State–Federal Judicial Observer

NEWS AND COMMENTARY OF INTEREST TO THE STATE AND FEDERAL JUDICIARY

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State–Federal Judicial Councils Promoted at Conference of Chief Justices Session in New Orleans

Chief Judge Henry A. Politz (U.S. 5th Cir.), featured luncheon speaker at the mid-year meeting of the Conference of Chief Justices (CCJ) in New Orleans in January, told the chief justices that one of the "bright spots" in court relations in Louisiana was the state–federal judicial council there and the vehicle it provided for "communications between state and federal judges."

Judge Politz recounted situations where state courts and federal courts have shared courtrooms. He told of a recent state court asbestos case that was tried in a federal courtroom. When the air conditioning broke down in the courtroom used by the Louisiana Supreme Court, it reconvened in the local federal court and held its sessions there.

"Sharing facilities wipes out bad feelings," Judge Politz declared. "State and federal judges need a cooperative spirit because we are all part of the same system."

He also told the chief justices that turning more criminal offenses of the types traditionally handled by state courts into federal crimes will not resolve the crisis of crime in the United States. He said the federal courts do not have the judges or administrative staff to handle all of the new crimes being created by Congress.

State-federal matters raised at the conference also included cooperation between state and federal courts and tribal courts on Indian reservations, a matter specifically discussed at the meeting of the Tribal, State and Federal Relations Committee of the CCJ. Chief Justice Stanley G. Feldman (Ariz. Sup. Ct.), chair of the committee, reported on the Arizona Court Forum that has been organized in his state and the "excellent opportunity" the forum provides for federal and state judges to meet with and cooperate with tribal judges on many issues that arise involving the three systems. Such issues include joint training of judges and prosecutors, recognition of decisions of tribal courts, and accessibility of tribal codes and tribal appellate case law. The committee also received a report on the meeting of the U.S. Ninth Circuit Tribal Courts Task Force in Reno, Nev., in October at the National Judicial College.

The conference received and discussed a report of its Ad Hoc Committee on the Long Range Plan of the Federal Courts, which had reviewed the *Proposed Long Range Plan for the Federal Courts* published last year. The report stated that changes in judicial roles in the next century that will have "profound implications" for both court systems require "that state judges participate in a substantial and meaningful way in the coordination of long range planning among the state and federal courts."

The committee affirmed the "need for ongoing state court participation in any judicial planning commission established by the federal courts." Chief Justice Ellen A. Peters (Conn. Sup. Ct.), chair of the CCJ, communicated the committee's opinion about state court representation and participation in long range planning for the federal courts to Judge Otto R. Skopil, Jr. (U.S. 9th Cir.), chair of the U.S. Judicial Conference Committee on Long Range Planning.

The conference also adopted strong resolutions on issues of federalism, including the following:

- opposition to pending legislation in Congress that would "broadly preempt the traditional authority of the highest courts of the states to regulate the ethics and professional responsibility of employees of the Department of Justice" (a reference to a bill incorporating a Department of Justice rule allowing U.S. prosecutors to communicate with persons represented by counsel);
- support for continued funding of the State Justice Institute;
- support for federal funding for state courts that includes recognition that block or formula grants are preferable, that funding programs should be balanced and include civil and family justice as well as criminal justice, that planning and distribution mechanisms in the state should include court representation, and that "federally imposed obligations should be accompanied by unrestricted federal funds commensurate with the obligation imposed"; and
- support for a condition that federal law enforcement block grant programs include state court functions and appropriation of federal funds "to ease the burden on state courts resulting from the expanded law enforcement capacity" of local police. ❑

State, Federal Judges Act Together to Combat Gender Bias in Court Systems

State and federal judges are acting together in several states to combat gender bias in court systems.

Exemplary activity in this area is in Alaska, where the state–federal judicial council appointed a joint State–Federal Gender Equality Task Force.

Co-chairs of the task force are Judge Karen Hunt (Alaska Super. Ct.) and Judge James K. Singleton (U.S. D. Alaska). The 13-member task force includes representatives from other Alaska courts, state court administrators, prosecutors, and bar leaders.

The task force is divided into three subcommittees, which focus on state courts, federal courts, and the legal profession, respectively. The task force conducted surveys, developed and distributed public relations materials, organized informal education programs, established mechanisms for fund raising to support ongoing activities, and prepared a set of recommendations in the three focus areas "to reduce instances of discrimination based on sex, and to create an atmosphere in the state and federal courts of fairness to all litigants and participants."

