74 F.R.D. 159

Federal Rules Decisions
August, 1976

AMERICAN BAR ASSOCIATION

REPORT OF POUND CONFERENCE FOLLOW-UP TASK FORCE [a1]

***161** The first report of the Pound Conference Follow-Up Task Force was submitted to the Board of Governors of the American Bar Association in the summer of 1976 and the Supplemental Reports early in 1977.

Interest in the Pound Conference and in the problems with which it dealt has continued and many valuable suggestions have been generated. The Department of Justice, for example, has developed pilot programs for the creation of neighborhood justice centers. Funding has been arranged and one may expect the recommendations to be implemented shortly. Similarly, the Department has drafted proposed legislation which would significantly expand the jurisdiction of the federal magistrates. The newly-created office for improvements in the administration of justice is addressing a number of other problems considered in these reports.

Examples could be multiplied. The opportunity for creativity exists at every level and, happily, interest has been widespread. As the Pound Conference itself and the reports reprinted here demonstrate, there is much that can be done to improve the delivery of justice in this country.

Griffin B. Bell /s/

CONTENTS

***164** THE TASK FORCE

Honorable Griffin B. Bell, *Chairman*

Honorable William H. Erickson

Jane L. Frank, Esquire

Francis R. Kirkham, Esquire

Honorable Wade H. McCree

Professor Maurice Rosenberg

Honorable Walter V. Schaefer

A. Leo Levin, *Consultant*

Wantland L. Sandel, Jr., Esquire, *Staff Liaison*

Footnotes

a1 The views and opinions contained in this publication, until approved by the House of Delegates or the Board of Governors of the Association, represent only the views of the Task Force of the Pound Conference Follow-Up and do not represent the views of the American Bar Association.

***165 Introduction**

The National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, held recently in Saint Paul in commemoration of Dean Pound's classic address, [1] was designed for "long-range planning," to look ahead to the time when there will be "260 million [Americans], with social, economic and political forces that will generate incalculable problems and conflicts to be resolved." [2] Inevitably, the "vexing problems" of today, [3] exacerbated by a litigation explosion of unprecedented dimension, were also discussed. The Conference generated a large number of proposals for reform and, in addition, identified a significant number of issues considered worthy of further study and exploration. [4]

This Task Force was appointed by President Walsh to assure that the ideas presented at the Pound Conference would be carefully considered by those organizations or agencies best able to evaluate and implement them.

The subjects discussed at Saint Paul were many and varied. The Conference heard an eloquent and vigorous reaffirmation of *The* ***166** *Priority of Human Rights in Court Reform.*[5] It heard the hope expressed that "the weak, the poor, the powerless" would be among the beneficiaries of whatever change the Conference generated.[6] The recommendations presented were intended to achieve the delivery of justice to all; none presented at Saint Paul, no recommendation presented in this report, is intended to detract from that goal.

The specific proposals presented would significantly affect both civil litigation and criminal prosecutions, in state as well as in federal courts. They would place increased emphasis on avoiding controversy and would create new forums for dispute resolution, providing alternatives both to jury and non-jury trials. Obviously, no single governmental agency has the authority to implement so wide a range of recommendations. Nor can any one organization or academic institution be expected to research all of the questions identified as worthy of study.

Some recommendations should be referred now to an official body able to effect change; some require evaluation and refinement before being referred. Other suggestions, however, need substantial study and analysis before specific, practicable recommendations will emerge. We believe these should be routed to other forums where they can be properly considered and developed. In the report which follows we have attempted to identify those in each category and to suggest appropriate next steps as regards each proposal.

Lawyers have a special responsibility, imposed by the Code of Professional Responsibility, to "assist in improving the legal system."[7] But lawyers are not the only ones with important contributions to make and we have not hesitated to recommend that others be involved in the process of shaping solutions to present problems. We have not attempted to deal with all of the questions which ultimately must be answered, nor have we attempted to choose between diverse points of view on many issues expressed at the Conference. Obedient to our mandate, we have attempted to recommend "what specific action the Association should take to see that answers are ultimately forthcoming."

***167** It is important to keep firmly in mind that neither efficiency for the sake of efficiency, nor speed of adjudication for its own sake are the ends which underlie our concern with the administration of justice in this country. The ultimate goal is to make it possible for our system to provide justice for all. Constitutional guarantees of human rights ring hollow if there is no forum available in fact for their vindication. Statutory rights become empty promises if adjudication is too long delayed to make them meaningful or the value of a claim is consumed by the expense of asserting it. Only if our courts are functioning smoothly can equal justice become a reality for all.

The ultimate goal, it is worth reiterating, is the fullest measure of justice for all. That goal cannot be achieved without change, but as the Chief Justice reminded us in his keynote address "change is a fundamental law of life."[8] What is important, he added, "is that lawyers fulfill their historic function," and help assure "orderly evolution."[9]

This report is intended to further that process, and to suggest a program for action by the American Bar Association designed to contribute significantly to the improvement of the administration of justice in this country.

1 Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, address delivered at the 1906 Annual Meeting of the American Bar Association in Saint Paul, Minnesota, printed in 29 A.B.A. Reports 395 (1906), reprinted, 35 F.R.D. 273 (1964). The Conference was jointly sponsored by the Judicial Conference of the United States, the Conference of Chief Justices, and the American Bar Association.

2 Burger, 1976 Annual Report on the State of The Judiciary, Supreme Court Reporter, vol 96, no. 9, pp. 3, 8 (1976). The purpose of the Conference was also described by Chief Justice Burger in the key-note address, Burger, *Agenda for 2000 A.D.-A Need for Systematic Anticipation*, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 83 (1976).

3 Burger, 1976 Annual Report, *supra* note 2, at 3.

4 The major addresses delivered at the Conference are reprinted in 70 F.R.D. 79 (1976).

5 Higginbotham, *The Priority of Human Rights in Court Reform*, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 134 (1976).

6 Burger, keynote address, *supra* note 2, at 96.

7 Canon 8

8 Burger, keynote address, *supra* note 2, at 96.

9 *Id.*

***168 Summary of Recommendations**

The ultimate goal of our efforts is to achieve the fullest measure of justice for all. To that end we make the following recommendations:

I. NEW MECHANISMS FOR THE DELIVERY OF JUSTICE

A. *Neighborhood Justice Centers*

1. We recommend that the American Bar Association, in cooperation with local courts and state and local bar associations, invite the development of models of Neighborhood Justice Centers, suitable for implementation as pilot projects. Such facilities would be designed to make available a variety of methods of processing disputes, including arbitration, mediation, referral to small claims courts as well as referral to courts of general jurisdiction. (See pages 9-11)

2. We recommend that the American Bar Association undertake to stimulate research and experimentation designed to develop criteria by which to identify disputes most likely to profit from mediation, fact-finding and other alternative mechanisms of dispute processing. (See pages 11-12)

3. We recommend that the American Bar Association undertake to stimulate research and experimentation designed to encourage resolution of disputes without resort to governmental agencies, particularly in the area of consumer complaints. (See pages 11-12)

B. *Small Claims Courts*

4. Mindful of the potential inherent in the revitalization and expanded use of small claims courts and of the forthcoming Conference on Minor Dispute Resolution being planned by the American Bar Association, we recommend that state and local bar associations be involved in the Conference and in programs for the ***169** implementation of recommendations which may result from the Conference. In that connection, we invite consideration of a pattern of experimentation, evaluation and widespread adoption of those programs which prove successful. (See page 12)

C. *Arbitration*

5(a). We recommend that the Judicial Administration Division consider the potential utility of programs of compulsory arbitration with a right of appeal de novo, tailored to local needs and circumstances, with a view to the development of a program for the federal courts.

5(b). We further recommend that the Judicial Administration Division, in cooperation with state and local bar associations and the National Center for State Courts, seek more widespread adoption of such programs in state courts.

5(c). We recommend that the American Bar Association invite the Conference of Chief Justices, a co-sponsor of the Pound Conference, to consider a program of encouraging the development of proposals for compulsory arbitration, tailored to local needs and circumstances and to promote the implementation of such programs. (See pages 12-15)

6. We recommend that the American Bar Association, in cooperation with the American Arbitration Association, undertake a program designed to increase the use of commercial arbitration in cases of repetitive litigation among members of the same industry, particularly where the expertise of arbitrators would be helpful. We further recommend that such a program should be concerned with developing criteria for the identification of additional categories of agreements appropriate for commercial arbitration. (See pages 15-16)

D. ***Administrative Agencies; "Sunset Laws"***

7. We recommend that the Section on Administrative Law consider the feasibility and desirability of increased use of the administrative process as an alternative to resort to the courts. (See page 16)

8. We recommend that the American Bar Association, acting through the Section on Administrative Law, establish a special commission composed of lawyers and non-lawyers, to study the "sunset laws," statutes which provide for automatic termination of administrative agencies after a specified term of years unless the legislature act affirmatively to continue their existence. We further ***170** recommend that such study be undertaken with a view to making legislative recommendations. (See pages 16-17)

9. We recommend that the Section on Administrative Law review all instances of multiple appeals as of right from administrative determinations with a view to proposing remedial legislation. (See pages 17-18)

II. ELIMINATING THE NEED FOR JUDICIAL ACTION

A. ***Changes in the Substantive Law***

10. We recommend that the Conference of Chief Justices be invited to consider whether decriminalization of "victimless" crimes such as public drunkenness should be referred to appropriate state agencies for study and possible action. We further recommend that state and local bar associations should be invited to consider and evaluate proposals in this area. (See page 19)

11. We recommend that the Conference of Chief Justices be invited to consider proposals to limit the right of recovery in cases of professional malpractice with a view to referring them to appropriate state agencies for evaluation and possible action. (See pages 19-20)

12. We recommend that the American Bar Association, acting through the appropriate sections, monitor experience with no-fault statutes. (See page 20)

