

Judicial Division Record

American Bar Association

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Metro-Detroit Judges Meet With Community on Child Violence

by Judge Gregory Holiday
Detroit, MI

On Wednesday, August 21, 2002, while ABA President A. P. Carlton, Jr. was in Detroit holding hearings on and garnering support for, his initiative on the 21st Century Judiciary, some of metro-Detroit's judges had their own equally important agenda. The judges were meeting and talking with members of the community about the alarming rate of child violence this year. Detroit, home to former Mayor and current ABA President-Elect Dennis W. Archer, has seen a skyrocketing of child violence during the first half of 2002. From kids shooting themselves and others with guns, to drug dealers spraying homes in drive-by shooting - all of these and more have brought metro-Detroit's community together in many venues.



Judge Sheila Gibson-Manning speaks out on efforts to curb child violence in metro-Detroit. Standing in background is Judge Gregory Holiday.

This meeting was billed as a Great Hall Series Special Event at Detroit's historic Fort Street Church entitled, "Child Violence in Metro-Detroit - The Role of Judges in Solving This Horrific Problem." With the ABA Justice Center underwriting

the costs of the event, Judge Gregory Holiday, chair of the JD Standing Committee on Minorities in the Judiciary, engaged participating judges and community members in a spirited discussion and search for solutions. Mayor Kwame Kilpatrick has said, "the only way we're going to solve [the problem of child violence] is to get the community to step up in a mighty way and wrap our arms around our children."

Clearly, metro-Detroit's judges have taken an active role in combating child violence. Many of the judges are participating

in after-hours programs where they meet with kids one on one in an effort to redirect them toward school, family and community. Judges noted that many delinquent children feel they have nothing to

lose because no one has concern for their welfare.

Ironically, Wayne County, where Detroit is situated, is receiving rave reviews for one model program that addresses the

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Judicial Clerkship Program Wins Meritorious Service Award

by Justice Frank Sullivan
Indianapolis, IN

The ABA Section Officers Conference Meritorious Service Award for 2002 was presented to the Judicial Division (JD) for co-sponsoring (with the ABA's Commission on Racial and Ethnic Diversity in the Profession) an annual Judicial Clerkship Program that encourages minority law students to seek judicial clerkships. The Appellate Judges Conference (AJC) had principal responsibility within the JD for the Program in 2002 and LexisNexis provided generous financial support. Pictured on page 4 holding the award are JD Immediate Past Chair Judge Diarmuid O'Scannlain of the U.S. Court of Appeals (9th Cir.); Judicial Clerkship Program Co-chair Justice Frank Sullivan, Jr., of the Indiana Supreme Court; and AJC Immediate Past Chair Judge Danny J. Boggs of the U.S. Court of Appeals (6th Cir.). The other Co-chair of the Judicial Clerkship Program was Judge Vicki Miles-LaGrange of the Federal District Court (W.D. Okla.).

The Judicial Clerkship Program, attended by 42 minority law students from 13 law schools throughout the country, took place at the ABA Midyear Meeting in Philadelphia earlier this year. Over parts of three days, the Program brought the students together with approximately one dozen judges and

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JUDICIAL
DIVISION

by Judge James S. Sledge
Anniston, AL

As reflected by the priorities of President A.P. Carlton, Jr. and the ABA, these are interesting and challenging times for the judiciary of the United States. We live in a time with a political climate of retreat of the role of the judiciary. The dominant view is to marginalize the court system. From many perspectives, access to the courts is being restricted. Political scientists would respond that our country is always shifting with one branch of government exercising more influence, than another. Nevertheless, the judiciary must address this phenomenon and adjust to the current climate. If there are reasons why the role of the judiciary is shrinking, we must consider and respond to those reasons.

When the United States of America markets its form of government around the world and particularly to developing countries, we boast that the foundation of democracy is an independent judiciary. Democracy requires the ability of every citizen to go to an independent judge for redress against the powerful. President Carlton has made judicial independence the hallmark of his because the qualities of a good judge reside not in constituent service, but in fair, reasoned judgment. A judge is not beholden to his or her constituents, but to the law, and the whims of the majority cannot always prevail. In America, we don't pay much attention to the independence of the judiciary and we assume that our foundation is solid. We should know better, and the ABA is focusing many spotlights on cracks in the foundation. Left unattended, these cracks will widen and democracy and our form of government is weakened.

Surveys have established that the sovereign, The People, do not understand the judicial system, but they want to learn. They are most willing to learn from judges. Certainly, the judicial system cannot remain strong and the judiciary independent without the support of The People. The Judicial Division has a challenge facing it.

As the new Judicial Division chair, I am thrilled and energized by the eagerness of

the JD to accept the challenge. We are reordering the priorities of JD. The top priority during this challenging time is public education on an independent judiciary. Also, we are reshaping our identity to become a think tank on judicial policy. We will advertise our members as resources on judicial issues for other ABA and outside of ABA organizations. During this time, we will need to reduce our role of providing member services and professional development. These are important functions, but we are currently called to more important issues.

All JD Conferences, the JD Program Committee, the JD Millennium Task Force, the JD Courts and Community Committee and Judges Network will focus on public education on an independent Judiciary. Millennium Task Force will be the strategic planning arm and think tank. They will work with organizations outside ABA to develop partnerships and create new approaches and policy. The task force seeks to make the Judicial Division the premiere national coordinator of judicial policy. Courts and Community will be the research and development arm. Working with other ABA organizations, they will find the best and most effective programs and methods of delivery of public education on judicial issues. Judges Network will coordinate the Conferences programs on public education. It will continue to solicit and gather materials from successful programs being presented by judges and make these materials available on the website. The goal will continue to be to implement a national, active series of programs of judges teaching the public about democracy and the role of an independent Judiciary.

My next column to you will provide more specific details of the ways to implement these goals. Each of the above groups is presently meeting and planning these steps. An energizing, initial step will be a public outreach summit during the coming mid year meeting in Seattle. Jack Brown tells you more of this summit in an article in this issue.

You see from this outline that the challenges are great and we are undertaking bold initiatives. I close with

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JUDICIAL DIVISION

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by Aimee Skrzekut
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The 2002 Association year goes out with a bang!

It has truly been a great year for the Judicial Division as leadership and staff worked to advance Division and Association goals. Looking back, the list of accomplishments is impressive. The Division debuted two new publications (The Handbook on the Administration of Justice and the Directory of Minority Judges, Third Edition), expanded existing partnerships with the National Highway Traffic Safety Administration and LexisNexis, developed education programs and even sent a team to Memphis and Oxford, England. The Division was applauded for its diversity initiatives. The Division was the honored recipient of the SOC Meritorious Service Award and was listed on the Commission on Racial and Ethnic Diversity's Goal IX Honor Roll. The Division continued to work collaboratively within the ABA Justice Center with excellent results and partnered with ABA entities and outside groups increasing its visibility and involvement with the issues important to the judiciary and judicial process.

Annual Meeting Highlights-

The JD Annual Dinner in Honor of the Judiciary did not disappoint. The Division collaborated with the ABA Justice Center,

which presented the John Marshall Award to Justice Anthony Kennedy at the United States Supreme Court. Justice Kennedy received the award for his exemplary commitment to improving the American justice system through efforts to increase public awareness about the system. The John Marshall Award was named in honor of the fourth Chief Justice of the United States, who is credited with establishing the independence of the judiciary and enhancing its moral authority. The ABA Justice Center John Marshall Award is presented to an individual responsible for extraordinary improvement to the administration of justice in the categories of judicial independence, justice system reform or public awareness about the justice system. Information on the Award and nominating procedures are located on the Justice Center webpage: www.abanet.org/justicecenter.

The Judicial Division also proudly accepted the 2002 Section Officers Conference Meritorious Service Award during the Annual Meeting. The Award, established in 1994 to recognize the significant contributions of ABA entities to the work of the Association, was presented to the Division and the Commission on Racial and Ethnic Diversity for the Judicial Clerkship Program (JCP). For the last two years, the JCP successfully brought together judges and minority law students for structured networking and research. For information on the 2001 and 2002 Programs, visit www.abanet.org/jd. If you would like to participate in the Third Annual JCP during the Midyear Meeting

in Seattle, please contact me at torresa@staff.abanet.org.

The National Conference of Specialized Court Judges in cooperation with the National Highway Traffic Safety Administration announced the 2002-03 Judicial Fellows. Judge Robin Smith of Midland, TX will serve as the full-time fellow with Judge Chris McNeil continuing as the National Conference of Administrative Law Judge part-time fellow. Congratulations Judges Smith and McNeil!

The Judicial Division Courts and Community Committee also released the results of its judicial outreach survey during the Annual Meeting. The survey revealed that 83% of respondents participated in some type of judicial outreach in the past year. Of those, most participated on the local level. Forty percent wanted program materials and "how to" resources while 30% wanted useful links and 18% wanted federal program information. For a complete overview of the survey, see the article on page 7.

Upcoming Education Programs-

The Judicial Division will present its annual Mediation for Judges Program in Chicago, IL November 11-15, 2002. The Program provides the training necessary to become a certified mediator in most states. Space is limited so contact Teri Curro (312/988-5689) immediately if you are interested in attending. The Division's Committee on Traffic Court Program will also present its annual Traffic Court Program October 9-11, 2002 in Reno, NV. The annual Traffic Court Technology Program is scheduled for Atlanta, GA, November 6-9, 2002. For details on either traffic court program, please contact Rebecca King at 312/988-5742. For complete information on all upcoming Division events, visit the JD webpage at www.abanet.org/jd.

New Arrivals-

Two new staff joined the Judicial Division in August. Please join me in welcoming Yolanda Simmons and Athir Mahmud. Ms. Simmons will serve as the part-time NHTSA Coordinator (Monday and Friday office hours) and can be reached at 312/988-6717. Ms. Mahmud

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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 Judicial 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, Phone: 800/238-2667 x 5700, Fax: 312/988-5709; E-mail: berliank@staff.abanet.org

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ARTICLE SUBMISSION DEADLINES

Winter 2003: Wednesday, November 20

Spring 2003: Wednesday, February 12

Summer 2003: Wednesday, May 7

Judicial Outreach Summit Planned for Seattle Meeting

by Jack L. Brown
Tulsa, OK

The Judicial Division, organizer and sponsor of the Judges Network, will present a Summit on Judicial Outreach on Friday, February 7, 2003, at the ABA Midyear Meeting in Seattle. The Honorable James S. Sledge, Judicial Division Chair, will moderate the Summit which compliments ABA President Alfred P. Carlton, Jr.'s initiative on the 21st Century Judiciary.

A Presidential Commission established by A. P. Carlton, Jr. examined a number of issues affecting the judiciary including judicial independence and accountability, with particular emphasis on state courts and selection, tenure, compensation, and ethics. According to Judge Sledge, the

Summit will heighten the understanding of judges, lawyers and the courts of their duties and obligations to participate in judicial outreach.

The Judicial Division will invite members of the judiciary, state and local bar leaders, as well as representatives of national organizations, addressing judicial policy impacting public outreach for judges. Judicial Division Conference leaders will also participate in the Summit.

Tentatively scheduled to begin at 9:00 a.m. and to conclude at 3:00 p.m., the Summit will include speakers on the duty of judges to participate in judicial outreach and the ethical obligations associated with judicial outreach. The program will also have a segment on current outreach initiatives being addressed nationwide including Judges Network programs and the recently completed Network survey on outreach issues.

The Summit luncheon will feature a keynote address. The afternoon session will consist of roundtable discussions on issues affecting judicial outreach such as

state and local bar commitment and programming, networking and coordination among program providers and increasing the participation of judges in outreach programs. Designated moderators will present conclusions from each of the roundtable discussions. The day preceding the Summit, the Judges Network plans to coordinate with Seattle area judges to present demonstration outreach programs in the Seattle community.

The Judges Network was established by the ABA Judicial Division to address all facets of judicial outreach. The Network is a web based delivery mechanism for judges and lawyers to identify, review and access current judicial outreach programs seeking to improve public trust and confidence in the American justice system. ABA President Carlton's judicial initiative incorporates Judges Network programs in its activities.

Visit the Judges Network at www.abanet.org/jd/judgesnetwork.

Chair's Column

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this reference. One of my heroes and fellow Alabamian, Justice Hugo Black described the challenge in *Chambers v. State of Florida* in 1940. We hold, "the basic principle that all people must stand on an equality before the bar of justice in every American court. Under our

constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement." The highest duty of a court is to preserve due process of law, "deliberately planned and inscribed for the benefit of every human being subject to our Constitution— of whatever race, creed or persuasion."

This challenge should guide us during these difficult times. Upholding the Rule of Law is never easy and particularly hard when it restricts the majority and the powerful. The People must be taught to value the Rule of Law. Judges have to teach them. No one else is doing it sufficiently and no one else can do it as well.

Service Award

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another dozen former law clerks for several panel discussions, a research exercise, and informal social events. These activities were designed to introduce and then reinforce reasons for pursuing a judicial clerkship: (1) allowing a new lawyer to develop a close personal working relationship with a judge; (2) improving a new lawyer's legal research, analytical, and writing skills; (3) enhancing a new lawyer's career opportunities; and (4) permitting a new lawyer to participate directly in the process of shaping the law.

Initial feedback from the participating law students, judges, and former clerks was extremely positive with virtually all of the participating students saying they intended to seek clerkships.



Washington, DC – (L to R) JD Immediate past chair Judge Diarmuid O'Scannlain, Justice Frank Sullivan, AJC immediate past chair Judge Danny Boggs.

Standing Committee on Minorities in the Judiciary Meets With Washington, D.C. High School Students

by Judge Gregory Holiday
Detroit, MI

On Friday, August 9, 2002, during the ABA Annual Meeting, eight judges and lawyers from the Judicial Division attended a pre-arranged outreach session at the Thurgood Marshall Academy Public Charter High School located in Southeast Washington, D.C. In this area of Washington, D.C., 94% of the public school students scored ABelow Basic" proficiency on standardized math tests in 2000, 70% scored ABelow Basic" in reading and writing, and 40% dropped out before graduating.

The Thurgood Marshall Academy, with about 120 students, is about to begin its 2nd year of operation, having opened in

the fall of 2001. With each successive year, the school adds one grade of students and a compliment of faculty and support staff.

School Principal Joseph Feldman reports that the school was designed for small class sizes (20 students per class), longer class days, periodic Saturday sessions, a focus on remedial education, and a comprehensive standards-based curriculum concentrating on law, democracy and human rights.

The School is temporarily housed on the 3rd floor of the Congress Heights United Methodist Church and has received a \$1 Million Dollar appropriation from Congress toward the reconstruction/renovation of another facility likely to cost at least 4 Million Dollars.

Some 25 students suspended their summer vacation to participate in this exchange. Judicial Division participants included Judges Arthur L. Burnett, Sr. (Washington, D.C.), William Churchill (San Francisco, CA), Charles R. Cloud (Norfolk, VA), Tela Gatewood (Oklahoma City, OK), Gregory Holiday (Detroit, MI), Benjamin Logan, II (Grand Rapids, MI), and Earledean V.S. Robbins (San Francisco, CA). Also participating were

National Association for Law Placement (NALP) Liaison Vielka Holness (White Plains, NY), Mrs. Ann Burnett (Washington, D.C.) and Judicial Division staff person Gilda Fairley.

In an introductory session, guests and students were treated to a delightful brunch, courtesy of the Thurgood Marshall Academy. From there, judges and participants met alternately with 9th graders and with 10th graders for one classroom hour each, discussing various paths toward success. The event closed with a photo session and more food and refreshments for everyone.

The next scheduled outreach program for the Standing Committee on Minorities in the Judiciary will be in February 2003 during the ABA Midyear in Seattle, Washington. For more information, or to register to participate, please contact Gilda Fairley at fairleyg@staff.abanet.org or by telephone at (312) 988-5705.

TOM'S TIP:

Time Off the Bench

by Judge Thomas C. Warren
Wenatchee, WA

When we last discussed travel, we were enjoying Vienna, and promising to do some impulse or holiday trips to London and Paris. As a frugal traveler, I am usually keeping my eye out for the vacation bargain. Our first effort at this was an impulse trip with our grown children to London over Thanksgiving.

In late October and early November the airlines often put many of their European flights on sale due to most people going home to grandmas' instead of thinking about a travel experience. When I spotted these sales, I got thinking about how much fun it would be in London for a long Thanksgiving weekend. Even flying out of Seattle the price round trip was impossible to pass up. The per person flight price was

just over \$200. To check out a future son-in-law, we also took him along to see whether he would be compatible with the "traveling Warren family." All five of us made it to London for just over \$1100 total.

Well, that sounds good, but what about the room costs in very pricey London? When browsing the travel section of a bookstore, I came across a book titled "Sandra Gustafson's Great Sleeps London" (Chronicle Books 2002). This was just what the frugal guy needed! This book gives you district by district low priced suggestions that can just fit the pocket book. Most offerings also include a full English breakfast, which further saves on a third of the meal costs. We needed some special housing to fit three women, and two males. We surely wouldn't want the young unmarried's sleeping together! Thus we needed a room for three and one for two, so I could reside with my future son-in-law. Great Sleeps gives you hundreds of

options and valuable information as to the nearby underground stations, bus stops, and nearby visitor sites. The newest version of the book also lists the web sites and e-mail addresses of most of the hotels and B & B's in the book. Recently, I used the most recent edition and was able to book the room I needed on the Internet.

So now we have covered the transportation and lodging. What about the outrageous cost of meals, especially if you have your whole family along? Again, Sandra Gustafson helps out with her book "Sandra Gustafson's Great Eats London." The book lists restaurants in every neighborhood and every type of cuisine at very reasonable prices. I would also suggest that because of the many great public parks in London, you might put together a lunch picnic on occasion. London is a very easy city to get around because of their terrific transportation system. You can buy bus and underground day or week passes and save a lot of money when criss-crossing the city. To select your sightseeing selections many of the greatest tourist venues are free of charge,

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MEDIATION FOR JUDGES

Sponsored by:
The American Bar Association
Judicial Division and
Section of Dispute Resolution

Illinois State Bar Association
20 South Clark Street
Chicago, IL

November 11-15, 2002

Acquire effective mediation skills while gaining eligibility for certification. This course will meet the forty-hour training requirements in most states.

