State–Federal Judicial Observer

NEWS AND COMMENTARY OF INTEREST TO THE STATE AND FEDERAL JUDICIARY

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State and Federal Judges Unite for Education Programs

by James G. Apple

An increasing number of judicial education programs are serving both the state and federal judiciaries.

While a decade ago such programs were virtually nonexistent, providers of judicial education programs are increasingly opening their programs to both state and federal judges, and state and federal judges are themselves planning and conducting education programs.

Examples of such programs, details of which are given below, include the following seminars and conferences:

• a videoseminar on "New Developments in the Federal Law of Habeas Corpus" at the American Law Institute–American Bar Association (ALI-ABA) headquarters in Washington, D.C.;

• a seminar for experienced appellate judges at New York University Law School (held annually);

• a seminar for new appellate judges at New York University Law School (held annually);

• a seminar on science at Duke University (held annually);

• a three-day seminar on habeas corpus and other issues being planned by the State–Federal Judicial Council of Florida (for December 1997);

• seminars held in 1993 in California on judges' roles in settlement of cases;

• two symposia in 1994 on handling capital cases sponsored by the California State–Federal Judicial Council;

• a national appellate judges conference in Washington, D.C., in March of this year;

• a tri-state seminar involving both trial and appellate judges from Vermont, New Hampshire, and Maine;

• the Harold R. Medina Seminar on Science and the Humanities at Princeton University (held annually); and

• a Federal Judicial Center program on science for appellate and trial judges, planned for October 1996, at the Banbury Center of Cold Spring Harbor Laboratory (in Huntington, N.Y., on Long Island).

The following factors have increased the need for judges to join together for educational experiences:

• a decrease in the amount of funds available for judicial education generally and a recognition of the need for maximum use of scarce judicial resources;

• a realization by both state and federal judges of the commonalty of judicial experience that exists between them and the resulting virtue in meeting to learn together;

• a desire among judges from both systems to discuss issues of common interest and concern and share experiences;

• a desire to explore areas of conflict, and resolution of those conflicts;

• a heightened sensibility among judges to issues of judicial federalism; and

• a desire to develop collegiality among judges from another system.

Details of these seminars and conferences are as follows:

Videoseminar on Habeas Corpus—The Federal Judicial Center and the American Law Institute–American Bar Association (ALI-ABA) network will conduct a national videoseminar in September 1996 on new developments in the federal law of habeas corpus, specifically focusing on the provisions of Title I of the Antiterrorism and Effective Death Penalty Act, passed by the Congress in the spring of this year. The day-long seminar, open to both state and federal judges, will feature academic and legal experts who will make presentations and comment on federal habeas corpus. The seminar will include an overview of the new law and discussions on retroactivity, constitutional issues, the impact of the new law on federalism, and the issue of survival of preexisting judicial standards. The final session will be a question-and-answer period for the participants. Details of the program can be obtained from the ALI-ABA, 4025 Chestnut St., Philadelphia, PA 19104-3099, phone (800) 253-6397, or from the Judicial Education Division, Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20002, phone (202) 273-4052.

The Appellate Judges' Seminars at New York University—For the past 40 years New York University Law School has been the site for summer seminars for state and federal appellate judges. The Institute of Judicial Administration, affiliated with the law school and present sponsor of the seminars, now presents one for new judges and one for advanced or experienced judges. Each seminar is one week long and is held during either June or July, and includes both state and federal judges on the faculty and as participants. Each seminar is limited to 40 judges.

This year's seminar for experienced appellate judges was held June 15–21. Subjects covered included the following: a review of the most recent Supreme Court term, constitutional interpretation, problems of federalism, measurement of non-economic and punitive damages, problems in appellate review, statutory interpretation, criminal procedure, law and religion, law and medicine, and the impact of the legal system on competitiveness.

Presentations at the new appellate judges seminar, conducted from July 15–21, focused on oral argument, conferencing and collegiality, styles of judicial reasoning, the process of decision making, opinion writing, problems of appellate review and appellate administration, and the craft of judging.

Additional information about both seminars can be obtained by writing or calling Ms. Jeannie Forrest, Institute of Judicial Administration, Room B-14, New York University School of Law, 40 Washington Square South, New York, NY 10012, phone (212) 998-6149.