B. ***Elimination of the Use of Courts in Non-Adversarial Proceedings***

13. The use of courts in non-adversarial proceedings is an unwise allocation of scarce resources. With respect to some such matters-e.g., approving changes of name, incorporating membership corporations and making appointments to semi-public office-the problem may be relatively simple and amenable to solution. With respect to other matters-e.g., uncontested divorce, child custody and adoptions-the issues are frequently subtle and complex. We recommend that the subject be referred to the Conference of Chief Justices for such further reference as they deem appropriate; and we further recommend that the attention of state and local bar associations and the interested sections of the American Bar Association be invited to this problem. (See pages 20-21)

***171 III. CRIMINAL PROCEDURE**

14. Mindful of the leadership of the American Bar Association and the Section of Criminal Justice in developing Standards for Criminal Justice and in seeking their implementation in every state, and mindful of recent changes in the law governing illegally obtained evidence, we recommend that the Section of Criminal Justice give a high priority to the development of effective deterrents to illegal search and seizure by law enforcement officers; and we further recommend that the National Conference of State Trial Judges be invited to contribute to the solution of this pressing problem. (See pages 22-26)

IV. CIVIL PROCEDURE

A. ***Correcting Abuses in the Use of Discovery***

15(a). The Section on Litigation, in coordination with the Judicial Administration Division, should accord a high priority to the problem of abuses in the use of pretrial procedures with a view to appropriate action by state and federal courts. The National Conference of State Trial Judges should be invited to join in a common effort to provide a solution for this problem. (See pages 27-28)

15(b). Early identification of issues in complex litigation can serve to reduce the cost of discovery and to expedite disposition of the case. We recommend that the Section on Litigation consider the utility of such early identification of issues and how best to assure its use in appropriate cases. (See pages 27-28)

B. ***The Use of Sanctions***

16. We recommend that procedural rules provide for sanctions for the willful filing of baseless or otherwise improper pleadings which contribute to delay and to increased expense of litigation. We further recommend that the Section on Litigation study the problem of enforcement and make recommendations appropriate for state and federal courts. (See pages 29-30)

17. We recommend that the Section on Litigation consider the possibility of creative use of sanctions, such as the taxing of costs, to serve as a useful deterrent to needless extension of litigation. We further recommend the Michigan mediation system as worthy of study in this context. (See page 30)

172 C.** ***Class Actions

18(a). We recommend that all concerned sections accord a high priority to evaluation of existing rules and statutes relating to class actions for the purpose of assessing current proposals for change, both state and federal, and for the further purpose of initiating recommendations for change. Such consideration should encompass not only the procedures governing class actions, but where the availability of a class action has substantive implications, it should include the substantive law as well. (See pages 30-34)

18(b). We further recommend that particular consideration be given to the desirability of (1) substituting an "opt-in" procedure for the present "opt-out" procedure in actions brought under Federal Rule 23(b)(3), or their state equivalents; and (2) providing for greater judicial control over attorney's fees in class actions. (See pages 30-34)

D. ***The Jury***

19. We recommend that the American Bar Association invite the American Bar Foundation, the Institute of Judicial Administration, the Federal Judicial Center or other appropriate organization to undertake a thorough study of the proper scope of the right to jury trial in civil cases and to make recommendations concerning any changes in present practice which may be desirable. Such study should include consideration of the recent extension of the right to jury trial as the result of the merger of law and equity, re-examination of the doctrines governing right to jury trial where new causes of action are created by statute and the use of the jury in complex litigation. (See pages 34-36)

20. We recommend that the ABA Standards Relating to Trial Courts be referred to the Conference of Chief Justices and to the Judicial Conference of the United States with a view to improving present procedures relating to jury selection and jury utilization. (See pages 36-37)

21. We recommend that the Section on Litigation consider new techniques, or the desirability of more widespread use of existing techniques, to assure better communication of instructions to the jury. (See pages 36-37)

E. ***Special Problems of Federal Jurisdiction***

22. We recommend that the Conference of Chief Justices and state and local bar associations be invited to study the contemporary ***173** utility of diversity jurisdiction with a view to endorsement of current proposals for its curtailment or elimination. (See pages 37-38)

23. We recommend that the Judicial Administration Division and the Committee on Coordination of Judicial Improvements study current proposals for elimination of three-judge courts and direct appeals, with reasonable exceptions, with a view to vigorous and effective support of legislation which would achieve this end. (See page 38)

V. ASSURING THE AVAILABILITY OF LEGAL SERVICES

24. We recommend that the American Bar Association continue its efforts to assure the availability of legal services to all and, to this end, that it maintain a close liaison with the Congress to assist in the development of specific recommendations and to aid in expediting their implementation. We further recommend that the ABA continue to work with state and local bar associations in this area. (See pages 39-41)

VI. JUDGES

25. We recognize that specific provisions designed to assure judges of superior quality in adequate numbers have been included in the ABA Standards on Court Organization and that there exists a special committee charged with seeking implementation of those standards. The development of a mechanism designed to assure periodic legislative consideration of the need for new judgeships would go far to alleviate a recurring problem in judicial administration. Specific proposals intended to achieve this end have been made. We recommend that these proposals be considered by the Judicial Administration Division, the Conference of Chief Justices and the Judicial Conference of the United States. (See pages 42-43)

VII. COLLECTION AND EVALUATION OF DATA

26. We recommend that the American Bar Association seek the creation of a Federal office for the collection of data relevant to judicial administration and to dispute resolution generally. Such an office would collect data, both state and federal, civil and ***174** criminal, and would be authorized to undertake special studies relevant to the administration of justice. It would work in close cooperation with the National Center for State Courts, the Federal Judicial Center and other groups. We recommend that ABA approval be conditional on approval by the Conference of Chief Justices. (See pages 44-45)

***175 I.**

New Mechanisms for the Delivery of Justice

A. NEIGHBORHOOD JUSTICE CENTERS

1. ***The Varieties of Dispute Processing*** [1]

A trial in a court of record is one way of resolving disputes. It is neither cheap nor speedy and society has long sought for alternative ways to resolve disputes that do not really require full-blown trials. Arbitration and administrative adjudication are familiar mechanisms; small claims courts provide a less formal, less costly and more expeditious means of providing claimants with a day in court. Other alternatives include mediation, conciliation, fact-finding and negotiation. The use of ombudsmen should also be mentioned and, in addition, there are various mechanisms of dispute avoidance, institutionalized effort to prevent potential grievances from ripening into claims which will have to be adjudicated or otherwise resolved. [2]

It was urged at Saint Paul that alternative methods of dealing with disputes, if properly developed and made widely available in realistic fashion, offered great promise of meeting the needs of claimants and, in the process, providing relief to the courts so that they might be available for litigants with claims which only courts can adjudicate.

If some disputes are first to be subjected to mediation or fact-finding, while others are to be sent to arbitration and still others ***176** to courts of record, it becomes necessary to employ some method of "routing" claimants to the appropriate forum. One model, described at the Saint Paul Conference, provided for a screening clerk located in a Dispute Resolution Center. Such a center might offer a variety of services. In addition to a trial court of general jurisdiction, it might house a Malpractice Screening Panel, an Ombudsman, a mediation service and other facilities as well. [3]

2. ***Designing Pilot Projects***

We believe these proposals offer sufficient promise of significant improvement in the delivery of justice to warrant the development, on an experimental basis, of Neighborhood Justice Centers designed to make available a variety of methods of dispute processing.

We do not here intend to describe a specific model; indeed, what is appropriate for one locality may not be suitable for another. As will be developed below, we recommend that the American Bar Association undertake to stimulate the development of practicable models, with a view to implementing one or more pilot projects. Some detail, however, is needed to describe the nature of the facility which we envision. What follows is intended solely for that purpose.

A Neighborhood Justice Center would be manned by paralegals, with perhaps one young lawyer for technical advice. It might well be designed to include the services of a mediator. Such a facility could be expected to prove effective in disposing of some civil disputes and perhaps some criminal matters. It might be helpful in avoiding litigation of "family

disputes," for example. Where the dispute was not resolved rapidly at the Neighborhood Center, persons aggrieved could be referred to a small claims court, to arbitration, or to the court of general jurisdiction.

We recommend that the American Bar Association invite the development of specific models of Neighborhood Justice Centers, one or more of which would then be funded as pilot projects. Such pilot projects would, of course, be valuable in themselves in providing for effective and efficient delivery of justice. Of greater significance, they could be evaluated, refined and modified and where warranted replicated in other communities.

Our primary purpose is to stimulate experimentation, evaluation and widespread emulation of successful programs.

***177** We urge, as a first step, that the American Bar Association take the initiative and invite the active participation of local courts and local and state bar associations in developing proposals for evaluation. Such submissions would, of course, contain specific proposals for the funding of pilot projects, which funding might be by local resources, by existing federal agencies, or by interested foundations. Successful pilot projects begin with thoughtful and creative design. Inevitably, such planning takes time; it is important that the process begin, and that it begin as soon as possible.

3. *Research and Development*

At Saint Paul there was some emphasis on the need for the development of criteria by which we could more readily identify those types of disputes most likely to profit from mediation, fact-finding or other alternative mechanisms of dispute processing. We recognize the potential value of research designed for this purpose. Nothing in our earlier proposal concerning Neighborhood Justice Centers is intended to minimize the need. On the contrary, the program detailed above should serve to stimulate such research, particularly since the evaluation of success or failure is of the essence in any experimental program.

There are various non-governmental as well as governmental programs which should be considered. In Sweden, Public Complaints Boards, although their recommendations are not binding, appear to have had a beneficent influence.[4] Non-governmental programs by civic organizations or by industrial associations may also contribute significantly to avoiding disputes, or to their prompt resolution should they arise.

Pilot projects designed to resolve disputes fairly and efficiently without recourse to government should be encouraged. They need not await the results of long-term study. Particularly in the field of consumer complaints, any serious program designed to resolve disputes and to deliver justice without resort to the courts or to other instrumentalities of government should also be encouraged.

We recommend that the ABA undertake to stimulate research in this area, including experimentation.