Attend lectures, demonstrations, case study exercises, critiques by certified mediators, and practical exercises demonstrating the skills and abilities necessary to become a competent and effective mediator. Apply this knowledge and ability to mediation or settlement conferences.

Learn how to successfully apply the different roles of mediator and settlement judge while exploring the ways that mediation skills can improve judicial effectiveness. Fine-tune your skills in a highly interactive learning environment by focusing on the challenges and opportunities of mediation in the courts. Discuss ethical dilemmas, issues of confidentiality, and the importance of neutrality in helping the parties develop solutions that meet their interests and needs.

Explore the essential stages of mediation. Engage in exercises designed to guide you through the fundamental process of mediation and the wide variety of mediation skills used. Program components include: presentations, demonstrations and group exercises led by skilled facilitators who will observe, critique and recommend improvement to individual techniques. This learning process allows each participant to conduct a complete mediation while learning from faculty, colleagues, and their own experience.

Distinguished Faculty:

- ▶ **Honorable Harris Agnew**, *Chief Circuit Court Judge (Retired), Rockford, IL*
- ▶ **Honorable Morton Denlow**, *U.S. Magistrate Judge, Northern District of Illinois, Chicago, IL*
- ▶ **Honorable Michael Getty**, *Circuit Court of Cook County (Retired), Chicago, IL*
- ▶ **Honorable Alan Goldberg**, *Circuit Court of Cook County, Chicago, IL*
- ▶ **Honorable Michael Jordan**, *Chair, IL State Bar Association Bench & Bar Section, Circuit Court of Cook County (Retired), Chicago, IL*
- ▶ **Professor Kim Kovach**, *University of Texas, Past Chair of ABA Dispute Resolution Section, Austin, TX*
- ▶ **Cheryl Niro**, *Past President, Illinois State Bar Association, Chicago, IL*
- ▶ **Professor Peter Robinson**, *Acting Director, Strauss Center for Dispute Resolution at Pepperdine University, Malibu, CA*
- ▶ **Honorable Jane Stuart**, *Immediate Past Chair, Illinois State Bar Association Bench & Bar Section, Circuit Court of Cook County, Chicago, IL*

Register early! Space is limited. For more information on the program visit the Judicial Division web site at <http://www.abanet.org/jd/02mediation.pdf> or contact Ed Schoenbaum at 217/524-7836 or edschoen@abanet.org.

Judges Network Survey Report – Now Available!

by Teri Curro
JD Staff

The Judicial Division has recently made an effort to better understand the needs of its judges interested in community outreach. In June 2002, the JD administered the **Judges Network Survey** as a means of collecting information from judges about how they reach out in their communities, and how the JD can assist in making their outreach experiences easier and more effective.

The survey report was completed in August 2002 in time for the Annual Meeting in Washington, DC. Over 500 JD judges responded to the survey, supplying the Judicial Division with information integral to further development and improvement of the Network. The following are some interesting findings from the survey:

- 86% of respondents said that, in the last three years, they have been

involved in *judicial outreach*, defined as “an activity in which he/she talks about his/her experiences as a judge or discusses the judicial process with members of the community.”

- A high percentage of respondents credited local contacts for getting them involved in community outreach: colleagues & friends, courts, local bar associations, and local schools topped the list.
- Respondents felt that “collaboration with other individuals or groups” and “member involvement” were the two most important factors in successfully planning outreach.
- Although the Network’s success is based largely upon the web site, the survey showed that 87% of respondents have *never* visited the Judges Network website.
- Ending on a positive note, 82% of respondents concluded by saying they would like to learn more about the Judges Network. And 66% said they’d like to share their outreach experiences with others.

The full survey report sheds light on what the Judges Network must do in the near future to meet member needs.

More About the Judges Network

Although still in its infancy, the Judges Network has begun to provide resources to judges so they may interact with local schools, community organizations, and community members to create a dialogue on the judicial system. The Network gives judges the opportunity to make a difference in their communities by sharing their best outreach practices and experiences with a national audience, while striving to make an impact on a local level. The Judicial Division is confident that the Network will become a reliable, web-based resource for materials, training, tips, peer consultation and idea exchange for judicial and community outreach.

To view the survey results online, visit the Judges Network web site at <http://www.abanet.org/jd/judgesnetwork.html>. For more information on the survey results, or to have a printed copy of results complete with charts & graphs, contact Teri Curro at 800/238-2667 x5689 or currot@staff.abanet.org.

Report on the Annual Meeting of the ABA House of Delegates

by Judge Fred Rodgers
Golden, CO

The ABA House of Delegates (House) held its semi-annual in Washington D.C. on August 5 and 6, 2002. The Judicial Division (JD) 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. One of the highlights of the sessions was the address by former Detroit Mayor Dennis Archer as he began his one-year term as ABA President-Elect, becoming the first African American to hold that position. He will become ABA President at 2003 ABA Annual Meeting in San Francisco. Archer, chairman of

Dickinson and Wright PLLC, a large Detroit law firm, is also a former justice of the Michigan Supreme Court. He said, “I am extremely proud to be here. I am also keenly aware of those who came before me – those who were not able to participate in the great dialogue that we have at the ABA, the great debates on public policy and legal issues. I think of the tremendous contributions these lawyers and others could have made to this association had they been allowed to join.” Among the notables in Archer’s entourage marching with him down the aisle to the well of the House were Sen. Hillary Clinton (D-N.Y.) and Mrs. Thurgood Marshall, widow of the late U.S. Supreme Court Justice. His wife, Michigan District Judge **Trudy Archer** was also in the group.

The House also witnessed the installation of new ABA President A.P. Carlton of Charlotte, N.C. who has announced his commitment to ridding the ABA of its “liberal label.” When Carlton chaired the House a half dozen years ago, he stressed the importance of “germaneness” to the legal profession of

ABA policy pronouncements from the House. The last time the ABA met in Washington in 1985, President Reagan was there to give the welcoming address. This year saw no such welcome from President Bush who was off vacationing at his Crawford, Texas ranch for the entire month of August.

Ethics and Professional Responsibility

The Commission on Multijurisdictional Practice (practice across state lines) submitted nine separate Reports, No. 201A through 201J, recommending adoption of various model rules, all of which were approved, some with amendments proposed on the floor of the House. The overarching principle of support for state court jurisdictional regulation of the practice of law was affirmed in Report 210A. Only one of the reports, 201G, the Model Rule on Admission by Motion, proved to be controversial enough to produce a close vote before it was

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Meet the Staff



Jambo, jina langu ni, Yolanda Simmons which means "Hello, my name is" in Kiswahili. I am the NHTSA Project Coordinator for the Judicial Division and I work for JD on Mondays and Fridays. I collaborate with Rebecca King on several NHTSA projects. I look forward to learning about new facets of the Justice System. In my dual role as a JD staff member, I am also the Administrative Assistant for the Council on Racial & Ethnic Justice. I am privileged to have been a part of this association for the past four years and to have experienced the impact it has on our legal system.

In addition to being an ABA employee, I am also a mother of two young children, a girl that is 8 and a boy that is 4. I am also a part-time student at Loyola University Chicago, attending classes at night, with a major in psychology with an emphasis in elementary education.

I am an amateur published poet and the Youth Director at my church. I am slowly learning Kiswahili and winemaking.

I am always eager to learn new things and I look forward to working with all of you.

Please feel free to contact me at (800) 238-2667 ext. 6716 or via email at simmonsy2@staff.abanet.org.



Athir Mahmud now serves as the Judicial Division's part-time Technology Coordinator. Athir will be responsible for updating and maintaining the Division and Conference web pages, list serves and many other technology initiatives. Athir possesses a Master's degree in Human-Computer Interaction (HCI) from DePaul University, where she served as an HCI Research Assistant. Her work includes designing and maintaining web sites, conducting and evaluating usability tests on new and existing web applications, observing and advising as an ergonomic specialist and human factors engineer, and serving as her department's graphic designer, for which she gained extensive recognition. Before this, Athir worked for Northwestern University Medical School (just across the street from the 750 building!) as a database computer programmer, managing data entry staff and training employees to create database reports and statistical analyses.

Athir's background is in experimental psychology and studio art. Her paintings, etchings, and drawings have received numerous awards and nationwide recognition. She continues to be active in the fine arts community and is an avid painter during her spare time. In addition to working for the American Bar Association, Athir is also currently a faculty member at the College of Computer Science at DePaul University, teaching graphic design and user-centered web development courses.

You can reach Athir at mahmuda@staff.abanet.org or by calling her at 800/238-2667 x 5701.

Child Violence

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problem of juvenile delinquency. Rather than place juvenile delinquents into an overburdened state system, many Wayne County youths are now living at home with supervision by a network of public and private agencies. Each youth is managed through a Care Management Organization (CMO), capable of handling 300-500 youths. The five Wayne County CMOs are rewarded with bonuses when kids succeed (by staying drug-free, in school, etc.) and are penalized when kids are not properly supervised and get into more trouble.

For several years, Fort Street Church's Great Hall Luncheon Series has featured an assortment of boxed lunches with a 20-minute community-oriented presentation sandwiched in between two 20-minute sets of live musical entertainment. In keeping with that format, this program featured boxed lunches along with live jazz music by the Ryan Mackstaller Trio both before and after the discussion on child violence.

A consensus among the judges and members of the community was that in order to solve the problem of child violence, we need the active support of family, friends, relatives, neighbors, schools, courts, community groups and churches. These judges are well on their way to becoming acknowledged as the heroes that they are.

JD Nominating Committee

At the 2002 Annual Meeting in Washington, DC, the JD Council supported the recommendations of the JD Nominating Committee. The results are:

JD Vice Chair

JD Delegate to the House of Delegates

National Judicial College Board

ABA Nominating Committee

Judge Louraine Arkfeld

Mr. Charles Patterson

Judges Elihu Berle and Henry duPont Ridgely

Judge Leslie Miller

Annual Meeting

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approved. The debate on this measure centered on three issues: (1) whether reciprocity in the movant's state should be a condition to admission by motion; (2) whether this rule unfairly discriminated against graduates of non-ABA approved law schools; and (3) whether to retain the requirement for passing the multi-state exam. In the approved Report, all three concerns were answered in the negative. Report 201B defines multi-jurisdictional practice; 201C sets forth ground rules for determining choice of law and which state has jurisdiction to impose discipline and 201D amends the Model Rules for Disciplinary Enforcement; 201E encourages use of the National Lawyer Regulatory Data Bank; 201F as amended approves the Model Rules on Pro Hac Vice Admission; 201H encourages jurisdictions to adopt the ABA Model Rule for Legal Consultants; and Report 201J adopts the Model Rule for Temporary Practice by Foreign Lawyers.

Another measure, Report No. 100 sponsored by the District of Columbia Bar Association, sought ABA support for federal legislation authorizing a lawyer admitted before one federal district court to enjoy reciprocal privileges in all federal district courts without local counsel. This proposal was defeated after delegates expressed concern that courts and not legislatures should determine matters related to admission to practice and reciprocity of bar admissions.

The House approved Report 114 submitted by the Standing Committee on Ethics and Professional Responsibility. It amends Rule 7.2 of the ABA Model Rules of Professional Conduct ("RPC") to permitting reciprocal referral arrangements with another lawyer or with a non-lawyer professional, as long as the referral agreement is not exclusive and its existence is disclosed to the client. The Standing Committee on Client Protection saw the adoption of its Report 111 which approved amendments to the ABA Model Rules for Lawyers' Funds for Client Protection. The amendments cover a number of topics and are designed to foster speedier and larger recoveries for clients cheated by their former lawyers.

Report 103 proposing an amendment to Rule 1.6(b) (2) of the RPC was withdrawn

without a vote, but it may be introduced again in the future. It would have expanded the circumstances under which a lawyer may reveal a client confidence to prevent a client from committing a crime reasonably certain to result in economic harm, as opposed to preventing death or bodily harm as is now provided.

The Section of Litigation sponsored the adoption of Report 105 which recommends that the Ethical Guidelines for Settlement Negotiations be used as a resource to promote ethical conduct in settlement negotiations, but that they not serve as a substitute for the RPC, nor as a basis for sanctions or discipline. The House approved this Report.

The War on Terrorism and Immigration Law

Report 115B places the ABA on record regarding the question of the balance between national security and individual rights in the war on terrorism. Despite ABA President Carlton's preference for more advocacy on behalf of lawyers at the expense of fewer forays into controversial political positions emanating from the House, the delegates voted to support greater protection for immigration detainees. In particular, the amended Report opposes incommunicado detention of foreign nationals in undisclosed locations, recommending that immigration detainees have their names and locations disclosed. Furthermore it recommends they have access to attorneys, family members, that they be promptly charged, be released when appropriate and that detention hearings be held with a right to appeal. Finally, it recommended that the ABA work to have these detention standards promulgated as INS regulations.

The issue of U.S. citizen detainees' rights was the subject of a task force report discussed by those at the meeting, but nothing reflecting official ABA policy on the subject was on the House agenda this time. Because of significant public interest in the cases of U.S. citizens John Walker Lindh, Yaser Hamdi and José Padilla, look for a report covering the legality of detention of these so-termed "enemy combatants" on U.S. soil, which may be introduced in the House before the ABA Midyear Meeting next February in Seattle or at the San Francisco Annual Meeting next August.

Report 115A reflects a more traditional immigration law topic. It supports legislation providing non-citizens who reside in the U.S. and demonstrate significant equities, and their dependents, with an opportunity to acquire lawful permanent residence.

Report 101 from the State Bar of Georgia was unusual and it was withdrawn, although it may be surface again at a future session. This so-called "sic the trial lawyers on the terrorists" measure would have committed ABA lobbying support to securing *qui tam* legislation permitting recovery of funds from terrorist support organizations. Delegates who deal with *qui tam* suits in the health care field expressed concern that such suits would be used to harass legitimate churches and mosques by disgruntled former members.

Human Rights: Children, the Elderly and Bioethics

The Young Lawyers Division successfully sponsored Report 104B which encourages initiatives to address youth hate crimes, prejudice-motivated acts and related forms of bullying, through promoting tolerance and anti-bias education for children, parents and school personnel. The House also passed Report 106, sponsored by multiple entities led by the Steering Committee on the Unmet Legal Needs of Children supporting the full implementation of the Foster Care Independence Act by the states in order to provide youth up to age 21 transitioning out of the foster care system full access to necessary services and emergency financial support.

Reports 108A and 108B sponsored by the Commission on Legal Problems of the Elderly were both passed by the House. The first supports recommendations of the National Policy Summit on Elder Abuse, held last December, to improve the civil justice system's response to elder abuse, and the second urges state and local implementation of the 2001 Wingspan Conference principles about adult guardianships issues. Also passed was Report 109 urging effective federal and state legislation to halt deceptive, abusive and fraudulent lending practices.

The Section of Individual Rights and Responsibilities sponsored two reports, 117A and 117B, and although each was

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Press Release - NYCLA Establishes Justice Center

Former Fordham Law School Dean John D. Feerick to lead effort to bring members of the bar and public together to advance Justice System improvements. NEW YORK, September 18, 2002 - The New York County Lawyers' Association announced today the formation of the NYCLA Justice Center. The Justice Center will bring together representatives of all NYCLA committees and sections involved with justice system initiatives as well as lay people from the private and public sector, so as to produce a greater and more focused collaboration in bench, bar and public involvement in justice system improvements. John D. Feerick, former Dean of Fordham University School of Law and former President of the Association of the Bar of the City of New York, has agreed to be the Justice Center Chair. Catherine A. Christian, a past NYCLA Board Member,

will be Vice Chair. NYCLA President Michael Miller stated: "Dean Feerick brings to this important effort extraordinary leadership, scholarship and commitment to the highest principles of our profession. He is the perfect founding Chair for NYCLA's Justice Center. " Among the areas to be addressed are judicial independence; access to the courts and legal services, including improvements in customer service in the courts; elimination of ethnic and racial bias in the justice system; and alternatives to litigation (such as alternative dispute resolution). NYCLA Committee on Committees Chair M. Barry Levy, who conceived and developed the initial mission of the Justice Center, stated, "The NYCLA Justice Center will endeavor to reach out to a broad spectrum of individuals and organizations, including students, professors, non-lawyers, social service providers and other groups having a direct interest in improving our justice system. Community involvement will be essential to its success." The New York County Lawyers' Association was founded 94 years ago as the first major bar association in the country that admitted members without

regard to race, ethnicity, religion or gender. Since its inception, NYCLA has pioneered some of the most far-reaching and tangible reforms in American jurisprudence and has continuously played an active role in legal developments and public policy.

"Imitation is the highest form of flattery," says Luke Bierman, director of the ABA Justice Center. "...we remain available to undertake any issues or projects that are appropriate for the ABA and I would be happy to discuss potential and opportunity at any time."

U.S. District Judge Norma Shapiro, chair of the ABA Justice Center Coordinating Council says, "The New York County Lawyers Association is to be congratulated on establishing a Justice Center. The ABA Justice Center has been most effective in encouraging the collaboration of bench, bar and the public in understanding and informing our country's justice system and looks forward to cooperation with the New York County Lawyers Justice Center on common issues and projects.

Judge Norma L. Shapiro's remarks for the presentation of the ABA Justice Center John Marshall Award on August 11, 2002

PRESENTATION OF THE ABA
JUSTICE CENTER
2002 JOHN W. MARSHALL AWARD
BY
ROBERT E. HIRSHON, ESQ.

TO THE HONORABLE
ANTHONY M. KENNEDY
ASSOCIATE JUSTICE
SUPREME COURT OF THE
UNITED STATES

Introduction by Hon. Norma L. Shapiro

Thank you, Judge O'Scannlain, and thank you for inviting the Justice Center Coordinating Council to present the second John Marshall Award at this Annual Dinner in Honor of the Judiciary. Thanks also to Luke Bierman, Director of the Justice Center, his Deputy, Marcia Kladder, and Kris Berliant, Judicial Division Conference Planner, for their efforts in planning the presentation of this Award. We are also very grateful to Lexis-Nexis for its generous support of the Justice Center Coordinating Council and its constituent groups.

It is especially wonderful to be able to convene this important event in this important courtroom. It is a bit more traditional than the Shedd Aquarium was last year, and though we may miss the fish who were with us in Chicago, we are inspired by the majesty of this year's venue. It is certainly most appropriate to present an award commemorating the contributions of Chief Justice John Marshall to a member of this Court in the Supreme Court building itself. The American Bar Association Justice Center appreciates the use of this hallowed hall.

