Manual for Cooperation Between State and Federal Courts

Federal Judicial Center
National Center for State Courts
State Justice Institute

1997

by
James G. Apple, Esq.
Chief, Interjudicial Affairs Office
Federal Judicial Center

Paula L. Hannaford, Esq.
Research Analyst
National Center for State Courts

G. Thomas Munsterman
Director, Center for Jury Studies
National Center for State Courts

The preparation of this manual was supported in part by a grant from the State Justice Institute to the National Center for State Courts. Points of view expressed in the manual do not necessarily represent the official position or policies of the State Justice Institute or the National Center for State Courts.

Contents

Preface

Closer relations, especially working relations, between state and federal courts have become a reality in the United States as the twenty-first century approaches. Indeed, this manual is an example of state–federal cooperation—it was put together by the staffs of the National Center for State Courts and the Federal Judicial Center.

We are most pleased to bring this manual to the judges in all of the state court systems and in the federal system of the United States, to reveal to them what has been done and what is capable of being done when state and federal judges and court staff work together.

The manual provides illustrations in many different areas of court practices and court administration where the "three Cs"—cooperation, communication, and collaboration between state and federal courts—have not only improved court operations, but have resulted in efficiencies and savings of scarce funds.

We hope that this manual will prove useful for the continuance and further promotion of the cooperation, communication and coordination that have characterized the relations among many courts of the federal and state systems in the immediate past. We also hope that the beneficial relations developed in the last twenty years among those courts will both expand and carry beyond the year 2000, to become a hallmark of all court operations for the new century.

Roger K. Warren, President
National Center for State Courts

Rya W. Zobel, Director
Federal Judicial Center

Acknowledgments

The idea for this manual resulted from several presentations given at the National Conference on State–Federal Judicial Relationships in Orlando, Fla., in April 1992. In particular, the papers presented by Judge William W Schwarzer of the Federal Judicial Center and V. Eugene Flango of the National Center for State Courts made reference to many examples of cooperation between state and federal courts. We acknowledge the inspiration provided by their research and their papers.

Funding for the conference and this manual was provided by the State Justice Institute and the Federal Judicial Center.

We wish to acknowledge the contributions of the advisory committee to this project. The advisory committee consists of:

Robert Doss Jr., Georgia state court administrator;

Hon. Susan Graber, Oregon Supreme Court;

John P. Mayer, Esq., court training specialist, U.S. district court, Eastern District of Michigan;

Mark Mendenhall, Esq., assistant circuit executive, U.S. Court of Appeals for the Ninth Circuit;

Hon. Sandra Mazer Moss, Pennsylvania Court of Common Pleas, 1st Judicial District;

Ancil Ramey, Esq., West Virginia Administrative Office of the Courts;

Hon. Barbara Rothstein, U.S. district court, Eastern District of Washington; and

Hon. Larry V. Starcher, chief judge, Seventeenth Judicial Circuit Court, West Virginia.

Members of the advisory committee furnished ideas for the manual and copies of documents for the appendix to the manual—they also reviewed a draft of the manual and made suggestions for its improvement.

They represent both state and federal courts and their joint contributions are examples of the kind of cooperation that this manual is intended to promote.

The Federal Judicial Center joined in this project as a partner with the National Center for State Courts. These organizations have published, for the past four years, the *State–Federal Judicial Observer,* a newspaper dedicated to issues of judicial federalism and to the promotion of state–federal judicial cooperation. Past issues of the *Observer* have provided some of the material contained in this manual.

Lastly, but of great importance, we wish to thank the many people who provided information on the materials presented in this manual and to those people responsible for the implementation of these original ideas.

James G. Apple, Esq.,
Federal Judicial Center

Paula L. Hannaford, Esq.,
National Center for State Courts

G. Thomas Munsterman, Project Director
National Center for State Courts

Introduction

This manual seeks to promote cooperation between state and federal judges and courts and to suggest many practical ways of doing so. It contains examples of practical steps state and federal judges and courts can take to save resources through sharing or other means, to avoid scheduling or other conflicts that adversely affect court operations and the bar, and to plan programs and other services that benefit both judiciaries. This manual also includes sample forms that provide the means to these ends.

Some of the activities described in the manual do not involve cooperation between state and federal courts per se. More accurately, they describe state and federal government relations that involve the courts of one system—e.g., the cooperation between the federal district court in Nevada and the Nevada attorney general's office in the handling of prisoner cases. Such examples are included in this manual because they can potentially facilitate state and federal court cooperation, and because intergovernmental relations involving a particular court are matters about which other state and federal judiciaries should be informed.

Cooperation between state and federal courts is a relatively new subject of interest to judges. It wasn't an issue of national significance until August 1970, when Chief Justice Warren Burger, in his state of the judiciary address to the American Bar Association, commented on the poor relations between state and federal courts in some states and called for the creation of state–federal judicial councils to help alleviate tensions.

Chief Justice Burger proposed that such councils would have two purposes: (1) to provide a means for ensuring the development and continuance of harmonious relationships between the state and federal judiciaries, and (2) to provide a forum for the interchange of ideas and an exploration of the ways in which the two judiciaries could cooperate.

In the decade following Burger's address, the dissonance in state–federal judicial relations to which Burger referred had largely disappeared. Chief Justice Robert J. Sheran of the Minnesota Supreme Court, in his opening address to the meeting of the Minnesota State–Federal Judicial Council in August 1980, was able to make the following observation about state–federal judicial relations nationwide:

> Fifteen years ago, a meeting such as the one we will be having for the next two days between federal and state judges sharing a common concern of the administration of justice in this country would have been most unlikely. At that time, the accepted thinking was the federal judiciary and the state judiciary ran on different tracks—so much the better, lest proximity lead to catastrophic collisions. The events of the '60s . . . created a situation which initially led to sharp conflict between the state and federal judicial systems. By now this attitude has been replaced, for the most part, by joint efforts to supplant dissonance with cooperation.[1]

The need for judicial cooperation has increased in recent years because of diminished judicial resources resulting from efforts to control public spending and increases in state and federal caseloads and case complexity. Changing social attitudes, public understanding about courts, and new demands on both state and federal courts have heightened the desirability of state–federal judicial cooperation.

In addition, the judiciary as an institution is under attack in many places—for fiscal, legal, and cultural reasons—and state and federal judges need to speak with one voice to state legislatures, to the U.S. Congress, and to the public about the necessary function a judiciary serves in a democracy.

An increased interest in state–federal judicial relations is evidenced by a number of events that have occurred in the last nine years:

- The first national conference on state–federal judicial relations (the "Orlando Conference") in April 1992, in Orlando, Fla., attracted over 325 state and federal judges, court administrators, and legal academics.
- Many state and federal judges and court administrators in the Ninth and Fourth U.S. circuits attended regional state–federal

1. Speech of Justice Robert J. Sheran, Minnesota Supreme Court, August 1980 (on file with the Interjudicial Affairs Office, Federal Judicial Center).

judicial conferences in Stevenson, Wash., in 1993, and Williamsburg, Va., in 1994.

- The number of active state–federal judicial councils has risen from nine in 1980 to thirty-four as of March 1, 1996.
- The Federal Judicial Center (FJC) created the Interjudicial Affairs Office in April 1992, to encourage state–federal judicial relations and monitor state–federal judicial activities.
- In January 1993 the FJC and the National Center for State Courts (NCSC) began publishing the *State–Federal Judicial Observer,* devoted to state–federal judicial relations and activities.
- In 1993 the FJC created a database of information about state–federal judicial councils.
- In 1987 the Judicial Conference of the U.S. Courts created the Federal–State Jurisdiction Committee, composed of both federal and state judges.

It should also be noted that the Conference of Chief Justices created its Federal–State Committee (now the Federal–State–Tribal Committee) in 1957.

At the conclusion of his 1980 address to the Minnesota State–Federal Judicial Council, Justice Sheran observed that the obligation to, as the U.S. Constitution says, "establish justice" was a continuing one that fell on state and federal judges alike. With this obligation in mind, Justice Sheran listed several objectives of the state and federal judiciaries, one of which was the following:

> [T]hat the general jurisdictional responsibilities of the court systems should be placed primarily in the courts of the states; that the federal court system should continue to be the one of limited and specialized jurisdiction; *and that the efforts of both the state and federal court systems should be coordinated and integrated in such a way as to make the system as a whole work as effectively as possible.*[2] (emphasis added)

The ultimate purpose of this manual is to help state and federal judges fulfill that objective.

Over 200 years ago, in Federalist No. 82, Alexander Hamilton wrote that "the national and state [court] systems are to be regarded as 'one whole.'" And in 1992 Chief Justice of the United States William H.

2. *Id.*

Rehnquist affirmed Hamilton's view in his opening remarks to the Orlando Conference.

The State Justice Institute, the FJC, and the NCSC are pleased to make this contribution towards that goal.

I. Litigation Issues

Litigation provides a fertile area for cooperation between state and federal courts. This chapter covers cooperation in litigation generally and cooperation in the area of complex litigation specifically, especially mass tort litigation.

A. Pretrial and Trial Matters

1. Calendar Conflicts

One of the most troubling issues involving state and federal courts is calendar conflicts. This issue is one of the most prevalent on the agendas of state–federal judicial council meetings.

The problem arises when a state or federal judge assigns a case for trial or hearing, and one or more of the lawyers in the case has another trial or hearing assigned for the same date in a court in the other system. Such a conflict cannot be resolved internally. In some situations, federal judges assume the superiority of the federal case over the state case and insist that the state court yield to this claimed federal priority. Such an attitude may create resentment in the affected state judge.

If both the federal and state judges remain adamant about keeping the assigned trial dates, the lawyer with the conflict is put in an untenable position—he or she must assign one of the cases to another lawyer in the law firm, and this new lawyer may not be familiar with the case or have the approval or goodwill of the client. If reassignment within the firm is not possible, the lawyer with the conflict must send the case to outside counsel, thus depriving the lawyer of a representation and depriving the client of his or her representation of choice.

There is at least one instance of a federal judge's ordering the arrest, during a state court trial, of a lawyer with such a conflict who had failed

to arrange for his client's representation in a simultaneous federal proceeding.

To avoid such calendar or scheduling conflicts some state and federal courts have adopted a local or statewide rule. One model rule, in the form of a 1992 policy statement by judges from both systems in Massachusetts, appears below. A longer model, from Georgia, appears as Appendix 1, *infra*. Appendix 2, *infra*, includes references to other states that have adopted formal calendar/scheduling conflict statutes or court rules.

Model Rule

The following statement of policy was issued by Massachusetts Superior Court Chief Justice Robert L. Steadman and Chief U.S. District Judge Joseph L. Tauro (D. Mass.) on behalf of their respective courts:

Over the years, scheduling conflicts have inevitably occurred between the Superior Court and the U.S. District Court. Thanks to the excellent relationship that exists between the justices and judges of these two very busy courts, such conflicts have been resolved on a personal and informal basis.

In order to assist counsel in their efforts to establish and maintain scheduling calendars, the justices and judges of these courts have determined that it would be useful to establish a policy that would give guidance to counsel and court personnel as to which matters will ordinarily be afforded precedence, given a scheduling conflict. Underlying this policy is the expectation of continued direct communication and cooperation between and among the justices and judges of these courts.

Scheduling Policy

When counsel have engagement conflicts with respect to cases pending in the Massachusetts Superior Court and the U.S. District Court for the District of Massachusetts, the following scheduling policy shall apply:

(1) Trials shall take precedence over all other hearings.

(2) Jury trials shall take precedence over nonjury trials.

(3) Criminal cases shall take precedence over civil cases.

(4) Criminal cases involving defendants who are in custody pending trial shall take precedence over other criminal cases.

(5) Among civil cases, or among criminal cases not involving defendants in custody, the case having the earliest docket number shall take precedence over the others, except that a trial setting involving numerous parties and counsel will ordinarily take precedence over other trials.

Counsel shall notify the presiding Superior Court Justice and U.S. District Judge of the scheduling conflict, in writing, not later than three (3) days after the receipt of the scheduling order giving rise to the conflict. Counsel's

notification shall include: (a) the names and docket numbers of each case, (b) the date and time of the scheduled proceedings in each case, and (c) a brief statement as to which case has precedence under this policy. The case or cases not having precedence shall be rescheduled, unless the presiding Justice and Judge agree otherwise. In the event of any scheduling conflict between the provisions of this policy and the provisions for scheduling criminal cases contained in the Speedy Trial Plan for the United States District of Massachusetts and in the Speedy Trial provisions of Mass. R. Crim. P. 36, this policy shall not have precedence, but such scheduling conflicts will be resolved with the same spirit of cooperation embodied in this policy.

2. Notice of Related Case

New cases filed in state or federal courts sometimes are related factually to other cases filed in the same or a different court. Some courts have adopted a "related case" rule requiring counsel who know of a related case to advise the court by formal notice in order to apprise the judge assigned to the new case of the pendency of related cases, to reduce redundancy, and to promote efficiency. Inspired by discussions in meetings of the California State–Federal Judicial Council, the California state courts have adopted a related case rule, a similar version of which has been adopted in each of the federal district courts in California. The "related case" rule appears below.

Rule 804 of the California Rules of Court is amended, effective January 1, 1996, to read:

Rule 804. Notice of related case

(a) Duty of counsel—Whenever counsel in a civil action knows or learns that the action or proceeding is related to another action or proceeding pending in any state or federal court in California, counsel shall promptly file and serve a Notice of Related Case. The Notice shall also be served on all known parties in each related action or proceeding. It shall state the court, title, case number, and filing date of each related action or proceeding together with a brief statement of their relationship. If the case is pending in the same court, it shall also give reasons why assignment to a single judge is or is not likely to effect economies.

This is a continuing duty that applies when counsel files a case with knowledge of a related action or proceeding and applies thereafter whenever counsel learns of a related action or proceeding.

(b) An action or proceeding is "related" to another when both:

(1) Involve the same parties and are based on the same or similar claims; or

(2) Involve the same property transaction or event; or

(3) Involve substantially the same facts and the same questions of law.

(c) Within 10 days after service upon a party of a Notice of Related Case, the party may file and serve a response supporting or opposing the Notice. A timely response will be considered when the court determines what action may be appropriate to coordinate the cases formally or informally.

(d) On notice to counsel, the judge to whom the case is assigned may confer informally with the parties, and with the judge to whom each related case is assigned, to determine the feasibility and desirability of joint discovery orders and other informal or formal means of coordinating proceedings in the cases.

A reference list of statutes/rules from other states and federal district courts for notice of related cases appears as Appendix 3, *infra*.

3. Pro Se Cases in Prisoner Proceedings—The Nevada Experience

A vexing problem for both state and federal courts is the large number of pro se cases filed by prisoners alleging violations of their civil rights by prison officials or others in the criminal justice system.

The number of cases brought by prisoners has increased significantly in both state and federal courts in many parts of the United States in the past five years. According to the National Association of Attorneys General (NAAG), in California in 1995 the attorney general's office spent approximately $10 million defending the state in more than 1,000 new lawsuits brought by prisoners and in the thousands more that were pending in the courts. The Attorney General of Indiana, from January 1993 through October 1994, handled more than 3,000 prisoner suits. In Texas the courts received 994 new prisoner suits in 1994. The Administrative Office of the U.S. Courts reported that 39,000 prisoner cases were filed in federal courts in the United States in 1994, a 17% increase over the previous year.[3] In 1995 the NAAG reported that, according to some, 20% of all cases before the courts in the United States have been brought by prisoners.[4]

3. National Association of Attorneys General, news release (August 1, 1995).

4. *Id.*

Prisoner pro se cases filed in the U.S. District Court for the District of Nevada have constituted a major part of that court's civil caseload. For the combined calendar years 1991 through 1993, the prisoner caseload comprised 49% of all civil cases filed in the northern division of the district and 17% of all civil cases filed in the southern division of the district.

