

Judicial Division Record

American Bar Association

Volume 5 Issue 4 Summer 2002

ABA Delegates' Report Preview of 2002 Annual Meeting Agenda Items ABA House of Delegates

by Judge Frederic Rodgers
Golden, CO
rodgers@abanet.org

A variety of issues awaits the ABA House of Delegates (HOD) at the 2002 ABA Annual Meeting in Washington, DC. The Judicial Division is represented by its five judicial Conference delegates, **Marvin Aspen, Sid Eagles, Ed Schoenbaum, Bob Summitt, and Sandra Thompson** plus the Division's delegate, **Chuck Patterson** from the Lawyers Conference. A number of other judges, including **John Vittone** and seven other judge members of the Board of Governors, enjoy membership in the House, so that altogether about five per cent of the 538 members of the House are judges. With so large a contingent, obviously the judicial perspective on ABA policy and HOD issues is well focused. What follows is information on some of the issues covered by Reports filed with the HOD for debate and action in Washington.

Multijurisdictional Practice

As mentioned previously in these pages,¹ the Report of the Commission on Multi-Jurisdictional Practice will be debated use, and it is controversial enough to have engendered a multiplicity of reactions to the proposal for its adoption. When one stops to think about the simple act of a lawyer giving global advice to a client with a multi-state presence, it becomes clear

why the practicing bar has alerted on this Report. One of the more controversial parts of the debate will involve the choice of law for disciplinary proceedings, that is, whether the lawyer who is complained against for practicing law outside the state of admission is to be judged by the laws of the admitting state or those of the state in which the alleged unauthorized practice occurs. Other proposals in the Report tread on the rights of state supreme courts to regulate the scope of law practice involving clients situated outside of their lawyers' admission states. Is an interstate telephone call giving an out-of-state client advice "the practice of law?" Obviously, some of the traditional barriers to practice erected by states, jealous to guard the prerogatives of their practicing bars may have to change to meet current multi-state practices and client driven needs. The HOD will attempt to resolve these questions.

Also of interest to the practitioner is a Report recommending amendment of the Model Rules for Lawyers' Funds for Client Protection to provide for more effective financing of client protection and security funds. It also would streamline the process for application and payment of claims against the fund.

(continued on page 12)

Standing Committee on Judicial Independence

by D. Dudley Oldham
Chair, Standing Committee on Judicial
Independence
Houston, TX

The Standing Committee sponsored a public forum on judicial selection issues in Austin, Texas in April in conjunction with its Spring Meeting. Chief Justice Thomas Phillips of the Texas Supreme Court introduced the panel discussion, which focused on public financing of appellate court elections in Texas. I participated in the panel discussion on behalf of the Standing Committee. The Standing Committee is planning several more events across the country to promote discussion of public financing and other potential improvements to state judicial selection systems. If you are interested in organizing an event in your community, please contact Seth Andersen at 312-988-5124.

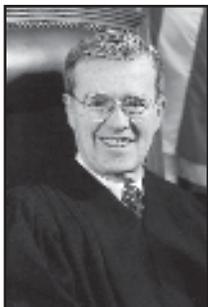
A subcommittee of the Standing Committee, chaired by Doug Houser of Portland, Oregon, continues to examine issues surrounding state judicial compensation. The Committee welcomes the input and suggestions of the JD in this important effort.

The Standing Committee is sponsoring a CLE program at the 2002 Annual Meeting in Washington, D.C. entitled, "The Supreme Court Speaks—Can Judicial Candidates? Life After *Republican Party of Minnesota v. White*." This panel discussion will examine the ramifications of the Court's decision in the White case on state codes of judicial conduct and the ABA Model Code of Judicial Conduct. We are pleased that the Judicial Division and the Standing Committee on Ethics and Professional Responsibility are cosponsoring this program, which will be held at the Marriott Wardman Park Hotel on Friday, August 9 from 9:30 to 11:30 a.m.

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JUDICIAL
DIVISION



by Judge Diarmuid F. O'Scannlain
Portland, OR

The highlight of the Annual Meeting in Washington, D.C. for all judges will be the Annual Dinner in Honor of the Judiciary which, for the first time, will be held at the United States Supreme Court. The Judicial Division will have the great honor of

hosting the formal presentation of the ABA Justice Center John Marshall Award by the President of the American Bar Association, Bob Hirshon, to Justice Anthony M. Kennedy. It will be a superb affair, but you will not be able to attend unless you get your ticket request in immediately because of the restricted capacity of the court facilities. There will be a reception in the East and West formal conference rooms of the court, followed by presentation of the award in the Chamber of the Supreme Court, with a gala dinner afterwards in the Great Hall. It will be a night to remember and I hope you will join us.

In a prior edition of *The Record*, I suggested that you plan to attend the Annual Meeting program on Judicial

John Marshall Award Update

The 2002 John Marshall Award presentation will take place during the Annual Dinner in Honor of the Judiciary, Sunday, August 11 at the U.S. Supreme Court in Washington, D.C.

The John Marshall Award Review Committee finalized their recommendations to the Justice Center

Elections. Now that the Supreme Court has rendered its decision in *Republican Party of Minnesota v. White*, I expect the room to be filled to overflowing! Notwithstanding ABA policy to the contrary, the law of the land now holds that the First Amendment trumps all other considerations when it comes to judicial elections. It is all the more important that you take the opportunity to consider the very insightful views of a spectrum of panel members who have been lined up for the event.

Elsewhere in *The Record* you will find discussions about the pending opinion request before the ABA Ethics Committee involving attendance at judicial seminars. Inevitably, excitement builds when there is an appearance that interest groups are attempting to influence decisions of such a highly-respected entity as the Ethics Committee. I want to thank its chair, Marvin Karp, for his courtesies extended to the Judicial Division in dealing with this issue of such wide-spread concern among judges and others, including the ABA itself which is a sponsor of so many judicial seminars at all levels of the judiciary.

Coordinating Council, chaired by Hon. Norma L. Shapiro. The Review Committee, chaired by Hon. David Horowitz, is composed of two representatives from each of the four Justice Center entities.

The John Marshall Award competition, now in its second year, attracted 14 nominations representing 11 individual nominees.

Justice Anthony Kennedy, winner of the 2002 John Marshall Award, will receive a glass sculpture created by artist Dale Chihuly.

Congratulations! The Judges' Journal has won an APEX Award for Publication Excellence for the "Electronic Filing and the Courts" issue. The magazine won in the Magazines & Journals--Printed category, which is an award for the overall magazine (content and art).

JUDICIAL DIVISION

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DIRECTOR'S COLUMN



by Aimee Skrzekut
Torres
Chicago, IL

There must be a soundness, a power, and even a wisdom in the judicial education programs courts create. – Charles S. Claxton

Division Leadership participated in a Joint Conference Planning Meeting in May. Judge Sledge, Chair-Elect asked attendees to begin charting a course for the 2002-03 Association year. Through joint sessions and conference breakouts, discussion ensued over where the Division should be sailing and how it will arrive at its final destination. The planning meeting was appropriately titled, Sailing into Uncharted Waters.

It was apropos that the Planning Meeting hosted the Judicial Division Leadership Team meeting. The meeting was the first in a series of activities associated with the Leadership Institute in

Judicial Branch Education which will take place at the Center for the Study of Higher Education at the University of Memphis June 18-23, 2002. Preparation for this summer's Institute centered on characteristics possessed by effective judicial education programs.

To facilitate this discussion, team members read an article by Charles S. Claxton. According to the article, effective education programs possess the following characteristics: "a clear and compelling purpose; helping judges think in qualitatively richer ways; helping participants become more competent; promoting active learning; adequate resources; a sound, integrated curriculum; and commitment and support of administrative leadership (Characteristics of Effective Judicial Education Programs, *Judicature*, June-July, 1992, vol. 76, no. 1)." During the Institute, team members will participate in a myriad of activities involving experiential learning, adult development, cognitive development and emotional intelligence to engage in sound educational planning.

Following the June Institute, will be an On-site Institute and a final Advanced Leadership Institute. Throughout the planning process, Judges Andre Davis (NCFTJ), Ruth Kleinfeld (NCALJ), Michael Pietruszka (NCSCJ), James Wynn (AJC) and I will work to develop a plan balancing Division and Conference objectives while soliciting input from Division and Conference leadership. In addition, there will be an opportunity for Division members to participate in the On-Site Leadership Meeting in Seattle, WA during the 2003 Midyear Meeting. Team efforts will culminate in a final report and action plan, which will incorporate information gleaned from all program activities and input from Division members.

The JD team will provide regular updates throughout the program and solicits your insight, concerns and questions about achieving Division judicial education goals. Please forward your comments to me via email: Torresa@staff.abanet.org.

JD Nominating Committee Update

by Judge David A. Horowitz
Los Angeles, CA

The JD Nominating Committee, chaired by Judge David Horowitz, has met and considered candidates

for nomination. The results of the Nominating Committee's deliberations are as follows: Judge Louraine Arkfeld for the position of JD Vice Chair and Mr. Charles Patterson for the position of the JD Delegate to the House of Delegates and Judge Leslie Miller for the Delegate to the ABA Nominating Committee. In addition, the names of Judge Elihu M. Berle and Judge Henry duPont Ridgely were given to

the ABA Board of Governors for the National Judicial College Board vacancy.

According to Section 5.03 of the JD Bylaws additional nominations may be made by petition signed by at least 15 Division members from no less than three Conferences and filed with the Division Director at least 45 days prior to the Annual Meeting. Members of the Council and Conference Executive Committees shall be notified of nominations by petition at least 15 days prior to the Annual Meeting.

The nominations will be voted on at the ABA Annual Meeting in Washington, D.C.

EDITOR'S NOTE

The *Judicial Division Record* is a publication of the American Bar Association (ABA) Judicial Division. The views expressed in the *Judicial Division Record* are those of the author only and not necessarily those of the ABA, the Judicial Division, or the government agencies, courts, universities or law firms with whom the members are affiliated.

All persons interested in submitting articles for inclusion in future issues of the *Judicial Division Record* should contact Judge Joel Medd, Editor, *Judicial Division Record*, Northeast Central District, P.O. Box 6347, Grand Forks, ND 58206-6347; Phone: 701/795-3824 x453, Fax: 701/795-3886, E-mail: jmedd@ndcourts.com or contact Kris Berliant at ABA/Judicial Division, 541 N. Fairbanks Ct., Chicago, IL 60611, E-mail: berliank@staff.abanet.org, Phone: 800/238-2667 x 5700, Fax: 312/988-5709.

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ARTICLE SUBMISSION DEADLINES

Fall, 2002: August 28

AMERICAN JUDGES STUDY AT OXFORD

by Judge Judith Macaluso
Washington, DC

Imagine a legal system in which it is unethical for a trial lawyer to prepare a witness. Imagine rules of discovery that require an attorney in a civil case to turn over documents that incriminate his client even if the other side hasn't asked for them. Imagine a system in which trial lawyers may not shake each other's hand, but there are virtually never problems of civility in the courtroom.

This may sound like justice in another universe. As 10 American judges recently learned, however, it's the way justice is done by our common law mother-England. Working with Dr. Christopher Whelan, who is Associate Director of Oxford University's international law program, the Division recently provided American judges with an extraordinary opportunity to attend Oxford for a five-day course in the British system of justice. The Americans were a diverse group, including judges of appellate, general, specialized, and administrative jurisdiction in both Federal and State courts. Without exception, they found the program useful, interesting, and entertaining. The week began with Judge Michael Payne of the Oxford Crown Court and Ms. Elaine Strachan, an Oxford barrister, describing the English legal system. The Americans knew the basic distinction between solicitors, who are advising attorneys, and barristers, who are trial attorneys. Many not-so-familiar differences were also explained—including the surprising fact that all barristers are required to be sole practitioners. They are strictly forbidden from forming partnerships or law firms. Barristers are also forbidden from directly obtaining clients. Clients may come only by referral through a solicitor. Nor are barristers paid by their client. Payment is made by the solicitor, and professional standards forbid a barrister from suing a solicitor who pays late or not at all. A challenging business environment to say the least! Barristers share expenses and get clients by aggregating in "chambers." Each chambers employs a clerk, a humbly titled but critically important employee who alone gets cases from solicitors to

distribute among the barristers. Equally strange to American practice is the "cab rank rule," which requires a barrister to take every case passed to him by the chambers clerk. By virtue of the cab rank rule, a barrister may defend a criminal client one day and prosecute one the next (private barristers, rather than government attorneys, are used for most criminal prosecutions). It is not unusual for barristers to face as opposing counsel other attorneys from their own chambers. Judge Payne and Ms. Strachan were justifiably proud of the standard of collegiality, ethics, and civility displayed by British barristers. This enviable conduct is influenced by the tiny size of the trial bar—about 9,000 trial lawyers in this country of some 50 million citizens. Good behavior is also fostered by the requirement that barristers receive cases only from a solicitor. In addition, promotion within the profession or from barrister to bench is strongly influenced by "secret soundings" of an attorney's professional and personal reputation. Step out of line and your case load and promotion prospects will both suffer! The American judges pondered the strengths and costs of such a system. As the week progressed, Dr. Whelan and Professor Paul Craig, who wrote the definitive treatise on European Union law, explored the role of the European Union on British legal practice. To a remarkable extent, British law is being subjugated to external sources of law, including the European Court of Justice. For a British judge to think solely in terms of British law would be as serious a mistake as for an American judge to think only in terms of State law.

The European Court of Justice, which was created by the 1957 Treaty of Rome, extends its jurisdiction to any matter that directly or indirectly affects trade. It takes only a moment's reflection on the scope of our own Commerce clause to understand how potentially pervasive this external source of law is. Indeed, England's Court of Appeal refers about ten cases a year to the European Court of Justice for guidance. Another important external source of supervening law is the European Court of Human Rights. This Court, for example, recently declared that England's pension plan, which mandated retirement for women at an earlier age than men, violates women's rights. Michael Beloff, Queen's Counsel and President of Oxford University's Trinity College, and Peter

Butler, former Member of Parliament, described the complicated crosscurrents affecting public acceptance of Treaty courts' intervention in England's democratic and judicial institutions. For the visiting judges, this was a fascinating and eye-opening introduction into a developing United States of Europe. The Americans also had several opportunities to visit with British judges and observe proceedings in London's Royal Courts of Justice and Oxford's Crown Court. The differences between British and American trial practice were thought provoking. In England, no juries are permitted in civil cases, except for defamation actions and suits against the police. Observing a criminal case for aggravated assault, the American judges watched in some amazement as a jury was empanelled in less than five minutes. Voir dire of jurors is not permitted, yet challenges may occur only for cause. Not surprisingly, jury selection devolves to a non-event.

As the trial proceeded, the defendant remained seated in the back of the courtroom, unable to speak to his lawyers. The complaining witness testified standing in a dock, bracing herself with both hands against the railing. Her stance seemed to give her testimony energy, spontaneity, and, at times, belligerence. Unfortunately, while answering a question about when she saw the defendant, she referred to an appointment he had with his probation officer. This resulted in a mistrial—curative instructions are not favored in England. As interesting as the legal programs were, the Oxford hosts realized that judges do not live by law alone. The judges and their guests were treated to a private tour of the astonishingly opulent Blenheim Palace; an entertaining walking tour of Oxford; analysis of the British political scene by Dr. Martin Holmes, a former Member of Parliament; and the opportunity for a theater evening in London. A particularly memorable occasion was lunch with Court of Appeal Judge Mary Arden at High Table in the vaulted and wood paneled vastness of Middle Temple Inn's main hall. The judges found the parallels and contrasts between the British and American systems to be a constant stimulus to creative thought. The Judicial Division, encouraged by the signal success of this inaugural program, plans in coming years to offer other Oxford weeks and to introduce a similar week on the Continent. Paris, anyone?

Judges Experience “Mediation for Judges” Education Program in Wilmington

by Judge Edward J. Schoenbaum
Springfield, IL

Judge Peter Loomis, chief ALJ, New York Department of Transportation wrote, “The days were indeed long, but I left there really feeling that I had learned an enormous amount during those five days. The faculty was wonderful. I had a great week and have not felt as stimulated professionally in a long time.”

Professor Kim Kovach (U. of Texas Law School), Hon. Bill Dressel, (President, National Judicial College and former Colorado Judge, who chaired the NCSTJ in 1990-91), Professor Phyllis Bernard (Oklahoma City College of Law), Professor Peter Robinson (Associate Director, Strauss Institute, Pepperdine University School of Law), Professor Harry Mazadoorian (Quinnipiac College School of Law, Hamden, Connecticut), Hon Jody Plymyer and Hon. Noreen

Lynch (both of the Maryland Office of Administrative Hearings), Hon. Michael Jordan (retired Circuit Court Judge of Chicago, Jack Hanna and Gina Brown (Staff Director and Training Staff respectively, both of the ABA Dispute Resolution Section staff in the D.C. office) made up the excellent faculty.

Twenty-three of the judges were from Delaware since the course was hosted by the Delaware Supreme Court. Judicial Educator Franny Haney McGuire handled all the local arrangements beautifully. The other 12 judges were from Florida, Minnesota, New York, Pennsylvania, Oregon, Kansas, Tennessee, and the District of Columbia.

The attendees evaluated the program as very well done, especially the lectures, demonstrations, and role plays, followed by critiques. Anonymous evaluation forms contained “. . . This is the best CLE I have been to so far. . . I would definitely tell other judges in my office to attend this program.” “Peter Robinson is possibly the best public speaker I have ever heard.” “A stellar panel of instructors.” Many liked the opportunity to role-play and being critiqued.

This course has now been offered on the West Coast and the East Coast. We have been approached about offering the course

again this Fall, probably in Chicago. If you are interested in becoming a certified mediator, please contact the committee chair at edschoen@abanet.org.

The attendees at the Judicial Division Planning Meeting in Key West, Florida in early May support our efforts to implement ways to roll educational programs out to more members through a variety of distance-learning approaches. These approaches could include materials downloaded to personal computers, audio programs, audio-visual tapes available via the Internet, and/or reading materials presented through “chat rooms.” The Committee is also investigating selling options for program materials for those who cannot attend our educational programs.

If you are interested in participating in any of the education programs or assisting the Committee in this initiative please e-mail me. We are looking for new, innovative ways to be of value to Division members as well as to the larger community of people who would benefit from the development of additional professional learning experiences.

Again, if any of you have suggestions or questions please contact me at edschoen@abanet.org or 217/524-7836 fax 217 524-7824.

TOM'S TIP:

Time Off the Bench

by Judge Thomas C. Warren
Wenatchee, WA

In the last *Judicial Division Record* I hope my first travel article whetted your appetite for some interesting, good quality, and hopefully inexpensive travel. Now let's go traveling.

Last year Mary Ann and I decided to go to Vienna, Austria. We are sort of working our way around the fringes of Europe. Prior to Vienna we have visited Great Britain, Ireland, Portugal, Spain, Italy, Turkey, Israel and Egypt, mostly on separate trips. Our style is to visit one country and try to spend some quality time rather than doing all of Europe in one 14-day blitz. I suppose we will eventually get to the heart of Europe so we can visit

France, Germany, the Netherlands, etc. Oh, so many trips and so little time!

Right I digress, back to the story of Vienna. We prefer to travel in the Fall as the summer tourists are gone, the weather is good, and often prices are reduced. In my surfing on the Internet (and with the touting of *Arthur Frommers BudgetTravel*) I came to love the website www.go-today.com. This is a “sell on the Internet only” travel agency that puts together inexpensive fly-drive (airplane tickets and rental car) and city tours (airplane tickets, 5 days in a hotel, daily breakfasts, and a half day city tour). We actually booked for early November so we were between the summer tourists and the winter skiers.

This was the second time I had booked a trip on the Internet and there is always a degree of fear when you commit the VISA card and don't have a real person to yell at (or sue) when things go bad. I was amazed

about Go-Today.com as everything they promised happened and usually faster and quicker than promised. The itinerary was confirmed within hours, if not minutes. The materials, hotel and city tour vouchers, and real honest to goodness airline tickets on scheduled airlines arrived within a week.

I would note that by living in rural Washington State, Mary Ann and I fly out of Seattle, so we always pay extra as usually travel deals are quoted out of New York or other East Coast departure cities. Most air and destination deals will have a reasonable add on rate depending on your departure city. From Seattle we usually pay \$150-\$200 extra, which is normal for West Coast departure cities. The airlines used by Go-Today.com are regularly scheduled airlines, not charters or discounters. We flew American Airlines to Chicago and then Sabena Belgian Airlines to Vienna. Coming home we flew Swiss-Air and American.