As Chair of the ABA Justice Center Coordinating Council, it is a privilege to

share in this presentation. The Justice Center unites organizationally the Judicial Division (chaired by the Honorable Diarmuid F. O'Scannlain), the Standing Committee on Judicial Independence (chaired by D. Dudley Oldham, Esq.), the Coalition for Justice (chaired by Burnham H. Greeley, Esq.), and the Standing Committee on Federal Judicial Improvements (chaired by Thomas Z. Hayward, Jr., Esq.) and furthers their common goal to improve the administration of justice and involve the public in doing so. The Justice Center Coordinating Council was initiated by Alfred P. Carlton, Jr., who will soon become the Association's President. We know of AP's commitment to judicial independence and other issues we hold dear. We thank him for his foresight in developing the Justice Center so that we can work together more effectively, and for making this Award a reality.

Our Award is named for the Honorable John Marshall, the fourth Chief Justice of the United States, because he established the independence of the judiciary and enhanced its moral authority. The John Marshall Award brings distinction and

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Annual Meeting

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amended on the floor, they both passed. Report 117A supports legislation to ensure the right of a surviving partner, sharing a mutual interdependent committed relationship with a victim of crime or terrorism to be eligible for victim compensation and assistance funds provided by the government to eligible spouses. Report 117B on stem cell research was more controversial and attracted some press attention. As modified it places the ABA on record as opposing government actions which would prohibit scientific research for therapeutic purposes or punish those who ethically participate in such research.

The Judiciary

The Standing Committee on Judicial Independence along with numerous co-sponsors introduced Report 113 which supports a comprehensive study of judicial election campaigns with an emphasis on the effect of campaign fund raising practices upon public trust and confidence in judges. As amended, the Report was approved by the House. As one of his first acts as ABA President, Carlton created a president's commission on judicial independence and called the commission the Commission on the 21st Century Judiciary. He tapped former FBI Director William Sessions as a co-chair with Edward Madeira, a Philadelphia practitioner. A new ABA/Harris Interactive poll found that 72 percent of Americans doubt that jurists dependent on campaign fund raising are impartial. The new ABA President's Commission plans several meetings around the country, having already begun work in Detroit in August, conducting hearings about how the judiciary may come to harm as a result of campaign fundraising.

In an interview, Sessions said the curious need look no further than the disputed Florida recount in 2000, when pundits sized up the Florida Supreme Court's decisions in *Bush v. Gore* by its Democratic and Republican members. The court's justices are appointed by the governor but only stay on the bench if they win a "retention" election. "The presumption was ... that of course they would rule in a fashion that was compatible with their political persuasion," Sessions said. "That's a seed of destruction." Although the ABA has taken a hard-line on electing judges – the practice should be banned, they say – the former Houston practitioner takes a slightly softer view. "We should work towards those selection processes which are based on merit," said the former federal judge, who was appointed FBI director in 1987 by President Reagan.

C. Boyden Gray, the former President Bush's White House Counsel, introduced Report 112, critical of current Senate Judiciary Committee practices, and urging a full Senate vote on all nominees, even those not approved by the Committee, coupled with an ambitious timetable for action. He agreed to withdraw the Report in favor of a softer approach in Report 10A, sponsored by the Kentucky Bar Association and the Litigation Section which urged prompt nomination by the White House to fill vacancies, prompt action by the Judiciary Committee, followed by advise and consent or rejection by the full Senate. The measure that passed leaves unanswered the issue of whether there should be a full Senate vote on nominees rejected in Committee.

ABA Governance

For the third time, ABA member Ned Jacobs' effort to include "the right to life" of the unborn as an ABA corporate purpose failed as did his companion measure to

require recording of individual votes of the members of the House. Under current practice voting is open and transparent, but only recusals are recorded. One amendment to the ABA Constitution that did pass was Report 11-2 which denies a state or local bar association representation in the House if its governing documents discriminate with respect to membership for reasons of "creed, color, national origin, ethnicity, age, persons with disabilities, and/or sexual orientation" along with race, sex or religion.

The Tort and Insurance Practice Section was finally able to win House approval for a new name, "Tort Trial and Insurance Practice Section" following mediation with the Litigation Section which had objected to its earlier proposal, "Civil Trial and Insurance Practice Section." The concern was that the "Civil Trial" nomenclature would lead to TIPS poaching potential Litigation Section members.

Miscellaneous

The House also passed the following reports: Report 119 sponsored by the Section of International Law and Practice recommends Congress and the President enact amendments to the Foreign Sovereign Immunities Act to resolve conflicting judicial decisions among the circuits. Report 107 cosponsored by the Criminal Justice Section and the Section on Individual Rights and Responsibilities adopts the "Blueprint for Cost-Effective Pre-trial Detention, Sentencing and Corrections Systems." It recommends repeal of state and federal mandatory sentencing laws, greater use of community corrections programs and other alternatives to imprisonment, and reliance on pre-trial release to save jail space for

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Time Off

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such as the British Museum, British Library, the National Gallery of Art, the Tate Art Gallery, and the National Portrait Gallery.

Finally, you can't visit London without experiencing live theater. We always try to figure out how to see a play or musical every night we are there. (This also cuts down on buying dinners!) To keep the cost of theater tickets reasonable, we most often visit the

half-price ticket booth in Leicester Square. All but the hottest shows will usually have half-price day of performance tickets available. You can visit the half-price ticket facility in advance at www.officiallondontheatre.co.uk.

Well, I guess we didn't get to France on this visit because of having too much fun in London. Next time we will visit Paris, or maybe Prague and Budapest. You will just have to wait and see!

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

Annual Meeting

(continued from page 11)

sentenced prisoners. Report 110 sponsored by the Section of Environment, Energy and Resources urges efforts to settle Indian water rights claims in the western states as a preferable alternative to litigation.

At the request of the Section of Legal Education and Admission to the Bar two law schools were granted full ABA approval by the House, Florida Coastal

School of Law in Jacksonville (Report 301C) and Chapman University in Anaheim (Report 301D). Also Ave Maria School of Law in Ann Arbor, MI was granted provisional approval (Report 301A). Certain additions and revisions to the Standards for Approval of Law Schools and the Interpretations were approved in Report 301B.

The House will next meet in Seattle February 10 and 11, 2003 and by that time we will have some new members of our JD delegation. Each of us in the House

reminds Judicial Division members that the privileges of the floor may be made available for you if you wish to speak about an issue before the House.

Judge Rodgers is a member of the ABA Board of Governors representing Colorado, Arizona and Oklahoma, and has served in the House of Delegates since 1993. He is a past Chair of the ABA Judicial Division and the National Conference of Special Court Judges, and serves as Board liaison to the National Conference of State Trial Judges.

NAWJ Presents Excellence in Service Award to Judge Shirley Tolentino

According to Judge Karla Moskowitz, the President of the National Association of Women Judges, Judge Shirley Tolentino was in the forefront of ensuring equal access to justice for all, and educating judges on cutting-edge issues affecting women and vulnerable populations, especially for minority women and children. During her presidency of the National Association of Women Judges she forged ties with organizations that have similar goals, such as the NBA. It was through cooperative programming that she enabled the production of the NAWJ organizational video, *Changing the Face of Justice*. Judge Tolentino took the lead in introducing the Color of Justice program in New Jersey. She was the first African-American woman Full-Time Municipal Court Judge in Jersey City, the first African-American woman Presiding Municipal Court Judge in Jersey City, and the first African-American woman Judge on the New Jersey Superior Court—the position she currently holds.



John Marshall Award

(continued from page 10)

recognition to those who actively and creatively ensure that our justice system remains strong and responsive to the needs of all Americans. Any individual responsible for extraordinary improvement to the administration of justice in the categories of Judicial Independence, Justice System Reform, or Public Awareness of the Justice System is eligible. Two representatives from each of the four Judicial Center entities constituted this year's Award Selection Committee, chaired by Judge David A. Horowitz.

Its choice of the Honorable Anthony M. Kennedy was approved unanimously by members of the Coordinating Council of the Justice Center. Why he is so clearly deserving of this award will be stated shortly by the President of the American Bar Association, Robert E. Hirshon, Esq.

But first a brief comment on the Award itself. We gratefully acknowledge the efforts of Judge James S. Sledge in obtaining a hand-blown glass work of art designed by the internationally acclaimed artist, Dale Chihuly. At his glass center in Stanwood, Washington, Dale Chihuly has led the development of glass blowing as a studio art and the broader contemporary interest in glass as an expressive medium.

This sunny golden sculpture we award tonight was chosen as reminiscent of the golden sun in the chair occupied by the President of the Constitutional Convention at Independence Hall, of

which Benjamin Franklin said, upon the signing of our Constitution:

"...I have the happiness to know that it is a rising and not a setting sun." Our Award recipient strives to keep that golden sun ever shining in ascendancy.

Tonight's award presentation is especially meaningful not just because of



The 2002 ABA Justice Center John Marshall Award presented to Supreme Court Justice Anthony Kennedy. Shown left to right – Mary Kennedy, Justice Anthony Kennedy, ABA Executive Director Robert Stein, Sandy Stein, Dr. Bernard Shapiro, Judge Norma Shapiro, chair of the ABA Justice Center Coordinating Council and Judge Diarmuid O'Scannlain, 2001 Judicial Division Chair.

the location. It has been a year of very challenging, often difficult, sometimes touching, moments for all of us. We can not forget that less than a year ago, this courthouse itself was closed because of terrorism. It is a stark reminder of why we gather tonight - to continue the work of many, despite the efforts of a few to defeat our beloved nation and the values for which it stands.

This gala affair is all the more appropriate because of the recipient and his work with the American Bar Association this past year. Justice Kennedy thought of the ABA when he was moved by the events of September 11 to develop personally an outreach initiative to teach high school students about democratic principles, a program that has come to be known as the Dialogue on Freedom. And it was the Association's President - Robert E. Hirshon - whom he

called. During the past year, President Hirshon has worked tirelessly on this and many other activities designed to keep the faith and maintain a nation committed to the rule of law. He is well known to all of us as a faithful adherent to the concept of public service by the members of our profession - he chose to return to his home state of Maine after graduating from the University of Michigan Law School so that he could be a part of his community and leave a legacy. His contributions to legal aid services, first in Maine, and then nationally, have made a difference to people across the country.

And he has made a difference to us in the past year. Bob Hirshon could not have anticipated what he would be called upon to do when he accepted the ABA gavel last year. But he was ready and able to

respond when called upon.

He knew that this Association was ready. He knew that ABA leaders, lawyers and judges, were ready and willing to take action. The Judicial Division's Judges Network; the Coalition for Justice's National Issues Forum project; the Standing Committee on Judicial Independence's public awareness programs are examples of how this Association had been reaching out to this country's citizens to make them more aware of the rule of law, how it affects them and how judicial independence is important to their lives.

So Bob Hirshon knew that this Association was ready to act when Justice Kennedy asked. We were ready and we were led in the finest tradition of the legal profession by an outstanding leader, the President of the American Bar Association, Robert E. Hirshon, Esq.

Director's Column

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can be reached at 312/988-5701 and will work Tuesday, Wednesday and Thursday as the Judicial Division Technology Coordinator. To become better acquainted

with JD's newest arrivals, flip to the Spotlight on Staff on page 8.

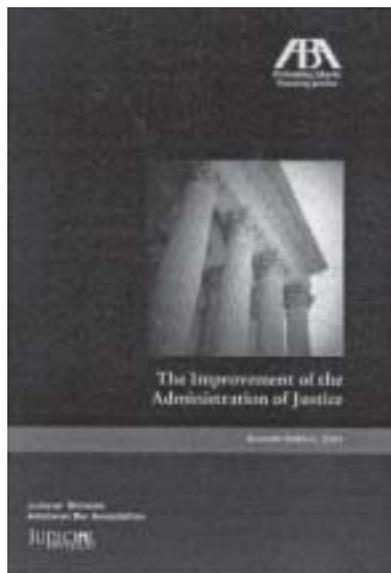
Thanks, Gracias, Grazie, Dziekuje, Domo Arigato-

In closing, I would like to thank Judicial Division officers for their strong leadership, hard work and support during

the year. I would also like to offer special thanks to Judicial Division staff (Kris, Teri, Mary Ellen, Gilda, Rebecca, Kara, Sandy, and Melissa)- we could not do it without you! Here's to a successful year and many great things to come!

THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE

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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.

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Appellate Judges News

American Bar Association

Do Intermediate Appellate Court Dissents Impact Decisions of the Louisiana Supreme Court?

by Judge Steven R. Plotkin^{1,2}
New Orleans, LA

The purpose of this article is to consider the impact of an appellate court dissenting opinion on the Louisiana Supreme Court's decision to reverse or modify a majority appellate court decision either wholly or partially.

The value and influence of dissenting opinions have long been debated among legal scholars, judges and lawyers. Some legal observers have negative views of dissenting opinions, regarding them as uncivil and provoking, breaches of collegiality and unity, and/or of limited value as the expression of a single judge's opinion. Nevertheless, a majority of legal thinkers believe that dissenting opinions have institutional legitimacy because they present reasons for reaching a result different from the one reached by the majority. I propose that an intermediate appellate judge's dissenting opinion does impact the Louisiana Supreme Court's review of the case, provided that the dissent is thoughtful, independent, and well reasoned, and that it attacks arguments of the parties in an impassive in tone. Dissenting opinions, when properly utilized, alert the parties and higher court of the dissenter's belief that the majority has misapplied settled law, distorted the facts, or erroneously devised a new rule of law. The dissent provides the framework in which the high court may grant review and correction for the future.

In order to confirm my proposal, I have conducted an unscientific "study in curiosity." The empirical data accumulated for this survey includes all decisions of the Louisiana Supreme Court in civil cases during 2000-2001. During those years, the Louisiana Supreme Court issued 111 opinions relating to civil appeals. All of those opinions were examined and compared to the corresponding published opinions from the intermediate courts of appeal, when available.

During the two-year period studied, the empirical data indicates that the Supreme Court granted writs of review in 111 cases, 42 of which contained dissenting opinions. Of those 42 cases containing dissents, the Supreme Court rendered a final decision either reversing or modifying in whole or in part the majority appellate court decision in 37 cases. Only five appellate court opinions, or 11.9 percent, containing a dissent were affirmed. Significantly, the Supreme Court corrected 88.1 percent of appellate cases containing dissents, indicating that the existence of an appellate court dissent does impact the Supreme Court's decision to reverse.

Even more importantly, my review of the Supreme Court's decisions in those 37 cases reveals that the Supreme Court clearly adopted the opinion of the dissenting judge in 16 cases, or 43.2 percent. In another 12 cases, or 32.4 percent, the dissenting appellate court judge's decision was adopted in part. Thus, my study indicates that 75.4 percent of the cases including an appellate court dissent in which the Supreme Court reversed the decision of the appellate court majority were influenced by the appellate court dissent. The Supreme Court's decision did not appear to affect the decision to reverse in only six cases, or 16.2 percent. No published appellate court dissent was available for comparison in the other three cases, or 7.2 percent.

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Deference: A Rewading Custom

Not Even Dicta - Item 53

*While it is nice to be smart,
it's nicer to be nice.*

Philosopher W. R. Toal (1963)

A feature of interest to many who have witnessed Congressional proceedings is the custom of using terms of respect and phrases of admiration whenever members refer to each other. Those terms of respect and esteem are used even when there may be a far less than cordial relationship between the two members. Such courtliness is admirable because it imposes an atmosphere of civility upon the proceedings, and enhances the dignity of the institution of the Congress.

Thus, when I commenced upon the career of judging, I borrowed the custom of the Congress and undertook the practice of deference when referring to a judicial colleague:

- The standard of review most commonly employed by the appellate courts is to determine whether the decision of the trial court composes an "abuse of discretion".

Since this appellate tribunal is a constant witness to the intense and careful study provided by the trial judges to the issues which confront them, it seems somewhat inappropriate, when a disagreement

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Thoughts From the (Ex-) Chair

by Judge Danny J. Boggs
*United States Court of Appeals, 6th Circuit
Louisville, KY*

I recently concluded my one-year term as your chair at the ABA annual meeting in Washington. It has been a great honor to serve you in that capacity during a year of triumphs and tragedy for our profession and our nation.

I was in Chicago at ABA headquarters on September 11, having scheduled briefings on my duties for the coming year.

Although the building closed down and most staff were sent home, AJC staff worked with me in getting set for the coming year. Now, nearly a year later, our country has made significant progress in combatting the terrorism that struck us on that day, while raising many legal issues that will require our attention and deepest thought in the years ahead.

The AJC carried on its work in our usual fashion, with educational seminars for judges and for our constituent units. The first national meeting of our dynamic and growing Council of Appellate Lawyers was held in New York in early October, in conjunction with the Conference of Chief Judges of Courts of Appeals. Coming so soon after September 11, it was both an inspiration to be in New York and an honor to help with the revival of that great city.

While we always try to do important work for our colleagues and our profession, whether our efforts are sung or unsung, recognition is always pleasant. At the ABA

annual meeting, the Meritorious Service Award is given to the ABA section or division that produces the outstanding program in the previous year. ABA President Robert Hirshon presented the award to the Judicial Division for our Minority Judicial Clerkship program, now in its second year.

I accepted the award on behalf of the Division and the AJC, which had been given lead responsibility by JD Chair Diarmuid O'Scannlain. The hard work on this program had been led by Justice Frank Sullivan of the Indiana Supreme Court. Frank and I were teammates in mentoring a group of law students at the first program, held at the ABA Mid-Year meeting in early 2001. For the 2002 session, Frank organized the program and secured the necessary judge power form a very successful program. Nine of the 12 judges involved were from the AJC. We believe that this program will inspire more minority candidates to apply for judicial clerkships, and provide them with the tools, both substantive and practical, to help them secure and fulfill the exciting and important job of a judicial clerk. I want to encourage all of our members to consider participating in next year's program, to be held in conjunction with the ABA mid-year meeting in Seattle in early 2002.

