entire bicycle. If the complaint alleges that the injury was caused by defective brakes, the discovery requests would be more narrow, and not seek information about the handlebars or seat assembly. To know whether the cause of the injury was the brakes, as opposed to some other component of the bike, requires some investigation of the accident prior to filing of the claim. Thus, in order to tie discovery requests to the pleadings, the pleadings must possess a degree of specificity that can only be achieved through additional preparation prior to filing the complaint, preparation that is often lacking under the current notice pleading system. The same principle applies to attaching quantitative limits to discovery. In order to ensure that all necessary information is obtained by the use of a limited number of interrogatories or depositions, the questioning must be finely tuned to the specific facts of the case and to the underlying elements of the action that must be proved to prevail. Therefore, the proposed reforms in this area place greater responsibility on the parties to focus their case before the initial filing through investigation and more thorough analysis.

2.2. Reforms to the Court System

The reforms that would have their primary impact on the courts can be characterized as promoting managerial controls of the litigation by the judge and reducing the judge's discretion to ignore certain litigant errors and abuses. Specific reform proposals include requiring the judge to hold mandatory settlement conferences with the litigants throughout the litigation;⁵³ making discovery sanctions automatic if the "court finds unreasonable, vexatious, or abusive discovery practice;"⁵⁴ requiring the establishment of early trial dates;⁵⁵ making summary judgment mandatory when there is no genuine issue of material fact;⁵⁶ encouraging judges to take a hands-on approach to managing cases;⁵⁷ encouraging early settlement;⁵⁸ requiring courts to determine the qualifications of experts prior to their testimony;⁵⁹ and promoting increased use of Rule 11.⁶⁰

All of the Council's proposals that would affect the role of judges can best be seen as a continuation of a process begun many years ago when the Federal Rules of Civil Procedure were amended to require courts to hold pre-trial conferences and engage in other case management activities.⁶¹ Most of the civil justice reform proposals put forth in recent years have included similar provisions.⁶² Although some commentators question the wisdom of increasing the managerial role of the judiciary,⁶³ many judges prefer taking control of a case early on in an effort to resolve the dispute quickly, promote settle-

⁵³ *Agenda for Civil Justice Reform*, *supra* note 14, at 16.

⁵⁴ *Id.* at 17.

⁵⁵ *Id.* at 19.

⁵⁶ *Id.* at 20.

⁵⁷ *Id.* at 20, 23.

⁵⁸ *Id.* at 15-16.

⁵⁹ *Id.* at 22.

⁶⁰ *Id.* at 25.

⁶¹ See Resnik, *supra* note 30, at 374; Elliott, *supra* note 24, at 323 n.67.

⁶² See, e.g., Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (requiring federal district courts to develop plans to expedite civil litigation through use of early, fixed trial dates and other techniques); FEDERAL COURTS STUDY COMM., REPORT, *supra* note 11; BROOKINGS INSTITUTION, *supra* note 11.

⁶³ See generally Resnik, *supra* note 30; Elliott, *supra* note 24.

ment, and reduce crowded dockets.⁶⁴ Indeed, the more responsibility judges assume for controlling the litigation, the closer our system moves toward the model presented by judges in the civil justice systems in Germany and Japan.⁶⁵

2.3. *Reforms to Substantive Law and Standards*

The remaining reform proposals address substantive law and the standards that courts apply in various aspects of the litigation process. By far the most controversial recommendation contained in this category concerns major reform to the law regarding punitive damages in both federal and state courts.⁶⁶ Another recommendation that falls into this category would establish a more stringent standard for determining the admissibility of expert testimony.⁶⁷

The proposed punitive damages reforms include establishing a “clear and convincing evidence” standard for awarding punitive damages, prohibiting the plaintiff from assigning a specific dollar amount to a request for punitives, bifurcating the decision on whether to award punitive damages from the determination of liability, making the judge responsible for determining the amount of punitives to be awarded, and limiting the amount of punitives to the amount of compensatory damages awarded. The Competitiveness Council has supported punitive damages reform before in federal product liability reform legislation.⁶⁸ Because none of our leading foreign competitors permit punitive damages in civil litigation at all,⁶⁹ the Council considers such reform to be an essential step toward improving American competitiveness.

Creating heightened standards for qualifying experts and their testimony would address concerns that some expert

⁶⁴ Resnik, *supra* note 30, at 417. See also Elliott, *supra* note 24, at 311; Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 262 (1985).

⁶⁵ See discussion *infra*, Sections 3.1 and 3.2.

⁶⁶ *Agenda for Civil Justice Reform*, *supra* note 14, at 22-23; Model Punitive Damages Reforms, *supra* note 14.

⁶⁷ *Agenda for Civil Justice Reform*, *supra* note 14 at 21.

⁶⁸ See Press Release, Statement by Vice President Quayle as Chairman of the President’s Council on Competitiveness, Nov. 30, 1989.

⁶⁹ See *infra* Sections 3.1.5, 3.2.5, and 4.3.

testimony is, in reality, based on "junk science" far from the mainstream of scientific thought.⁷⁰ Some commentators have pointed out that a litigant can find an "expert" to testify to just about any position that the litigant wants to take, and that courts find it difficult or are reluctant to exclude this type of testimony even though it can ultimately skew the result of the trial itself.⁷¹ If implemented, this proposal could reduce reliance on "junk science" in the courtroom, and achieve faster, fairer and more predictable results.⁷²

In conclusion, it is clear that the package of reforms proposed by the President's Council on Competitiveness has the potential to affect all aspects of the litigation process, including the litigants, the courts, and the law itself. Although many of the reforms already have been proposed by scholars and jurists, that fact alone will not keep what are essentially mainstream ideas from being viewed as controversial by some.⁷³ When the proposed reforms are compared to the civil justice systems already in operation in the courts of Germany and Japan, many similarities become obvious. If similar concepts and procedures operate efficiently and fairly in other countries, it is more likely that their implementation here would also be beneficial.

3. CIVIL JUSTICE SYSTEMS IN GERMANY AND JAPAN

Today's American and British civil justice systems emerged piece by piece as the result of what is called a common law tradition.⁷⁴ Courts fashion the law on a case-by-case basis,

⁷⁰ HUBER, JUNK SCIENCE, *supra* note 34, at 2. See also E. Donald Elliott, *Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence*, 69 B.U. L. REV. 487, 491 (1989) [hereinafter *Scientific Evidence*]; OLSON, *supra* note 2, at 162-66.

⁷¹ HUBER, JUNK SCIENCE, *supra* note 34, at 3; OLSON, *supra* note 2, at 158-62.

⁷² See *Scientific Evidence*, *supra* note 70, at 491.

⁷³ See Crovitz, *supra* note 16, at col 4; Blum, *supra* note 21, at 3; see also Resnik, *supra* note 30, at 444 (similar reforms would profoundly change the litigation process).

⁷⁴ Kaplan, *supra* note 3, at 841; Dr. W. Zeidler, *Evaluation of the Adversary System: A Comparison, Some Remarks on the Investigatory System of Procedure*, 55 AUSTL. L.J. 390, 391 (1981); Harry W. Jones, *Introduction in AMERICAN BAR ASSOCIATION, LEGAL INSTITUTIONS TODAY: ENGLISH AND AMERICAN APPROACHES COMPARED*, xiii-xv (1977) [hereinafter *ENGLISH AND AMERICAN APPROACHES*].

building on precedent to fill the gaps over time.⁷⁵ Legal questions are left unanswered until the courts are presented with a case squarely requiring the court to determine what the law is regarding a specific issue.⁷⁶ Germany and Japan, however, are civil law countries.⁷⁷ The civil law tradition is statute bound; legislatures draft statutes, rules, and directives setting forth the law in advance. Courts apply and interpret the law, but do not create it.⁷⁸

Another distinction is the characterization of systems as either adversarial or inquisitorial. America and Great Britain are said to have adversarial systems, whereas the German and Japanese systems are described as inquisitorial.⁷⁹ Under an adversarial system, the litigants are in charge. They develop their cases, presenting the evidence that is most favorable, and leaving it to their adversary to negate or discredit their position. Presented with two conflicting sides to the dispute, the neutral judge or jury hears the conflicting evidence, decides what the truth is, and determines which side should prevail.⁸⁰ In an inquisitorial system, the judge is the primary actor, actively seeking evidence from both sides, directing the parties' actions, and providing constant commentary on the quality of the case and the likely outcomes.⁸¹

Because these distinctions are fundamental, they have played a significant role in shaping practice in the civil courts

⁷⁵ Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 422 (1988); JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 34 (1985) [hereinafter *CIVIL LAW*]. See *ENGLISH AND AMERICAN APPROACHES*, *supra* note 74, at xiii-xv.

⁷⁶ *CIVIL LAW*, *supra* note 75, at 34.

⁷⁷ See Zeidler, *supra* note 74; see also *infra* note 136 and accompanying text.

⁷⁸ *CIVIL LAW*, *supra* note 75, ch. V, VI, VIII; Zeidler, *supra* note 74, at 392.

⁷⁹ See Zeidler, *supra* note 74, at 390; Resnik, *supra* note 30, at 380 & nn.23-24; text accompanying note 166.

⁸⁰ See Resnik, *supra* note 30, at 380-82; Zeidler, *supra* note 74, at 394-95 n.31. It must be acknowledged, however, that the British judge takes a much more active role during trial than the American judge does, frequently questioning the witnesses, summing up the evidence for the jury, and injecting other comments and guidance into the trial process. See generally Kaplan, *supra* note 3.

⁸¹ *CIVIL LAW*, *supra* note 75, ch. VI. See Zeidler, *supra* note 75, at 394-96 & nn.28, 29, 34, 35, 41 & 42.

of both systems.⁸² Nonetheless, there has been a convergence of the systems over time, such that clear lines of demarcation are beginning to blur.⁸³ For example, some aspects of the American system, such as the increasingly managerial role played by the judge, mimic the inquisitorial style; and some aspects of the German system, such as counsel's written and oral arguments, are clearly adversarial. While this blurring does not make the systems interchangeable, it does make it easier for one system to adopt procedures or borrow principles from the other. Thus, the fact that the reforms proposed by the Competitiveness Council may have their origins in procedures or principles in effect in civil law countries does not negate the potential relevance or utility that these reforms may have to the American civil justice system. Instead of focusing on the nature of the system from which the procedure comes, the focus should be on what a particular reform can accomplish if placed into effect in the American system.

