

Conversations With...

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Washington Legal Foundation
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The Honorable Dick Thornburgh Bernie Marcus Hank Greenberg Steve Hantler

The Issue: Civil Justice Reform

In this edition of Washington Legal Foundation's CONVERSATIONS WITH, three business leaders speak out about the impact of litigation on America's entrepreneurial spirit, consumers, and our communities. Former Attorney General Dick Thornburgh leads a lively discussion with co-founder and former Chairman of The Home Depot, Bernard Marcus; Chairman and Chief Executive Officer of American International Group, Hank Greenberg; and DaimlerChrysler Assistant General Counsel, Steve Hantler. In addition to examining the successes and failures of efforts to reform America's civil justice system, the participants urge other CEOs and corporate counsels, as well as businesses' employees and shareholders, to become more involved in an issue that deeply affects their productivity and pocketbooks.

Governor Thornburgh: Let me start by asking each of you — why you are involved in legal reform? Why does it matter to you as a business leader?

Bernie Marcus: Although I retired from The Home Depot, I remain concerned about how the civil justice system is having a very negative impact on the economy. I am especially concerned about the effect on entrepre-

neurs. It would have been so much more difficult to start The Home Depot if the legal climate then was as unfair and abusive as it is now. I'm proud that The Home Depot employs more than 300,000 people and contributes greatly to the local economies of thousands of communities. But I shudder to think how many tens of thousands of new jobs have been lost because would-be entrepreneurs are being discouraged from starting or expanding their companies because they are worried about losing their shirts in a civil justice system that has become a "litigation lottery" in too many jurisdictions in this country.

Hank Greenberg: Bernie is right. Trial lawyers have convinced the public that we live in a risk-free society. Their philosophy is that if you trip, become ill, lose money in a speculative investment, or gain weight — somebody else must pay. But in reality, awards and settlements in frivolous and unwarranted lawsuits are eventually paid for by consumers who wind up paying higher costs for products and services when business is forced to include the cost of litigation in its prices. Consumers may not realize that they are bearing the brunt of the high costs of "lawsuit abuse." Consumers also may not realize the impact of litigation on our



Dick Thornburgh
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Hank Greenberg
American International Group



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economy. America's tort system takes away about 2 percent of our Gross Domestic Product from productive investment. The total could rise to as much as \$300 billion by 2005. This is \$300 billion that can't be used to fund new product development or business expansion. As a result, legal reform should be a high priority for every consumer, business leader, employee, and investor.

Steve Hantler: I'm involved in legal reform not only because of the threats to our free enterprise system that Bernie and Hank identified, but also because of the negative effect our out-of-control civil justice system has on our culture. That our culture has changed for the worse is undeniable. Neighbors have an argument. Years ago, they would have worked it out over the backyard fence. What do they do now? The New American Way — they sue. Someone likes McDonald's food too much. What do they do? They sue. Parents are upset over an umpire's call. What do they do? They sue. Litigation has not only become our society's principal drama, much like westerns once were, it has become our new national pastime with a new lawsuit being filed every 1.9 seconds.

Governor Thornburgh: Steve, can "tort reform" or "legal reform" be clearly defined?

Mr. Hantler: Legal reform is restoring predictability and fairness to our civil justice system without restricting access to our courts for legitimate lawsuits. Put another way, legal reform is about striking the right balance between the needs of consumers and business.

This requires more than just legislation that removes the perverse incentives for over-claiming and frivolous and unwarranted lawsuits. The biggest pitfall I have seen in the legal reform battle with "Trial Lawyers, Inc." is relying solely on legislative strategies. This is a prescription for failure. As important, if not more, is the selection of judges who interpret the law and leave law-making to legislative bodies. Too many tort reform statutes have fallen victim to the trial bar's "judicial nullification" project and activist judges who ignore

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Bernie Marcus

the will of their legislatures. And, fundamentally, legal reform requires public awareness that we have a legal crisis and that the crisis hurts consumers in the pocketbook, reduces their medical care, drives good jobs overseas, and increases their property taxes, among other things. Armed with this awareness, the public will insist that their government officials fix the broken legal system.