In the Western District of Washington, state and federal judges met in Seattle on January 21 for a day-long "Federal–State Judiciary Gender Bias Workshop." The workshop agenda was prepared by Judge George W. Colby (Wash. Dist. Ct.) and Magistrate Judge Cynthia Imbrogno (U.S. W.D. Wash.).

Twenty-five judges attended the workshop, including a representative of the local tribal court. It included presentations on "gender and justice" in both state and federal courts, the legislative future for issues of gender bias, and small group discussions.

In two other states, Minnesota and Hawaii, federal court judges have been included in the membership of state court task forces on gender fairness. ❑

State Justices, Federal Judges Attend Certification of Law Conference

Twenty-three state supreme court justices and federal circuit, district, and bankruptcy judges from across the country attended a one-day workshop on certification of questions of law from federal courts to state supreme courts. The workshop, sponsored by the American Judicature Society (AJS), was held at the University of Denver School of Law in December.

Workshop participants heard the results of a recent comprehensive survey of state justices' and federal judges' attitudes toward certification. The survey was conducted by the AJS. Forty-three states currently have some form of certification process.

Both federal judges and state justices reported a high level of satisfaction with their recent certification experiences.

In a plenary session, the federal participants also shared their experiences using certification, some noting problems with delay in receiving an answer from supreme courts to which they had certified questions. Others described the excellent relationship they have with state justices—and vice versa— resulting from informal communications that have helped resolve delay problems.

The issue of whether the certification process should be enhanced or limited was debated at the workshop by two legal scholars.

Prof. Ira P. Robbins, of the Washington School of Law at American University, argued for expansion and refinement of the current certification process—the process is typically used in diversity cases where an issue of state law cannot be resolved by reference to existing case law or legislation. Robbins proposed that the procedure also be adopted for state supreme courts that may on occasion need to apply the law of another state.

Prof. Geri J. Yonover, of the Valparaiso University School of Law, argued for limiting the certification process. She proposed that parties who elect to bring their cases to the federal forum where a state forum was available be barred from asking the federal courts to certify a question of state law because they could have brought the suit in the state court initially and avoided the delays inherent in the certification process.

At one session the attending judges crafted recommendations to guide future development of the certification process. Recommendations included (1) adoption of a certification process by the seven state supreme courts that have none, and (2) adoption by each supreme court with a certification process of a time limit for informing a certifying court of its decision to answer or not answer a certified question of state law.

The workshop was supported by a grant from the State Justice Institute.

The AJS will publish a manual on the certification process this spring. Any court or state–federal council wishing to conduct its own certification workshop should contact Jona Goldschmidt at the American Judicature Society, phone: (312) 558-6900. ❑

Rhode Island Forms New State–Federal Judicial Council

Through the efforts of Chief Justice Joseph R. Weisberger (R.I. Sup. Ct.) and Judge Bruce M. Selya (U.S. 1st Cir.), a state–federal judicial council has been organized in Rhode Island.

A preliminary organizational meeting of the new council was held in September of last year in Providence at the Brown University Faculty Club. Five state judges and four federal judges attended to discuss the structure of the organization and potential areas of cooperation between state and federal courts, a topic that was by unanimous agreement one of "great importance."

Chief Justice Joseph R. Weisberger (R.I. Sup. Ct.) was instrumental in the formation of Rhode Island's State–Federal Judicial Council.

Judge Selya and Chief Justice Weisberger were designated chair and vice chair, respectively, of the new council.

The agenda at the first meeting included attorney calendar conflicts and cooperation in the use of interpreters for the deaf.

A second organizational meeting of the new council was held on November 21, in Providence, with seven state judges and five federal judges in attendance.

The participants decided to announce the formation of the new council in the state bar journal to solicit issues for consideration by the council.

The main topic of discussion related to the appointment of trial counsel for indigent defendants in criminal cases. The council also discussed the use of clinical law students for pro bono cases and a forthcoming regional seminar on "Courts Under Attack—What We Can Do About It."

A third meeting of the council was held in March.

With the formation of the Rhode Island council, there are now 32 active councils in the United States and its territories. ❑

Inside . . .

FJC Science Manual To Be Made Available to State Judges

The Federal Judicial Center's recently published handbook, *Reference Manual on Scientific Evidence*, will soon be available to state judges through private publishers. The manual is free of copyright restrictions.

Eight private publishing companies either have decided to reprint the manual and offer it for sale or are considering doing so (these companies, with contact telephone numbers, are listed below). The manual is available on the Internet at "http://www.fjc.gov".

All federal judges received a free copy of the manual. The FJC cannot distribute the manual more widely.

The purpose of the manual is "to assist judges in managing expert evidence, primarily cases involving issues of science or technology." The 1993 decision of the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993) has heightened the need for judicial awareness of scientific principles.