What follows is a brief discussion of the civil litigation processes in Germany and Japan, with emphasis on those components that could be considered analogous to the Council's reform proposals.

⁸² See CIVIL LAW, *supra* note 75, at 2.

⁸³ See John Henry Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 STAN. J. INT'L L. 357, 361 (1981); Zeidler, *supra* note 74, at 400. For example,

although there is no formal rule of *stare decisis*, [in the civil law tradition] the practice is for judges to be influenced by prior decisions. Judicial decisions are regularly published in most civil law jurisdictions. A lawyer preparing a case searches for cases in point and uses them in his argument; and the judge deciding a case often refers to prior cases. Whatever the ideology of the revolution may say about the value of precedent, the fact is that courts do not act very differently toward reported decisions in civil law jurisdictions than do courts in the United States.

CIVIL LAW, *supra* note 75, at 47.

3.1. *The German Procedural System*⁸⁴

German civil procedure is distinguished from the American system in two fundamental ways.⁸⁵ First, once the initial complaint is filed, the judge controls the evidentiary process, not the parties, as is the case in the United States.⁸⁶ Second, there is no bifurcation of an action into a pretrial discovery stage and trial stage.⁸⁷ Rather, the case is adjudicated in an ongoing process that combines the gathering and evaluation of evidence, usually in a series of hearings.⁸⁸ Other distinguishing features are the relatively modest role played by the

⁸⁴ Leading scholarly discussions on German civil procedure, written in English, include Arthur Taylor von Mehren, *Some Comparative Reflections on First Instance Civil Procedure: Recent Reforms in German Civil Procedure and in the Federal Rules*, 63 NOTRE DAME L. REV. 609 (1988) [hereinafter von Mehren, *On German Law*]; Langbein, *supra* note 3, at 823; Peter Gottwald, *Simplified Civil Procedure in West Germany*, 31 AM. J. COMP. L. 687 (1983); Zeidler, *supra* note 74, at 390; Kaplan, *German Civil Procedure*, *supra* note 3, at 1193. For further discussion of the proceedings of a lawsuit in the German courts, see Dr. Christopher E. Hauschka, *Central Issues of Business Litigation in West German Civil Courts*, 19 CAL. W. INT'L L.J. 47 (1988); William B. Fisch, *Recent Developments in West German Civil Procedure*, 6 HASTINGS INT'L & COMP. L. REV. 221 (1983).

⁸⁵ Langbein, *supra* note 3, at 826.

⁸⁶ *Id.* at 826. The German civil justice system places a remarkable amount of authority on the judge, who dominates the entire process with few of the checks and balances present in the American system. This investiture of broad power implies significant trust in the capability of individual German judges, and a greater degree of respect for authority, which perhaps can be attributed to the German culture itself. *Id.*; see generally H. EICH, *THE GERMANS* (1963). The German process for selecting judges may also facilitate this heightened level of respect, because Germany has a career judiciary wherein advancement is based on merit, not politics; and acceptance into the ranks of the judiciary occurs upon the completion of legal training, not after years of practice as a lawyer. Langbein, *supra* note 3, at 848-51, 852-53. See also Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1033 (1975).

⁸⁷ Langbein, *supra* note 3, at 826. See also von Mehren, *On German Law*, *supra* note 84, at 614-16 (describing German reforms and efforts to concentrate the civil process into a single proceeding).

⁸⁸ Professor von Mehren postulates that the evolution of the current German civil procedure system stems not so much from cultural and sociological considerations as it does from the institutional feature of the discontinuous trial system. von Mehren, *On German Law*, *supra* note 84, at 611.

lawyers and parties, and the continuous emphasis on a quick disposal of the case.⁸⁹

3.1.1. *Initiation of a Lawsuit and the Pleadings*

A lawsuit in Germany begins in much the same way as in the United States, with the filing of a complaint.⁹⁰ The pleadings in the case are written in great detail and they govern the scope of the remainder of the proceeding.⁹¹ The defendant presents his own detailed version of the case in his reply, including his own statements of fact, legal arguments, and means of proof.⁹² Clearly then, there is an adversarial quality to the lawsuit.⁹³

3.1.2. *Gathering the Evidence*

Discovery in the American sense is unknown in Germany.⁹⁴ Instead, the parties have an affirmative duty in the initial proceedings to identify to the court and to each other the principal evidence, including specific documents and witnesses, that supports their claims.⁹⁵ All of this takes place voluntarily, without a request from the opponent or

⁸⁹ Langbein, *supra* note 3, at 830 (court constantly goes for the jugular).

⁹⁰ The complaint must ask for either damages or specific relief, and set forth the key facts and the underlying legal theory. *Id.* at 827; Kaplan, *German Civil Procedure*, *supra* note 3, at 1215.

⁹¹ See Hauschka, *supra* note 84, at 53-54. Because the court can dismiss the case if the pleadings contain allegations that are not corroborated by sufficient facts, the parties are unlikely to leave anything out of the pleadings. Andreas G. Junius, *The Trial Process in European National Courts: Common Law and Civil Law Comparisons*, in *FRONTIERS OF EUROPEAN LITIGATION: 1992 AND BEYOND* 5 (ABA Professional Education Committee 1991).

⁹² Langbein, *supra* note 3, at 827; Gottwald, *supra* note 84, at 689.

⁹³ Langbein, *supra* note 3, at 824 & n.4. See also von Mehren, *On German Law*, *supra* note 84, at 609-10.

⁹⁴ "A party cannot compel an opponent to disclose information which is in his possession and is relevant to the action. If the party does not present the document voluntarily, it can only be obtained by order of the court. Any 'fishing' discovery is largely impossible, because the party is not obliged to provide information which may somehow be connected with the action, but need only present those documents whose existence and content have been alleged by the opponent in a relevant way." Gottwald, *supra* note 84, at 691.

⁹⁵ Langbein, *supra* note 3, at 827; Kaplan, *German Civil Procedure*, *supra* note 3, at 1215.

court.⁹⁶ If the information at issue concerns certain confidential matters, such as state secrets or confidential business information, the party or witness in possession of that information can refuse to produce it without fear of an adverse inference.⁹⁷

Under the German rules of civil procedure, the judge has the primary authority to obtain evidence not provided by the parties.⁹⁸ Based on the pleadings and other pretrial writings, the judge determines which witnesses are to be heard, which documents are to be produced, and whether there is any other evidence that he wants presented before the court.⁹⁹ The German court may confine its proof-taking to those few issues that it feels may be determinative in the case and await the results of that evidence before deciding if any further evidence needs to be taken.¹⁰⁰

German lawyers generally will not have out of court contact with witnesses.¹⁰¹ This is a marked contrast with

⁹⁶ The Zivilprozessordnung ("ZPO"), the German Code of Civil Procedure, empowers a court to impose penalties on a party who fails to contribute to the full and accurate disclosure of information in a dispute. Kaplan, *German Civil Procedure*, *supra* note 3, at 1218-1219. However, if a party refuses to disclose documents or other information, the court cannot compel production as in the United States. *Id.* at 1226 & n.134. Instead, the court may draw an adverse inference against the recalcitrant party. *Id.* at 1226 & n.133.

⁹⁷ See ZPO § 376, Examination Involving Official Secrets; § 383, Refusal to Testify, THE CODE OF CIVIL PROCEDURE RULES OF THE FEDERAL REPUBLIC OF GERMANY OF JANUARY 20, 1877 95-98 (1990) (Goren trans.).

⁹⁸ Langbein, *supra* note 3, at 824. See also Gottwald, *supra* note 84, at 690-91. Although these powers are broad, the judge generally may not use his investigatory powers to enlarge the issues beyond the scope of the pleadings. *Id.* at 691-92; Hauschka, *supra*, note 84, at 51. The court's power to point out relevant and irrelevant allegations and proof is viewed as a protective device, and is sometimes described as the "Magna Carta" of the present German civil procedure. Gottwald, *supra*, at 692.

⁹⁹ Langbein, *supra* note 3, at 828. There are no strict rules of evidence in the German system; the judge is allowed to consider every piece of relevant evidence, although evidentiary shortcomings affect the weight or credit given such evidence. *Id.*; Kaplan, *German Civil Procedure*, *supra* note 3, at 1237.

¹⁰⁰ Langbein, *supra* note 3, at 830; Kaplan, *German Civil Procedure*, *supra* note 3, at 1233.

¹⁰¹ An out of court contact with a witness could be both a serious ethical breach and a self-defeating strategy. Langbein, *supra* note 3, at 834; von Mehren, *On German Law*, *supra* note 84, at 609; Kaplan, *German Civil Procedure*, *supra* note 3, at 1200. Not only has the German Bar Association questioned out of court contact, but German judges would be extremely

the American system, where witnesses are prepared extensively prior to presenting their testimony.¹⁰² Witnesses can be examined orally,¹⁰³ and testimony may be given in narrative form¹⁰⁴ with questioning primarily by the court.¹⁰⁵ Cross-examination of witnesses, such as that conducted in the United States, is not permitted.¹⁰⁶ Interrogation by the parties and their attorneys is usually limited, and will not cover ground already traversed by the judge.¹⁰⁷

3.1.3. Oral Hearings

After the judge develops a sense of the case from the pleadings, he will schedule an oral hearing with the parties to shape the issues and content of the case.¹⁰⁸ This occurs simultaneously with the gathering of evidence as described above. The court proceeds, alternating adversarial dialogue with non-adversarial proof taking, over as many hearings as are necessary to decide the case.¹⁰⁹ Oral argument in German civil proceedings has been described as more of a collaborative discussion than as an adversarial proceeding.¹¹⁰ It clearly lacks the theatrical quality of oral argument presented

reluctant to place much faith in the testimony of such a witness. von Mehren, *On German Law*, *supra*, at 618-19. Nonetheless, German lawyers may nominate potential witnesses whose testimony might turn out to be helpful to his case, based on conversations with the client and the documentary record. Langbein, *supra*, at 827.

¹⁰² Langbein, *supra* note 3, at 829.

¹⁰³ A witness also may respond to the court's questions in writing if the relevant information can be provided in business documents or other authenticated records. Gottwald, *supra* note 84, at 696.

¹⁰⁴ Kaplan, *German Civil Procedure*, *supra* note 3, at 1235.

¹⁰⁵ von Mehren, *On German Law*, *supra* note 84, at 609; Hauschka, *supra* note 84, at 71.