National Appellate Judges Conference—State and federal judges of the Appellate Judges Conference of the American Bar Association joined to plan and present a three-day conference for state and federal appellate judges from across the nation in March in Washington, D.C., titled "The Community of Courts: The Compleat Appellate Judge." The Federal Judicial Center also provided funds for the program. The conference agenda included presentations on relationships between state and federal courts and among the three branches of government, judicial collegiality, and the judiciary's relationship with the public. For complete details of the conference, see the January 1996 issue of the *State–Federal Judicial Observer,* no. 11, p. 1.

Duke University Science Seminar—For

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First Tennessee Federal Judicial Conference Held

Tennessee state and federal judges met in Nashville on May 2–3, 1996, for the first Federal Judicial Conference in the state. The event was created and sponsored by the Tennessee Bar Association and included 32 federal judges and 24 state judges.

Federal judges were asked to invite one state judge, one lawyer in the state 36 years of age or younger, and two other lawyers.

Over 225 judges and lawyers attended.

The conference focused not only on the problems challenging the federal judiciary, but also those facing state judges.

Chief Judge Gilbert S. Merritt (U.S. 6th Cir.) gave the opening address of the meeting—he reviewed the growing caseloads in both trial and appellate federal courts and the increasing technical nature of trials.

John Seigenthaler, chair of the Tennessee Supreme Court Commission on the Future of the Tennessee Judicial System and former editor of Nashville's daily newspaper, in a luncheon speech to the conference said that Tennessee citizens are dissatisfied with the present legal system in the state because it is "archaic, slow, expensive, and presided over by unresponsive lawyers and judges." He reported on suggestions to improve the system.

The one and a one-half day conference featured panels on "The Art of Judg-

See TENNESSEE, page 4

Rep. Hyde Urges More Judicial Contact with Legislators, More State–Federal Cooperation

Representative Henry J. Hyde (Ill.), chair of the Judiciary Committee of the U.S. House of Representatives, in an address to members of the Judicial Conference Committee on Federal-State Jurisdiction at its semi-annual meeting in Washington, D.C., on June 20, 1996, urged judges to communicate more with members of Congress.

He said he "welcomed the contributions" federal and state judges make to the work of his committee.

"I don't resent communications from judges," he said. "I find them very useful."

"Members of Congress and judges have shared objectives," he continued, "to uphold the law, improve the administration of justice, and safeguard the precious liberties of our citizens. The special expertise judges bring to issues involving court operations can be invaluable to Congress and state legislatures."

Congressman Hyde noted the common interest of his committee and the judiciary committee "in promoting the independence, integrity, and efficiency of the judiciary—at both the federal and state levels."

"We need to be familiar with the challenges that judges face," he concluded, so that judges are able "to decide increasing cases fairly and expeditiously."

To foster better communications between the legislative and judicial branches, the congressman recommended that all members of Congress visit their local courthouses on a regular basis.

He also emphasized the need for cooperation between the federal government and state governments in matters of common concern. "We confront enough difficulties when the federal government and the states act together; working at cross purposes is unacceptable," he said. Some of the problems Congress and citizens face "simply are too pervasive and threatening for either the federal government or the states, acting alone, to solve."

Rep. Henry J. Hyde (Ill.)

In stressing the need for coordination "to avoid squandering our people's limited resources," he singled out criminal activity as an area where the federal government and the states need to cooperate.

"Efforts to make this a safer society involve overlapping state and federal roles. The national government, in cooperation with the states, must do its share while remaining sensitive to the potential impacts changes in federal law have on judicial workloads."

He added, however, that while the "potential burden on the federal judiciary is an important factor in our deliberations, it is not the only factor."

In other business, committee chair Judge Stephen A. Anderson (U.S. 10th Cir.) presented Judge Roger Warren, the new president of the National Center for State Courts, with a framed copy of a resolution passed by the Judicial Conference of the United States honoring the National Center for State Courts on the 25th anniversary of its founding.

The resolution noted the National Center's "unfailing commitment to improve judicial federalism by strengthening communication, cooperation, and coordination between state and federal courts."

The committee also reviewed proposed legislation affecting state and federal courts, including *inter alia*, prisoner litigation, habeas corpus, parental rights, the confidentiality of medical records, and government takings of private property.

The committee is composed of 10 federal judges and three state chief justices. Dean Thomas M. Mengler of the University of Illinois College of Law serves as academic consultant to the committee. ❑

Inside . . .