(continued on page 11)

2002 ABA Annual Meeting - Washington, DC

Judicial Division - The Mayflower Hotel

August 8 - August 13

(Tentative schedule as of 5/22/02)

All programs will take place at the Mayflower Hotel, unless otherwise noted)

Thursday, August 8

- 12:00 p.m. - 5:00 p.m. Office
North Carolina Room, 2nd Floor
- 1:00 p.m. - 3:00 p.m. Courts & Community Committee/Judges Network Meeting
TBD
- 3:00 p.m. - 4:30 p.m. **PROGRAM**
Fever or Chill? The Administrative Judiciary in an Era of Reform
Rhode Island Room, 2nd Floor
- 3:00 p.m. - 5:00 p.m. Division Committee Meetings
New York Room, 2nd Floor
- 6:30 p.m. - 8:30 p.m. Judicial Division Reception (Complimentary)
Grand Ballroom, Promenade Level

Friday, August 9

- 7:30 a.m. - 5:00 p.m. Office
North Carolina Room, 2nd Floor
- 8:00 a.m. - 9:00 a.m. Joint Conference Breakfast
Chinese Room, Promenade Level
- 9:00 a.m. - 12:00 p.m. National Conference of State Trial Judges
Orientation (9:00am - 10:00am)
Executive Committee Meeting (10:00am - 12:00pm)
Cabinet Room, Promenade Level
- 9:00 a.m. - 10:00 a.m. Conference Committee Meetings
New York Room, 2nd Floor
- 9:00 a.m. - 11:30 a.m. National Conference of Special Court Judges
Business Meeting (9:00am - 10:30am)
Executive Committee Meeting (10:30am - 11:30am)
Colonial Room, Lower Lobby
- 9:00 a.m. - 12:00 p.m. National Conference of Administrative Law Judges
Executive Committee Meeting
South Carolina Room, 2nd Floor
- 9:00 a.m. - 12:00 p.m. Judges' Journal Editorial Board Meeting
New Jersey Room, 2nd Floor
- 9:00 a.m. - 12:00 p.m. Executive Committee Meetings
Lawyers Conference
Rhode Island Room, 2nd Floor
National Conference of Federal Trial Judges
New Hampshire Room, 2nd Fl.
- 9:30 a.m. - 11:30 a.m. **PROGRAM**
The Supreme Court Speaks...Can Judicial Candidates? Life After Republican Party of Minnesota v. White
Joint program with ABA Standing Committee on Judicial Independence
CLE Centre, Marriott Balcony C, Mezz. Level
- 12:00 p.m. - 2:00 p.m. Judicial Division Awards Luncheon (Ticketed: \$50.00)
Chinese Room, Promenade Level
- 2:00 p.m. - 5:00 p.m. **PROGRAM**
New Technologies and Best Practices for Courts
Georgia Room, 2nd Fl.
- 2:00 p.m. - 5:00 p.m. National Conference of State Trial Judges
New Committee Chairs Meeting (2:00pm - 3:00pm)
New Committee Meetings (3:00pm - 5:00pm)
New York Room, 2nd Floor
- 6:00 p.m. - 9:00 p.m. National Conference of State Trial Judges Reception (Ticketed: \$60.00)
City Club of Washington, 1300 I Street, N.W.
- 7:00 p.m. - 10:00 p.m. National Conference of Special Court Judges Annual Dinner (Ticketed: \$55.00)
The Army and Navy Club, 901 17th Street, N.W.
- 7:00 p.m. - 10:00 p.m. National Conference of Federal Trial Judges Annual Dinner (Ticketed: \$60.00)
Old Ebbitt Grill, 675 15th Street, NW

Saturday, August 10

- 7:30 a.m. - 5:00 p.m. Office
North Carolina Room, 2nd Floor
- 7:30 a.m. - 10:00 a.m. National Conference of Special Court Judges
Business Meeting/Elections
Cabinet Room, Promenade Level
- 7:30 a.m. - 9:30 a.m. National Conference of State Trial Judges
Business Meeting/Elections
Massachusetts Room, 2nd Fl

Saturday, August 10 (continued)

- 8:00 a.m. – 9:30 a.m. *Joint Breakfast*
Lawyers Conference
National Conference of Federal Trial Judges
SC on Federal Judicial Improvements
Chinese Room, Promenade Level
- 8:00 a.m. – 11:00 a.m. National Conference of Administrative Law Judges
Executive Committee Meeting
Rhode Island Room, 2nd Floor
- 9:30 a.m. – 11:00 a.m. Executive Committee Meetings
Lawyers Conference
New Hampshire Room, 2nd Floor
- 9:30 a.m. – 11:00 a.m. National Conference of Federal Trial Judges
Massachusetts Room, 2nd Floor
- 10:00 a.m. - 12:00 p.m. Conference Committee Meetings
New York Room, 2nd Fl.
- 10:00 a.m. – 12:00 p.m. National Conference of State Trial Judges
Executive Committee Meeting
Colonial Room, Lower Lobby
- 11:00 a.m. – 12:00 p.m. *Business Meeting/Elections*
Lawyers Conference
New Hampshire Room, 2nd Fl.
National Conference of Administrative Law Judges
Massachusetts Room, 2nd Floor
National Conference of Federal Trial Judges
Pennsylvania Room, 2nd Floor
- 12:00 p.m. - 5:00 p.m. Judicial Division Council Meeting / Business Meeting
Business Meeting will immediately follow the Council Meeting
Chinese Room, Promenade Level
- 2:00 p.m. – 3:30 p.m. **PROGRAM**
What Role Should Ideology Play in Selecting Federal Judges?
Marriott Wardman Park, Marriott Balcony A, Mezz. Level
- 3:30 p.m. – 5:00 p.m. **PROGRAM**
Traffic Safety and Racial Profiling – Can the Two be Reconciled?
Pennsylvania Room, 2nd Floor

Sunday, August 11

- 7:30 a.m. - 5:00 p.m. Office
North Carolina Room, 2nd Floor
- 8:00 a.m. – 10:00 a.m. *New Executive Committee Meetings*
Lawyers Conference
Pennsylvania Room, 2nd Floor
National Conference of Administrative Law Judges
Georgia Room, 2nd Floor
- 8:00 a.m. – 11:00 a.m. *New Executive Committee Meetings Continued)*
National Conference of Special Court Judges
State Room, Promenade Level
National Conference of State Trial Judges
State Room, Promenade Level
- 8:00 a.m. – 12:00 p.m. *Executive Committee Meeting*
Appellate Judges Conference
Colonial Room, Lower Lobby
- 9:00 a.m. – 12:00 p.m. *New Executive Committee Meeting*
Federal Trial Judges
Colonial Room, Lower Lobby
- 10:00 a.m. – 12:00 p.m. **PROGRAM**
Impact Decisions
South Carolina Room, 2nd Fl.
- 12:00 p.m. – 2:00 p.m. New JD Council Meeting
Massachusetts Room, 2nd Floor
- 2:00 p.m. – 6:00 p.m. Standing Committee on Minorities in the Judiciary
South Carolina Room, 2nd Floor
- 2:00 p.m. – 5:00 p.m. **PROGRAM**
Bench & Bar Conference
Joint program with Section of Litigation
Cabinet Room, Promenade Level
- 6:30 p.m.-11:00 p.m. Cocktail Reception followed by the Annual Dinner in Honor of the Judiciary (Ticketed Event: \$90.00)
Supreme Court of the United States

Monday, August 12

- 7:30 a.m. - 12:00 p.m. Office
North Carolina Room, 2nd Floor

Judicial Division 2002 Annual Meeting Programs

All Judicial Division programs will take place at the Mayflower Hotel, unless otherwise indicated.

(Tentative as of 5/22/02)

Rooms subject to change.

Pricing schedule for Division programs:

Law Students: Free of Charge

JD Members: Free with Division passport

Non-members: \$25.00 per program (unless otherwise indicated)

THURSDAY, AUGUST 8

3:00pm – 4:30pm

Fever or Chill? Taking the Temperature of the Administrative Judiciary in an Era of Reform

Mayflower Hotel, Rhode Island Room, 2nd Floor

Sponsor: National Conference of Administrative Law Judges **Cosponsors:** General Practice, Solo and Small Firm Section, National Association of Women Judges, Senior Lawyers Division, Young Lawyers Division.

Significant momentum has been developing for major efforts to reorganize the way the administrative judiciary functions at both state & federal levels. A distinguished panel will update lawyers and judges on the status of specialty courts, central panels, corps of judges, and other major efforts including pending legislation, the Administrative Law and Regulatory Practice Section's examination of the Administrative Procedures Act, and the ABA's Model Central Panel Act.

Moderator: Hon. Ruth Kleinfeld, *Office of Hearings and Appeals, Manchester, NH*

Speakers: Prof. Michael Asimow, *UCLA Law School, Los Angeles, CA*; Hon. John Hardwicke, *Office of Administrative Hearings, Hunt Valley, MD*

Invited speakers: Hon. Tom Davis, Hon. George Gekas and Hon. Melvin L. Watt.

FRIDAY, AUGUST 9

9:30am – 11:30am

The Supreme Court Speaks Out..Can Judicial Candidates? Life after Republican Party v. White (free for all attendees)

Marriott Wardman Park, Marriott Balcony C, Mezz. Level

Cosponsored with the ABA Standing Committee on Judicial Independence.

The U.S. Supreme Court's decision in *Republican Party of Minnesota v. White* is certain to have a profound impact on the canons of the ABA Model Code of Judicial Conduct and state Codes of Judicial Conduct that govern the speech of judicial candidates. At issue in the case is the ability of candidates to discuss their positions on disputed legal and political issues. A panel of attorneys connected to the case, judicial ethicists, judges, and consultants to judicial campaigns will discuss the implications of the Supreme Court's decision on the speech of judicial candidates and on the independence of the judiciary.

New Technologies & Best Practices for Courts

2:00pm – 5:00pm

Mayflower Hotel, Georgia Room, 2nd Fl.

Sponsor: Lawyers Conference **Cosponsors:** General Practice, Solo and Small Firm Section, National Association of Women Judges, Section of Individual Rights & Responsibilities, Senior Lawyers Division.

How do courts – both federal and state- balance privacy concerns with the need to provide public access to court records in a digital environment? What solutions have been developed to deal with issues that arise when court move to electronic filing? What new technologies are courts using to improve efficiency and effectiveness? Attendees will learn best practices for dealing with these and other issues.

Speakers: Hon. Robert M. Bell, *Chief Judge, MD Court of Appeals, Annapolis, MD*; Victoria S. Cashman, *Cashman & Associates, Middletown, OH*; Alan Carlson, *Justice Management Institute, El Cerrito, CA*; Hon. Gladys Kessler, *U.S. District Court for DC, Washington, DC*; Hon. Herbert B. Dixon, Jr., *DC Superior Court, Washington, DC*; Hon. Gregory Holiday, *CIS Bureau of Hearings, Detroit, MI*; Steven Emmert, *Reed Elsevier, Washington, DC*; Charles Vanstrom, *Denver, CO*.

SATURDAY, AUGUST 10

What Role Should Ideology Play in Selecting Federal Judges? (free for all attendees)

2:00pm – 3:30pm

Marriott Wardman Park, Marriott Balcony A, Mezz. Level

Sponsor: National Conference of Federal Trial Judges **Cosponsor:** ABA Center for Professional Responsibility.

To what extent should the United State Congress consider ideology in selecting Federal Judges at all levels? "Ideology" may be defined broadly to include conservative/liberal, Republican/Democratic, rich/poor, and limitation or restraint/activism. Who draws the line to avoid "undesirable ideologies?"

Speakers: Hon. Samuel Bufford, *U.S. Bankruptcy Court, Los Angeles, CA*; Prof. Erwin Chemerinsky, *USC Law School, Los Angeles, CA*; Prof. Jesse Choper, *University of California Berkeley Law School, Berkeley, CA*; Hon. Andre Davis, *Baltimore, MD*; C. Boyden Gray, *Washington, DC*; Gray, Hon. M. Margaret McKeown, *U.S. Court of Appeals, San Diego, CA*; Prof. Judith Resnik, *Yale University, New Haven, CT*.

Traffic Safety and Racial Profiling – Can the Two be Reconciled?

3:30pm – 5:00pm

Mayflower Hotel, Pennsylvania Room, 2nd Floor

Sponsor: National Conference of Special Court Judges **Cosponsors:** General Practice, Solo and Small Firm Section, National Association of Women Judges, NHTSA, Section of Individual Rights & Responsibilities, Senior Lawyers Division.

Racial profiling is prevalent in America. Tens of thousands of innocent motorists on highways across the country are victims of racial profiling. This program will explore how the nation's highways can be made safer while insuring that minorities are not unfairly targeted by stricter traffic laws.

Moderator: Hon. Robert Pirraglia, *District Court of Rhode Island, Providence, RI* **Speakers:** Colonel Anna Amos, *South Carolina Police Department, Columbia, SC*; Derrick Humphreys, *Humphreys & Brooks, Washington, DC*; Malea Kiblan, Esq., *Kiblan & Battles, McLean, VA*; Kareem Schora, Esq., *Arab Anti-Discrimination Committee, Washington, DC*.

SUNDAY, AUGUST 11

Impact Decisions

10:00am – 12:00pm

Mayflower Hotel, South Carolina Room, 2nd Fl.

Sponsor: National Judicial College **Cosponsors:** General Practice, Solo and Small Firm Section, Section of Individual Rights & Responsibilities, National Association of Women Judges, Senior Lawyers Division, Young Lawyers Division.

An expert panel will analyze civil and criminal cases from the 2001-02 U.S. Supreme Court term and how these cases impact State courts.

Moderator: Dean Ernest Borunda, *National Judicial College, Reno, NV* **Speakers:** Hon. Steven A. Schiller, *Circuit Court, Chicago, IL*; Prof. Penny J. White, *University of Tennessee College of Law, Knoxville, TN*.

SUNDAY, AUGUST 11

Bench & Bar Conference

2:00pm - 4:30pm

Mayflower Hotel, Cabinet Room

Joint program with the Section of Litigation

A unique opportunity for attendees to join distinguished state and federal court judges and leading litigators in a candid dialogue on the challenges – and opportunities - facing our civil justice systems, from the impacts of technology, globalization and specialization to the complications of overlapping, conflicting, and parallel federal and state proceedings and rules of ethics, procedure, evidence and trial practice.

Moderator: Peter B. Freeman, Esq., *Chicago, IL* **Speakers:** Hon. Marvin E. Aspen, *U.S. District Court, Chicago, IL*; Hon. Herbert B. Dixon, Jr., *Superior Court of DC, Washington, DC*; Lawrence J. Fox, Esq., *Drinker Biddle & Reath, LLP, Philadelphia, PA*; Hon. James E. Graves, Jr., *MS Supreme Court, Jackson, MS*; Gregory P. Joseph, Esq., *Gregory P. Joseph Law Offices LLP, New York, NY*; Hon. Lee H. Rosenthal, *U.S. District Court, Houston, TX*.

House of Delegates

(continued from page 1)

Death Penalty Counsel

This Report, submitted by the ABA Standing Committee on Legal Aid and Indigent Defendants, recommends amendment to the ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases. The amendments seek to increase the responsibility of state and federal jurisdictions making indigent death penalty counsel appointments to insure that only experienced and competent counsel are selected, and further that the compensation for such counsel be at a level commensurate with the marketplace for such experienced counsel.

International Law

The Section on International Law and Practice can be counted on to provide interesting sounding Reports and proposals. The first is a Report urging Congress to amend the Foreign Sovereign Immunities Act to clear up confusion which has resulted from diverse judicial interpretations of language in the Act over the scope of its application to government entities, officials and corporations. The amendments suggested in the Report address a series of issues that frequently arise in litigation under the Act, such as whether the Act covers government officials or reaches second and third tier subsidiaries, how the commercial activity exception should be applied to events outside the United States, and whether the statute presents too many obstacles to enforcement of a judgment. These issues arise because language in the statute has caused conflicting judicial decisions, ambiguities, and confusion.

The second is a proposal for the ABA to support efforts to promote good governance at the national level as a goal of the World Summit on Sustainable Development (Summit). The Summit is to take place from August 26 to September 4 in Johannesburg, South Africa and will mark the ten year anniversary of the 1992 United Nations Conference on Environment and Development (often referred to as the "Earth Summit," "Rio Summit" or UNCED) held in Rio de Janeiro, Brazil. The Summit is expected to address a wide range of issues concerning environmental conservation, and social and economic development, within the

larger context of sustainable development. The outcome of the Summit will likely guide international environmental law and policy for the coming decade.

Finally, the third is a Report on Intersexed Children which would commit ABA lobbying support to encourage all countries to forbid any child of ambiguous sexuality from being subjected to surgical genital alteration to meet current medical protocols without continuing informed consent by the parents. This is a fascinating issue of bioethics which arises out of an unusual decision of the Constitutional Court of Columbia.

Human Rights

The ABA Committee on Unmet Legal Needs of Children proposes a Report supporting implementation of the 1999 Foster Care Independence Act through appropriate state legislation in order to provide youth up to age 21 transitioning out of foster care with full access to all necessary social services support. The ABA Commission on Homelessness and Poverty has advanced an initiative seeking creation of a National Housing Trust Fund to create and maintain affordable housing. The Commission has also submitted a Report urging Congress to act to enact legislation to curb predatory lenders and provide funding for the legal defense of those victimized by unscrupulous lending practices, primarily the elderly, low income and minorities.

The Tax Section has sponsored a Report recommending that Congress provide adequate continuing funding for the Low Income Taxpayer Clinic under Code Section 7526.

The War on Terrorism

The State Bar of Georgia has submitted a Report urging ABA support for Congress to pass legislation allowing regular citizens to prompt government efforts to seize funds promoting terrorism. Under the proposal a citizen with inside knowledge of a charity that is sending its funds to support a recognized terrorist organization, for example, could file a *qui tam* suit under seal as a *relator* in the name of the Government. If the Government accepted this invitation to intervene, the Government would pursue the case itself, and if it won, the citizen would then be entitled to receive what in essence is a contingent or finder's fee consisting of a percentage of the money the Government

recovers. If the Government chose not to intervene, the citizen could still pursue the action, and would recover a higher percentage if he or she won, but would have to fund the litigation.

The proposed law would work the same way as current *qui tam* actions in the health care field, except with the goal being the seizure of terrorist-related funds. Citizens would in essence become private attorneys general. After 9/11, some pundits joked that we ought to "sic" our trial lawyers on the terrorists. Those same pundits might say that the proposed procedure would accomplish this and further, without insiders being rewarded for coming forward, the layers of complexity in the transactions make the laws very hard for the FBI and Treasury Department to enforce. Proponents of the Report point to stock exchange trades showing examples of traders selling short before the 9/11 events, but no arrests or charges have ensued. A prospect of *qui tam* rewards, they contend, may change that.

ABA Governance

Four proposals to amend the ABA Constitution have been submitted along with others seeking to amend the Bylaws. The former require a vote of two-thirds of the HOD to pass. Among the Constitutional amendments, the HOD is asked to revisit a proposal from Edward Jacobs, a lawyer in the Virgin Islands that would make defense of the unborn a corporate purpose of the ABA. He has also sponsored an amendment requiring the recording of individual votes in the House. Mr. Jacobs' similar proposal on defending the unborn was politely rejected at last year's Annual Meeting. Also there are Reports supporting amendments which would (1) add to the catalogue of prohibited discriminatory practices disqualifying local bar associations from representation in the HOD; and (2) change the name of the Tort and Insurance Practice Section to the "Civil Trial and Insurance Practice Section." One bylaw amendment, requiring only a simple majority to pass, would make it optional instead of mandatory for the Board of Governors to review and make pre-hearing recommendations on HOD measures.

Because the *Judicial Division Record* goes to press more than two months before the House meets, it is likely that some of the reports described above may be withdrawn

(continued on next page)

House of Delegates

(continued from previous page)

or amended as negotiations and discussion among ABA members, committees and sections gets underway. There is a lively HOD website at which much preliminary badinage is carried on among the delegates. Also the fact that state and local bar associations are permitted to file Reports right up until the House begins its session means there may be other items of

importance and interest to judges added to the House agenda. Each conference delegate or I would be pleased to furnish you with up-to-date information about the status of the reports as the annual meeting draws closer. If you would like to have the privileges of the House floor to join the debate on any of the issues before the House, it is a routine matter for any of us to arrange that for you at the annual meeting with an appearance before the House Rules and Calendar committee on

the Saturday before the House begins its sessions. Please ask us.

Fred Rodgers is a member of the ABA Board of Governors and has served in the House of Delegates for 10 years. He is a past Chair of the Judicial Division and the National Conference of Special Court Judges, and serves as Board liaison to the National Conference of State Trial Judges.

¹ See Rodgers "ABA Delegates Report" Vol. 5 *Judicial Division Record* p.4 (No. 3 Spring 2002)

FROM THE EDITOR



by Judge William G. Kelly
Kentwood, MI

A New Court-house

Over the last two years, I have been very involved in the design and construction of a new courthouse. What a pleasure it has been to work with professionals in other fields. So often in court we deal with people who are irresponsible and the only professional people we see are attorneys. In the construction process, I have met only people who are responsible and hard-working. In designing the courthouse, we consulted with architects and engineers in their specialties. The work was divided up

into electrical, plumbing, mechanical, security, landscaping, etc. The plans were coordinated by the architect and the construction company.

The supervisor at the job site is like the conductor of an orchestra as he works with the various trades to make sure that they finish their tasks in time so that another trade could then perform their tasks. Literally, hundreds of people have worked on the project.

The city set a limit on the spending and then allowed the court significant input into the design. We met with the architects and presented our vision. The architects probed and came up with numerous alternatives. Changes were made. The construction started and has progressed well. The monthly progress meetings go over any problems on the building. We will hold the dedication on August 2. You are all invited. I plan on bringing the pictures with me to the Annual Meeting the following week so I can bore anyone who asks me about the new building.

Along the way, we met with people like Kevin Sandler, president of ExhibitOne, and he spent hours consulting with us on the design of our audio-visual system. Dedicated professionals like Kevin have helped make this building become a facility that will meet our needs for many years to come.

I have been privileged to be a member of the bar for several years. We tell ourselves that ours is a noble calling. It is. At the same time, however, I have gained great respect for members of other professions and trades.

Next year, I will become the chair of the Traffic Court Program and so I will not have the time to continue to serve as the editor of the *Judicial Division Record*. Fortunately, Judge Joel Medd, the current chair of the State Trial Judges Conference and the editor of their newsletter for several years in the past, has agreed to serve as the editor. I want to thank you for the opportunity to serve as your newsletter editor and I ask you to support Joel as you have supported me in the past.