¹⁰⁶ Langbein, *supra* note 3, at 833-34.

¹⁰⁷ Kaplan, *German Civil Procedure*, *supra* note 3, at 1235; Langbein, *supra* note 3, at 829. If one witness contradicts another, the court may order a confrontation between the two. Kaplan, *German Civil Procedure*, *supra*, at 1235.

¹⁰⁸ Langbein, *supra* note 3, at 828.

¹⁰⁹ *Id.* at 829. This process has been described as "merg[ing] the investigatory function of our pretrial discovery and the evidence-presenting function of our trial." *Id.*

¹¹⁰ Kaplan, *German Civil Procedure*, *supra* note 3, at 1221-22.

by American litigators.¹¹¹ Finally, the court decides the case without the help of a jury.¹¹² From a practical standpoint, the discontinuous nature of the German civil justice process cuts against reliance on a decision-maker other than the judge because it is not possible for a specially assembled group of lay people, such as a jury, to remember the evidence and make themselves available over long intervals of time.¹¹³

3.1.4. Experts

Experts play a unique role in the German system, standing "midway between witnesses and members of the court."¹¹⁴ There is nothing in German litigation that resembles the "battle of the experts", so common in America. Experts are not even thought of as witnesses; rather, they are referred to as "judges' aids,"¹¹⁵ and their advice is frequently sought by the court.¹¹⁶ While the parties to the litigation may propose particular experts to the court, it is ultimately up to the judge to decide whether an expert's opinion is needed and to select the expert.¹¹⁷ Selection is guided by a desire for credibility and objectivity.¹¹⁸ Experts are normally instructed to prepare a written opinion, which is presented to the court and both parties.¹¹⁹ Both the court and the witnesses can question the expert on his report after it is filed.¹²⁰

¹¹¹ Langbein, *supra* note 3, at 831. See also Benjamin Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409 (1960).

¹¹² Langbein, *supra* note 3, at 829, 863-65.

¹¹³ von Mehren, *On German Law*, *supra* note 84, at 611. However, the Germans do rely on lay persons in some instances, through the use of specialized courts, where lay specialists actually sit on the court as judges. See Langbein, *supra* note 3, at 865; Hauschka, *supra* note 84, at 49-50.

¹¹⁴ Kaplan, *German Civil Procedure*, *supra* note 3, at 1242.

¹¹⁵ Langbein, *supra* note 3, at 835 (citation omitted).

¹¹⁶ *Id.* at 836.

¹¹⁷ *Id.* at 837. But where both parties agree on an expert, the court cannot refuse to hear him. However, the court can still appoint its own expert as well. *Id.*

¹¹⁸ See *id.* at 837 ("The essential insight of Continental civil procedure is that credible expertise must be neutral expertise. Thus, the responsibility for selecting and informing experts is placed upon the courts.").

¹¹⁹ *Id.* at 839.

¹²⁰ *Id.* The ZPO authorizes the court to utilize another expert if it decides that the first report is unsatisfactory in some way. *Id.*

3.1.5. Damages

A party suffering damages from another's conduct must specify and prove in detail what injuries have occurred and what damages would remedy the injury. Excess damages, such as punitive damages or triple antitrust damages are not permitted.¹²¹

3.1.6. Settlement

Another distinctive feature of the German system is the conscious effort that is put into seeking settlement, which is both required by law and encouraged by the nature of the proceedings.¹²² Often, because of the detailed nature of the pretrial pleadings, the court will encourage settlement even before the first oral hearing gets under way.¹²³ The judge frankly discusses the outlook for both sides, commenting on weaknesses and strengths, and sometimes even indicating the probable outcome.¹²⁴ This discussion often causes the parties to settle early, because they realize that an early settlement will be no different from the ultimate decision rendered by the judge.¹²⁵ Indeed, the commonly held view in Germany is that it is better to settle disputes consensually than to go ahead with litigation.¹²⁶

¹²¹ Hauschka, *supra* note 84, at 55; Junius, *supra* note 91, at 7.

¹²² See Langbein, *supra* note 3, at 830-31, n.25 (ZPO imposes duty on court to seek settlement); Kaplan, *German Civil Procedure*, *supra* note 3, at 1224-28.

¹²³ Kaplan, *German Civil Procedure*, *supra* note 3, at 1223.

¹²⁴ Langbein, *supra* note 3, at 832.

¹²⁵ Hauschka, *supra* note 84, at 66 ("Frustrated lawyers are all too familiar with incidents where a judge turns to the plaintiffs to explain why they might lose, and then explains to the defendants why their chances for success are also poor. After that, the judge proposes the settlement which, in his opinion, would be the likely outcome of the proceedings anyway.")

¹²⁶ Zeidler, *supra* note 74, at 394. In fact, many lawyers feel that it is unfashionable to be seen in court too often. Hauschka, *supra* note 84, at 47-48. The strong drive toward settlement also may have something to do with the overall structure of the civil system. Some commentators feel that the episodic structure of the German system encourages settlement by lessening the tension and theatrics that are characteristic of the American system. "German civil proceedings have the tone not of the theatre, but of a routine business meeting—serious rather than tense. When the court inquires and directs, it sets no stage for advocates to perform." Langbein, *supra* note 3, at 831. See also Benjamin Kaplan, *Civil Procedure—Reflections on the*

3.1.7. Costs

Under the German system, the loser of the litigation pays the costs.¹²⁷ Costs include counsel's fees plus court costs, both of which are determined by statute.¹²⁸ The size of German costs and counsel fees are characterized as modest, and are said to be lower than costs for comparable cases in the United States.¹²⁹ Contingency fees, once barred by statute, are now condemned by professional canons.¹³⁰ However, in some cases, counsel fees can be negotiated to reflect the actual work done or the quality of the result obtained.¹³¹

3.1.8. Alternative Dispute Resolution Mechanisms

German use of alternative dispute resolution techniques is not as extensive as that in the United States.¹³² Nonetheless, the German legal system includes a number of specialized courts that hear and adjudicate disputes involving only one area of law.¹³³ Germany also provides a summary adjudication process for certain debts,¹³⁴ and permits arbitration in a broad range of circumstances.¹³⁵

Comparison of Systems, 9 BUFF. L. REV. 409 (1960). However, the German system also has an impediment to settlement, which is a settlement fee that must be paid by each settling party to the attorneys in addition to their regular counsels fees. Junius, *supra* note 91, at 13.

¹²⁷ Kaplan, *German Civil Procedure*, *supra* note 3, at 1461-62; Langbein, *supra* note 3, at 832.

¹²⁸ Kaplan, *German Civil Procedure*, *supra* note 3, at 1462. The authors set forth a chart displaying court costs and lawyers fees in effect at the time of publication. *Id.* at 1464.

¹²⁹ *Id.* at 1465.

¹³⁰ *Id.* at 1466.

¹³¹ *Id.*; Hauschka, *supra* note 84, at 59-60.

¹³² von Mehren, *On German Law*, *supra* note 84, at 624, n.51.

¹³³ See Hauschka, *supra* note 84, at 49-50 (business courts), 77-78 (summary proceedings), 78-79 (labor courts). The "judges" in these courts often include non-lawyer specialists, such as leaders from the business community for the business courts, who are substantive experts regarding the area in dispute. *Id.* at 49-50. The advantages of using these special courts is the increased degree of expertise that the decision-makers can bring to bear on resolution of the dispute.

¹³⁴ See THE CODE OF CIVIL PROCEDURE RULES OF THE FEDERAL REPUBLIC OF GERMANY OF JANUARY 30, 1877, Book Seven, §§ 688-703d (1990) (Goren trans.).

¹³⁵ *Id.* at Book Ten, §§ 1025-48.

What this brief overview of the German litigation process reveals is a system wherein much of the potential adversarial quality of the dispute is negated by the dominant role of the judge. There is no discovery, no preparation of witnesses, no party-controlled selection of experts, no cross-examination, and perhaps most striking, no single event such as the American trial where everything is resolved in one comprehensive presentation. Instead of the drama so prominent in American litigation, where each side does all it can to win, German litigation is conducted much like a series of business meetings where all participants are seeking a common goal.

3.2. *The Japanese Procedural System*¹³⁶

The Japanese legal system is a hybrid of both the German civil law and the American common law, complicated by a third element, referred to as "Japanese legal consciousness."¹³⁷ The German elements of Japanese civil law were adopted wholesale from the German civil code in the late 1800s.¹³⁸ During the American occupation after World War II, Japan adopted an American-style constitution, along with the substantive American law of corporations, competition, employment, income tax, and securities regulation.¹³⁹ Japanese civil procedure developed along the same lines as its substantive law. A procedural code similar to that used in Germany was adopted in 1890,¹⁴⁰ and it survives today with only modest modification as a result of the Americanization of

¹³⁶ For a lean but thorough overview of the Japanese procedural system, see TAKAAKI HATTORI & DAN FENNO HENDERSON, *CIVIL PROCEDURE IN JAPAN* (1985) [hereinafter HATTORI & HENDERSON].

¹³⁷ Charles R. Stevens, *Modern Japanese Law as an Instrument of Comparison*, 19 AM. J. COMP. L. 665, 667 (1971).

¹³⁸ See generally Arthur T. von Mehren, *Some Reflections on Japanese Law*, 71 HARV. L. REV. 1486 (1958). This change was made to facilitate foreign trade on an equal basis with western countries once Japan opened its doors to the outside. Dean, *supra* note 3, at 246; see also Stevens, *supra* note 137, at 666.

¹³⁹ Dean, *supra* note 3, at 246. See generally Alfred C. Oppler, *The Reform of Japan's Legal and Judicial System Under Allied Occupation*, 24 WASH. L. REV. 290 (1949); Thomas L. Blakemore, *Post-War Developments in Japanese Law*, 1947 WIS. L. REV. 632 (1947).

¹⁴⁰ HATTORI & HENDERSON, *supra* note 136, § 1.03[1].