Arizona State-Federal Council Creates Death Penalty Law Clerks

The Arizona State–Federal Judicial Council has initiated a Capital Litigation Law Clerk Project that resulted in the employment of three law clerks in the superior courts of Arizona to assist trial court judges in the handling of capital cases at all stages of litigation.

The project is being funded jointly by the Arizona Supreme Court and the State Justice Institute and was inspired by the experience of the former chief judge of the U.S. Ninth Circuit, Judge J. Clifford Wallace, with federal death penalty law clerks.

The Arizona law clerks publish a capital litigation reporter, which includes a review of important decisions by the Arizona courts and those of the U.S. Ninth Circuit relating to handling capital cases, changes in procedural rules in those courts relating to capital cases, and statistics and information about capital cases generally.

Two of the capital litigation law clerks are located in the Superior Court of Maricopa County in Phoenix, and one law clerk is located in the Superior Court of Pima County in Tucson.

The U.S. District Court for the District of Arizona also has an Office of Death Penalty Law Clerks.

Further information about the law clerk program can be obtained from the project manager for northern Arizona, Sarah Shew, Superior Court of Maricopa County, 101 W. Jefferson, Phoenix, AZ 85003, phone (602) 506-7877, or from the project manager in southern Arizona, Paula Nailon, Superior Court of Pima County, 110 W. Congress, Tucson, AZ 85701, phone (520) 740-8782. ❑

"Judicial Insanity" by Judge Steve Rushing

"Judicial College 101"

(Judge Rushing (Fla. 6th Jud. Cir.), from Clearwater, Fla., is the author of a book of cartoons, *Legal Insanity*. For further information about this book, call 1-800-LAW-LAFF.)

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A note to our readers

The *State–Federal Judicial Observer* welcomes comments on articles appearing in it and ideas for topics for future issues. The *Observer* will consider for publication short articles and manuscripts on subjects of interest to state and federal judges. Letters, comments, and articles should be submitted to Interjudicial Affairs Office, Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20002-8003.

OBITER DICTUM

U.S. Justice Department Supports Strong State Court System and Principled Judicial Federalism

by Janet Reno,
Attorney General of the United States

(The following article was adapted from remarks by the Attorney General at the Conference on the Future of the Judiciary in March 1996, at Williamsburg, Va., celebrating the 25th anniversary of the founding of the National Center for State Courts)

State and local courts are where most Americans experience the justice system. That's where most of our legal disputes are resolved and where most of our law is made. There are some issues and problems sufficiently national in scope or importance that are best addressed by nationally uniform solutions. As Americans have become more mobile, some links must be forged across the nation. Experimentation being so necessary to the development of common sense solutions, it is often best done in the state court system rather than at the federal level. It is so important that the splendid differences in the traditions and backgrounds of our states continue to be reflected in the judicial systems.

I have a greater appreciation now, having been to most of the states, for states' traditions and differences, which are among the factors that make our nation great. Thus, we must work together to preserve our federalist system in every way that we possibly can, and I try to make sure that the Justice Department pursues a policy consistent with the principles of federalism. I address such matters at my quarterly meetings with representatives of the Conference of Chief Justices and at meetings with the Executive Committee of the Judicial Conference of the United States.

Let us take one situation as an example of how federal and state governments can work together. Violent crime is one of the greatest problems our society faces. It is basically a state and local law enforcement problem and as a rule cases involving violent crime should be prosecuted in state courts. But there must be partnerships between state and federal judicial systems that enable us to share resources, intelligence, and expertise so that the very best job is done in each individual case, regardless of the court in which it is prosecuted.

The Department's policy about whether to prosecute cases in federal court or refer them to state court emphasizes three main principles. First, federal, state, and local authorities should work together to determine where the case should be handled, based on what is best for the community and what is best for the case. Mere protection of turf has no place in that decision-making process. But we will have to work together to address those situations in which the rules of evidence in one system, or the discovery procedures in one system, or the sentences in one system, seem to dictate the forum in which the case will be filed. We now have certain states where the police will regularly bring certain cases to federal court because of an evidentiary rule in the state. That should not, I think, be a factor if we are to adhere to principles of federalism. This is one of the issues that I would like to discuss on a continuing basis.

Second, federal, state, and local authorities must cooperate in sharing information and in cross-designating prosecutors to promote the most efficient use of our limited criminal justice resources. This is federalism in action.