Time Off

(continued from page 5)

Arriving in Vienna we found our hotel to be delightful. It was probably 150 years old with about 45 very large rooms and a wonderful breakfast room. The hotel was about 4 blocks from the ringstrasse, the major circle boulevard around the old part of Vienna. Our first full day in Vienna we scheduled our pre-paid half day guided city tour, so we could get our bearings, and decide where we wanted to return to. We purchased a week's pass for the trams and subway so we could easily get around. Most European cities have an honor system where they only randomly check tickets or passes. In Vienna we were never

checked. Apart from selecting all the attractions to visit, my most important task on our trips is to make sure the "world's greatest shopper" doesn't go overboard. I just hate carrying big pots back on the airplane! Actually, we usually limit our buying to small gifts and street art (no frames!) that all pack easily.

The highlights of Vienna included, to my amazement that the Viennese take their dogs everywhere, including restaurants, stores, and markets. It was quite a surprise to have a dog sniffing your leg when you were having dinner in a very elegant Viennese coffee house! They really like their dogs. We spent one of our days taking the train to Salzburg which is just as beautiful as the pictures show. By the way,

although we traveled in early November, the weather was sunny the entire week with the temperatures in the high 60's. Our big splurge of the week was orchestra seats for the Nutcracker Ballet and the Vienna Opera House. It was a real once in a lifetime experience.

Even with the two long flights the trip was a restful, exciting, and fun holiday. Not having to change hotels each day makes for a very convenient vacation. For a week "off the bench" it worked out great. Oh, by the way the combined cost from Seattle for the two of us for the Go-Today.com package, including a hotel upgrade was \$1786.

(continued on page 15)

The Improvement of the Administration of Justice (7th Edition, 2001)

by Judge Edward J. Schoenbaum
Springfield, IL

This book could also have been titled “Everything You Always Wanted to Know About the Courts” or “Courts and the Administration of Justice for Dummies.” This 7th edition has just come out and contains 498 pages of the most useful and wide ranging information available to judges, lawyers, court administrators, the media, and others interested in our courts. The 39 well written chapters summarize all aspects of the courts and the various improvements in the administration of justice that have evolved since the 6th edition was published in 1981

The genesis of this book goes back to the 1938 Report of the Section of Judicial Administration to the ABA House of Delegates. That report contained a collection of committee papers that served as a “comprehensive and practical program for the reform of the procedure of our courts.” The co-editors write in the preface, “Looking back on this report is like discovering your ancestors for the first time: you have a general idea where everyone came from, but so much has happened over the intervening years that it is difficult to trace the origins of a specific family.” That first report focused on the seven major areas: judicial administration, pretrial procedure, trial practice, trial by

jury and the selection of jurors, evidence, appellate practice, and administrative agencies.

Later decennial reports were published by the Section and later Division of Judicial Administration and bore the promising title “*The Improvement of the Administration of Justice*.” The past 20 years have seen remarkable challenges to the courts and these chapters are great abstracts that lead to a better understanding of all aspects of judicial administration.

This is a project of the Lawyers Conference under their Handbook Committee which worked on this edition since 1998 through 2001 when most of the chapters were submitted. In addition to Lawyer’s Conference leadership of past conference chairs Ryan E. Tibbitts, Mary Campbell McQueen, Marla Greenstein, Frances Bremson, and Richard N. Bien, Judges Louraine C. Arkfeld; Charles Clevert; Donald D. Haley; Edward J. Schoenbaum; and James Scott Sledge. Other key Lawyers Conference members on the committee include: James J. Alfini, and the two editors Gordon M. Griller and E. Keith Stott. John Fallahay, Fallahay Publishing, handled the editing phases.

The authors are a “Who’s Who” of those who have made and are making things happen in improving our courts. They are: Louraine C. Arkfeld, Mark W. Armstrong, Marvin E. Aspen, Carl Baar, Holly Bakke, Duane Benton, Greg Berman, J. W. Brown, Christopher F. Carlton, Paul D. Carrington, John Clark, Caroline S. Cooper, Ronald P. Corbett, Jr., Debra L. Dailey, B. Michael Dann, Derek Denckla, John M. Doktor, Mary Frances Edwards, Chuck A. Ericksen, Rebecca J. Fanning,

John Feinblatt, Ernest C. Friesen, Richard Fruin, Charles Gardner Geyh, Cynthia Gray, John M. Greacen, John Greco, Marla N. Greenstein, Gordon M. Griller, Dan Hall, Sophia H. Hall, Paula L. Hannaford, Roger A. Hanson, D. Alan Henry, Jane Howell, John K. Hudzik, Suzanne H. James, John N. Kirkendall, Joel E. Knutson, Mary Campbell McQueen, John A. Martin, Bruce E. Meyerson, G. Thomas Munsterman, Robert D. Myers, Richard J. Pagoria, Marcus W. Reinkensmeyer, Jim Rogers, Frederic B. Rodgers, David B. Rottman, Edward J. Schoenbaum, Freda F. Solomon, Maureen M. Solomon, Douglas K. Somerlot, John A. Stookey, John J. Sweeney, Bill Thompson, Brenda J. Wagenknecht-Ivey, Russell Wheeler, Penny J. White, and Ronnie A. Yoder. Each of them write on the area of their greatest expertise.

Some of the chapter titles are: “The Role of the Courts...”; “...Ensuring Access to Prompt and Affordable Justice.”; “The Role of the State Court Administrator...”; “Recent Developments Contributing to Improved Appellate Justice”; “Trial Court Leadership...”; “The Promise of Court Technology...”; “Reconsidering the Structure and Organization of American Courts...”; “Building Public Trust and Confidence through Effective Caseflow Management”: and many more. You can go on-line at: www.abanet.org/jd or fill out the order form on page 13 This is a must read on what is happening to improve our courts. Judicial Division members can purchase the book at the discounted rate of \$39.95.

New Youth Court Booklet Goes International

Paula Nessel
Chicago, IL

The United Nations General Assembly Special Session on Children served as an international launch site for youth courts on May 8 in New York City. One thousand copies of the ABA’s new *Roadmap* booklet—*Youth Courts: Young People Delivering Justice* – were

distributed at the session. The national youth court initiative was the only youth program in the United States to be featured in this U.N. event which is held every ten years, and the ABA’s *Roadmap* booklet was selected to be the only youth court publication distributed at the event.

Youth Courts: Young People Delivering Justice was also prominently featured at the April 16 plenary session of the National Youth Court Conference attended by over one thousand youth court coordinators and youth and adult volunteers in Arlington, VA. Nearly 7,000 free copies of the booklet were mailed to members of the U.S. Congress; state governors and

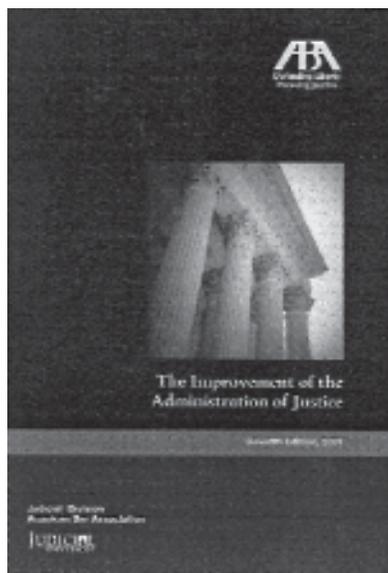
attorneys general; state, local, women’s, and minority bar associations and young lawyer affiliates; state supreme courts; selected metropolitan trial courts; juvenile and family court judges; youth courts; and organizations interested in justice improvement. A downloadable copy of the booklet is on the ABA Web site at www.abanet.org/justice.

Youth Courts: Young People Delivering Justice concisely introduces youth courts to courts, bar associations, and the general public. Youth court, a relatively new program that is also known as teen court or peer jury, engages youth volunteers in

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THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE

7TH EDITION



Written for judges, judicial leaders, court administrators, legislators, policymakers, students, news editors, civic reformers, and others with a broad interest in judicial administration, the seventh edition of *The Improvement of the Administration of Justice* is a major new publication of the ABA Judicial Division. It seeks to explain the current posture of the justice system and visit the issue of future judicial improvements.

Lawyers, judges, law professors, consultants, and court administrators have contributed their expertise to thirty-nine articles covering a wide range of issues from court technology and court interaction with the media to recent developments in appellate justice and judicial independence.

Each chapter contains a bibliography to guide readers through the text and highlight the "hottest" issues within. *The Improvement of the Administration of Justice* is a superb starting point for generalist readers seeking to learn more about the justice system. It resolutely investigates the challenges facing the system, analyzes the system's current responses, and offers visionary thinking about what lies ahead.

Please send me _____ copies of
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Booklet

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helping their peers who have committed delinquent acts or have exhibited other problem behaviors. Youth courts are not formal courts, but commonly serve as sentencing hearings for first-time offenders who have acknowledged their guilt and agreed along with their parents or guardians to accept a sentence determined by their peers.

Youth courts are among the "justice initiatives" supported by the ABA's Coalition for Justice, since they involve the non-lawyer public with courts and bar associations in projects to improve the justice system. While youth court programs are not formal courts, they are considered to be therapeutic or problem-solving courts as they attempt to address the needs of youth respondents by using principles of restorative justice. Youth courts frequently use community service, apologies to victims, and jury duty as dispositions in order to help youth respondents become productive members of their communities.

The 36-page *Youth Courts* booklet provides an overview of youth courts and describes their structure, funding, effectiveness, and challenges, as well as the collaboration needed among the legal, law enforcement, and education professions and the community and youth volunteers. Ten local youth courts representing juvenile justice, community, and school settings as well as innovative variations are profiled. Information about statewide youth court associations and additional youth court resources are provided.

To order a complimentary copy – while quantities last – call the ABA Service Center (800/285-2221) and request PC# 3460012. For further information, contact Paula Nessel, ABA Office of Justice Initiatives, 750 N. Lake Shore Dr., Chicago, IL 60611; Fax: 312/988-6100; Email: paulanessel@staff.abanet.org. The booklet was produced by the American Bar Association's Coalition for Justice with support from the National Youth Court Center and the Office of Juvenile Justice and Delinquency Prevention.

New Members

Administrative Law Judges

Mary Margaret Anderson	Oakland CA
Sandra Ann Robinson	Loxahatchee FL
Jack Raines	Atlanta GA
Rorey Smith	Boise ID
Frederick R. Waitsman	Frankfort KY
Lourdes M. Diaz-Velazquez	Louisville KY
Larry J. Butler	Baton Rouge LA
R. Bryan McDaniel	Baton Rouge LA
Gilman H. C. Nunes JD	Shreveport LA
Lawrence F. Rossow	Upper Marlboro MD
William S. Myers	Hackensack NJ
Carol Ann Wood	Albuquerque NM
Kathleen D. Sheehy	Albany NY
Randall Scott Straus	Staten Island NY
Mike Intranet	Troy NY
Brian David Levine	Norman OK
Debra Ann McReynolds-Farm	Fajardo PR
Joel R. Maillie	Austin TX
Kathleen H. Switzer	Houston TX

Appellate Judges

Correction: new member Judge Roger L. Gregory, Richmond, VA was listed incorrectly as Robert L. Gregory.

Matthew Howard Lembke	Birmingham AL
Deborah Alley Smith	Birmingham AL
Perry O. Hooper, Sr.	Montgomery AL
John Mauzy Pittman	Little Rock AR
Troy A. Price	Little Rock AR
John Boyd Robbins	Little Rock AR
David B. Earl	Phoenix AZ
Suzanne Rabe	Tucson AZ
Edward Alexander Hoffman	Los Angeles CA
Kirk Christopher Jenkins	San Francisco CA
Paul J. Killion	San Rafael CA
John Robert Webb	Denver CO
John B. Farley	Hartford CT
Alice E. Loughran	Washington DC
Gregory Andrew Castanias	Washington DC
Jennifer Ann Dowd	Washington DC
Brian J. Leske	Washington DC
Paul Mogin	Washington DC
Kannon Kumar Shanmugam	Washington DC

Susan L. Parker	Wilmington DE
Linda Spaulding White	Fort Lauderdale FL
Mary E. Kuenzel	Lakeland FL
Stephen R. Senn	Lakeland FL
Robert W. Goldman	Naples FL
Lamar Dwight Oxford	Orlando FL
Robert Augustus Harper Jr.	Tallahassee FL
Sara Margaret Steetle	Tallahassee FL
Robert L. Teitler	Weston FL
Ramin Gurbanov	Chicago IL
James Leon Dennis	New Orleans LA
Michael Eric Malamut	Boston MA
Catherine Emily Stetson	Bethesda MD
Mark Allen Butler	Silver Spring MD
Marilyn Jean Kelly	Detroit MI
D Andrew Portinga	Grand Rapids MI
Evelyn C. Tombers	Lansing MI
William M. Hart	Minneapolis MN
Grant Barry Anderson	Saint Paul MN
Thomas B. Weaver	Saint Louis MO
Michael James Hagburg	Bismarck ND
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Kathleen B. Havener	Cleveland OH
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Renee L. Snow	Shaker Heights OH
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Robert Mitchell Gruner	Philadelphia PA
Richard B. Klein	Philadelphia PA
John T. Bender	Pittsburgh PA
Ann M. Sinsheimer-Weeks	Pittsburgh PA
Houston M. Goddard	Knoxville TN
Scott Steven Cooley	Austin TX
Marshall Steven Nagle	Dallas TX
William Arthur Newman	Dallas TX
Marvin S. Sloman	Dallas TX
Cynthia S. Anderson	El Paso TX
Michael Anthony McEnrue	Houston TX
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Gregory E. Lucyk	Richmond VA
Gretchen A Speidel	Richmond VA
Mark J. Zanchelli	Richmond VA
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Vo Hoang Tuyen	Hochiminh
Ibrar Hussain	London

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		Cynthia Bahr	Texas City TX	Robert Deal Briggie	Colorado Springs CO
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Louis Karl Fisher	Washington DC			Thomas D. Roti	Palatine IL
Eamonn Wesla Astey	Ft Lauderdale FL	Special Court Judges		Lori Ruth Lefstein	Rock Island IL
Mahnaz Toms	Oviedo FL	Donald Wesley Schaefer	Decatur GA	Daniel B. Burke, Jr.	New Alban IN
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Time Off

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Next time, how about an impulse trip to London or a New Years celebration in Paris?

The Legal Stuff: All of the recommendations and advice of Time Off The Bench are personal to Judge Tom Warren and are not in any way connected or endorsed by the American Bar Association. If you follow any of my suggestions, I warrant nothing! You are all smart enough to evaluate your own risks when traveling. As always, I appreciate your

feedback, comments or criticism (be gentle). Contact me at Thomas.Warren@co.chelan.wa.us

Appellate Judges News

American Bar Association

Absorbing the 2002 Winter Olympics

by Judge Norman H. Jackson
Salt Lake City, UT

The long and eagerly awaited 2002 Salt Lake City Winter Olympics are history. Now, hundreds of entities and thousands of individuals are engaged in self-evaluation, including the Utah judiciary. How did the Utah court system prepare for and cope with this 17-day event?

Because we had advance notice and opportunity to prepare, our situation contrasted that of New York Courts last September. We did not have an unexpected disaster thrust upon us. The September 11th terrorist attack presented the dramatic reality that we ought to expect the unexpected. Accordingly, our preparations took on heightened scrutiny.

Prior to September, court security was a concern, because virtually all state courts in Salt Lake County had moved to the new Scott M. Matheson Courthouse in the Spring of 1998. The move included the Utah Supreme Court, the Utah Court of Appeals, the Administrative Office of the Courts, and all local state trial courts. Our physical consolidation in the heart of downtown already presented an imposing challenge to and opportunity for would-be terrorists. Public parking under the courthouse was closed. Security cameras were added to the perimeter of the building. Extra law enforcement personnel were stationed at garage entrances to check IDs. All trash receptacles, Federal Express boxes, chairs, tables and benches around the exterior were removed and stored. Mail delivery was reduced and all other deliveries were prohibited.

The Supreme Court calendared cases before the games began and after they ended. The Court of Appeals did not

schedule oral arguments during February. Rather, one-half were moved to January and one-half to March. The appellate courts remained open for business during the Olympics while most judges and staff either telecommuted or worked 6:00 a.m. to 2:00 p.m. This was done to reduce downtown traffic congestion in afternoons and evenings and to support Olympic activities and festivities.

A Matheson Courthouse security meeting convened about two weeks before the Olympic Torch was to arrive for ceremonies at the Salt Lake City and County Building across the street from the courthouse. We were surprised by a Salt Lake Olympic Committee request to erect a two-level media viewing and interviewing platform on the front steps of the courthouse in front of the glass six-story rotunda. Further, it was proposed that the platform be used daily from 11:00 a.m. to 1:30 a.m. the next morning to observe ceremonies, cultural celebrations and entertainment on the square. For obvious reasons, this request was denied. We were also surprised when Salt Lake City designated the four street corners in front of the courthouse as protest zones. However, no protest groups appeared.

Amid all of these concerns, our primary concern seemed to be - how to best serve Utahans and tens of thousands of visitors at the same time. How could proceedings be expedited for out-of-state visitors, particularly those charged with misdemeanors, petty offenses and infractions, and how could this be done with Olympic venues located in five counties and three judicial districts?

The answer: Create Olympic Courts. Eight Olympic courts were organized in the affected judicial districts.¹ These courts would process, hear and dispose of Olympic-related infractions and minor misdemeanors involving non-residents. District and juvenile court judges and clerks, prosecutors, defenders, victim

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History ... and its Intriguing Path !

The members of the First Continental Congress first gathered on the morning of Monday, September 5, 1774 - how ironic that the first Monday of September, 110 years later in 1884, would be designated and celebrated as Labor Day. Harken now, for that irony is even deeper and brighter.

When the members of that Congress assembled in Philadelphia early on that first Monday of September in the City Tavern at Second and Walnut Streets, the threshold item of business was a vote upon the place where sessions of the Congress should be conducted: the Pennsylvania State House, as recommended by the conservatives, or Carpenter's Hall, as urged by the radicals.

The majority voted to meet in Carpenter's Hall, the chamber of the Carpenter's Guild, so as to symbolize a bond between the Congress and America's labor force, men likely to be the backbone of the Continental army. Thus it was that the First Congress assembled that afternoon, and thereafter, in Carpenter's Hall.

Imagine! The first session of the First Continental Congress was conducted on Labor Day - in Philadelphia's Chamber of Labor!

Not Even Dicta

Item No. 49

JUDICIAL
DIVISION
Appellate Judges Conference

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May It Please the Court, the Bar, and the Academy: The Journal of Appellate Practice and Process

by Coleen Barger¹

Appellate judges are well familiar with law reviews, whose topics range from the most arcane academician's theory to the common student-written case note, and everything in between. Increasingly, it seems, law schools have begun to publish specialty journals which focus on a single area of the law and which, in many instances, are edited not by students, but rather, by experienced scholars.

One such journal is *The Journal of Appellate Practice and Process*, published by faculty members of the University of Arkansas at Little Rock, William H. Bowen School of Law. The *Journal* is the only publication aimed at issues, procedures, and practice before appellate courts. Beginning with its debut issue, published in the winter of 1999, complimentary copies of the *Journal* are distributed to all federal and state appellate judges in the United States and to foreign appellate jurists who request it. Moreover, the *Journal* has a good-sized paid subscriber base—law school and court law libraries, as well as appellate practitioners, including all members of the ABA's Council of Appellate Lawyers.

Each issue features essays, articles, development pieces, and practice notes, many of which have been contributed by

members of the appellate bench. The first issue featured essays by Chief Justice William Rehnquist, the late Justice Stanley Mosk of California, then-District of Columbia Circuit Judge Patricia Wald, and Eighth Circuit Senior Judge Myron Bright. Succeeding issues have featured works by Eighth Circuit Senior Judge Richard Arnold; Utah Justice Christine Durham; New York Court of Appeals Chief Judge Judith Kaye, ; New Hampshire Associate Justice James Duggan; former Tennessee Justice Penny White; California Court of Appeal Associate Justice George Nicholson; former Alberta Court of Appeals Judge Roger Philip Kerans; Justice Philip Talmadge of Washington; Judge Edward Toussaint of the Minnesota Court of Appeals; Pennsylvania Superior Court President Judge Stephen McEwen and Second Circuit Judge Roger Miner.

Recent issues have highlighted themes such as technological innovation and the Solicitor General. The Summer 2002 issue will examine state courts' treatment of expedited appeals. Unpublished opinions and courts' "no citation" rules served as the focal point for another issue. In the Summer 1999 issue of the *Journal*, Judge Richard Arnold expressed his opinion that with one exception, "all decisions have precedential significance"² and questioned his circuit's rule prohibiting citation of unpublished opinions, asking: "[I]s the assertion that unpublished opinions are not precedent and cannot be cited a violation of Article III?" Perhaps not surprisingly, a year later Judge Arnold authored a panel opinion in fact declaring the Eighth Circuit's local "no citation" rule unconstitutional,³ and although the court en banc later vacated the panel decision as

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EDITOR'S NOTE

Editor: Hon. Stephen McEwen, Jr., Media, PA

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ARTICLE SUBMISSION DEADLINES

Fall, 2002: August 28

Juror No. 5

by Chief Justice Anthony V. Cardona
New York Supreme Court
Appellate Division, Third Department
Albany, NY

The Constitutions of the United States and the State of New York guarantee to each of us the right to trial by jury when our legal interests or liberties are at stake. The Chief Judge of the State of New York, Judith S. Kaye, recognizing that jury service is not only a responsibility of every citizen but also an opportunity to participate in the American justice system, has been committed to jury reform. As a result of her efforts, the Legislature abolished, effective January 1, 1996, the disqualifications for elected officials and automatic exemptions for various professions, making it possible for every citizen of this State to serve on a jury. So, on September 25, 2001, for the first time I took my place among 125 prospective jurors summoned for service at the Albany County Courthouse. None of my family and friends who knew I had been summoned for jury duty ever thought I would be selected and I must admit, I also had my doubts. I went to the designated courtroom which happened to be one I had presided in as a trial judge. This time, however, I sat in the back of the courtroom while a very courteous staff member from the Commissioner of Jurors' Office carefully and clearly explained all aspects of the process.