Japanese law following World War II.¹⁴¹ What makes this hybrid system of law uniquely Japanese, however, is Japanese legal consciousness, which means that the people of Japan view all of their relationships, including those that are purely economic, as social and not legal.¹⁴² Consequently, when a dispute arises that could be resolved through the courts, the Japanese are more inclined to use other means, such as personal conciliation and negotiation, first.¹⁴³

3.2.1. *Initiation of the Lawsuit and the Pleadings*

It is technically correct to say that a lawsuit in Japan begins with the filing of a complaint,¹⁴⁴ but it is more apt to say that the lawsuit begins only after the parties have failed to reconcile their dispute through other means.¹⁴⁵ Although the lower rates of litigation in Japan are often attributed primarily to the Japanese cultural aversion to litigation,¹⁴⁶ the Japanese system also imposes very high barriers to entry into the court system. At the time a lawsuit is filed, the parties must pay a filing fee based on a sliding scale set by statute, which often is beyond the means of an average citizen.¹⁴⁷ In addition, Japanese attorneys require an initial retainer from the plaintiff before the suit is filed, which also is based on a statutorily controlled sliding scale that increases with the amount of damages claimed.¹⁴⁸

¹⁴¹ *Id.* § 1.03[4]. Those modifications that were made were concerned primarily with creating additional safeguards to protect the parties' rights. *Id.*

¹⁴² Stevens, *supra* note 137, at 666.

¹⁴³ *Id.* at 667 (quoting TAKEYOSHI KAWASHIMA, JAPANESE LEGAL CONSCIOUSNESS (1967)).

¹⁴⁴ HATTORI & HENDERSON, *supra* note 136, §§ 4.03[1][b], 7.01[2][a].

¹⁴⁵ *Id.* § 6.02; see Thomson, *Dispute Resolution in Japan: The Non-Litigious Way*, LAW SOC'Y J., May 1986, 30-31.

¹⁴⁶ See Thomson, *supra* note 145, at 30-31.

¹⁴⁷ HATTORI & HENDERSON, *supra* note 136, at § 7.01[2][a] (plaintiff must affix revenue stamps to pleading based on the value of the claim); see, e.g., *Apples vs. Persimmons*, *supra* note 39, at 208. The filing fees increase with the size of the damages claimed. For a graph of this sliding scale, see *id.* at 208. For example, in order to file a \$1 million lawsuit, the plaintiff is required to pay a filing fee of more than \$5,000. *Id.* at 209.

¹⁴⁸ *Apples v. Persimmons*, *supra* note 39, at 209. Based upon this schedule, the initial retainer in a \$1 million lawsuit is \$41,531. *Id.* Civil litigants in Japan are not required to be represented by counsel. HATTORI

The initial pleadings filed by the plaintiff are more detailed than American pleadings,¹⁴⁹ but less exhaustive than the pleadings required under German procedure.¹⁵⁰ However, this abbreviated initial filing is soon supplemented with an extensive memorandum, identifying potential evidence and witnesses,¹⁵¹ which ultimately makes the initial Japanese filings comparable to the written pleadings under the German system.¹⁵² The defendant must file an answer responding to the complaint, raising defenses, and identifying witnesses and evidence that support its position.¹⁵³

3.2.2. *Gathering the Evidence*

Japan has no system of pretrial discovery in the American sense.¹⁵⁴ Without a system of discovery by the parties, the

& HENDERSON, *supra* note 136, § 6.02.

¹⁴⁹ Harada, *supra* note 3, at 41.

¹⁵⁰ Generally, they include identification of the parties and their representatives, a statement of the relief sought, and the grounds for that relief. HATTORI & HENDERSON, *supra* note 136, § 7.01[2][a].

¹⁵¹ *Id.* § 7.02[10][a].

¹⁵² *Id.* § 7.02[4] n.93.

¹⁵³ *Id.* § 7.02[10][b].

¹⁵⁴ Itsuko Mori, *The Difference Between U.S. Discovery and Japanese Taking of Evidence*, 23 INT'L LAW. 3, 4 (1989); Harada, *supra* note 3, at 22, 34 ("[I]n Japan, acquisition of evidence from the opposing party at the pretrial stage is not allowed as a general rule."). Nonetheless, Japanese attorneys often conduct their own investigations into the facts and the evidence likely to support a legal claim, much as their American counterparts do. *Id.* at 24-26. The methods available to private counsel include extensive interviews with the client and witnesses, (in contrast to the German practice where attorneys are unlikely to interview witnesses in advance), examination of documents which are in the client's possession, inquiries through the local bar association to government offices that may have relevant information, and the use of private detective agencies. *Id.* The drawback of private investigation, however, is that it is entirely dependant upon the voluntary cooperation of the individuals from whom information is sought because there is no supporting court order with coercive power. Still, this is a far cry from the German system, where preliminary interviews with potential witnesses is considered an unethical practice. Apart from this preliminary investigation conducted prior to filing the lawsuit, the role of the lawyer in gathering evidence is extremely limited. Mori, *supra*, at 3-4. The only court sanctioned way to gather evidence during the Japanese equivalent of the pretrial period is to convince the court that the particular evidence must be "preserved" or it will be unavailable for trial. *Id.* at 3. Although the parties have no coercive power to gather evidence, *id.* at 3-4, they do have an obligation to produce

responsibility and authority for gathering evidence in Japan rests with the court,¹⁵⁵ as it does under the German system.¹⁵⁶ Implicit in this responsibility is the duty to decide in the first instance what evidence is relevant, and therefore, what should be produced.¹⁵⁷ Courts aggressively participate in this process,¹⁵⁸ selecting relevant evidence from that identified in the parties' pleadings, memoranda, and oral argument.¹⁵⁹ Because there are no rules of evidence comparable to those in the American system, all evidence is admissible as long as it is relevant to the issues in dispute.¹⁶⁰ Unlike the invasive character of the American discovery system where the production of intensely personal information or confidential business information such as trade secrets frequently is compelled, the Japanese system recognizes broad rights to refuse to disclose information to the courts.¹⁶¹

documents in their own possession in a limited number of situations. Harada, *supra* note 3, at 29. For example, where a party moves for production of a document and the opponent has possession of it, the opponent has a duty to produce it. *Id.* Other instances where a party can be compelled to produce a document are where the document has been drawn for the benefit of the person offering proof or where the document regulates the legal relations between the person offering proof and the holder thereof. *Id.* When a party ordered to produce evidence fails or refuses to do so, the court may draw an adverse inference against the non-producing party and in some cases, impose a civil fine. *Id.* at 31.

¹⁵⁵ Harada, *supra* note 3, at 35; Mori, *supra* note 154, at 3.

¹⁵⁶ Harada, *supra* note 3, at 42.

¹⁵⁷ *Id.* at 35; HATTORI & HENDERSON, *supra* note 136, § 7.05[4][b] (court need not accept all evidence suggested by the parties).

¹⁵⁸ Harada, *supra* note 3, at 35.

¹⁵⁹ HATTORI & HENDERSON, *supra* note 136, § 7.05[4][b]. The court may also obtain evidence *sua sponte* from the government, experts, the parties, and when necessary, to preserve evidence. *Id.*

¹⁶⁰ *Id.* § 7.05[4][a].

¹⁶¹ *See, e.g., id.* § 7.05[6][c], n.400 (Osaka high court upheld denial of United States' request for evidence related to matters that would have given competitors an advantage in setting prices); *see also* Harada, *supra* note 3, at 44. This stems from respect for personal privacy, *id.* and recognition of the property or ownership rights of the holder of the information. *Id.* at 42 (ownership rights in documents are no longer seen as inviolable, and can be subjected to a duty to produce information for use in a lawsuit). In addition, the Japanese recognize a right to refuse to testify on the grounds that it will bring disgrace. HATTORI & HENDERSON, *supra* note 136, § 7.05[6][c].

3.2.3. Oral Hearings

The Japanese system provides that the adjudication of a legal dispute should be concentrated into one continuous hearing, comparable to an American trial.¹⁶² In practice, however, cases usually are decided over a series of hearings, as they are in Germany.¹⁶³ The main hearing consists of oral argument by the parties and proof-taking by the court.¹⁶⁴ The parties orally state the relief sought and present the allegations.¹⁶⁵ Afterwards, the focus shifts to the judge, who starts gathering the proof either in documentary evidence or through the testimony of witnesses in a continuous sequence.¹⁶⁶

When the main hearing cannot be concluded in one day, it is continued.¹⁶⁷ When the judge feels the case or issue is ripe for judgment, he will declare the oral proceedings closed.¹⁶⁸ Since juries are not available in civil actions in Japan,¹⁶⁹ as a rule courts are expected to render oral and written decisions within two weeks after the closing of the taking of evidence.¹⁷⁰ Because the Japanese rules of civil

¹⁶² Takeshi Kojima, *Civil Procedure Reform in Japan*, 11 MICH. J. INT'L L. 1218, 1227 (1990).

¹⁶³ *Id.* at 1218 (in practice, cases have approximately seven oral hearings). The hearings are divided into two stages: the preliminary or preparatory hearings and the main hearings. HATTORI & HENDERSON, *supra* note 136, § 7.01[1]. At a preliminary hearing, the court and the parties narrow the issues and the court selects the evidence, from that identified in the parties' memoranda, that will be gathered and considered at the main hearing. *Id.* § 7.02[1].

¹⁶⁴ HATTORI & HENDERSON, *supra* note 136 at § 7.04[1].

¹⁶⁵ *Id.* If one party fails to appear, the party that is present may be asked to present its opponent's formulation of the issues. *Id.* at n.278.

¹⁶⁶ *Id.* As a general rule, the judge does not hear oral testimony from the parties themselves because they are perceived as biased, and because forcing them to testify against their self-interest is considered unfair. *Id.* at n.280.; § 7.05[10]. However, the parties may be called to testify if the judge cannot resolve its doubts from the other available evidence. *Id.*

¹⁶⁷ *Id.* § 7.04[2]. This often results in a long chain of brief hearings, which allow the court to dissect a case into particular claims or issues and to address each at a different hearing. *Id.* § 7.04[4].

¹⁶⁸ *Id.* § 7.04[1]. No further evidence may be presented regarding a claim that the judge has closed, or after the judge has closed evidence gathering for the case as a whole. *Id.*

¹⁶⁹ See Dean, *supra* note 3, at 253.