Third, we should not let the fine line of federalism get blurred because one part of the system has more resources than the other. I worry that many cases may be brought in the federal system because we have an opportunity to make sure that the sentences that are imposed are actually carried out because we have adequate cell space. That's not going to be true for much longer, and I think the better way to do it is to make sure that there is an appropriate distribution of prison space so that cases will be filed consistent with principles of federalism, and not based on who's got the space to house the prisoners. Blurring the fine line of federalism can, I think, undermine our federal system as we know it.

We must be innovative in addressing these matters, but then we must recognize that there is need for uniformity. Many states—a surprising number of states in this country—have identified domestic violence as one of their most serious crimes. It is primarily a local problem. But we live in a very mobile society where people frequently move across state lines. It is possible for abusers to frustrate court orders of civil protection by moving or following a victim just a few miles into another state. A protection order is no better than the extent to which it can be recognized and enforced wherever the parties are.

The 1994 Violence Against Women Act directs that domestic violence protection orders issued by one state or Indian tribe be given full faith and credit by another if certain due process requirements are met. Implementation of this provision requires law enforcement officers and judges to make determinations about out-of-state protection orders. To do this, they require nationally uniform verification and enforcement mechanisms. What mechanisms should exist? What should they look like? Such issues are best explored within the laboratories of state and local jurisdictions.

The Justice Department has recently awarded funding to Kentucky for a regional pilot project to test an interstate and intrastate verification mechanism for enforcing protection orders. One of the reasons that Kentucky was chosen for this pilot is its information technology system, known as LINK, which makes information about protection orders readily available to law enforcement, social services, pretrial services, the courts, and advocates. Every state would benefit from such a system. Our partnership with Kentucky is a very exciting example of federal support on the state level to explore potential solutions to problems that are national in scope.

Finally, I think there are some issues that I don't have the answer to that we're going to have to resolve as we address the problems of federalism. These issues emerge from what technology—what a shrinking world—means to the state court systems. If a man can sit in his kitchen in St. Petersburg, Russia, and use his computer to sabotage an industry in Chicago, how does that affect state court jurisdiction? Who's going to have jurisdiction? Who can best handle it? What relationships should exist between state systems and foreign nations?

I have already been exposed to a great variety of agencies with which I must deal if I'm involved in international prosecutions. One of the issues will be how do we maintain state court jurisdiction where it is appropriate while, at the same time, providing the states with the assistance of the federal government in dealing with foreign jurisdictions. We must also address issues involving terrorism and the use of classified material. All of these issues must be faced if we are to maintain the strong traditions of federalism and a strong court system. I pledge to do that in every way that we can. ❑

A Point of History: Judicial Federalism and the First Cases Before the U.S. Supreme Court

by Thomas C. Bogle
Intern, Federal Judicial Center

On October 11, 1995, the U.S. Supreme Court heard arguments in *Seminole Tribe of Florida v. Florida.* At issue in the case was the constitutionality of a federal statute, the Indian Gaming Regulatory Act.

The larger issue of federalism involved in the case had its birth in two of the very first cases heard by the Court over 200 years ago.

The Gaming Act allowed Indian tribes to conduct certain gaming activities only in conformance with an agreement between the tribe and the state in which the gaming activities would be conducted. Under the Act, states are required to negotiate "in good faith" with tribes toward the formation of such a compact. If, however, states do not consent to negotiations, the tribe may sue the state in federal court.

The state of Florida challenged the Act on the grounds of infringement of state sovereignty.

In March of this year the Supreme Court declared the Act unconstitutional as a violation of states' Eleventh Amendment rights (64 USLW 4167, 116 S. Ct. 1114).

The extent to which states can be summoned before federal courts has been an intensely debated issue, not only at the time of the adoption of the Constitution but throughout the nation's history. The Eleventh Amendment, adopted as a result of early debates on the issue, and specifically to overturn one of the Court's first decisions, states that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." (The Supreme Court has held that the application of the amendment is not limited to diversity suits.)

The amendment was not part of the Bill of Rights—it was ratified in 1795, eight years after the adoption of the Constitution and four years after the adoption of the Bill of Rights.

After passage of the Judiciary Act of 1789, which established the U.S. federal court system, many Federalists believed that the act empowered the federal judiciary to hear suits brought against a state by a citizen of a different state. Anti-federalists, who feared a challenge to state sovereignty, vigorously objected to that view. Two of the first cases heard by the Supreme Court explicitly dealt with this question.