Some of these cases prove to be actionable; however, many are frivolous. Most of these cases originate in state prisons and the state attorney general typically is responsible for defending the state prison officials in them.

Such cases involve, in addition to judges and court clerks, U.S. marshals or other court officials responsible for service of summons. Careful screening of these cases can ensure that (1) meritorious cases survive and are given proper attention, and (2) frivolous cases are disposed of in a timely manner so that judges and court staff do not waste time.

The Prisoner Litigation Reform Act (PLRA) enacted in April 1996 can be expected to reduce the number of prisoner pro se cases. However, several parts of the PLRA are already being challenged and other sections may be challenged. The actions and activities described below can be useful to both state and federal judges involved in the handling of such cases. Readers interested in this subject may wish to consult the *Resource Guide for Managing Prisoner Civil Rights Litigation,* published in 1996 by the Federal Judicial Center.

State–Federal Cooperation—Early Case Evaluation of Prisoner Pro Se Cases

The federal district court in Nevada, in cooperation with the Nevada attorney general's office, developed an early case evaluation system that has substantially reduced the work of the federal judges, the U.S. Marshal's Service, the Nevada attorney general's office, and state prison officials related to such cases. The system is potentially useful for both state and federal judges confronted with large numbers of prisoner pro se cases.

The early case evaluation system in Nevada was developed in the fall of 1994 and has operated successfully since then. Its purpose is to distinguish the issues that have merit from those that are frivolous and should be dismissed. It is designed to remove from the courts as early as possible those actions or counts (and defendants affected by those counts) in a complaint that are without merit.

Evaluation hearings are conducted only for prisoners *in forma pauperis* pro se civil rights (section 1983) actions.

The system operates as follows:

- Upon receipt of a prisoner *in forma pauperis* pro se civil rights petition and the assignment of a case number to the petition, the pro se law clerk reviews it to determine whether the plaintiff should be permitted to proceed *in forma pauperis*. At the same time, the pro se clerk reviews the complaint to determine whether it appears to be frivolous on its face. If it appears to be completely frivolous, full *in forma pauperis* status is granted, and the action is dismissed without the need for a hearing.
- For those cases not dismissed immediately as frivolous on their face, the pro se law clerk prepares a bench memorandum. The bench memo summarizes the counts and factual allegations and identifies which, if any, of the counts and named defendants should be dismissed as frivolous. Two of the most common reasons for dismissal are lack of factual support for a claim against an individual defendant and immunity of a defendant from suit.
- If the entire case is not dismissed as frivolous, the pro se law clerk secures a date and time for a telephonic early case evaluation hearing. The cases are generally set for ten-minute intervals. A courtesy copy of the complaint and order are sent to the Nevada attorney general's office at least a week in advance of the scheduled hearing. The attorney general's office then assigns a deputy to participate in the hearings. The deputy makes inquiry of appropriate employees of the Nevada Department of Prisons about the allegations in each complaint and arranges to have a representative from the Nevada Department of Prisons at the hearing to answer any questions the court may have and for possible administrative resolution of the dispute.
- The early case evaluation hearing opens with the judge advising the plaintiff about the reasons for the hearing. The judge then summarizes the allegations in the complaint. The plaintiff is asked whether the court has correctly interpreted the allegations. If not, the plaintiff is directed to explain any misinterpretation and state any facts supporting the allegations. The court advises the plaintiff about any deficiencies in the complaint with respect to parties or contents of the complaint. The court then explains to the plaintiff that certain counts and/or defendants should be

dismissed where appropriate. In many cases the plaintiff is willing to dismiss counts and/or defendants, particularly where at least one count and one or more defendants remain.

Most dismissals are without prejudice. Only occasionally have dismissed claims been refiled. The court may then order the complaint to be amended to conform to the stipulation about removal of defendants or counts in the complaint without the necessity of filing additional pleadings.

- In the presence of a Nevada Department of Prisons official at the hearing, and because of the fact that the official has already had an opportunity to investigate the complaint, some plaintiffs are willing to voluntarily dismiss the entire action without prejudice to refile if the problem is not resolved administratively.
- If the plaintiff is unwilling to dismiss counts and/or defendants, the court reviews the sanction provisions of Rule 11 so the plaintiff understands what may happen if he or she persists with frivolous claims.
- For those claims and defendants remaining, the court requests the deputy attorney general to accept service of process for all defendants currently employed by the Nevada Department of Prisons who remain as defendants at the conclusion of the hearing. This procedure avoids problems associated with preparing and issuing summonses (usually multiple summonses because not all defendants are effectively served on the first attempt).
- After counsel has accepted service of process, the court orders counsel to file an answer or otherwise respond to the complaint, generally within a twenty-day period. The hearing is then concluded.

The early case evaluation system affords all parties clear, identifiable advantages, as follows:

- With legitimate claims it assures the prisoner that the judge has reviewed the complaint and allows the prisoner to communicate directly with the judge.
- It provides the inmate with direct access to the judge to listen to his or her complaint.

- The focus is on the real claims of the plaintiff, thus avoiding the expenditure of time, money, and effort litigating frivolous claims against unnecessary parties.
- The system encourages early dispute resolution by the parties wherever possible. It saves the time and cost of having the U.S. marshal issue and serve process on prison officials.
- It has resulted in a reduction in the period between the service of process and the trial by at least four to six months.
- It provides the plaintiff with a better understanding of the legal standards required for proceeding with claims.
- It provides the plaintiff with an opportunity to amend the complaint to plead facts that would satisfy those standards.
- It permits the court to advise the plaintiff of potential sanctions that may be imposed for pursuing frivolous claims.

During the first six months of using these new procedures, of the 166 original causes of action filed, 69 remained after the early case evaluation hearings, a 58% reduction in the number of cases. Of the 279 original defendants, 131 defendants remained after the hearings, a reduction of 53% of the original number of defendants. Virtually all of the dismissals of causes of action and defendants were voluntary on the part of the plaintiffs at the time of the hearing.

In addition, in most instances the U.S. marshal did not have to serve process on the defendant prison officials, as service was accomplished at the hearing. As an indication of the success of the program for the marshal's service, the number of individual processes served either by mail or in person from April 1, 1993, through September 30, 1993, totaled 700. For the period April 1, 1994, through September 30, 1994, after the new evaluation system was introduced, the total declined to 270.

Nevada federal magistrate judges have begun conducting early case evaluation hearings, further reducing the workload of federal district judges in handling these types of cases.

Additional information about the handling of prisoner pro se cases in Nevada can be obtained from Ms. Ann Cathcart, litigation division, Nevada Attorney General's Office, Capitol Complex, Carson City, NV 89710, phone (702) 687-3541, or from Richard Owens, Esq., senior staff attorney, U.S. District Court for Nevada, Reno, NV 89509, phone (702) 784-5515, ext. 106.

For additional information about the handling of prisoner pro se cases in other states, contact the National Association of Attorneys General, 444 North Capitol Street, N.W., Washington, DC 20002, phone (202) 434-8000.

4. Pro Se Cases in Other Civil Proceedings—Vexatious Litigants

Unlike pro se litigants in criminal cases and matters (e.g., appeals and habeas petitions), pro se litigants in civil cases generally have few administrative hurdles to overcome before filing their cases in court. Most of these individuals invoke the assistance of the courts with the same respect and seriousness demonstrated by individuals represented by legal counsel.

There are, however, exceptions to this general observation. Both state and federal courts have become increasingly concerned about the burdens imposed on opposing parties and on the courts by the frivolous claims of so-called "vexatious litigants." A significant part of the problem is the paucity of prophylactic measures that state and federal courts have available to curb litigants' abuse of judicial process. After all, there are no behavioral constraints on litigants similar to rules of professional conduct for attorneys to prevent frivolous or vexatious filings.

For the most part, state and federal courts have followed three courses of action with respect to these litigants. The first is the most direct: ruling on the merits of the litigant's claim. Although this option disposes of the matter judiciously, it does not deter the vexatious litigant from filing subsequent claims or appeals. The second option is the application of sanctions, including financial penalties, by the judge on the parties that file frivolous claims under Rule 11 of the Federal Rules of Civil Procedure (and corresponding state rules). These rules apply equally to pro se and represented litigants. Penalties assessed under these rules may have some deterrent effect on vexatious litigants.

The third, and most extreme, option available to courts is to impose a permanent injunction on the litigant that prohibits him or her from filing future claims without prior permission of the court. State and federal courts that have restricted litigants' access to the courts through this approach usually apply a balancing test, such as the one articulated in

Safir v. United States Lines, Inc.[5] to determine whether a permanent injunction is appropriate. *Safir* sets out five factors for consideration: "(1) the litigant's history of litigation and in particular whether this history entailed vexatious, harassing, or duplicative lawsuits; (2) the litigant's motive in pursuing the litigation, e.g., does the litigant have an objective good faith expectation of prevailing?; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (5) whether other sanctions would be adequate to protect the courts and other parties." The primary consideration under *Safir* is whether a vexatious litigant is likely to continue to abuse the judicial process and harass other parties.

5. Appellate Pro Se Cases—Ninth Circuit Pro Se Procedures

The U.S. Ninth Circuit Court of Appeals implemented a procedure in 1993 for screening pro se appellate cases. The program originated in response to the growing caseload—up to one third of the docket in some jurisdictions—of prisoner pro se petitions. Under the Ninth Circuit program, court staff review all pro se civil appeals, including habeas petitions, for jurisdictional or failure-to-prosecute defects. Improper appeals are dismissed, while the remaining cases are ranked according to the complexity of the legal issues presented. Less complex cases are processed on the merits by staff attorneys through presentations to oral screening panels. More complex cases, such as those raising questions of first impression, are assigned by the Ninth Circuit pro se coordinator to private counsel who have volunteered to accept such cases on a pro bono basis.

The appointed counsel are given access to all previous filings in both the appellate and district courts and ordered to prepare supplemental briefings for the appellate court. This ensures that pro se cases receive the same attention as other cases of similar complexity. The cases cover a broad range of legal issues, including prisoner civil rights and habeas appeals, labor and employment cases, discrimination, bankruptcy, social security, immigration and mining cases, and contract and civil forfeiture appeals.

5. Safir v. United States Lines, Inc., 792 F.2d 19 (2d Cir. 1986).

Further information about the Ninth Circuit program can be obtained from Susan V. Gelmis, pro bono coordinator, Ninth Circuit Court of Appeals, P.O. Box 193939, San Francisco, CA 94119-3939, phone (415) 744-9892.

6. Prisoner Grievance Procedures

One of the methods that some states have used to reduce the number of pro se prisoner cases filed in a U.S. district court is to establish an administrative grievance procedure in the prisons of the state. Generally, prisoners must follow the prison grievance procedure and exhaust the remedies provided by it before filing any lawsuit based on the grievance. Some states (e.g., Indiana) have reported that the use of such a grievance procedure has substantially reduced the number of pro se prisoner cases filed in federal courts.

The U.S. Department of Justice (DOJ) certifies state prisoner grievance procedures measured by DOJ standards, pursuant to the authority of 42 U.S.C. § 1997e. The standards for certification can be found in part 40 of title 28 of the U.S. Code of Federal Regulations. Certification of a prisoner grievance procedure makes applicable to prisoner civil rights complaints (42 U.S.C. § 1983) the exhaustion of remedies requirements of 42 U.S.C. § 1997e.

B. Special Issues Relating to Complex and Multijurisdictional Litigation

There is perhaps no area in which state and federal court cooperation has greater potential for success than in complex, multijurisdictional litigation. State and federal judges have demonstrated considerable creativity and innovation in balancing the tensions between effective and efficient judicial administration on the one hand and justice for individual litigants on the other.

A large number of successful collaborative efforts between state and federal courts were born of the necessity of managing burgeoning caseloads of asbestos litigation during the late 1970s and early 1980s. At one point, as many as 40,000 cases were pending in the U.S. District Court for the Eastern District of Pennsylvania and the Philadelphia Court of Common Pleas (including federal cases transferred to the Eastern Dis-

trict of Pennsylvania by the U.S. Panel on Multidistrict Litigation). For the state and federal judges presiding over these cases, cooperation was essential for any meaningful and prompt resolution of the cases.

Over the past two decades, state and federal courts have learned a great deal about managing complex, multijurisdictional litigation. Typically, this type of litigation involves mass tort claims, although contract claims (e.g., breach of warranty) and state statutory violations occasionally form the basis of these suits. Federal court involvement arises from diversity of citizenship or claims under federal laws (e.g., securities, antitrust, environmental, and patent). Taken individually, the cases are generally manageable—although many of the tort claims raise difficult factual problems concerning scientific evidence.

The aggregate caseload is another matter, however. Multiple plaintiffs with a variety of injuries or diseases sue multiple defendants on a variety of common law tort and contract claims, and state and federal violations (often involving state and federal government regulatory agencies, such as OSHA, EPA, and DOL as parties). A single catastrophic event (e.g., an airplane crash or hotel fire) or the widespread prevalence of an environmentally or medically provoked disease or condition (e.g., asbestosis, breast implant consequences) that result in the same or similar claims filed in both state and federal courts have all the makings of an administrative nightmare.

The following are examples of the various methods that state and federal courts have developed for coordinating such litigation. Judges may also wish to consult the *Manual on Complex Litigation, Third* (1995) published by the FJC, available from the Information Services Office, Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20002-8003, phone (202) 273-4153, and the *Resource Book on Managing Mass Tort Cases*, by Alexander B. Aikman, available from the National Center for State Courts, 300 Newport Ave., Williamsburg, VA 23185, phone (804) 253-2000.

1. Discovery Coordination

By coordinating discovery in complex and multijurisdictional cases, state and federal courts reduce duplicative discovery, minimize the resource expenditures associated with discovery for both parties, effectively manage judicial caseloads, and enhance the likelihood of global settlements.

State and federal judges have found the following methods of discovery coordination to be successful in complex and multijurisdictional cases:

- joint scheduling,
- joint discovery plans,
- common discovery masters,
- joint use of discovery materials,
- common document and physical evidence depositories,
- use of new technologies, such as CD-ROM, for efficient storage and retrieval of documents, and
- resolving differences between state and federal applications of law governing discovery.

Cases involving even moderately complex issues or disputed scientific evidence typically require plaintiffs and defendants to expend vast amounts of resources during discovery. Multiplying these costs dozens, hundreds, or sometimes thousands of times—as is often the situation in mass tort cases—can result in large expenditures of time and money for both sides. If not subject to effective judicial control, the discovery process in complex and multijurisdictional cases can generate enormous amounts of duplicative material, place excessive financial burdens on both plaintiffs and defendants, and can quickly overload court dockets. As Judge William W Schwarzer once observed, "[d]iscovery creates the greatest need and presents the greatest opportunity for coordination [between state and federal courts]."[6]

At the 1992 National Conference on State–Federal Judicial Relationships, Schwarzer described in detail many successful methods.[7] Sample case-management orders, both for initial and advanced case management, appear as Appendix 4 and Appendix 5, *infra*.