***178** B. SMALL CLAIMS COURTS

Revitalization and expanded use of small claims courts offers substantial promise of assuring the delivery of justice to all citizens in a manner which is both speedy and efficient. The American Bar Association is currently planning a Conference on Minor Dispute Resolution, to take place in May, 1977. Empirical research designed to provide needed factual information has already been undertaken.

We recommend that state and local bar associations be involved both in the Conference and in programs for the implementation of recommendations for change which may result.

Again, we recommend a pattern of experimentation, evaluation and widespread adoption of those programs which prove successful.

C. ARBITRATION

1. *Compulsory Arbitration*

Experience has already supplied a substantial body of information pointing to the utility of a procedure under which certain types of cases are submitted to compulsory arbitration before three members of the Bar, with a right of appeal de novo. [5] Such provisions are in effect in Pennsylvania, [6] Ohio, [7] and New York [8] and in some cases apply to virtually all law suits involving claims for money damages up to $10,000.

***179** The reports on the operation of a number of these rules are highly favorable. These programs provide far speedier adjudication than the courts; procedures are more informal and less expensive. Moreover, the diversion of appropriate claims into the arbitration process relieves the pressure on the court system to the benefit of all litigants. [9]

Adoption of compulsory arbitration procedures in federal courts could prove beneficial. [10] The Judicial Conference of the United States, acting through the appropriate committees, may wish to consider a national rule. If the Judicial Conference chooses not to promulgate a rule applicable nationally, the possibility of adopting local rules in the various circuits or in metropolitan districts deserves consideration. We recommend that the Judicial Administration Division seek adoption of an appropriate federal program.

We also recommend that the Judicial Administration Division encourage state courts to explore the potential utility of arbitration procedures. State and local bar associations should be involved in the effort.

We recommend that the Conference of Chief Justices consider the potential advantages of encouraging the development of proposals for compulsory arbitration, tailored to local needs and circumstances. [11] We recognize that the National Center for State Courts can perform significant service by the dissemination of information presently available, design of specific proposals, and evaluation of the data generated by the adoption of the program in any given court. We therefore recommend that the Judicial Administration ***180** Division maintain continued close contact with the National Center to assure a coordinated effort.

It is important to recognize that the success of a program of compulsory arbitration depends on the degree of legislative support for the program in the form of funds with which to operate the system and from which to compensate the arbitrators. Compared to the cost of court trials the cost per case is small indeed. Lawyers provide facilities for the conduct of the hearings at no cost to the state and the rate of compensation for the arbitrators is typically very modest. Indeed, the success of compulsory arbitration is due in no small measure to the willingness of the members of the bar to participate in the program as a public service.

In the aggregate, however, the funds required are not de minimis, particularly when provision must be made for processing literally thousands of cases annually in a single county. Accordingly, we recognize the need for an effective program to inform legislators of the value of arbitration programs and the need to provide adequate fiscal support. Here, once again, the active participation of state and local bar associations can be of significance and their active participation should be encouraged.

2. *Increased use of commercial arbitration by contractual provision.*

Whenever contracting parties agree in advance in a contract for arbitration of any disputes which may later arise, the probability of resort to a law suit is reduced. Although such provisions are not uncommon, [12] courts continue to be obliged to litigate large numbers of cases which might more profitably be arbitrated.

Repetitive litigation among members of the same industry, such as disputes among insurance companies, might more frequently be resolved by arbitration to the benefit of all concerned. [13] By developing a pattern including an agreement to arbitrate in specified categories of cases, much could be achieved. [14]

Such categories would include areas in which there is a substantial volume of repetitive litigation, in which the primary impact of the disposition of disputes will be felt within a particular industry, ***181** in which the expertise of arbitrators knowledgeable about the customs and practices of the particular industry would be helpful, and, normally, in which the relationship of the parties depends on a written contract. Specifically, contractual provisions for arbitration may profitably be adopted with respect to disputes between franchisors and franchisees, and between contractors and sub-contractors in the construction industry, in addition to disputes among insurance carriers previously mentioned.

We recommend a program of education which would invite the attention of all concerned to the advantages of non-judicial dispute resolution. The ABA should take the initiative in developing and implementing such a program on a national level.

In this connection, it is significant that the American Arbitration Association and the American Bar Association have been cooperating on a number of projects. A joint effort in this area would be appropriate. Such an effort should not be limited to education and persuasion. It is also desirable to identify other categories of agreements appropriate for arbitration. In addition, it may be desirable to recommend revision of court rules or statutory provisions concerning the effect of arbitration and the bases of appeal from awards.

In short, we recommend a continuing cooperative program of study, of monitoring the operation of the program, and of education designed to assure widespread implementation and use.

D. ADMINISTRATIVE AGENCIES; "SUNSET LAWS"

It was suggested at Saint Paul that increased resort to administrative agencies might serve to relieve the courts of disputes which they are currently obligated to resolve. We recommend that the Section on Administrative Law consider the feasibility and desirability of this suggestion. Any specific proposals will, of course, require careful analysis. Moreover, basic changes in procedure of the type here proposed frequently have substantive implications. For this reason specific recommendations should, in accordance with usual practice, be made in coordination with all interested sections.

There is another side of the coin. Proliferation of administrative agencies with no thought given to eliminating those which no longer perform a useful function is wasteful, imposing burdens on affected citizens without commensurate benefit to society. Repeal ***182** of legislation creating such boards and agencies is rare, for it requires the exercise of initiative by some interested party. It has long been suggested that agencies be required to justify their continued existence from time to time. [15] The so-called "sunset laws," which provide for the automatic termination of administrative agencies after a specified period of time, unless the legislature acts affirmatively to continue them, are intended to force such justification and evaluation. Colorado has provided a model which deserves consideration in other jurisdictions. [16] The subject is one which should command the attention of the Section on Administrative Law, but it is also one which is of interest to members of other professions, to the business community and to consumers. It is one concerning which non-lawyers have much to contribute. For this reason we recommend that the American Bar Association establish a special commission, composed of lawyers and non-lawyers, to study the "sunset laws" and related plans with a view to making legislative recommendations.

Present provisions for judicial review of administrative determinations offer the possibility of improvement, at least in some instances. The usual pattern presently prevailing in the federal system provides for a single appeal as of right. [17] Under some statutes, however, two appeals as of right are allowed, to the District Court and thereafter to the Court of Appeals. The Social Security Act has been cited as one example of unnecessary proliferation of appeals. [18] Fashioning specific remedies requires careful consideration of the volume of litigation, reversal rates and the nature of the questions ***183** presented at the various levels of appeal. [19] The right of every claimant to a day in court, with adequate representation to make it meaningful, would, of course, still be assured.

We recommend that the Section on Administrative Law review all instances of multiple appeals as of right with a view to assessing their justifiability in each situation and to proposing remedial legislation where necessary.

1 The title is taken from Sander, *Varieties of Dispute Processing*, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 111 (1976).

2 Professor Sander has pointed out that possible reforms aimed at reducing the number of disputes include changes in the substantive law, such as decriminalization of some activities or the adoption of no-fault provisions, where appropriate; reducing court discretion by statute in certain areas, such as in the division of marital property; and greater emphasis on "preventive law." Sander, *supra* note 1, at 112.

3 *Id.* at 131.

4 *Id.* at 119.

5 The right of appeal is conditioned upon payment of a non-recoverable sum as costs, providing a deterrent. The threshold question, of course, is whether this results in the denial of the right to trial by jury. That right has been held to be satisfied by the right of appeal de novo, *Application of Smith*, 381 Pa. 223, 112 A.2d 625 (1955), which states at 381 Pa. 230-231, 112 A.2d at 629, "The only purpose of the constitutional provision is to secure the right of trial by jury before rights of person or property are *finally* determined. All that is required is that the right of appeal for the purpose of presenting the issue to a jury must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable." (emphasis in original).

6 *Pa.Stat.Ann.* tit. 5 § 21 et seq. (1963).

7 In Ohio a Rule of the Supreme Court authorized the trial court of any county to establish a mandatory arbitration rule. The favorable experience with mandatory arbitration in Hamilton County (Cincinnati) and Cuyahoga County (Cleveland) is discussed at some length by Chief Justice C. William O'Neill in an address delivered before the Fifth Circuit Judicial Conference in Houston, Texas, May 26, 1976.

8 22 N.Y.Codes, Rules, and Regulations, Part 28 (1974).

9 Prof. Maurice Rosenberg and Myra Schubin, Esq., writing in 1961, observed that the adoption of compulsory arbitration of claims [up to $2000] in the Municipal Court of Philadelphia had impressive results: "In one sweep the major part of the court's civil jurisdiction was diverted to arbitration panels; in less than two years delay fell sharply from between twenty-four and thirty months to between three and five months." Rosenberg and Schubin, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 HARV.L.REV. 448, 458 (1961). *See also* O'Neill, *supra* note 3, at 9 discussing the Ohio experience, together with accompanying data.

10 Compulsory arbitration procedures may prove beneficial to federal courts in relieving them of relatively small claims which arise under federal statutes such as The Truth-In-Lending Act.

11 The provisions of existing compulsory arbitration statutes are by no means identical. Details of the programs provided by these statutes may vary widely with respect to such features as the size of the claims diverted into arbitration and the availability of particular procedures.

12 Sander, *supra* note 1, at 116.

13 *See, e.g.*, Security Mutual Casualty Ins. Co. v. Century Casualty Co., 531 F.2d 974 (10th Cir.1976).

14 Of course, a great deal has already been accomplished to this end. *See*, Coulson, *Arbitration-Positive Experiments in Modern Justice*, 50 Judicature No. 4 (Dec. 1966).

15 As Chief Justice Burger observed in his keynote address: "My colleagues, Justices Black and Douglas-not in jest but in complete seriousness-said many years ago that new regulatory agencies and new government programs should be dismantled after a fixed period-ten years or so-and not reinstated unless a compelling need were shown." Burger, *Agenda for 2000 A.D.-A Need For Systematic Anticipation*, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 83, 89 (1976).

16 *Colo.Rev.Stat.Ann.* § 24-34-104, effective July 1, 1976. This bill was introduced in the Colorado House of Representatives as H.R.1088.