Governor Thornburgh: I've heard that term "lawsuit abuse" used quite a

bit. Steve, can you define it? And what do you mean by Trial Lawyers, Inc.?

Mr. Hantler: Lawsuit abuse takes place when plaintiffs' lawyers and their clients use the legal system to strike it rich rather than to seek justice and fair compensation. Our civil justice system has become a "litigation lottery" in too many jurisdictions, especially those that the American Tort Reform Association calls "Judicial Hellholes." These are jurisdictions, one leading plaintiffs' lawyer has said: "[W]here the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges who are elected ... and it's almost impossible to get a fair trial if you're a defendant in some of these places. ... The cases are not won in the courtroom. They're won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or the law is."

No wonder the trial lawyer industry rakes in \$39 billion annually in fees, according to The Manhattan Institute. This is more than the annual revenues of Pfizer, Microsoft and Intel, and double those of Coca-Cola and Cisco Systems. This and other data about the trial bar—dubbed "Trial Lawyers, Inc."—by The Manhattan Institute appears in Manhattan's annual report appropriately named *Trial Lawyers, Inc.* This report reveals that, when viewed closely, the trial bar looks less like tender shepherd boys with slingshots and more like a band of Goliaths with flame throwers.

Governor Thornburgh: Bernie, how do you rate the success of the legal

reform movement over the last five years? What has worked? What has not?

Mr. Marcus: We've made a lot of progress in restoring predictability and fairness in several states, from Alabama, to Texas, to Michigan where there has been strong CEO leadership for reform. We've also seen some positive changes in Louisiana, Mississippi and Ohio, but more still has to be done there. In other states, especially those with "magic jurisdictions" or "Judicial Hellholes," depending upon your perspective, we've gone backwards. On the federal level, the trial bar has been able to put roadblocks in the way of class action and asbestos reform legislation. As you know, without 60 votes for cloture in the Senate, there will be no federal reform legislation.

What does all this add up to? In states where CEOs have shown decisive leadership and involvement in the political and legislative processes, meaningful legal reform has been achieved. To win in more states, we need more CEOs to bring their organizational and fundraising leadership to legal reform.

Governor Thornburgh: The public seems to understand that there is too much litigation, and that plaintiffs' lawyers can often do more harm than good. Why hasn't that understanding translated into a clearer mandate for politicians and judges to change the system?

Mr. Greenberg: Legal reform is just not a "top of mind" issue for the public, but it should be. Business must do a better job of making the case for reform to the public. And, we have a

very strong case. After all, over-claiming and unwarranted litigation awards translate directly into higher prices for consumers, reduced medical care for patients, fewer jobs for employees, and lower investment returns for every one of us. Also, when cities remove diving boards from swimming pools because of liability risks, this hurts community residents. When local schools cut back on sports programs because of the risk of lawsuits against the schools and coaches, this hurts the public too. I firmly believe that once the

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public understands that they have perhaps the biggest stake in our broken tort system, they will demand that elected and appointed officials fix the system.

Mr. Marcus: Let's not forget the harm to philanthropy. It's easy to see business and charity as two separate spheres and forget that abuses of the legal system have a negative impact on both. The first thing to remember is that charities, non-profits, and foundations

are every bit as much in the legal crosshairs as businesses. As a result, volunteers for non-profits are harder to recruit because of their fear of being sued. It can be difficult to get people to serve on boards because they fear, with reason, that they might get dragged into a lawsuit. Remember, we're living in an era when Little League umpires are sued by parents for calling junior "out" at home plate. It all adds up to a soaring liability problem that, for many organizations, has been ruinous. Without a doubt, skyrocketing litigation-related costs have come at the expense of programs that should be helping needy and needful Americans.

Mr. Hantler: Hank and Bernie are right — Trial Lawyers, Inc. has been winning the battle for the hearts and minds of the public. Make no mistake: This is a well-orchestrated public relations campaign by the trial bar and its surrogates. In an interview in May 1999, one lawyer talked to *The New Yorker* about the strategy meeting of the Castano Group, a band of trial lawyers who led the assaults against the gun and tobacco industries. He said, "A lot of what we discussed was how to talk about the [issue] to the general public."