The reference manual is divided into three parts. The first part deals with case management and evidentiary issues. "Management of Expert Evidence," a section in the first part, was written by Judge William W Schwarzer, director of the FJC until his retirement in March of this year.

Judge Schwarzer reviews actions judges can take in managing cases involving scientific evidence, form the initial conference with attorneys for assessing the case and defining and narrowing the issues to the final pretrial conference. He also discusses use of magistrate judges, special masters, and court-appointed experts; discovery and disclosure procedures; and handling in limine and summary judgment motions.

The introductory part also includes analysis of the evidentiary framework of trials involving expert scientific evidence, prepared by Prof. Margaret A. Berger of the Brooklyn Law School.

The second part of the manual contains a series of reference guides on specific scientific topics, including epidemiology (the study of the incidence, distribution, and origin of human disease), toxicology (the science of poisons), surveys and statistical samplings, DNA evidence, statistics, multiple regression (the relationship between two or more variables), and economic losses in damage awards.

A final part, divided into two sections, relates to two "extraordinary procedures": court-appointed experts and special masters.

The reference manual is the product of a cooperative effort by the Federal Judicial Center and the Carnegie Corporation of New York, a charitable institution.

The following private publishers have decided to republish the manual or are considering doing so:

- Clark Boardman/Callaghan, (800) 221-9428 (customer service/order department);
- Lawyers' Co-operative Publishing Co., (800) 254-5274 (sales department);
- Lawyers' Weekly USA, (800) 451-9998 (will be offered to subscribers only);
- LRP Publications, (800) 341-7874 ext. 307 (sales department);
- Matthew Bender Co., (800) 223-1940;
- Mealey Publications, (800) 925-4123 (customer service);
- Shepard's/McGraw-Hill, (800) 525-2474 (sales department) (for information on bulk sale discounts, call Steve Brunette at (719) 481-7576); and
- West Publishing Co., (800) 328-9352 (sales department).

Publication plans and prices can only be obtained by calling the numbers above. ❑

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A note to our readers

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

OBITER DICTUM

Discretionary Access—A Novel Way to Reallocate Cases Between State and Federal Courts

by Jon O. Newman
Chief Judge, United States Court of Appeals for the Second Circuit

In recent years many knowledgeable observers of state and federal court systems have urged that some reallocation of cases from federal courts to state courts is necessary. Though both court systems currently labor under large volumes, there are two fundamental reasons for making a slight adjustment and allocating some cases to the state court system.

First, there are some cases currently being filed in federal court in which there is little, if any, significant federal interest. Second, a modest curtailment in the growth of federal court cases will enable the federal courts to remain at approximately their current size, rather than grow into a large, bureaucratic system that would eventually undermine the need for having federal courts at all.

Since state courts now handle about 97% of all cases filed in the United States, a very slight shifting of cases from federal to state courts will result in an insignificant percentage increase in state court caseloads but will have a major stabilizing effect on federal courts. Because state court volumes will undoubtedly rise in the coming years because of population growth, the slight increase from a reallocation of a few federal court cases would not have any significant effect on state courts. Such an allocation would, however, have a profoundly beneficial effect on the federal court system.

Until now, those calling for reallocation of cases from federal to state courts have usually urged that all cases within designated categories be shifted. The category most frequently mentioned is diversity of citizenship cases, or at least in-state plaintiff diversity cases. A novel alternative to the categorical approach is a system of "discretionary access"—a procedure for enabling federal court judges to exercise discretion whether a particular case within federal court jurisdiction ought to be litigated in federal or state court. This approach has recently been recommended by the Long Range Planning Committee of the Judicial Conference of the United States.

The principal virtue of discretionary access is that it permits cases to remain in federal court whenever the need for a federal forum exists, but facilitates the reallocation to state courts of many cases for which a federal forum serves no significant purpose. Moreover, discretionary access is a more politically palatable device for accomplishing a modest reallocation of cases from federal to state courts than wholesale abolition of entire categories of federal court jurisdiction.

Alternative Forms of Discretionary Access

A system of discretionary access can be structured in different ways.

(1) *Scope of Discretionary Access*. A discretionary access system could be instituted for all civil cases within legislatively identified categories, or, more narrowly, for those civil cases within identified categories that satisfy legislatively prescribed criteria.

(2) *Placement of Discretion.* The discretion to determine access for each case could be placed in either the federal district court or the federal court of appeals. It is so common to think of cases originating in the district court and moving "up" to a court of appeals that the very idea of choosing between a district court and a court of appeals as the entry point may seem startling. But there in no structural reason for not lodging discretion in a court of appeals, and the choice of court should be carefully considered.