Maintaining the funding of the high-quality judicial education programs of the Appellate Judges Conference has been one of the most difficult issues facing your leadership in the past several years. Many of our programs have been funded by grants from the State Justice Institute, which has been funded by Congressional appropriations. Those appropriations have

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EDITOR'S NOTE

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

The *Appellate Judges News* is a published quarterly by the American Bar Association (ABA) Judicial Division Appellate Judges Conference. The views expressed in the *Appellate Judges News* (AJC) 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 Stephen McEwen, Jr., Superior Court, 201 W. Front Street, Media, PA, 19063, E-mail: judge.mcewen@superior.court.state.pa.us Phone: 610/565-9191; Fax: 610/565-9385 or contact Mary Ellen Donaghy at ABA/Judicial Division, 541 N. Fairbanks Court, Chicago, IL 60611; Phone: 800/238-2667 x5694; Fax: 312/988-5709; E-mail: donaghyme@staff.abanet.org

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ARTICLE SUBMISSION DEADLINES

Winter 2003: Wednesday, November 20

Spring 2003: Wednesday, February 12

Summer 2003: Wednesday, May 7

Thoughts

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been reduced radically over the past several years, and may be terminated entirely this year. Even if the SJI survives in a reduced form, we cannot count on the significant support we have received in the past. In the past we have had good experience in obtaining support for certain programs through cooperation with law schools. Our LL.M. program has been run in cooperation and with the support of the University of Virginia Law School for many years. We have organized sessions of the Spencer-Grimes Seminar Series in conjunction with Harvard and Boalt Hall law schools in the last year. In this spirit, the Executive Committee authorized exploration of the possibility of affiliating

the educational programs of the AJC with a cooperating law school, which would provide financial support, and cooperation in raising additional funds. Over the past year, we have received strong interest in such an affiliation from the Dedman School of Law at Southern Methodist University in Dallas. The Executive Committee, at our recent meeting in Washington, authorized your new Chair, Justice Craig Enoch of the Texas Supreme Court, to pursue this opportunity, with the goal of creating the necessary long-term financial stability for our education programs.

This affiliation will not affect the continuing full participation of the AJC in the work of the ABA, such as the award-winning Minority Clerkship program mentioned above, Judicial Division and

House of Delegates activities, and the other roles played by the AJC within the ABA. It is intended only to provide financial support and administrative flexibility in continuing the programs that have been the centerpiece of AJC activities. I hope we will all give Justice Enoch and the staff our support in continuing to strengthen our educational programs.

In closing, I reiterate that it has been a great honor and privilege to work with our country's fine appellate judges and appellate lawyers in the ABA over the past year. I look forward to remaining active in the educational and professional activities offered by your AJC. I hope each of you will do likewise.

Deference

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with the trial court, even though deep, is but a difference of opinion, to label that difference of opinion "an abuse of discretion".

Thus, the appellate courts might better serve to rely upon a different label for reversal in such cases, such as the phrase - "carefully considered difference of opinion." Such a term does not relax the restriction that we refrain from substitution of our opinion for that of the hearing court. Rather, it simply substitutes a label which more aptly and perhaps more sensitively, describes the basis for appellate reversal.

*

- The distinguished trial judge was without the benefit of those recent holdings which compel us to reverse the judgment of sentence (The name of trial judge is intentionally omitted because his ruling was reversed.)

*

- While I commend the majority for a most persuasive expression of view, and acknowledge that our venerable colleague, Judge John D. Brown, provided in *Smith v. Jones* a succinct and scholarly analysis of the principles which require that this case be remanded for further proceedings, I am unable to join in the majority view.

- *
 - Since my colleagues of the majority are pillars of jurisprudential wisdom, I hasten to declare that I join in the decision to remand this case for a hearing on the complaint for support filed by appellant, while expressing a difference of view, namely

*

- When one differs with the view of two such insightful colleagues, brevity is the far wiser course. Thus it is that I simply observe that I am of the mind that

*

- The issues which confront this Court in this appeal are of such importance and difficulty that unanimity of view is understandably impossible. I can, however, afford to be succinct since my esteemed colleagues have so carefully and thoughtfully analyzed these complex and urgent issues. I am compelled to an expression, nonetheless, since I share the view of Judge White that *judgment n.o.v.* should have been entered

As the foregoing examples reveal, deference, once begun, moves naturally to practice and even custom. Nonetheless, courtliness is not as uniform a practice in the judiciary as it is in the Congress, as I quickly learned.

It seems that a venerable judge was my colleague upon a three-member panel during my early months as I launched upon

the practice of labeling as *distinguished* the trial judge whose ruling was the subject of consideration. When my veteran colleague, who was held in deep admiration and affection, only concurred in my opinion instead of joining, I inquired as to whether I could provide such an adjustment to the rationale or the text as would enable him to join fully and not simply concur in the result. He quickly counseled that a quite simple adjustment of but one word would do it: "You refer to that trial judge as *distinguished*. He is not. He is a judge in this county and I can assure you there is no redeeming adjective you can lay on him." Well, my colleague was tried and true, and I was brand new, so I deleted the adjective of bouquet.

However, a few months later, the same situation arose. I again contacted my veteran colleague as to whether an adjustment was possible and once again he advised that the trial judge was not eligible for the label *distinguished*. When I called his attention to the fact that this time the undistinguished judge was not from his county, he responded that "He's from the county next over. I know all of his mates, and they tell me he is far, far from distinguished".

I was concerned that, even though my practice of deference was just underway, it was already imperiled. However, that venerable colleague and I soon reached an accommodation: Whenever I used the label *distinguished* or *learned* or *eminent* or the like, but he perceived the judge as

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Court Dissents

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In summary, the results of this study support my theory that dissents do have a significant impact on the Supreme Court's decision to reverse an appellate court decision. Of the cases involving a dissent

for which a writ of review was granted, the Supreme Court reversed almost nine out of ten. Moreover, of those cases that were reversed, three-quarters of the Supreme Court decisions adopted the opinion of the dissenting appellate court judge, either wholly or partially.

1 Judge, Louisiana Fourth Circuit Court of Appeal, New Orleans, LA.

2 Research and editorial assistance provided by Mary Beth Akin, Senior Law Clerk and Nicole Hyde, third-year student at Tulane University Law School.

Deference

(continued from page 18)

otherwise, he would ask me to delete the bouquet only when the judge was from his very own county, and when the undistinguished judge was from another county, he would join in the label *distinguished*, however undistinguished the jurist. And, happily, may I tell you that

during the several years we served together thereafter, he never again objected.

The display of deference to colleagues is so prudent as to be urgent. It reflects quite favorably upon the Court as an institution, promotes the collegiality which so nicely conditions the workplace climate, and, as importantly, encourages meaningful jurisprudential discussion. While virtue is its own reward, deference in dissent can

also be a device to encourage a more open-minded consideration of the rationale of the dissent and to soften criticism when a reviewer is disturbed by the notions of the dissent.

And so it is that ... I defer!

Appellate Court Opinions as Registers of History

by Judge C. Tolbert Goolsby, Jr.
South Carolina Court of Appeals

As any first-year law student soon learns, what the law is in a given situation can be discovered by reading an opinion written by an appellate court. An appellate court's opinion, however, often offers much more. Not only will the reader find the law declared in an opinion, the reader will frequently discover a little something about the history of his or her state and country and, indeed, sometimes something about the history of his or her family — maybe even something the reader had rather not know.

In his monumental work, *The Decline and Fall of the Roman Empire*, Gibbon said that “[h]istory is . . . little more than the register of the crimes, follies and misfortunes of mankind.” Voltaire expressed the same thought, stating that “[h]istory is only a record of crimes and misfortunes.”

The opinions of our appellate courts are also a register of crimes, follies, and misfortunes. They catalog mistakes, big

and small — those made by government, by organizations, and by individuals. In doing so, they tell us about the particular times in which they were written.

For instance, 1 *Bay's Law* and more than three hundred other volumes constitute the *South Carolina Reports*. This work contains all of the written opinions of South Carolina's appellate courts from 1783 forward. Two opinions in 1 *Bay's Law* may be of particular interest.

During the American Revolution, there were Americans, indeed South Carolinians, who embraced the English standard and did so wholeheartedly. In many ways, the war was a war against fellow Americans as much as it was a war against the British. Opinions in two different but similar cases reflect this historical fact. These cases are *Whitaker v. English*, 1 Bay 15, decided in 1784, and *Porter v. Dunn*, 1 Bay 53, a case decided three years later.

The opinion in the first case describes Mr. English, the appropriately named defendant, as “one of those deluded citizens of America, who joined the British Army in the late war, and accepted a commission in their militia service.” Mr. English again wound up on the losing side after the court concluded the 1783 peace treaty between this country and Great Britain did not exonerate him for

participating in a raiding party that took cattle, horses, and other property belonging to Mr. Whitaker, the plaintiff, and for removing them to the British garrison in Camden.

The opinion in the second case describes Mr. Porter, the plaintiff, as “an officer in General Sumter's brigade,” and Mr. Dunn, the defendant, as “a planter on [the] Black [R]iver, who had joined the British . . . and performed duty as a soldier in their militia.” While Mr. Dunn was serving King George's battalions, Sumter's brigade, according to the opinion, seized Mr. Dunn's property and gave it to Mr. Porter, as the opinion recites, “in lieu of pay, for his services as an officer in the line” After the war, Mr. Dunn, retrieved his property and Mr. Porter sued to get it back. This time the former Tory became a winner as the court reached a result consistent with the first case, declaring “that the practice of taking property from an enemy . . . and dividing it among the soldiers, was not justified by the laws of nations or rules of warfare.”

Appellate court opinions do more than record who won and who lost a case. They also provide a brief look at events and the way things were at a given point in our nation's history.

**** In Memoriam ****

CHIEF JUDGE MARTIN M. DOCTOROFF
by Carl West Anderson, Presiding Justice (Ret.)
California Court of Appeals, First District

Michigan Court of Appeals Judge Martin M. Doctoroff lost his three-year battle with Lou Gehrig's disease July 9, 2002, when he died in his sleep at age 69. He served fifteen years on the court and several years as its Chief Judge, succeeding Chief Judge Bob Danhof. It was during his service as Chief Judge that Marty became very active in the Council of Chief Judges of Intermediate Courts of Appeal of the United States (CCJ) and the Appellate Judges Conference (AJC) of the Judicial Division of the American Bar Association.

Marty's leadership capabilities were affectionately recognized by his peers in the Council of Chief Judges when he was in the chairs to become their President and suddenly lost his position as Chief Judge. The Council's By-Laws then required that its President be a sitting Chief. However, rather than be denied Marty's leadership the Council quickly amended the By-Laws to incorporate the concept that "Once a Chief Judge, always a Chief Judge." Thus, a coup was avoided, Marty assumed the Council's highest office lawfully, he presided with distinction in 1998, and culminated his reign at the Key West, Florida, annual seminar. (See photo of Marty and Allene.)

Marty demonstrated from the commencement of his service on the Council's Executive Committee that he was committed to the Council as a devoted team player. That became evident when on an Executive Committee retreat in southern seas he reluctantly boarded the skiff for a floating committee meeting and

earned the distinction as the most unseaworthy of all!

Marty dutifully accepted his responsibility to CCJ and the AJC by also serving on the latter's Executive Committee from 1994 to 2000. His courage there was oft demonstrated by his acceptance of the position of AJC representative to the Judicial Division, where he explained AJC positions most eloquently to a less than enthusiastic reception. Also during this time (1996-1998) he was tapped to chair the Eleventh Appellate Practice Institute's no easy assignment.

Marty's commitment to attaining excellence in the perception and delivery of appellate justice in America was recognized by his appointment to the Appellate Court Performance Standards Commission, sponsored by the National Center for State Courts. He was absolutely committed to improving not only appellate efficiency but also the delivery of just decisions. The Performance Standards and Measures (published in June of 1999) reflect his practical approach to attaining these goals.

Despite his elevation to lofty positions both in Michigan and at the ABA, Marty never lost sight of his roots. He was annually elected by the Michigan Bar to represent them in the ABA's House of Delegates. He accepted the assignment like all others—with dedication.

Marty's participation in these extra-court judicial activities often separated him from his beloved Allene, but I know from many conversations with him on those occasions that she was always very close in his thoughts. On Marty's death, their son Andrew is reported to have told the Detroit Free Press that "most people remember him for being part of the most glorious marriage that anyone could ever want to have." At first Allene's commitment to her patients as a clinical

psychologist and later her own battle with a rare form of cancer often prevented her from joining Marty at these meetings. Nevertheless, she insisted that he participate, and in their later years together encouraged him to leave her bedside; he dutifully complied. Appellate justices owe both Allene and Marty a debt of gratitude for such joint dedication.

It was only after Allene died in 1999 that Marty sought help with what had been troubling him, and in November of 2000 was diagnosed with ALS, amyotrophic lateral sclerosis. His reporter friend at the Detroit Free Press, Brian Dickerson, described this awful period in Marty's life as follows: "Still disconsolate over Allene's death, Marty rallied in the company of friends. Late in 2000, when doctors finally put an awful name to the disease that was already contorting his limbs, the terminal diagnosis seemed to galvanize him. He had spoken movingly of Allene's gallantry as she battled cancer, and now, as his own body turned to husk, he resolved to be worthy of his wife's example." Marty is survived by his four sons: Andrew of Huntington Woods (a lawyer with Honigman, Miller, Schwartz and Cohn), Daniel of New York City, Mark of Moscow, and Thomas of Shanghai—and his seven grandchildren.

Those of us who knew and worked with Marty will cherish the memories of his wit and wisdom. But most of all we will miss his companionship—he was the embodiment of collegiality! He made you feel that your problems were his, but he never burdened you with his, which were overwhelming to most. He faced death with dignity and courage. There should be an empty chair at our deliberations to remind us of Marty—that we might strive to match his courage and dedication. Marty will be sorely missed by all of us who were fortunate to have known and worked with him. He was just plain fun to be with.

Lawyers Letter

American Bar Association

Somerlot Wins 2002 Excellence in Judicial Administration Award

The Excellence in Judicial Administration Award is presented annually by the ABA Judicial Division Lawyers Conference (LC) to recognize an individual who has shown extraordinary achievement in judicial administration. The LC recognizes recipients who have demonstrated excellence through lifetime dedication to the field of judicial administration through legal, scholarly or civic avenues, or through a single outstanding achievement.



by Emily Barnhart
Philadelphia, PA

In keeping with the tradition of outstanding and distinguished award recipients, Douglas K. Somerlot of Denver, Colorado was presented with the 2002 Excellence in Judicial Administration Award at the ABA Annual Meeting in Washington, D.C. Doug is the Executive

Vice President of the Justice Management Institute, and serves on the faculty of the University of Denver College of Law Master of Science in Legal Administration Program and the National Judicial College in its course on Effective Caseflow Management.

In addition to his numerous civic roles, such as his participation as a member and the former Chair of the ABA Judicial Division's Task Force on Prompt and Affordable Justice, Doug is a prolific writer in the field. Doug recently contributed to the Seventh Edition (2002) of the Judicial Division's handbook on *The Improvement of the Administration of Justice*.

Current LC Chair Anne Kelley and I recently had an opportunity to speak with Doug to explore his philosophy concerning his work in judicial administration, and his thoughts concerning improvements and developments in the field going forward. Throughout his career, Doug has gained experience working hands-on in various courts throughout the country, through his role as an educator, through years researching problems associated with the administration of justice, and through his work on projects at both the ABA and the Justice of Management Institute implementing new policies and

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EDITOR'S NOTE

Lawyers Letter is a publication of the ABA Judicial Lawyers Conference (LC). The views expressed in the *Lawyers Letter* are those of the author only and not necessarily those of the ABA, the Judicial Division, the LC, 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 Ms. Emily Barnhart. E-mail: barnhart@ballardspahr.com, Publications Chair, 1735 Market St., 51st Fl, Philadelphia, PA 19103; Phone: (215) 864-8276; Fax: (215) 864-9809 or contact Teri Curro at ABA/Judicial Division, 541 N. Fairbanks Court, Chicago, IL 60611; Phone: 800/238-2667 x5689; Fax: 312/988-5709; E-mail: currot@staff.abanet.org

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Spring 2003: Wednesday, February 12

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by Anne Kelley
Redmond, WA

What a valuable and inspirational Annual Meeting we had this year in the Judicial Division, and in particular within the Lawyers Conference (LC). It was great to be able to honor **Douglas K. Somerlot** with the Award of

Excellence in Judicial Administration, and thrilling for so many of us to shake hands with and honor **Supreme Court Justice Anthony M. Kennedy** for his work in connection with judicial outreach—a Lawyers Conference and Judicial Division passion based upon Justice Kennedy's "Dialogue on Freedom". Being in the Supreme Court chamber and hearing Justice Kennedy's comments on the Rule of Law, particularly in the wake of the September 11 tragedy, was revitalizing. Indeed, Justice Kennedy's words made clear the significance of the work so many in the Judicial Division and within this Conference are doing to protect the Rule of Law and to enhance the public's understanding of and respect for the judiciary. For me, as incoming Chair, the evening also crystallized how important it is to have an active fleet of lawyers, court administrators and other court and technology professionals supporting the Judicial Division's many important projects.

This year, I am privileged to be working with a great Executive Committee and wonderful Committee Chairs who are focused on taking action in support of Judicial Division initiatives, as set forth by **Judicial Division Chair Judge James Scott Sledge**. I would like in this quarterly column to outline a few of the Conference's current activities in support of the Judicial Division's broad initiatives, as well as introduce the Committee Chairs who are leading these efforts. Next quarter, I will introduce some of the key Conference members who are involved in activities coming to a head at the Midyear Meeting in my home town of Seattle, Washington, including **Jack Brown**, **Dan**

Gourash and **Justin Connor** (who lead the Judges Network judicial outreach effort) and **Vicky Cashman** (who is the LC Education Program Committee Chair and who is preparing programming for the next Annual Meeting in San Francisco, California).

I thought my first article for the *Judicial Division Record* as LC Chair would be an appropriate opportunity to thank **Charles Vanstrom** for his great work as LC Chair this past year, and to recognize Charles' continuing commitment to the Conference by chairing the Nominations Committee. Charles' year as chair saw the 7th Edition of the *Judicial Administration Handbook* come to fruition and the blossoming of the Judges Network. These two important milestones set his year apart as a very productive one. Now that Charles is involved in nominations, I expect he will bring his characteristic good humor and depth of knowledge of the Conference and the Division to ensure a strong and diverse leadership within the LC well into the future. If you have input regarding prospective nominations for the Executive Committee, please email Charles at CVanstrom@aol.com.