17 See generally, Currie and Goodman, *Judicial Review of Agency Action: The Quest for an Optimum Forum*, 75 COLUM.L.REV. 1 (1975).

18 *Id.* at 23 et seq. The Longshoremen's and Harbor Workers' Compensation Act previously provided for two tiers of review, but was amended to provide for appeal directly to the Courts of Appeals (33 U.S.C. § 921 (Supp. II, 1972)). See Currie and Goodman, *supra* note 17 at 36-37.

19 See generally. Currie and Goodman, *supra* note 17.

***184 II**

Eliminating the Need for Judicial Action

A. CHANGES IN THE SUBSTANTIVE LAW

1. *Decriminalization*

The desirability of decriminalization of what are frequently termed "victimless" crimes such as public drunkenness has been vigorously supported and equally vigorously opposed. We recommend that the Conference of Chief Justices be invited to consider whether the subject should be referred to appropriate state agencies for study and possible action. In addition, state and local bar associations should be invited to consider and evaluate proposals in this area. It should be noted that it is not necessary to accord like treatment to social problems as diverse as drunkenness and prostitution, although both are frequently lumped under the rubric of "victimless crime."

2. *Professional Malpractice*

A number of statutes relating to medical malpractice have recently been enacted; most are procedural in nature. Proposals which would limit the right of recovery in medical malpractice, and in professional malpractice generally, have been urged as appropriate next steps. These are matters which are primarily for the states and we therefore recommend that the Conference of Chief Justices be invited to consider whether this subject, too, should be referred to appropriate state agencies for study and possible action. If the ABA is to make any recommendation in this area, the matter should first be considered by interested sections.

3. ***No-Fault Provisions as an Alternative to Actions Based on Negligence.***

The history of ABA concern with no-fault proposals, and ABA support of state no-fault statutes, is familiar. It is appropriate that ***185** the subject remain on the agenda of the Association and that the ABA monitor experiences with no-fault provisions where they have been adopted. The potential for major benefits from the no-fault approach is too significant for the ABA to fail to remain concerned with this subject.

4. ***Simplification***

Simplified laws and simplified procedures serve to reduce costs and thus serve the public interest. Needless complexity in the substantive law serves to invite litigation; procedures which are needlessly complex are wasteful.

In the effort to simplify, however, we must be mindful not to eliminate the rights and procedures granted to the less powerful and less affluent members of our society in order to assure them equal justice.

The law governing transmission of property at death has long been singled out as an example of needless complexity. We note, however, that substantial progress has been made in many states, thanks in large measure to the Uniform Probate Code. In general, it may be observed, the work of the Commissioners on Uniform State Laws has been an important influence.

These are matters best considered by the individual sections in the course of their continuing concern for improvement of the law.

B. ELIMINATION OF THE USE OF COURTS IN NON-ADVERSARIAL PROCEEDINGS

Judicial resources are never available in overabundance and they should be reserved for the resolution of controversies and the vindication of rights. Much time is consumed in some courts as a result of judicial involvement in uncontested probate, uncontested divorce, incorporating membership corporations, approving changes of name and, in some cases, making appointments to semi-public offices. It is certainly an appropriate judicial function to assure that absent interests are in fact represented when important rights might otherwise be lost, but courts should not be quick to assume that conflicts exist when in fact there are none. Thus, there is much to commend the proposal that the courts be freed from the obligation to act in situations inappropriate for judicial action, limiting judicial involvement to cases in which a controversy between adversaries has developed.

***186** The issues are frequently subtle and complex. It may, or it may not, be desirable to develop new procedures for approval of child custody and adoptions where these are not contested. Again, the work of the Commisisoners on Uniform State Laws can be helpful.

We recommend that the matter be referred to the Conference of Chief Justices for such further reference as they may deem appropriate. We further recommend that the attention of state and local bar associations, and of the interested sections of the ABA, be invited to this problem.

***187 III**

Criminal Procedure

The public expects the criminal justice system-referred to in some countries as a social defense system-to be effective in reducing crime and affording protection to the community and to be fair in the process. Our system of criminal justice,

however, is not viewed as effective. Crime and the fear of crime have become two of the society's most deeply disturbing problems. There is profound dissatisfaction with the operation of the criminal law,[1] both on the part of those who consider judicial processes too slow and the judges too lenient and on the part of those who consider sentences too harsh, our correctional institutions ineffective and the system, generally, one which oppresses the poor and is manipulated by the rich.[2] Understandably, much of the Pound Conference was devoted to the criminal justice system.

Recommendations for change concerned virtually every phase of the system from arrest through appeal. They varied in nature and purpose, reflecting in some instances opposing points of view. The abbreviated roster of proposals which follows serves to illustrate the range of concerns expressed at Saint Paul and the willingness of at least some of the participants to experiment with procedures fundamentally at variance with present practice.

***188** Elimination of the professional bondsman was urged as an important step in bail reform.[3] Control of prosecutorial discretion was considered desirable, perhaps by the development of standards which would serve as a guide in individual cases.[4] Effective pre-trial discovery was urged and the desirability of an omnibus procedure considered.[5]

Trial procedures came under scrutiny; understandably, it was urged that we develop procedures which are prompt and fair and which consider the interests of victims, jurors and witnesses while yet safeguarding individual rights.[6] Assuring competence of counsel was accorded a high priority.[7]

Reform of sentencing practices was a subject which received some emphasis, with particular concern for the need to reduce disparity in sentencing.[8] To that end proposals were discussed recommending that sentencing guidelines be established and that judges be required to assign reasons for the sentences which they impose.[9]

***189** The need to improve our correctional institutions was stressed; the creation of in-prison procedures to deal with prisoner complaints was urged as a means of achieving internal prison reforms and reducing the workload of courts.

Present patterns of post-conviction remedies, involving repetitive collateral attacks and multiple appeals, were severely criticized.[10] Specific proposals included provision for a single post-conviction hearing,[11] speedier review and the imposition of a requirement of a colorable claim of innocence as a prerequisite to collateral attack.[12]

More fundamental changes, with potential impact on an entire range of present procedures, were urged. The exclusionary rule was attacked and its efficacy as a deterrent to illegal activity by police officers challenged.[13] The *Miranda* rule was also criticized, with a proposal for in-custody interrogation before a judicial officer offered as an alternative.[14] It bears emphasis that the proponents of these changes were not suggesting that illegal activity by law enforcement officials should be condoned. On the contrary, they called for increased effort to discover alternative deterrents to illegality that would prove more effective than the challenged procedures in achieving their basic purpose as well as less obstructive in the enforcement of the criminal law.[15]

These, then, were some of the major proposals presented at Saint Paul-innovative, creative and in many respects controversial.

The American Bar Association has, of course, been actively involved in attempting to improve the administration of criminal ***190** justice in recent years. The ABA-sponsored studies may, with justification, be termed monumental. The ABA Standards for Criminal Justice were the result of a decade of intensive effort[16] and the Section of Criminal Justice

has mounted a nationwide program seeking their implementation in every state. [17] Certainly the continuation of these efforts must remain of primary concern.

This is an area of the law, however, which is hardly static; change comes quickly and is far-reaching in impact. Thus, in a Supreme Court opinion announced earlier this month the scope of federal collateral attack on state convictions was sharply curtailed, [18] and on the same day the Court took occasion to question the deterrent effect of the exclusionary rule. [19] Again, there is no suggestion that illegal practices be condoned; the concern is for procedures which protect the interests of society while assuring fairness to defendants. These developments require, therefore, that the quest for other practicable, effective deterrents to illegal search and seizures by law enforcement officers be accorded a high priority. Accordingly, we recommend that the matter be referred to the Section of Criminal Justice, confident that vigorous efforts by that Section will assure continued ABA leadership in this field.

The National Conference of State Trial Judges has an obvious interest in, and its members possess rich experience relevant to these issues. We recommend that they, too, be invited to contribute to the solution of these pressing problems.

1 Rubin, *How Can We Improve Judicial Treatment of Individual Cases Without Sacrificing Individual Rights: The Problems of the Criminal Law.* National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 176, 178 (1976). *See also*, National Advisory Commission on Criminal Justice Standards and Goals, *Report on Courts*, 1 (1973), [hereinafter National Advisory Commission *Report*] where it is observed, "While all components of the [criminal justice] system have been criticized, it is becoming apparent that, as the Nation's crime-consciousness grows, the role of the courts in crime control is becoming the center of controversy."

2 *See* Rubin, *supra* note 1.

3 Rubin, *supra* note 1, at 183. *See also* National Advisory Commission *Report, supra* note 1, Standard 4.6.

4 A related issue, the desirability of plea bargaining, provoked controversy. Compare the discussion in Rubin, *supra* note 1, at 183-186 with Schaefer, *Is the Adversary System Working In Optimal Fashion? Id.* at 159, 174-175.

5 Rubin, *supra* note 1 at 188; *see also* National Advisory Commission *Report, supra* note 1, Standard 4.9 and commentary thereto.

6 *See* Higginbotham, *The Priority of Human Rights in Court Reform*, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 134, 151-154; Rubin, *supra* note 1, 178, 193. *See also* Burger, *Agenda For 2000 A.D.-A Need for Systematic Anticipation, id.* at 83, 92: "Inordinate delay in criminal trials and our propensity for multiple trials and appeals shock lawyers, judges and social scientists of other countries."

7 Rubin, *supra* note 1, at 188; see also National Advisory Commission *Report, supra* note 1, Standards 12.15 and 13.16 and accompanying Commentary, advocating specialized training for prosecutors, defenders and their assistants with a view toward assuring maximum effectiveness of counsel in criminal trials.

8 *See* Schaefer, *supra* note 4, at 173-174; Rubin, *supra* note 1, at 193-196; National Advisory Commission *Report, supra* note 1, at 109.

9 Rubin, *supra* note 1, at 195; *see also* Schaefer, *supra* note 4, at 173-174. Appellate review of sentencing was also considered, with Rubin noting, "Although a majority of judges oppose appellate review, the United States is the only democratic nation that does not have it." Rubin, *supra*, at 195; *see also* Schaefer, *supra*, at 173.