The first case to be entered on the Court's docket was *Van Staphorst v. Maryland*.

At the end of the Revolutionary War, the State of Maryland negotiated a loan from two Dutch bankers, Nicholas and Jacob Van Staphorst. After negotiations were finalized, however, the Maryland legislature objected to the agreement. The Van Staphorst brothers tried to reconcile their differences with Maryland for seven years, but without success. They finally decided in 1790 to take action against the state through the newly created federal court system.

Originally, Maryland officials seemed to see no danger to state sovereignty in the case. The legislature complied with a court summons requesting the state's appearance during its February 1791 term. Luther Martin, Maryland's attorney general, represented the state and entered a plea in the matter. It wasn't until anti-federalists decried the federal jurisdiction of the case that Maryland and other states recognized a potential threat to their sovereignty. To avoid setting a precedent that the federal government had jurisdiction over cases involving a defendant state, the Maryland legislature recommended in December 1791 that the case be settled out of court. The case was later discontinued when the Van Staphorsts and Maryland agreed to terms.

Because a precedent wasn't set on the issues, the questions raised in the case over the extent of state sovereignty in the federal courts were far from answered.

The second case entered on the Court's docket also dealt with a citizen of one state suing a different state. In 1777, a printer, John Holt, entered an agreement with the State of New York. Under the terms of the agreement, Holt would print laws and resolutions passed by the legislature in exchange for a salary of £200 a year. In 1781, New York paid Holt for all services up to that date and continued his contract until Holt's death in 1784. Eleazer Oswald, the surviving administrator of Holt's estate and a resident of Pennsylvania, sought reimbursement from New York for all services between 1781 and the date of Holt's death. Having not received payment, he brought the case of *Oswald v. New York* before the Supreme Court in 1791.

John Jay, 1st Chief Justice of the U.S. Supreme Court. He decided one of the first cases in the Court, a case that dealt with a fundamental issue of judicial federalism.

Despite a court order, the State of New York refused to send representatives to appear at the Supreme Court's first term in 1792, citing its status as a sovereign entity within a federation. Plaintiff's counsel asked that a writ be issued to compel the state's appearance at the beginning of the Court's next term, and the Court took the matter under advisement. The issue of whether the Supreme Court could force a state to appear in the newly created federal judiciary was a first for the Court. But a series of procedural questions arose, delaying the decision in the case, and allowing the justices enough time to hear and rule on another case defining a defendant states' rights in federal courts. That other case was *Chisholm v. Georgia.*

Chisholm's action involved the failure of the state of Georgia to pay a debt. In July 1792, a summons was issued to the governor and attorney general of Georgia, calling on them to appear before the Supreme Court to respond to a suit by Chisholm, a citizen of South Carolina.

One year later, when the state failed to make an appearance, Chisholm's lawyer, U.S. Attorney General Edmund Randolph (acting in a private capacity), moved for a default judgment if the state failed to appear before the Court's next term. The Court, at the next term in February 1793, granted Randolph's motion, holding that it could indeed hear suits brought by individuals against states.

A summary of the case by the clerk of the court stated that "Chief Justice Jay delivered one of the most clear, profound, and elegant arguments perhaps ever given in a Court of Judicature."

The decision, according to one commentator, "fell upon the country with a profound shock." A newspaper claimed that the decision was more dangerous than the power earlier claimed by the British Parliament to tax the American colonies without their consent.

The decision angered many anti-federalists, who believed that the federal government was infringing on the sovereign states. That anger was increased in early 1795 when representatives for New York finally appeared in the *Oswald* case. After hearing arguments on both sides, a jury for the trial in the Supreme Court decided for the plaintiff. New York was ordered to pay damages.

Soon after the ruling in *Chisholm*, states began to consider an amendment to the Constitution that would protect their sovereignty in federal courts. The Eleventh Amendment was ratified on February 7, 1795—just two days after the decision in the *Oswald* case.