¹⁷⁰ HATTORI & HENDERSON, *supra* note 136, § 7.04[1].

procedure do not specify the burden of proof applicable to decide issues in a civil case, two schools of thought have developed.¹⁷¹ Some judges subscribe to the theory that the judge must be convinced by a preponderance of the evidence.¹⁷² The predominant view, however, is that the judge should be convinced beyond a reasonable doubt—a rather remarkable standard under American law.¹⁷³ The rationale for using this extremely high standard in civil cases is as follows:

Although he need not be convinced so firmly that there is no room for finding otherwise, he is required to be convinced at least to such an extent that people in general might behave in daily life, relying on his finding with full satisfaction. The judge can find a certain fact true only when he has been convinced that it is ninety-nine percent true; he may not, when he has been convinced it is seventy per cent true, but thirty per cent untrue.¹⁷⁴

3.2.4. *Expert Witnesses*

The Japanese have a rather unique hybrid expert witness, described as a person who by virtue of learning or experience has gained “special sensory perceptions with respect to the matter in controversy which an ordinary person would not have been able to obtain.”¹⁷⁵ As in Germany, expert witnesses are selected by the judge.¹⁷⁶ The parties are able to challenge the judge’s selection of an expert by demonstrating that circumstances exist which “prevent the expert from faithfully giving expert testimony.”¹⁷⁷ The expert testifies

¹⁷¹ *Id.* § 7.05[13][b].

¹⁷² *Id.* § 7.05[13][b] & nn.466-67.

¹⁷³ *Id.* § 7.05[13][b] & n.468.

¹⁷⁴ *Id.* § 7.05[13] (citing and quoting a Japanese Supreme Court case where the Court stated that “It is necessary and sufficient that the judge has acquired through the proof, a conviction of the existence of such a relationship to the degree that an average person will not entertain any doubt.”)

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* § 7.05[9].

¹⁷⁷ *Id.* at n.424.

under oath, and may be required to testify in person or to provide a written report.¹⁷⁸ The judge may, at his discretion, require several experts to render joint or separate opinions.¹⁷⁹

3.2.5. Damages

In Japan, several factors work together to keep the amount of damages claimed and awarded in a lawsuit at a moderate level. First, damages are regarded merely as a method of compensating pecuniary loss. "Very seldom, if ever, is the amount of damages decided with a clear view of its deterrent effect."¹⁸⁰ Consequently, punitive or exemplary damages are not permitted.¹⁸¹ Because there is no jury in the Japanese system, judges over time have been able to set standards for valuing damages with remarkable consistency.¹⁸² This has led the Japan Federation of Bar Associations to develop a non-official schedule of damages, which is widely used to determine damages in individual lawsuits.¹⁸³

3.2.6. Settlement

Because the Japanese culture places a high value on resolving disputes consensually, one of the first actions taken by a Japanese attorney is an attempt to settle the claim or dispute prior to filing the lawsuit.¹⁸⁴ Japan follows a "loser-pays" system for litigation costs, and a prevailing plaintiff can be required to pay the losing defendant's attorneys' fees if the

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in *LAW IN JAPAN*, 41, 41-50, 60-66 (von Mehren ed., 1963).

¹⁸¹ Babcock, *supra* note 6, at 334, 335. In tort cases, attorney fees are considered as part of the damages rather than as part of the litigation expenses. HATTORI & HENDERSON, *supra* note 136, § 10.01 n.3. Because the initial filing fees and retainer to counsel are based on the amount of damages claimed, litigants have a financial incentive not to overstate the damages being sought. Moreover, the court cannot grant damages larger than those claimed by the prevailing party, even if the larger amount of damages is proved by the evidence. *Id.* § 7.06[5].

¹⁸² *Apples vs. Persimmons*, *supra* note 39, at 210.

¹⁸³ *Id.*

¹⁸⁴ HATTORI & HENDERSON, *supra* note 136, § 6.02.

court finds that the plaintiff failed to attempt to resolve the dispute privately before bringing it to the courts.¹⁸⁵ Even if the case ultimately ends up in court, the judge has much leeway to try to bring the parties to a compromise, and may seek a settlement at any stage of the action.¹⁸⁶

3.2.7. Costs

The general rule in Japan is that the losing party pays for all "litigation expenses," including those of the opposing party.¹⁸⁷ "Litigation expenses" are defined as costs directly and necessarily incurred by the parties and the court in prosecuting an action or other proceeding.¹⁸⁸ Attorneys' fees generally are not included in "litigation expenses," but may be recoverable in tort actions as part of the damages.¹⁸⁹ However, litigants are not required to be represented by counsel and *pro se* appearances are common.¹⁹⁰ When an attorney is retained, the fee payable is fixed by statute and, therefore, not based on a contingency.¹⁹¹ Thus, the allocation of costs in Japan is a hybrid of the German and American systems.

3.2.8. Alternative Dispute Resolution Mechanisms

As might be expected of a culture that values private conciliation highly, Japan provides a broad range of non-judicial alternative dispute resolution processes and centers.¹⁹² There is a system of summary courts, which emphasizes quick, oral procedures and minimizes the formal writings

¹⁸⁵ *Id.* § 10.02.

¹⁸⁶ *Id.* § 7.02[14].

¹⁸⁷ *Id.* § 10.01.

¹⁸⁸ *Id.* These include the cost of preparing the complaint or other documents to be filed with the court, the cost of travel to file them, the cost of travel to retain a lawyer, and the costs of collecting evidence and interviewing witnesses.

¹⁸⁹ *Id.* § 10.01, n.3. It has been proposed that Japan adopt the German system of compulsory representation by counsel, which would also require adoption of a system requiring the losing party to pay his adversary's counsel fees as well. *Id.* § 2.04 n.59.

¹⁹⁰ *Id.* § 2.01.

¹⁹¹ See *Apples vs. Persimmons*, *supra* note 39, at 209-10.

¹⁹² *Id.* at 211.

used to decide a dispute in the regular civil court.¹⁹³ There is also an official compromise process conducted by the summary courts,¹⁹⁴ and a civil conciliation process conducted by professional conciliators.¹⁹⁵ In all cases, these alternative channels are provided because they are faster and less expensive than formal civil court proceedings.¹⁹⁶

To sum up, the Japanese have fashioned a civil justice process based largely on German practice, with certain checks on the domination of the judge taken from the Americans. Still, the system has evolved to incorporate and reflect many fundamental cultural traits that are uniquely Japanese. Although the Japanese system permits more partisan or adversarial activities than the German system does, the ongoing nature of the adjudication process, coupled with the conciliatory values inherent in the culture, yield a result that is still closer to the businesslike process used by the Germans than it is to the American adversarial system of trial.

4. COMPARISON OF THE PROPOSALS AND THE EXISTING SYSTEMS

The procedures followed in the German and Japanese civil justice systems, as described above, are very different from those used in the American system in several very fundamental ways, such as the dominant role played by the judge and the lack of a unified trial. Neither foreign system uses civil juries, allows punitive damages, or filters the admissibility of information through a complicated system of evidentiary rules.

Nevertheless, there are many common elements to the systems as well. Each system is driven by the initial claims and allegations of the parties. The gathering of information to use as evidence and the identification of witnesses to testify is a critical element in each system, although the manner in which the evidence and witnesses are produced is quite

¹⁹³ HATTORI & HENDERSON, *supra* note 136, § 9.02[1].

¹⁹⁴ *Id.* § 9.02[2].

¹⁹⁵ *Id.* § 9.02[3]. The types of conflicts resolved through these alternative mechanisms are diverse, including questions involving human rights, consumer rights, environmental protection, construction contracts, intellectual property, and even traffic accidents. *Apples vs. Persimmons*, *supra* note 39, at 211.

¹⁹⁶ HATTORI & HENDERSON, *supra* note 136, § 9.02[1] n.17.

different. All three systems have a tradition of presenting oral argument during the actual adjudication process.

With these general impressions in mind, we can now begin to make broad comparisons of the German and Japanese systems with the reforms proposed by the Competitiveness Council. From these comparisons, we can develop a greater understanding of each system and identify strengths to emulate and weaknesses to avoid. Because there may not be a direct correlation between a specific proposal and specific elements of the foreign systems, the comparison will be based on the paradigm identified earlier, and will focus on the roles of the parties, the court, and the substantive law.

4.1. The Role of the Parties

Both the German and Japanese systems impose significantly more responsibility and risk on the parties to litigation than the American system does. Perhaps the most striking example is the high financial barriers to entry in both the German and Japanese systems. Another major difference is that the German and Japanese parties are expected to present a rather finely honed dispute to the court from the start, containing very detailed pleadings and a substantial amount of information about the evidence and witnesses that will support the allegations made. At the same time, these two systems give the parties little control over the conduct of the litigation once the initial pleadings have been filed. In effect, these two systems are less “user-friendly” than the American system.

4.1.1. Increasing Consensual Resolution of Disputes Outside the Courts

Both the German and Japanese cultures place a very high value on resolving disputes privately, and view recourse to the courts as a last resort. At one time, this trait was also reflected in American attitudes toward litigation, but seems to have been abandoned of late.¹⁹⁷ Overall, the Japanese system creates the most pressure for the parties to resolve their disputes privately, perhaps because of “Japanese legal

¹⁹⁷ OLSON, *supra* note 2, at 1-3.

consciousness." The Competitiveness Council has suggested three reforms to help foster increased private conciliation in the American civil justice system.

First, the Council proposed that a plaintiff be required to notify a defendant about a potential claim in advance of filing a lawsuit—a small step toward reinstatement of this abandoned value. An initial notice requirement may help facilitate more private attempts to resolve disputes without recourse to the courts. This requirement is still a far cry from the Japanese system, which imposes costs on a plaintiff who comes to court without first attempting to settle the dispute privately.¹⁹⁸ If fewer cases are filed, there will be fewer cases to resolve, resulting in some savings of cost and time to both the parties and the judicial system.¹⁹⁹ Moreover, a notice requirement can be easily implemented with minimal additional work or expense. For these reasons, adoption of this reform should be supported.

Second, the Competitiveness Council has also called for increased use of alternative dispute resolution techniques as another way to reduce demands on the courts. Japan has developed an extensive system of alternative dispute resolution mechanisms to which cases can be directed or diverted before actual litigation commences.²⁰⁰ It might be useful, then, to study the Japanese system more closely to identify especially effective or useful processes that could be added to the existing ranks of alternative systems already in use in America. There is no corollary to this extensive system of alternatives in Germany.

Last in this category is the Competitiveness Council's proposal requiring the parties to certify that they have attempted to resolve discovery disputes privately before bringing them to the court for resolution. This is consistent

¹⁹⁸ See HATTORI & HENDERSON, *supra* note 136, § 10.02.