2. Joint Scheduling

Organizing discovery so that the various stages proceed in tandem allows lawyers on both sides to prepare simultaneously for discovery in both courts. State and federal judges can accomplish joint scheduling through relatively informal means, such as creating reasonable time frames in the

6. William W Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 Va. L. Rev. 1689, 1707 (1992).

7. *Id.*

respective litigation for completing various discovery tasks. Scheduling orders in the two courts need only reflect the same sequence for discovery and the deadlines for responding to interrogatories, taking depositions, and collecting physical evidence. Alternatively, judges can develop more formal joint scheduling orders.

There are several benefits to joint scheduling. Not having to juggle multiple stages of discovery uses the lawyers' time for all parties more efficiently. Early discussions between the judges enhances future opportunities for collaboration. Finally, parties at the same stage of discovery, who have access to the same information, are better situated to make informed assessments about the future prospects of the litigation and settlement. Thus, they are often more likely to consent to global settlement arrangements.

A sample joint scheduling order appears as Appendix 6, *infra*.

3. Joint Discovery Plans

Some state and federal judges have successfully arranged more formal discovery agreements, such as joint discovery plans. In a case of asbestos litigation in Ohio, for example, Judges Thomas D. Lambros (U.S. N.D. Ohio) and James J. McMonagle (Ohio Ct. Com. Pls., Cuyahoga County) issued a joint memorandum of accords establishing "a coordinated and uniform treatment of the asbestos cases pending before [their] two courts . . . ."[8]

One notable example of discovery coordination occurred in *Air Crash Disaster at Sioux City, Iowa, on July 19, 1989*, a consolidated proceeding under the Judicial Panel for Multidistrict Litigation (JPML).[9] The federal cases were consolidated before Judge Suzanne B. Conlon (U.S. N.D. Ill.) in Chicago. Cases arising from the same accident were pending in state courts in Illinois and Missouri. Judge Conlon went beyond the JPML requirements and coordinated discovery with the state judges in both states.

In her orders, Judge Conlon included provisions for coordinating proceedings, particularly joint discovery, as follows:

8. *In re* Ohio Asbestos Litig., 83-OAL (N.D. Ohio & Ct. Com. Pleas Cuyahoga County, July 14, 1983) (Federal–State Memorandum of Accord on Asbestos Litigation).

9. *In re* Air Crash Disaster at Sioux City, Iowa, on July 19, 1989,734 F. Supp 1425; 128 F.R.D. 131; 133 F.R.D. 515 (J.P.M.L. 1990).

> This court shall coordinate these proceedings with the parallel Sioux City disaster cases before Judge Donald P. O'Connell in the Circuit Court of Cook County. Counsel are requested to identify any state court judges handling other cases arising from the Sioux City disaster, so that coordination efforts can be made.
>
> –from the order dated November 27, 1989

> The court entered an agreed order providing that one attorney represented plaintiffs in each of the consolidated actions pending before this court, the Circuit Court of Cook County, Illinois, and the Circuit Court of St. Louis, Missouri, may question deponents, provided that the questions are not duplicative or repetitious. Lead counsel, or their designees, in all three consolidated actions are to consult before noticing depositions, so that scheduling is fully coordinated and witnesses are not deposed more than once.
>
> –from the order dated August 2, 1990

> This court shall continue to send copies of all its orders to Judge Donald P. O'Connell of the Circuit Court of Cook County, and Judge Philip J. Sweeney of the Circuit Court of St. Louis County, Missouri, and requests those courts or lead counsel for the parties to provide copies of Judge O'Connell's and Judge Sweeney's order to facilitate coordination of these cases.
>
> –from the order dated August 2, 1990

A sample joint discovery plan appears as Appendix 7, *infra*.

4. Common Discovery Masters

Rule 53(b) of the Federal Rules of Civil Procedure authorizes a district judge to appoint a special master under certain circumstances, including discovery management in complex cases. In a number of jurisdictions, state judges have a corresponding authority by virtue of state statutes, court rules, or existing case law. By jointly appointing a master to supervise discovery, state and federal courts can reduce duplicative discovery and establish consistent standards and procedures. These steps also reduce the incentive for forum shopping and set the tone for cooperation on future litigation matters. Separate appointments of a common discovery master achieve the same objectives as a joint appointment.

A sample order for a joint discovery master appears as Appendix 8, *infra*.

5. Joint Use of Discovery Materials

Discovery materials developed in preparation for state court proceedings may be used in related federal court cases, and vice versa. Generally, the scope of admissibility is within the discretion of the trial judge. Materials developed in related litigation may be used generally or courts may limit their admissibility to specific claims or issues.

In the litigation that followed the 1979 crash of a DC-10 departing from O'Hare International Airport, the state and federal courts agreed to limit the admissibility of discovery from related cases to those issues pertaining to liability.[10] The degree of active coordination that courts require of counsel in developing discovery materials also varies. Some courts have accepted discovery developed initially (or concurrently) for related cases pending in other courts, while others have ordered the parties to conduct joint discovery, such as joint interrogatories and depositions. Adopting both methods would be an alternative—i.e., accepting discovery conducted in other cases and ordering joint discovery.

A sample order for the joint use of discovery materials appears as Appendix 9, *infra*.

6. Common Document and Physical Evidence Depositories

Some courts have created common document and physical evidence depositories accessible to all federal and state counsel and parties. Establishing a depository provides a convenient location for all parties and their counsel to inspect and copy discovery documents and physical evidence. It facilitates cross-referencing of existing documents and physical evidence, thus aiding resolution of subsequent disputes concerning production of requested discovery materials. Moreover, a central depository and filing system prevents plaintiffs and defendants from being overwhelmed by repetitive discovery requests.

Although often beneficial in complex and multijurisdictional litigation, establishing a common depository can be expensive. Consequently, before proceeding state and federal courts should carefully consider the benefits and costs associated with depositories, as well as the number and

10. Airline Disaster Litigation Report—Uniform Damage Rules Needed, 127 F.R.D. 405 (N.D. Ill. 1989) (liaison counsel's final report and summary of proceedings in *In re* Air Crash Disaster Near Chicago, Ill., on May 25, 1979, 476 F. Supp. 445 (J.P.M.L. 1979)).

location of depositories, supervisory authorization, and the allocation of costs among parties.

The use of common document and physical evidence depositories also has been recommended for death penalty habeas corpus cases because of the involvement of both systems and potentially a large number of attorneys from both systems.

A sample order relating to a common depository for documents and physical evidence appears as Appendix 10, *infra*.

7. Use of Technology

The use of new technologies, such as CD-ROM and laser disk storage and retrieval technology, may reduce costs associated with document depositories as well as enhance access to these materials for interested parties. The breast implant cases, for example, have generated over one million documents. To make document retrieval more manageable, Chief Judge Sam C. Pointer (U.S. N.D. Ala.) placed the defendants' discovery documents (including complaints, tests and studies, research and development, outlines, laboratory notebooks, insurance policies, letters, memos, contracts, patents, and inspection procedures and protocols) on CD-ROM. The 15,000 documents stored on the CDs were made available to plaintiffs for a $25 charge—immensely cheaper and more efficient than requiring attorneys to travel to a central depository to inspect and copy documents.

Electronic filing of pleadings and other documents for these and other cases is possible through the complex litigation automated docket (CLAD) system developed by LEXIS/NEXIS.

8. Resolving Differences

Judges and attorneys who have participated in multijurisdictional litigation report that state and federal rules of procedure and evidence are generally compatible. There have been few occasions when differences in state and federal law required inconsistent decisions on discovery matters—particularly because many states follow the federal approach regarding scope of discovery, which is considerably broader than admissibility at trial.[11] As one judge noted, "What went on in discovery wasn't

11. *See* Fed. R. Civ. P. 26(b) (1995).

going to have a thing to do with whether [material] was admissible as evidence [in court]."[12]

On the few occasions when differences have arisen, state and federal judges have developed a number of techniques for resolving them. One method, used by Judge Jack B. Weinstein (U.S. E.D.N.Y.) and Judge Helen E. Freedman (N.Y. Sup. Ct.) in the Brooklyn Navy Yard asbestos litigation, was to agree to apply federal law—ostensibly because of its broader application—to all discovery matters.

Other methods include (1) giving deference to preexisting orders; (2) establishing whether state or federal law governs a particular issue (and deferring to the decisions of the judge who has proper jurisdiction over those issues); (3) agreeing that state judges rule on discovery matters raised by counsel representing the parties in state courts and federal judges rule on those raised by counsel in the federal cases; and (4) requiring the attorneys in all cases to attempt to resolve discovery disputes among themselves before bringing them to the attention of the courts.

9. Joint Proceedings

Conducting joint proceedings conserves time and resources for both courts and parties, enables judges to share information and insights about case-management techniques, and introduces the concept of state–federal coordination to litigants. Nevertheless, joint proceedings raise a number of practical issues, including the following:

- *the number and scope of issues to be addressed;*
- *the spatial and resource limitations of court facilities;*
- *the dynamics of presiding and deliberating over joint hearings;*
- *the mechanics of drafting and releasing joint orders;*
- *finding acceptable resolutions for conflicts between state and federal law; and*
- *surmounting the logistical problems associated with dual juries for joint trials.*

"Can you tell me why a state judge from Philadelphia was presiding in New York City with a federal judge from Birmingham, Alabama?"[13]

12. Interview with Judge Peter T. Fay, U.S. Court of Appeals for the Eleventh Circuit, in Miami, Fla. (May 13, 1991) (on file with the Interjudicial Affairs Office, Federal Judicial Center).

13. Sandra Mazer Moss, *Response to Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute from a State Judge's Perspective*, 73 Tex. L. Rev. 1573 (1995)

A number of state and federal courts have experimented successfully with joint proceedings in complex, multijurisdictional cases. The matters that judges have considered at these hearings span the complete range of pretrial matters—case management, discovery, and settlement—as well as substantive issues, such as class certification and summary judgment. Some judges limit joint hearings to decisions about specific issues, such as coordinating discovery; others consider joint hearings to be an essential tool of effective case management and make them a regular practice during litigation.

Regardless of the frequency with which individual judges conduct joint hearings, virtually all note similar benefits from the practice. Specifically, judges find that joint hearings are useful for conserving time and resources by avoiding duplicative proceedings. As Judge Carl B. Rubin (U.S. S.D. Ohio) observed about the Beverly Hills Supper Club Fire litigation,[14] "What conceivable sense is there in having . . . lawyers appearing in two separate courts doing the same thing twice?"[15] Conducting joint hearings also enables judges to share information, insights, and case-management techniques to expedite litigation. Finally, many judges have found that joint hearings provide the parties and their attorneys with an effective introduction to the concept of state–federal coordination. By setting a good example of judicial cooperation, judges set the tone for the lawyers to work together cooperatively. Joint hearings require state and federal judges to address a number of pragmatic issues, described below.

Agendas

Many judges prefer a flexible courtroom style that permits them to address related issues as they arise during pretrial proceedings. Joint hearings, however, typically require a greater degree of formality and, consequently, more advance planning. Some judges have found that joint agendas that clearly define the matters to be addressed—for both the presiding judges and for the parties—are sufficient preparation for successful hearings.

(comment by Pa. Sup. Ct. Chief Justice Robert N.C. Nix, Jr. after learning that Judges Sandra Mazer Moss (Pa. Ct. of Com. Pls.) and Sam C. Pointer (U.S. N.D. Ala.) had copresided in a pretrial hearing on breast implant litigation).

14. *In re* Beverly Hills Fire Litig., 639 F. Supp. 915 (E.D. Ky. 1986).

15. Interview with Judge Carl B. Rubin (U.S. S.D. Ohio) (July 5, 1991) (on file with the Interjudicial Affairs Office, Federal Judicial Center).

Location

Because of the large numbers of individuals typically involved in joint hearings, the physical size of the state and federal court facilities and the availability of their respective resources (e.g., staff support, equipment, and technology) are important considerations. These factors may rule out some locations—especially smaller courthouses.

Although space and resource considerations may limit the choice of location in some jurisdictions, several judges emphasized the symbolic value of alternating the location of joint hearings between state and federal courthouses. They noted in particular that conducting joint hearings demonstrates respect for their judicial colleague in the other court as well as their mutual commitment to sharing management responsibilities. Moreover, joint hearings convey judicial recognition of the significant impact that these cases have on state and federal courts and of the importance that neither court is dominating the litigation process.

Presiding over Joint Hearings

The mechanics of presiding over joint hearings and deliberating on the merits of the issues addressed therein may require some negotiation between the state and federal judge. The problem of designating which judge has principal responsibility for directing the hearing, for example, can be resolved in several ways. Some judges prefer to maintain co-equal status even with respect to presiding over court proceedings. Others prefer to have the "host" judge preside—that is, the judge in whose courtroom the hearing takes place.

Joint Deliberations

Another problem involves how the judges will deliberate on the matters presented at the hearing. Judges who prefer to deliberate privately may choose to retire to chambers, while others may decide to confer quietly on the bench. During the Florida Everglades Disaster litigation,[16] Judge Peter T. Fay (U.S. 11th Cir.) and Judge Harvey S. DuVal (Fla. Cir. Ct.) (ret.) even developed a set of hand signals to indicate to one another whether they were inclined to sustain or overrule objections.

16. *In re* Air Crash Disaster at Fla. Everglades on Dec. 29, 1972, 368 F. Supp. 812 (J.P.M.L. 1973).

Drafting and Releasing Orders

The drafting process following a joint hearing generally is a matter of accommodating the judges' respective styles. Some judges prefer to reach a consensus before drafting court orders. Others allocate the writing tasks among themselves, exchanging rough drafts for each other's comments, before releasing the final orders. A secondary matter associated with drafting court orders is whether each court will release separate, identical orders or whether the courts will issue a joint order applicable to cases pending in both courts. Generally, this determination depends on the degree of cooperation that the courts have demonstrated up to that point.

In the Orthopedic Bone Screw Litigation pending in the Pennsylvania state and federal courts, Judge Sandra Mazer Moss (Pa. Cir. Ct.) and Judge Louis C. Bechtle (U.S. E.D. Pa.) issued a joint opinion on a motion for partial summary judgment on one issue in the litigation. The discovery proceedings were being coordinated by the two judges. A portion of this joint opinion is reproduced as Appendix 11.

10. Differences in State and Federal Law

Regarding procedural and evidentiary matters, judges in multijurisdictional litigation rarely encounter insurmountable obstacles as a result of differences between state and federal law. For the vast majority of states, the rules of procedure and evidence are similar—if not identical—to the federal rules. In addition, the federal rules rely on principles of equity, giving significant discretion to the trial judge. Thus, in the relatively few instances that state law is both inflexible and substantially different from federal law, the federal courts were able to adapt to fit the state requirements. As Judge Jack B. Weinstein (U.S. E.D.N.Y.) commented, "with the ingenuity of the judges and parties, there isn't any problem [caused by conflicting rules] that can't be solved, or someone has misinterpreted the law." [17]

Generally, the same holds true for differences in substantive law. Most multijurisdictional litigation is based on state tort and contract law rather than federal statutes. Under the *Erie* doctrine[18] the federal courts apply

17. Interview with Judge Jack B. Weinstein (U.S. E.D.N.Y.) in New York, N.Y. (May 16, 1991) (on file with the Interjudicial Affairs Office, Federal Judicial Center).

18. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

state law to the cases pending in their courts. Thus, in the context of joint proceedings in multijurisdictional litigation, it is entirely appropriate for federal judges to defer to the judgment and expertise of their state court peers. This not only results in consistent application of state law, it also promotes active state court involvement in a process that might otherwise be dominated by the federal court.

Even if there is little or no difference in the actual language of the law to be applied, state and federal judges still may disagree about the correct application of law to the facts of the pending cases. In this respect, the problems of state–federal cooperation in complex litigation are no different from those routinely encountered by judges serving on appellate panels. Judges who have experienced these conflicts sometimes agree simply to defer to the judge in whose court the cases are pending. Others employ many of the same techniques discussed above in regard to differences in discovery coordination.

Judges should not overlook the potential contributions of attorneys in resolving these differences. Once introduced to the concept, attorneys often become very enthusiastic about state–federal cooperation and can alleviate a number of logistical difficulties associated with state–federal proceedings. Some differences, however, simply cannot be glossed over. Rather, they require judges to issue separate, conflicting decisions. As a practical matter, however, the damage to cooperative efforts by state and federal courts is mainly one of appearance. Provided that judges continue to communicate and do not permit one conflict to interfere with collaborative activities on other matters, there is no reason for disparate decisions to threaten future prospects for state–federal cooperation.

11. Joint Trials

A number of judges and lawyers have enthusiastically supported the idea of joint trials of state and federal cases involving the same subject matter, issues, and parties. However, as far as the authors of this manual have been able to determine, there has never been a joint trial involving state and federal cases presided over by a state judge and a federal judge in the United States. In one recent case a federal judge and a state judge came close to conducting such a trial.

Judge Marvin J. Garbis (U.S. D. Md.) and Judge Joseph H. H. Kaplan (Md. Cir. Ct.) each had been assigned cases pending in their respective courts involving the same or similar issues relating to the alleged failure

of the city school system of Baltimore to provide adequate special education for handicapped students. In the federal proceedings the Maryland Disability Law Center sued the city of Baltimore school system. In the Maryland state court proceedings an individual plaintiff and the city school system sued the state of Maryland for funds to provide an adequate school system, and the state of Maryland filed a counterclaim seeking a restructuring of the city school system. The claims involved the issue of the adequacy of the special education program in the city schools, the adequacy of public school education in the city and the reasons for any inadequacies in the program, including funding. The cases were scheduled to go to trial jointly on November 6, 1996. However, the parties, after a week's postponement, agreed to settle the case in principle. On November 26, 1996, Judge Garbis and Judge Kaplan, sitting together, conducted a joint proceeding to receive the terms of the settlement and enter an appropriate order.[19]

The procedural order relating to the conduct of the joint trial appears as Appendix 12, *infra*.

In the 1980s in Louisiana, another attempt was made to consolidate cases from the state court and federal court into a jointly conducted trial. The cases arose from the alleged puncturing of an abandoned mining shaft of the Diamond Crystal Salt Co. by a Texaco drilling rig situated in Lake Peigneur on Jefferson Island, La., causing the salt dome to partially collapse and to fill with water from the lake and from the Delcambere Canal.

Thirteen suits were filed in the U.S. District Court for the Western District of Louisiana and were consolidated in the division of Judge Eugene Davis. The major suits arising from the cave-in ($230 million in claims) were filed in Louisiana's 19th Judicial District Court and were consolidated into the division of Judge Charles Roberts. These suits named as defendants the state of Louisiana and many of the defendants in the federal suits. Eight other suits were filed in Louisiana's 16th Judicial District Court, many of which also named the state as a defendant.

In an attempt to expedite matters, Judge Davis and some of the attorneys invited Judge Roberts to participate in preliminary status conferences with the lead counsel. Since many of the suits named the same de-

19. For a complete description of the case and issues, see *In Schools Case, Unlikely Partners*, The (Baltimore) Sun, Nov. 11, 1996, at sec. B. The settlement is described in *City, State Sign Deal for Schools*, The (Baltimore) Sun, Nov. 27, 1996, at A1.

fendants, it was agreed that five of the cases in the 19th District and five in the 16th could be tried simultaneously with the consolidated federal cases. As Judge Roberts pointed out, "The attorneys realized the advantage of having just one lawsuit and just one trial—the advantage to their clients, the reduction in cost, and the avoidance of possibly conflicting results."

More than forty attorneys eventually agreed by stipulation to the following procedures for the state and federal suits being consolidated: (1) trials would be bifurcated; (2) state court matters would be conducted along with the consolidated federal cases at the U.S. District Courthouse before Judge Davis and a judge ad hoc appointed by the Louisiana Supreme Court to sit as judge of both the 16th and 19th Judicial Districts; (3) jury would be selected and impaneled according to the Federal Rules of Civil Procedure, except that only nine out of twelve would need to concur; (4) U.S. District judge would enter judgment in federal cases; (5) on nonjury matters, the ad hoc judge would enter judgment as to cases in the 16th and 19th Judicial Districts; and (6) concerning jury issues in the state court suits, the findings of the federal jury would be entered as if the case had been tried before state juries.

All of the cases were eventually settled before trial.

For jury trials the complications associated with dual juries may render a joint jury trial impractical. In addition to requiring a court facility with sufficient space and resources to accommodate two juries, courts attempting to conduct a joint trial would have to address a host of difficult issues, such as (1) harmonizing the jury selection process (e.g., number of jurors, number of peremptory strikes); (2) alleviating the awkwardness of presenting potentially conflicting evidence simultaneously to state and federal juries; (3) sorting through the complexity of developing double sets of jury instructions; and (4) resolving potentially conflicting stan dards regarding unanimity of jury verdicts. Finally, dual juries run the ever-present risk of inconsistent verdicts.

These problems are not insurmountable when addressed individually. Indeed, a number of jurisdictions have conducted multiple-jury trials in criminal cases involving two or more defendants. The major problem associated with these trials is a variation on the *Bruton*[20] error problem—namely, preventing evidence that is admissible against one party,

20. Bruton v. United States, 391 U.S. 123 (1968).

but inadmissible against another, from being presented accidentally to the wrong jury during the course of a joint trial. Introducing a state–federal wrinkle to this already tangled issue adds a level of complexity that makes the task appear even more daunting. Nevertheless, one day a state judge and a federal judge may muster sufficient ingenuity to make the attempt.

12. Settlement Issues

State–federal coordination of complex litigation encourages global settlements in both court systems. Judicial techniques assisting in settlement negotiations include the following:

- *joint alternative dispute resolution mechanisms;*
- *joint settlement sessions;*
- *supervision by one judge or settlement master;*
- *informal settlement coordination; and*
- *settlement-related coordination.*

Intersystem coordination not only reduces duplicative discovery and pretrial activities, it also improves the chances for global settlements. State and federal judges presiding over all types of complex, multijurisdictional litigation have noted that many parties are reluctant to settle the federal cases if they will still have to proceed to trial for the state cases, and vice versa. As a result, they have developed a number of techniques, discussed below, to encourage settlement of cases pending in both court systems.

Joint Alternative Dispute Resolution (ADR)

Use of joint ADR techniques early in a case encourages a resolution before the discovery costs become excessive. In addition, the nonadversarial nature of most ADR mechanisms (e.g., mediation) tends to prevent the development of excessive animosity among the litigants, making them more amenable to offers of settlement.

Joint Settlement Sessions

Attorneys and judges in all types of cases—including complex, multijurisdictional litigation—recognize the value of judicial involvement in settlement negotiations, particularly for prodding recalcitrant litigants toward settlement. In the Ohio asbestos litigation, Judge James J. McMonagle (Ohio Ct. Com. Pls.) and Judge Thomas D. Lambros (U.S. N.D.

Ohio) conducted a form of joint "shuttle diplomacy" that helped settle a number of state and federal cases.[21]

Supervision by One Judge or Settlement Master

In some instances of complex, multijurisdictional litigation, a single judge has supervised settlement negotiations for both the state and federal cases. In the MGM Hotel Fire litigation,[22] Senior Judge Louis C. Bechtle (U.S. E.D. Pa.) (sitting in Nevada by designation) took the lead in a coordinated settlement process. Although this approach tends to reduce involvement by the nonsupervisory court, it often improves the overall effectiveness of settlement negotiations. Other courts have found that appointing a joint special settlement master achieves the same ends. The use of a joint settlement master also avoids losing joint state and federal involvement since a jointly appointed master has an obligation to report to both courts. (See Common Discovery Masters, *supra* page 19.)

Informal Settlement Coordination

Even without deliberate judicial efforts in settlement activities, some informal cooperation can assist the settlement process. In the Chicago air crash cases,[23] for example, the federal liaison counsel agreed to share information about state settlements with the federal court. This information provided Judge Peter T. Fay (U.S. 11th Cir.) with a basis of comparison for suggesting appropriate settlement amounts for the federal cases.

Settlement-Related Coordination

Some judges have used jointly appointed trustees or other outside specialists to handle settlement-related matters, such as the administration of settlement funds pending distribution to successful plaintiffs.

13. Intersystem Coordination: The U.S. Judicial Panel on Multidistrict Litigation and the Mass Tort Litigation Committee of the Conference of Chief Justices

With the gradual acceptance of informal efforts at coordination in complex, multijurisdictional litigation, state and federal courts now are beginning to develop more formal intersystem methods of coordinating these cases.

21. *See* Schwarzer et al., *supra* note 6, at 1719.

22. *In re* MGM Grand Hotel Fire Litig., 570 F. Supp. 913 (D. Nev. 1983).

23. *In re* Air Crash Disaster Near Chicago, Ill., on May 25, 1979, 476 F. Supp. 445 (J.P.M.L. 1979).

State and federal courts have developed some remarkably inventive methods for coordinating complex, multijurisdictional litigation. For the most part, however, these methods are ad hoc and tend to be fairly informal, and their use falls entirely within the discretion of the trial judge. Only recently have state and federal courts begun to institutionalize these methods of coordination by authorizing legislation and creating standing state and federal judicial committees. The U.S. Judicial Panel on Multidistrict Litigation (JPML), for example, has authority under the federal Multidistrict Litigation Statute[24] to transfer federal court cases, by petition of one of the parties or sua sponte by the JPML—for coordinated pretrial proceedings that involve common questions of fact.

The Mass Tort Litigation Committee (MTLC), a standing subcommittee of the Conference of Chief Justices, serves as the state counterpart to the federal JPML. Although it lacks the authority to command state courts to engage in coordinated pretrial activities, the MTLC accomplishes some of the same tasks as the JPML by facilitating voluntary cooperation among state courts. In addition to active involvement in ongoing cases (e.g., coordinating discovery and trial schedules), the MTLC acts as a communication and information network, developing performance standards and standardized procedures for managing complex litigation. It also advises state and federal organizations—e.g., the U.S. Congress and the Conference of Chief Justices—about the jurisdictional issues implicated by complex litigation.

As these parallel efforts have been increasingly formalized in the respective judicial systems, state and federal courts are now advancing to the next logical stage of state–federal coordination of multijurisdictional litigation: the development of formal intersystem coordination. The following four organizations have advanced proposals for accomplishing this objective: the American Law Institute,[25] the Judiciary Committee of the U.S. House of Representatives,[26] the American Bar Association

24. 28 U.S.C. § 1407 (1968).
25. American Law Institute, Complex Litigation Project (1994).
26. Multiparty, Multiforum Jurisdiction Act, H.R. 1100, 103d Cong., 1st Sess. (1993).

Commission on Mass Torts,[27] and, most recently, the Federal Judicial Center.[28]

These proposals adopt several different approaches, including relaxing federal diversity jurisdiction, developing a federal tort law to preempt state law in these cases, and establishing mandatory aggregation for certain classifications of cases. At the heart of each proposal, however, lies a fundamental tension in managing complex, multijurisdictional litigation: balancing caseload management concerns (e.g., cost and time of duplicative proceedings) against the ideal of adjudicating each case on its own merits.

> *Letter from the Hon. Sandra Mazer Moss (Pa. Ct. Com. Pls.) dated January 10, 1995.*
>
> Origins of the Mass Tort Litigation Committee of the Conference of Chief Justices
>
> Like many great ideas, the [Mass Tort Litigation Committee] MTLC was created from a minor inconvenience. Four years ago, fifteen judges attended a medical conference. After two days they had failed to meet each other since the conference contained no social component. I complained to my husband, William Deane, a management expert, who suggested to the conference that they host a breakfast on the last day.
>
> Twelve out of the fifteen judges attended to share coffee, doughnuts, war stories, and problems. We were all frustrated and angry about our huge asbestos dockets and our inability to cope with them. We learned we all had the same dilemmas, the same plaintiffs and defendants—even the same law firms.
>
> We vowed to keep in touch because, in truth, we understood each other better than did judges on our own local courts who never faced mass filings, "scorched earth" trial tactics, and frequent bankruptcies. A month later, several federal asbestos judges created the now famous "Gang of Eight"[29] to

27. Comm'n on Mass Torts, Am. Bar Ass'n, Report to the House of Delegates (1989).

28. William W Schwarzer et al., *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 Tex. L. Rev. 1529 (1995).

29. The federal judges composing the "Gang of Eight" who were trying to deal with the problems associated with the nationwide asbestos litigation were: Judge Robert M. Parker (U.S. 5th Cir.) (at that time U.S. E.D. Tex.); Judge Charles Schwartz, Jr. (U.S. E.D. La.); Chief Judge Charles R. Wolle (U.S. S.D. Iowa); Judge Thomas D. Lambros (U.S. N.D. Ohio); Judge Jack B. Weinstein (U.S. E.D.N.Y.); Judge Rya W. Zobel (U.S. D. Mass.)

address their specific crises. A few days later, Judge Marshall Levin of Baltimore, Justice Helen Freedman of New York City, and myself joined forces to create a similar ad hoc state judges asbestos litigation committee. MTLC was born.

It started as an informal network of three judges and may have remained so had we not met Professor Francis McGovern. He focused our energies, secured funding from David Tevelin, executive director of the State Justice Institute (SJI), and tapped administrative personnel from the National Center for State Courts.

Eleven judges from ten states attended our first meeting in January 1991—coincidentally held in Washington, D.C., right in the middle of Operation Desert Storm. We had our own miniature Desert Storm as we all tried to understand each other's perspectives and long-range strategies.

Many wondered—as my own chief justice had when I first told him—"Where's the jurisdiction?" How does a state court trial judge in Pennsylvania, New York, Maryland or Massachusetts bind another in Texas, California, Colorado, or Tennessee? The answer became clear—with a handshake, a wing, and a prayer.

What happened in the next three-and-a-half years—from then until now—is a saga marked by "zillions" of frequent flyer miles, all-night brainstorming sessions in strange cities, too many luncheon speeches, and more than our share of minor miracles.

We joined forces with the federal bench: Judge Charles Wolle, our liaison federal judge; Judge Charles Weiner, the MDL's asbestos judge; and Judge Sam Pointer, who is still helping in silicone breast implant litigation. In fact, Judge Pointer invited state judges to preside with him at federal hearings around the country—prompting one chief justice to quip, "Can you explain why a state trial judge from Philadelphia was presiding in New York City with a federal judge from Birmingham, Alabama?" What a creative way to foster state–federal relations.

One or more federal judges has attended all our meetings and currently the federal multidistrict litigation panel considers where and how state litigation is being conducted before assigning mass torts MDL status.