The question over the extent of a state's sovereignty in federal courts remains a divisive issue, as demonstrated by the *Seminole Tribe* case decided in March. The decision was far from unanimous. Four justices believed that the Indian Gaming Regulatory Act did not violate a state's sovereign rights, thus leaving little doubt that the Court will be hearing more cases like those heard by the first chief justice, John Jay, and his associate justices over 200 years ago. ❑

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the past five years a seminar for state and federal judges on "judging science" that focuses on issues of scientific evidence that arise in state and federal courtrooms has been conducted at Duke University in Durham, North Carolina. The seminar is usually held in May. It is limited to 20 judges: usually 5–7 federal judges join 13–15 state judges for six days of presentations and discussions. The first seminar was funded by a grant from the State Justice Institute; successive seminars have been supported by grants from private foundations. For the past three years the seminar has been directed by Judge Gerard T. Wetherington (Fla. 11th Jud. Cir.). For information about next year's seminar, contact Judge Wetherington, c/o Duke University Private Adjudication Center, 8000 Weston Parkway, Cory, NC 27513, phone (919) 677-9363, fax (919) 677-9166.

Seminar on Health Care—The Federal Judicial Center sponsored a seminar June 24–26, 1996, in Manalapan, Fla., on "Health Care and the Legal System." Participants in the seminar, which was attended by 21 federal judges and 9 state judges, heard presentations on a number of topics: an introduction to the health care delivery system, legal and ethical issues relating to health care, public health issues, "medical futility" and litigation prospects, medical practice guidelines, relationships and transactions among health care providers and payers, trade-offs in cost, quality and access, experimental treatments, state initiatives in health care, and alternative dispute resolution issues in health care.

Seminar of the Florida State–Federal Judicial Council—A planning committee of the Florida State–Federal Judicial Council has been formed for the presentation of a seminar for state and federal judges in December 1997. The three-day seminar, also supported by the Federal Judicial Center, will feature presentations on habeas corpus problems in death penalty cases and will include plenary sessions on other broad subjects of interest to state and federal judges and break-out sessions to focus on specific topics. Members of the planning committee include Florida state judges Robbie M. Barr, T. Michael Jones, and Gisela Cardonne, and Florida federal judges Gerald B. Tjoflat (U.S. 11th Cir.), Maurice M. Paul (U.S. N.D. Fla.), and Stanley Marcus (U.S. S.D. Fla.). Further information about the seminar can be obtained from Chief Judge Maurice M. Paul, U.S. District Court, Northern District of Florida, U.S. Courthouse, Gainesville, FL, phone (352) 380-2415.

California seminars—The State–Federal Judicial Council of California sponsored in 1993 and 1994 two capital case symposia attended by both state and federal judges (see the July 1994 issue of the *State–Federal Judicial Observer*, no. 6, p. 3). The Association of Business Trial Lawyers in the San Francisco-Oakland area of California conducted two seminars for state and federal judges on the role of the judge in the settlement of civil cases. The seminars were held at the request of the chief judges of the respective state and federal courts in the area (see the March 1994 issue of the *State–Federal Judicial Observer*, no. 5, p. 2).

The New England Tri-State Seminar—Beginning in 1994 approximately 150 state and federal judges in the tri-state area of Vermont, New Hampshire, and Maine have been gathering each fall to attend a two and one-half day seminar. Funded for three years by the State Justice Institute, the seminar focuses on one particular subject and is broken down into five half-day segments, each devoted to one particular aspect of the general subject of the seminar. Past seminars, which rotate among sites in the three states, have focused on evidentiary and medical-legal/bioethical issues.

The upcoming seminar in October of this year will be held in New Hampshire and will deal with sexual violence. Plans are also being made for the 1997 seminar, which will focus on the liberal arts and the sciences. The seminar is directed by a six-person committee made up of one judge and one court staff person from each of the three states. The seminar was started through the efforts of Justice Caroline D. Glassman (Maine Sup. Ct.) and Associate Justice James L. Morse (Vt. Sup. Ct.). For further information about the seminar, contact Associate Justice James L. Morse, Supreme Court of Vermont, 109 State Street, Montpelier, VT, 05609-0801, phone (802) 828-3276.

The Harold R. Medina Seminar at Princeton University—The Medina Seminar, now in its seventh year, began as a one and one-half day seminar on the humanities in 1990. Sponsored primarily by the Judicial Leadership Development Council (a private, nonprofit corporation located in Washington, D.C.), the seminar was expanded in 1992to five and one-half days to include a day of science and an expanded curriculum in the humanities. The faculty for the seminar consists of Princeton professors as well as notable speakers from outside the university. It is limited to 20 state and 20 federal judges. The 1997 seminar will be held June 5–10. For further information, write or call Judge John W. Kern III, 2510 Vermont Ave., N.W., Watergate East 314N, Washington, DC 20037, phone (202) 338-5513.