¹⁹⁹ It can be, and indeed, has been argued that preserving or even promoting the inefficiency of the current civil justice process is one way of deterring resort to the courts, and thereby reducing litigation costs and delays. Gross, *supra* note 7, at 752, 753. Ignoring the almost nihilistic connotations of this position, it fails to account for the moral obligation of the government to the people to provide and operate government institutions, such as the courts, at optimum levels in all respects, even when identical results could be achieved using inadequate or slipshod practices.

²⁰⁰ See discussion and notes *supra* Section 3.2.8.

with, but not as strict as, the Japanese rule already discussed that imposes fees on a party who fails to attempt private settlement of the entire dispute before coming to court. It also has some precedent in this country in state courts, some of which have promulgated a rule that requires the parties to certify to the court that they have attempted and failed to resolve their discovery dispute before seeking court intervention.²⁰¹

Each of the three preceding proposals is to be commended because it will force parties to focus on what they can do to help themselves before triggering personal expenses and the expenditure of public tax dollars by turning to the courts. Moreover, these proposals can be implemented by the parties themselves, requiring little or no governmental action. They are likely to reduce litigation costs and delays, albeit slightly, by keeping some parties out of the courts altogether and keeping others out until after they have utilized all appropriate means of self-help. Consequently, there is nothing to be lost, and some potential benefit to be gained by their enactment.

4.1.2. *Changing Market Incentives*

Both the German and Japanese civil justice systems impose much higher economic barriers to entry than the American system. The barriers are highest in Japan due to statutorily determined filing fees and retainers for attorneys, both of which increase with the value of a claim. Moreover, both systems impose costs on the loser, although this does not include attorneys' fees in Japan. The German system, where all costs are imposed on the loser, and the Japanese system to a much lesser extent, are supposed to prevent the filing of marginal claims where the likelihood of success is small and promote the filing of meritorious claims where the likelihood of success is great.²⁰² The American contingency fee system, on the other hand, does not always provide adequate barriers against marginal claims because there is no penalty for losing. Also, because of the high rate of settlement in the United

²⁰¹ See, e.g., TEX. R. CIV. PR. 166b.7., Discovery Motions (West 1991).

²⁰² Cf. Posner, *supra* note 29, at 428-29; Resnik, *supra* note 30, at 441-42.

States,²⁰³ even a marginal claim presents the likelihood of settlement prior to full adjudication and thus also presents the likelihood of some financial recovery for the plaintiff and the plaintiff's attorney. As long as the plaintiff's recovery is sufficient to cover the legal expenses of bringing the claim in the first place, the contingency fee system provides tremendous incentives for attorneys to file claims with little regard for their merit.²⁰⁴ Another problem with the contingency fee system is that by giving the plaintiff's attorney a financial stake in obtaining the highest possible award from the defendant, the system can place the attorney's interests in direct conflict with those of his client, who may be better served by a settlement in a lower dollar amount.²⁰⁵

Just as the contingency fee system creates certain inappropriate incentives for plaintiffs, it also creates some unhealthy disincentives for defendants. Under it, a defendant with a meritorious defense or position has little incentive to seek vindication at trial. Without the hope of reimbursement for legal expenses, forging ahead to trial is often only going to increase the defendant's overall legal expenses. Because these legal expenses could cause the price of vindication to be high, the defendant may find it cheaper and quicker to settle even the least meritorious cases. Consequently, the contingency fee system affects the civil justice system in a way that is often at odds with the efficient delivery of justice—it encourages non-meritorious claims while discouraging the vindication of legitimate positions or defenses.

The Council's proposal to adopt a "loser-pays" rule does not necessarily mean the end to contingency fee arrangements, however. Indeed, even with a "loser-pays" rule in effect a plaintiff could still enter into a contingency fee agreement with an attorney. The only difference would be that the plaintiff would have to be willing to pay the defendant's legal costs if the defendant won. If the plaintiff won, the plaintiff would recover his own legal expenses in addition to the amount of the award. At that point, the plaintiff could divide the total recovery according to whatever agreement had been reached

²⁰³ See *infra* note 209 and accompanying text.

²⁰⁴ Cf. Easterbrook, *supra* note 1, at 645 (discovery abuse more likely to occur when party engaging in abuse incurs no cost).

²⁰⁵ See Elliott, *supra* note 24, at 330-31.

with the attorney, provided it complied with local ethical rules. This arrangement has been used frequently in antitrust cases where attorneys' fees and treble damages are awarded by statute.²⁰⁶

The net effect of adoption of the Council's "loser-pays" rule would be to level the playing field and to allow the winner of the case to emerge whole. Under the current system, even after winning the suit, the defendant always suffers the financial loss of at least the legal fees.²⁰⁷ Moreover, it seems that adoption of a "loser-pays" system would help reduce the number of lawsuits that are filed by weeding out non-meritorious claims at the courthouse door. Further, if marginal claims do enter the system, a "loser-pays" rule will give the defendant an incentive to fight for full vindication at trial, because only through success at trial can the defendant recover his legal expenses. The exposure to the possibility of paying the other sides' attorneys' fees should induce the parties and their attorneys to conduct more rigorous and accurate evaluation of their claims and defenses.

From a practical perspective, however, implementation of a "loser-pays" rule in federal diversity cases, as the Council has proposed, may be a hollow victory for many defendant-businesses. Because many of these cases will sound in tort or products liability, the plaintiff will be a private individual who will not have the financial wherewithal to pay the defendant's legal expenses if the defendant prevails. So, even under a "loser-pays" rule, the business defendant will still be forced to bear the costs of the litigation, which means that this reform proposal is unlikely to decrease legal costs significantly in individual cases. Nonetheless, the deterrent effect of the "loser-pays" rule may ultimately decrease legal costs for the business community and society as a whole simply because fewer marginal lawsuits will be filed.

For these reasons, the Competitiveness Council's proposal to adopt a "loser-pays" system in federal diversity cases has significant potential and appeal. Because the proposal calls for implementation of the "loser-pays" rule only in federal diversity cases, it will affect only a small percentage of cases

²⁰⁶ 15 U.S.C. § 15 (1988).

²⁰⁷ Cf. Shavell, *supra* note 38, at 72.

in the United States. This will allow members of the legal community to monitor how well it works and provide a solid base of information that can be used to consider whether implementation of a "loser-pays" rule is indicated on a larger scale.

The Council's proposals that would impose costs on the loser of discovery motions and require payment for discovery costs incurred by exceeding proposed quantitative limits on discovery stand on slightly different footing from adoption of a full "loser-pays" rule. Instead of creating barriers to entry into the system, or placing one of the parties in an all-or-nothing position, these proposals would impose costs, and create market incentives, only at the margins—for discovery in excess of that which is normally considered sufficient to pursue a case and in those limited circumstances where a party pursues a discovery request that is without merit. Although German and Japanese law provide no direct comparison because they do not permit discovery, adding market incentives to one of the most abused components of the American litigation process is consistent with the generally higher economic barriers that exist in these countries. Imposition of costs may serve as an incentive to reduce frivolous motions and discovery excesses.²⁰⁸ By the same token, paying for the additional discovery should not be objectionable and would be justified if the additional information ensures success on the merits or proves additional damages in an amount that equals or exceeds the additional cost. At a minimum, it should make the parties stop and think more carefully about their discovery needs. Because imposition of certain discovery costs on the parties is likely to deter excessive or abusive discovery, these proposals should be implemented.

The final proposal that falls into the category of changing market incentives is the Council's proposal to impose costs on a party who rejects a settlement offer, but then recovers less than the proposed settlement after going to trial. This is somewhat similar to the Japanese rule that imposes fees on a party who fails to attempt settlement prior to filing a lawsuit. Although the proposed penalty should create some additional

²⁰⁸ See Easterbrook, *supra* note 1, at 645.

pressure to settle, it would not be as effective as the Japanese rule because that rule emphasizes the importance of settling *before* filing the lawsuit. The Council's proposal does not create any incentive to keep cases out of court in the first place. Instead, it focuses on resolving them consensually after the case is already in the court system. Nonetheless, it is a step in the right direction and should be supported.

It bears mentioning that the rate at which cases settle in America already is high—estimates range from seventy percent to as high as ninety-eight percent.²⁰⁹ Although there is room for only marginal improvement in the *rate* at which cases settle, the *speed* at which they settle can be increased, and should contribute to the overall reduction of litigation costs. This is illustrated by comparing the costs of a case that settles shortly after the defendant files an answer with a case that lingers on, settling only after trial. In the former case, cost savings would be recognized by all involved. The latter case produce few cost savings, if any, beyond a possible negotiated decrease in the damages awarded. Therefore, increased financial incentives emphasizing earlier settlement could yield important reductions in cost within the system. In this respect, the Competitiveness Council's recommendations are an important step in the right direction.

4.1.3. *Modifying the Gathering of Information*

One of the more striking differences between the American civil justice process and those in Germany and Japan is that litigants in these latter systems voluntarily identify and disclose all information deemed relevant by the judge. The American system of discovery stands in sharp contrast, where even in the most civilized of disputes nothing is turned over to an adversary without a request; in most cases, information is not turned over without at least challenging the opponent's need for it.

A number of explanations for this difference can be identified. First, and perhaps most important, litigants in Germany

²⁰⁹ Elliott, *supra* note 24, at 324 n.74 (citing Charles Clark & James Moore, *A New Federal Civil Procedure II: Pleadings and Parties*, 44 YALE L.J. 1291, 1294 (1935) and Administrative Office of the U.S. Courts, 1984 ANNUAL REPORT OF THE DIRECTOR 152 (Table 29)); Posner, *supra* note 29, at 429 (settlement rate is 98% in auto accident cases).

and Japan are required to provide extremely detailed initial pleadings which set forth their claims, allegations, and supporting factual evidence in full. This establishes clear boundaries to the dispute and gives the litigants a much more concrete understanding from the very beginning of the real issues involved. In turn, this makes it much easier to identify information that will be relevant to resolving the dispute, and conversely makes it unlikely that a litigant will be forced to disclose confidential information unnecessarily. As a result, it is not difficult to reach a consensus on the information that should be produced.

Second, the information is gathered by the judge. Neither of the litigants is going to want to antagonize the judge by refusing to produce information that the judge has found to be relevant, particularly in light of the judge's dominant role in both the German and Japanese systems. Moreover, with the judge in control, the gathering of information is non-adversarial. A litigant cannot attempt to run up costs by making sweeping discovery demands, hope to bolster a weak claim by rummaging through an opponent's files, or threaten to expose extremely confidential information in an effort to coerce cooperation in another area.