After completing this initial phase, 25 of us were brought to another courtroom which — by the way — was adjacent to my chambers. I thought — “another step closer to selection”. The trial judge, two attorneys and the defendant were present

in that courtroom. This was the first time I knew it was a criminal case. The defendant had been indicted for robbery in the third degree, a class E felony. When my name was called, I took a seat as Juror No. 5. I was very excited. After some preliminary remarks by the trial judge, the selection process began. At the start it was a little awkward. One of the attorneys addressed me as “Judge Cardona” and, of course, that was not going to work as there could be only one judge in the courtroom. Uncomfortable with calling me “Mr. Cardona”, the attorneys decided to call me “Juror No. 5”, which I thought was terrific. After questioning, Juror No. 5 was sworn.

Upon completion of jury selection, we took a break and then assembled in the jury room. The inevitable occurred: one of the jurors began to question me about the matter before us. I used that opportunity to clarify my role by indicating that I knew nothing about the case and we would learn about it, together, from the evidence presented in the courtroom. We then went back into the courtroom where I listened carefully to the opening statements and the testimony which followed. I felt a tremendous responsibility to make sure I understood exactly what the witnesses were saying. Time passed quickly and soon court adjourned for the day.

On day two, testimony was completed by late afternoon and the court inquired whether any of us had a commitment that evening since it wanted to go forward with the summations and the charge in order to give us the case. We agreed to work into the evening and received the case at about 6:30 p.m. We ordered dinner and started our deliberations.

Although it was obvious as we commenced deliberations that some of the

jurors questioned the identification of the defendant as the perpetrator, the discussion turned to the elements of robbery in the third degree. I suggested that we resolve the identification issue first because if we could not agree that the defendant was the perpetrator, it was not going to matter whether the District Attorney proved the elements of the crime. The jurors having difficulty with the identification expressed themselves further and we decided to have some testimony read back. When deliberations resumed, we again discussed identification and it was agreed that the defendant committed a crime, but what crime? As we started to discuss the elements of robbery in the third degree, one of the jurors expressed concern that the District Attorney had not proven the element of force. Another juror asked what I thought and I indicated that I would rather hear from some of the others before expressing my own views. Other jurors voiced concern regarding the force element. Soon, the discussion focused upon the requirement of proof beyond a reasonable doubt. Within a short time, all agreed that the “robbery” was in fact a petit larceny and that verdict was rendered.

H.L. Mencken once defined a jury as “[a] group of twelve men [and women] who, having lied to the judge about their hearing, health, and business engagements . . . failed to fool him”.¹ That cynical view, thought by some to be prevalent among jurors, never materialized. In fact, the opposite was true. My fellow jurors did not shy away from their responsibilities. They knew the importance of their role in the justice system, listened to the evidence carefully, analyzed it critically and applied the law they received from the court. I was

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Appellate Process

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moot, it acknowledged that the constitutionality of the circuit's local rule “remains an open question in this Circuit.”⁴ The *Journal's* Spring 2001 issue highlighted eleven separate articles on the topic of unpublished opinions, most of which were cited by Ninth Circuit Judge Alex Kozinski in a recent case confirming the vitality and constitutionality of that circuit's “no citation” rule.⁵

Will future issues of the *Journal* similarly foretell a circuit split? It's hard to say with certainty, but the *Journal's* editors welcome manuscripts which inspire a continuing dialogue about the operation of and issues facing appellate court systems. For more information about the *Journal*, including tables of contents for each issue, visit its web site, <http://www.ualr.edu/~appj>.

¹ Coleen Barger is Associate Professor of Law and Developments Editor of *The Journal of Appellate Practice and Process*.

² Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219, 222 (1999). The sole exception would apply to an opinion issued by a three-judge federal panel which did nothing more than follow an existing published opinion by an earlier panel of that court. *Id.*

³ *Anastasoff v. United States*, 223 F.3d 989, vacated as moot, 235 F.3d 1054 (8th Cir. 2000) (en banc).

⁴ *Anastasoff v. United States*, 235 F.3d 1054, 1056 (8th Cir. 2000).

⁵ *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001).

Olympics

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advocates and law enforcement officers volunteered for service and agreed to be available on an as-needed basis through the Olympics. An interpreter network was created and conference phones installed at each designated court site. Each court was on stand-by, prepared to convene at any time through 2:00 a.m. each day.

Moreover, trial courts trimmed regular calendars and remained on call in case of riots, out of control protest groups, gang activity and mass arrests. Likely, because of large numbers of highly visible security forces, Games-related crime took a holiday. Perhaps, those inclined to mischief stayed home engrossed in NBC's coverage of competition and ceremonies.² The anticipated scourge of prostitutes and

pickpockets did not materialize. One peace officer remarked that they were ready for the sky to fall, and he kept looking up but nothing happened. The night before the Olympics ended, a disturbance broke out just two blocks from the Matheson Courthouse and outside the secured downtown area. The media labeled this occurrence variously as an "unruly crowd," "beer brawl" and "clash." Peace officers quickly dispersed the crowd. Twenty persons were arrested, fifteen for failure to disperse, one for assault, and the remainder for public intoxication and disorderly conduct. These cases were processed in the ordinary course of trial court business.

Cases filed due to unlawful conduct within secured Olympic areas involved 285 people. Most of these cases came from Salt Lake City (115) and Park City (135).

In Salt Lake City, 88 were pin traders charged with setting up businesses without a license, while in Park City, 44 were DUIs and 18 were pin traders. The Olympic Courts disposed of these cases during regular business hours. Thus, not one Olympic Court was called into session during night-time hours.

It could be said that the Utah Judiciary's efforts came to naught. On the other hand, perhaps we proved the well-known adage that an ounce of prevention is worth a pound of cure.

¹ The Olympic Court sites were: Morgan, Weber and Davis Counties, West Valley, Silver Summit, Heber City, Provo City, and (Matheson) Salt Lake City.

² The crime rate also went down during the Atlanta and Sydney Summer Olympic games.

JUDGING AT THE HAGUE

by Patricia McGowan Wald
Judge, International Criminal Tribunal for the former Yugoslavia 1999-2001
Judge, U.S. Court of Appeals for the District of Columbia, 1979-1999
Chief Judge 1986-1991

In 1999, after 20 years on the D.C. Circuit, I was appointed by U.N. Secretary General Koffi Annan to the Yugoslav War Crimes Tribunal at the Hague. There is only one American judge on the 16-person tribunal, and I filled the unexpired term of Gabrielle Kirk McDonald who had served since 1993. The Tribunal was set up during the Bosnian war to prosecute and try crimes against the laws of war, crimes against humanity and genocides as set forth in the Geneva Convention, the Genocide Convention and "customary international law". The Tribunal tries individual perpetrators of these crimes, not the States involved in the armed conflicts. In the case of the Yugoslav Tribunal, its jurisdiction covered crimes perpetrated during the successive conflicts in the first half of the nineties between Yugoslavia and Croatia, Yugoslavia and Slovenia, Bosnian Serbs and Bosnian Muslims, Bosnian Serbs and Bosnian Croats, Bosnian Muslims and Bosnian Croats, as well as the later conflict between Kosovo and Yugoslavia. The

Tribunal uses two working languages - French and English, but its judges come from all over the world, i.e., Malaysia, Sri Lanka, Turkey, China, Jamaica, Guyana, Zambia, Egypt, Morocco, Portugal, Italy, France, England and the United States. There are three trial chambers and an appeals chamber; trial judges sit in panels of 3 without a jury. The Tribunal makes its own Rules of Procedures and Evidence which are a combination of familiar common law adversarial rules but with some less familiar practices imported from the civil law mode of trial.

In this short account, I will discuss only a few predominant differences I found in judging at an international court as compared to a U.S. federal court.

1. Language turned out to be an ever-present problem. In the courtroom, we had a bank of skilled translators who simultaneously translated what everyone said in French, English and Bosnian-Croat, (B/C/S) the Balkan dialect. But even then there were frequent disputes as to whether the translations accurately conveyed the speaker's intent. Every language does not have a precise counterpart for the ordinary words and phrased of other languages, let alone legal terms, which incorporate unique facets of a country's legal culture. And the translation process itself makes the trial slow-going; an American prosecutor asks a Bosnian witness a question in English; it must then be translated into Bosnian-Croat for the witness to answer; then her answer in B/C/S must be translated back into English

before the prosecutor can continue; especially on cross-examination any rapid fire exchange is virtually impossible. Even among the judges, bench conferences to decide a procedural or evidentiary question are difficult if they do not speak the same language, and deliberations outside the courtroom even more so since there are not enough translators to cover the deliberations. The legal aides to the judges are also likely to be skilled in speaking or writing one language but not always two; when it comes time to write a several hundred page decision in whatever language (French or English) the authorized version will appear, the problems multiply. Nonetheless, tolerance, endurance, and hard work can overcome the obstacles as I learned during my two year term in which I participated in two year-long trials and several appeals, all culminating in decisions several hundreds of pages long. Do I have a solution? The only one I have thought about is to have the official language and every judge or legal aide required to speak it. Or perhaps Canadian courts which use both French and English may have discovered other routes. In the long term, our next generation of American lawyers headed toward a global career would do well to start concentrating on language dexterity early on. I wish I had.

2. Mixing common law and civil modes of criminal trial procedure is not a simple matter. In any international court no one country can expect to have all its

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Hague

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procedures and rules of evidence replicated. But such rules do, after all, reflect a particular legal culture and they generally fit together in a reasonably coherent pattern. To pluck a few from one system and a few from another does not always result in an efficient or rational combination. But it has to be done; yet except for the Nuremberg and Tokyo war crimes trials that followed World War II, it had not been done before. The Yugoslav Tribunal took the first steps and eventually came up with a workable system though there is little doubting my mind that future tribunals could improve on it considerably. Coming from the American experience, I found it somewhat uncomfortable for a court to draft and amend its rules completely without supervision or even advice from outside itself. The Tribunal has amended its rules more than a dozen times over the past eight years, usually in response to perceived difficulties that have arisen in trials. As they now read, trials are conducted without juries, indictments are brought down by an independent prosecutor but must be confirmed by a judge who reads all the prosecutor's material in order to assure that the indictment is backed by enough evidence to make out a prima facie case; there are extensive pretrial hearings; there is provision for provisional release (thought it has been granted to only a handful of the 50 or so defendants tried or awaiting trial); defense counsel is assigned if the defendant is indigent, pretrial discovery is more generous than our own Federal Rules of Criminal Procedure allow; guilt must be proven beyond a reasonable doubt and there is a right of appeal to an Appeal Chamber. Prison sentences may go up to life, but there is no death penalty and they are served in the prison systems of several neutral countries such as Norway, Finland, Sweden with whom the Tribunal has made arrangements.

But, on the other hand, American judges might blink at the far more relaxed

standards for admitting evidence, i.e., no ban on hearsay and frequent use of transcripts from other trials, depositions, unsworn and uncross-examined witness statements (though not involving the role or conduct of the accused); permitting the accused to make a statement on the merits without being sworn or cross-examined; extensive questioning of witnesses by the judges who may also call their own witnesses; findings of guilt by two out of three trial judges, a right of appeal from an acquittal by the prosecutor, and the rendering of sentence simultaneously with the verdict.

On the whole, these procedures, some of which are dictated by the Tribunal's enabling statute, incorporate the essentials of a fair trial, if not a trial American judges would always recognize. But in the inevitable clinches in the courtroom where the rules do not cover a situation or issue, Tribunal judges tend to rely on their instincts which hark back to their own legal cultures. So there is some inconsistency between trial benches on just how the trials proceed. My impression is that judges at the Hague have more inherent power to decide procedural issues according to their own standards than our judges do here.

3. The Tribunal trials have tended to be too slow, averaging 15 months and some lasting more than two years. In the past, the judges have not been as "managerial" as our judges' only recently has the Tribunal adopted rules letting the judges set limits on the number of witnesses and the length of their testimony. The trials themselves tend to involve complex military and political events; hundreds of witnesses must be brought from foreign countries - a large percentage of them testify under protective measures such as pseudonyms, face or voice distortion (all trial proceedings are televised into the Balkans and Western Europe) and sometimes in closed session because of the risks to victims of retaliation in their homelands where ethnic tensions fester still. In some cases, the judges themselves contribute to the slowness because of their lack of

courtroom experience; defense counsel, too, often lack any background in the art of cross-examination and slow the process down. Many of the trials involve multiple defendants with many counsel questioning each witness and putting forth their own defenses. Right now, the Tribunal is holding 5 or 6 trials a day in order to finish its docket by the end of the decade and it has recently received help in the form of a group of ad litem judges who come to the Hague for one or two trials only. All of these factors make the Tribunal quite expensive to operate, so much so that the United Nations had declined to follow the model in later war crime tribunals, opting instead for hybrid, part national/part international courts located near the country of conflict and intended to be later integrated into that country's own judicial system.

4. I have not had time to talk about the novelty of applying a different body of law - international humanitarian law - in deciding cases. Of course international law is part of federal common law and many American judges have resort to it in cases during their judicial careers. But those cases are few and far between. International law has few judicial precedents; it must be derived from a potpourri of sources such as international treaties, conventions, compacts, treatises, draft declarations and diplomatic practices. The two Tribunals for Yugoslavia and Rwanda for the first time since Nuremberg are developing a corpus of judicial decisions identifying and applying those principles previously enforced only by voluntary compliance, diplomacy, threats of war or war itself. This body of cases is a distinct contribution to international law and to future Tribunals. I am gratified to have had a small part in bringing the Tribunals work to fruition. I believe that an international courts and judges will increasingly look to international courts as sources of information and persuasive reasoning, and in turn contribute their own knowledge and experience to the efficacy of those Tribunals.

Juror No. 5

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so impressed that 12 strangers with different backgrounds and life experiences could come together open to all points of view with the single purpose of reaching a

just verdict and, in doing so, guaranteeing the accused his constitutional right to trial by jury.

My experience gave me a unique opportunity to see inside the jury process. I came away with a renewed belief that once selected, jurors are absolutely

committed to the process and that our jury system remains vibrant and vital to the administration of justice. I look forward to my next opportunity to serve.

¹ Mencken, A Mencken Chrestomathy, ch. 30, at 623 [1949].

Lawyers Letter

American Bar Association

Conference Goals

by Anne Kelley
Irvine, CA

Members of the Lawyers Conference Executive Committee participated in a very productive planning meeting with the other Judicial Division Conferences at a meeting (2) being a resource for other groups within the ABA and beyond, (3) providing a focal point for public education regarding the justice system, and (4) making meaningful professional development programs available to division members, where possible through distance learning. "We were particularly energized by the focus in the next year on what were called the public education and "think tank" initiatives and encourage other LC members and other ABA attorneys to help bring these initiatives to life," said Charles Vanstrom, the current LC Chair. Justin Connor, LC Executive Committee member and LC liaison with the YLD, concurred: "It is great to see the spirit of cooperation among the conferences, and we look forward to working with others under the new tenure of Judge Sledge."

Indeed, the Judges Network, the exciting judicial outreach program

originating in the Division's Courts and Community Committee is supported in large part by members of the Lawyer's Conference. And more great members are needed to ramp the program first in the pilot states of Arizona, California, Florida, Iowa, and New York, and then beyond, as more judges become involved in the program and more communities commit themselves to ongoing public education about our justice system. Jack Brown, current LC Secretary and a prime mover behind the Network thanked the LC for its "commitment and leadership in ensuring a bright future and success for the Judge's Network." Immediate past chair Rick Bien stated that he is "always excited to see the Lawyers Conference take the leadership position on issues facing the Judicial Division." Indeed, members of the Lawyers Conference are hard at work to update materials on the Network's website to support programs in the '02-'03 year and build an infrastructure to support expanded programs in the future.

Beyond the Judges Network, the Lawyers Conference is enthused about many aspects of the '02-'03 year to come. "Putting judges together with practicing attorneys in structured but informal dialogues on key emerging issues for the judiciary is one of the Judicial Division

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All persons interested in submitting articles for inclusion in future issues of *Lawyers Letter* should contact Mr. David T. Lopez, 3900 Montrose Blvd., Houston, Tx 77006-4959, E-mail: david.lopez@lopezlawfirm.com Phone: 713/523-3900, Fax: 713/523-3908 or contact Kris Berliant at ABA/Judicial Division, 541 N. Fairbanks Ct., Chicago, IL 60611, E-mail: berliank@staff.abanet.org Phone: 800/238-2667 x 5700, Fax: 312/988-5709

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ARTICLE SUBMISSION DEADLINES

Fall, 2002: August 28

Conference

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projects the Lawyers Conferences will support in the year to come," said Dan Gourash, Executive Committee Member, referring to Judge Sledge's "think tank" theme. Anne Kelley, Chair Elect, says her primary focus over her term will be to increase membership and participation in these new projects in the year ahead. Kelley noted: "The Lawyers Conference is such a great place to find your niche; there's everything from scholarly writing and editing, as with the recently republished Judicial Administration Handbook, to interaction with local judges and your community with the Judges Network, to white paper preparation for a "think tank" dialogue at a mid-year meeting, to working with judges on committees within the JD." After a great year under the leadership of Charles Vanstrom, the Lawyers Conference is looking forward build upon its successes to provide strong support to Judicial Division initiatives, bring new members into the JD, and continue providing leadership to the Judges Network and other ongoing programs.

Lawyers Conference Nominations for 2002

*By Rick Bien
Kansas City, MO*

At the 2002 Midyear Meeting in Philadelphia, PA, the LC Nominating Committee presented the following nominations for the 2002-03 association year:

CHAIR

Anne Kelley

CHAIR-ELECT

Mary Fran Edwards

VICE-CHAIR

Jack Brown

SECRETARY

Justin Connor

EXECUTIVE COMMITTEE

Dan Gourash

Michael Hyman

Administrative Judiciary

News and Journal

American Bar Association

CHAIR'S COLUMN



by Judge Jodi Levine
Oklahoma City, OK

A place at the table. It is simple really. A chance to be heard, to make a difference, to be a part of the group and to have an equal opportunity to have your voice heard.

As Conference Chair, this year my desire was to increase our visibility at the table and to increase the size of our table. I am proud to say that our Conference has become more visible as a spokesperson for the administrative judiciary. I also am proud to say that we are a leader in our celebration of our diversity. Our statement of diversity on our membership application has become a standard for the Judicial Division. We are continuing to increase our reach with the establishment of a new committee to address the international administrative judiciary.

During my year we shared our place at the table. We cosponsored programs and all our programs were cosponsored. We worked with John Holmes and the Federal Bar Association and the Sections of Individual Rights and Responsibilities and of Administrative Law and Regulatory Practice to present a Fall program. During the Annual Meeting we are presenting other events with the Administrative Law Section.

We continued our close relationship with NAALJ by working together to present educational seminars. I also was delighted to attend their Annual Meeting in Austin and honored to celebrate the installation of their President Larry Craddock, one of our Executive Committee members. We welcomed members of AALJ to our Midyear Meeting and voted to support in principle their proposal for retirement benefits for federal

ALJs. We continued our participation at the ALJ Summit in Washington, D.C. We worked with our fellow Judicial Division Conferences including hosting a Joint Dinner at the Midyear Meeting with the Lawyers Conference. We will welcome a representative of the newly created Association of Hearing Office Chief ALJs to visit our Annual meeting. The word is out that NCALJ is willing to work with other organizations for the betterment of the administrative judiciary.

We used our place at the table to draw attention to issues of importance to the administrative judiciary this year. With the assistance of the Governmental Affairs Office and the Administrative Law Section, we drafted a letter to the U.S. Department of Interior objecting to the proposed misuse of the term administrative law judge. We, with our fellow ALJ organizations, were successful in persuading the U.S. Office of Personnel Management that the federal administrative law judges should receive the salary increases to which they were entitled. We recently helped draft a letter to urge that Social Security claimants be provided the due process hearings they are entitled to receive and worked with the Governmental Affairs Office to bring this message to Capitol Hill.

During the Annual Meeting we will host an open meeting of our Health & Benefits Committee to further address issues related to the Social Security Administration and to Medicare. We have invited members of the Administrative Law Section, the Commission on Legal Problems of the Elderly, the Governmental Affairs Office and AALJ to name just a few. My hope is that this meeting will allow not only for open dialogue but also for action. By hosting this meeting we are providing an opportunity to be heard, a chance to make a difference. We are providing the table.

We have used our place at the table to reach out to the community at large. We presented a mock Social Security disability hearing during the Midyear meeting in

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Special Education Seminar for ALJs

by Judge Larry Craddock
Austin, TX

LRP Publications and Special Education Connection (<http://www.lrp.com/>) presented a symposium entitled, "Hearing Officer Training: Adjudicating Special Education Disputes Fairly and Correctly" in Tampa, Florida, May 4-5. Plans are to offer an update of this same symposium again in San Francisco next year. Presented as part of a longer Institute on Legal Issues of Educating Individuals with Disabilities, the symposium was sold separately so that people could attend the symposium without attending the entire seminar. Lyn Beekman of Special Education Solutions, L.L.C., Okemos, Michigan a special education ALJ in Michigan presented the program. He also serves as a special education review officer in several other states and has trained special education ALJs throughout the United States. [More on Beekman at <http://www.bu.mvcc.com/piam/lyn.htm>].