The Seminar at Banbury Center, Cold Spring Harbor Laboratory—This five and one-half day seminar is limited to 15 state and 15 federal judges and will be conducted by the Federal Judicial Center and the Judiciary Leadership Development Council and cosponsored with the Laboratory. The Laboratory and Banbury Center are located in Huntington, N.Y. (on Long Island), one hour's train ride from Grand Central Station in Manhattan. The seminar, scheduled for October 1996, will cover not only general subjects relating to science but also specific scientific issues, including science issues in the courtroom, science issues in criminal investigations, and issues relating to scientific misconduct. The opening presentation will be given by Nobel Laureate and Laboratory Director James Watson, the codiscoverer of the DNA molecule. For additional information about this seminar, call or write James G. Apple, Chief, Interjudicial Affairs Office, Federal Judicial Center, One Columbus Circle, N.E., Washington, DC 20002, phone (202) 273-4161. ❑

State and Federal Judges Report on Discovery Coordination, Electronic Filing, and Mediation at Mass Tort Meeting; Standards Committee Appointed, Begins Work

by Thomas Willging
Federal Judicial Center

Coordination of discovery in the *Orthopedic Bone Screw Litigation* (pending in the Pennsylvania state and federal courts) and limitations on such discovery were among several topics of discussion at the March 1996 meeting of the Mass Tort Litigation Committee (MTLC) in Albuquerque, N.M.

The MTLC, a committee of the Conference of Chief Justices, was established to help handle mass tort cases among the several state courts and between the state courts and federal courts. The State Justice Institute has been a major funding source for the MTLC.

Judge Sandra Mazer Moss (Pa. Com. Pleas), chair of the MTLC, described to the committee the actions she and Judge Louis C. Bechtle (U.S. E.D. Pa.) took in coordinating discovery in the bone screw litigation relating to the development and use of bone screw products. Judge Bechtle took the lead in coordinating discovery regarding specific bone screw products while Judge Moss coordinated discovery regarding health care providers.

Judges Moss and Bechtle also adopted a novel approach in the handling of this litigation—they issued a joint opinion on one aspect of the discovery proceedings.

The judges at the meeting also discussed limitations on the coordination of discovery in state and federal courts in mass tort litigation.

One limitation relates to the scheduling of trials. Trials in state courts have at times been delayed to accommodate the more exacting and time-consuming process of ruling on motions and scheduling trials in the federal courts. These delays have sometimes worked to the disadvantage of plaintiffs who in turn put pressure on the state courts to obtain trials within the time frame of other state cases.

Another limitation to coordination involves the use of plaintiffs' liaison committees and the payment of fees on an hourly basis to the members of such committees for conducting national discovery. Often these lawyers generate elaborate discovery activities and then assess fees that local counsel must pay as a precondition for using the products of that discovery. Sometimes such fees are more than local counsel can afford. The state judge has few satisfactory alternatives at that stage of the litigation because additional discovery might be costly and duplicative.

The consensus reached at the meeting was that state–federal coordination must be mutually beneficial if it is to work. State courts have the power and responsibility to set their own standards and to limit cooperation to activities that meet those standards. For example, state judges can coordinate discovery if it can be done in time for scheduled trials or at a cost that local parties can afford.

In other business, Judge Susan Del Pesco (Del. Super. Ct.) described the electronic filing system used in her court in mass tort litigation.

That court has used the Complex Litigation Automated Docket (CLAD) system for 27,000 asbestos cases, 15 insurance coverage cases, and one complex commercial case. Since 1991, 45,000 documents have been filed electronically in the Delaware Superior Court. Vendors and users paid all costs, including hardware, software, and telephone lines. An initial enrollment fee is charged to the litigant—these fees provide the funds for computer hardware and the installation of new phone lines.

Limited access serves as a means for local control and accountability. Only local attorneys can enter a document into CLAD. An attorney's password serves as the equivalent of a Rule 11 signature. Affidavits and appendices may be filed in hard copy; the court is considering the use of optical character recognition (OCR) scanning equipment to read hard copy into electronic format.

Judge James W. Mehaffy, Jr. (Tex. Dist. Ct.) described a local area network (LAN) electronic filing system that a vendor developed for his court. In that system a document can be electronically filed in a central unit and then electronically served to all designated parties or lawyers.