10 Rubin, *supra* note 1, at 196-197. Schaefer, *supra* note 4, at 170-171. It was also suggested that the problem was one that "must be solved by the courts themselves." Walsh, *Improvements in the Judicial System: A Summary and Overview, id.* at 223, 227.

11 Rubin, *supra* note 1, at 198.

12 Schaefer, *supra* note 4, at 171, *citing*, Friendly, *Is Innoecnce Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.CHI.L.REV. 142 (1970).

13 Schaefer, *supra* note 4, at 171.

14 Schaefer, *supra* note 4, at 166. In his discussion of this proposal, *id.* at 166-170, Justice Schaefer notes that Dean Pound had advocated a "legal mode of interrogation of suspects taken into custody" as early as 1907. *Id.* at 166 *quoting* Proceedings, Am.Pol.Sci. Ass'n. (1907), reprinted in Roscoe Pound and Criminal Justice 100 (S. Glueck, Ed.1965).

15 Schaefer, *supra* note 4, at 172.

16 Erickson, The ABA Standards for Criminal Justice, App.-3, reprinted from Criminal Defense Techniques (Cipes & Bernstein eds. Release No. 10, July 1975) (distributed by ABA Section of Criminal Justice.) The National Advisory Commission on Standards and Goals for Criminal Justice, funded by LEAA, meanwhile produced six volumes of standards and goals, which were in substantial agreement with the ABA Standards in those areas covered by both. The House of Delegates also endorsed these standards and goals to the extent not inconsistent with the ABA Standards.

17 *Id.* App. A-4-8.

18 Stone v. Powell, 44 U.S.L.W. 5313 (U.S. July 6, 1976), holding "that where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." 44 U.S.L.W. 5317.

19 United States v. Janis, 44 U.S.L.W. 5303, 5308-5310, text at notes 19-29 and authorities cited (U.S. July 6, 1976).

***191 IV.**

Civil Procedure

A. CORRECTING ABUSES IN THE USE OF DISCOVERY

Substantial criticism has been leveled at the operation of the rules of discovery. [1] It is alleged that abuse is widespread, serving to escalate the cost of litigation, to delay adjudication unduly and to coerce unfair settlements. Ordeal by pretrial procedures, it has been said, awaits the parties to a civil law suit.

Much of the criticism has focused on the role of the trial judge. It has been urged that the fair and orderly operation of the rules should be a prime and personal responsibility of the trial judge. It has been further suggested that abuse cannot be eliminated unless the judge insists on defining the issues before extensive discovery is permitted. [2] Others have urged that, in the federal system at least, magistrates should monitor the process and be admonished not to allow unrestricted and expensive discovery unrelated to the actual needs of the litigants.

***192** Certainly, abuse of the processes of discovery on any widespread scale must be a matter of prime concern. Fashioning appropriate remedies, remedies which will neither impose undue burdens on the courts nor prove unfair to litigants with genuine need for extensive discovery, is, however, a complex task. Empirical data concerning the types of cases in which abuse is most likely to occur, the nature and extent of the abuse, and the utility of remedies which have been tried may prove helpful. [3] Happily, the Section on Litigation already has the subject under study. The National Conference of State Trial Judges and the Judicial Administration Division may be expected to provide additional perspectives which would aid in developing practicable and equitable solutions. A common effort by these three bodies would have many advantages. It would assure the active participation of those best able to contribute to prompt and effective resolution of these difficult questions. Accordingly, we recommend that consideration be given to such a joint program.

At the least, the Section on Litigation, in coordination with the Judicial Administration Division, should accord a high priority to the problem of abuses in the use of pretrial procedures and report its findings and recommendations with a view to appropriate action by state and federal courts.

B. THE USE OF SANCTIONS

Imposition of sanctions in the course of civil litigation is a familiar penalty which may be imposed for failure to comply with judicial orders, [4] willful violation of an obligation imposed by procedural rules, [5] or even in some circumstances for failure to respond to a request to admit. [6] Such sanctions may run the gamut from an order to pay reasonable expenses, including attorney's fees, incurred ***193** by an adversary in proving a single fact [7] to punishment for contempt in the extreme case. [8]

Reasonable sanctions imposed to assure compliance with reasonable procedures are appropriate and necessary to prevent abuses. [9] It is right to insist that an attorney's signature on a pleading certifies that to the best of his knowledge there is good ground to support its averments and that it is not interposed for delay. [10] Where inadequate and improper pleadings give evidence of contributing to delay and increased expense of litigation, [11] it is desirable to assure that procedural rules specifically provide that an attorney's signature carries with it such a certification and that sanctions may be imposed for willful violation. Moreover, it is important that judges enforce the rules. We recommend that the Section on Litigation study the problem of enforcement and make recommendations appropriate for state and federal courts.

The taxing of costs can be, and in some places has been used far more creatively. The risk of being taxed with the expenses incurred by an opposing party has been considered a useful deterrent to needless extension of litigation. Similarly, it has been used to avoid resort to trial where trial is unnecessary. What has been termed the Michigan mediation system, for example, has proved useful in reducing the number of unnecessary trials. [12] Under the terms of the governing provisions, cases in which liability is realistically not in issue can be referred for evaluation to an impartial panel. The findings of the panel are not binding, but, if rejected by a litigant ***194** who then fails to achieve a substantially more favorable result at trial, they subject the litigant to the imposition of the costs of litigation. It is important to emphasize that these mechanisms are designed to apply equally to all parties to a lawsuit.

In our view, such creative use of sanctions offers a significant potential for increased efficiency to the benefit of the litigants immediately involved and to the ultimate benefit of all who depend on the availability of an efficient judicial system. We recommend that the Section on Litigation evaluate programs designed to this end, and encourage experimentation and implementation of those programs which have proved successful.

C. CLASS ACTIONS

Class actions have been in use for well over a hundred years and have proved themselves a valuable tool. A little more than a dozen years ago the Federal Rules governing class actions were changed substantially, use of the class action became far more widespread, its impact on litigants far more significant, and the governing rules and doctrine highly controversial. It is certainly true that few procedural devices have been the subject of more widespread criticism and more sustained attack-and equally spirited defense. The dissatisfaction, however, does not encompass all kinds of class actions; it focuses on litigation under Federal Rule of Civil Procedure 23(b)(3) and its state counterparts, which permit suits on the part of persons whose only connection is that one or more common issues characterize their position in relation to an adverse party.

The sheer magnitude of many of these suits, in some instances involving literally hundreds of thousands of claimants and an equally imposing number of documents, has been said by some critics to result in litigation so complex as to be

beyond the power of judicial tribunals to adjudicate on any rational basis. [13] The use of the jury in such cases has been condemned with particular vigor, resulting in judicial speculation as to whether jury trial should be denied even when requested by both sides. [14]

***195** There are those, however, who vigorously resist any attempt to contract the sweep and scope of class actions. The Supreme Court's holding in *Eisen* concerning notice to the individual members of the class drew substantial fire for unduly restricting the utility of the Federal Rule. [15] By the same token, the Court's holdings relating to jurisdictional amount in 23(b)(3) class actions has been condemned in language which reflects the intensity of feeling which these problems of practice and procedure evoke. [16]

The unseemly picture of the lawyer frequently as the real party in interest, representing vast numbers of plaintiffs no one of whom has substantial interest in the recovery, has been a cause of concern. [17] The size of counsel fees in such litigation led one panelist at Saint Paul to characterize litigation as a new "growth industry." [18]

More importantly, the order of magnitude of the potential liability in many treble damage cases and other 23(b)(3) actions and the sheer expense of defending, have been said to coerce settlements unrelated to the merits of the claim, thus resulting in what has been called a "de facto" deprivation of defendants' "constitutional right to a trial." [19]

A number of specific proposals for change were considered in some detail at the Pound Conference. Elimination both of claims ***196** which are de minimis and of cases "too big for adjudication,"-either because of too many parties, too many witnesses, or an excessive diversity of issues-was suggested. The major problems could be solved, it was urged, by a requirement that members of a class who desire to litigate take some affirmative step to "opt in," replacing the current practice under which they are considered litigants if they fail to "opt-out." [20]

It would be wrong to leave the impression that the debate over class actions is limited to the federal forum. On the contrary, developments in the law applied in federal courts have served to heighten interest in state provisions. Recently enacted statutes in New York [21] and in California [22] depart significantly from the federal pattern, as does the Fifth Tentative Draft of a Uniform Class Actions Act presently before the Commissioners on Uniform State Laws.

***197** The impact of the class action on producers and consumers alike [23] and the diversity of viewpoints concerning the nature of the problems and the preferred solutions, make it clear that the subject must remain of primary concern. Moreover, substantive considerations of major significance are involved. The 1974 amendment to the Truth in Lending Act limits recovery in a class action under that statute to $100,000 or one percent of the net worth of the creditor, whichever is less, [24] a formula which amply illustrates that, once again, the substantive law may be developing in the interstices of procedure.

We have already noted the active interest of the Commissioners on Uniform State Laws in this area; there is reason to believe that the appropriate committees of the Judicial Conference of the United States will consider whether changes in the Federal Rule are desirable. We note, as particularly worthy of study, the possibility of an added measure of judicial control over attorney fees in class actions, [25] and the substitution of "opt-in" provisions for the present "opt-out" rule. [26] Further, we urge all concerned sections of the ABA to accord a high priority to class actions with a view to assessing proposals put forth by others and, of equal importance, with a view to initiating recommendations for change both with respect to procedures and to the substantive law.