An estimated 75-80 ALJs attended from numerous jurisdictions including Maryland, Florida, Tennessee, Arkansas, Georgia, Texas and the Department of Defense. Many felt that the seminar was excellent.

Later this year, Lyn Beekman will be part of the First National Academy for Individuals with Disabilities Education ACT (IDEA) Administrative Law Judges and Hearing Officers, July 22-23, 2002, University of Seattle School of Law. See <http://www.law.seattleu.edu/seminar/seminarevents1.asp> for more information.

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Chair's Column

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Philadelphia. We also donated our extra soaps and shampoos to a shelter in Philadelphia. We will do this again during our Annual Meeting.

In setting the priorities for our Conference this year I included mentoring. I believe it is not enough to provide a place at the table. A mentor should help the person make that place a real opportunity for contribution. I hope that I inspired and helped you find your place at this table we call NCALJ.

Thank you again to the Chairs who preceded me. I am very honored and humbled that my name will be linked with each of yours on the list of NCALJ Chairs. When I began my year as Chair I wrote about the prior Chairs and that we needed a more formal way to remember them for their fine work as our leaders. To this end, I have decided we should create the status of Fellows of the Conference. Each immediate past Chair automatically will be designated as a Fellow at the conclusion of his/her year as the immediate past Chair. Each current Chair also should have the ability to nominate, with the confirmation of the Executive Committee, a person who has made an extraordinary contribution to the administrative judiciary to be a Fellow. Each year at the Annual Meeting the announcement should be made of who the new Fellows of NCALJ will be. My vision for the Fellows is that they will assist each current Chair by being mentors to our committees and our members. At our Annual Meeting this year we will honor those past Chairs and welcome our Charter Class of Fellows.

To conclude with emphasis I express my thanks to those who helped me Chair our Conference.

Being Chair is not a job one can do alone. My appreciation goes to Aimee Skrzekut Torres and Kris Berliant, whose extraordinary skills and talents were essential for me during my years as Chair-Elect and as Chair. Thank you to Teri Curro, who started as our Conference Administrator just as my year as Chair began. She has been a fast learner and a wonderful asset for me and for the Conference. (Memo to Officers – do not let her escape) Thanks to Gilda Fairley, the newest member of the team. In her short tenure she has been wonderful in helping us work on our membership issues.

Thank you to Diarmuid O'Scannlain and my fellow JD Conference Chairs for their assistance and support. Thank you to each of our Conference Committee Chairs. Your work made a difference. Thanks to Amy Boss, Lametrea Gray and Candy Simon for their assistance at the Section Officers Conference and in general.

Thanks to my office, family and friends for their guidance, patience and sense of humor. Thanks to my furry guys at home who were patient while I worked the late hours and took all those trips and who always were there to welcome me home with their love and a wag of a tail.

Most especially, I thank each of you for giving me the privilege of having a place at the adult table. As a member of the Executive Committee and then as Secretary, Vice Chair, Chair-Elect and now Chair I have had the opportunity and responsibility to help lead our Conference. It is a responsibility I have been very proud and honored to have.

ABA Tells Congress of SSA Due Process Hearing Concerns

On May 9, 2002, Robert Evans sent a letter to Hon. Wally Herger, chairman, Subcommittee on Human Resources, and Hon. Clay Shaw, Jr., chairman, Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, about the Subcommittee Hearing on "Challenges Facing the New Commissioner of Social Security" scheduled for May 2, 2002. Evans expressed the ABA's concerns regarding several informal proposals that would reform the process of determining disability under the Social Security Act, particularly a proposal to transfer hearings before administrative law judges of the Social Security Administration ("SSA") to state agencies. Evans asked that his letter be included in the record of the May 2, 2002, hearing.

Evans noted that transferring the SSA hearing process to the state agencies would effectively eliminate the right of claimants to present a full case before a qualified administrative law judge who has been selected by the Office of Personnel Management under the Administrative Procedure Act (APA). The ABA opposes any attempt to deny Social Security claimants the right to a full due process hearing under the APA before an administrative law judge. The APA was adopted by Congress in 1946 to ensure that the American people were provided with hearings that are not prejudiced by undue agency influence. A transfer of the SSA hearing process to the state agencies would deny a claimant his or her rights to a due process hearing, on the record, before an ALJ appointed under the APA. Further, federal ALJs apply the law and published regulations on a uniform and national basis, and such a transfer would seriously undermine both the fairness and predictability of the claims process.

Evans also expressed concern that the Social Security Administration may be considering changing the position of administrative law judge to the position of "hearing officer," and that the agency may have taken steps to budget for such a

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Member News

NCALJ Editor, Judge Ann Breen-Greco, Chicago, Illinois, will become President of the Illinois Association of Administrative Law Judges (IAALJ) at the Association's Annual Meeting, June 5, 2002, which will take place in conjunction with the Association's seminar on Credibility Determinations and Judicial Decision Writing. Judge Breen-Greco's theme for her term will be "Building Bridges." Judge Breen-Greco aims to establish working relationships with

professional bar associations and the two Illinois judicial associations—Illinois Judicial Council (an organization of primarily African American judges seeking to enhance opportunities for African Americans to attain judgeships; Judge Breen-Greco is a member of the organization) and the Illinois Judges Association. Judge Ed Schoenbaum, a past chair of NCALJ, is also on the IAALJ board and has worked with both the ABA's Judicial Division and the Illinois State Bar Association to generate support for IAALJ.

NCALJ OFFICERS

Chair

Judge Jodi B. Levine
SSA/OHA
420 W. Main Place, Suite 400
Oklahoma City, OK 73102
(P) 405/234-5505; (F) 405/236-3105
jblevine57@aol.com

Chair-Elect

Judge Ruth L. Kleinfeld
1750 Elm Street, Ste 303
Manchester NH 03104
(P) 603-641-2963 X3008
(F) 603-623-4050
Ruth.L.Kleinfeld@ssa.gov

Vice-Chair

Judge Tyrone Butler
NYS Department of Health
3 Nilde Court
Poughkeeps, NY 12603
(P) 518/402-0748 (F) 518/402-0751
ed.felter@state.co.us

Secretary

Judge Daniel Solomon
U.S. Dept. of Labor/OALJ
800 K Street
Washington, DC 22310
(P) 202-693-7300; (F) 202-693-7365
dsolomon@oalj.dol.gov

Immediate Past Chair

Judge Edwin L. Felter, Jr.
(P) 303/764-1460; (F) 303/894-2541
(F) 303/794-4261
ed.felter@state.co.us

Delegate to ABA House of Delegates

Judge Edward J. Schoenbaum
(P) 217/524-7836; (F) 217/524-7824
edschoen@juno.com

ABA Board of Governors Liaison

Victor Futter
(P) 516/627-4954; (F) 516/463-6338
lawvzf@hofstra.edu

Executive Committee

Judge Ronald G. Bernoski
(P) 414/297-3141 x3009; (F) 414/297-1993

Judge Larry Craddock
(P) 512/475-1300; (F) 512/475-1313
Larry.Craddock@banking.state.tx.us

Judge Tela L. Gatewood
(P) 405/234-5505; (F) 405/236-3105
TLWebGate@aol.com

Judge Chris Graham
(P) 573/751-7101; (F) 573/526-3651
cgraha01@mail.state.mo.us

Judge Gregory Holiday
(P) 313/256-2300; (F) 313/256-3497
gregory.holiday@cis.state.mi.us

Judge Errol H. Powell
(P) 850/488-9675; (F) 850/488-5366
Errol_Powell@doah.state.fl.us

Richard Goodwin
(P) 209/222-9940; (F) 209/221-1157
rgoodwin@attbi.com

Judge Ann M. Young
(P) 301/415-7463; (F) 301/415-5599
AMY@nrc.gov

The Role of the Administrative Law Judge

CA Review of the Harrison and Perry Cases

(Adapted from comments by Judge Ronnie A. Yoder, Chief Administrative Law Judge, US Department of Transportation, Washington, D.C., at the NAALJ annual conference in Austin, TX. Comments are solely the author's and not those of DOT or any other organization)

What is an administrative law judge? A federal administrative law judge is an employee of a federal agency who holds hearings for an agency, and makes decisions in accordance with its policy. In addition, he or she is assured of tenure and decisional independence and freedom from off-the-record agency input, and is generally considered to be subject to the Code of Judicial Conduct in his public and private life.

What is the role of the administrative law judge? In *Butz v. Economou*, 438 U.S. 478 (1978), the Supreme Court said:

"There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is 'functionally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on

proffers of evidence, regulate the course of the hearing, and make or recommend decisions. . . . More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency. . . . Since the securing of fair and competent hearing personnel was viewed as 'the heart of formal administrative adjudication,' Final Report of the Attorney General's Committee on Administrative Procedure 46 (1941), the Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners. . . . They may not perform duties inconsistent with their duties as hearing examiners. When conducting a hearing under § 5 of the APA, . . . a hearing examiner is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigative or prosecution functions for the agency. . . . Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. . . . In light of these safeguards, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women. We

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EDITOR'S NOTE

Editor: Judge Ann Breen-Greco, Chicago, IL
The *Administrative Judiciary News and Journal* is a published quarterly by the ABA Judicial Division National Conference of Administrative Law Judges (NCALJ). Opinions stated herein are those of the author only and not necessarily those of the ABA, the Judicial Division or the NCALJ, or the government agencies or other entities by whom the authors are employed. Comments, suggestions, or article submissions should be directed to Judge Ann Breen-Greco, P.O. Box 25988, Chicago, IL 60625-0988, E-mail: annrun@aol.com Phone: 773/539-8468, Fax: 773/539-3292 or contact Rosline Jerome at ABA/Judicial Division, 541 N. Fairbanks Ct., Chicago, IL 60611, E-mail: jeromer@staff.abanet.org Phone: 800/238-2667 x 5689, Fax: 312/988-5709

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ARTICLE SUBMISSION DEADLINES

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The Role

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therefore hold that persons subject to these restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts." 438 U.S. 478, 513-14 (emphasis added).

The same rule has been applied to the state administrative judiciary. The role of a judge is to be an independent decision-maker. Recently that role has received reinforcement from the federal courts, which have held that even an at-will state hearing officer is entitled to constitutional protection of her decisional independence. In *Harrison v. Coffman*, 35 F.Supp.2d 722 (E.D. Ark. 1999), U.S. District Court Judge Howard F. Sachs issued a virtual emancipation proclamation for every administrative judge, holding that a state at-will hearing officer has a First Amendment free-speech right to decisional independence protected by the U.S. Constitution. Judge Sachs recognized that his holding was probably a case of first impression, but he concluded that:

"constitutional protection of decisional independence . . . does seem logically and historically compelled under the expansive view of the First Amendment that covers academic freedom and is evidenced in other major rulings of the Supreme Court during the past thirty years. . . . If grading practices of teachers may sometimes merit First Amendment analysis, it seems almost certain that opinion-writing by both traditional judges and administrative law judges properly claims First Amendment protection. . . . I am satisfied that since ALJs enjoy absolute immunity for their quasi-judicial work product, that work product has the same First Amendment protection from retaliation against the authors as is enjoyed by similar works produced in the judicial branch."

Harrison was a state ALJ who decided workers' compensation claims under Arkansas law. Her employment was at-will; but she contended that it could not be terminated on grounds violating the United States Constitution. She alleged a

violation of her First Amendment rights when she was fired by the Workers' Compensation Commission, because "she exercised her free speech right to independently and impartially decide cases before her in a competent manner within a range of reason and without imposed or required prejudgment, partiality or ideological bias." In effect she alleged that her exercise of quasi-judicial independence and impartiality, as reflected in her written opinions, caused her to be discharged. Judge Sachs concluded:

"Although plaintiff may have been employed in the Executive Branch of State government, this does not preclude treating her work as judicial or quasi-judicial, for federal constitutional analysis. . . . Defendants . . . argue . . . that unidentified opinions of an ALJ should not be classified as matters of 'public concern,' as is supposedly universally required for protection of employee speech. *Connick v. Meyers*, 461 U.S. 138, 143 (1983).

"In the present case, it is clear that rulings by an ALJ are not of parochial concern; they involve more than the personal wishes or well being of the author. . . . This case, as alleged, plainly involved quasi-judicial 'decisional independence.' . . . Whether or not constitutional protection of decisional independence can be soundly advocated as a matter of 'good government' . . . it does seem logically and historically compelled under the expansive view of the First Amendment that covers academic freedom and is evidenced in other rulings of the Supreme Court during the past thirty years. The protection of classroom expression within definable limits seems on a par with constitutionally appropriate protection of decisional independence.

"Although further development of the issues may show that this case does not ultimately turn on whether there is a First Amendment right to decisional independence, I am presently prepared to recognize such a

right in ruling on the motion to dismiss. This may well be the first decision so holding. I am fairly sure, given the First Amendment rights of teachers, that judges enjoy the protection asserted by plaintiff."

In *Perry v. McGinnis*, 209 F.3d 597 (6th Cir. 2000), the Sixth Circuit Court of Appeals, without citing *Harrison*, held that a Michigan Administrative Law Examiner's decisions in inmate discipline cases are protected free speech under the First Amendment, barring the judge's dismissal for failure to maintain a 90-percent guilty rate in decided cases. The Court said in *Perry*:

"As a threshold matter, we must determine whether Perry's decisions made in inmate disciplinary hearings constitute expression as protected by the First Amendment. We find that they do. The Supreme Court has long held that communicative action is protected by the First Amendment. . . . Regarding administrative law judges, the Court said:

"In the instant case, . . . the state entrusted one of its employees with the task of reviewing facts, evaluating a set of circumstances, and making a decision . . . (T)he decisions came in the form of guilty/not-guilty determinations. Perry's decisions . . . are communicative acts-acts aimed squarely at the inmates in question with the goal of reemphasizing the parameters of acceptable behavior in prison. . . . Compulsion . . . is . . . particularly unsettling in the instant case because, here, the interference results in the heavy hand of the state's disciplinary authority being brought to bear on inmates who may have done nothing to deserve the invocation of that authority.

"We find that a disciplinary hearing decision, like the assignment of a letter grade, is a communicative act entitled to First Amendment protection." *Perry*, at 603-604.

In *Perry* the Sixth Circuit reversed and remanded the District Court's dismissal of the hearing officer's complaint, directing a trial to determine whether the State's interest in disciplining Perry outweighed Perry's free speech rights:

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The Role

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"It is well established that a government employer cannot 'condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.' . . . As a logical consequence, retaliation by a government employer against an individual who exercises his First Amendment rights constitutes a First Amendment violation. . . . This is the case even if the employee could have been terminated for any reason.

"The Supreme Court has established a three-pronged test for determining whether a plaintiff can prevail on a First Amendment retaliatory discharge claim. Under the test, commonly called the Pickering test, the plaintiff must set forth three elements: 1) the speech involved a matter of public concern, 2) the interest of the employee 'as a citizen, in commenting upon matters of public concern,' outweighs the employer's interest 'in promoting the efficiency of the public services it performs through its employees,' and 3) the speech was a substantial or motivating factor in the denial of the benefit that was sought. If the employee satisfies this test, he has established a prima facie case" (citations omitted).

In *Perry* the ALJ argued that he was fair and impartial in his disposition of disciplinary cases, and that each of his decisions was a communicative act protected by the First Amendment. He further argued that in disciplining and terminating him for that expression, the MDOC infringed upon his freedom of expression. The Court noted that:

"The district court assumed, *arguendo*, that Perry's decisions in inmate disciplinary hearings constituted matters of public concern, and then proceeded to base its disposition of the case on prong two of the Pickering test—the balancing prong. When fleshed out, it is clear that Perry's insistence through his decisions that he be impartial and operate within the confines of constitutional law, constitutes speech on a matter of public concern. When Perry conducts hearings, he is doing so at the

behest of the Michigan legislature, see Mich. Comp. Laws § 791.252 (1979) and is making decisions that can result in a greater or lesser period of incarceration for an inmate. These are intensely public matters."

That's the role of the ALJ. Your role and your independence are tied to the assurance of due process. That process is not "due," if you are pressured in your decision making. Perry alleged that the MDOC was contravening the law by demanding that "ALEs find 90% of inmates appearing before them guilty." And the Court held: "If hearing officers focus on finding 90% of the defendants before them guilty, as the evidence adduced thus far suggests, they cannot possibly be impartial, as is required by *Wolff*. The prisoner whose case merits a not-guilty finding, but whose case would result in the eleventh not-guilty finding in one hundred decisions, is sunk. His fate is sealed before his file is opened. Such a system reeks of arbitrary justice, which can only be injustice.

"Because Perry's speech served to ensure that the MDOC, an arm of the state, was operating in accordance with the law as established in *Wolff*, it concerns the most public of matters."

In reversing the district court, the Sixth Circuit noted:

"At the very least, the record is not thorough enough to determine whether the MDOC's interest in impairing Perry's First Amendment right through discipline and termination was based on a desire to maintain accountability or a desire to maintain a 90% guilty rate. As such, the district court erred in determining that the Pickering balance could only favor the prison officials and in consequently granting the prison officials' motion to dismiss. Therefore, the issue is remanded to the district court for further consideration in line with this opinion."

I've quoted a lot from *Harrison* and *Perry*. Why? Because every word is a proclamation of your role, and your rights, and your freedom, and your responsibility.

Now each case is different; and each judge here may have a somewhat different statutory and regulatory situation, but the

new federal cases affirming a constitutional free-speech First-Amendment right to decisional independence are the most exciting new precedents in administrative adjudication since *Butz v. Economou* in 1978. And they should warm the heart of any hearing officer or ALJ seeking to fulfill the mandate of Canon 1 of the Code of Judicial Conduct—to "uphold the integrity and independence of the judiciary."

Hearing

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hearing officer position. The suggestion implies that the use of administrative law judges at SSA is a matter of beneficial convenience to the agency and not an established right held by each claimant. One of the purposes of the APA is to establish the position of an independent administrative law judge selected on a merit basis and insulated from agency bias and pressure in performing their adjudicative functions. See *Butz v. Economou*, 458 U.S. 478, 513 (1978). Replacing administrative law judges in the Social Security Administration with hearing officers who do not have these same attributes will effectively deny claimants their rights to a due process hearing, and the ABA opposes any such change.

Federal Trial News

American Bar Association

CHAIR'S COLUMN

by Judge James G. Glazebrook
Orlando, FL

This year, the NCFTJ has focused its efforts on three issues that affect the independence of the federal judiciary: (1) the ethical attacks on federal judges who attend educational seminars hosted by disapproved organizations; (2) the large number of judicial vacancies that remain nationwide in the federal courts; and (3) the inadequate compensation of federal judges. All three issues received attention at the May 2-5 Judicial Division Spring Planning Meeting in Key West, Florida, and also at the May 7-8 ABA Day in Washington, D.C. This column reports on the status of these issues.

Ethical Attacks on Judges for Attending Expense-Paid Seminars

Organizations with specialized agendas are attacking federal judges for having attended seminars hosted by rival organizations that promote antithetical agendas. Any judge is subject to attack if he or she has accepted reimbursement for attending any seminar in a desirable location that is "privately-funded" by an organization that presents, in the eye of the attacker, an "unbalanced" or "slanted" viewpoint. In this context, "privately-funded" means *any* non-governmental source of funding, including contributions from individuals, corporations, foundations, law schools, and bar associations.

The attacks are a means of "judge-shopping" – attaining an optimal judge or pool of federal judges, who might adjudicate cases in the organization's favor. The mechanism of attack may be a motion to force the recusal of a particular judge in a specific case; vicious adverse publicity intended to affect judicial decision-making

and to discourage judges from attending and learning disfavored viewpoints; or a public challenge to the ethics of a particular judge whom the President has nominated for appointment or elevation. By these means, judge-shopping subverts the independence of the judiciary. Independent judges learn from all sides, objectively balance competing views, and ignore public criticism for taking unpopular or disfavored positions.

The Community Rights Counsel ["CRC"] and the Alliance for Justice are two special interest organizations that have taken the lead in criticizing organizations that hold seminars for federal judges and other attendees. See www.tripsforjudges.org and www.allianceforjustice.org/jsp/enviroreport/home.html. Their primary targets are three organizations alleged to present seminars with an unbalanced pro-market, pro-development, anti-environmental-protection, anti-regulatory slant: (1) the Foundation for Research on Economics and the Environment ("FREE"); (2) George Mason University's Law and Economics Center ("LEC"); and (3) the Liberty Fund of the Manhattan Institute's Center for Legal Policy. The CRC has also published a target list of federal judges who have attended the seminars, and has included members of the National Conference of Federal Trial Judges on the list.

For the last 15 months, the ABA's Standing Committee on Ethics and Professional Responsibility ["Ethics Committee"] has been drafting an ethics opinion, based on the ABA Model Code of Judicial Conduct, on the propriety of judges attending expense-paid educational seminars. The Ethics Committee has discussed evolving versions of the opinion at 12 meetings during that time. It is unclear how the Ethics Committee first saw a need to regulate the education of judges. Nevertheless, Doug Kendall, the Executive Director of CRC, and Nan Aron, the Executive Director of the Alliance for

Justice, have been monitoring the status of the draft ethics opinion, and counsel for the Ethics Committee has kept them advised of its progress.

The 10-member Ethics Committee has no judges as members, and rarely issues ethics opinions affecting judges (four opinions in 18 years). The Ethics Committee is one of the few organs of the ABA that is authorized to establish ABA policy without the approval of the House of Delegates. Before issuing an opinion on judicial conduct, the Ethics Committee must submit the draft opinion for review by the Judges Advisory Committee. The Judges Advisory Committee comprises nine judges from the various conferences of the Judicial Division including two who are members of the National Conference of Federal Trial Judges.