As a group, we have continually met with national counsel on both sides of the aisle in the different causes of action for current updates and guidance. At our last meeting, in Reno, Nevada, on September 9 and 10, 1994, a breast implant litigant gave us new perspectives on mass tort litigation.

(presently director of the Federal Judicial Center); Judge Walter J. Gex III (U.S. S.D. Miss.) and Judge Charles R. Weiner (U.S. E.D. Pa.).

We testified before a special congressional subcommittee on judicial administration. We gave our views to the U.S. Senate Judiciary Committee. We addressed the Conference of Chief Justices.

Our numbers grew from eleven to twenty judges—from eighteen states. Asbestos gave way to DES, L-Tryptophan, lead paint, PCBS, silicone breast implants, repetitive stress syndrome, and orthopedic bone screws. We truly became a mass tort litigation committee.

We're now planning a mass tort litigation conference born by our desire to share innovative techniques with judges, lawyers, and academics nationwide. We hope to organize a formal communications network, foster state–federal cooperation, establish a trial judges' bench book with model guidelines, and ignite creative thinking. For the conference six out of eighteen facilitators and reporters, as well as all the discussion leaders, are MTLC members. We want to combine our knowledge and experience with that of other federal and state judges, attorneys, academics, and social scientists to create a conference that will truly lead us into the twenty-first century.

Sandra Mazer Moss
Calendar Judge
Complex Litigation Center
Philadelphia, Pennsylvania

Further Reading

Alexander I. Aikman, Managing Mass Tort Cases: A Resource Book for State Trial Court Judges (National Center for State Courts 1995)

James S. Kakalik et al., Costs of Asbestos Litigation (Institute for Civil Justice 1983)

Manual for Complex Litigation, Third (Federal Judicial Center 1995)

Linda Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 Fordham L. Rev. 169 (1990)

Reference Manual on Scientific Evidence (Federal Judicial Center 1994)

Report of the Ad Hoc Committee of the Judicial Conference on Asbestos Litigation (1991)

William W Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 Va. L. Rev. 1689 (1992)

Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 Cornell L. Rev. 779 (1985)

Jack B. Weinstein, Individual Justice in Mass Tort Litigation (1995)

Jack B. Weinstein, *The Role of the Court in Toxic Tort Litigation*, 73 Geo. L.J. 1389 (1985)

C. Bankruptcy Issues

Bankruptcy proceedings create a major area of friction between state and federal courts—especially bankruptcy stays of state court proceedings. Much of the friction arises because many state trial judges lack understanding of the nature, extent, and effects of "automatic stays" under the U.S. Bankruptcy Code.

The American Bankruptcy Institute (ABI) is a private, nonprofit organization devoted to education and research on bankruptcy issues. Detailed information about bankruptcy issues can be found in the ABI's recent publication *Bankruptcy Issues for State Trial Court Judges* (1993), developed through a grant from the State Justice Institute. Copies of this publication ($10.00 each) can be obtained from the American Bankruptcy Institute, 510 C Street, N.E., Washington, DC 20002, phone (202) 543-1234.

1. Frequent Issues Arising in Bankruptcy Cases for State Judges

The ABI developed responses to a number of issues commonly raised by state judges about bankruptcy stays. The issues and responses, as supplemented by several FJC staff members, are presented below. Elaborations for some of the answers have been provided by U.S. Chief Bankruptcy Judge Sidney B. Brooks (D. Colo.).

Actions, motions, and proceedings in state court that are not stayed by a bankruptcy filing. Certain actions are excluded by statute from the operation of the automatic stay, and the following are common ones: most criminal actions against the debtor; alimony, maintenance, or support collections from property other than property of the bankruptcy estate

(e.g., collections from property acquired after the debtor files a Chapter 7 petition); and police or regulatory enforcement actions (e.g., consumer protection and environmental actions). The statutory exceptions from application of the stay appear at 11 U.S.C. § 362(b).

State court actions that can violate a bankruptcy stay. While it is more likely that a party or counsel for a party would act in violation of an automatic stay, a state court judge might violate an automatic stay in a myriad of ways, ranging from conducting a pretrial conference in a mortgage foreclosure action to the trial of a contract dispute. Essentially any act that moves a matter forward on a claim against a debtor or property of the estate during the pendency of a bankruptcy violates the stay. As a practical matter, only acts in willful violation of the stay result in the imposition of sanctions, from which state court judges would likely be immune.

Determining what is not covered by the automatic stay can be tricky. When in doubt, the state court judge should refrain from proceeding and advise the parties to obtain relief from the stay in the bankruptcy court. The process to do so is relatively swift and self-executing, if not opposed. In all events, it is treated on a relatively expedited basis.

The stay otherwise expires automatically on the closing or the dismissal of the case, or when a discharge is entered. Typically a discharge is entered about ninety days after an uncomplicated Chapter 7 case is filed or at the successful conclusion of a Chapter 13 plan.

Note: If a defendant files for bankruptcy shortly before the commencement of a state court action, quick relief from the stay might be obtained by the other litigants if they immediately apply to the bankruptcy court and justify prompt modification of the stay. Bankruptcy judges do not tolerate unfair litigation tactics, and would probably abstain from trying a case better handled in a state court.

Cases involving joint tortfeasors. When state law provides for apportionment of liability among joint tortfeasors, and one defendant files for bankruptcy, the question often arises whether the case can proceed and, if it can, whether it should. In states that apportion liability by percentage, cases can proceed in state court against tortfeasors that have not filed for bankruptcy. However, if the automatic stay applies to the entire pro ceeding because the ultimate determination of the issues could conclusively establish liability of the one who filed bankruptcy (e.g., apportionment of liability among defendants and the nondefendant who filed

bankruptcy) then the case could not proceed against any of the tortfeasors unless the bankruptcy court grants relief from the stay.

Even if the case can proceed, it should not proceed until the plaintiff or a codefendant obtains relief from the automatic stay.

Liability limited to the extent of insurance. Even in tort cases where a defendant is insured and liability is limited to the extent of the coverage, a party should seek an order granting relief from the automatic stay to remove any doubt about the effects of proceeding with the action. (See also notes on previous issue.)

Extent of bankruptcy court authority to reexamine or undo awards of child support, alimony, or attorney fees made in a divorce action. Since support and alimony awards are generally nondischargeable, questions often arise about the characterizations or labels of those awards (as well as attorney fee awards) and their relation to property settlement obligations, which are generally dischargeable. Bankruptcy courts will not be bound by the labels given to the debts in a state decree or settlement. Accordingly, bankruptcy courts may undo such state court awards if the labels are inconsistent with the parties' true intentions and dischargeability rights.

Removal and remand issues. A case filed in state court may be removed to the federal court for disposition by the bankruptcy court. However, the bankruptcy court will not likely retain cases such as personal injury actions that are traditionally determined in state court, and the bankruptcy court could remand the case back to the state court.

Nondischargeable state court judgments. Examples of state court judgments that are not dischargeable in individual Chapter 7 cases include: judgments for most governmentally imposed fines, penalties, or forfeitures; money judgments based on fraud, embezzlement, larceny, and willful or malicious injury to persons or property; and money judgments for death or personal injury arising from accidents involving intoxicated drivers. The reorganization chapters (11, 12, and 13) provide broader discharge opportunities than are available to Chapter 7 debtors.

A creditor who desires to have his or her claim or judgment against a debtor excepted from the debtor's discharge should, typically, initiate a timely action in bankruptcy court to have the claim adjudicated. A creditor's failure to do so, particularly where some type of wrongdoing is alleged (fraud, willful and malicious injury, etc.), is likely to result in a discharge of that judgment.

Collateral attacks against state court judgments in bankruptcy court. A state court judgment that is based on specific findings of fact and conclusions of law is more likely to be adopted by, or otherwise serve to estop collaterally, the bankruptcy court when it is presented with the issue of dischargeability of that judgment.

Default judgments or issues not fully litigated in state court may be subject to collateral attack in the bankruptcy court. But collateral estoppel applies in bankruptcy proceedings to matters that have been fully litigated and determined in state courts.

Judgments for embezzlement, fraud, intentional torts, and drunk driving under Chapter 13. Money judgments based on driving while intoxicated are not dischargeable in Chapter 13, but money judgments for embezzlement, fraud, and intentional torts are. In Chapter 13, debtors usually agree to pay creditors from future income over an extended period of time pursuant to a plan approved by the bankruptcy court. Such a debtor is not entitled to discharge until the successful completion of payments under the plan.

Criminal restitution and fines. Restitution and fines are dischargeable only if the criminal sanction was imposed as a compensation for pecuniary loss rather than as punishment. A restitution obligation is both penal and compensatory, so it is not dischargeable. Orders that are clearly meant to punish, at least in part, would render the sanction nondischargeable.

Jurisdiction of a state court to determine dischargeability in bankruptcy. Only bankruptcy courts can determine whether to grant or deny a discharge in bankruptcy, but state court judges can ascertain whether discharge has in fact been granted or denied through evidentiary methods of proof of any fact. Issues relating to dischargeability are addressed in more detail in various places in the ABI publication referenced above.

Verification of bankruptcy filings. The state court judge can call the bankruptcy court clerk's office to verify bankruptcy filings. Phone numbers for clerks' offices appear in the ABI publication referred to above, or in the "Government Listings" section of most telephone directories under U.S. Government, Courts, District Court for (Name of Federal District), Bankruptcy Court, Clerk's Office. An alternative is to require the debtor's lawyer to file with the state court a date-stamped copy of the debtor's filed bankruptcy petition or Official Bankruptcy Form 9 ("No-

tice of Filing Under the Bankruptcy Code, Meeting of Creditors and Fixing of Dates") after such form has been issued by the bankruptcy court.

2. Two Approaches of Bankruptcy Courts in Dealing with State Courts

Because bankruptcy stays are a continuing source of friction between bankruptcy judges and state trial judges, some courts have developed procedures and suggestions for reducing the amount of tension. In the Western District of Washington, the bankruptcy court adopted the following formal procedure for dealing with the issue.

The attorneys involved in a case in the state courts are required to notify the state court judge that a bankruptcy affecting the state court case has been filed. The state court judge then sends a letter to the bankruptcy court asking that he or she be notified of the critical events in the bankruptcy case, especially final disposition. The bankruptcy court then includes the state court judge on the creditors' notice list to receive notice of final discharge.

In addition, the bankruptcy clerk sends out a notice to all the nearby state superior courts informing them of the PACER computer software system. PACER allows any person or court at any time, via a computer and modem, to dial up a case and check the status of that case. The Washington Administrative Office of the Courts first began using PACER to check the status of a large list of bankruptcy cases, and it now uses it on an ongoing basis.

In the U.S. District Court for the Northern District of California, the clerk of the bankruptcy court assists state courts in two ways. The first arose because many debtors were listing fines from county criminal violations (traffic, etc.) for discharge in their bankruptcy case. These debts are not dischargeable under federal law, but the local state courts were unsure how to proceed. Local court administrators contacted the bankruptcy court and worked out a procedure for notifying debtors that criminal fines are not dischargeable. The local state court administrators were already receiving the usual automatic bankruptcy notices to creditors. With advice from the bankruptcy court, when the local state court administrators receive such a bankruptcy notice they check their records and immediately send a letter to the debtor with a fine advising that the fine is not dischargeable.

The second action taken by that particular bankruptcy court is holding once-a-year "brown bag" lunches for state superior and municipal court judges to explain the effects of bankruptcy stays and how such stays affect state court actions. The bankruptcy judge invites all the state judges in the seven-county area to the luncheon meeting.

One bankruptcy judge from that district, Judge Alan Jaroslovsky, has also prepared an outline for state judges that describes the policies and procedures of the Northern District of California in dealing with state courts. This outline appears below.

Dealing with Bankruptcy Stays
Some Practical Suggestions to State Court Judges on How to Deal with Bankruptcy Issues, by Alan Jaroslovsky, U.S. bankruptcy judge, Northern District of California

I. Introduction

State court judges are frequently presented with issues of bankruptcy law. Typically, these fall into one of two categories:

• One party argues that the automatic stay prohibits the matter from going forward; or

• One party argues that the debt sued upon has been discharged.

Generally speaking, a state court judge presented with such an issue has three choices:

1. The judge can decide the matter himself or herself; or
2. The judge can send the parties to the bankruptcy judge for a ruling; or
3. The judge can call the bankruptcy judge and discuss what to do.

Personally, I recommend the third approach—a phone call will resolve most problems. However, the first two options are also worthy of discus sion. The three options are reviewed below.

II. The State Court Judge Can Decide the Issue

A. Automatic Stay Issues

If the issue involves application of the automatic stay the state court judge can attempt to determine if the stay applies. In many cases, it is a simple matter to look at the statute and bankruptcy rules and determine if the stay applies. For instance, criminal proceedings and the collection of support are specifically exempted by sections 362(b)(1) and (2) of the Bankruptcy Code. Likewise, Rule 6009 of the Federal Rules of Bankruptcy Procedure specifically allows the trustee or debtor in possession to proceed with litigation in any court.

From the state court's perspective, the problem with proceeding when the automatic stay might apply is that whatever the court does might be void. If

I were a state court judge faced with the argument that the proceedings were stayed by a bankruptcy proceeding, I would proceed if it were a very short matter, such as a motion or default hearing. However, I would be hesitant to proceed with a full-day trial or anything longer for fear that whatever was done would be void and the time spent on it wasted. Instead, I would probably call the bankruptcy judge or order the parties to get a ruling from the bankruptcy judge.

B. Dischargeability Issues

There are twelve types of nondischargeable debts, ranging from taxes to student loans to debts of creditors who had no knowledge of the bankruptcy. The bankruptcy court has exclusive jurisdiction over lawsuits concerning just three types of debt: fraud, fiduciary defalcation, and intentional torts. As to the other nine types of nondischargeable debt, the bankruptcy court and the state court have concurrent jurisdiction. Thus, if a creditor sues a debtor in state court and the debtor raises discharge of the bankruptcy debt as an affirmative defense, the state court probably has jurisdiction to hear it if it wants to.

III. Sending the Parties to Bankruptcy Court

Generally speaking, bankruptcy issues are raised in state court by either bumblers or pettifoggers. No competent debtor's counsel wants the state court to decide bankruptcy issues; the issue may be presented in state court because the debtor's counsel does not know how to get the issue before the bankruptcy judge. On the other hand, sly debtor's counsel sometimes try to confound a state proceeding by raising bankruptcy issues which they know a bankruptcy judge would summarily dismiss as meritless.

Ordering the parties to place the issue before the bankruptcy court may not work if counsel are not competent or the party raising the bankruptcy issues knows they are meritless. In such circumstances, it is better for the state court judge to contact the bankruptcy judge directly.

IV. Calling the Bankruptcy Judge

Most bankruptcy judges are eager to cooperate with their state counterparts. Often a call to the bankruptcy judge results in quick assurance that a state court trial can proceed (e.g., that a criminal matter is not stayed by the automatic stay). If it is more complicated, the bankruptcy judge can set up a hearing on the spot (e.g., "The automatic stay applies but it sounds like it should be lifted. Order the parties to appear before me at 2:00 p.m.").

All of the personnel of my bankruptcy court consider it the highest priority to assist state courts and law enforcement officers. The division chief (in essence, the office manager of this branch of the court) should be contacted for information concerning whether or not a bankruptcy has been filed and the contents of any particular file.