Placing discretion in the district court has the virtue of using a more traditional entry point. It also creates the opportunity for review of the district judge's exercise of discretion. A consideration that weighs against placing discretion in a district judge is the desire to avoid the appearance (and, occasionally, the reality) that a decision to leave a particular case for the state court was made to reduce the judge's burdens, rather than because of a principled assessment of the appropriateness of a federal court forum.

Placing discretion in the court of appeals has the virtue of lodging the discretion in judges with a circuitwide vantage point for viewing the evolution of federal law within their circuit and exercising discretion against a broad frame of reference. A district judge would assess a particular case only in light of the other cases filed in that judge's court; an appellate judge would assess the need to file a particular case in federal court in light of the other cases coming to the court of appeals from all of the district courts of the circuit.

(3) *Direction of Discretion*. A basic choice in structuring a system of discretionary access is whether discretion is exercised to let a new filing come into federal court or to divert to state court an already filed case. This choice is related to the choice of placement of discretion since, if discretion is lodged in an appellate court, it would make more sense to rule on entry of a new case into the federal system rather than reallocate an already-filed case.

Structuring the discretion to determine entry rather than reallocation will help expedite the case by making the venue decision the very first step, thereby letting the litigants know at the earliest possible moment whether they will be proceeding in federal or state court. It also avoids letting an already-filed federal case acquire a certain momentum just by being filed—a momentum that might be enhanced by ancillary matters such as temporary restraining orders, prejudgment remedies, and confidentiality orders. Another virtue of "entry" rather than "exit" discretion is that, as lawyers observe how entry discretion is being exercised, they will develop their own sense of what cases are worth trying to file in federal court and will file most matters in state court, whereas an exit discretion would invite lawyers to file routinely in federal court hoping to avoid reallocation.

(4) *Consequences of Discretionary Access*. A choice can be made between two alternate routes to be followed once a case has been reallocated to state courts under a system of discretionary access. One consequence is to leave the reallocated case entirely within state court jurisdiction, where it would receive a state court trial, whatever state court appellate procedure is available, and the existing opportunity for Supreme Court review by petition for writ of certiorari. The other consequence is to leave the reallocated case within state court jurisdiction—subject, however, to an application to the relevant federal court of appeals after a final judgment to obtain federal appellate consideration of a particular federal issue presented by the case.

The virtue of a bifurcated appellate system in the context of discretionary access

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State and Federal Judge Florence Allen Registered Series of Firsts in Long Career

Ohio Woman Jurist Gained High Academic Honors, then High Achievements in Judicial Offices

by Sarah L. Wilson
Judicial Fellow
Federal Judicial Center

(Adapted from a profile of Florence Allen in Women in Law, *a biographical reference work to be published by Greenwood Press in 1995.)*

Florence Ellinwood Allen's career represented a series of "firsts" for American women in the law. She was the first woman elected to a state court of last resort (Ohio Supreme Court, 1922–34) and the first woman to sit on a trial court of general jurisdiction (Court of Common Pleas for Cuyahoga County, 1920–22). Appointed by President Franklin Delano Roosevelt to the U.S. Court of Appeals for the Sixth Circuit in 1934, she was the first woman in the United States to serve on a federal court of appeals and was the first woman circuit chief (1958–59). However, efforts to elevate Allen to the position of first woman justice on the U.S. Supreme Court were unsuccessful. Despite a campaign by Allen's supporters to appoint her to the Supreme Court during the Roosevelt, Truman, and Eisenhower administrations, her prediction that a Supreme Court appointment "will never happen to a woman while I am living" ultimately proved to be true.

Professional Life in Ohio

Born in Salt Lake City, Utah, in 1884 to parents active in state politics and progressive reform movements, Allen spent most of her professional life in Ohio, where she first became active in the women's suffrage movement as a college student at Western Reserve University. She earned a master's degree in political science from Western Reserve in 1908 before deciding to pursue a legal career. Barred because she was a woman from attending the university's law school, she attended law school at the University of Chicago for one year before transferring to New York University, one of the few law schools in the country that had afforded full privileges to women since the mid-19th century.