After 13 months of deliberation and eleven Ethics Committee meetings to discuss revisions, counsel for the Ethics Committee first brought the draft ethics opinion to the attention of the Judges Advisory Committee just before a telephone conference on March 22, 2002. Counsel told the judges that the Ethics Committee would assume that the Judges Advisory Committee had no objection or comment if none was received within 30 days of March 22. Counsel then warned the Judges Advisory Committee that they may not disseminate the draft ethics opinion until publication so as to protect the Ethics Committee from lobbying from groups seeking particular results. Judges were permitted to obtain only informal feedback from colleagues without seeing the draft opinion.

In order to avoid running afoul of the thirty-day limit, the NCFTJ Chair-Elect fired off a strongly-worded objection to what appeared to be a rushed and secret consideration of a politically sensitive issue

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Chair's Column

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without broader discussion and input from many organizations that have thought long and hard about the propriety of such a rule. According to its counsel, the Ethics Committee had not coordinated with the Judicial Conference of the United States or with many other groups representing judges because "the ABA interprets its own rules and model standards." Indeed, counsel for the Ethics Committee refuses to recognize the NCFTJ – or any other component of the ABA's own Judicial Division – as having any role in advising the Ethics Committee on this issue.

The Judges Advisory Committee further discussed the draft ethics opinion in a hurried one-hour telephone conference on April 10, 2002. Counsel told the Judges Advisory Committee that "this is rolling whether you make comments or not." The Judges Advisory Committee voted unanimously to defer final consideration due to a need for significant additional study, and to meet with the Ethics Committee at the Annual Meeting in August 2002.

In another hurried one-hour telephone conference on May 1, 2002, counsel to the Ethics Committee told the judges that it was counter-productive for judges to suggest that there should be no ethics opinion at all on this subject, and unhelpful for judges not to suggest language to improve the draft now under consideration. Counsel reminded the judges that the President of the ABA determines who will serve on the Judges Advisory Committee next year. The two judges from the National Conference of Federal Trial Judges have since received letters thanking them for their service on the Judges Advisory Committee.

At the Spring Planning Meeting in Key West, Florida, the National Conference of Federal Trial Judges discussed the proposed ethics opinion at length (but honored the Ethics Committee's request not to disseminate the opinion). The ethics opinion states that a judge creates an appearance of impropriety under most circumstances when he or she attends a privately-funded expense-paid seminar hosted by a "special interest organization,"

that is, any organization publicly known for particular points of view. The National Conference of Federal Trial Judges decided that the draft ethics opinion is wholly unsatisfactory.

The ABA is an organization publicly known for "particular" points of view that are likely to be considered controversial by a significant segment of the general public. See, e.g., Glazebrook, *Judicial Impartiality and the Advocacy of Social Policy*, JUDICIAL DIVISION RECORD, Spring 2002, at 31. The ABA often holds multi-day meetings and seminars in resort locations (such as Key West), and then reimburses the judges' expenses. ABA programs are rarely open to the general public, and transcripts are seldom made and distributed. The Judicial Division's programs aim for balance, but may appear unbalanced in the eyes of some observers. A judge does not commit an ethical violation by attending a Judicial Division event simply because major contributors to the ABA may include corporations, foundations, organizations, and lawyers with litigation pending or impending before the attending judge.

Judges generally respect the ABA, and want to comply with the highest ethical standards. Nevertheless, an ethics opinion of the ABA does not apply to federal judges. Federal statutes and the Code of Conduct for Federal Judges, not the ABA Model Code, govern the ethical duties of federal judges, including the attendance of federal judges at educational seminars. A judge must disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. 28 U.S.C. § 455 (a) (2002). The goal of § 455 (a) is to avoid even the appearance of partiality. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988). Subject to reasonable exceptions, federal judges may not accept gifts from anyone whose interest may be substantially affected by the judge's official duties. 5 U.S.C. § 7353 (2002).

The Judicial Conference of the United States Committee on Codes of Conduct has issued Advisory Opinion No. 67 (August 25, 1980; revised July 10, 1998) on this subject. Opinion No. 67 states, in pertinent part:

The education of judges in various academic disciplines serves the

public interest. That a lecture or seminar may emphasize a particular viewpoint or school of thought does not in itself preclude a judge from attending. Judges are continually exposed to competing views and arguments and are trained to weigh them.

It would be improper to participate in such a seminar if the sponsor, or source of funding, is involved in litigation, or likely to be so involved, and the topics covered in the seminar are likely to be in some manner related to the subject matter of such litigation.

The drafter of the ABA ethics opinion nevertheless aims to cover federal judges, and purports to "provide guidance" to federal judges by addressing seminars "not adequately discussed in Committee on Codes of Conduct Advisory Opinion No. 67."

Remarkably, the draft ethics opinion does not even cite the controlling federal case governing the propriety of federal judges attending expense-paid educational seminars. See *Aguinda v. Texaco, Inc.*, 241 F.3d 194 (2d Cir. 2000). In *Aguinda*, District Judge Jed S. Rakoff, sitting in the Southern District of New York, had dismissed a complaint filed by citizens of Peru and Ecuador seeking damages from Texaco for polluting the rain forests and causing personal injuries. Plaintiffs later moved for Judge Rakoff to recuse himself on the ground that he had created an appearance of impropriety by attending an unbalanced expense-paid environmental law seminar sponsored by an organization (FREE) that had received funding from Texaco, and at which a former Texaco CEO spoke. Plaintiffs relied on a publication by the CRC criticizing private judicial seminars, and on similar criticism voiced by the Alliance for Justice. See *id.* at 198.

In *Aguinda* the Second Circuit held without dissent that Judge Rakoff had not abused his discretion in denying recusal under 28 U.S.C. § 455 because Texaco had played only an indirect and minor role in funding the seminar (FREE had received 3-6% of its general funding from Texaco), and because plaintiffs had not shown that the seminar touched upon an issue material

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Chair's Column

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The Standing Committee on Ethics and Professional Responsibility is charged, under the Constitution and Bylaws of the Association, with "expressing its opinion on proper professional or judicial conduct." The Association has a long-standing policy that regulation of the legal profession should vest primarily with the judicial branch of government. Since 1931, the Ethics Committee has been responsible for the interpretation of provisions of the ABA Code of Judicial Conduct. Over its life, the Ethics Committee has issued 116 Formal and Informal Ethics Opinions regarding judicial ethics opinions covering a wide range of subjects such as appearance of impropriety in personal, business, and social life; acceptance of bar association awards; political activities; and media appearances.

The Judges Advisory Committee was created in 1970 as an adjunct of the Ethics Committee, and its members are appointed, as are those of the Ethics Committee, by the President of the Association. The members of the Judges Advisory Committee reflect all aspects of the judiciary and have included state and federal judges at the trial and appellate levels, as well as federal administrative law judges and U.S. magistrate judges. These appointees are not delegates from particular judicial entities either within or outside the Association.

Rule 7 of the Rules of Procedure of the Standing Committee on Ethics and Professional Responsibility, adopted in 1972, provides that "[B]efore issuing an opinion with respect to judicial conduct the Committee will submit the proposed opinion to the Judges Advisory Committee and consider any objection or comment from the Judges Advisory Committee and any member of it. The Committee may assume that the Judges Advisory Committee and its members have no objection or comment if none is received by the Committee within 30 days after the submission." The Judges Advisory Committee formulates its comments during teleconferences, in-person meetings, and by regular mail or electronic correspondence.

In 2000, the Ethics Committee became interested in the ethical ramifications of judges' participation in privately-funded educational programs because of the proposed Judicial Education Reform Act. In accordance with its usual procedures, the Committee began its work on this subject by assigning one of its members to prepare a draft opinion, without, however, giving that member any instructions as to what the draft opinion should say. The Committee then used that initial draft, as well as all succeeding drafts, as a means of thinking through the issue. When that process will reach a point where the Committee is in full agreement as to what the opinion should say, and no further drafts are therefore necessary, is difficult to predict.

In August, the Ethics Committee will be meeting with, and receiving comments from the Judges Advisory Committee. Future "draft opinions" will reflect the results of that discussion, including information and viewpoints presented to the Ethics Committee by the members of the Judges Advisory Committee.

to the disposition of a pending claim or defense. 241 F.3d at 198, 203. The court concluded that:

no reasonable observer would believe that such funding would influence a seminar-attending judge's decision in litigation involving Texaco. Rather, such an observer would regard the donation to FREE as far too remote to create a plausible suspicion of improper influence.

Judges are provided meals and often lodging by, *inter alia*, bar associations and law schools that are funded by donors who appear before the judges as parties or as counsel to parties

Id. at 202-03. The court thoroughly rejected CRC's argument that seminars for judges must be funded exclusively from public sources. *Id.* at 205.

To find otherwise, the court reasoned, would require judges "to recuse themselves in a vast number of matters or decline invitations to numerous events of an entirely innocent nature that are of importance to the judiciary, the profession, and legal education." *Id.* at 203. The court also rejected as futile any attempt to determine whether a presentation is "balanced." Such a determination, reasoned the court, "depends so heavily on each individual's view as to whether his or her position on the issue is prominently featured that a search for a consensus as to what is a balanced presentation of a particular issue is almost chimerical." *Id.* at 204. Some will always say that a presentation is unbalanced if the subject is

controversial. *Id.* The court also noted that it would be impossible to try to unravel every contact a judge has had with a subject (e.g., free copies of publications discussing disputed policy issues). Judges are trained to weigh competing values. *Id.* at 205.

Aguinda provides a safe harbor for federal judges. No reasonable observer would believe that a judge is subject to "brainwashing" that would affect the outcome of litigation so long as:

(i) a presentation does not relate to legal issues material to the disposition of a claim or defense in an action before a judge who attended the presentation, (ii) the funding by a party of a seminar's sponsor is too remote or minor to appear to a reasonable person to have an influence on the judge, and (iii) the nature of a party's funding of a sponsoring organization does not create an appearance of either control or impropriety.

Id. at 204.

On the other hand, federal judges are properly wary of attending presentations involving pending litigation, and must assure themselves that parties or counsel to the litigation are not funding or controlling the presentation. *Id.* at 206. Obviously, a judge may not attend a deliberately biased *ex parte* presentation by litigants in a pending case who intend to prejudice the judge. In one high-profile nationwide asbestos case, plaintiffs lured the presiding judge into a one-sided scientific "seminar" so that he would preview plaintiffs' key expert testimony. *See In re School Asbestos Litigation*, 977 F.2d 764,

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EDITOR'S NOTE

Editor: Samuel L. Bufford, Los Angeles, CA

The *Federal Trial News* is a publication of the American Bar Association (ABA) Judicial Division National Conference of Federal Trial Judges (NCFTJ) which serves to inform Conference members of actions of the Conference and the ABA. It also informs of legislative activities affecting the courts and federal judiciary. Opinions stated herein are those of the author only and not necessarily those of the ABA, the Judicial Division or NCFTJ. Comments should be directed to: Judge Samuel L. Bufford, U.S. Bankruptcy Court, 255 E. Temple Street, Ste. 1582, Los Angeles, CA 90012, E-mail: samuel_bufford@ce9.uscourts.gov Phone: 213/894-0992, Fax: 213/894-6407 or contact Rosline Jerome at ABA/Judicial Division, 541 N. Fairbanks Ct., Chicago, IL 60611, E-mail: JeromeR@staff.abanet.org Phone: 800/238-2667 x 5689, Fax: 312/988-5709.

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ARTICLE SUBMISSION DEADLINES

Fall, 2002: August 28

Chair's Column

(continued from previous page)

781-85 (3d Cir. 1992). A judge's partiality might reasonably be questioned where the judge receives reimbursement for such an *ex parte* presentation out of settlement funds that the judge had personally approved. *Id.*

At ABA Day in Washington, D.C. on May 7, I had the opportunity to discuss the proposed ethics opinion with Marvin L. Karp, Chair of the Standing Committee on Ethics and Professional Responsibility. He listened carefully and thoughtfully to the above concerns, and assured me that the Ethics Committee welcomes our input, and will carefully consider every one of our concerns. The ten lawyers on the Ethics Committee want to do what is right, have no interest in advancing anyone's political agenda, and have no interest in urgently rushing to complete an opinion without considering the concerns of the judges and judicial organizations affected by the rule. Interested parties will have an opportunity to meet in person with the Ethics Committee at the Annual Meeting in August 2002, and the Ethics Committee will keep an open mind. All conferences in the Judicial Division should study the issue and attend.

Filling Judicial Vacancies

The National Conference of Federal Trial Judges is very pleased that ABA President Robert E. Hirshon chose to emphasize two issues of extreme importance to federal trial judges in his opening remarks at ABA Day in Washington: federal judicial vacancies and federal judicial salaries. President Hirshon said that "the President should nominate judges expeditiously, and the Senate should confirm, or at least hear the President's nominations, just as expeditiously." He said that the ABA is a non-partisan organization, and that the ABA's Standing Committee on the Judiciary has vetted all nominees within thirty days.

The ABA Day panel of speakers also reflected the importance of the judicial vacancies issue to the ABA. The Honorable Alberto Gonzales, Counsel to the President, gave the keynote address. Speakers at the breakfast briefing were

Senator Orrin C. Hatch, Ranking Member of the Senate Committee on the Judiciary, and Senator Patrick Leahy, Chair of the Senate Committee on the Judiciary.

Senator Hatch said that federal judicial vacancies were his first issue of concern, and that the confirmation process was "never as bad as it is right now." He expressed concern about an "unfair trashing on nominees." He said that special interest groups and zealots on both sides want "activists who meet their narrow litmus test," so they "beat up on the nominees." Senator Hatch said that he had to "overrule the far right" a number of times when he served as Chair of the Senate Committee on the Judiciary, and he succeeded in confirming 377 of former President Clinton's nominees, only five below the all-time record set by President Reagan. Senator Hatch said that it now averages 150 days for a nominee to be confirmed, and that civil dockets are being delayed in a great number of places.

Senator Hatch expressed concern about discouraging judicial applicants who now expect to endure a grueling confirmation process just to "sit in limbo." He complained that eight of President Bush's first 11 circuit nominees have still seen no action, and that the Sixth Circuit has only eight of its 16 seats filled. Senator Hatch reported that the ABA had made changes in the ABA Standing Committee on the Judiciary, and that the Committee is now doing a "good job in rating nominees."

Senator Leahy viewed the Senate's advice and consent role as ensuring that judges are impartial and fair, and not as a "rubber stamp" of the nominees. He said that the Senate rejects judicial activists from the extreme right and the extreme left. Senator Leahy said that the Senate Committee on the Judiciary had inherited 110 vacancies, had held 18 hearings, and had confirmed 56 district judges and nine court of appeals judges in 10 months. He said that 50 of the 56 district judges were Republicans, and "most fairly conservative." He said that the "courts should be above ideology," and that he aims to "eliminate judge-shopping based on ideology" so that anybody can come into any federal court and be treated fairly.

Senator Leahy said that the ABA's Standing Committee on the Federal

Judiciary has an "invaluable role as an independent evaluator," and that the ABA reports are "extraordinarily helpful." He found the reports especially helpful on temperament, but not dispositive. He said that the late commencement of the ABA review adds two months to the confirmation delay.

Fair Judicial Salaries

In his opening remarks at ABA Day in Washington, ABA President Robert E. Hirshon urged Congress to pay judges an adequate salary, whether by restoring the regularity of COLAs, or by way of a "downright increase in judicial salary." He noted that the 1990's were a boom time in law firm salaries, and that federal judges now see their law clerks earning more than judges when the law clerks leave to begin private practice. Noting that judges had received only four COLAs since 1993, and had suffered a 13% decline in purchasing power, President Hirshon urged Congress to give the judges all future COLAs, even if it requires delinkage from congressional salaries. President Hirshon said that the ABA supports the creation of a Salary Review Commission to consider fair salaries, not only for the federal judiciary, but for all federal government employees. He supported giving judges all retroactive COLAs to upwardly adjust their salaries.

Senator Leahy also spoke about pay for federal judges. He said that he had been inclined to vote to separate judicial pay from congressional pay, but that there is little support for de-linkage now "as the United States Supreme Court speaks with open hostility to the Congress and overturns its legislation." Senator Leahy explained further about why there is "not a great deal of sympathy" for delinkage. The Chief Justice complains of his workload to the Senate, yet "the justices know their schedule six months in advance." Senator Leahy says that he often works all weekend and finds himself on the Senate floor until 1:00 a.m., "yet the judges ask me to call them back between 9:00 a.m. and 3:30 p.m. to talk about their pay." Lastly, Senator Leahy suggested that the federal judges "pick better lobbyists" ones who do not need to hire a limousine to drive two blocks to Capitol Hill."

Special Court News

American Bar Association

Have You Heard about the NHTSA Judicial Fellowship?

by Judge Michael Witte
Lawrenceburg, IN

Since the mid 1990's, the membership of the ABA Judicial Division has heard about the position of Judicial Fellow for the National Highway Traffic Safety Administration (NHTSA). However, identifying and describing the Fellowship has been somewhat of a mystery to some members of the Division. This article will introduce the reader to the Judicial Fellow program, its history, and its future.

THE JUDICIAL FELLOW PROGRAM

The Judicial Fellow operates under an annual grant awarded by NHTSA. NHTSA is an agency of the U.S. Department of Transportation. NHTSA's role is to prevent and reduce injuries and deaths that occur on our nation's highways. Some of the traffic safety items that come under the jurisdiction of NHTSA are seatbelt and helmet safety, impaired driving enforcement, speed detection devices, and photo traffic violation enforcement.

The Fellowship is similar to an academic fellowship offered by institutions of higher learning. The Judicial Fellow serves as an advisor and consultant on highway traffic safety issues. Many times the Judicial Fellow participates in "think tank" operations with other highway traffic safety experts. The judicial fellow provides expertise from a judicial perspective. Other tasks of the position include continuing education faculty, workshop facilitator, author, and participation in special projects within the highway traffic safety industry.

The fellowship is in addition to the judge's regular duties in his or her court,

therefore time management is demanding on the judge. The position entails much travel including monthly trips to Washington, D.C. The Judicial Fellow serves a one-year term subject to reappointment and receives a stipend. All of these special duties are performed within the scope of the Canons of Judicial Conduct.

HISTORY

The Judicial Fellow program began in 1992. It was the brainchild of Ms. Kay Chopard, formerly of NHTSA, and Judge Linda Chezem of the Indiana Court of Appeals. They were looking for a way to reach out and educate judges on the highly technical aspects of impaired driving adjudication. Impaired driving cases are very common on court dockets. As common as these cases are, their adjudication and sentencing are technical, scientific, and sometimes difficult. Breath test instruments, pharmacology, toxicology, field sobriety tests, and opinion testimony all present evidentiary challenges in the impaired driving adjudication process. In addition, the court needs to be cognizant of the character traits and dynamics of alcohol abuse and chemical dependency. That is a lot of special knowledge for a "routine traffic court case". A full understanding of these issues would hopefully bring uniformity in the adjudication of impaired driving cases, as well as hopefully reduce the number of deaths and injuries associated with impaired driving.

Ms. Chopard and Judge Chezem created the Judicial Fellowship program in order to develop a uniform curriculum to instruct judges on these multiple aspects of impaired driving. The curriculum was presented to judges through the National Judicial College. Under the leadership of Dean Norman Lefstein and Judge Chezem, the Indiana University School of Law at Indianapolis served as the first host of the NHTSA Judicial Fellowship grant. Judge

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Navy Reservist Spreads Democracy in Court Program

by Colonel Linda Strite Murnane*
Bolling AFB, DC

On any Monday morning in the Second Judicial Circuit Court in Maui, Hawaii, you might see the Honorable Shackley F. Raffetto on the bench sorting out the issues of a complex civil trial or operating the drug court he pioneered.

What you might not understand is why there are two judges on his bench that day.

The explanation is an exciting and innovative Court Observer program Judge Raffetto has implemented designed to demonstrate and familiarize emerging democracies with the court system in the United States.

Judge Raffetto, who is also a Captain in the U.S. Naval Reserve, conceived this program while he was serving as an adjunct faculty member with the Defense Institute of International Legal Studies (DIILS). In his role as an adjunct faculty member, Judge Raffetto has traveled to several emerging democratic nations, and taught on various legal topics pertaining to the military in democratic societies.

In April 2000, Judge Raffetto invited Justice Gombosuren Ganzorig of the Peoples Republic of Mongolia to join him in Hawaii to observe a felony criminal jury trial. In December 2000, Dr Bakhtiyar R. Tuzmukhamedov, an international law expert with the

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MISSION STATEMENT

To represent special court judges in relation to the legal profession and to the public; to promote a representative, educated, and sensitive judiciary providing equal justice under the law; and to assist judges in meeting challenges facing the judiciary.

CHAIR'S COLUMN



by Judge Steve L.
Smith
Bryan, TX

Annual Meeting

When you receive this issue of the *Judicial Division Record*, the Annual Meeting should be just around the corner. I hope that you have made plans to attend. Our nation's Capital is a stirring and impressive venue, with countless opportunities for first-class sightseeing. Whether you're talking the Smithsonian, the monuments or Arlington National Cemetery, there will be something for everyone in your family.

Activities begin on Thursday evening, August 8th, with the annual LexisNexis reception. We'll have conference meetings on Friday and Saturday morning, including elections during the Saturday meeting. Our conference dinner will be held at the Army and Navy Club on Friday, August 9th. Thanks to Annual Meeting Committee Chair Louraine Arkfeld and Board of Governors member Judge John Vittone for their help in securing this prestigious dinner venue. Rounding out activities will be the Annual Dinner in Honor of the Judiciary on Sunday, August 11th at the Supreme Court.