The courtroom deputy can also be called. She knows how I can be located and my availability for hearings. My secretary is in charge of processing orders and can tell you whether an order has been signed and entered. She can also assist in locating me.

3. Other Approaches of Bankruptcy Courts in Dealing with State Courts

U.S. Bankruptcy Judge Kenneth J. Myers (S.D. Ill.) described in a December 20, 1994, letter to Judge William J. Bauer (U.S. Ct. App. 7th) how judges in his district resolved problems regarding bankruptcy stays and their consequences in the state courts. Of particular note is the meeting for all federal judges and chief state judges in southern Illinois to discuss issues of mutual concern about the relationship between state and federal courts, including bankruptcy courts and bankruptcy stays. Portions of Judge Myers' letter appear below:

> As often happens, seemingly simple problems are not subject to simple solutions. . . .
>
> Chief District Judge Phil Gilbert recently convened a meeting of the federal judges and chief state judges in southern Illinois to address issues of mutual concern. We met and had a very productive discussion concerning the relationship between the state and federal courts. At that time, the question of the implication of the automatic stay was raised by a number of judges. The primary concern was not notification of the bankruptcy but rather what the judge should or could do once notified that a bankruptcy proceeding was in progress and a stay in effect. The state judges were somewhat shocked to learn that, normally, obtaining an order granting relief from the automatic stay to allow pending litigation to proceed is a relatively simple process involving a short hearing before the bankruptcy judge. The problem of the automatic stay and its impact on state court litigation appears to be one of ignorance by attorneys who believe that once a stay is in effect the state court litigation is stayed until the bankruptcy proceeding is concluded. This, of course, is not the case at all. At the meeting with the state judges, I offered to appear in the various circuits to discuss with all of the state judges the implications of the automatic stay and what could be done to expedite state court proceedings when a bankruptcy case is involved. That offer remains open.
>
> Additionally, our office is always available to answer any inquiries from state judges concerning pending bankruptcy matters. . . . [S]tate judges, if

they have the proper equipment, can access the bankruptcy records directly by computer.

Although it may seem simple for the bankruptcy court to implement some type of disclosure procedure, the problems resulting from such a procedure outweigh its benefits. First of all, although the statement of affairs in bankruptcy does require the listing of all suits to which the debtor is or was a party within a year immediately preceding the bankruptcy filing, such information is at times incomplete and, in some cases, omitted from the schedules altogether. In order for the bankruptcy court to notify the state court upon the filing of a bankruptcy petition, clerk's office personnel would need to scrutinize each bankruptcy case to determine if litigation was pending. They would then have to notify someone in the state court and disclose what information was, in fact, available. State court personnel would then have to ascertain which state judge was involved in the pending litigation and relay the information to the appropriate judge. The procedures would be unduly complicated and the information derived unreliable.

On the other hand, a state court rule requiring the parties to disclose in the pending state litigation the filing of a bankruptcy case would be a more efficient way to deal with this problem. State court proceedings in the absence of knowledge of a bankruptcy filing can proceed in a normal fashion until the judge is notified that a bankruptcy case is, in fact, pending. The automatic stay operates against the litigants, not the judge. It should be the obligation of the litigants in the state court case to notify the state court judge of the bankruptcy filing. In short, the problem of nondisclosure in the state court appears to be more one of developing a state court requirement for disclosure, rather than requiring a rather time-consuming procedure in the bankruptcy court, which would yield questionable benefits.[30]

As a follow-up to Judge Myers' letter, Chief Judge Richard A. Posner (U.S. Ct. App. 7th) proposed on January 24, 1995, a rule—to be included in the local rules of all federal courts in Illinois, Indiana, and Wisconsin—placing an obligation on attorneys involved in a civil case in those states to notify the state court judge assigned to the case of the filing of a bankruptcy claim and issuance of a bankruptcy stay affecting the state court proceeding. The text of the proposed rule appears below.

30. Letter from U.S. Bankruptcy Judge Kenneth J. Meyers (S.D. Ill.) to Judge William J. Bauer (U.S. Ct. App. 7th) dated December 20, 1994 (on file with the Interjudicial Affairs Office, Federal Judicial Center).

Stays from Bankruptcy Court

Parties to pending civil litigation in [Illinois, Indiana, and Wisconsin] courts are required to immediately inform the state court judge and other parties in the state court litigation of the filing of a bankruptcy case which results in a stay of the state court proceedings; the requirements of the automatic stay provisions of section 362 of the Bankruptcy Code: the bankruptcy case caption, docket number, court, judge, and the date of filing of the bankruptcy petition; and a statement as to whether counsel has moved or intends to move the bankruptcy court to lift stays.

D. Habeas Corpus and Appellate Matters

1. Habeas Corpus Cases and Review Generally

The following is an excerpt from *Federal Habeas Corpus Review—Challenging State Court Criminal Convictions*, by Roger A. Hanson and Henry W. K. Daley (of the National Center for State Courts).[31]

State prisoners can challenge the validity of their convictions and sentences by filing habeas corpus petitions in a federal court. These petitions allege that the police, prosecutor, defense counsel, or trial court deprived the prisoners of their federal constitutional rights, such as the right to refuse to answer questions when placed in police custody, the right to a speedy and fair trial, and the right to effective assistance of counsel. Because these petitions must have been presented to the state courts for review, the prisoners are relitigating previously resolved issues. Nevertheless, if these petitions are successful in federal courts, federal judges can issue writs of habeas corpus ordering the prisoners to be released from custody, their sentences reduced, or their cases remanded for retrial or resentencing.

These petitions raise basic questions about the respective institutional roles of the federal and state courts, the finality of the criminal legal process, and the efficiency of federal review. Is a federal examination of issues already adjudicated in the state courts necessary to preserve individual constitutional rights? Is swift and sure punishment, a goal of the criminal justice system, compromised or maintained by the review? Are the courts in control of habeas corpus litigation or do these cases take on lives of their own?

31. Roger A. Hanson & Henry W. K. Daley, Federal Habeas Corpus Review—Challenging State Court Criminal Convictions (National Center for State Courts 1992).

These kinds of questions are part of a perennial debate among national and state policy makers, judges, and attorneys concerning the appropriate scope of review, with one side seeking to restrict the scope of federal review and the other side seeking to maintain or to expand the scope.

2. Habeas Corpus Issues in Capital Cases—Sufficiency of Trial Record

Reversal of state court judgments by a federal court in a habeas corpus proceeding, particularly in capital cases, has been a traditional source of friction between state and federal judges.

Insufficiency of the record relating to certain issues sometimes requires a federal judge to reverse the conviction of a defendant in a state court capital case.

State courts can avoid unnecessary reversals of convictions in capital cases, and can avoid causing federal courts to conduct extensive and expensive hearings on habeas corpus proceedings in capital cases, by making sure that the trial record covers the following issues, which Judge Arthur L. Alarcon (U.S. 9th Cir.) cited as the most frequent reasons for such reversals or hearings:

- competency of the petitioner to stand trial;
- capacity of the petitioner to make a knowing and intelligent waiver of a relevant constitutional right;
- whether the petitioner has been treated or hospitalized for a psychiatric disorder;
- impact of the denial of medication prescribed by the petitioner's private physician on his or her ability to comprehend trial proceedings or to assist counsel in presenting the defense;
- alleged failure of counsel to conduct a competent investigation or to call material witnesses;
- impact on the jury of the unsubstantiated shackling of the defendant during trial;
- alleged suppression or destruction of exculpatory evidence;
- unreported rulings on essential instructions, or a lack of clarity in the record as to defense instructions reviewed and rejected by the trial courts;

- scope of oral stipulations between counsel affecting constitutional rights and the defendant's understanding of the stipulations;
- lack of clarity in the record regarding exhibits displayed to a witness in the presence of the jury, such as a gruesome photograph, or awareness of the jury of such evidence;
- failure of the record to indicate whether the jury requested and received an exhibit;
- failure of the record to show that the petitioner read and understood a written waiver of his or her presence at certain stages of the proceedings, or of any other constitutional right;
- alleged knowing presentation by the prosecutor of false testimony;
- alleged failure of the prosecutor to disclose the fact that a state witness testified falsely on cross-examination;
- defense lawyer's alleged conflict of interest;
- alleged bias of the trial judge;
- alleged conflicts or misconduct involving court officials, interpreters, bailiffs, and jurors;
- alleged unconstitutionality of the state's method of execution;
- alleged unconstitutional charging practices, such as a denial of equal protection based on race, national origin, age, gender, or religion; and
- alleged unconstitutional procedures in selecting the grand or petit jury.

3. Death Penalty Case Coordination—Western District of Washington

In early 1989, the U.S. District Court for the Western District of Washington and the Washington State Supreme Court developed procedures to ensure that the handling of death penalty cases was coordinated efficiently.

The key to these procedures was the creation of a system for keeping all interested parties informed as to the status of each death penalty case pending in the courts of the state. This included the Washington State

Supreme Court, the federal district courts, and the affected state trial court judges.

There were four components to this communication network:

1. A biweekly status report of all aggravated first-degree murder death penalty cases that are before the state courts in Washington is prepared and distributed by the attorney general of the state of Washington. This report is distributed to all federal district judges and the federal district court clerk.
2. The Death Penalty Manual, prepared in-house by the clerk, the commissioner, and other personnel of the Washington State Supreme Court, is distributed to the judges of the U.S. district court.
3. The clerk's offices of the state supreme court and the federal district court agree that copies of records in death penalty cases will be transmitted to the district court immediately upon conclusion of state supreme court proceedings if a habeas corpus petition is likely.
4. Cases are assigned, before filing, to federal district judges—cases are assigned using the list of potential death cases submitted by the state. Thus, counsel are aware of the judge to whom a petition will be assigned, and the court is provided with needed materials in advance of any filings. This has resulted in the efficient handling of these cases.

For further information on this death penalty case coordination program and the district's death penalty manual, contact Bruce Rifkin, clerk, U.S. District Court for the Western District of Washington, 215 U.S. Courthouse, Seattle, WA 98104.

4. Early Warning Systems in Death Penalty Habeas Corpus Cases in Federal Appellate Courts

Several federal appellate courts have developed "early warning systems" to allow such courts to anticipate and expedite review of capital habeas corpus cases. Two such circuits are the U.S. Fifth and Ninth Circuits.

The key features of the Fifth Circuit's system are (1) prefiling the record; (2) pre-assigning cases to panels; and (3) tracking the status of cases before and after they reach the court of appeals. The Ninth Circuit system incorporated several of the Fifth Circuit features, especially the

tracking procedures, and included some modifications, which include providing the court with monthly reports detailing the case history, current status, names and telephone numbers of counsel, citations to opinions, and the length of the record. Appendix 13, *infra*, is the standardized form developed for this case tracking system. The Ninth Circuit system also features a "death penalty coordinator" from the staff of the court clerk's office to facilitate communication between counsel, other court coordinators, and the state supreme court.

5. Avoiding Federal Problems—Handling Criminal Cases in State Courts

Senior Judge William W Schwarzer (U.S. N.D. Cal.), former director of the Federal Judicial Center and first chair of the Judicial Conference of the U.S. Committee on Federal–State Jurisdiction, has long had an interest in issues of judicial federalism. In 1989 Judge Schwarzer prepared a paper for a training session of California's Judicial Education Center on "avoiding federal problems"—this paper discusses some of the difficult issues state judges face when handling criminal cases, issues that would be cause for concern of a federal judge reviewing a state criminal case in a federal habeas corpus proceeding. An edited version of the paper appears as Appendix 14, *infra*.

E. Certification and Preemption Issues

1. Certification of Questions of State Law

Certification of state law issues is a common topic on the agendas of state–federal judicial councils. The certification process is one in which federal courts obtain rulings on unclear or novel points of state law. The noted Supreme Court case of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), requires federal courts to apply state substantive law in civil actions where no federal law applies, but to follow federal law for procedural matters in such cases. Many states now have statutes, rules, or court orders permitting the certification of state law issues by federal courts to the highest court in the state and studies have found that these procedures are immensely helpful to state and federal judges.

In 1994 the American Judicature Society (AJS), with support from the State Justice Institute, conducted a comprehensive survey of certification

of questions of state law among federal judges in December 1994 to focus on the issues involved in certification procedures. The results of the AJS survey were reported in *Certification of Questions of Law: Federalism in Practice* (1995), by Jona Goldschmidt; it is available from the American Judicature Society, 180 N. Michigan Ave., Chicago, IL 60601-7401, phone (312) 558-6900.

2. Uniform Certification of Questions of Law Rule

The Uniform Certification of Questions of Law Rule was prepared by the National Conference of Commissioners on Uniform State Laws and was first available in 1967. The text of the uniform rule appears below.

The Uniform Certification of Questions of Law Rule (1995)

Section 1. Definition[s]. As used in this [act] [rule]: (1) "state" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States; (2) "tribe" means a Native American tribe, band, or village recognized by federal law or formally acknowledged by a state.

Section 2. Power to Certify. The [supreme court] [or an intermediate appellate court] of this state, on the motion of a party to a pending cause or its own motion, may certify a question of law to the highest court of another state [or of a tribe] [or of Canada, a Canadian province or territory, Mexico, or a Mexican state] if: (1) the pending litigation involves a question to be decided under the law of the other jurisdiction; (2) the answer to the question may be determinative of an issue in the pending litigation; and (3) the question is one for which an insert is not provided by a controlling appellate decision, constitutional provision, or statute of the other jurisdiction.

Section 3. Power to Answer. The [supreme court] of this state may answer a question of law certified to it by a court of the United States or by [an appellate] [the highest] court of another state [or of a tribe] [or of Canada, a Canadian province or territory, Mexico, or a Mexican state], if the answer may be determinative of an issue in a pending case in the certifying court and if there is no controlling appellate decision, constitutional provision, or statute of this state.

Section 4. Power to Amend Question. The [supreme court] of this state may reformulate a question certified to it.

Section 5. Certification Order; Record. The court certifying a question shall issue a certification order and shall forward it to the designated receiving court. Before responding to a certified question, the receiving court may

require the certifying court to deliver its record, or any portion of the record, to the receiving court.

Section 6. Contents of Certification Order. (A) A certification order must contain: (1) the question of law to be answered; (2) the facts relevant to the question, showing fully the nature of the controversy out of which the question arose; (3) a statement acknowledging that the receiving court may reformulate the question; and (4) the names and addresses of counsel of record and unrepresented parties. (B) If the parties cannot agree upon a statement of facts, then the certifying court shall determine the relevant facts and shall state them as a part of its certification order.

Section 7. Notice; Preference. The [supreme court] of this state, acting as the receiving court, shall notify the certifying court of acceptance or rejection of the question; and in accordance with notions of comity and fairness, it shall respond to an accepted certified question as soon as practicable.

Section 8. Procedures. After the [supreme court] of this state has accepted a certified question, proceedings are governed by [the rules and statutes governing briefs, arguments, and other appellate procedures]. Procedures for certification from this state to a receiving court shall be those provided in the rules and statutes of the receiving forum.

Section 9. Opinion. The [supreme court] of this state shall state in a written opinion the law answering the certified question and send a copy of the opinion to the certifying court and to counsel of record and unrepresented parties.

Section 10. Cost of Certification. Fees and costs are the same as in [civil appeals] docketed before the [supreme court] of this state and shall be equally divided between the parties unless otherwise ordered by the certifying court.

Section 11. Severability. If any provision of this [act] [rule] or its application to any person, court, or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] [rule] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] [rule] are severable.