The Competitiveness Council has proposed adopting a limited disclosure requirement that adopts some elements of the broad disclosure systems in place in Germany and Japan.²¹⁰ Under it, the litigants would voluntarily identify certain "core" information to the opposing party, such as witnesses with knowledge "of any material fact directly relevant to the particularized allegations" in the action and the location of documents "directly relevant to the case" before engaging in further discovery.²¹¹ Although experience in Germany and Japan provides some support for the efficacy of this proposal, it is likely to create a variety of problems here

²¹⁰ *Agenda for Civil Justice Reform*, *supra* note 14, at 16. Parties to litigation in Great Britain also engage in the voluntary exchange of certain preliminary information at the start of lawsuit. See Jeremy G. Epstein, *English and American Discovery: Comparative View*, NAT'L L.J., Nov. 26, 1984, at 15.

²¹¹ See Model State Plan, *supra* note 14, Model State Core Disclosure and Discovery Provisions, at 21; see also *Agenda for Civil Justice Reform*, *supra* note 14, at 16.

if implemented without significant modification of the discovery process.

The primary practical obstacle to adoption of a disclosure requirement is our notice pleading system. Claims are not presented with enough clarity and precision to enable an opponent to accurately assess and identify that information which is likely to be relevant, and which therefore should be disclosed.²¹² As a result, litigants will be required either to guess at the information that may be relevant or to file a motion with the court seeking further clarification of the pleadings. Neither of these results would be efficient and both have the potential of increasing overall costs instead of decreasing them. Adoption of a disclosure requirement would create particular hardships if sanctions could be awarded for failure to make adequate disclosures.

The Council's proposed disclosure requirement raises some practical questions as well. Unquestionably, a requirement to make voluntary disclosure of information to an opponent is non-adversarial.²¹³ Its origins probably lie in the inquisitorial systems of Germany, Japan and other civil law countries. The American system, however, is fiercely adversarial.²¹⁴ Good faith compliance with the requirement to disclose witnesses and documents may well cause a party to identify documents and witnesses suggesting a legal theory or line of factual inquiry to the opposition that the opposing party never considered. In short, the disclosure requirements would force a party to do the opposition's work, and perhaps to do the work better than the opposition would on its own. Such a require-

²¹² See Easterbrook, *supra* note 1, at 644. Under the current discovery regime, an interrogatory or document request seeking identification or production of documents "most relevant to the case" would almost certainly draw a vagueness objection. See, e.g., *In re Hunter Outdoor Prods., Inc.*, 21 B.R. 188, 192 (Bankr. D. Mass. 1982) ("The plaintiff's requests generally ask for any and all documents which show or tend to show that the defendant is guilty of the conduct complained of. Such a request is not a sufficient designation under [Federal] Rule [of Civil Procedure] 34."); *Frank v. Tincum Metal Co.*, 11 F.R.D. 83, 85 (E.D. Pa. 1950) ("[A] blanket request . . . for the production of all books and records relating to the subject matter [at issue] is obviously too general and indefinite to be granted.")

²¹³ Cf. Frankel, *supra* note 86, at 1052-55.

²¹⁴ See, e.g., *Gardner v. California*, 393 U.S. 367, 369 (1969) ("[W]e deal here with an adversary system where the initiative rests with the moving party.")

ment is antithetical to our adversary system. As Justice Jackson's concurrence in *Hickman v. Taylor* stated, "[d]iscovery was hardly intended to enable a learned profession to perform its functions either without wits or *on wits borrowed from the adversary*."²¹⁵

A second related and equally serious problem with the Council's proposed disclosure requirements is that they would also compromise the attorney work-product doctrine. An attorney's mental impressions would be revealed to the opposition by the very act of identifying witnesses with knowledge the attorney believes to be "directly relevant to the particularized allegations" and documents the attorney would consider "directly relevant to the case."²¹⁶

Consequently, direct transplantation of the German and Japanese disclosure requirements into the American system, even on a limited basis, would be a serious mistake. Other reform provisions may be more effective at eliminating discovery abuse in the United States. First, the rules governing the initial pleadings should be modified to require parties to state their claims and allegations with increased specificity. This would be a move closer to the German and Japanese pleadings. The Council has proposed that discovery requests be tied to the pleadings. Although this is a step in the right direction, it does not go far enough because it contains no concomitant requirement that the pleadings themselves be prepared with greater specificity. Consequently, parties will

²¹⁵ 329 U.S. 495, 516 (1947) (emphasis supplied).

²¹⁶ See, e.g., *Gould Inc. v. Mitsui Mining & Smelting Co.*, 825 F.2d 676, 680 (2d Cir. 1987) ("[T]he selection and compilation of documents by counsel for litigation purposes is protected opinion work product. . . ."); *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1329 (8th Cir. 1986) (holding that counsel's "selective review of AMC's numerous documents was based on her professional judgment of the issues and defenses involved in this case. This mental selective process reflects [counsel's] legal theories and thought processes, which are protected as work product."); *Sporck v. Peil*, 759 F.2d 312, 315 (3d Cir. 1985) (holding that because counsel's selection of documents to prepare a witness for a deposition reveals his "selection process, and thus his mental impressions . . . identification of the documents as a group must be prevented to protect defense counsel's work product."). See also *Hickman v. Taylor*, 329 U.S. at 514 (explaining that FED. R. CIV. P. 26 [which defines the scope of discovery] was not intended to open the "mental processes of lawyers" to "the free scrutiny of their adversaries.").

still be able to make broad, unfocused discovery requests due to the continued vague nature of the pleadings.

Next, the scope of discovery should be limited. One way to accomplish this would be to change the standard for what is discoverable from "all information likely to lead to admissible information" to "information relevant to the claims and defenses."²¹⁷ Another possibility would be to give the judge greater authority for managing the litigation. For example, if the judge were required to become familiar with the issues involved in the dispute after the filing of the initial pleadings, the judge could help the parties frame their discovery requests to pursue only those lines of inquiry most likely to lead to information essential to the key issues in the case, and to cut off lines of inquiry that are tangential or simply a fishing expedition.

A third and complementary alternative would be to adopt a "meet and confer" procedure where counsel for all parties would be required to discuss their discovery needs and plans in the hope of negotiating a consensual discovery program.²¹⁸ At a meeting to be held shortly after the answer is filed, counsel would discuss the factual bases of their positions, identify potential expert witnesses, and negotiate the scope of discovery. A somewhat similar device has been tried in a few federal district courts,²¹⁹ and could provide an effective means of forcing civil litigants to behave civilly in discovery. The end product of the "meet and confer" requirement would be a formal report to the court from the parties detailing their discovery plans and identifying areas where disputes exist that may require the court's intervention. The parties would be bound by their written report throughout the litigation.

The alternatives just described could be implemented individually or in combination. Each of them would instill

²¹⁷ See Comments of the United States Chamber of Commerce on Proposed Amendments to the Federal Rules of Civil Procedure at 9-12 (Feb. 1992) (citing various authorities recommending adoption of this standard) [hereinafter Chamber of Commerce Comments]; cf. Easterbrook, *supra* note 1, at 644 n.26.

²¹⁸ See Chamber of Commerce Comments at 12-14; see also Cal. (C.D.) Local rule 6.1.1; Fla. (S.D.) Local Rule 14.A.1.

²¹⁹ See Cal. (C.D.) Local Rule 6.1; Fla. (S.D.) Local Rule 14.A.1; see also Comm. on Discovery, New York Bar Assoc., *Report on Discovery Under Rule 26(b)(1)*, reprinted in 127 F.R.D. 625, 639-40 (1990).

more certainty into the discovery process than the Council's disclosure plan. Perhaps more important, however, they would sharply narrow the focus of discovery to the real issues to be resolved in the dispute and make it much more difficult for litigants to use the current overbreadth of discovery as a tactical weapon to harass and intimidate an opponent.

Another Council suggestion aimed at curbing discovery abuses would establish quantitative limits for discovery.²²⁰ Unfortunately, such numerical limits may not provide a means for adequate differentiation between simple and complex cases. The types and quantity of information necessary to resolve a dispute vary greatly with the complexity and underlying issues of the case. Consequently, although setting an arbitrary limit on the number of depositions or interrogatories has some initial appeal as a limiting device, it may not prove flexible enough to accommodate the disparate needs of the litigants. In conclusion, although the Council's goals of focusing and narrowing discovery are laudable, the proposed disclosure plan would be unworkable in the present system and the remaining proposals do not go far enough to effect meaningful change.

Another substantive Council proposal regarding discovery is a call to retain current rules that permit courts to protect confidential information. Both the German and Japanese systems provide much greater recognition of the importance of certain types of confidential or private information,²²¹ and accordingly, they provide better protection for this type of information than the American system does. Indeed, in both Germany and Japan, a person with confidential information can refuse to disclose that information even though it is needed to resolve the legal dispute.²²² In America, the reverse is true. Confidential information generally must be produced, unless it is protected as privileged.²²³ American courts have the authority to prohibit disclosure of trade secrets and other confidential information outside the litigation through the issuance of protective orders or by sealing court

²²⁰ *Agenda for Civil Justice Reform*, *supra* note 14, at 17.

²²¹ See *supra* notes 97 and 161 and accompanying text.

²²² *Id.*

²²³ See FED. R. CIV. P. 26(b).

records.²²⁴ However, a recent legislative effort to restrict court authority to protect confidential information, coupled with the general reluctance of American courts to issue protective orders in the first place, has resulted in less frequent use of this protective authority.²²⁵

This has several implications for American businesses. First, litigation in American courts creates greater risks that trade secrets or other proprietary information may fall into the hands of competitors.²²⁶ This is especially true in light of the broad rights of access that members of the public and media have to information produced in our courts.²²⁷ Second, fear of disclosure of confidential or private information may exert untoward pressure to settle claims that might otherwise be won, simply to avoid the risk of disclosure. In both instances, this imposes costs on litigants that do not have any counterpart in Germany or Japan. Indeed, one such cost might be the loss of a constitutional right to be free from unauthorized governmental taking of private property.²²⁸ Another may be the loss of the competitive advantage that a trade secret or other intellectual property provides. To eliminate these costs, courts should embrace the Competitiveness Council's proposal and use their existing authority freely to protect confidential information.