***198 D. THE JURY**

1. ***The Right to Jury Trial***

Trial by jury has long been the subject of debate, "attracting at once the most extravagant praise and the harshest criticism." [27] It is significant, as the Commentary to the ABA Standards Relating to Trial Procedures observes, that "American trial court procedure remains unique in the breadth of the jury trial guaranty it affords and the generality with which juries are used." [28] The use of juries in civil cases was the subject of trenchant criticism at Saint Paul, where it was described as the cause of much of the current dissatisfaction with the adversary system. [29] Of course, there were many who reaffirmed their commitment to the civil jury and those who expressed the view that the issue "must be addressed with all the cautions that we exercise in dealing with that which has been regarded as a fundamental part of our system." [30]

Whatever the division of opinion concerning the desirability of reducing or eliminating the scope of the right to jury trial in civil cases, there would seem to be rather widespread agreement that the right should not be extended. The fact, is, however, that there has been a substantial extension of the right to jury trial in the federal system over the past few decades. [31] The reasons for the expansion, ***199** rooted in the Supreme Court's view of the implications of the merger of law and equity, need not be detailed here. The subject clearly appears ripe for reexamination. [32] It may also be appropriate to reexamine the application of doctrines governing right to jury trial in the cases of new causes of action created by statutes of a type unknown to the common law. [33]

It should be noted that complaints with respect to the civil jury have been focused particularly on cases which are complex and difficult. [34] Long ago, equity felt free to assert jurisdiction in such cases and thus preclude jury trial; accounting in equity is a familiar example. This subject, too, is ripe for reexamination.

We recommend that the American Bar Foundation, the Institute of Judicial Administration, the Federal Judicial Center, or some other appropriate organization, be invited to undertake a thorough study of the proper scope of the right to jury trial in civil cases and to make recommendations concerning any changes in present practices which may be desirable.

2. ***Jury Trial Procedures***

The procedures presently employed in jury trials can be improved substantially. As the Chief Justice observed in his keynote address in Saint Paul, there is reason to doubt "whether the jury selection process, which is provided as a means to insure fair, impartial jurors, should be used as a means to select a favorable jury." [35] It is hardly in the public interest to afford the parties on either side the opportunity to select a jury biased in their favor. The ABA Standards Relating to Trial Courts include recommended procedures designed to achieve both efficiency and impartiality. [36] They deserve implementation.

***200** Frequently too little attention is paid to the price in needless discomfort and boredom and sheer indignity that thoughtless practices exact from citizens called for jury duty. It is familiar knowledge that too many jurors react negatively to the whole system of justice as a result of their own experiences. Various proposals relating to efficient utilization of jurors deserve consideration. Continued experimentation is certainly to be commended.

We recommend that the ABA Standards Relating to Trial Courts be referred to the Conference of Chief Justices and to the Judicial Conference of the United States with a view to correcting abuses in this area wherever such abuses exist. Aside from amenities, attitudes and sheer waste, the actual functioning of juries can be improved.

Increased use of interrogatories and special verdicts, and better communication of instructions to the jury, perhaps by use of a videotaped charge, are two further examples of suggested improvements in the use of juries. Other examples may

also be suggested. We recommend that the Section on Litigation consider suggested new techniques, or more widespread use of existing techniques, with a view to appropriate recommendations.

E. SPECIAL PROBLEMS OF FEDERAL JURISDICTION

Elimination of diversity jurisdiction, or at least denying such jurisdiction at the option of a citizen of a forum state, has long been espoused. [37] The high quality of justice dispensed in state courts makes resort to removal to the federal courts unnecessary; moreover, today parochialism is hardly the problem it once was, if it can be said to be a problem at all. The change would have little impact on the total volume of litigation in state systems, but would provide significant relief to the federal courts. [38] We recommend that the Conference of Chief Justices and state and local bar associations ***201** be invited to consider this improvement with a view to endorsement. Such endorsement, we are confident, would go far toward assuring favorable action by the Congress.

Legislation passed by the Senate and pending in the House would eliminate three-judge courts and direct appeals, with reasonable exceptions. [39] The ABA, acting through the Judicial Administration Division and through the Committee on Coordination of Judicial Improvements, should actively support the legislation and seek to have it enacted into law.

1 Rifkind, *Are We Asking Too Much of Our Courts?* National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 96, 107 (1976); Kirkham, *Complex Civil Litigation-Have Good Intentions Gone Awry?, id.* at 199, 202-204. Expressing concern regarding complaints that pretrial procedures are abused, the Chief Justice commented that he had asked the appropriate committees of the Judicial Conference of the United States to conduct hearings, "on any proposals the legal profession considers appropriate." Burger, *Agenda for 2000 A.D.-A Need for Systematic Anticipation, id.* at 83, 96.

2 Kirkham, *supra* note 1 at 204, Rifkind, *supra* note 1 at 107. Judge Rifkind also added, "I believe it is fair to say that currently the power for the most massive invasion into private papers and private information is available to anyone willing to take the trouble to file a civil complaint. A foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the Fourth Amendment."

3 The value of empirical research in considering amendments to the Federal Rules of Civil Procedure has been recognized by the Advisory Committee in the past. *See, A Field Study of Discovery Practice*, Advisory Committee's Explanatory Statement concerning Amendments of the Discovery Rules accompanying the 1970 Amendments to F.R.C.P., 26-37.

4 *See, e.g.*, FED.R.CIV.P. 37(b)(1).

5 *See, e.g.*, FED.R.CIV.P. 11.

6 FED.R.CIV.P. 37(c).

7 *Id.* Attorney's fees, of course, have varied purposes. They are often intended to make a party whole. They are included in many statutes to serve as an incentive to bringing suit.

8 FED.R.CIV.P. 37(b)(2)(d).

9 Sanctions must, of course, be determined pursuant to law and in accordance with established procedures. *See* Link v. Wabash R. Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734,1962).

10 FED.R.CIV.P. 11.

11 Commenting on the extent of abuse of liberalized pleading requirements, Judge Rifkind observed: "Many actions are instituted on the basis of a hope that discovery will reveal a claim." Rifkind, *supra* note 1, at 107.

12 For a description of The Michigan Mediation System in Wayne County, Michigan, and for an evaluation of its operation, *see* Miller, *Mediation in Michigan* 56 Judicature 290 (1973). The Mediation System was established by Michigan General Court Rules and Wayne County Circuit Court Rules, *id.* at 290, and periodic statistical reports are prepared.

13 Kirkham, *supra* note 1 at 203.

14 Parsons, J. in Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc., N.D.Ill., Case No. 71-C-1243 (May, 1976) (Transcript of decision rendered orally).

15 Schuck and Cohen, *The Consumer Class Action: An Endangered Species*, 12 SAN DIEGO L.REV. 39 (1974) Comment, *Class Actions and the Need for Legislative Reappraisal*, 50 NOTRE DAME LAW. 285 (1974); Comment, *The Federal Courts Take a New Look at Class Actions*, 27 BAYLOR L.REV. 751 (1975).

16 "*Snyder* was a disappointment and *Zahn* a tragedy to those who view class actions as a powerful weapon on behalf of the average citizen." Coiner, *Class Actions: Aggregation of Claims for Federal Jurisdiction* 4 MEMPH. STATE U.L.REV. 427, 447 quoted in Wright and Miller, Federal Practice and Procedure, Civil § 1756 (Supp.1975).

17 American College of Trial Lawyers, *Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure*, 20-21 (1972). The potential conflict of interest between the attorney and the members of the class has also become the subject of study. See Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. Legal Studies 47, 56-61 (1975).

18 Kirkham, *supra* note 1 at 204.

19 Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits-the Twenty-Third Annual Antitrust Review*, 71 COLUM.L.REV. 1, 9 (1971).

20 American College of Trial Lawyers, *supra* note 16 at 2-3, also contains such a proposal. *See also* Miller v. Mackey International, Inc., 515 F.2d 241 (5th Cir.1975). Counsel had sought court approval of a fee in excess of $130,000; the District Court awarded only $20,500, and counsel appealed. The Court of Appeals reversed. Bell, J., concurring specially, appeared to invite consideration of the need for special counsel to represent members of the class against "their counsel" on the issue of fees. Noting that "lawyers representing one client having a claim valued at $587," ended up with "an estimated 1,500 to 2,000 clients unknown to counsel having claims approximating $700,000," he added: "These unknown clients have no counsel other than the counsel here and thus the fees are being awarded in a non-adversary context. They had no representation in the district court and they have none here." *Id.* at 244. Examining the problem in terms of root causes, Judge Bell called for a "better system," one which "would be in the form of an opt-in provision in the class action rule so that only those persons would be in the law suit who choose to remain in and thus allow counsel to represent them. This would enable a return to the tradition of the legal profession where clients affirmatively employ counsel." Finally, Judge Bell suggests that "pending amendment of the rule, an opt-in procedure should be used in the discretion of the district court if it is substantially related to the management of a class action." Rule 23(b)(3)(D), "coupled with the inherent powers of the court to manage litigation, will be sufficient in some cases to allow a class action to be maintained only on an opt-in procedure." *Id.*

21 N.Y.C.P.L.R. § 901 *et. seq.* (McKinney Supp.1976).

22 Cal.Civ.Code §§ 1780, 1781 (West 1973).

23 Kirkham, *supra* at 204, referring to class actions, observed that they are "adding billions of dollars to the cost of producing consumer goods and services."

24 15 U.S.C.A. § 1640(a) (Supp.1976), amending 15 U.S.C.A. § 1640 (1974).

25 The courts have already evidenced sensitivity to the problems raised by large fee awards in class actions. Flatly characterizing the fees awarded in the settlement of a class action as "excessive," the Second Circuit commented: "For the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so." City of Detroit v. Grinnell

Corp., 495 F.2d 448, 469 (2d Cir., 1974). See also the concurring opinion of Bell, J., in Miller v. Mackey International, Inc., discussed note 20 *supra*.

26 At least one member of the Task Force opposes substitution of the opt-in provision.

27 Kalven, *The Dignity of the Civil Jury*, 50 VA.L.REV. 1055, 1056 (1964).

28 ABA Commission on Standards of Judicial Administration, *Standards Relating to Trial Courts*, Commentary to § 2.10 (1975), approved by the House of Delegates 1976.

29 Schaefer, *Is the Adversary System Working in Optimal Fashion?* in National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 159, 160 (1976).

30 Walsh, *Improvements in the Judicial System: A Summary and Overview*, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 223, 228. (1976). For a thoughtful discussion of the considerations raised by the proposal to eliminate juries in civil cases, see *id.* at 227-228.