Section 12. Construction. This [act] [rule] shall be construed to effectuate its general purpose to make uniform the law of those jurisdictions that enact it.

Section 13. Short Title. This [act] [rule] may be cited as the Uniform Certification of Questions of Law [act] [rule] (1995).

Section 14. Effective Date. This [act] [rule] shall take effect on _____.

3. Federal Preemption of State Law

The following was adapted from a paper prepared in September 1995 by Senior Judge William W Schwarzer (U.S. N.D. Cal.).

I. Categories of Preemption

The supremacy clause of the Constitution[32] states that the Constitution and all laws made under its authority shall be the supreme law of the land. Obviously the effect of this clause is not to supersede all state law. It supersedes state law only when necessary to give federal law, or the Constitution, its intended effect. When it does supersede state law, it results in preemption. Determining when courts will find preemption, and what effect they will give it, is often complicated and not readily predictable.

The general guidelines for preemption were summarized by the Supreme Court of the United States in *English v. General Electric Co*.[33] Based on its prior decisions, the Court described three categories of preemption, as follows:

A. Express preemption: State law is preempted to the extent that Congress has expressly provided for preemption.[34]

B. Field preemption: State law may also be preempted by implication where a statute, though lacking explicit preemption provisions, regulates a field that Congress intended to be occupied exclusively by the federal government.[35]

32. U.S. Constitution, Art. VI, para. 2.

33. English v. General Electric Co., 496 U.S. 72 (1990).

34. The Employee Retirement and Income Security Act (ERISA) (29 U.S.C. §§ 1001–1461) expressly supersedes "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . ." (29 U.S.C. § 1144(a)); Shaw v. Delta Airlines, 463 U.S. 85, 95–100 (1983); Public Health Cigarette Smoking Act of 1969 (15 U.S.C. §§ 1331–1340) specifically provides that "[n]o statement relating to smoking and health, other than the statement required by [the act] . . . shall be required on any cigarette package [or on advertising of labeled cigarettes]" (15 U.S.C. § 1334(a)). In *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2619–25 (1992), this preemption clause was held to preempt state law claims based on failure to warn, but not claims based on breach of express warranty, intentional fraud, or conspiracy since Congress expressly limited the scope of preemption intended.

35. Section 301 of the Labor Management Relations Act provides that "[s]uits for violation of [collective bargaining agreements] may be brought in any district court . . . " (29 U.S.C. § 185(a)). As a matter of policy, this section is construed to preempt the application of state law to claims requiring the application or interpretation of a collective bargaining agreement. *See* Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 403–06 (1988). Sections 7 and 8 of the National Labor Relations Act (NLRA) protect certain concerted ac-

Field regulation, since it is not express, is necessarily by implication. The question arises whether field preemption may be implied where Congress has expressly provided for limited preemption. In *Cipollone v. Liggett*[36] a plurality of the Supreme Court reasoned that since Congress had made express provision for preemption in connection with failure to warn, preemption could not be implied with respect to other claims such as breach of warranty or fraud. On the other hand, in *Freightliner v. Myrick*[37] a unanimous court, holding that the federal government's failure to enact brake standards under the National Traffic and Motor Vehicle Safety Act[38] did not preempt state tort law, said that "[t]he fact that an express definition of the preemptive reach of a statute 'implies' . . . that the Congress did not intend to preempt other matters does not mean that the express clause entirely forecloses any possibility of implied preemption . . . *Cipollone* supports an inference that an express preemption clause forecloses implied preemption; it does not establish a rule."[39]

C. Conflict preemption. State law is also preempted to the extent that it actually conflicts with federal statutes or the Constitution.

Conflict preemption exists where state law either (1) makes it "impossible for [a party] to comply with both federal and state law" or (2) would "frustrate" the accomplishment and execution of the full purposes and objectives of the Constitution.[40]

tivities and prohibit defined unfair labor practices (29 U.S.C. §§ 157, 158). These sections are construed to preempt application of state law directed either at (1) conduct actually or arguably prohibited or protected by federal law, San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959), or (2) activity Congress meant to leave unregulated, Machinists v. Wisconsin Emp. Rel. Comm'n, 427 U.S. 132, 140–48 (1976); federal standards for crossing safety issued under the Federal Railroad Safety Act of 1970 (45 U.S.C. §§ 421–444) do not preempt state common law negligence claims with respect to crossings, but federally prescribed train speed limits preempt state law claims based on claims of excessive speed. CSX, Inc. v. Easterwood, 113 S. Ct. 1732 (1993); even where Congress has not specifically legislated in a field, its silence may be interpreted as evidencing an intention to leave it free of state regulation, preempting state law. This occurs primarily under the dormant commerce clause. For example, in *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2012–19 (1992), Alabama's imposition of a fee on the disposal of out-of-state waste was held to be a violation of the Commerce Clause. *See also* Philadelphia v. New Jersey, 437 U.S. 617, 623–29 (1978).

36. Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992).

37. Freightliner Corp. v. Myrick, 115 S. Ct. 1483 (1995).

38. 15 U.S.C. §§ 1381–1431.

39. *Freightliner*, 115 S. Ct. at 1488.

40. *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

D. Application. Reference to these three categories provides a helpful though not invariably authoritative analysis because court decisions are not entirely consistent.[41]

II. The Effect of Preemption

Cutting across the three categories of preemption, noted above, is another distinction based on the effect of preemption. A holding that preemption exists leaves open the question what effect it is to be given in the circumstances. Preemption will have two effects: it is either defensive or it is complete.

A. Defensive preemption. In most instances, preemption, whether express or implied, has the effect of only barring application of state law. Thus, defensive preemption

- operates as a defense against a state law claim,
- can be asserted wherever the action is pending, whether in state or in federal court, and
- does not create subject matter jurisdiction and therefore will not permit removal of the action to federal court.[42]

B. Complete preemption. "Federal preemption most often appears as a defense to a plaintiff's claim and 'cannot be the basis of the original federal jurisdiction' . . . the Supreme Court has fashioned a narrow exception to this

41. The Airline Deregulation Act (ADA) bars states from enforcing "a law, regulation, or other provision . . . related to a price, route, or service of an air carrier" (49 U.S.C. § 41713(b)). *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2036–41 (1992), held state consumer protection advertising guidelines to be preempted; *American Airlines, Inc. v. Wolens*, 115 S. Ct. 817, 823–26 (1995), held a consumer state law breach of contract action against an airline based on the terms of its frequent flier program not covered by the preemption clause; *Hodges v. Delta Airlines*, *Inc.*, 44 F.3d 334 (5th Cir. 1995), holding that a claim for personal injury alleged to have resulted from the airline's alleged negligent stowing of a case of rum in the overhead storage bin was not preempted.

42. Franchise Tax Bd. v. Laborers Vacation Trust, 463 U.S. 1 (1983) (no federal subject matter jurisdiction of action to determine validity of imposition of state taxes on ERISA trust though ERISA preempts power to tax trust). *See also* Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986) (no federal subject matter jurisdiction over claim alleging misbranding of drug in violation of Federal Food, Drug and Cosmetic Act (21 U.S.C. §§ 333–395)); Gile v. Optical Radiation Corp., 22 F.3d 540, 541–45 (3d Cir. 1994); bar of Medical Device Amendments (MDA) to the Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 360c–360ss, against state requirements relating to safety or effectiveness of medical devices (e.g., contact lenses) different from or additional to federal requirements preempts state law product liability claims; MacDonald v. Monsanto Co., 27 F.3d 1021, 1023–25 (5th Cir. 1994); Insecticide, Fungicide, and Rodenticide Act's (IFRA) (7 U.S.C. §§ 136–136y) bar against state labeling requirements additional to federal requirements preempts state law claims based on improper labeling.

rule. The preemption defense can 'be the basis of the original federal jurisdiction' when Congress has completely preempted a given area of state law. This . . . permits recharacterization of a plaintiff's state law claim to a federal law claim.[43] In such cases, complete preemption overrides the well-pleased complaint rule and any claim asserted must be treated as one arising under federal law, regardless of whether it is meritorious. (The difference between defensive and complete preemption can be analogized to the difference between a fly swatter and a vacuum cleaner.) Thus complete preemption:

• creates federal subject matter jurisdiction permitting removal of the action even if the claim as a federal claim turns out not to be actionable.

• does not preclude concurrent jurisdiction in the state court (except for the rare instances where it is expressly barred by statute).[44]

C. Application. From time to time, courts appear to overlook the distinction between defensive and complete preemption and assume that federal subject matter jurisdiction exists when defensive preemption is involved.[45]

Another approach to the issue of preemption, prepared by Justice Susan Graber of the Oregon Supreme Court, appears as Appendix 15, *infra*.

43. Bruneau v. F.D.I.C., 981 F.2d 175, 179–80 (5th Cir. 1992).

44. Because ERISA's statutory enforcement scheme is exclusive of other remedies with respect to claims relating to employee benefit plans, the effect of its supersession clause is to displace state law with respect to claims falling within scope of the act. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54–57 (1987); though preemption under section 301 of the Labor Management Relations Act is implied, not expressed, the policy in favor of national uniformity is so powerful that it displaces state law with respect to claims involving the interpretation or enforcement of collective bargaining agreements. *Lingle*, *supra* n.35, at 403; Steelworkers v. Rawson, 495 U.S. 362, 368–72 (1990) (claim based on breach of union's duty of fair representation preempted); Note: both ERISA and Section 301 have spawned an extensive and complex jurisprudence of preemption that is in a constant state of flux. Not every claim involving an employee under a benefit plan or a collective bargaining agreement is necessarily preempted; Rosciszewski v. Arete Associates, Inc., 1 F.3d 225, 228–33 (4th Cir. 1993); Copyright Act (17 U.S.C. § 301 (a)) displaces copyright claims under state computer crime act; Grote v. Trans World Airlines, Inc., 905 F.2d 1307, 1309–10 (9th Cir. 1990); Railway Labor Act (45 U.S.C. §§ 151–188) displaces employee's state law claims for breach of covenant of good faith and fair dealing.

45. Stamps v. Collagen Corp., 984 F.2d 1416, 1420–24 (5th Cir. 1993). MDA held to preempt state law personal injury claim in an action that had been removed from state court without indication of the basis for federal jurisdiction; Richardson v. Advanced Cardiovascular Sys., Inc., 865 F. Supp. 1210, 1212–19 (E.D. La. 1994), following *Stamps, supra* MDA held preempted state law action that had been removed on basis of federal question jurisdiction.

II. Education and Administrative Matters

Our federalist system of government, with its overlapping jurisdictions and potentially conflicting applications of substantive law, poses a challenge to both state and federal courts. As seen in the previous chapter, effective communication and cooperation between the state and federal judicial systems is one way to maximize efficiency in case management. But collaborative efforts go beyond the development of policies and procedures that affect the disposition of individual cases. Several jurisdictions report that efforts to share ideas, expertise, personnel, and tangible resources strengthen both judicial systems. In some instances, courts have found that pooling their respective resources produced certain economies of scale, eliminating duplication and saving money. At other times, coordinated approaches by state and federal courts reduced the appearance of inconsistency, improving public confidence and respect for both court systems. In addition to technical competence by their respective judges, state and federal courts depend heavily on their internal administrative machinery and on individuals outside of the immediate control of the judiciary (e.g., practicing attorneys, executive and legislative officials, and media representatives) for maintaining their credibility as public institutions.

This chapter describes collaborative efforts undertaken by state and federal courts to address these critical areas of court operations: judicial education, facilities and services, and relations with nonjudicial institutions.

A. Joint Education and Training

Joint judicial education reduces duplicative programs and seminars, freeing resources to cover a broader scope of topics of interest to state and federal judges. There are many topics that cover common judicial experience, regardless of the court system. In addition, joint educational programs provide opportunities for state and federal judges to discuss issues of mutual concern and to establish informal collegial relationships.

The scope of judicial education for both state and federal judges has expanded significantly in recent years. Traditional programs and seminars focus on judges' professional skills and knowledge, such as case-management techniques and developments in statutory law and case law involving evidence, procedure, and substantive law. Newer programs introduce judges to innovations in court management and administration (e.g., court-annexed ADR), interdisciplinary approaches to issues confronting the judiciary, and more expansive examinations of the philosophical, ethical, social, and cultural implications of law in contemporary society.

1. Examples of Joint Education Programs

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

Examples of such programs, which include both seminars and conferences, include:

- a seminar for experienced appellate judges at New York University Law School held annually in June;
- a seminar for new appellate judges at New York University Law School held annually in late July;
- the national appellate judges conference in Washington, D.C., in March;
- the Harold R. Medina Seminar on Science and the Humanities at Princeton University held annually in June;
- a tri-state seminar involving both trial and appellate judges from Vermont, New Hampshire, and Maine;

- a Federal Judicial Center program on science at the Banbury Center of Cold Spring Harbor Laboratory in October 1996 for both appellate and trial judges;
- a seminar on science at Duke University held annually in June;
- a videoseminar on "New Developments in the Federal Law of Habeas Corpus" in September 1996 emanating from ALI-ABA headquarters in Washington, D.C.;
- a three-day seminar being planned by the State–Federal Judicial Council of Florida for December 1997;
- seminars held in 1993 in California on the judge's role in settlement of cases; and
- two symposia in 1994 sponsored by the California State–Federal Judicial Council on handling capital cases.

Several factors have influenced the movement for judges to join together for educational experiences, including the following:

- a decrease in the amount of funds available for judicial education and a recognition of the need for maximum use of scarce judicial resources;
- a realization by both state and federal judges of the commonage of judicial experience that exists between them and the resulting virtue in meeting to learn together;
- a desire among judges from both systems to discuss issues of common interest and concern and to share experiences; and
- a heightened sensibility among judges to issues of judicial federalism.

Details of the aforementioned seminars and conferences include the following:

Videoseminar on Habeas Corpus. The Federal Judicial Center and the ALI-ABA network conducted a national videoseminar in September 1996 on new developments in the federal law of habeas corpus, specifically focusing on the provision of Title I of the Antiterrorism and Effective Death Penalty Act, passed by the Congress in the spring of 1996. The day-long seminar, open to both state and federal judges, brought together as presenters and commentators national academic and lawyer experts on federal habeas corpus. It included an overview of the Act and discussions on retroactivity, constitutional issues, the impact of the Act on federal-

ism, and the issue of survival of preexisting judicial standards. The final session was a question and answer period for the participants.

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

The 1996 seminar for experienced judges was held June 15–21. Subjects covered included a review of the most recent Supreme Court term, constitutional interpretation, problems of federalism, measurement of noneconomic and punitive damages, problems in appellate review, statutory interpretation, criminal procedure, law and religion, law and medicine, and the impact of the legal system on competitiveness.

Presentations at the new appellate judges seminar, conducted from July 15–21, 1996, focused on oral argument, conferencing and collegiality, styles of judicial reasoning, the process of decision making, opinion writing, problems of appellate review and appellate administration, and the craft of judging.

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

National Appellate Judges Conference. State and federal judges of the Appellate Judges Conference of the American Bar Association helped sponsor a three-day meeting for state and federal appellate judges from all parts of the nation in March 1996 in Washington, D.C. The Federal Judicial Center also provided funds for the program. The conference agenda included presentations on relationships between state and federal courts and between the three branches of government, judicial collegiality, and the judiciary's relationship with the public. For complete details of the conference, see the January 1996 issue of the *State–Federal Judicial Observer* (No. 11, p. 1).