Despite her academic success (she was at the top of her class at Chicago and second in her class at NYU), Allen had difficulty finding a legal job in Ohio after graduating. Turned away from numerous law firms, she opened her own practice and established a reputation as counsel for the women's suffrage movement. In 1916, Allen argued before the Ohio Supreme Court in favor of municipal suffrage for women, a legal frontier developed by the suffragists following defeats in their campaign to amend state constitutions. Shortly after women secured the right to vote with the passage of the 19th Amendment, Allen announced her nonpartisan candidacy for a court of common pleas judgeship. Women from both parties with whom she had worked for woman suffrage and world peace, as well as major newspapers, unions, churches, and citizens' groups, rallied to her cause, and in 1920 Allen became the first woman elected to sit on a state court of general jurisdiction. Two years later, the same constituency mobilized "Florence Allen Clubs" throughout the state to campaign for her successful election as an independent candidate to the Ohio Supreme Court. Allen was re-elected to the court in 1928 by the largest plurality ever won for that office.

Florence Ellinwood Allen (1884–1966)
(Photo courtesy of The Western Reserve Historical Society, Cleveland, Ohio.)

As a state supreme court justice, Allen decided numerous legal issues reflecting Ohio's importance to the nation's increasingly industrialized economy. Generally supportive of organized labor, she issued many decisions favorable to aggrieved employees, including a decision construing the state Workman's Compensation Act broadly to preserve an employee's action against an employer who failed to comply with workplace safety requirements, and a ruling that nonviolent and uncoerced picketing was lawful. Allen also decided many issues related to increased urbanization and new methods of municipal governance. Her first decision on the Ohio Supreme Court upheld the constitutionality of Cleveland's city manager plan, which replaced the municipal election system with a proportional representation plan. Changes in the state constitution to allow municipalities greater powers of self-governance had resulted in the passage of novel legislation concerning education, taxation, and civil liberties. Allen participated in judicial efforts to clarify the meaning and constitutionality of many of these statutes throughout her tenure on the state's highest court.

After two unsuccessful bids for federal legislative office in 1926 and 1932, Allen was chosen by President Roosevelt to fill a vacancy on the U.S. Court of Appeals for the Sixth Circuit in 1934. Despite strong support for her nomination in many quarters, the appointment of a woman to the federal appellate bench provoked considerable controversy: Allen recalls in her memoirs that one of her Sixth Circuit brethren reportedly was ill for two days after—and because of—her appointment.

Supported New Deal

On the federal bench, Allen proved to be a critical supporter of New Deal economic recovery initiatives. She rendered her most celebrated decision in the 1938 case challenging the constitutionality of the Tennessee Valley Authority Act, which authorized dam and reservoir construction in the Tennessee River watershed to control flooding, promote navigation of interstate waterways, and produce electrical power. The three-judge district court panel over which Allen presided upheld the constitutionality of the act in its entirety, providing Roosevelt's New Deal government with a monumental victory. In *Filburn v. Helke*, 43 F. Supp. 1017 (S.D. Ohio 1942), Allen dissented from the majority ruling that national wheat crop controls exceeded the constitutional reach of the federal commerce power. The Supreme Court later reversed in *Wickard v. Filburn*, 317 U.S. 111 (1942), following Allen's reasoning that the growing practices of an individual wheat farmer affected interstate commerce and could therefore be nationally regulated. Allen also issued the first federal court ruling calling for desegregation in public housing a year after the Supreme Court declared racially segregated educational facilities unconstitutional in *Brown v. Board of Education*, 347 U.S. 483 (1954).

Championed Women's Rights

Throughout her lifetime, Allen championed equal rights for women. Like many of her contemporaries in the suffrage movement, Allen staked her claim to full participation in public life on grounds of equality as well as a belief in women's heightened moral perspective. Such elevated moral perspective "is the real reason for having competent and upright women serve as judges," she noted in her memoirs. "When women of intelligence recognize their share in and their responsibility for the courts, a powerful moral backing is secured for the administration of justice."

Allen retired from the bench in 1959. She died of a stroke at the age of 75 in September 1966. She remained the only woman appointed to a judgeship on the U.S. courts of appeals during her lifetime. The next appointment, in 1968, was Judge Shirley Ann Hufstedler for the U.S. Court of Appeals for the Ninth Circuit. Not until the end of the 1970s, when women's rights activity was again on the rise, were women appointed in large numbers to the federal judiciary. ❑

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is that it provides a useful "second chance" to have a federal issue decided by a federal forum in the event that the case was initially reallocated to the state court but, upon full development, presented an important federal issue that could not have been fully anticipated at the outset.

(5) *Discretion Procedure*. The choices here concern the elaborateness of the system of exercising discretion. At one extreme, there could be a detailed explanation by the judge of the reasons for allowing a case to be filed (or reallocating it to the state court), followed by appeal for abuse of discretion (at least in those cases where discretion was exercised to leave the case for the state court). Under such a regime, the discretion would have to be lodged in a district court in order to afford the opportunity for an appeal. At the other extreme, the exercise of discretion could be simply an up-or-down ruling, without explanation and without any appeal.

