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Introduction

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In July 1991, I spoke to the American Bar Association (ABA) and urged the legal community to address the growing problem of excessive litigation. At that time, the direct cost of the American tort system-awards to plaintiff, costs of defending suits, and administrative overhead-was approximately $132 billion, or 2.3% of the Gross Domestic Product (GDP). Since 1950, nominal tort costs have grown at an annual rate of 11% while GDP has grown at 7.5%, and population at 1.2%.

American tort costs, as a percentage of GDP, are roughly double the average for the industrialized countries who are our main competitors. Japan's costs, at a mere 0.7% of GDP, are only a third as high as ours. Italy, which runs second behind the United States in tort costs, spends only 1.3% of GDP, a full percentage point behind our dubious achievement.

These figures do not include the indirect costs of litigiousness, for example, the costs of excessive medical procedures that doctors and hospitals feel compelled to order for patients in order to avoid medical malpractice suits. While the indirect costs are difficult to measure, they are estimated as two to three times greater than the direct costs cited above.

At the ABA convention, speaking as head of the White House Council on Competitiveness, I proposed an "Agenda for Civil Justice Reform in America," which included fifty specific recommendations to address this problem. Many of these involved providing incentives for plaintiffs and their attorneys to avoid unnecessary and frivolous litigation.

Our first recommendation was to "promote voluntary use of Alternative Dispute Resolution (ADR) techniques." These included:

*_Early neutral evaluation_. This procedure allows parties to have their cases evaluated with respect to legal principles and factual matters to indicate their likelihood of prevailing should they continue to trial.

*_Mediation_. Litigants meet with a third party who attempts to promote a resolution of the issues in the litigation. The mediator does not propose a decision on any issues, but facilitates a settlement.

*_Arbitration_. The arbitrator hears the facts in the case and renders a decision, which is binding on the parties. The rules of evidence are greatly relaxed so that the parties are spared significant expense.

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Mini-trials. Under this abbreviated process, the attorneys for each party present their cases to both parties in an effort to reach greater understanding that could lead to settlement.

Summary Jury Trials. The procedure uses expedited proceedings to provide the litigants with a prediction of the likely result if they were to proceed to trial.

After the speech to the ABA, the Competitiveness Council took several actions to promote ADR. We recommended changes to the Federal Rules of Civil Procedures that would include consideration of ADR procedures explicitly in pre-trial conferences. We also proposed a model state "Multi-Door Courthouse Act" that included each of these ADR options as procedures parties could choose at the outset of litigation.

In addition to enabling the parties to choose these ADR techniques, the Council's model state act also allowed the parties to choose a fee-shifting mechanism, if they failed to follow the recommendations of a mediator. Under this process, the mediator would determine a recommended dollar amount that should be awarded by the court. If the plaintiff rejects the determination, and the final award is not greater by 10% than the determination, then the plaintiff pays the defendant's fees and expenses incurred after the mediation. Similarly, if the defendant rejects the determination and fails to secure an award of at least 10% less than the determination, the defendant pays the plaintiff's fees and expenses incurred after the mediation. This procedure encourages each party to take the mediation seriously and reach an agreement.

Some states have considered making fee shifting mandatory if the parties refuse to submit to some form of ADR. In these situations, if a party chooses to forego ADR and takes the case to trial and loses, he or she would be liable for the opposing party's legal fees. Opponents argue that requiring ADR interferes with the parties' right to a trial by jury. Proponents argue that this rule creates incentives for frivolous and weak cases to be resolved by arbitration, yet preserves the individual's rights to trial (including trial by jury) because the party may always choose not to use ADR. Fee shifting merely ensures that the full cost of that decision is borne by the party making the decision to use ADR or proceed in the court system. Of course, if a party prevails at trial, he or she would not be liable for the opponent's fees.

Although the Council's recommendations did not include these additional incentives, there appears to be a good case for them in jurisdictions where voluntary ADR has not reduced case loads and litigation costs.

Many states have moved to adopt voluntary or mandatory ADR. In Indiana, the court adopted voluntary ADR in 1992. Although the proce-

dures are new, they appear to be very successful, particularly for cases that do not involve large potential awards. Both parties benefit, because they avoid excessive litigation expenses and have the matter resolved expeditiously.

The Competitiveness Center of Hudson Institute, which I chair, has undertaken additional studies of the legal system and of proposals for reform. For instance, the Center is about to complete and release a major study quantifying the costs of medical malpractice in a major urban hospital. The study also examines the effect of malpractice and product liability on the delivery of medicine at the hospital, especially in the area of "defensive medicine." This is just one example of how we need to continue research on the effects of litigation and the likely impact of tort reform.

The articles in this edition of the NORTH DAKOTA LAW REVIEW also contribute greatly to the discussion by exploring the various forms of ADR in greater depth. They will contribute to the scholarly understanding of the merits of ADR and the various issues concerning their application to state and Federal trials. We have a pressing need to advance the case of reform to begin to reduce the costs of litigation to our society and our economy. Alternative Dispute Resolution is a key component of efforts to reduce excessive litigation and the costs it imposes on society.