*To the members of the Conference
who are reading this but not
actively participating in the
Conference, come work with us and
with the other Conferences in the
Judicial Division!*

In recognition of the many talented people in the Conference who have signed up for committee participation and of the need for increased membership to support the activities of the Judges Network and other projects, active membership participation within the Lawyer's Conference is my theme for this year. I am proud to lead off my discussion of new Committee Chairs with **Michael B. Hyman**. Michael not only is the LC Membership Chair, but is also Chair of the JD Membership Committee during a year when the entire Division is working on increasing membership. Michael is a practicing attorney with the law firm

Much Shelist Freed Denenberg Ament & Rubenstein, P.C., Chicago. His practice involves prosecuting class actions on behalf of plaintiffs who have been victimized by consumer, antitrust and securities fraud violations.

Michael plans to increase membership with an eye toward recruiting individuals interested in becoming immediately active in the work of the JD. He is supported in this effort by **Charles Hollenbeck** (former chair of the Judiciary Image Evaluation Task Force), and is working closely with **Jack Brown** (LC Vice-Chair and Co-chair of the Judges Network), **Justin Connor** (LC Chair-Elect and liaison with the Young Lawyer's Division) and **Dan Gourash** (LC Secretary, Co-chair of the Judges Network and liaison with TIPS). Michael is also working with the Litigation Section's Task Force on the Judiciary and Bench Bar Committee to recruit lawyer and bar association support for the Judges Network and other projects.

Michael will also focus on increasing and activating participation by court administration professionals by reaching out through existing LC members who are judicial administrators. Expanded membership by court administrators is crucial in order to broadly articulate the perspective of judicial administrators, as well as raise issues of importance to judges so that we can effectively support the judiciary. If you would like to reconnect through active participation in the LC (including by serving on the Membership Committee), or can recommend lawyers or court personnel who would be interested in expanding Conference membership, please email Michael at mbhyman@muchshelist.com

I am also excited to have an active new LC Publications Chair in **Emily J. Barnhart**. Emily is an associate with Ballard Spahr Andrews & Ingersoll, LLP's Philadelphia office, and practices within Ballard's Litigation Department and Intellectual Property Group. In addition to contributing an article in this issue of the *Judicial Division Record* about Excellence in Judicial Administration Award Recipient Doug Somerlot, Emily has jumped on board to move forward publications efforts for the Conference for the next year. Ideas are abounding for new *Record* articles. As a

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Administration Award

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improvements relating to judicial administration. Doug's lifelong commitment to this field provides a unique wealth of knowledge from which Doug draws in discussing the administration of justice in United States courts today.

We asked Doug to speak to his beliefs concerning areas of judicial administration in which significant progress has been made, and what he believes are the most successful innovations and trends which contribute to fruitful dialog and change toward efficient and accessible justice. We also asked Doug to address those areas of judicial administration in which further study and attention should be devoted.

Doug enthusiastically first spoke of the growing and very important move toward "collaboration of judicial leaders with not only court management leaders but also other people both within and outside of the justice system." The interdisciplinary cooperative and collaborative development and leadership which have now become more prevalent to create successful judicial admin-

istration change efforts "is a really significant thing", commented Doug. Doug explained that what is valuable is the result created by bringing to the table for an open dialog, not only judges and court administrators, but also parties from non-legal fields and with different backgrounds and interests, such as family services agencies and treatment providers. Bringing all these parties together collectively "to solve a problem" creates a more effective approach to judicial administration, and allows for increased trust in the system. Additionally, collaborative efforts lead to better results with respect to all aspects of judicial administration, and particularly with respect to those with specialized needs, such as families in crisis. Early in his career Doug saw collaborative efforts have a positive effect with respect to juvenile justice. Presently, he commented, new and expanded collaboration is also likely to be

beneficial and needed in light of the "recent advent of specialty courts or specialty dockets", such as "mental health courts, drug courts, and community courts."

Doug also discussed with us areas in which attention should be focused in order to improve upon and ensure the continued success of the judicial administration field in the future. More effort should be devoted to "training those who are going to be the judicial leaders, both judges and court staff, of the future". More specifically, people should be trained to "lead in a collaborative fashion". "Leading in that way is certainly not something taught in law school, nor is it probably something that is taught judges or court



The first Excellence in Judicial Administration Award recipient Dean Emeritus Robert B. Yegge (left), Charles Vanstrom, immediate past LC chair and the 2002 Award of Excellence recipient Douglas K. Somerlot (right).

administrators in the training programs they go through". Doug believes strongly that valuable lessons and instruction may be learned from those within the court system who are already accustomed to a collaborative "mind set" by virtue of their experience working in historically specialized areas, such as family courts.

Additionally, what should not be left uncaptured is the three decade wealth of experience held by the group of individuals who comprise the current court administration leadership, many of whom graduated from the Institute for Court Management's Career Executive Program (which came into existence in 1970 and is now a part of the National Center for State Courts). Doug noted the importance of devoting attention to cultivating the future generation of court administrators. It is these individuals who will go on to make a difference to those things that are very important to us - "the law, the courts,

justice", as those in his generation have made a difference. We must now "think in a much more formal and organized way about how we go about mentoring and passing along this knowledge."

After speaking with Doug, I have no doubt that he will continue to be a thoughtful advocate and will continue to excite in others an interest in judicial administration as a career which provides the opportunity to make a "contribution beyond just doing their work every day."

Long-time colleague and friend, Superior Court of Arizona Court Administrator Gordon M. Griller nominated Doug for the 2002 Award of Excellence. Mr. Griller praised

Doug's three decades of outstanding service spent promoting and improving the administration of justice in numerous capacities such as educator, court consultant and researcher on court delay reduction. As a result of Doug's many accomplishments, coupled with "his gracious and responsible character as a person", Mr. Griller was "pleased and honored" to nominate Doug as an individual personifying the "highest qualities

exemplified by the Award of Excellence."

Marla Greenstein, chair of the committee responsible for selecting Doug as this year's recipient of the Excellence in Judicial Administration Award, noted that "throughout his career Doug has distinguished himself not only in the quality of his research and presentation but in his insight into the human dynamics that are integral to understanding justice at work. He has the amazing ability to appreciate every point of view and every person he meets." The committee chose Doug as this year's recipient because he "lives a life that exemplifies the purpose of the award."

Doug has demonstrated a sincere devotion to improving affordability of litigation and access to courts, particularly access to family courts. He has dedicated his career to increasing the efficiency of all courts through the study and improvement

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Chair's Column

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preview, Emily is going to be working with former LC Chair-Elect **Mary Fran Edwards** to highlight Mary Fran's impressions and perspectives on the court system in Outer Mongolia, where Mary Fran is now working to improve the Mongolian judicial system. Emily is also enthusiastic about promoting the *Judicial Administration Handbook*. She will be working with ABA staff and others on her Committee to expand readership of the *Judicial Administration Handbook*. If you have an idea for an article for the *Judicial Division*

Record, for the *Judges' Journal*, or for a publication that might be appropriate for development within the LC, please email Emily at barnhart@ballardspahr.com.

Finally, a proposal was made during Executive Committee discussions at the Annual Meeting that the Conference prepare a resolution to the House of Delegates at the Midyear Meeting in Seattle, Washington in support of the ABA and Federal Bar Association's position in support of an increase in federal judicial salaries. The Federal Bar Association's position was articulated in its report on federal judicial pay erosion, and the ABA's

position was expressed by ABA President Bob Hirshon before Congress this year. **Dan Gourash** is spearheading the effort to prepare a draft of the resolution for discussion at the Section Officers' Committee meeting. Research is being gathered to support a good executive summary. The Conference is proud to be able to take positions that support an effective judiciary, be they on ethical issues or more pragmatic matters.

To the members of the Conference who are reading this but not actively participating in the Conference, come work with us and with the other Conferences in the Judicial Division!

Administration Award

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of judicial administration, and has motivated others to become involved in this important work.

Charles J. Vanstrom, immediate past LC chair one of the committee members responsible for selecting Doug as this year's award recipient, commented that "judicial administration as a profession is underrated

and often misunderstood, but people like Doug and Dean Emeritus Robert B. Yegge of University of Denver Law School [for whom the Award of Excellence in Judicial Administration was formerly named and to whom the award was first presented] have guided the way for people to begin to appreciate the vital importance of this field. Without their teaching, research and writing this field of practice would be deficient."

We asked Dean Yegge to provide some final reflections on this year's winner. He said of his friend and fellow educator, "Doug has devoted his professional career to judicial administration. He will just get better as he gets older, and through teaching he will be sustaining and developing a new generation of judicial administrators. He absolutely is a deserving recipient!"

As a Judicial Division Lawyers Conference member, you know about all the great benefits the Judicial Division has to offer, including great publications, outstanding CLE programs, and the opportunity to network with judges nationwide. Now it's time to share that information with your colleagues and help us recruit new, interested members! We are asking every current LC member to recruit two new JD members. For ABA members, the JD enrollment fee is only \$35! **For your efforts, you will receive a unique, stainless steel, Judicial Division key ring (with built-in light!).** Your new members will also receive our fabulous give-away item. Simply copy the form below and share it with a few of your colleagues.

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Administrative Judiciary

News and Journal

American Bar Association

Issues for Federal Administrative Law Judges

by Judge Dan Solomon
Washington, D. C.

The following issues are of special importance to Federal Administrative Law Judges.

Issue No. 1. Elimination of OPM OALJ
The Office of Personnel Management (OPM) through the Office of Administrative Law Judges (OALJ), sets policy for and operates the government-wide programs for Federal Administrative Law Judges. Congress authorized OPM to establish hiring standards for ALJ positions. 5 U.S.C. §§1104(a)(2), 1302(a). OPM regulations establish procedures for selecting applicants for those positions. 5 C.F.R. § 930.203. Federal agencies and individual ALJs have relied upon OPM, with OALJ as a single point of contact, for guidance in implementing the various personnel directives that Congress has established to ensure compliance with the Administrative Procedure Act. OALJ has the responsibility of administering an examination, maintaining a selection register and ensuring the appointment of merit-based eligible candidates, loans and temporary assignments of ALJs to agencies, retired ALJ senior judge appointments, reduction in force priority assignments, reassignments of ALJs, and administration of the unique compensation, classification and promotion program for ALJs. OPM issued a reorganization plan that eliminates OALJ. There is no indication from the plan whether the OALJ will be transferred, and if so, to what entity. Therefore, the ABA is recommending to the Honorable Kay Coles James, Director of OPM, she not approve the plan until she confers with the

ABA, the Chief Judges of the 29 effected agencies and other ALJ groups before finalization. Issue No. 2. SSA Threatens to Eliminate Due Process Hearings. There are renewed threats to eliminate the right of a Social Security disability claimant to a full due process hearing before an ALJ. In Congressional hearings Social Security Deputy Commissioner Martin Gerry stated that the Commissioner was reviewing the entire disability system and that she will announce "reforms" in late fall. Some of the proposals included an elimination of a claimant's right to a hearing before an ALJ. In early June, the ABA wrote to E. Clay Shaw, Chairman of the Social Security Subcommittee to have the Committee remind SSA that the ABA stands for 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"). On June 20, John Pickering testified before the House Ways and Means Social Security Subcommittee. He reminded the committee that the ABA supports continued due process hearings. Subsequently, ABA President Alfred P. Carlton, Jr., wrote to the Commissioner, objecting "strongly to any attempt to reduce or eliminate the availability of a hearing conducted by an Administrative Law Judge." President Carlton also wrote, "The federal administrative judiciary represents the statutory embodiment in the Administrative Procedures Act of the guarantee of due process that is a hallmark of our democracy. We have consistently supported and promoted the use of the APA by federal agencies because it offers the best protection to our citizens in its dealings with the federal government. Our members stand ready to work with you and Deputy Commissioner Martin Gerry or other members of your staff to devise an approach to making the Social Security disability appeals process

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Bylaws Committee to do Complete Review This Year

by Judge Jean S. Cooper
Washington, DC

The NCALJ Bylaws Committee, co-chaired by Judges Jean Cooper and John Hardwicke, will do a complete review of the bylaws this year, and will be making proposals for a number of bylaws changes based upon that review. The review will be based on the NCLAJ mission and how accurately its bylaws reflect that mission. We will also consider proposals developed by the Bylaws Committee last year concerning revised criteria for Conference membership and whether someone no longer serving as a member of the administrative judiciary should be able to serve as Vice-Chair or Conference Chair. We will also draft proposed bylaws to reflect the newly created NCALJ Fellows, as well as other activities in which NCALJ regularly participates. Any NCALJ members who have ideas or suggestions to make about needed bylaws changes should contact Judge Jean Cooper at jean_s_cooper@hud.gov this fall.

CHAIR'S COLUMN

by Judge Ruth Kleinfeld
Manchester, NH

Justice, justice, shalt thou pursue... These words from Deuteronomy inspire the beginning of my year as your new Chair, as I seek to provide the kind of leadership and motivation that our immediate past chair, Jodi Levine, so ably demonstrated. Her abilities to forge connections and attract active members has been outstanding, and has given our Conference increased visibility and new standing in the JD and in the ABA. Thank you Jodi, you have been a terrific leader and great coach!

The challenges to be met as we plan our activities this year are formidable, but as has been said with respect to liberty, the price of justice is eternal vigilance, and that vigilance informs our agenda. Especially in the federal administrative judiciary, where we have become aware of fresh attacks on due process of law, we seek to marshal the support and presence of the ABA to help us advocate for the principles we live by, for the sanctity of the rule of law, for the constitutional rights of Americans, and the protection of the Administrative Procedures Act.

In both federal and state arenas, we must not forget our role as a bulwark of democracy. We who are blessed by the privileges of education and skill and status in the community have a concomitant responsibility, an affirmative obligation, to foster an understanding and appreciation of the administrative judiciary. Through our meetings and programs at our conference and in our division, we must maintain as our top priority the recognition that the independence of the judiciary is the underpinning of our society, and as such it must be guarded and protected against forces of expediency or ignorance that would

undermine its most basic elements. This is a constant and sacred undertaking that will demand much of us, but the task ahead of us is made easier by the dedicated work of judges everywhere in this nation who strive continually to render decisions of high quality in a timely fashion, and who still find it possible to devote time and energy to the work of the American Bar Association and other professional organizations to fulfill our duty to serve *pro bono publico*. Our new Executive Committee is comprised of this kind of judge, and I am very proud to be devoting this year to working with the Committee to achieve our goals.

In the next issue I will articulate our goals, so we can be guided by them, and assess our progress in achieving them. This will require some work by the Executive Committee and particularly by our officers to rank possible targets and establish a plan to reach our objectives.

But even in the midst of significant and immediate substantive concerns, there will still be time to have fun—this is a goal that was specifically added to our official conference long-term plan, and it is one that I think is essential to being a well-rounded judge with increased capacity to deal effectively with the high levels of stress that characterize the judicial environment. In furtherance of this goal, I have asked Judges Chris Graham and Dick Goodwin to serve as an Ad Hoc Committee to identify and plan additional activities in conjunction with our Midyear Meeting in Seattle, and our Annual



Passing of the Baton – Judges Jodi Levine (immediate past chair) and Ruth Kleinfeld.

Meeting in San Francisco, so before you make flight reservations, be sure to check out the possibilities to add a day or two to your trip to enjoy the company of your fellow judges in a more relaxed atmosphere that will give you the opportunity to experience some of the many attractions of those two beautiful regions.

I would be remiss if I failed to acknowledge the deep disappointment felt by all the active members of our Conference, especially the Executive Committee, who were looking forward to having the Honorable John Hardwicke, former Chief Administrative Law Judge of the State of Maryland, serve this year as Chair of NCALJ. Unfortunately his term ended in June and he has retired. Under our Bylaws, a retired judge may continue as a member, but is not eligible to serve as Chair or Chair-Elect. His many years of devotion to the administrative judiciary and to our conference were illustrious. He is known as the foremost proponent of the Central Panel concept, and was one of the leaders who developed the Model Code for

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Judicial Division Chair Judge Diarmuid O'Scannlain congratulates newly installed officers and Executive Committee members – Front row: Judge Diarmuid O'Scannlain, newly installed NCALJ chair, Judge Ruth Kleinfeld; Second row: Judges Daniel Solomon, Tyrone Butler, Chris Graham, Dick Goodwin, Bryan McDaniel, and Errol Powell.

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Issues

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more streamlined, more timely, and more consistent. I urge you to avail yourself of the experience, expertise, and dedication within the ABA as you consider options to achieve your goals. Representatives of the ABA would be pleased to meet with you at your earliest opportunity to outline further how we could assist in your deliberations."

Issue No. 3. A bill to strengthen the Office of the SSA Chief Judge has been introduced into the House of Representatives (HR. 4932). The bill will place the SSA administrative law judge hearing system under the operational control of a chief judge who will report directly to the Commissioner. Existing ABA policy supports this bill. Issue No. 4. Task Force at the Annual Meeting, the Task Force on the Social Security Disability Process, a joint project of the NCALJ Health & Benefits Committee, the AdLaw Adjudication and AdLaw Benefits Committees, met at the Federal Bar Association. Numerous other groups who have an interest in due process also are part of the task force and participated at an open discussion. There was general agreement that claimants' rights to due process hearings before ALJs must be protected. The Task Force was divided into subcommittees, "Effectuation" and "Legislation" and will meet again on October 17. Issue No. 5. Supreme Court

Rules That ALJs are Judges Federal Maritime Com'n v. South Carolina State Ports Authority, 122S.Ct. 1864, 152 L.Ed.2d 962, decided May 28, 2002, is a seminal case on the authority of ALJs. After the agency decided, on its own motion, to review an ALJ's ruling and determined that ALJs do not have the authority to determine legal issues as "judicial" body, and are mere employees entirely subordinate to the agencies to which they are assigned, the Court determined that ALJs are "judges" if they have the attributes of judges. A cruise ship company filed a complaint against the South Carolina State Ports Authority (SCSPA) with the Federal Maritime Commission (FMC), seeking reparations and injunctive relief for alleged violations of the Shipping Act. Rejecting the opinion of its own ALJ, the Commission ruled that sovereign immunity did not bar the complaint. The United States Court of Appeals for the Fourth reversed. Upon FMC's petition for certiorari, the Supreme Court held that state sovereign immunity precluded FMC from adjudicating a private party's complaint that a state-run port had violated the Shipping Act, and that an ALJ has the authority to make this determination. In so doing, the Court extended *Butz v. Economou*, 438 U.S. 478, which determined that ALJs are entitled to judicial immunity, to a role as a functioning judge with authority to render a decision independent of the employing agency.