31 *See, e.g.*, Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW.L.REV. 486, 501 (1975): "the 'bottom line' in using the rational approach has invariably been extension of the right to jury trial to cases where historically there would have been no such right." *See also* F. James, Civil Procedure 377 (1965): "the Court makes it clear that the constitutional right to a jury attaches to those areas wrested from 'the scope of equity' by 'expansion of adequate legal remedies provided by the Declaratory Judgment Act and the Federal Rules.' The present Court, which heavily favors the jury trial will no doubt use this flexibility always to expand jury trial."

32 *See* Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN.L.REV. 639 (1973); Redish, *supra* note 5.

33 *See, e.g., Frank Irey, Jr., Inc. v. Occupational Safety and Health Review Comm'n.*, 519 F.2d 1200 (3d Cir.1975), *cert. granted*, 96 S.Ct. 1458 (1976), discussed in Schaefer *supra* note 2 at 164.

34 *See* text at note 3, *supra*.

35 Burger, *Agenda for 2000 A.D.-A Need for Systematic Anticipation*, in National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 83, 92 (1976).

36 Section 2.12.

37 Noting that the subject of diversity jurisdiction "is one to which I have addressed myself on a number of prior occasions, particularly in reports to the American Bar Association annual meeting," the Chief Justice called for abolition of diversity jurisdiction with the statement that "in the 20th century such cases have no more place in the federal courts than the trial of a contested overtime parking ticket!" Letter of the Chief Justice to Senator Roman L. Hruska, Chairman, Commission on Revision of the Federal Court Appellate System, May 29, 1975, 67 F.R.D. 195, 397-398 (1956).

38 *Id.* at 397, *citing* the 1969 Study of the American Law Institute.

39 S. 537, 94th Cong., was passed by the Senate on June 20, 1975. H.R.6150 is pending in Committee.

***202 V.**

Assuring the Availability of Legal Services

Neighborhood Justice Centers, described earlier in this report, are designed to make it easier for all citizens to obtain just resolution of their grievances. The availability of mediation and arbitration will serve the same end. In some cases simplified procedures will make it possible for the citizen adequately to prosecute his own claim or to establish his own defense; this has long been a stated goal of small claims courts. Moreover, the forthcoming Conference on the Resolution of Minor Disputes may be expected to deal with appropriate ways and means for the realization of that goal. Nonetheless, it must be recognized that in many cases substantial claims will be referred to courts of general jurisdiction with a realistic

possibility that plenary trial will be necessary. In such cases a litigant not represented by counsel is, realistically speaking, deprived of his day in court. Adequate legal representation must be viewed as a prerequisite to the delivery of justice.

In a very fundamental sense, the issue forces us to examine the precise nature of the commitment of our society, and especially of our profession, towards those who cannot afford to retain their own counsel. We have gone far to protect the indigent criminal defendant; a genuine sensitivity to the need to provide representation in civil matters involving status, such as divorce and custody, is also apparent. [1] In many cases the contingent fee assures adequate representation for the indigent. The full range of the need, however, has not yet been met. We recognize and applaud the advances already made towards ensuring access to the judicial system for all; ***203** it is important, however, that we maintain a continuing awareness of the need for further progress and a continuing commitment to find and implement the means by which to achieve it.

Canon 2 of the Code of Professional Responsibility has particular relevance in this context. It provides that "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."

On a national level, Congress has already evidenced concern with these problems; [2] the Legal Services Corporation has also shown interest in state and federal programs designed to assure the availability of legal services to all. [3] This is an area in which the concern of state and local bar associations can be particularly productive and efforts should be made to stimulate interest and initiative at the local level.

The American Bar Association has taken significant steps in the effort to assure delivery of justice to all. [4] We recommend that the American Bar Association continue in the forefront of this effort, and particularly that it maintain a close liaison with the Congress to assist in the development of specific recommendations and to aid in expediting their implementation. We recommend further that the American Bar Association invite the attention of state and local bar associations to the potential for service in this area.

1 *See, e.g.*, Commentary to American Bar Association Commission on Standards of Judicial Administration, *Standards Relating to Trial Courts*, Standard 2.20 (1976).

2 *See, e.g.*, May 19, 1976 Hearings of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, the most recent in a series on these issues.

3 *See* Thomas Ehrlich, *Causes of Popular Dissatisfaction with the Administration of Justice: The Perspective of the Poor*, Statement before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, May 19, 1976.

4 The ABA Consortium on Legal Services and the Public includes the following constituent committees: Standing Committee on Lawyer Referral Service, Standing Committee on Legal Aid and Indigent Defendants, Standing Committee on Legal Assistance for Servicemen, Special Committee on the Delivery of Legal Services, Standing Committee on Specialization, Special Committee on Prepaid Legal Services, Special Committee on Public Interest Practice, Special Committee to Survey Legal Needs.

***204 VI.**

Judges

Assuring judges of superior quality in adequate numbers has long been a concern of the Association. A number of specific recommendations presented at Saint Paul are embodied in the Standards on Court Organization, which have already been approved by the House of Delegates. These emphasize prompt filling of vacancies, [1] merit selection [2] and adequate

provision for the tenure [3] and discipline [4] of judges. The importance of a program of continuing education for judges [5] also deserves inclusion in any program concerned with judicial quality.

In the effort to move from precept to practice, the ABA has established a special committee, chaired by Judge Winslow Christian to seek implementation of these standards. [6] Accordingly, we recommend that the above proposals be referred to that committee for action.

An additional proposal, presented at Saint Paul and not included in the Standards, is the development of a mechanism designed to assure periodic legislative consideration of the need for new judgeships. Such a mechanism would regularly supply the legislature with data concerning workloads and population, including both past experience and future projections, a formula by means of ***205** which to utilize the data in determining the number of judgeships warranted for each court, and a self-imposed legislative requirement that the legislature vote on new judgeships within a specified time after the submission of such data.

We recommend that this proposal be considered by the Judicial Administration Division, the Conference of Chief Justices and by the Judicial Conference of the United States.

1 American Bar Association Commission on Standards of Judicial Administration, *Standards Relating to Court Organization* (1974). Standard 1.21(b)(ii).

2 Standard 1.21(a).

3 Standard 1.21(b)(iii).

4 Standard 1.22.

5 Standard 1.25.

6 The Committee to Implement the Standards Relating to Court Organization. The jurisdiction of the committee, however, may soon be broadened.

***206 VII.**

Collection and Evaluation of Data

There was repeated emphasis at the Pound Conference on the paucity of data available for an adequate understanding of the reasons for the critical problems of judicial administration and for informed consideration of the alternatives to judicial resolution of disputes. [1] Are disputes not brought to court resolved in some other manner? If so, how? Are there social and psychological costs involved in not pressing disputes? If so, what are they? Further, it was suggested that we do not know, and we need to learn, the relative speed and cost of different methods of dispute resolution. [2] Certainly, it is difficult to judge the desirability of increased resort to alternatives without such information.

We need to learn more of the operation of the Bail Reform Act and the Criminal Justice Act. [3] We have no reliable data, it was urged, on the number of crimes committed in this country, on arrests and dispositions. [4] For efficient operation, the entire system ***207** of the administration of justice must be thoroughly coordinated and adequately funded. This is difficult, if not impossible, without adequate data, current and reliable.

This is an area concerning which the Task Force considers it appropriate to make its recommendation directly to the Board of Governors with a view to the earliest possible implementation.

In our judgment, creation of a Federal Office for the collection of data, both state and federal, civil and criminal, would be desirable. Such an office might be established as an adjunct of the Administrative Office of the United States Courts. It would collect state data reported to it on a voluntary basis and would be authorized to undertake special studies relevant to the administration of justice. This Office would work in close cooperation with the National Center for State Courts, and the Federal Judicial Center, and with other groups. Indeed, we note that certain state data, relating to wiretaps, is today reported to the Administrative Office of the United States Courts.

ABA approval should be made conditional on approval by the Conference of Chief Justices.

In the long range, it may become appropriate to transfer some or all of the functions of this office to the National Institute of Justice, should one be established. Certainly, nothing in this proposal is intended to preclude, or to militate against the establishment of such an Institute. However, the need for data is too pressing, and the opportunity for creating a simple, efficient mechanism for meeting that need too obvious, to postpone action now until a National Institute is in fact created.

1 Sander, *Varieties of Dispute Processing*, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 111, 133 (1976).

2 *Id.*

3 Commenting on these two acts, the Chief Justice said, "Each of these acts was one that most informed people would call 'good' legislation. Now, a decade and more of actual experience shows that the interaction of these two improvements created vexing problems not anticipated." Burger, *Agenda for 2000 A.D.-A Need for Systematic Anticipation*, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 83, 90 (1976).

4 Rubin, *How Can We Improve Judicial Treatment of Individual Cases Without Sacrificing Individual Rights: The Problems of Criminal Law*, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. 70 F.R.D. 176, 180-181 (1976).

***208 Supplemental Report of Pound Conference Follow-Up Task Force**

Recommendations

1. We recommend that the Board of Governors take special action designed to assure funding of experimental Neighborhood Justice Centers in the immediate future. This recommendation is made in view of interest in this concept which has been generated by the Pound Conference and ABA reports, and the funding opportunities which have recently arisen.

2. We recommend that the Division of Judicial Administration be invited to study the desirability of expanded use of magistrates within the Federal judicial system, consistent with Article III. We further recommend that the Division on Judicial Administration, in coordination with the Federal Judicial Center, develop legislative proposals designed for this purpose.

3. We recommend that the American Bar Association endorse, in principle, funding by the Congress of a program for the collection of data relevant to judicial administration, both state and federal, civil and criminal. This recommendation is a modification of Recommendation 26 (pp. 7-8; 44-45) of the August, 1976 Report of this Task Force.

Discussion

This Task Force was appointed last spring by President Walsh to assure that the ideas presented at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, more commonly referred to as the Pound Conference, would be carefully considered by those organizations or agencies best able to evaluate and implement them.