Governor Thornburgh: Bernie, what do you think of that? Have those with the most at stake in the legal reform debate done a good job of explaining the problem to the public? What is missing from the reform message?

Mr. Marcus: First, I agree with Hank that the public may have the most at stake here. But, in any event, business has largely chosen to let the trial lawyers frame this as a contest between big business and the little guy. Trial

Lawyers, Inc. has learned how to take its case to the court of public opinion through the electronic media to portray business as greedy and corrupt so the public will sympathize with the alleged victims. CEOs need to recognize, as Steve pointed out, that the trial lawyers have created a coordinated, well funded and highly focused campaign to trash our motives, our integrity and our products. Business has to seize the opportunity to connect the dots and show the public how trial lawyer abuses are really selling out their families' futures to pay for private jets and baseball franchises. What are we waiting for?

Governor Thornburgh: Many Americans believe that liability litigation is an important check on "corporate greed." Some also feel that lawsuits properly fill gaps where elected officials and legislators fail to protect consumers. Right?

Mr. Greenberg: On your first point, I will agree that the trial bar has succeeded in demonizing corporations and profits in the minds of many. While it is true that there are a handful of bad actors out there, the trial bar has, with a broad brush, painted all corporations as greedy. Successful companies are slammed for succeeding. The fact is that profits are the lifeblood of our economy. We need healthy, competitive companies to create good paying jobs, fund employee retirement plans, and to give back to the communities in which they operate through civic and charitable projects. Business needs to counteract the trial bar's false messages.

On your second point, I have to believe that most Americans want public policy decided by their elected state and

federal legislators and not by Trial Lawyers, Inc. Making national policy in a handful of state courtrooms around the country subverts the legislative process, not to mention the separation of powers among the three branches of government.

Governor Thornburgh: But Steve, doesn't litigation—or the threat of litigation—protect people by making products safer?

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Mr. Hantler: That's one of the 7 Myths of Highly Effective Plaintiffs' Lawyers. Let's look at this in the context of punitive damages. Kip Viscusi of Harvard Law analyzed the extent to which punitive damages work to deter risky behavior in states that allow punitive damages, as well as in states that do not. We would expect states that allow punitive damages to exhibit safer risk performance than the states without punitives. Viscusi's conclusion? States with punitive damages had no safer risk

performance than states without punitives. The reason? Juries award punitive damages in such an arbitrary manner that there is simply no deterrent effect.

Assuming that punitive damages once had a deterrent effect, it has been eroded by the arbitrariness of awards, especially against companies that have invested heavily in safety yet were still hammered with unwarranted punitive damages.

Governor Thornburgh: Another one for you, Hank — Plaintiffs' lawyers have sold the idea that it is okay to hammer a business because, in the end, an insurance company will foot the bill. How has this perception hurt the insurance industry?

Mr. Greenberg: Trial lawyers have always prospered by spreading the idea that someone else will pay. The truth is, we all pay because higher insurance premiums must be passed along by insurance companies to their customers, who, in turn, are forced to raise prices for consumers. For example, there has been a slew of baseless asbestos litigation cases against companies that had little or nothing to do with asbestos. These costs radiated throughout the entire economy and contributed to a slowdown in the economy at a time when the country was struggling to get back on its feet.

Governor Thornburgh: Let's stay with this theme — the impact of litigation on businesses. Bernie, I'm sure Home Depot has been the target of untold numbers of lawsuits. How did lawsuits—and the threat of lawsuits—factor into your every day business?

Did it change the way you ran the company?

Mr. Marcus: When we started out in the 1970s, the legal system was far more rational than it is today. By the time I retired, lawsuits had become the wild card for all in business. An unpredictable tort system casts a shadow over every plan and investment. It is devastating for start-ups. The cost of even one ill-timed abusive lawsuit can bankrupt a growing company and cost hundreds or thousands of jobs. CEOs and their boards are forced to lower their aspirations and hold back on innovations to manage defensively. This is holding our nation back from competing effectively in the global marketplace and offshore competition is seriously cutting into market share for U.S. companies.

Governor Thornburgh: Are proponents of civil justice reform getting the message out to employees, shareholders and pensioners that lawsuits affect their jobs, investments and pensions?