You'll also have the opportunity to attend top-flight educational opportunities, including an excellent program on Racial Profiling headed up by Judge Bob Pirraglia.

JD Planning Meeting

Conference officers Eileen Kato, Mike Pietruszka, Sharon Hatten and I attended the JD Planning Meeting in Key West on May 2-5. JD Chair-Elect Jamie Sledge had a fast-paced session planned. Discussions centered on the mission of the Judicial Division and what can be done to provide the most "bang for the buck" for JD members. We'll be discussing the results of the meeting at the Annual Meeting in Washington.

NHTSA Activities Continue

We continue to work with the National Highway Traffic Safety Administration (NHTSA). A traffic technology seminar was presented in Corpus Christi, Texas in March. The evaluations indicate that the program is being well-received. A program is scheduled in early June for Michigan, and plans call for an additional program to be presented in November in Georgia. If your state might be interested in having a traffic technology or standardized field sobriety test seminar presented, please contact Rebecca King at the JD office (kingre@staff.abanet.org). She'll be happy to contact the appropriate individuals to begin planning a session for your judges. Thanks to Judges Robert Pirraglia (outgoing NHTSA fellow) and Karl Grube (former NHTSA fellow) for their efforts.

Our future with NHTSA is bright. A new Judicial Fellow will soon be named from some seven applicants. Rebecca King and Aimee Skrzekut Torres have secured an additional NHTSA grant to conduct a state-by-state analysis of DUI/DWI laws. The purpose of the project is to identify

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EDITOR'S NOTE

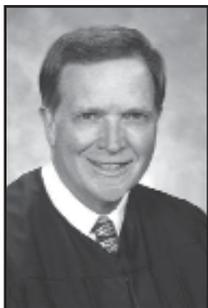
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All persons interested in submitting articles for inclusion in future issues of *Special Court News* should contact Judge William G. Kelly, Editor, *Special Court News*, PO Box 8848, Kentwood, MI 49518-8848, E-mail: judge@ci.kentwood.mi.us, 616/554-0717 or fax 616/698-8199 or contact Rebecca King: 541 N. Fairbanks Court, 13th Floor; Chicago, IL 60611, e-mail: Kingre@staff.abanet.org or 800/238-2667 ext. 5742.

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ARTICLE SUBMISSION DEADLINES

Fall, 2002: August 28



Abuse of Power

by Judge William G. Kelly
Kentwood, MI

I attended the seminary in high school in preparation to be a Catholic priest. (You could say, I always wanted to wear black robes and marry couples.) Needless to say, I have been upset by the news that so many priests have caused so much pain. Many young children trusted and respected these priests and were abused by

them. The victims should be compensated. The misdeeds done by the pedophiles have robbed these victims of so much and have harmed the institution of the church. This same institution has and still does so much good in the society such as providing first class schools and hospitals. This same institution still has the responsibility of preaching Christ's message of love and peace. I am optimistic that this crisis will present opportunities for the church to improve and it is important for Catholics and other believers to help.

It is easy to say that as judges this crisis has nothing to do with the courts except the litigation which will result. I think there is a reminder for our institution, the judiciary, here. A few bad actors think they are above the law. In my own state, we have seen a judge who dismissed traffic tickets in exchange for sexual favors and

another who put prostitutes on probation to himself and then made home visits. They were removed from the bench by the Judicial Tenure Commission but, of course, their actions detracted from the efforts by the rest of us to seek justice in our communities.

Frequently, a defendant appearing before the court will present themselves in their best light. The court will be advised that the defendant is a good student or employee. My response is that no matter how educated a person is or how successful they are in a career, people will think of them as an alcoholic unless they take care of their substance abuse. In the same way, an institution must police itself to make sure that those who abuse their power are disciplined appropriately and individual judges must take responsibility for their own behaviors.

Rescinding Domestic Violence No Contact Orders

by Judge James Riehl
Port Orchard, WA

Many years ago, I had the opportunity to hear a woman speak to a group of judges about her life with her husband. For over 20 years she had been a victim of a very abusive relationship resulting in substantial physical injuries. Eventually she hired someone to kill her husband and was subsequently convicted of murder. After serving several years in prison, she was released.

During the many years of abuse, she had obtained numerous restraining orders against her husband. Shortly thereafter she would return to court and ask the judge to rescind the order, which was done. As she explained to us, at the time she wished the judges had known just how fearful she was of her husband and had hoped the judges would have denied her request to rescind the orders.

Two things struck me at that time and have stayed with me all these years. First, the perception of the public, especially victims of domestic violence, that we as judges possess superhuman powers to detect what is in the minds and hearts of

victims appearing before us. Second, the incredible power judges possess when they decide whether restraining orders should or should not be rescinded and the corresponding impact on people's lives.

For many years, the judges in our court heard requests from victims of domestic violence to rescind no contact orders with little or no information. It became clear that it was incumbent upon our judges that a more systematic approach was necessary to make a better and informed decision regarding safety of victims. Fortunately, our court has a probation division that has the resources and expertise to assist in providing that information to the court.

Today, we have established a procedure by which a victim in a criminal prosecution, after sentencing, may request the court to rescind a no contact order that was imposed at the time of sentencing. This three-step procedure is described in a form given to the person asking that the no contact order be rescinded.

In Step 1, the victim contacts the court and sets up an appointment with the Domestic Violence Specialist.

In Step 2, the No Contact Order Screening Checklist form is filled out by probation at the interview prior to the hearing. The probation officer is trained to ask the questions in a way to convey the most information. A judge can also do this information gathering at the time of hearing if no probation services are

available. See below if you wish to obtain a copy of the form we use.

In Step 3, a hearing is set and the information is conveyed to the court. It has been our experience that a number of victims do not appear at the hearing after having spoken to the probation officer. When they do, the court reviews the case, including the probation information, hears from the victim and then makes a determination as to whether the no contact order should be rescinded.

Hopefully, through this process there will be fewer victims who later lament that they wished the judge had known all the reasons why they were requesting the relief. I encourage judges who hear these types of cases to institute a similar process. By doing so, we become better judges and our communities become safer.

For a copy of the forms that we use, call me at (360) 337-7010 or write to me at 614 Division Street M.S.#39, Port Orchard, Washington 98366

KITSAP COUNTY DISTRICT COURT
PROBATION SERVICES DIVISION
PROCEDURE FOR:
OBTAINING DISMISSAL OF A POST
SENTENCING
"NO CONTACT ORDER"
GRANTED BY THE KITSAP COUNTY
DISTRICT COURT

Navy

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Constitutional Court of Russia, observed a case also in Judge Raffetto's court.

For both of these observers, it was an opportunity to watch how a jury trial in an American civilian courtroom operates and the role of a judge. More importantly, it provided a dynamic interaction with the American mechanics in the courtroom as well as a workshop on "Rule of Law" under the American system of jurisprudence.

To enhance the value of the Court Observer program, Judge Raffetto provided judicial robes for his observers and allowed them to be seated next to him on the bench throughout the entire trial, including the jury selection process, arguments and jury instructions.

"I came upon the idea for the Court Observer program while working with DIILS," Judge Raffetto explained. "I realized in working in places like Mongolia and Russia, that their post cold-war constitutions often contain guarantees and individual rights to citizens that are similar to or greater than those afforded under the U.S. Constitution. However, because the constitutions are so new, few judges and lawyers practicing in these newer democratic nations have any academic training in constitutional law as it applies in a democracy in democratic constitutional traditions. It is in the interests of all democracies that their law professionals learn about methods and legal institutions used by other democratic nations and assist each other to learn and implement those concepts that have been proven to enhance democracy, strengthen democratic institutions, and promote public confidence in the rule of law."

Raffetto will shortly be retiring from the U.S. Naval Reserve. He served from 1961 - 1963 in the U.S. Marine Corps. He joined the U. S. Naval Reserve Judge Advocate Generals Corps in 1981 through the Direct Commission program. He was a military judge with the Navy and Marine Corps Trial Judiciary for five years, and in 2000, he transferred to the Commander U.S. Pacific Command Reserve Detachment 120 where he has worked in the Pacific

Command (PACOM) Staff Judge Advocate's Office at Camp Smith, Hawaii. It is during this assignment that he first associated himself with the DIILS program.

The Defense Institute of International Legal Studies (DIILS) is co-located with the Naval Justice School in Newport, Rhode Island. DIILS is a joint agency activity reporting to the Defense Security Cooperation Agency (DSCA) in Washington, D.C. DIILS conducts training seminars on a wide range of subjects related to rule of law, justice and human rights. To date, they have provided training programs to more than 15,000 military and civilian personnel in 83 countries worldwide.

Judge Raffetto noted that it is an easy lure to his Court Observers to come to Maui, Hawaii to attend the program. In addition to the time spent on the bench observing the trials in Judge Raffetto's courtroom, each participant in the Court Observer Program was able to sightsee and visit cultural attractions of Hawaii.

Raffetto's program has sparked the interest of various personnel in the State Department, and several other countries are considering sending judges to observe the courtrooms in America. "What's important about this program," Judge Raffetto summarized, "is that we are enhancing dialogue between law professionals about concepts of justice, the rule of law, and due process - building on the concepts the DIILS seminars so effectively communicate."

For individuals interested in further information about Judge Raffetto's one-man initiative to spread democracy and the rule of law, he can be contacted at Second Circuit Court, Courtroom Number 2, 2145 Main Street, Wailuku, Hawaii, 96793, or by e-mail at Jsraffetto@aol.com.

**Colonel Linda Strite Murnane is the Chief Circuit Military Judge, European Circuit, Ramstein Air Base, Germany. Her J.D. was awarded by the University of Cincinnati. She is admitted to practice before the U.S. Supreme Court, the Ohio Supreme Court, the Court of Appeals of the Armed Forces and the Air Force and Army Courts of Criminal Appeals. She is the current chair of the Military Courts Committee, National Conference of Special Court Judges, Judicial Division, American Bar Association.*

Chair's Column

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weaknesses, loopholes or gaps associated with intoxication laws. A consultant will collect data, conduct focus sessions with national organizations and NHTSA staff, and help finalize criteria used to analyze the laws. Once the data has been analyzed, it will be presented in the form of a written report.

The collaboration that we have had with NHTSA has enabled the Conference to position itself to bring in non-dues revenue through the presentation of programs. I have appointed a committee, chaired by Judge Michael Witte, to study the opportunities that we have to help the Conference optimize its financial base. The committee will be looking at suggestions for program topics, the frequency of when programs should be presented, how to cultivate a diverse and large enough faculty and other issues. If you'd like your input to be considered, you may e-mail Mike at gmwitte@hotmail.com.

Membership

At last year's Annual Meeting, I challenged each Executive Committee member to recruit at least two new Conference members during the year. The JD, under the direction of JD Membership Committee Chair Judge James Glazebrook, conducted a membership "blitz" this Spring. As a result our conference has 13 new members. Just today, I provided membership materials to a newly-appointed Municipal Judge in our community. Our ranks will grow only when we are willing to share the story of what the NCSCJ means to us. Meet the challenge! Bring a new member on board before the month is out.

ABA Day in Washington

I was honored to attend the ABA Day in Washington, D.C. last week. Many ABA members met with members of Congress to discuss issues relating to the legal profession. Two items on the agenda which have direct impact on our duties are the continued funding of the Legal Services Corporation and the State Justice Institute. Contact your Senator or Representative and tell them you support continued level funding for LSC and the restoration of SJI monies into the FY 2003 budget.

NHTSA

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Chezem served as the first NHTSA Judicial Fellow from 1992-1995. She was succeeded by Judge G. Michael Witte of Lawrenceburg, Indiana, from 1995-1998. Judge Karl Grube of St. Petersburg, Florida, served as the third Judicial Fellow from 1998-2000. The current Judicial Fellow is Judge Robert Pirraglia of Providence, Rhode Island. In the summer of 2002, the fifth NHTSA Judicial Fellow will be selected.

In 2000, the Judicial Fellowship grant moved from Indiana University to the ABA Judicial Division, National Conference of Special Court Judges. In 2001, a second Judicial Fellow position was created for an administrative law judge. This position grew from the recognition that many traffic safety adjudications occur through administrative proceedings such as driver licensing sanctions and commercial motor vehicle safety enforcement. The second position is housed with the National Conference of Administrative Law Judges Conference of the ABA Judicial Division. Administrative Hearing Officer Christopher B. McNeil of the Ohio Department of Public Safety serves as the first NHTSA Administrative Law Judicial Fellow.

Ms. Chopard has moved on to serve as Deputy Executive Director of the National Criminal Justice Association. Her successor at NHTSA is Mr. Brian Chodrow, National Outreach Director. Mr. Chodrow continues to promote the Judicial Fellow program as a jewel of the federal agency. He works closely with the ABA in maintaining the Fellowship as an integral part of the Judicial Division.

PROJECTS AND MILESTONES

Performance milestones and project participations have been numerous since the program began in 1992. The impaired driving curriculum has been refined and continues to be a foundation for the program. The judiciary of more than 25 states has been the beneficiary of the NHTSA impaired driving curriculum.

The Judicial Fellow has performed legal writing exercises including articles for national publications and development of DUI sentencing guideline manuals for both adult and juvenile offenders. Also, this ABA newsletter contains a regular insert called *Highway to Justice* that reports on developments in the adjudication of traffic cases.

The position is called upon frequently to serve as faculty at state and national continuing education programs, and to serve as a facilitator at traffic safety workshops. The Judicial Fellow program has been responsible for several CLE programs at the annual meeting of the ABA, including "Civility Among Judges" and "Standardized Field Sobriety Tests: Whose Standards?"

The Judicial Fellow has been called upon to serve on implementation groups and advisory boards for various NHTSA projects. One such task was the implementation of national standards to address the aggressive driving phenomena. Also, the Judicial Fellow works closely with the administration at the National Judicial College to develop and present specialized courses related to traffic safety adjudication. Specialized courses in 2002 will include "Traffic Issues in the 21st Century", "Sentencing Motor Vehicle Law Offenders", and "DUI Primer for New Judges".

Periodically NHTSA performs assessments of state highway safety programs. Areas of review can include the arenas of impaired driving, passenger restraints, or bureau of motor vehicle records and licensing. The assessments are similar to an audit and are performed by a team of five experts in the traffic safety field. The Judicial Fellow sometimes serves on an assessment team. The assessments normally take five or six days and are quite labor intensive. The final report of the assessment team is presented to the executive branch of a state government.

FUTURE

The future of the Judicial Fellow program is exciting. As technology advances in the transportation industry, the array of new legal challenges is

boundless. Imagine a smart car that prohibits a suspended driver from operating the vehicle or an automatic pilot that allows hands free driving. What legal issues can arise from these situations? The current future of the Judicial Fellow is the Traffic Court Technology program, which is a product of the Judicial Fellow grant and presented by the National Conference of Special Court Judges. This traveling program is in its fourth year and improves with each presentation. Rhode Island, Washington, and Texas have hosted the program for its respective judiciary. In 2002, the program will take the road to Michigan and Georgia.

The Traffic Court Technology program is not your ordinary traffic court CLE presentation. It focuses upon the current and future technology of traffic enforcement and highway safety. Evidentiary issues related to the developing technology are discussed. Program topics include photo traffic enforcement, alcohol detection devices, auto tracking and disabling devices, drug and alcohol recognition field tests, commercial motor vehicles, and opinion testimony in emerging technologies. At the end of the program, a mock trial is conducted. The format allows full audience participation. The trial encompasses most of the technology issues discussed throughout the course. NHTSA's Rolodex of leading traffic safety authorities lends a level of expertise to the program that can rarely be duplicated.

The Traffic Court Technology program can be presented for your state judiciary by contacting the ABA National Conference of Special Court Judges or your state judicial educator.



NCSCJ Officers at the Division Spring Planning Meeting in Key West, FL - (L-R) Judges Steve Smith, Sharon Hatten, Eileen Kato and Michael Pietruszka.

Trial Judges News

American Bar Association

A Review of the 20th Annual Conference of the National Conference of State Tax Judges

by Judge Alexander P. White
Circuit Court of Cook County

The 20th Annual State and Local Taxation Conference of the National Conference of State Tax Judges convened on Friday, March 15, 2002, in Cambridge, Massachusetts. The two-day conference addressed problems on public school funding, appraisal techniques and technological issues as well as case updates and legislative developments. The conference was originally scheduled to be held in Salt Lake City, Utah on September 13-15, 2001 but was cancelled due to the tragic events of September 11, 2001.

History of the Conference

Twenty years ago, Judge Lawrence L. Lasser established the Tax Court of New Jersey at the request of New Jersey Governor Brendan Byrne. He was appointed presiding judge of that court, a position he held for 16 years before retiring in 1995. In 1980, he contacted several state tax court judges to promote the organization of a conference. Subsequently, he sought affiliation with the American Bar Association, Section of Taxation, and the National Center for State Courts. Eventually, he contacted the Lincoln Institute of Land Policy (the Institute) and was successful in having it sponsor periodic tax programs and the Annual Conferences of the State Tax Judges. Tragically, two weeks prior to the 18th Annual Conference, Judge Lasser was killed in an accident on his farm in Tewksbury, New Jersey.

The Lincoln Institute is supported by the Lincoln Foundation, which was established in 1947 by John C. Lincoln, a Cleveland industrialist. Mr. Lincoln founded the Lincoln Electric Company of Cleveland, Ohio, which became the world's leading manufacturer of arc welding equipment. He drew his ideas about land use and taxation from the 1879 book, *Progress and Poverty*, written by Henry George, the American political economist and social philosopher. Mr. George subscribed to the theory that taxes on land should be on the full rental value of land produced by natural and social factors and leave to the owners and users of the land the value created by their investments and labor. The Institute implements this theory by recognizing that taxation has a major impact on the manner in which a parcel of real estate is used. Because taxation policy and the adjudication of real estate tax disputes have a substantial role in the formulation of land use policy, the Institute promotes programs which address these concerns.

The 20th Annual Conference

Thirty state tax judges met at the headquarters of the Lincoln Institute which is located on Brattle Street, two blocks from Harvard Yard, in a mansion located next to the Henry Wadsworth Longfellow Museum. Opening remarks were given by Blaine Davis, Conference Chairman, and Joan Youngman, Senior Fellow and Chairman of the Department of Valuation and Taxation of the Lincoln Institute.

In the first session, the questions presented were whether the property tax should play a role in supporting school funding and if so, whether it could adequately support funding and if so, whether it should be local, statewide or both. Robert Castrell, Professor of Economics at the University of Massachusetts, discussed education reform in Massachusetts. Citing an article by Stephen P. Crosby, Secretary of

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A Review of the Report of the Illinois Commission on Capital Punishment

by Judge Alexander P. White,
Circuit Court of Cook County, Illinois

On April 15, 2002, an Illinois gubernatorial Commission charged with evaluating the state's death penalty system recommended drastically scaling back the types of cases in which the ultimate sanction can be imposed. The report by Gov. George H. Ryan's Illinois Commission on Capital Punishment suggested cutting the list of situations that could trigger eligibility for capital punishment from 20 to 5. Its members also proposed barring the death penalty for mentally retarded defendants and defendants convicted based on uncorroborated eyewitness testimony or the testimony of a single jailhouse informant. These suggestions were among 85 changes recommended by the Commission which has no authority to make these changes on its own and, in most instances, requires the General Assembly or the Illinois Supreme Court to approve the measures for them to take effect.

In January 2000, Governor Ryan announced a moratorium on executions in the state, calling Illinois' capital punishment system "so fraught with error" that he could not authorize another execution. He called a halt to lethal injections following several high-profile cases in which prisoners on death row were cleared of charges. He then

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JUDICIAL

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National Conference of State Trial Judges

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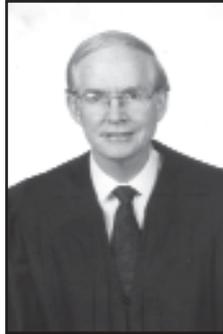
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CHAIR'S COLUMN



by Judge Joel D. Medd
Grand Forks, ND

This will be my last Chair Column of my year as your Conference Chair. This has truly been a year of changes. Of course, the biggest event affecting all of our lives was the 9-11 terrorist attack. To a certain extent, this even affected ABA

activities in postponing meetings and changing some of their formats.

Someone once said that the only person that likes change is a wet baby. Much of the year has been spent coping with change. Besides having files on all the committees and projects, I actually opened a file with the label "Vacancies" as it seemed that I was always filling some vacancy. Another change is the new Annual Meeting format developed after many meetings and conference calls.

I stated my goals as being membership and outreach to members. At the Spring Planning Meeting the report was that overall we have done quite well with membership compared to general ABA statistics. We were set back with membership when one of my membership co-chairs decided to run for an Appellate seat and won. There are two aspects to membership: recruitment and retention. For recruitment Membership Chair Judge Carolyn Temin has worked with me to revise our insert into the membership

packet. Member lists have been distributed to the area Delegates to prompt them and state liaisons to look who is not a member. Judge Temin worked with Rebecca King, our Conference Administrator, to host a Philadelphia Judges Reception. A sample recruiting/talking points letter has been distributed to assist in recruiting with each area Delegate being asked to recruit "Just One More." As for retention, I circulated a membership survey to all members to get input on issues and ascertain interests. Through this we signed up more members on committees and onto our list serve.

Secondly, I wanted to increase outreach by better use of technology. I revamped our State Trial Judges Website at <http://www.abanet.org/jd/ncstjweb.html> with a new greeting and a "What's New" feature. For the first time we will also be posting our minutes of the Midyear Meeting on the website.