²²⁴ See, e.g., FED. R. CIV. P. 26(c) (protective orders); New York Rule 216.1 of the Uniform Rules for the Trial Courts, 22 NYCRR Part 216 (regarding the sealing of court records).

²²⁵ See Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991); Cortese, *supra* note 48, at 468 (citing Richard P. Campbell, *The Protective Order in Products Liability Litigation*, 31 B.C. L. REV. 771 (1990)); Michael Hoening, *Protective Confidentiality Orders*, N.Y.L.J., Mar. 5, 1990, at 3.

²²⁶ See Junius, *supra* note 91, at 24.

²²⁷ See Arthur R. Miller, *Private Lives or Public Access*, 77 ABA J., Aug. 1991, 65, 65.

²²⁸ See Note, *Trade Secrets in Discovery: From First Amendment Disclosure to Fifth Amendment Protection*, 104 HARV. L. REV. 1330 (1991).

4.2. *The Role of the Court*

The courts in Germany and Japan are far more deeply involved in hands-on management of civil litigation than their American counterparts. Indeed, the judge controls the litigation from beginning to end—the hallmark of inquisitorial systems of justice. This involvement starts when the judge begins to plan the gathering of evidence, and requires the judge to quickly assimilate the facts of the case and to understand the parties' claims, allegations, and defenses. In Germany, the judge even assumes responsibility for conducting the examination of witnesses.

The hallmark of the American adversarial system traditionally has been the neutral judge, who participates minimally in the pre-trial process and acts more like an umpire than a manager at trial.²²⁹ In recent years, however, American judges have assumed more and more responsibility for helping the parties move the case along during the pretrial period.²³⁰ Many of the Competitiveness Council's reforms would promote additional hands-on management by American judges. Several of these proposals are already pending in Congress or before court rules committees, and include fixing early trial dates,²³¹ enhancing existing case management techniques,²³² and assuming more responsibility for policing the conduct of the parties through imposition of sanctions.²³³

Although these proposals would increase the managerial nature of the judge's role somewhat, they would not cause the metamorphosis that would be necessary to turn our neutral umpires into German or Japanese-style judges. Rather, they would make modest, incremental changes that have broad support in academia and among members of the judiciary

²²⁹ See, e.g., Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 385 (1978); Frankel, *supra* note 86, at 1053.

²³⁰ Resnik, *supra* note 30, at 391-92.

²³¹ See, e.g., Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 473, 104 Stat. 5089 (1990).

²³² See, e.g., FEDERAL COURTS STUDY COMM., REPORT, *supra* note 11, Part III, ch. 5, § E.1. at 99-100.

²³³ See, e.g., JUDICIAL CONFERENCE, *supra* note 11, at 55-62 (Rule 37); *Rule 11: Final Report to the Advisory Comm. on Civil Rules of the Judicial Conference of the United States* (no date).

themselves.²³⁴ Because of the broad support that already exists for increasing the managerial role of the court, these proposals can be categorized as the least controversial and the most likely to be put into effect.

One of the Competitiveness Council's proposals that would affect the role of the court is new to the official roster of civil justice reform proposals. This proposal would require the judge to assume more control over the testimony of expert witnesses. In both Germany and Japan, this is in fact the case.²³⁵ Those courts select expert witnesses at their own discretion. Although the parties may nominate experts that they would prefer the judge to use, the ultimate decision is left to the judge. A German or Japanese expert witness is non-partisan, and frequently considered more an aid to the court than a witness. Because the expert is retained to help the judge rather than the parties, the expert generally comes from the mainstream of a particular scientific or technical area.

Under the current American system, the judge plays almost no role in selecting experts, or in controlling the quality or area of specialization of the expert.²³⁶ Without any restraint from the court, litigants can produce experts whose testimony will support their position, even if it is only with "junk science," instead of experts who will help the court understand particularly complex fields of inquiry. The Council's proposals would require the court to find that the proffered expert testimony is based on "widely accepted" theories, and the party offering the expert would be required to prove that a significant portion of experts in the relevant field support the proffered expert's position. The Council also specifically rejects moving to mandatory court appointment of experts,²³⁷ as is done in Germany and Japan. Adoption of these proposals has the potential to eliminate the waste of time that results

²³⁴ Although Professor Resnik argues with some force that managerial judges inject a degree of arbitrariness into the litigation process, particularly because many of the judge's "managerial" decisions are unreviewable by appellate courts, Professor Elliott counters that the judges themselves are aware of this potential and have taken certain corrective measures, such as avoiding *ex parte* discussions with the litigants. See Resnik, *supra* note 30, at 424-31; Elliott, *supra* note 24, at 327.

²³⁵ See *supra* notes 117 and 175 and accompanying text.

²³⁶ See HUBER, JUNK SCIENCE, *supra* note 34, at 3.

²³⁷ *Agenda for Civil Justice Reform*, *supra* note 14, at 22.

from presentation of "junk science" or from dueling experts whose conflicting testimony only serves to confuse the court and jury.²³⁸ Perhaps more important, adoption of these proposals could improve the ultimate goal of the litigation—finding the truth. Consequently, adoption of these proposals should be encouraged.

4.3. *Substantive Law and Standards*

The nexus between free trade among nations and uniform legal standards is too well established to be questioned as we watch the European Community of 1992 come into being. Indeed, one of primary motives behind formation of the European Community, and any common market arrangement, is to eliminate the legal barriers that hinder free and full competition.²³⁹ It should not be surprising, then, that the Competitiveness Council, as part of its civil justice reform proposals, recommends modifying a few areas of substantive American law that are grossly out of sync with the laws of our toughest competitors (Germany and Japan) and which hinder the competitiveness of American businesses.

Clearly, this is the rationale behind the proposal to make sweeping reforms to the law regarding punitive damages. Neither German nor Japanese law authorizes punitive damages in civil cases. None of the civil law countries or even Great Britain permits them either.²⁴⁰ The entire concept of using the civil law, as opposed to the criminal law, to punish a litigant simply does not exist outside the United States.²⁴¹

Consequently, the debate within the American legal community as to whether juries are awarding punitive damages more or less frequently, and in smaller or larger amounts, is irrelevant. When we think about competitiveness, the only relevant fact is that none of our foreign competitors award punitive damages at all.

²³⁸ See HUBER, JUNK SCIENCE, *supra* note 34, at 198-204.

²³⁹ See generally Riggs, *An Overview of 1992 and EC Institutions: Executive, Legislative and Judicial Processes*, Tab B, ABA NATIONAL INSTITUTE ON FRONTIERS OF EUROPEAN LITIGATION: 1992 AND BEYOND, May 16-17, 1991.

²⁴⁰ Thieffry, *supra* note 1, at 358.

²⁴¹ *Id.*

Although the Competitiveness Council's proposals regarding punitive damages would make what some may consider sweeping changes, they would not eliminate punitive damages altogether. Instead, they would put into effect a system of standards that would moderate the availability and the size of punitive damages and preclude civil juries from making certain decisions that might be improperly motivated by prejudice or other emotions that have no place in legal decision-making.²⁴² At one time the business community looked to the United States Supreme Court to provide some relief from our harsh punitive damages law, but the recent decision in *Pacific Mut. Life Ins. Co. v. Haslip*²⁴³ simply held that Due Process requires some sort of standards and did not go on to describe what they might be. Consequently, relief must come from some other direction and the Competitiveness Council's proposals deserve favorable consideration because they would provide some measure of hope and actual relief to the business community, even though they would not eliminate punitive damages entirely.

5. CONCLUSION

Some of the Competitiveness Council's proposals seem to have their roots, or at least branches, in the civil justice systems of Germany or Japan: the "loser-pays" rule, the disclosure requirement in discovery, punitive damages reform, neutral expert witnesses, greater protection for trade secrets, and increased managerial responsibility for judges. While this similarity may give us the opportunity to learn how these provisions work in Germany or Japan, it does not tell us whether they will work here in America. In each case, the purpose and effect of a specific reform proposal must be evaluated in the context of our own system.

Analysis of the Competitiveness Council's major proposals reveals that many of them would help reduce costs or delays. For example, increased private resolution of disputes could keep cases from entering the court system in the first place. Imposition of additional market incentives for marginal activities, such as excess discovery, failure to accept a reason-

²⁴² See Model State Punitive Damages Reforms, *supra* note 14.

²⁴³ ___ U.S. ___, 111 S.Ct. 1032 (1991).

able settlement offer, or failure to win a discovery motion will create financial incentives for litigants to analyze their positions more carefully before acting. Switching to a "loser-pays" system in federal diversity cases is a worthy experiment that should afford us valuable insight into whether it should be applied in all cases. Reforming certain aspects of discovery can help eliminate much waste without materially affecting the parties' ability to gather information that is needed to resolve the dispute. Allowing judges to assume more managerial responsibilities during the pretrial period will help cases move through the system more quickly. As worthy as these changes may be, most involve procedures and rules at the periphery of the civil justice system. They would not radically alter its fundamental characteristics, and as such, there is little to lose and much to gain from their speedy implementation.

One of the Council's proposals would be a significant departure from the present adversarial system. Specifically, the proposal to adopt a disclosure requirement would alter our civil justice system significantly, but it would fully resolve the problem it is meant to address—abusive discovery. Although Germany, Japan, and even Great Britain use some form of disclosure, adopting a disclosure process here would be problematic at best and unlikely to accomplish meaningful reform of discovery abuses. A variety of more fruitful reforms have been suggested, such as those described in this article, that stand a far better chance of eliminating the excessive scope of discovery and forcing parties to work together civilly and efficiently to resolve the underlying legal dispute. As such, the Council's disclosure proposal should not be adopted.

The most clear-cut conclusion that emerges from this comparison of the Council's proposals with the German and Japanese systems is the need for punitive damages reform. Current American law regarding punitive damages is without precedent in the law of our closest competitive rivals. Moreover, the potential benefits to competitiveness from sharply restricting the use of punitive damages are obvious—an immediate reduction in costs for American businesses.

The effect of the Competitiveness Council's proposals would be to make the litigation system less "user friendly," a result that would move the American system closer to those in Germany and Japan. In this respect, the proposals are on

target and are a major step forward in one very important respect. They reflect high-level recognition of what many businesses already know—that the excesses of the American civil justice system impose significant, untoward costs without providing adequate offsetting benefits, and that these costs inevitably have an impact on the ability of American businesses to compete in international markets.