Though an exercise of discretion is normally accompanied by an explanation and by an opportunity for appeal, there are strong reasons for favoring a "no explanation/no appeal" approach. First, the consequence of a negative ruling is not a denial of any substantive right, but simply remits the litigants to a state-court judge, bound by oath and the supremacy clause to apply the applicable federal law as faithfully as would the federal-court judge. Second, a system of discretionary access should ideally function with utmost expedition. An appeal would insert an additional layer of litigation that should be avoided. Third, the exercise of discretion could be monitored by Congress so that adjustments in eligible categories or in criteria could be made if it were determined that cases were being reallocated too frequently or too sparingly.

A further procedural choice concerns the opportunity of the parties to present and contest their arguments for and against discretionary access. One approach would be to treat access as a normal subject of litigation, permit the parties to allege the circumstances weighing for and against access, and then resolve, after a hearing, any factual disputes framed by the opposing contentions. Another approach is to permit the parties to submit only affidavits and have the judge (whether district or appellate) rule without any hearing to resolve factual disputes.

The "no hearing" approach helps expedite matters and also avoids the need to place the federal judge in the awkward position of resolving factual disputes concerning the fairness of the state court.

Conclusion

Congress should be urged to create a system of discretionary access to federal courts applicable to civil cases within designated categories of the present concurrent jurisdiction of federal courts. No alteration should be made with respect to access to federal courts in criminal cases or in civil cases now within the exclusive jurisdiction of federal courts. An appropriate group of categories for initiation of the discretionary access system might be as follows: in-state plaintiff diversity cases; out-of-state plaintiff diversity cases below a jurisdictional amount of $250,000; prison condition cases; cases not presenting a substantial constitutional claim; FELA cases; Jones Act cases; and ERISA cases.

As an alternative to instituting a system of discretionary access nationwide, consideration should be given to legislative authorization of a pilot project to experiment with such a system in two circuits for two or three years.

The discretionary access decision should be an entry decision for leave to file, rather than an "exit" decision to reallocate an already-filed case. The discretion as to access should be lodged in the appropriate federal court of appeals, the discretion to be exercised by any active judge of that court. The decision to grant or deny access should be made on the basis of the parties' affidavits, without the need for a hearing, and the decision need not be accompanied by an explanation of reasons nor be subject to appeal. In any case reallocated to the state court, opportunity should be provided, after final judgment, to petition the appropriate federal court of appeals for leave to have that court resolve any federal issue presented by the record.

A system of discretionary access, however structured, offers a flexible, achievable way of moderating the growth of federal court caseloads and thereby stabilizing the size of the federal judiciary. It also achieves the purpose—important to both federal and state courts—of making sure that state courts remain the forum for all cases except these that belong, for some good reason, in a federal court. ❑

Congressional Plan Is Major Topic at Committee Meeting

The "Contract with America," the legislative plan of the Republican majority in the House of Representatives of the 104th Congress, was a major topic of discussion at the biannual meeting of the Federal–State Jurisdiction Committee of the Judicial Conference of the United States, which was held in California in January.

Although committee members held lengthy discussions about substantive parts of the legislative plan that would affect the judiciary, including habeas corpus reform and prisoner civil rights litigation, the committee took no official action on any proposed bill.

Issues relating to prisoner civil rights litigation were reviewed in detail. However, specific recommendations for controlling the flood of these types of cases were postponed pending further study.

The committee also discussed, but took no action on, pending legislation in the Congress relating to products liability reform and private securities fraud litigation.

It also reviewed the proposed long-range plan for the federal courts, particularly the chapter in the plan on "judicial federalism."

Judge Stanley Marcus (U.S. S.D. Fla.) chairs the committee, which includes four chief justices of state supreme courts.

The committee will meet again in June.❑

National Roundup of State–Federal Judicial Councils

California—The California State–Federal Judicial Council met on October 28, 1994, in San Francisco. Seven state members and seven federal members attended. Justice H. Walter Croskey (Cal. Ct. App.) and his subcomittee on council structure recommended, and the council approved, retaining the present council structure and augmenting the structure by conducting periodic regional meetings in each of the four federal judicial districts. Justice William D. Stein (Cal. Ct. Sup.) reported on the results of a survey of programs offerred by the largest state and federal courts in California to increase public confidence in the judiciary. Judge Alexander H. Williams III (Cal. Super. Ct.) gave a report on the successful Capital Case Symposium, and the council discussed a recommendation that a circuit-wide capital defender organization be created to handle the bulk of capital habeas defense cases. The California Center for Judicial Education and Research will be developing a video training program for capital case counsel at the state appellate level. Judge Fern M. Smith (U.S. N.D. Cal.) led a discussion of proposed rules to facilitate coordination of large cases, and the council also discussed the state judges' experience under the "three-strikes" legislation and its effect on civil case dockets and courthouse facilities.