Our Conference speaks for our country's trial judges. We have been a strong voice in support of continued State Justice Institute Funding. I met with Denise Cardman at the Washington, D.C. Legislative Office of the ABA and we developed a plan to communicate our support to Congress. Coordinated by her, I wrote a letter to each member of the House and Senate Appropriations Committee stating our support. Conference members have also expressed their support. Former Conference Chair John Dafron and SJI Board Member and Judge Sophia Hall briefed us on the SJI concerns. We have attended the Assembly of Courts Associations meeting and other SOC and

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EDITOR'S NOTE

Trial Judges News is a publication of the ABA Judicial Division National Conference of State Trial Judges. The views expressed in the *Trial Judges News* are those of the author only and not necessarily those of the American Bar Association, the Judicial Division, the NCSTJ, or the government agencies, courts, universities or law firms by whom the authors are affiliated.

All persons interested in submitting articles for inclusion in future issues of *Trial Judges News* should contact Judge Alexander P. White, Jr. E-mail: alnm130@aol.com, Publications Chair, 1300 East River Drive, Des Plaines, IL 60018 or to ABA/Judicial Division/NCSTJ; 541 N. Fairbanks Court, 13th Floor; Chicago, IL 60611, 800/238-2667 ext. 5742 or E-mail: Kingre@staff.abanet.org.

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ARTICLE SUBMISSION DEADLINES

Fall, 2002: August 28

A Review

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impaneled the 14-member Commission.

One of the two Commission chairs, Frank J. McGarr, a retired federal judge, said that while a majority of the Commission members favored abolishing the death penalty, that was not the Commission's charge. Paul Simon, a former U.S. Senator from Illinois, said he made the motion to call for abolition of capital punishment, which was narrowly defeated by the members. McGarr said, "Our concern was the existing system and we are here to make it work in the best way possible." Co-chair Thomas P. Sullivan noted "the current system for capital cases is badly flawed." The Commission's message is clear, added Sullivan, who previously headed the U.S. Attorney's Office in Chicago and is now a Jenner & Block, LLC partner.

The most controversial of the recommendations is reducing the list of "aggravating factors" that could qualify defendants for the death penalty. The Commission called for the elimination of 15 of the 20 factors including murder in the course of a felony and murders that are particularly "brutal and heinous." The Commission wrote in its report, "All the members of the Commission believe, with the advantage of hindsight, that the death penalty has been applied too often in Illinois since it was established in 1977." The Commission's report would leave in place eligibility factors for murders of police or firefighters, multiple murders, killings in prisons, torture with murder and the murder of someone involved with a felony trial – including lawyers, witnesses, judges or jurors.

The Commission also suggested other ways to limit the scope of capital punishment in the state. It recommended

eliminating the death penalty as an option for mentally retarded defendants or those convicted based on the testimony of only one witness. Judges also would assume more responsibility. Under the proposals, judges would be able to reverse a jury verdict to impose the death penalty. The Commission also recommended that the Illinois Supreme Court review capital cases for proportionality among sentences in murder cases. Another recommendation would require police to file a document with the trial court in capital cases certifying that officers have turned over all of their reports, notes and documents about the case to the prosecuting authority. Prosecutors would no longer be able to argue that they did not receive all of the information from police when the prosecutors fail to turn over exculpatory evidence to the defense, as they are required to do.

Annual Conference

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Administration and Finance for the Commonwealth of Massachusetts, he asked, what is the best way to divide a pie equitably? He answered, it's simple enough when there are only two people involved. One slice, the other chooses. But this is child's play compared to the division of the \$3.2 billion school funding pie in the legislative playground of Massachusetts. There are 328 local and regional school districts operating, each with its own grievances over perceived historical inequities, spread over 351 towns and cities of varying wealth and demographics, represented by 160 representatives and 40 senators, courted by an array of organized interest groups, in an intensely political state. These are not the conditions for a smooth road to reform. This year, the Swift administration led the journey to reform, but unfortunately – to stretch the metaphor, the legislature not only took a wrong turn, but went off the road entirely. As a result, the Commonwealth missed the opportunity to recraft school funding for greater fairness and equity. It's not too late, however, for next year – and the future – if the proper lessons can be drawn from this year's experience.

Daphne Kenyon, President of the Josiah Bartlett Center for Public Policy, gave a

report on the current school finance situation in New Hampshire. There is no income tax or sales tax in New Hampshire. In 1997, the New Hampshire Supreme Court held the local property tax unconstitutional and directed the legislature to implement a remedy by April 1, 1999. A state property tax was enacted with a provision for grants to poor school districts. It was declared unconstitutional, reenacted with modifications and is currently being challenged as unconstitutional.

Robert Schwab, Professor of Economics at the University of Maryland, discussed "The Effects of School Finance Litigation." Professor Schwab, who is working on a task force reviewing all the school funding litigation throughout the United States, discussed the various laws being challenged and the nature of the challenges.

William Fischel, Professor of Economics at Dartmouth College, gave a presentation on "Capitalization, Property Taxes and the School Finance Debate." Professor Fischel presented evidence that the market will determine the amount of educational dollars available to individual school districts and thus, court mandates are not necessary.

The luncheon speaker was David Brunari, contributing editor of *State Tax Notes*, who gave a speech entitled "Talking

to Lawmakers About Taxes." His presentation, which was given with humorous examples regarding his contacts with specific legislators, highlighted the fact that legislators do not understand sound tax policy and are more concerned with the political benefits emanating from tax legislation. One example involved a state legislator who was considering a "sales tax holiday not once each year but once each quarter." Another was a legislator considering a sales tax exemption on clothing but who did not know how to differentiate between high-priced suits and low-priced formal wear, and ties, shoes, handkerchiefs and shoe laces. A third example was the legislator who wanted to tax the services of prostitutes and escort services (does this include park guides?) and adult book stores which show nudity, with the tax going for college scholarships.

The second session allowed the participants to make presentations regarding important tax cases from their jurisdictions. The cases dealt with either substantive issues such as valuation, exemptions and income and sales tax or procedural concerns involving pretrial proceedings, mediation, the unauthorized practice of law and uniformity.

On Saturday morning, Dennis Neilson, Director, Advantax Management Corporation, gave a presentation on

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National Conference of State Trial Judges Leadership Speaks for State Trial Judges at the Assembly of Court Associations Conference in D.C.

Conference Chair Joel Medd and Conference Secretary Hank Ridgely attended the annual Assembly of Court Associations in Washington, D.C. March 8 and 9, 2002. The three primary topics of discussion were Privacy and Public Access to Court

Records, Self-Represented Litigation and Judicial Governance and Accountability. The Assembly also received an update on the legislation pending in Congress for the elimination of the State Justice Institute. The efforts of our Conference to Asave@SJI and the efforts of others were discussed. While in Washington, D.C. for this Assembly, Conference Chair Joel Medd met with Ms. Denise Cardman of the Legislative Office of the D.C. ABA office concerning assisting in the SJI efforts. Judge Medd and Ms. Cardman discussed the letter which our Conference was to write to each member of the Congressional Appropriations Committees and other efforts.

Shown here at the Assembly are, from left to right, Mr.



Thomas A. Henderson, Executive Director, Association Services Division, National Center for State Courts, Ms. Kay Farley, Director, Government Relations Office, National Center for State Courts, Conference Chair Judge Joel D. Medd and Conference Secretary Judge Hank Ridgely.

Independence of Judiciary and Free Press Essay Contest Established in Delaware

by Judge Hank Ridgely
Dover, DE

In the Winter 2001 issue of the Judicial Division Record Judge Medd wrote about Justice Abe Gerges' promotion of an Independence of the Judiciary Essay Contest as chair of our Independence of the Judiciary Committee. In Delaware we have taken the promotional message to heart and can testify about the success of our first Bar Bench Media Conference Essay Contest on the importance of an

independent judiciary and free press. The collaboration of the Bar, Bench and Media on sponsoring the contest was exemplary and the students' writing was a reminder not only to ourselves but also the public of the importance of the freedoms we enjoy.

Chief Justice E. Norman Veasey honored the two winners of the essay contest by presenting them with Outstanding Scholastic Achievement Awards. The Awards were given in recognition of distinguished student writing which illuminates the importance of an independent judiciary and free press in the United States of America.

The students were also presented a \$500 stipend and

will have the opportunity for an internship with a Delaware justice or judge, a Delaware lawyer, and an electronic and print media representative for one day. Additionally, the winning essays will be published in local newspapers and magazines including *The Delaware Lawyer* and they will be posted on the website of the Bar Bench Media Conference at <http://courts.state.de.us/supreme/bbmc>. I invite you to read them.



Delaware Chief Justice Norm Veasey is shown here presenting an Outstanding Scholastic Achievement Award to Robert Kleiner as Judge Hank Ridgely and Robert's mother and sister look on.



The second Delaware Judicial Independence essay contest winner, Andrew Silverman was presented the Outstanding Scholastic Achievement Award at the Delaware Supreme Court. Shown here left to right are Andrew's principal Dr. Robert Adams, Delaware Chief Justice Norm Veasey, Andrew's mother Linda Silverman, and President Judge Henry duPont Ridgely.

Annual Conference

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"Identification and Quantification of Functional Obsolescence." His remarks addressed property taxes and a comparison of how the public sector "values" property. Most states promulgate the use of tables that value personal property and publish cost data to determine the value of the real property. This approach is a mass appraisal methodology that attempts to fit and treat all property the same versus valuing a specific property. The public sector's approach is generally grounded in the "Cost Approach to Value". He compared the mass appraisal approach and how a specific property may be adjusted to reflect all depreciation affecting that property. He explained what the tables represent, how to measure additional physical deterioration that may not be included in the tables, and how to measure excessive functional obsolescence and any economic obsolescence that may be affecting a property.

The Conference adjourned with the 21st Annual Conference of the State Tax Judges scheduled to take place in Salt Lake City, Utah on September 26-28, 2002.

The Future of the Conference

Technology will drive the Conference into the 21st Century. A web page is now available to gather and coordinate all state and local tax information (www.LincolnInst.EDU). The increase in the complexity of state and local taxation due to the necessity for, and proliferation of, state and local taxes requires the need for an organization to assimilate current events and trends and develop policies that respond to these events. The Conference is ideally suited to meet that challenge.

Judge Sophia Hall

Judge Hall is the Administrative Presiding Judge of the Resource Section of the Juvenile Justice and Child Protection Department of the Circuit Court of Cook County. Judge Hall is charged with creating initiatives to facilitate the court and community to better serve children and families within the Juvenile Court's jurisdiction. Judge Hall brings broad knowledge to this position as she served as the Presiding Judge of the Juvenile Division for three years before it was divided into two divisions and the Resource Section in 1995. Judge Hall also sits in the Chancery Division where she hears cases seeking equitable relief, corporate and partnership cases, class actions, and the like.

Judge Hall was elected a Judge of the Circuit Court of Cook County in 1980. She served in the Criminal Division for four years, and thereafter in the Chancery Division for five years. Both assignments made her the first woman in 20 years to serve in either division. When assigned as the Presiding Judge of the Juvenile Division in 1992, she was the first woman ever to serve as the Presiding Judge of any Division or District of the Circuit Court of Cook County.

Judge Hall was appointed by President William J. Clinton to the Board of the State Justice Institute and confirmed by the United States Senate April 3, 1998 for a three year term. Judge Hall is a past President of the National Association of Women Judges and a past President of the Illinois Judges Association. She was the Region 6 representative to the Executive Committee of the National Conference of State Trial Judges of the Judicial Division of the American Bar Association, and is now its Secretary. She is a past member of the Board of Directors of the National Center for State Courts.

Judge Hall was an adjunct faculty member of Loyola University of Chicago School of Law. Judge Hall has lectured on continuing legal and judicial education subjects for the Illinois Judicial Conference, Chicago Bar Association, National Association of Women Judges, National College of Juvenile and Family Law, and other organizations.

Judge Hall received her Juris Doctor from Northwestern University School of

Law and her Bachelor of Science Degree from the University of Wisconsin at Madison, Wisconsin.



NCSTJ Spreads the Word about Drug Court Standards

by Judge Hank Ridgely
Dover, DE

By letters dated April 3, 2002, NCSTJ Chair Judge Joel Medd and I as the Chair of the NCSTJ Criminal Justice Committee wrote each Chief Justice of the Conference of Chief Justices to present complimentary copies of the new ABA Standard for Procedures in Drug Treatment Courts adopted at the 2001 Annual Meeting by the House of Delegates. Drug Courts are one of the fastest growing innovations in the American judicial system. They have been proven effective in breaking the cycle of addiction and crime which state trial judges confront daily in their courtrooms.

The Standard, which is available on line at the NCSTJ web site, is a recommended guideline for the effective implementation of drug courts. The NCSTJ led the collaborative effort within the ABA for the adoption of this Standard. Our efforts to have the House of Delegates adopt the Standard were expressly supported by the Conference of Chief Justices. The Standard also has been endorsed by the National Association of Drug Court Professionals.

Executive Committee Profile

by Judge William R. Carpenter
Topeka, KS

Judge William R. Carpenter is a third generation lawyer who opted early in his career to work behind rather than in front of the bench. Judge Carpenter, who prefers to be called "Bill," graduated from Yale University in 1954, and served two years in the U.S. Army Military Intelligence as a First Lieutenant before

receiving his law degree from Harvard Law School in 1959. After a short stint in his family law firm he was elected a magistrate judge. Two years later, he ran for a vacant position on the District Court, which is the Kansas trial court of general jurisdiction. Bill liked the job so well he stayed thirty and a half years before retiring in 1995. During this time he was elected president of the Kansas District Judges Association, was a faculty member at the National Judicial College in Reno, Nevada, and served as the chief judge of the Third Judicial District of Kansas for twelve years. Bill has been active in NCSTJ

for the past dozen years and has served as Chair of the Court Delay Reduction and Litigation Control Committees that drafted "The Discovery Guidelines for State Courts."

The Guidelines have been approved by the ABA House of Delegates and are presently being disseminated throughout the United States by NCSTJ. During his retirement from the bench he has served as president of the Dispute Resolution Section of the Kansas Bar Association and as a private mediator. Bill resides in Topeka, Kansas, with his wife, Joan, who is a practicing physician.

Elections for Officers and District Representatives

State delegates will have the opportunity to elect officers and district representatives at the NCSTJ business meeting on Friday, August 9, 2002, at the annual meeting. The nominating committee has proposed the following slate of officers:

Chair	Carolyn Engel Temin
Chair-Elect	Sophia Hall
Vice-Chair	Henry duPont Ridgely
Secretary	Elihu Berle
Delegate to the House of Delegates	Leslie Miller

Nominations will also be accepted from the floor at the meeting.

District representatives will be elected by the state delegates from each district. The position rotates among the states in each district. The following list indicates the districts electing representatives and the states from which they will be selected. Should a state fail to send a delegate or should no one from that state choose to serve, the position would be filled by the next state in rotation.

- District 2, Vermont
- District 3, West Virginia
- District 5, Michigan
- District 9, South Carolina
- District 11, Idaho
- District 12, Colorado

Conference Officers Attend the Judicial Division Spring Planning Conference in Key West

Judicial Division Chair-Elect Judge James Sledge led the discussions on topics ranging from programming at the ABA Annual Meeting to increasing membership. There will be an increased effort to involve the Judges Network to put on programs for the public on the role of the judiciary and the importance of an independent judiciary. Programming at the Annual Meetings may emphasize

emerging issues and we will attempt to collaborate with other bar entities to produce interesting and exciting programs. We will make increased efforts to follow-up on these topics and make the programs available to more members by distance learning methods such as taping or Internet availability.

The planning meeting provided an opportunity for each conference to discuss their plans for the upcoming year. Conference Chair Joel Medd provided a status report on the ongoing programs and projects of our conference. Chair-

Elect Carolyn Temin stated her primary goal is to promote outreach to our members and increased involvement of our judges.



Shown here on the Liberty Schooner, after a long day of meetings, are Conference of State Trial Judges Officers, Chair Joel Medd, Vice-Chair Sophia Hall, Chair-Elect Carolyn Temin and Secretary Hank Ridgely.

A Review of the ABA Section of Litigation Annual Meeting

by Judge Alexander P. White
Chicago, IL

The Annual Meeting of the ABA Section of Litigation took place in Boston, MA on April 24-27, 2002. Numerous programs were offered including the following:

- Bad faith and the tripartite relationship: Can we all get along (when the heat is on); Trial evidence in action: Cross-examination techniques; Internet games; The Boston Massacre: The trial of Captain Thomas Preston for the wrongful death of Crispus Attuck; What makes juries listen today – and many more.

On Thursday, two programs were presented at a town hall meeting at Faneuil Hall and highlighted the role of lawyers in a democracy. The first examined the response of the legal profession to the

horrific events of September 11, 2001. Many lawyers honored a moratorium on civil lawsuits while others took steps to protect the rights of victims. A victims compensation fund was established. A panel of nationally recognized experts discussed a balance between the need to protect the nation's security and the need to preserve constitutional freedoms.

The second examined the results of a national research project that collected data on the public perception of lawyers. A video was shown which featured citizens expressing their views on lawyers. A panel discussed the findings contained in the report on what Americans like and dislike about lawyers and what can be done by individual lawyers, law firms and bar associations to improve the negative perception of lawyers.

On Friday, master trial attorneys presented a wrongful death action by the Estate of Crispus Attucks against Captain Thomas Preston, the British officer in charge of His Majesty's troops, who allegedly gave the order to fire on a large group of colonists. A panel of historians discussed the events leading up to the Boston Massacre and the subsequent trials

brought by and on behalf of the victims.

On Friday afternoon, Sonya Hamlin, a noted jury consultant and author of the best selling book "What Makes Juries Listen Today," talked about the unique needs and expectations of jurors and how demographic changes require lawyers to rethink the manner in which they analyze, plan and try cases. Ms. Hamlin focused on today's generational, cultural and ethnic differences and the revolution in how information is gathered and absorbed in American Society.

On Saturday, a program addressed the significant issues encountered on the Boston "Big Dig" tunnel project, the largest public works project in the nation. Areas of discussion involved construction, ADR, land use, environmental law and the use of dispute avoidance and innovative management techniques.

Also on Saturday, a program on the "Scottsboro Boys Trial" included the showing of a prize-winning video and a panel of experts who discussed the social and legal implications of the landmark case and how its lessons are still relevant seventy years later.

Chair's Column

(continued from page 38)

Planning meetings to represent the State Trial Judges.

We have disseminated the Drug Court Standards spearheaded by Criminal Justice Committee Chair Judge Hank Ridgely. We also are distributing our Discovery Guidelines spearheaded by Judge Bill Carpenter.

Our Bylaws have been amended and should be set for ratification at our business meeting at the Annual Meeting.

The Speakers Bureau/Education Committee chaired by Judge Elihu Berle continues to progress and we have drafted a postcard announcement highlighting our Speakers Bureau to other sections within the ABA. We will continue to publicize this effort and to update our speaker list. If you are interested in being on a panel or a speaker, please let our Conference Administrator Rebecca King know at 800/238-2667 x 5742. The Education Committee continues to explore better

education programs and we are looking at distance learning 24/7.

Judge Herbert B. Dixon of Washington, D.C. has chaired the Annual Meeting Committee. He has worked with Judge David Horowitz to put on a Bench and Bar Program with the ABA Section of Litigation on an interesting and exciting program. Judge Dixon has also planned a very relaxing social program for our conference.

NY Judge Abe Gerges wanted to chair the Judicial Independence Committee and has promoted his Judicial Independence Essay Contest for high schools. As you can see from Judge Ridgely's article and picture that this project can be very successful.

Judge Joan Irion of San Diego has stepped forward to chair the Courts and Community Committee and has done a great job of getting that committee organized and active.

As the past Conference Publications Chair-Newsletter Editor, I know the work and dedication that position takes. Judge Alex White has done that job magnificently and deserves all our thanks.

There are too many people to thank individually and I will be remiss in forgetting to mention everyone. I would like to thank all of you for your great support and work as state trial judges. Immediate Past Conference Chair Judge Leslie Miller has been of tremendous assistance and has continued her liaison work with the Conference of Chief Justices started during her term. A special thanks to our great staff, Rebecca, Aimee, Kris and Gilda.

I would encourage you to get on our list serve by contacting Rebecca at the number above. It will keep you in touch with hundreds of other judges around the country and in informed about ABA issues, programs and opportunities.

One of the greatest rewards of belonging to the ABA and our Conference is working with wonderful interesting people. I have thoroughly enjoyed my year and would ask for your continued support of incoming Chair Judge Carolyn Temin. Thanks again for giving me this opportunity and look forward to working with you in the future.

Save the Date

July 21-24, 2002

Spencer – Grimes Appellate Judges Seminar
Coeur d' Alene, ID
More information: 800/238-2667 (x5696)

August 8-14, 2002

ABA Annual Meeting
Washington, DC
The Division meets August 8 – August 11
More information: 800/238-2667 (x5700)

August 11-14, 2002

Spencer-Grimes Appellate Judges Seminar
Stowe, VT
More information: 800/238-2667 (x5696)

September 29-October 2, 2002

Spencer-Grimes Appellate Judges Seminar
Berkley, CA
More information: 800/238-2667 (x5696)

October 3-6, 2002

13th Appellate Practice Institute
Reno, NV
More information: 800/238-2667 (x5696)

October 4-6, 2002

Council of Appellate Lawyers Annual Meeting
Reno, NV
More information: 800/238-2667 (x5704)

October 9-11, 2002

Traffic Court Seminar
Reno, NV
More information: 800/238-2667 (x5700)

November 6-9, 2002

Traffic Court Technology Seminar
Atlanta, GA
More information: 800/238-2667 (x5742)

* Visit www.abanet.org/jd for more information on upcoming meetings.



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