Pursuant to that mandate, the Task Force reported to the Board of Governors in August, presenting 26 Recommendations. In view of the interest in the ideas presented at the Pound Conference ***209** and the rapid developments in the areas considered by the Task Force, the Task Force undertook to prepare a supplemental report.

We are pleased to report that the Recommendation endorsing the abolition of three-judge courts (pp. 6-7, 38) has been enacted by the Congress and was signed into law August 12, 1976 (P.L. 94-381).

There have been other developments. The papers presented in St. Paul last April have already been cited in a number of judicial opinions. See, e.g., Stone v. Powell, 96 S.Ct. 3037, 3050 n. 28 (1976); Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers (9th Cir. No. 73-2727, Sept. 17, 1976, concurring opinion of Markey, C.J.). The Young Lawyers Section devoted a full day in Atlanta to the Pound Conference and committees of that Section are actively developing an action program. A special ABA Task Force on the Resolution of Minor Disputes, under the chairmanship of Talbot D'Alemberte, commenced work last summer; and the American College of Trial Lawyers appointed a prestigious special committee to consider the implementation of proposals generated by the Pound Conference, which committee is already at work.

Meanwhile, the National Conference of Commissioners on Uniform State Laws has approved a Uniform Class Actions Act and the United States Senate evidenced continued interest in consumer courts by passing S. 2069, which would fund experimentation in this area by the states.

We do not attempt in this supplemental report to catalogue all developments relevant to the ideas propounded at the Pound Conference or to the Recommendations included in our earlier report. Courts and legislatures will continue to grapple with these issues precisely because they are significant today and are likely to become more significant tomorrow. The use of sanctions in civil litigation to deter willful conduct, which contributes both to delay and to increased expense of litigation, provides one example. The importance of the subject is underscored by recent judicial developments. Only last month, the United States Court of Appeals for the Fifth Circuit affirmed the action of the trial court in striking defendant's answer and counterclaim, and entering judgment for plaintiff, as a sanction for delay in making discovery. The Court of Appeals, while noting that it was not called upon "to say whether we would have chosen a more moderate sanction," (***210** Emerick v. Fenick Industries, 539 F.2d 1379, 1381 (5th Cir.1976), found no abuse of discretion. In reaching this conclusion, the court relied on National Hockey League v. Metropolitan Hockey Club, Inc., 96 S.Ct. 2778 (1976), decided by the United States Supreme Court at the end of June.

In our earlier report, we recommended that the Section on Litigation make recommendations on this subject "appropriate for state and federal courts." We adhere to our earlier Recommendations (Numbers 16-17, pp. 5, 29-30), and find no need formally to renew them. In this case, as with other recommendations calling for study and evaluation, we are confident that future developments will be duly considered in the normal course.

A final example may be noted. Last month, the Congress enacted, and the President signed into law, P.L. 94-559, providing for attorney's fees in civil rights litigation. The new statute is relevant to assuring the availability of legal services to all (see Recommendation Number 24, pp. 7, 39-41), but it does not yet preclude the need for further action.

Other recent developments are noted below in connection with the discussion of specific recommendations.

NEIGHBORHOOD JUSTICE CENTERS

The recommendations of this Task Force for the creation of Neighborhood Justice Centers (Numbers 1-3, at pp. 1-2, 9-12) have generated prompt and favorable response. An article in the August 29, 1976 issue of the Nashville Tennessean reports on the development of one such program by Judge A.A. Birch, noting the parallel to the ideas presented by Chief Justice Burger and by our earlier report.

Three metropolitan counties in Florida now have pilot programs "designed to offer an alternative to the usual criminal court procedures for persons who may be involved in certain county and municipal ordinance violations, misdemeanors or minor felonies." Chief Justice Ben F. Overton of the Supreme Court of Florida describes them as follows:

> Citizen Dispute Settlement Programs. These programs are designed to resolve citizen disputes that could but would not necessarily result in a criminal charge. The parties may be relatives, neighbors, co-employees, or be involved in some other relationships. Types of charges that generally arise and are considered in this program are assault and battery, threats, malicious destruction of property, ***211** complaints about dogs or other animals, improper telephone calls, and petit larceny.
>
> Also included are certain domestic felonies and landlord and tenant disputes. Three metropolitan counties in our state now have operating pilot programs. Hopefully, this type of program will relieve the criminal justice system of certain minor offenses.

The concept of the Neighborhood Justice Center is commanding attention outside of legal circles. It is noteworthy that the School of Social Work of Bryn Mawr College has expressed interest in the development of a pilot program.

Opportunities for funding have arisen and, to take advantage of this interest and these opportunities, we recommend special action by the Board of Governors, consistent with our prior recommendations (Numbers 1-3, at pp. 1-2, 9-12).

In this connection, the funding mechanism used in connection with the Legal Clinic experimental program may serve as a model.

MAGISTRATES IN THE FEDERAL SYSTEM

Various proposals for wider and more effective utilization of Federal magistrates have been put forth in recent months. There are a wide range of matters, both civil and criminal, which might appropriately be left to a magistrate, rather than to a District Judge. In many, perhaps in all such instances, the decision of the magistrate would be final absent specific, timely objection by one of the parties to the litigation.

Chief Judge Harry Phillips of the Sixth Circuit, in a letter to Mr. Justice Rehnquist dated August 12, 1976, provides a rich range of examples. [1] Commenting to Judge Phillips on his proposal, ***212** Judge Bell suggested a Magistrates Division in the District Courts.

The Congress, by enacting P.L. 94-577 in the last days of its most recent session, has expanded the jurisdiction of the Magistrates. Further expansion of that jurisdiction, consistent always with Article III, and the creation of a Magistrates Division within the United States District Courts, is deserving of careful consideration. In the first instance, the subject is one appropriate for the Division on Judicial Administration. We note, however, that the Federal Judicial Center

is particularly suited to provide assistance in the development of specific legislative proposals and we recommend a coordinated effort between the Division on Judicial Administration and the Center.

DATA COLLECTION

In our earlier report, we pointed to the need for an appropriate office for the collection of data relevant to judicial administration and to dispute resolution generally. We urged that such an office be empowered to collect data, both state and federal, civil and criminal, and that it should be authorized "to undertake special studies relevant to the administration of justice." (See Recommendation Number 26, pp. 7-8, 44-45). That Recommendation was premised on the view that increased efforts should be devoted to the acquisition, analysis and dissemination of data about the courts and about dispute resolution generally. In part, these efforts would be concerned with making better use of data already collected. In part, they would involve research designed to generate information we do not have. We remain convinced of the importance of providing increased resources to achieve these ends.

***213** Our earlier report sought creation of a Federal office for this purpose. In that report we recognized the need for close cooperation with the National Center for State Courts, the Federal Judicial Center and other groups.

Our present recommendation is a modification of our prior proposal. We adhere to the basic idea that such an office be funded by the Congress. We do not, however, in our present recommendation attempt to specify whether a new office is necessary or desirable, nor whether it should be state or federal. We recognize the desirability of coordination between interested organizations with a view to developing a practicable program for presentation to the Congress.

Funding by the Congress, in our view, is the essential ingredient. It is essential if we are to meet the pressing need for adequate information necessary to evaluate and to improve our many judicial systems.

CONTINUED EXISTENCE OF THE FOLLOW-UP TASK FORCE

It is the view of the Task Force that with this report we have completed the assignment with which we were charged. We have not been asked to monitor, let alone to assure, implementation of the ideas presented at the Pound Conference. Ours has been a far more modest task, that of assuring that the ideas presented in St. Paul were referred to those organizations or agencies best able to evaluate and implement them. This is entirely appropriate, for the range of recommendations which have been generated as a result of the Pound Conference is too wide, and the significance of the proposals too far-reaching, for implementation to be left to this, or any similar Task Force. The concerns expressed in St. Paul and the specific recommendations generated will inevitably occupy an important place on the agenda of the ABA for some time to come.

Respectfully submitted,

Honorable Griffin B. Bell, Chairman

Honorable William H. Erickson

Jane L. Frank, Esquire

Francis R. Kirkham, Esquire

Honorable Wade H. McCree

Professor Maurice Rosenberg

Honorable Walter V. Schaefer

A. Leo Levin, Consultant

Wantland L. Sandel, Jr., Esquire,

Staff Liaison

November, 1976

[1] Judge Phillips' letter, in relevant part, reads as follows: "In your address at the ABA judiciary dinner in Atlanta on August 9, you used the appropriate term 'needle in a haystack' in describing judicial review of Social Security cases. You emphasized how unfortunate it is that judges possessing the qualifications traditionally expected for the federal bench are required by statute to examine Social Security records and determine whether the decisions of the Secretary of Health, Education and Welfare are supported by substantial evidence. "As of July 31, 1976, there were 1,558 black lung cases and 280 Social Security cases pending in the Eastern District of Kentucky. A total of 724 black lung cases and 184 Social Security cases were filed in that District during the twelve month period ending June 30, 1976. This District also has a heavy criminal caseload and a substantial backlog of civil cases in addition to black lung and Social Security appeals. It has only three District Judges. (A fourth would be provided in the omnibus bill now pending before the House Judiciary Committee.) "The number of Social Security cases now pending in this District would be much larger except for the fact that other district and circuit judges in our Circuit have agreed to serve by designation for the purpose of disposing of many of the Eastern Kentucky Social Security cases, all of which are submitted on cross-motions for summary judgment. "These cases usually involve nothing more than issues of fact. In examining the record on appeal, the District Judges (and the Court of Appeals on review) serve in a capacity comparable to that of an appellate commission in state workmen's compensation cases. "At the Roscoe Pound Revisited Conference in St. Paul on April 9, 1976, Solicitor General Bork proposed that final decisions in such cases involving purely factual issues should be made by some tribunal other than Article III courts, with no judicial review as a matter of right. My information is that the Department of Justice is studying this problem. It is to be hoped that the Department will make appropriate recommendations and that Congress will enact legislation relieving Article III judges of jurisdiction in these 'needle in a haystack' types of litigation."

74 F.R.D. 159