Iowa—At the meeting of the Iowa State–Federal Judicial Council on September 19, 1994, participants discussed the following: the growing phenomenon of jury nullification and how state and federal courts might deal with it; resolving scheduling conflicts; the potential use by federal courts of the Iowa Fiber Optic Network; and a comparison of the Federal Rules of Civil Procedure with the local federal rules. The council also discussed proposed improvements to the Iowa bar examination and plans for a new edition of the Iowa Judicial Directory.

Maryland—Five federal judges and five state judges attended the meeting of the Maryland State–Federal Judicial Council. Judge Lawrence F. Rodowsky (Md. Ct. App.) was elected chair of the council. Principal topics of discussion at the meeting, which was held in Baltimore, were the resolution of attorney calendar conflicts and an administrative order of the Maryland Court of Appeals establishing guidelines for the resolution of such conflicts. Areas where the sharing of information between state and federal judges would be useful were identified, including death penalty cases and bankruptcy stays and their effects. The judges also considered "federal law issue" training for state judges, including ERISA, and the inclusion of federal judges in state judicial education programs. Another item on the agenda was the proposed long range plan for the federal courts. Chief Judge J. Frederick Motz (U.S. D. Md.) outlined local federal rule changes relating to admission of attorneys to the Maryland federal court and compensation of expert witnesses.

Nevada—Las Vegas was the site of the November 4 meeting of the Nevada State–Federal Judicial Council, with seven members attending. The council welcomed Nevada Deputy Attorney General David F. Sarnowski and Assistant Federal Public Defender John Lambrose. The council discussed the use of State Justice Institute (SJI) grants to fund "capital" law clerks for trial court judges in death penalty cases. Bankruptcy Judge Robert C. Jones (U.S. D. Nev.) suggested that a training program, funded by the SJI, be conducted for state trial judges on methods for handling cases affected by federal bankruptcy court stays. The council also discussed the need for better communication between the state and federal courts regarding early appointment of counsel in death penalty cases. Judge Melvin Brunetti (U.S. 9th Cir.) described the success of the circuit's new pro se unit, which saves court time and improves understanding by reviewing meritorious cases and locating counsel. Judge Howard D. McKibben (U.S. D. Nev.) and Mr. Sarnowski described the cooperative efforts of the federal district court and the state Department of Prisons and Attorney General's office to quickly and efficiently address prisoner pro se litigation, including development of an early case evaluation hearing system. Michael Pescetta, director of the Nevada Appellate Project, reported on the continuing work of the project, despite its loss of state funding, to deal with services to attorneys in federal habeas corpus cases, the shortage of counsel and the quality of representation in capital cases, and case file handling and retention matters. Judge Brunetti and Mr. Sarnowski led the council's discussion of the impact of the new federal crime legislation, and Mr. Sarnowski updated the council on continuing planning for a statewide video-teleconferencing network and its possible application to judicial uses.

Oklahoma—Nineteen members of the council met on November 15, 1994. Judge Carol M. Hansen (Okla. Ct. App.) reported that a subcommittee of the western district council (the Oklahoma council is divided into three regional councils according to the boundaries of the three federal district courts) is working with the Attorney General's office and Department of Corrections officials to implement a mediation program in the state prisons and federal certification of the administrative grievance procedure. Judge Jane P. Wiseman (Okla. Dist. Ct.) reported on a meeting of the northern district bankruptcy judges with state judges to discuss the effect of ambiguous and complex divorce decrees in bankruptcy proceedings. Magistrate Judge John L. Wagner (U.S. N.D. Okla.) described how the northern district council and state courts are coordinating ADR-sharing programs, training, and work, and are developing a written protocol for cooperation. The council appointed a committee to develop and implement methods for improving communication between the federal and state judiciary and the legal community and public. The committee, composed of Judge Wiseman, Judge Joe Taylor (Okla. Ct. App.), Judge Wagner, Judge Robin J. Cauthron (U.S. W.D. Okla.), and Judge Robert H. Henry (U.S. 10th Cir.), will endeavor to issue periodic press releases regarding council activities.