EDITOR'S NOTE

Administrative Judiciary News and Journal is a publication of the ABA Judicial Division National Conference of Administrative Law Judges (NCALJ). The views expressed in the *Administrative Judiciary News and Journal* are those of the author only and not necessarily those of the ABA, the Judicial Division, the NCALJ, 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 Hon. Ann Breen-Greco. E-mail: anrun@aol.com, Publications Chair, P.O. Box 25988, Chicago, IL 60625-0988; Phone: 773-539-3292, Fax: 773/539-3292 or contact Teri Curro at ABA/Judicial Division, 541 N. Fairbanks Court, Chicago, IL 60611; Phone: 800/238-2667 x5689; Fax: 312/988-5709; E-mail: currot@staff.abanet.org

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ARTICLE SUBMISSION DEADLINES

Winter 2003: Wednesday, November 20

Spring 2003: Wednesday, February 12

Summer 2003: Wednesday, May 7

Mary Ellen Coster-Williams to Chair Public Contracts Section This Year

by Judge Jean S. Cooper
Washington, DC.

Judge Mary Ellen Coster-Williams, of the GSA Board of Contract Appeals and a long-time NCALJ member, will chair the ABA Public Contracts Section for 2002-2003. This is only the second time that a judge has chaired that section. Judge Ruth Burg, another NCALJ member, chaired the section in the early 1980's. Judge Coster-Williams will work closely with NCALJ to make sure that there is coordination and agreement on proposals and programs that will be of interest to the administrative judiciary. NCALJ is very proud that one of its members will be chairing a section of the ABA this year.

Judge Coster-Williams has also been nominated by President George W. Bush to serve on the U. S. Court of Federal Claims. Her career has been exemplary. She has five years of experience as an Assistant United States Attorney, was in private practice in large and mid-sized firms, and has been a member of the administrative judiciary since 1989, when she was appointed to the GSA Board. She graduated from Duke University School of Law in 1977, where she served on the Editorial Board of the Duke Law Journal. She also has a B.A. and an M.A. from Catholic University. Judge Coster-Williams was elected to the Fellows of the American Bar Foundation in 1985. She has also served as an officer of the District of Columbia Bar and on the Board of Directors of the Bar Association of the District of Columbia.

NCALJ Seminar: The Administrative Judiciary in the Reform Era

by Judge Ann Breen-Greco
Chicago, IL.

A distinguished panel composed of Professor Michael Asimow and Judges Ron Bernoski and John Hardwicke, moderated by Judge Ruth Kleinfeld (new NCALJ Chair) addressed momentum developing for efforts to reorganize the way the administrative judiciary functions at both state and federal levels. The seminar, sponsored by NCALJ, was cosponsored by General Practice, Solo and Small Firm Section, National Association of Women Judges, Senior Lawyers Division, and Young Lawyers Division.

Professor Asimow discussed the Administrative Practices Act and the Office of Personnel Management (OPM)'s hiring method. Referring to the "dubious scoring system" and the veteran's preference utilized to hire federal administrative law judges, Professor Asimow described the system as "anathema to the idea of hiring the very best people to be judges." A better process, he offered, would be selection by judges with a probation period before lifetime position.

Professor Asimow expressed concern regarding ALJs' status as "captives" of agencies, always in jeopardy. ALJs need job protection. Professor Asimow suggested a federal panel based on the central panel concept for benefit cases only: social security, veterans, black lung, and maritime. The Chief Judge selected should have "without cause" protection. The "trade off", Professor Asimow pointed out, is giving up APA protection but it is not needed in the central panel. There should be peer review and the right to hearing preserved. He also believes the distinction

between administrative law judge and administrative judge should be eliminated.

Although Professor Asimow expected to have sharp disagreement on his proposal, Judge Ron Bernoski agreed with him. Judge Bernoski defined administrative adjudication as deteriorating over the years and there is now more non-APA adjudication. On the issue of APA versus non-APA adjudication, Judge Bernoski proposed that non-APA judges be elevated.

Judge Hardwicke described a central panel as one hearing cases from two or more agencies. Where an ALJ is an employee, by nature, such employee cannot be independent. The meaning of "independence" for the judiciary in the executive branch "requires some collaborative effort with the agency... cognizant of the agency's goals and mission." The administrative adjudication assures as much process as is due in the executive branch before court. Judge Hardwicke proposes strengthening the adjudicatory function in the executive branch.

ALJ's Home Picketed

In July 2002, the Houston Chronicle published the rates at which each of the 17 Social Security judges in the Houston area grant disability benefits. The figures, released for the first time in about 19 years anywhere in the nation, ranged from 37 percent for one judge to 80 percent for another. Led by a Pipefitters Union organizer, demonstrators have picketed the home of the judge with the lowest approval rate, saying he is unfair to the disabled. The judges' association asked the Social Security Administration to step in, but the agency said there is no evidence the peaceful pickets violate federal law. The judges said last month's report and other articles about disability claims lacked a balanced view that can come only from unrestricted public access to the hearings.

Chair's Column

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Central Panels, which has been adopted by the ABA. It has been an honor to have worked with such a distinguished bar leader, and I know I speak for all our members in wishing him a healthy, productive and enjoyable retirement. I also thank the members of the Executive Committee who stepped into the breach to keep the conference moving ahead by taking on duties a year ahead of schedule.

Our Executive Committee is eager to make this an outstanding year, and we ask for your support, your ideas, and your active participation. I have already heard from some members who only rarely have been able to attend meetings but who want to receive benefits such as conference materials and an opportunity to vote on matters that come before the membership. I will look for ways to meet these needs, and encourage you to email me or other members of the Executive Committee. I particularly urge you to become involved with committees that are organized around subject matter of interest to you--that is the best way to get the most out of your membership! I have appointed excellent committee chairs, and every person who expressed an interest in a particular committee was assigned to that committee, so you should be hearing from its chair soon. It's not too late, either, if you did not send in your committee preference form. Contact our wonderful ABA staff member Teri Curro (CurroT@staff.abanet.org) to let her know of your availability. There is much to be done, and as a local poet once said, *and miles to go before I sleep.*

NCALJ COMMITTEE CHAIRS FOR 2002-2003

1. ADR & Mediation in Administrative Hearings & Adjudication
Chair: Candida Steele; Vice Chairs Larry Craddock, Bruce Cooper
2. ByLaws
CoChairs Jean Cooper, John W. Hardwicke
3. Courts & the Community
CoChairs Chris Graham, Errol H. Powell; Vice Chair Jodi Levine
4. Educational Programs
CoChairs David Harfeld, Ed Schoenbaum
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16. Publications
CoChairs Ann Breen-Greco, Ann M. Young
17. Senior & Retired Judges
Chair John Hardwicke; Vice Chair Charles R. Welch
18. State Administrative Law
Chair Larry Craddock; Vice Chairs Barbara Curtin Marquadt, Roberta Ann Coates

Newly Elected NCALJ Fellows

by Judge Jean Cooper
Washington, D. C.

The purpose of the newly-instituted NCALJ Fellows program is to recognize outstanding service and leadership on behalf of the administrative judiciary. In addition to all past chairs of NCALJ, Judges John Hardwicke and Earldean Robbins were also inducted into the inaugural class of NCALJ Fellows. In the future, after former Chairs have completed their year as Immediate Past Chair, they will be eligible for induction into the NCALJ Fellows. The Executive Committee may choose additional Fellows who did not serve as NCALJ Chair, based on their contributions to the advancement of the administrative judiciary. In order of past Chairs, the Fellows are as follows:

Hertz Plaine (deceased), Arthur A. Gladstone, Sidney Ullman (deceased), Gordon J. Myatt, John G. Liebert (deceased), Stanley N. Ohlbaum (deceased), Ernst Liebman, Paul Harkey, Marvin H. Morse, Michel Levant, Irving Sommer, Delphene C. Strickl, and Nahum Litt, J. F. Greene, Victor W. Palmer, Francis O'Byrne (deceased), John M. Vittone, David I. Harfeld, E. Earl Thomas, Charles N. Bono, Donald B. Jarvis, Parlen L. McKenna, Ronnie A. Yoder, Jody Rosenzweig, Carroll D. Little, James W. Kerr, Edward J. Schoenbaum, Jean S. Cooper, Edwin L. Felter, Jr.



NCALJ Fellows – Front Row: Judges Gordon Myatt, Jodi Levine, Marvin Morse; Second row: Judges Earldean Robbins, Ed Felter, Jr.; Third row: Judges Ed Schoenbaum, Jean Cooper, John Hardwicke; Top row: Judges Carroll Little, Victor Palmer, Ronnie Yoder.



Left to right, Judge Ann Breen-Greco and daughter Jasmia, leaving to attend the President's Reception with Judge Jean Cooper.



"Hotel Cooper (aka home of Judge Jean Cooper)" – Yoko Felter, Richard and Sally Kirby, Julie Costilla, Jean Cooper, and Jodi Levine.

Federal Trial News

American Bar Association

Drafting a Bankruptcy Law for Ecuador

by Judge Samuel L. Bufford
Los Angeles, CA

Editor's note: a number of federal judges, as well as state judges, have provided assistance to developing countries in training judges, drafting laws and constitutions, advising on court automation, and otherwise contributing to the development of the rule of law in those countries. This article describes one such experience.

The best practices, measured by international standards, was what the World Bank wanted in a draft bankruptcy law for Ecuador. However, a clone of the United States bankruptcy law, or even a draft based on our law, would not be acceptable.

The World Bank also wanted the project completed in 75 days, including 20 days of consultations in Ecuador to obtain information to tailor such a law to its particular legal system, economy, institutions and needs.

Josefina McEvoy, an international bankruptcy lawyer in Los Angeles who grew up in the Dominican Republic, won the contract in March, 2002. For assistance Ms. McEvoy recruited Julia Metzger, a commercial lawyer and adjunct law professor with substantial international teaching experience who was of counsel to the law firm. Ms. Metzger in turn recruited me – I found it hard to turn down, because Ms. Metzger is my wife and I have taught nearly 20 seminars on bankruptcy law abroad, mostly in Central and Eastern Europe. My participation was on a *pro bono* basis.

World Bank Policy

How does the World Bank persuade countries to improve their bankruptcy laws? The business of the World Bank is to

make loans to developing countries for which it expects repayment (the International Monetary Fund (IMF), in contrast, typically makes loans for which repayment is problematic). The World Bank understands that the prospects for repayment largely turn on whether a borrowing country has a viable market economy and a system of commercial laws and institutions to support such an economy. These conditions are frequently absent in countries in the developing world. Accordingly, in recent years the World Bank (and occasionally the IMF) have often required borrowing countries to develop such legal structures and institutions to qualify for continued funding.

Business bankruptcy law is high on the list of the legal structures necessary to support a market economy. Business bankruptcy law plays three fundamental roles in a market economy. The first role, liquidation, is well known: liquidation under bankruptcy law provides an organized procedure for the redeployment of assets from an inefficient use (in a business that is losing money) to a more efficient use (a business that can make money).

Bankruptcy law's second role is to provide a process for restructuring the finances and the business operations of a viable business (i.e., one that could operate profitably). This restructuring falls within the general category of business reorganization or rescue, as we know it in the United States and the industrial world.

Developing countries tend to have many businesses that need restructuring or liquidation. This is especially true in countries such as the formerly Communist countries, where businesses have simply not been permitted to fail. The economic landscape in these countries is full of economic dinosaurs – businesses that should have failed, but which have been kept alive only by living on government

support. Funding the continued operations of such businesses robs governments of funds that are badly needed for other purposes, and frequently leads to massive budget deficits. Such governments are tempted to print money to meet the payrolls of these businesses (and many have succumbed to this temptation), and these countries have frequently suffered from runaway inflation.

Bankruptcy provides a third function that is extremely important. Most developing countries are anxious to attract foreign investment, particularly from industrial countries. Businesses that might invest in a developing country want an orderly way to terminate an investment if it proves unsuccessful. Bankruptcy provides the internationally recognized exit procedure.

The World Bank and other international lenders have come to appreciate that a mandate to a country to improve its bankruptcy laws needs more precision. Countries have revised their laws in response to such requirements, but the new laws have often been insufficient. Thus the World Bank and several other international lenders (e.g., the IMF and the Asian Development Bank) have formulated standards for well-drafted bankruptcy laws.

Ecuador

Because Ecuador wanted to borrow money from the World Bank, it was Ecuador's turn to take on the task of revising its bankruptcy law.

We divided up the work. Ms. McEvoy went to Ecuador for a week in late March to meet with government officials to learn the local legal, economic and institutional conditions. By sheer perseverance she was able to arrange more than a dozen meetings with government agencies and officials to obtain the necessary

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by Judge Irene M. Keeley
Clarksburg, W. Va

Thank you for the opportunity to serve as your chair for 2002-2003. I am honored to follow Judge James Glazebrook who, as chair of the National Conference of Federal Trial Judges, has effectively championed the cause of judicial independence and has been an articulate spokesperson on a broad range of issues affecting federal trial judges. I know I speak for all members of our Conference in expressing my deep appreciation to him for his leadership during the 2001-2002 year.

As I take up the reins, let me begin by reporting that the recent ABA Annual Meeting in Washington, D.C. was a great success for our Conference.

Program

Spearheaded by Program Co-Chairs, Bankruptcy Judge Sam Bufford and United States District Judge Mary Ann Vial Lemmon, our Conference, together with the American Judicature Society, sponsored a very timely and well-received program entitled "What Role Should Ideology Play in Selecting Federal Judges?" Before a standing room only audience, a distinguished panel of current and former Washington insiders, as well as law professors and federal circuit and district judges, debated how ideology and politics influence the judicial selection process. Fortunately for us, Judges Bufford and Lemmon have agreed to plan our Conference's program for next year's Annual Meeting in San Francisco. They guarantee that the topic will be timely and perhaps a bit controversial!

Annual Conference Dinner

On Friday, August 9, 2002, members of our Conference attending the Annual Meeting had an opportunity to gather and greet each other over drinks and a delicious dinner at Old Ebbitt Grill located near the White House. It was an enjoyable evening and many thanks go to Teri Curro for all her hard work in arranging the event.

ABA Justice Center John Marshall Award

This year's recipient of the ABA Justice Center John Marshall Award was United States Supreme Court Justice Anthony M. Kennedy. The John Marshall Award is a national honor created by the ABA's Justice Center to recognize individuals responsible for extraordinary improvement in the administration of justice. Justice Kennedy received the award for the innovative program he created to respond to the attacks of September 11. Called "Dialogue on Freedom", it is now operated by the ABA and brings together students and lawyers to focus on the democratic principles on which our country was founded.

United States District Judge Norma Shapiro, a former chair of our Conference and current chair of the Justice Center Coordinating Council, presented the award to Justice Kennedy at the gala Annual Dinner in Honor of the Judiciary. This year's dinner was held at the Supreme Court of the United States. For all who attended and dined surrounded by portraits of former justices and chief justices, it was a memorable event and a highlight of the Annual Meeting.

Committee on Federal Judicial Improvements

On a more substantive note, as it traditionally does, our Conference invited the members of the ABA Standing Committee on Federal Judicial Improvements and the JD Lawyers Conference to a joint breakfast on Saturday, August 10. This gathering enables our Executive Committee to have a frank discussion of important issues affecting judicial nominations and judges'

salaries with the members of the Standing Committee and the Lawyers Conference. This year the discussion focused on the progress of the Volcker Commission's review of the need for a substantial boost in judges' pay, as well as the prospect for a COLA for judges in FY 2002-2003. We expressed our particular appreciation to the Standing Committee for its support of the federal judiciary, as well as for the high-profile focus given to judicial issues by ABA President A. P. Carlton and President Elect Dennis Archer. We also expressed our strong desire to be consulted by the ABA's leadership whenever committees or sections within the ABA are poised to recommend policy positions that affect federal judges. We noted that it is hard to recruit new members, and even to retain current members, when ABA policy threatens rather than supports the federal judiciary. (See discussion below about proposed ethics opinion.)

With the Standing Committee, we will be monitoring the evolving budget situation on Capitol Hill as Congress returns after Labor Day, and I urge each of you to contact your senators and representatives to urge their support for a COLA this year. I will keep you advised of developments on that front as we head into what looks like a Fall season of continuing budget resolutions.

Privately Funded Seminars

The most important issue for our Conference at the Annual Meeting was the proposed ABA ethics opinion relating to judicial attendance at privately funded seminars. We strongly oppose the proposed opinion that the ABA's Standing Committee on Ethics and Professional

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EDITOR'S NOTE

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All persons interested in submitting articles for inclusion in future issues of the *Judicial Division Record* should contact Judge James Glazebrook, E-mail: James_Glazebrook@flmd.uscourts.gov, Publications Chair, 80 N. Hughey Avenue, Orlando, FL 32801 (P) 407-835-4310, (F) 407-835-4340 or contact or contact Teri Curro at ABA/Judicial Division, 541 N. Fairbanks Court, Chicago, IL 60611; Phone: 800/238-2667 x5689; Fax: 312/988-5709; E-mail: currot@staff.abanet.org

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Chair's Column

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Responsibility has been considering for well over a year. For the past few months, as members of the ABA Judges Advisory Committee, both United States District Judge Andre Davis, our Chair-Elect, and I have participated in a review of the Ethics Committee's draft opinion. The JAC, as it is called, consists of federal and state judges and is charged with advising the Ethics Committee about any proposed opinions that may affect the judiciary. Before final action on such an opinion can be taken by the Ethics Committee, it is required to consult with the JAC. The culmination of this consultation occurred at the Annual Meeting, when the JAC and the members of the Ethics Committee met each other face to face for the first time.