Mr. Greenberg: Business has a big opportunity to communicate with its key stakeholders about the need for legal reform. These stakeholders get a steady diet of distortions from Trial Lawyers, Inc. through the media, but not enough companies are using their communications channels to educate those with the greatest interest in knowing our side of the story.

For example, few companies have communicated with their stakeholders about the damage that asbestos lawsuits have done to the country. So far, the asbestos morass has taxed the economy with \$54 billion in litigation costs, even

though 90% of the claimants have shown little or no evidence of illness or injury. Some 70 companies have gone bankrupt. Some 60,000 jobs—many of them good, high-paying jobs—have been lost. One reason why the trial lawyers have been able to win public support for their lawsuits is that most companies did so little to communicate all the facts to their stakeholders.

Governor Thornburgh: Bernie, what do you think about that?

Mr. Marcus: Hank is right. Employees have a lot at stake in the way

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the legal system operates, especially with the attack on share value by the trial bar. Take The Home Depot. We never had a pension plan. Our employees' retirement is based on stock ownership, as with so many other companies. Since we've been so successful, we have many retirees who have comfortably retired — and I'm proud of that. But can a new company build that kind of faith in the future given the current predatory legal environment? That worries me.

Governor Thornburgh: You've talked a lot about consumers. What about the impact of medical malpractice?

Mr. Hantler: More than half of all medical malpractice awards now exceed \$1 million. The country's largest malpractice insurer, the St. Paul Companies, recently left the business entirely. More doctors are dropping their practices because of lawsuit-related costs. Obstetricians and neurosurgeons are severely limiting their practices, and leaving some states altogether — forcing many patients to travel hours for care. Hospitals are shutting down, some AIDS vaccines have not been developed — all out of fear of lawsuits. Patients and insurers are stuck with as much as \$108 billion a year in unnecessary health-care costs brought on by the aggressive tactics of trial lawyers trying to take advantage of the so-called 'deep pockets' of insurance companies.

Governor Thornburgh: I'd like to go back to my earlier question about the impact of litigation on Americans who own stock. One of the plaintiffs' lawyers' favorite tactics is to jawbone the media, securities analysts, and short-sellers about the impact a lawsuit will have on a company's stock. This, of course, gives them leverage to coerce a large settlement. Steve, should the SEC regulate this activity?

Mr. Hantler: At the very least, they should look into it. The HMO sector a few years ago lost \$12 billion in share value in a single day as a result of a trial lawyer's meetings with key HMO analysts. The Washington Legal Foundation has filed a formal Petition for Rulemaking before the SEC asking

it to promulgate a regulation that would require trial lawyers to disclose their contacts about pending class action lawsuits against public companies. We need to lift this rock and see how much of this is going on and how companies and individual investors have been harmed.

Governor Thornburgh: Bernie, would you agree that plaintiffs' lawyers operate by a different set of rules today?

Mr. Marcus: Lawsuits have become a form of high-stakes arbitrage. Now every lawsuit can be a bet-your-company proposition. The trial bar has demonstrated that its primary concern is maximizing the size of its fees and that it has little or no regard for the retirees, employees, or small investors who depend on their respective companies for their savings and retirement incomes. It is ironic that sometimes trial firms sue companies on behalf of plaintiffs who don't even know they are parties to the suits and certainly don't realize that the attack on the company's share value and brand will cost them more in reduced retirement income than they will recover from the lawsuit. When I started out, a million-dollar damage award was exceptional. Now, many companies feel lucky to escape with a million-dollar award. Awards are now in the billions. Billions!

Governor Thornburgh: Steve, what are your thoughts about the need for a more effective defense strategy?

Mr. Hantler: Business needs to be more aggressive and not be shy about standing up to abusive tactics. For example, we took two certified class

actions to trial and won both of them. While in the short term, it may have been cheaper to settle, we decided to draw a line in the sand when it comes to frivolous cases. We also drew a line in the sand on two other cases. In Missouri, my company stood up to two lawyers who used to defend DaimlerChrysler in class actions, and then decided to sue us with the benefit of confidential information and documents. We sued the two lawyers and won an \$850,000 judgment. And, the Missouri Supreme Court suspended their license to practice law. In Texas, a judge dismissed a \$2 billion product

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liability lawsuit against my company, and hit three San Antonio lawyers with a \$920,000 fine for participating in a scheme that involved witness and evidence tampering. You can fight back.