Oregon—Over 60 members of the council met on February 10, 1995. Judge Otto R. Skopil, Jr. (U.S. 9th Cir.) and Judge Pamela L. Abernethy (Or. Cir. Ct.) reported on the future of federal and state judiciaries, the federal circuit's *Justice 2020* report, and the upcoming state report on court improvement. Judge James A. Redden (U.S. D. Or.) and U.S. Attorney Kris Rogers led a discussion on efforts in Congress to amend parts of the 1994 federal crime statute. Chief Justice Wallace P. Carson Jr. (Or. Sup. Ct.) reported on the effect of current Oregon ballot measures—mandatory minimum sentences for juveniles and other citizen-mandated crime-fighting measures—that would affect the courts and the prison system. Bankruptcy Judge Polly S. Higdon (U.S. D. Or.) and Magistrate Judge John A. Jelderks (U.S. D. Or.) submitted their report on the effect of bankruptcy on non-bankruptcy courts. Chief Justice Carson reported on the work of the state committee on racial and ethnic issues. Several tribal court judges and officials attended the council meeting. Judge Redden updated the council on state–federal–tribal court relations. A council subcommittee will explore a proposal to assign a part-time federal magistrate judge to sit on certain cases on the reservation to hear cases where there are non-tribal defendants and tribal victims. The formal council meeting was followed by a panel presentation that addressed the "loser pays" proposal now being considered by the U.S. Congress. The panel included Chief Justice Carson, Judge Redden, and the chairs of the Oregon House and Senate judiciary committees.

Virginia—Chief Justice Harry L. Carrico (Va. Sup. Ct.) presided over the September 29, 1994, meeting of the council in Richmond. Robert N. Baldwin (Va. Ct. Adm'r) presented a status report on the Middle Atlantic State–Federal Judicial Relationships Conference scheduled for November 14–15 in Williamsburg. The council discussed the disagreement between the Department of Justice and the American Bar Association (and Conference of Chief Justices) regarding the rule exempting federal prosecutors from state bar ethics codes that prohibit lawyers from talking with persons represented by counsel. The council also discussed the impact on the courts of health care reform legislation and the federal crime bill then recently enacted.

Washington—The council met on October 21, 1994, in Seattle. Justice Barbara Durham (Wash. Sup. Ct.) presided. A panel moderated by Judge Barbara J. Rothstein (U.S. W.D. Wash.) explored the role of law schools in developing and enhancing attorney professionalism. Members of the panel included Justice Charles Z. Smith (Wash. Sup. Ct.), Dean Wallace D. Loh (Univ. of Washington School of Law), and Dean John E. Clute (Gonzaga Univ. School of Law). Dean Loh suggested that law schools and the bar cooperate in developing a set of criteria that each assess in making admissions decisions and that they adopt the same criteria as a method of raising the threshold level for admission. The panel also discussed perceptions of a growing lack of civility in the legal profession. Several university and bar programs were noted for their success in teaching professionalism and ethics issues. A task force appointed by Chief Justice James A. Anderson (Wash. Sup. Ct.) will respond to the ABA's report evaluating the state bar's discipline system. The bar report stated that the system is underfunded and suggested that it should be supervised by the supreme court instead of the bar.

Northern Mariana Islands—The Commonwealth–Federal Judicial Council met on February 3, 1995, in Saipan. Chief Justice Jose Dela Cruz (N. Mar. I. Sup. Ct.) welcomed Commonwealth Acting Governor Borja and Justices Bellosillo and Quiason of the Supreme Court of the Philippines as guests at the meeting. Chief Judge J. Clifford Wallace (U.S. 9th Cir.) expressed the need to continue quality judicial education programs at all judicial levels and the need for computerization in small courts, noting that the decline in resources increases the need for sharing resources. The council discussed continuing efforts to solicit donations of excess library books to the Commonwealth Law Library. Presiding Judge Alexandro C. Castro (N. Mar. I. Super. Ct.) presented a report on the state of the superior court, including plans to install a local area network and provide computer workstations for all judges. The council discussed ways that judges and staff of the U.S. 9th Circuit could assist the commonwealth in technical and training areas. Other topics on the council agenda were the experience of the superior court with cameras in the courtroom, the recent vote of the U.S. Judicial Conference to disallow use of cameras in the courtroom, and how the judiciary may effectively deal with family violence issues. Chief Judge Alex Munson (U.S. D. N. Mar. I.) and Chief Justice Dela Cruz are pursuing plans to enlist the aid of the probation office of the Superior Court of Guam in developing a training program for commonwealth judges and court staff. Chief Judge Wallace noted the completion of the Ninth Circuit's study of gender bias and its upcoming report on race, religion, and ethnicity in the courts and suggested that Guam and Saipan should explore the relevance of these studies to local conditions. ❑

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