Despite the acrimony that has sometimes accompanied the public debate on this issue, I am happy to advise you that our meeting with the Ethics Committee was cordial and collegial. Judge Davis and I, together with Judge Margaret McKeown of the Ninth Circuit Court of Appeals (who is also a member of the JAC), stated the case on behalf of the federal judges. The Committee's members listened carefully as we documented the serious deficiencies of the proposed opinion. The Committee's chair Marvin Karp later met with the Judicial Division's leadership and indicated his Committee's willingness to reassess the draft in light of the JAC's comments. This evaluation is a process that will take some time, but rest assured that Judge Davis, who remains on the JAC, will continue to monitor this very important issue closely for all federal trial judges. We are indeed fortunate to have such a strong and articulate advocate guarding the gate on this issue.

Education

Finally, as you know, our Conference strongly supports the public outreach and education efforts of the Judicial Division under the leadership of James Sledge. Judge Sledge, who is a former chair of our Conference, envisions creating a Judges Network to supply communities around the country with judicially-initiated programs intended to foster respect for, and understanding of, our nation's system of justice. Judges from both the state and

federal judiciary will be called upon to participate in these programs.

As federal trial judges, we are concerned about a variety of important issues critical to maintaining the independence of the judiciary, such as the need for a pay raise, for additional judgeships, for effective court management among district, magistrate and bankruptcy judges, and for sufficient personnel and technology resources. We also work to foster diversity in the court workforce, especially through our support of the Judicial Division's Minority Clerkship program. While our advocacy on these issues is key, we all must remember our paramount obligation is to give back to our communities and the nation through outreach efforts such as the Judges' Network. Please consider volunteering your time, talents and ideas to keep our Conference vitally involved in educating our citizens, both young and old, about the importance of our courts in our nation's system of government. Whether Congress raises our salaries or the Administrative Office improves technology in our courtrooms will not matter if Americans do not revere the law and respect the judiciary that administers it.

A Last Comment

For those of you who may not be aware of it, I want to alert you to a bill making its way through Congress that would amend the Judicial Conduct and Disability Act of 1980 to streamline procedures for handling complaints against federal judges. Although the ABA supports this legislation, to my knowledge no one from within the ABA leadership has discussed this legislation, and its impact on federal judges, with our Conference prior to adopting that position. I intend to inquire about this oversight, and to send a strong message that the National Conference of Federal Trial Judges expects to be consulted before the ABA leadership lobbies for legislation affecting federal judges. As Congress returns from its summer recess, our Executive Committee will be evaluating this proposed legislation and whether it has "legs". We will carefully monitor the situation to assure that there is no repeat of our experience with the proposed ethics opinion where, as all concede, the judiciary was consulted far too late in the process.

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Bankruptcy Law

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background. At the same time I took on the responsibility to draft a report on international best practices for an insolvency law before the end of March.

Ms. McEvoy also took on the job of translating the statutory text after it was drafted in English. I took on the responsibility of drafting the portions of the statute that the international materials addressed, while Ms. Metzger took on responsibility for additional matters such as regulated industries, for which there were no international standards or models. We set a deadline of April 12 for a working draft of the law, which would have to be emailed to Ecuador by April 23, so that we could meet with Ecuador officials in early May, obtain their comments and make revisions.

UNCITRAL Model

Fortunately, Working Group V the United Nations Commission on International Trade Law (UNCITRAL) had nearly completed a project on international standards for a well-drafted bankruptcy law, that turned out to be a very useful source for both the best practices report and the statutory language.

I had participated in the American Bar Association committee that advised the U.S. State Department on the United States' contribution to this project. Our committee had made an effort to reach out and include many of the best bankruptcy specialists throughout the world, so that our input included materials with broad international support and consensus. In addition, we had worked closely with the UNCITRAL secretariat to draft a set of standards that we thought would give substantial guidance to a developing country in drafting a bankruptcy law. The drafts had been discussed extensively by the members of UNCITRAL (nations throughout the world), and were well advanced by the time we commenced work on the Ecuador project.

In fact, there was one version of the UNCITRAL materials, a 31-page February 28, 2002 document entitled "UNCITRAL

Legislative guide on insolvency law: Recommendations" that could readily be adapted for both the best practices review and the draft statute itself. A revision of this document, A/CN.9/WG.V/WP.61 is available on the UNCITRAL website at <http://www.uncitral.org/en-index.htm>. I adapted this draft for my 31-page report, "Core Provisions of an Effective and Efficient Insolvency Regime: Review of Best Practices," which I completed in three days in late March.

It took approximately six to eight hours at the computer to transform the UNCITRAL document into language that could be enacted as a statute. Ms. Metzger spent substantially more time developing the statutory language for regulated industries. Finally, Ms. McEvoy spent even more time translating the entire text into Spanish and making additional revisions. The April 23 text of the draft law was some 50 pages long and contained more than 100 sections.

On May 5 we arrived in Quito, Ecuador and spent several days meeting with government officials to discuss the draft bankruptcy law. We spent a day working on revisions with the Ecuadorian consultants for the project. We also met with numerous other government officials, including the Commissioner of Banking, the director of the Banker's Association, and a number of members of the Supreme Court, some of whom had been active in the effort to revise the bankruptcy law. (In the Continental European legal tradition, which Ecuador inherited from Spain, separation of powers is not as strong as in the common law tradition). We also met

with commercial law specialists in Guayaquil, the commercial and banking center of Ecuador.

Fortunately, we also managed to fit in some time for sight seeing (in most of my teaching abroad I have had little or no extra time to see the sights). Quito is almost exactly on the equator, and we made a visit to a national park nearby with a display at exactly zero degrees latitude. We also visited Cotopaxi, which at nearly 20,000 feet elevation is the highest mountain in Ecuador and the world's highest active volcano. Finally, we visited Otavalo, a market town with a very active market in domestic goods and folk art that was initially developed as a Peace Corps project.

After returning to the United States, we made further revisions to the draft statute based on the comments that we received in Ecuador. In particular, we drafted additions to provide for family farms and for the substantive consolidation of related cases. When we completed the drafting, Ms. McEvoy tackled the translation, and she returned to Ecuador the first week of June to deliver the finished draft.

Will Ecuador enact the statute that we drafted? Elections are scheduled there in October, and the government has decided to put off revision of the bankruptcy law until afterwards. The World Bank will put pressure on Ecuador to adopt revisions based on our draft. While what is finally adopted by the Ecuadorian Congress remains to be seen, it likely will bear a substantial imprint of the law that we drafted.



NCFTJ Members helped to honor Justice Anthony Kennedy at the Judicial Division's Annual Dinner in Honor of the Judiciary at the United States Supreme Court. (From left, JD Chair-Elect Hon. James S. Sledge, Supreme Court Justice Anthony Kennedy, NCFTJ Chair-Elect Hon. Irene M. Keeley, NCFTJ Chair Hon. James G. Glazebrook, and NCFTJ Secretary Hon. Mary Ann Vial Lemmon.)

Special Court News

American Bar Association

2002-2003 NCSCJ Nominating Committee Announced

NCSCJ Chair Hon. Eileen Kato appointed the following judges as members of the 2002-2003 Nominating Committee:

Hon. Michael Pietruszka, Committee Chair
P.O. Box 223
Niagra Square Station
Buffalo, NY 14201
E-mail: pietruszka@aol.com

Hon. Clint Deveaux
Atlanta, Municipal Court
170 Garnett Street, S.W.
Atlanta, GA 30303-3612
E-mail: judgedint@aol.com

Hon. Ernestine Gray
421 Loyola Avenue
Orleans Parish Juvenile Court
New Orleans, LA 70112
E-mail: egray@opjc.new-orleans.la.us

Hon. Marcia Walsh
Circuit Court of Missouri
Kansas City Municipal Court
1101 Locust Street
Kansas City, MO 64106
E-mail: marcia_walsh@kcmo.org

Copies of all nominations should be sent to:

Rebecca King
ABA Judicial Division
541 N. Fairbanks Court
Chicago, IL 60611
E-mail: kingre@staff.abanet.org

Judicial Education Award Presented to Traffic Safety Administration

Shown here receiving the Judicial Education Award from Judge Steve Smith is Robin Mayer, Division Chief, National Outreach Division National Highway Traffic Safety Administration.

The NCSCJ Judicial Education Award was presented to the National Highway Traffic Safety Administration (NHTSA) for providing outstanding training to judges in conjunction with the National Judicial College in the area of motor vehicle safety. The judicial faculty training programs that have been funded through grants to the NJC were programs designed to produce "teams" of qualified presenters that would return to their home states to present education programs for their fellow judges. The "Courage to Live" program was also developed designed to empower teens to reject drugs and alcohol. Other well-attended, successful programs were developed to assist Specialized Court Judges.



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CHAIR'S COLUMN



by Judge Eileen Kato
Seattle, WA

Greetings from the great Pacific Northwest – host of next year's ABA Midyear Meeting! I am honored to serve as Conference Chair this year and working with each of you.

Annual Meeting

I hope many of you had the opportunity to attend the ABA's Annual Meeting in Washington, D.C. in early August. It was wonderful to see many of you at our conference meetings and to meet several new conference members. One of the highlights of the Annual Meeting this year was the Annual Dinner in Honor of the Judiciary, which was held in the U.S. Supreme Court. It was a very elegant and classy event, which was made even more memorable with the presentation of this year's ABA Justice Center John Marshall Award in the Supreme Court courtroom to Justice Anthony Kennedy.

One of the traditions of our conference at the Annual Meeting has been our famous raffle. All members are asked to bring a little something to the meeting from their hometown or region to donate to the raffle. At each business meeting and at our annual conference dinner, all attendee names are dropped in a hat for the raffle drawings. Some of this year's items included Texas salsa, lots of t-shirts and baseball caps from across the country,

memorable Washington, D.C. souvenirs, and bottles of wine. The last and very special item was a German stein donated by United States Air Force Colonel Linda Strite Murnane, Chief Circuit Military Judge. Colonel Murnane is currently stationed in Germany. The stein was made by Zoller and Born, a German manufacturer. A total of 5,000 pieces were made. The stein is a limited edition commemorating the humanitarian airlift support provided by the airlift squadrons at Ramstein Air Base Germany during Operation Enduring Freedom. Military men and women airlifted thousands of meals to the Afghan people during the prosecution of the war, to keep them from starving during the winter months. A portion of the proceeds from the sales of the limited edition steins is being returned to help fund morale and welfare programs for the men and women of the United States Armed Forces engaged in the Air Against Terrorism. Judge Beth Bloom from Florida was the lucky recipient of this very memorable raffle item.

The Year Ahead . . .

Conference Committees.

Our committees should be the lifeblood of our conference. Unfortunately, many of the committees have gone anemic over the years. It's time for a hard assessment of the value of so many committees within our conference, and to rejuvenate the charge of each committee. In making the committee appointments this year, I have charged each committee with developing at least one project this year, whether it's

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EDITOR'S NOTE

Special Court News is a publication of the ABA Judicial Division National Conference of Specialized Court Judges (NCSCJ). The views expressed in the *Special Court News* are those of the author only and not necessarily those of the ABA, the Judicial Division, the NCSCJ, 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 *Special Court News* should contact Rebecca King at ABA/Judicial Division, 541 N. Fairbanks Court, Chicago, IL 60611; Phone: 800/238-2667 x5742; Fax: 312/988-5709; E-mail: kingre@staff.abanet.org

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ARTICLE SUBMISSION DEADLINES

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Summer 2003: Wednesday, May 7

Chair's Column

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an article in the Judicial Record, an item to be included in our Conference website, a bench checklist for judges on substantive legal areas, or developing a program proposal for next year's annual meeting. The possibilities are endless and with the creative enthusiasm of our committee chairs, its members, and the support of our conference membership, I have great expectations for a successful year ahead.

Diversity Plan. The Judicial Division was included in the Commission on Racial and Ethnic Diversity's 2001-2002 Goal IX honor roll. The Goal IX Report tracks and evaluates minority participation throughout the Association, especially in leadership. In discussing the issue of diversity with other in-coming chairs in the Judicial Division, I discovered that our

Conference has not established a Diversity Plan. One of this year's goals is to create a diversity plan for our conference, one that is inclusive in all respects. Even without such a written plan or statement, however, our conference is beginning to reflect the richness of diversity in our Executive Committee this year. By recruiting new members and providing opportunities for all members to become actively involved, our conference can become a leader in the Judicial Division as a conference, which reflects the diversity of our communities and our country.

New NHTSA Judicial Fellow. An article by Judge Michael Witte in the last issue of the Judicial Record explained the Judicial Fellow program with the National Highway Traffic Safety Administration (NHTSA), its history, and its future. Our new NHTSA Fellow is Judge Robin Smith from Midland, Texas. Judge Smith is a

former chair of our conference and will continue the outstanding efforts of the former NHTSA Fellows to serve as an advisor and consultant on highway traffic safety issues.

There is much work for our conference in the year ahead. As conference members, I encourage you to identify an issue or issues that interest you and notify either me, the conference officers, or your district representative to find out how you can become actively involved in your conference. Remember the words of Margaret Mead: "Never doubt that a small group of thoughtful committed citizens can change the world; indeed it's the only thing that ever has." I look forward to working with each of you and encourage you to contact me if you have any questions, concerns, or an interest in becoming more actively involved in our conference.

Flaschner Award Presented to Judge Marcia J. Waldorf

The Franklin N. Flaschner Award was presented to Judge Marcia J. Waldorf, of Honolulu, Hawaii at the Annual Meeting in Washington, DC. Shown presenting the award to Judge Waldorf is Immediate Past Chair Judge Steve L. Smith while Immediate Past Judicial Chair Diarmuid F. O'Scannlain looks on. Judge Waldorf was cited for her long and dedicated work on the judicial education committee as both a planner and speaker. She has also worked extensively in the area of domestic violence and has done training in that area as well in the DUI programs. For the past seven years Judge Waldorf has served as the District Court Legislative Coordinator. Most recently she was tasked by the Chief Justice to create a model for mental health court. Judge Waldorf was nominated by Senior Judge Frances Q. F. Wong also from Honolulu, HI.



Trial Judges News

American Bar Association

National Conference of State Trial 2002-2003 Committee Chairs

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A Review of an Article on "The Changing Role of a Judge and its Implications"

by Judge Alexander P. White
Chicago, IL

In the winter 2002 issue of *Court Review*, the journal of the American Judges Association, court consultant Roger Hanson has authored an article on "The Changing Role of a Judge and its Implications," which has as its basic objective the exploration of whether there are common patterns that occur when new and different judicial expectations are introduced. Judicial behavior has been expressed in two opposite ways. Judges are either 1) aloof finders of fact or 2) partners with the litigants and their attorneys. The recent creation however, of drug, gun, mental health, and domestic abuse courts is having an impact on judicial behavior.

Mr. Hanson defines role orientation as what an individual should do and role behavior as what an individual actually does. He examines the role of court reform, such as bail reform, case management, alternative dispute resolution and specialized courts, with respect to changes in judicial expectations and the benefits of discussing the implications of these changes. He then reviews prior research with respect to judicial roles and enumerates the five distinct themes that have evolved. The first theme is the development of five judicial role

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Judge Barland Retired But Still Active

Judge Tom Barland and his wife, Jill of Eau Claire, Wisconsin attended the annual meeting. Judge Barland recently retired but has kept extremely busy, recently completing a 6 week-long jury trial. He was recently named to the Lawyers Hall of Fame Exploratory Committee, which is looking into establishing such a hall of fame with the ABA Museum. Judge Barland is a recipient of the NCSTJ Award of Judicial Excellence. He resigned as Chair of the Jury Management Committee but remains active on that committee.



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CHAIR'S COLUMN



by Judge Carolyn
Temin
Philadelphia, PA

in touch with events occurring outside our courtrooms. We are faced with the seemingly never ending burden of increasing docket loads and are required to master the art of efficient case management. We are expected to be able to handle diversified matters and at the same time to develop special expertise in areas addressed by the burgeoning development of the so-called "problem solving courts." We are required to be experts in running our courtrooms and at the same time to be active in judicial outreach programs to educate the public about the justice system. The Conference is an important resource that is available to us to help us fulfill these various obligations.

During my year as chair, I hope to continue the excellent work done by my predecessors and to make the Conference answerable to the needs of our membership. In order to do this I need your participation. I intend to use our list

This is both a very exciting time and a very challenging time to be assuming the chair position of the National Conference of State Trial Judges (NCSTJ). Today, as never before, we must be more versatile, more energetic, more organized and more

serve (njd_st@mail.abanet.org), the National Judicial Dialogue to communicate with you directly to keep you advised of important developments within the ABA, to send you information about projects in which you may want to participate and to encourage you to share your ideas with the officers and membership of the Conference so that we can insure that we are answering your needs. If you have email and haven't yet signed on to the list serve you can do so easily by sending a request to mahmuda@staff.abanet.org

I encourage you to visit our Web page (www.abanet.org/jd/ncstjweb.html), which, by the time you read this should have the names and email addresses of our committee chairs and district representatives. If you haven't already done so, I urge you to join a committee and become an active member. Is there an area we are not yet addressing? Let me know! Just go to, <http://www.abanet.org/jd/ncstjweb.html> Now that most state trial judges are equipped with computers, and have access to the Web, it becomes increasingly feasible to attend virtual meetings and participate in the Conference even if you don't have the time or resources to attend the ABA Annual and Midyear Meetings. I hope you will take advantage of this possibility.

And, please don't hesitate to contact me directly at cetemin@aol.com. I look forward to working with you in the coming months.

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 ABA, the Judicial Division, the NCSTJ, 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 Alexander P. White, Jr. E-mail: alnm130@aol.com, Publications Chair, 1300 East River Drive, Des Plaines, IL 60018 or contact Rebecca King at ABA/Judicial Division, 541 N. Fairbanks Court, Chicago, IL 60611; Phone: 800/238-2667 x5742; Fax: 312/988-5709; E-mail: kingre@staff.abanet.org

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ARTICLE SUBMISSION DEADLINES

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A Review

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orientations. These are as follows: 1) the task performer; 2) the adjudicator; 3) the lawmaker; 4) the administrator; and 5) the constitutional defender. The second theme is that expectations affect a judge's behavior. Thus, if a judge views himself or herself as a law interpreter, adjudicator, administrator, case manager or peacekeeper, he or she will gravitate toward that role. The third theme is that judges who give weight to precedent and

to litigants, rather than the public, are 1) law appliers, 2) law extenders, 3) mediators or 4) policymakers. The fourth theme is the impact court management policies, such as control of litigation, including control of the parties and their attorneys, settlement procedures and inventory management, have on judicial roles. The final theme is that judicial expectations impact how a judge makes decisions.