Governor Thornburgh: What about outside the courtroom. What is your approach to so-called “litigation communications?” Have corporate counsels come around to this?

Mr. Hantler: We've got a long way to go. A 1998 survey found that 62 percent of Americans believe that a corporation's “no comment” about a lawsuit means that company is covering up a wrongdoing. As I have written in *Litigation Management Magazine*, 48% of Americans are less likely to buy a company's product when that company is accused of wrongdoing in a lawsuit. The charges don't have to be true, the accusation is enough. The “no comment” approach is clearly not risk-free. More and more companies are developing litigation communications programs to combat those of the trial bar. We need to manage issues, not just lawsuits.

Governor Thornburgh: If you look at litigation—especially class actions—as a big business, how would you rate plaintiffs' lawyers as entrepreneurs?

Mr. Marcus: They're not only bigger than companies such as Coca-Cola, as Steve says, they shrewdly reinvest their earnings in their business by helping to elect judges, legislators, governors, and by supporting “consumer activists” who push their agenda. So I would rate them as very creative and aggressive. While the trial bar is playing world-class chess, business approaches this problem like we are only playing a simple game of checkers.

Mr. Greenberg: Look at the McDonald's lawsuits. People are suing others for making them fat. We used to joke about this. Now it is happening. The trial lawyers are organized and have built up a war chest that allows them to conduct R&D to uncover the next area they will attack. Trial Lawyers, Inc. is gaining success in developing novel

causes of action, such as lifelong medical monitoring for people who may have been exposed to what amounts to background levels of allegedly harmful substances. By background levels, I mean the levels of those substances that exist in nature. This could be the next asbestos-type company-killer.

Governor Thornburgh: What about judges? How much of a role can judges play?

Mr. Greenberg: Judges are central players. Judges who do not feel particularly bound by the “rule of law” are one of the reasons why our tort system is out of kilter. And, conversely, the judges who stand up for the rule of law are key drivers to restoring predictability and fairness to our tort system. Also, judges can better manage the discovery process so it is a tool for discovery rather than a weapon to force unreasonable settlements. Judges can apply the science-based *Daubert* standards mandated by the Supreme Court with fidelity. They can be more discerning in certifying class actions, because once a class-action lawsuit is certified, a settlement will almost always be forced. They can take a sharp look, as some judges have, at who comprises the class beyond the lead plaintiff. And, public attention needs to be focused on judges who believe their role is to legislate from the bench.

Governor Thornburgh: We’ve discussed encouraging reform-minded judges and legislators. What else needs to change to bring about reform?

Mr. Greenberg: I want to expand on something Bernie said earlier. We need

to change our culture where coaches and umpires for kids’ baseball and soccer teams have to worry that their next decision might get them a lawsuit from an angry parent. Fewer people will volunteer for community organizations and non-profit boards when they feel vulnerable to frivolous lawsuits against their organizations. The tidal wave of lawsuits is overwhelming our spirit of community involvement and entrepreneurship. Americans need to appreciate that only profitable companies can create jobs and give benefits to their community. We must show Americans that frivolous lawsuits kill the golden goose.

Mr. Marcus: We need to hold states accountable for their legal climates. Tom Donohue and the U.S. Chamber of Commerce have rendered a great service by rating states from best to worst. Companies that operate internationally do the same thing, on a country-by-country basis — how adequate is that country’s legal system, how do they treat foreign investment, how transparent is their regulatory system? Doing this for the states creates a measure by which we can ask a state: Why, as Hank has suggested in another article, would an institutional investor buy your municipal bonds? Why would I locate a facility in a state that is a legal swamp?

Mr. Hantler: We need to demonstrate to consumers the extent to which abusive lawsuits fail to serve plaintiffs. The Washington Legal Foundation and Larry Schonbrun have separately helped to highlight this issue by challenging class-action lawsuits that give lawyers millions, but plaintiffs

nothing. When a business is hit with a frivolous case, they need to litigate — and recover damages.