Judge Mehaffy reported that all costs were paid by the vendor who set up the system and contracted with system users. The benefit to the court is in case management. Lawyers and clients also save costs associated with traditional filing practices. A lawyers' committee and a local rule relating to electronic filing were important ingredients in setting up the successful system.

Members of MTLC at the meeting began drafting proposed standards for document depositories and electronic filing. Judge Moss appointed a subcommittee cochaired by Judges Del Pesco and Mehaffy to study the issues. Judges C. Judson Hamlin (N.J. Super. Ct.), Richard A. Levie (D.C. Super. Ct.), and Helen E. Freedman (N.Y. Sup. Ct.) will serve on the subcommittee which is charged with developing proposed standards, recommending model systems, and identifying resources and vendors for courts to use.

Judge Janice M. Holder (Tenn. Cir. Ct.) and Professor Francis McGovern (Univ. of Alabama Law School) discussed the approaches used in training mediators to become familiar with the breast implant litigation settlement, which affects cases in both state and federal courts. They identified issues and characteristics of mediation in this type of case:

• Because breast implant users tend to be embarrassed, private, and passive about having had the implant surgery, female mediators were selected to conduct orientation sessions—however, this approach does not apply to mediators who work to facilitate settlements in cases in which parties are represented by lawyers;

• mediation will be organized on a regional basis—a regional mediation program will be ready to operate in September or October of this year;

• while the federal multidistrict litigation took the lead in the initial training, local development of specific programs and future training of mediators is anticipated—there is still a need to train mediators in the medical aspects of breast implant litigation;

• parties are expected to pay for the mediation—plaintiffs want ADR programs now, while defendants want to defer programs until after plaintiffs have made their decisions about the national settlement; and

• Judge Sam Pointer (U.S. N.D. Ala.), national coordinator of the breast implant litigation, is now using ADR in all cases scheduled for trial. ❑

State–Federal Issues Included in NCSC Anniversary Celebration

State–federal relations was a prominent issue at the National Conference on the Future of the Judiciary held March 23–25 at Williamsburg, Va. The conference celebrated the 25th anniversary of the National Center for State Courts.

Relations between state and federal courts was a topic included in the three major documents produced by the conference: a leadership agenda for the courts, an agenda for the National Center, and a statement of principal issues facing the courts.

The subject was also highlighted in the keynote speech by U.S. Attorney General Janet Reno (see Obiter Dictum column, page 2) and was included in the major address to the conference by Professor John B. Oakley (U. Cal. Davis Law School) on "Twenty-First Century Justice: Problems and Proposals from a State Court Perspective."

In the document titled "Leadership Agenda for the Courts," produced as a result of small discussion groups and discussion during one of the plenary sessions, the third of three "tiers" of items included the statement: "promote the use of federal/state judicial councils."

Participants in the small group discussions also expressed the need for the National Center and the Conference of Chief Justices to "expand efforts to communicate with the federal courts, the U.S. Congress and the executive branch with regard to concerns about federalism of traditional state crimes and federally created causes of action."

Included in the "principal issues" paper, in a section on building relationships with "customers," was a suggestion to "improve federal/state relations."

Professor Oakley also mentioned "improving state–federal coordination" in his address. He specifically referred to two conferences on state–federal judicial relationships, the national conference in Orlando, Fla., in April 1992, and the western regional conference in Stevenson, Wash., in 1993, as sources of ideas for state–federal cooperation.

Oakley observed that materials furnished to participants in the National Conference included a report of the western region state–federal conference that is "an informative source of some of the strategies for developing face-to-face contact and collaboration between state and federal judges at the national level." He said that the National Center had been "an effective voice at the level of . . . intersystem cohesion in articulating and lobbying for appropriate federal attention to the collective concerns of the state courts."

The conference attracted over 310 judges, court administrators, and law professors from across the United States. ❑

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ing: Is It Changing," "Managing Discovery: Rule 26 and Alternate Approaches," and "Why ADR Makes Sense."

One special feature of the conference was the breakup of participants into small groups to react to and discuss excerpts from videotape segments that presented issues of legal ethics and professionalism.

Magistrate Judge J. Daniel Breen (U.S. W.D. Tenn.), new president of the Tennessee Bar Association, said that the Association had received "many favorable comments about the conference." He said that the bar association would probably sponsor another conference in the fall of 1997 or spring of 1998. "We will involve more state judges in the planning of the next conference," he said.

The Federal Judicial Center provided funds for the attendance of the federal judges. ❑

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