The author concludes with three recommendations. These are as follows: 1) the need to know more about the expectations of judges; 2) the need for a

more formal and structured dialogue on the desirability and direction of changes in role orientations and corresponding court reforms; and 3) the need for more research on the relationship between current judicial role orientations and role behavior. These recommendations would provide a more comprehensible path toward the establishment of meaningful court policies.

After reviewing this article I would suggest that court administrators make this article available to their judges so that a dialogue can occur on role orientation and role behavior which in turn will lead to improved judicial performance.

Profile of Executive Committee Member Judge Edward Cunningham

Judge Edward C. Cunningham received his Bachelor of Business Administration from the University of Oklahoma in 1974. In 1978, Judge Cunningham graduated from the University of Oklahoma College of Law. He has also completed the General Jurisdiction Program for State Trial Judges at the University of Nevada-Reno.

He was appointed District Judge of Canadian County, Oklahoma, by the Honorable Governor George Nigh in May of 1984. He previously served as the Associate District Judge (1983-1984) as well as the Special District Judge (1981-1982) for the 26th Judicial District. In January of 2003 he will be sworn in to his sixth term as Presiding District Judge for Canadian County, State of Oklahoma.

Judge Cunningham was honored by being voted the Outstanding Young Lawyer of 1982 by the members of the Oklahoma Bar Association. He has been elected to the position of Presiding Judge for the Trial Division for the Court on the Judiciary and currently serves as Past-presiding Judge for that division. He has also been appointed as Presiding Judge for a number of panels to the Oklahoma Court of Criminal Appeals. Judge Cunningham has also been appointed by the Supreme Court of Oklahoma to serve on the Court of Tax Review for the State of Oklahoma. Judge Cunningham also holds the title of



Master Emeritus with the Ruth Bader Ginsburg American Inn of Court. Judge Cunningham was also made a Fellow of the Young Lawyer Division for the Oklahoma Bar Association and is also a fellow of the Oklahoma Bar Association.

Judge Cunningham has been honored by the United States Department of Justice for his work on the rights of victims of crime. In November of 1988, he was also honored by the Family Law Section of the Oklahoma Bar Association as the 1988 Outstanding Member of the Judiciary.

His most recent appointments include the Oklahoma Judicial Conference Delegate to the American Bar Association and Chairman of the Oklahoma Criminal Law Committee. He is a member of the National Conference of State Trial Judges of the American Bar Association. He currently serves on the Executive Committee of that Conference and represents the Trial Judges for the States of Oklahoma, Texas, Louisiana, and Arkansas. He currently serves on the Rights of Victims of Crime and the Courts and the Community committees for the National Conference of State Trial Judges. Judge

Cunningham received a personal commendation from Oklahoma Governor Frank Keating in April of 1998 for his sixteen years of "Devotion to the principles of justice and the rights of the victims of crime."

Judge Cunningham serves on the Board of Directors of numerous civic related organizations including the Board of Directors for the American Diabetes Association and the Canadian County Chapter of the Salvation Army. He is currently the Vice-Chairperson for the Board of Directors for the Canadian County Health Department in the State of Oklahoma.

Judge Cunningham and his family moved to Yukon, Oklahoma, after living in El Reno, Oklahoma, for twelve years. His wife Peggy is a practicing attorney in Yukon, Oklahoma. They have two sons, Kevin and Patrick. Kevin attends the University of Oklahoma and Patrick attends Yukon High School.

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A Review of the Tenth Educational Forum of the Roscoe Pound Institute

by Judge Alexander P. White
Chicago, IL

On Saturday, July 20, 2002, ninety-six state appellate and trial judges participated in the Tenth Educational Forum for State Court Judges in Atlanta, Georgia. The topic of the forum was "State Court and Federal Authority: A Threat to Judicial Independence." The forum consisted of morning and afternoon plenary sessions followed by small breakout discussion groups and a closing plenary session. Two subjects were addressed. The first was "Trends in Federalism and What They Mean for State Courts," which focused on incursions into the traditional Constitutional role of the State courts. The second was "Issues State Courts Face When Considering Federal Preemption of State Court Procedures: An Analysis for State Court Judges," which focused on two mainstays of the U.S. legal system: the supremacy of federal law and the independence of state courts.

At the morning plenary session, Professor Georgene M. Vairo of Loyola Law School in Los Angeles asked the rhetorical question, "[I]s the federal government a threat to state courts?" Professor Vairo examined various federal government activities, which despite the United States Supreme Court's recent federalism decisions that seem to show a determination to give states their due role as a joint sovereign, reveal a significant incursion on state jurisdiction.

Professor Vairo then discussed federal legislative developments, and demonstrated the evident desire of Congress to remove significant numbers of actions filed in state courts to the federal courts, in apparent contradiction of the federal judiciary's Judicial Conference of the United States strong call in 1995 to restrict federal court jurisdiction. Examples of enacted litigation with this effect include the Securities Litigation Uniform Standards Act of 1997, the "Y2K" Act, parts of an Act that gave rise to the September 11th Victims Compensation Fund, and Bankruptcy Code provisions. Examples of proposed legislation includes statutes that would allow easier removal of class actions to federal courts without complete diversity

of citizenship, set up compensation funds as exclusive remedies for asbestos-related injuries, and provide tax relief for parties paying into asbestos settlement funds.

Professor Vairo then examined a number of federal court trends that tend to enhance federal judicial powers at the expense of state courts. These include the following: aggressive use of the Bankruptcy Statutes to stay litigation against debtors and in some cases against third parties; increased use of the All Writs Act to enjoin state litigation that might frustrate federal court settlements; use of anti-forum shopping sanctions against attorneys who file parallel class actions in state courts, despite the fact that the state court finds the attorneys' actions appropriate; applications of varying rules to permit late removals to federal courts, including a party's cost of compliance with an injunction in the calculation of the amount in controversy; and expressions of support by committees of the Judicial Conference for relaxed standards for diversity jurisdiction.

Despite these findings, Professor Vairo pointed to exceptions to this trend. Federal courts have been striking down the use of "settlement classes" to resolve major segments of the asbestos litigation and other complex litigation, they have recognized a state court settlement of a class action as precluding a federal securities class action, and they have denied. All Writs Act injunctions against state court litigation in some cases.

Finally, in respect to perspectives, Professor Vairo considered how the federal courts have come to dominate the field of complex state-claim-based litigation, and suggested a more balanced approach by Congress and the federal courts to use the best forum for resolution of such cases.

In response Kenneth M. Suggs, Esq. of Columbia, South Carolina, reviewed the history of tort reform and the role of state courts in determining state legislative tort reform efforts were unconstitutional. He emphasized the trend by defendants in tort actions to remove cases to the federal courts. He argued state courts do not have the resources to hear complex litigation and are more political. Dean John L. Carroll, of the Cumberland Law School, Birmingham, Alabama, observed there are perceptions state courts lack resources, lack tools such as multi-state litigation rules, and do not manage firmly. He argued national problems can only be resolved in federal courts. Patrick A. Long, Esq. of Santa Ana, California asserted defendants use federal courts because they offer better administration and the politics of federal judicial appointments is tempered by life

tenure. The Honorable Gerald W. VandeWalle, Chief Justice of the North Dakota Supreme Court, argued Congress, not the federal courts, should determine federal jurisdiction and that programs are being developed by the National Center for State Courts, which are similar to federal multi-state litigation panels, in an attempt to resolve jurisdictional disputes.

At the afternoon plenary session, Professor Wendy E. Parmet of Northeastern University School of Law, explained the conflict between federal preemption and states rights.

As a background proposition, she expanded on her introduction and explained the "Madisonian Compromise," which demonstrates the Drafters of the United States Constitution assumed the continuation of state courts' authority. Their authority, however, was qualified by the Constitution's assertion that federal law would be supreme (the supremacy clause) and must be enforced by state judges. It raises the question of how to reconcile the continued independence of state courts with their obligations under the Supremacy Clause.

Professor Parmet discussed norms of construction, and emphasized that state courts cannot enforce a federal statute that itself is unconstitutional. Yet, as Justice Brandeis observed in his concurrence in *Ashwander v. Tennessee Valley Authority*, courts that have available to them more than one ground of decision, including one that does not involve a Constitutional question, may not have to, and, if possible, should not, reach the Constitutional question. One particularly relevant non-Constitutional response is the use of a "plain statement" rule, under which a state court will not interpret a federal statute as regulating state court procedures unless Congress, in the statutory language itself, has made a clear statement of its intent to do so. Another is an interpretation that the federal statute, for the most part, incorporates state law and so creates little conflict between federal and state law.

Professor Parmet analyzed the constitutional issues and discussed avenues state courts must use to decide the Constitutional issues raised by federal efforts to regulate state court procedures. The first is to determine whether Congress had the authority to make the law in question. That authority must come from somewhere in the Constitution. The Supremacy and State Judges Clauses are not, by themselves, sources of authority. Possible sources of Congressional authority include the Constitution's Commerce

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Committee Chair Profile

by Judge Joan K. Irion
Chair, Courts in Community Committee

Judge Joan K. Irion received her Bachelor of Arts degree from the University of California Davis, in 1974, a Masters Degree in Public Administration from San Diego State University in 1976, and her law degree from the University of California, Davis, in 1979. She became a member of the law firm Heller Ehrman White & McAuliffe, based in San Francisco, where she did business litigation and state and local tax litigation. In 1995, she moved to San Diego, California, and in 1998 founded Heller Ehrman's San Diego office, which grew from three attorneys to over forty attorneys by year-end 2000. She was then appointed by Governor Gray Davis to the San Diego County Superior Court bench. Since being appointed to the bench, she has sat as a criminal law judge and a family law judge.

Throughout her legal career, Joan has been intimately involved with the ABA.



Her activities include: ABA Host Committee Co-Chair 2001 Mid-Year Meeting (2000-2001); Member, ABA Futures Committee (2000-2002); Member, ABA House of Delegates (1988-1998); ABA House Committee on State and Local Bars (1996-1998); Member, ABA Litigation Section, Task Force on Merit Selection of Judges (1995-2001); Member, Section of Legal Education and Admission to the Bar Law School Evaluation Team, (1996); Co-Chair, ABA Litigation Section, Tax Litigation Committee (1993-1996); Member, ABA Standing Committee on National Conference of Lawyers and

Certified Public Accountants (1990-1993): Member, ABA Section of Taxation, Committees on State and Local Taxation (1989-1998) and Court Procedure (1987-1988); ABA Young Lawyers Division, Executive Council (1985-1986); Member, ABA Women's Caucus; Fellow, American Bar Foundation.

Since becoming a judge in 2001, she has continued her active interest in the ABA by succeeding Judge Judith McConnell, when she was elevated to the California Court of Appeal, as Chair of the Courts in the Community Committee. Committee members include Judge Gerald Elliott of Kansas, Judge Arthur Hunter of Louisiana, Judge William Witham of Delaware and Judges Jon Stafsholt and Susan Miles of Minnesota.

Working with the Judges Network, the Committee's efforts have focused on identifying and distributing information about successful outreach programs conducted by trial courts across the nation. In addition, the Committee has worked with ABA staff to locate outreach programs to be presented in conjunction with the Judiciary in the 21st Century Forums. The Committee is also working on judicial

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Your Executive Committee in Action

by Judge Hank Ridgely
Dover, DE

The 2001-2002 NCSTJ Executive Committee had a full agenda at the Annual Meeting in Washington, D.C. Reports were presented from Chair Joel Medd about increased outreach, membership and improvements to the Conference web page. The several Committees within the Conference reported on innovative projects completed or underway. Among these are the Conference's Speakers Bureau, Drug Court Standards and the Civil Discovery Guidelines. The Conference continues to be a strong voice in support of the State Justice Institute and in representing State trial judges within the ABA and with other entities such as the Assembly of Court Organizations and the Conference of Chief Justices.

At each Annual Meeting the ABA House of Delegates convenes to formulate the policy of the ABA. The Executive

Committee endorsed four specific resolutions of interest to State trial judges. The first was Report No. 105 - Ethical Guidelines For Settlement Negotiations. These guidelines were recommended by the Section of Litigation and are designed to assist counsel with ethical questions that arise in the settlement negotiation context.

The Executive Committee also supported the adoption of Report No. 107 - Blueprint For Cost-Effective Pretrial Detention, Sentencing and Corrections Systems. This recommendation was sponsored by the Criminal Justice Section and urges that reviews be undertaken by federal, state, territorial and local governments to improve the cost-effectiveness of pre-trial detention, sentencing and correctional systems. It

urges the use of alternatives to incarceration and the implementation of a "Blueprint" that includes the adoption of community corrections and the repeal of mandatory sentences.

A resolution to support efforts to improve the response of criminal and civil justice systems to elder abuse, neglect and exploitation was endorsed by the Executive Committee. Report No. 108A of the Commission on Legal Problems of the Elderly urges implementation of the recommendations adopted by the National Policy Summit on Elder Abuse in December 2001.

The fourth resolution supported by the Executive Committee was Report No.

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Roscoe Pond

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Clause, the Spending Clause, or Section 5 of the Fourteenth Amendment, which can be used to enforce rights granted in Section 1 of the same Amendment, many of which relate to courtroom procedures. In addition, there may be relevant limitations upon Congressional authority derived from the Tenth Amendment, which has been read as a limit on Congress's power to commandeer either the legislative or executive branches of state government – the “No-Commandeering Principle.” However, whether that principle limits the power of Congress to require state courts to apply federal procedural requirements remains uncertain. One reason to believe the “No-Commandeering” Principle should apply to state judges is the general practice

of the federal courts to give deference to state procedures, even where the state courts are adjudicating federal claims, and especially where there is a strong state interest in following state court procedure.

In her conclusion, Professor Parmet asserted that although recent federal legislation affecting state court procedure raises complex and troubling federalism issues, it may be unlikely the United States Supreme Court will be able to cut through the complexity with a single, definitive decision agreed to by a clear majority of the Court. Thus, state judges may have to expect to be called upon in the foreseeable future to decide, on their own, the limits of the application of federal law in their courtrooms.

In response, Robert S. Peck of the Center for Constitutional Litigation of Washington, D.C., argued that Congress only has the authority to regulate state law

issues and not state law claims. The Honorable James D. Moyer, U.S. Magistrate Judge of the U.S. District Court for the Western District of Kentucky, stated the federalization of state court procedures is an issue which must be resolved. John H. Beisner, Esq., Washington, D.C., suggested federal question and diversity issues are exclusively federal jurisdiction, concurrent jurisdiction may address issues in either federal or state courts, and all other matters should be exclusively state jurisdiction. The Honorable Stanley G. Feldman, Justice, of the Arizona Supreme Court, argued that federal courts should only take jurisdiction where they have been given congressional authority and that state court judges must actively assert jurisdiction.

Award of Judicial Excellence Presented to Judge S. Louis Rathje

by Judge Joel D. Medd
Grand Forks, ND



Judge S. Louis Rathje of Wheaton, IL was presented with the NCSTJ Award of Judicial Excellence by Chair Joel D. Medd. Assisting in presenting the award was Judge Stephen C. Mathers, former president of the Illinois Judges Association who nominated Judge Rathje.

Judge Rathje was cited for his work in passing national legislation to exempt judicial pension plans from taxation. Judge Rathje recognized that judges in his home state of Illinois and in other states were in danger of no longer being able to make tax-deferred contributions to their pension plans, but also that all prior contributions would be subject to recalculated income taxation, plus penalties. He rallied the support of not only the Illinois Judges Association but also that of other states, the National Center for State Courts and the ABA to get federal legislation passed in 1998 to save literally millions of dollars in income tax liability for state trial judges. Judge Rathje's notable contributions to many professional and civic organizations were also cited.

Chair Profile

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education in the area of community outreach. It has put together a program on ethical issues for judges involved in community outreach to be presented at the Summit on Judicial Outreach at the ABA Mid-Winter Meeting in Seattle in February of 2003. Finally, working together with other interested committees of the Conference, the Courts in the Community Committee is participating in a national essay competition on issues involving the independence of the judiciary and the press.

The Committee, though small in number, is hard working and is looking forward to a very successful year.

Executive Committee

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201A sponsored by the Commission on Multijurisdictional Practice. This resolution affirms ABA support for the principle of state judicial regulation of the practice of law. All of the Reports supported by the Executive Committee on behalf of the Conference were approved by the ABA House of Delegates. Copies may be found within the summary of recommendations on the web at <http://www.abanet.org/leadership/recommendations02/summary.html>.

Members of the 2001-2002 Executive Committee attending were Chair Joel Medd, Chair-Elect Carolyn Temin, Vice Chair Sophia Hall, Secretary Hank Ridgely, Immediate Past Chair Leslie Miller, and District Representatives Frank Darigan, Jr., Abe Gerges, Herb Dixon, Alex White, Jon Stafsholt, Janet Berry, Dewey Whitenton, Cliff Freeman, and Bill Carpenter.

Save the Date

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 Program
Atlanta, GA
More information: 800/238-2667 (x5742)

November 11-15, 2002

Mediation for Judges
Chicago, IL
More information: 800/238-2667 (x5689)

November 12-17, 2002

Council of Chief Judges 23rd Annual Seminar
San Antonio, TX
More information: 800/238-2667 (x5704)

February 5-11, 2003

ABA Midyear Meeting
Seattle, WA
The Division will meet February 6-9, 2003
More information: 800/238-2667 (x5700)

March 30-April 2, 2003

Spencer-Grimes Appellate Judges Seminar Series
Tampa/St. Petersburg
More information: 800/238-2667 (x5696)

May 1, 2003

Law Day: Independent Courts Protect our Liberties
Washington, DC
More information: 800/238-2667 (5735)

July 24-27, 2003

Spencer-Grimes Appellate Judges Seminar Series
Providence, RI
More information: 800/238-2667 (5696)

August 7-13, 2003

ABA Annual Meeting
San Francisco, CA
The Division will meet August 7-10, 2003
More information: 800/238-2667 (x5700)

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



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