Governor Thornburgh: Hank, Bernie, you have been more active than many of your fellow corporate chief executives on legal reform. How can your colleagues join you in taking the lead on this issue?

Mr. Greenberg: We have to demand results from the legal reform organizations we support and the staff who are assigned to work with them. Too often, business confuses activity with results. We shouldn’t count the number of calls made to Senators’ offices as results. The result is, did the Senator vote for or against cloture? That’s a result. Did we get the bill? That’s a result. We need to run these efforts like we run our businesses — by demanding results.

Mr. Marcus: An important step is to take the time to learn about what legal reform efforts have worked, particularly at the state level, and why. There is no point in simply repeating mistakes from the past failed efforts. We know how to win reform and we should be investing wisely in efforts that will succeed. Another key step is to make sure the legal reform groups are plugged into collaborative efforts with groups in other states and at the national level. Make sure the groups in which you invest have a coherent plan based on proven techniques, and are not just spending a lot of money in a lot of different directions.

For too long, the business community has been going off in many different directions without a clear focus.

Too many companies have sat on the sidelines, leading many people to believe that business shouldn't get involved in the issues because we have something to hide. We're on the right side on this issue. We occupy the high ground. It is time we acted like it.

Governor Thornburgh: One last question. Based on the current trends in the legal environment, how do you see this struggle between what you call Trial Lawyers Inc. and business over the next five years?

Mr. Greenberg: One thing is certain: The trial bar is going to be more aggressive than ever, both in the court room and in the court of public opinion. They are well funded, very well coordinated and, let's face it, they are winning billions of dollars in fees. They are going to exploit the hesitancy of the business community to every advantage and they won't stop pushing on their own accord.

Mr. Marcus: The big question is whether more CEOs are going to get involved and bring with them their leadership, organizational skills and fundraising capabilities. With nearly ten years of experience behind us, we know how to win legal reform. But there aren't enough companies and CEOs involved right now in the fight to cover all the states where we need to win.

Mr. Hantler: At this point, there is clear evidence that almost every company is paying very significant amounts because of the abuses of the trial bar. CEOs who look closely at their own numbers will see that it will be very expensive to sit out this fight. We're banking on the idea that when

CEOs truly study the total costs they'll be paying in the next five years—litigation, settlements and awards, share value dilution, damage to company and product image, substantially higher insurance costs, staff disruption, and so on—they will decide to get involved now to help win this fight. If all of these numbers were kept in one place instead of in five or more different departments, it would be a shockingly large number.

Bottom line — Trial Lawyers, Inc. presents a high level threat that must be met with a high level response.

Washington Legal Foundation's (WLF) seventh and newest publication format, CONVERSATIONS WITH, provides an occasional forum for leading experts from business, government, academia, and the legal profession to discuss current legal policy issues. In spontaneous and informal question-and-answer conversations, our participants give frank thoughts on a wide range of important contemporary subjects.

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Biographies

The **Honorable Dick Thornburgh** is a former Attorney General of the

United States, Governor of Pennsylvania, and Under-Secretary-General of the United Nations. He is currently Of Counsel to the law firm *Kirkpatrick & Lockhart LLP*, and Chairman of Washington Legal Foundation's Legal Policy Advisory Board.

Maurice ("Hank") Greenberg is the Chairman and CEO of American International Group (AIG), the world's leading international insurance and financial services organization. He has been AIG's Chief Executive Officer since 1967 and its Chairman since 1989. Mr. Greenberg is widely quoted on the U.S. civil justice system and the need for common sense legal reforms.

Bernard Marcus is co-founder of The Home Depot, Inc., the world's largest home improvement retailer. His company revolutionized the home improvement business with its warehouse concept. He served as Chairman of the Board until his retirement on May 31, 2002. He remains Director Emeritus. Mr. Marcus has written and spoken extensively on the topic of legal reform.

Steven Hantler is the Assistant General Counsel for Government and Regulation of DaimlerChrysler Corporation. He is one of the nation's leading experts on legal reform and has contributed to legal reform initiatives in many states and at the federal level. Mr. Hantler is widely quoted in business magazines and newspapers, as well as on television and radio, about the U.S. civil justice system.