Duke University Science Seminar. For the past five years a seminar for state and federal judges on "Judging Science" that focuses on issues of scientific evidence that arise in state and federal courtrooms has been

conducted at Duke University in Durham, N.C. The annual seminar is usually held in May. It is limited to twenty judges—from five to seven federal judges join thirteen to fifteen state judges for six days of presentations and discussions. The first seminar was funded by a grant from the State Justice Institute; successive seminars have been supported by grants from private foundations. For the past three years the seminar has been directed by Judge Gerard T. Wetherington (Fla. 11th Jud. Cir.). For information about the seminar, contact Judge Wetherington, c/o Duke University Private Adjudication Center, 8000 Weston Pkwy., Cory, NC 27513, phone (919) 677-9363, fax (919) 677-9166.

Seminar on Health Care. The FJC sponsored a seminar June 24–26, 1996, in Manalapan, Fla., on "Health Care and the Legal System" attended by both federal and state judges. The seminar was supported by a grant from the Henry J. Kaiser Family Foundation of Menlo Park, Cal. Participating judges heard presentations on the health care delivery system, legal and ethical issues relating to health care, public health issues, "medical futility" and litigation prospects, medical practice guidelines, relationships and transactions among health care providers and payers, "trade-offs" in cost, quality, and access, experimental treatments, state initiatives in health care, and alternative dispute resolution issues in health care. Nine state judges and twenty-one federal judges attended the seminar.

Seminar of the Florida State–Federal Judicial Council. A planning committee of the Florida State–Federal Judicial Council has been formed for the presentation of a seminar for state and federal judges in Florida in December 1997. The three-day seminar, also supported by the Federal Judicial Center, will feature presentations on habeas corpus problems in death penalty cases, plenary sessions on other broad subjects of interest to state and federal judges, and break out sessions focusing on specific topics. Two outcomes of the seminar are anticipated: (1) an educational experience involving "combined forces" providing "superior course offerings on topics of mutual interest and exploration of areas of conflict," and (2) the development of collegiality among judges who rarely have time to meet and spend time together. Members of the planning committee include Florida state judges Robbie M. Barr, Michael Jones, and Disela Cordone and federal judges Chief Judge Gerald B. Tjoflat (U.S. 11th Cir.), Chief Judge Maurice M. Paul (U.S. N.D. Fla.), and Judge Stanley Marcus (U.S. S.D. Fla.). Further information about the seminar can

be obtained by writing to Chief Judge Maurice M. Paul, U.S. District Court for the Northern District of Florida, U.S. Courthouse, Gainesville, FL 32607-0268, phone (352) 380-2415.

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

The New England Tri-State Seminar. Beginning in 1994, approximately 150 state and federal judges in the tri-state area of Vermont, New Hampshire, and Maine have attended a two and one-half day seminar. Funded for three years by the State Justice Institute, the seminar focuses on one particular subject and is broken down into five half-day segments, each devoted to one particular aspect of the seminar's subject. The 1994 seminar, held in Bethel, Me., focused on evidentiary issues. The seminar in 1995, held at Ascutney, Vt., dealt with medical-legal/bioethical issues. The 1996 seminar was held in Mt. Washington, N.H., and dealt with sexual violence.

Plans are being made for the 1997 seminar, which will focus on the liberal arts and the sciences, similar to the Medina seminar at Princeton. The seminar is directed by a six-person committee made up of one judge and one court staff person from each of the three states. The seminar was started through the efforts of Justice Caroline D. Glassman (Maine Sup. Ct.) and Associate Justice James L. Morse (Vt. Ct. App.). For further information about the seminar, contact Associate Justice James L. Morse, Supreme Court of Vermont, 109 State Street, Montpelier, VT 05609-0801, phone (802) 828-3276.

The Harold R. Medina Seminar on Science and the Humanities at Princeton University. The Medina Seminar, now in its seventh year, began in 1990 as a one-and-a-half day seminar on the humanities. Sponsored by the FJC and the Judicial Leadership Development Council, a private, nonprofit corporation located in Washington, D.C., the seminar was expanded in 1992 to include a day of science and an expanded curriculum in the humanities. The faculty for the seminar consists of Princeton pro-

fessors as well as notable speakers from outside the university. It is limited to 20 state judges and 20 federal judges and every year draws over 100 applications.

The Seminar at Banbury Center, Cold Spring Harbor Laboratory. A five and one-half day seminar limited to fifteen state and fifteen federal judges, it was conducted in October 1996 by the Federal Judicial Center and the Judiciary Leadership Development Council, and co-sponsored with the Laboratory. The Laboratory and Banbury Center are located in Huntington, Long Island, one hour's train ride from Manhattan. The seminar covered not only general subjects relating to science but also specific scientific issues. The opening presentation was given by Nobel Laureate and Laboratory Director James D. Watson, co-discoverer of the DNA molecule. For additional information about this seminar, call or write James G. Apple, chief, Interjudicial Affairs Office, Federal Judicial Center, One Columbus Circle, N.E., Washington, DC 20002-8003, phone (202) 273-4161, fax (202) 273-4019.

B. Ethnic, Gender, and Racial Issues

State and federal judges and court personnel have combined efforts to conduct conferences and seminars on ethnic and racial issues in the courts.

1. National Conferences and Seminars

More than 160 state judges, federal judges, court officers, court administrators, legislators, and educators from 53 states and territories attended the first National Conference on Eliminating Racial and Ethnic Bias in the Courts, in Albuquerque, N.M., from March 2–5, 1995. The conference focused on actions designed to assist judicial leaders and administrators in the development of strategies to eliminate the effects of racial and ethnic bias in their judicial systems.

2. Joint Task Forces and Joint Study Projects

State and federal judges and court officials not only participate jointly in conferences and seminars, they have joined together in task forces and study projects dealing with gender, racial, and ethnic issues.

Gender Bias

State and federal judges have acted together in more than one state to combat gender bias in court systems.

For example, in 1993 the Alaska State–Federal Judicial Council appointed a joint State–Federal Gender Equality Task Force. Co-chairs of the task force were Judge Karen Hunt (Alaska Super. Ct.) and Judge James K. Singleton (U.S. D. Alaska). The thirteen-member task force included representatives from other Alaska courts, state court administrators, prosecutors, and bar leaders.

The task force was divided into three subcommittees to focus on state courts, federal courts, and the legal profession. It 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 2, 1995, 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.

The state and federal courts in Montana supported the work of the state bar of Montana in promoting gender fairness. The Montana Supreme Court created a Gender Fairness Task Force in 1990, and its work was carried forward by a standing committee of the state bar—the President's Commission on Women in the Profession. In addition, the federal practice section of the state bar, with the cooperation of lawyer representatives appointed by the state's federal judges, presented two seminars for lawyers on gender fairness and are developing a statewide survey of all 2,000 lawyers in Montana on the issue.

In Hawaii, Associate Justice Robert G. Klein (Haw. Sup. Ct.) appointed U.S. Magistrate Judge Francis I. Yamashita (D. Haw.), a former state judge, as the federal representative on the Hawaii Supreme Court's Per-

manent Committee on Gender and Other Fairness, created in 1989. The permanent committee was merged in 1993 with the gender fairness committee of the Hawaii State Bar Association. The committee developed and conducted training for state judges to prevent sexual harassment.

In Minnesota a federal court judge was included in the membership of state court task forces on gender fairness.

Tribal Court Issues

State and federal courts have become increasingly interested in tribal court issues and have participated in study projects relating to them. In 1988, for example, the Conference of Chief Justices appointed a committee to seek ways to resolve jurisdictional dilemmas between state, federal, and tribal courts.[46] The efforts of that committee resulted in a national conference in the fall of 1993 in which leaders of state, federal, and tribal courts and prominent experts in Indian law developed a national agenda addressing such issues. Following the conference, the Conference of Chief Justices adopted a resolution calling for future projects to adhere to four basic principles:

1. Tribal, state, and federal courts should continue cooperative efforts to enhance relations and resolve jurisdictional disputes.
2. Congress should provide resources to tribal courts consistent with the courts' current and increasing responsibilities.
3. Tribal, state, and federal authorities should take steps to increase the cross-recognition of judgments, final orders, laws, and public acts of the three jurisdictions.
4. The goal of future federal, state, and tribal courts' efforts should be to define what is appropriate jurisdiction of tribal courts over conduct, in Indian country, by tribal members, nonmember Indians, and non-Indians.

The new project, involving federal as well as state and tribal courts, if funded, would support the creation of tribal-state-federal court forums, promote communication and cooperation, and develop intergovernmental agreements that would provide for cross-use of facilities, programs, and personnel in each of the systems. The project would also en-

46. Stanley G. Feldman & David L. Withey, *Resolving State–Tribal Jurisdictional Dilemmas*, 79 Judicature 154 (Nov.–Dec. 1995).

courage exchange of justice system records information and facilitate extradition to and from Indian country.

"A New Paradigm for Fairness: The first National Conference on Eliminating Racial and Ethnic Bias in the Courts," a report issued by the NCSC, includes a section on "interrelations of state, tribal, and federal courts." This discussion is included as Appendix 16, *infra*.

The Judicial Education Division of the FJC conducted, with the U.S. Department of Justice, a seminar in the fall of 1996 that involved federal and tribal judges on the issue of Indian child sexual abuse and jurisdictional and substantive law issues relating to such crimes.

Further Reading

American Judicature Society, *Indian Tribal Courts and Justice,* 79 Judicature 3 (Nov.–Dec. 1995).

C. Facilities and Services

1. Courthouse Security

State and federal courts have resources available, such as the U.S. Marshal's Service's physical security evaluation, to maintain safe and secure court facilities. In addition to cooperating on security assessment and improvement, some courts have "borrowed" more secure facilities for cases that require additional security measures.

In addition to dealing with violent crime as part of their job responsibilities, state and federal court personnel are also potential victims of violent crime. Effective security measures in state and federal courthouses are critical to ensure protection for judges and court personnel, attorneys, litigants, witnesses, and other individuals conducting business within court facilities.

To address some of these concerns, the federal courts developed the *United States Courts Design Guide* to set standards for security measures and equipment in federal court facilities. This guide is available to interested state judges and court administrators, as well as those from the federal system, from the Space and Facilities Division, Administrative Office of the U.S. Courts, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20002.

First released in 1991 as a joint effort of the Administrative Office of the U.S. Courts, the U.S. General Services Administration, and the U.S. Marshal's Service, with assistance from the National Institute for Building Sciences, the guide examines security issues relating to courthouse design, furnishing, and technology. The 1994 edition and 1995 addendum clarify certain ambiguities discovered in earlier editions and provide an expanded treatment of issues surrounding handicapped accessibility.

The Court Security Division of the U.S. Marshal's Service employs a staff of court inspectors throughout the country to assess security needs in federal courthouses and to make recommendations using the guide standards. The U.S. Marshal's Service also provides this service to state courts upon request at no cost on a time-available basis. The state court system in West Virginia and several courts in Montana have availed themselves of the opportunity to have a security survey conducted. As part of the West Virginia survey, an inspector for the U.S. Marshal's Service surveyed the Monongalia County Courthouse in Morgantown, W. Va., in June 1993. The inspector made an overall inspection and security evaluation for the courthouse with specific suggestions to cover security "loopholes." She also reviewed individual judges' chambers, courtrooms, and offices of clerks and other administrative personnel for "security enhancement" and provided recommendations for improvement in each area.

State courts who wish to avail themselves of this service should submit a written request for a courthouse physical security survey to the following address: Donald Horton, chief, Court Security Division, U.S. Marshal's Service, Lincoln Place, 600 Army-Navy Drive, Arlington, VA 22202.

Further Reading

Richard W. Carter, Court Security for Judges, Bailiffs & Other Court Personnel (1992)

Justice Planning Associates, Inc., Courthouse Security Planning: Goals, Measures, and Evaluation Methodology (1991)

National Association for Court Management, Security Guide Subcommittee, Court Security Guide (1995)

United States Courts Design Guide (Administrative Office of the U.S. Courts and the U.S. Marshal's Service 1994 & Supp. 1995)

2. Sharing State and Federal Courthouses and Courtrooms

Sharing courthouses and courtrooms can

- *relieve overcrowding caused by temporary overstaffing;*
- *ease travel requirements and provide convenience for distant litigants and witnesses;*
- *increase venue options; and*
- *maximize court budgets through formal lease and sales arrangements with existing court facilities.*

Overcrowded facilities often provide the impetus for state–federal sharing of court facilities. During the late 1980s, for example, filings in the Washington state courts increased dramatically. To handle the heavy caseloads, state court administrators appointed large numbers of judges *pro tempore,* but had very limited space in which to assign them to work. Fortunately, this period coincided with hearing room vacancies in the Western District of Washington's federal courthouse after the local bankruptcy court moved to new facilities. For over a year, the federal district court allowed state court judges to use the vacant hearing rooms. Although the hearing rooms lacked sufficient space to accommodate jury trials, they were ideal for civil bench trials and pretrial proceedings.

Iowa state and federal courts also have shared court facilities. Rather than require a number of witnesses to travel over 100 miles to the federal courthouse, for example, one federal judge borrowed a county courtroom for the two days needed to conduct a trial. The county courthouse was located less than a mile from the factory where all of the witnesses worked. In another case, federal court facilities were made available for a state criminal trial. The state judge, after granting a motion for a change of venue, discovered that all of the county courtrooms at the new location would be unavailable on the proposed date of trial. In both of these cases, the arrangements for sharing facilities were made after brief telephone calls between the chief justice of the Iowa Supreme Court and the chief judge of the U.S. district court (S.D. Iowa).

Federal courts are sometimes better prepared than state courts for proceedings that might attract armed litigants or spectators. This consideration, as well as others, prompted the Western District of Washington to invite the King County [Washington] Superior Court to hold a highly publicized murder trial in the federal courthouse rather than at the

county courthouse. The underlying offense also suggested that removal from the county courthouse might be appropriate: the defendant allegedly shot and killed his estranged wife while standing in the hallway of the King County Superior Court awaiting commencement of proceedings in a domestic relations case. Shots from the defendant's concealed handgun reportedly missed hitting a state court judge by inches.

In the fall of 1994, the chief judge of the U.S. District Court for the Northern District of California responded to a request from the chief judge of the local superior court for assistance in providing court facilities for the conduct of a high-profile murder case pending in the superior court. The state court made the request because the state court facilities were undergoing repairs for damage from a recent earthquake. The chief district judge made available the ceremonial courtroom in the federal courthouse. The defendant, a local gang member, was charged with taking hostages. In the subsequent police shootout, all of the gang members except the defendant were killed.

The U.S. Marshal's Service provided security at the beginning of the trial, which lasted several months. Security personnel from the superior court assumed the duties of prisoner escort, control of courtroom decorum, and other security details. The superior court judge brought a superior court system staff with him for the conduct of the trial, including a court reporter and bailiff. The only imposition to the federal court, other than the loan of the ceremonial courtroom, was the need to make available a second courtroom where the state judge handled the extensive voir dire, necessitated by the nature of the case.

In Kentucky, according to Judge Eugene E. Siler, Jr. (U.S. 6th Cir.), the state court of appeals (an intermediate court of appeals in which three-judge panels hear cases in different regions of the state) uses federal courtrooms to conduct hearings and hear oral arguments. The federal judges in Kentucky also use state courtrooms in various parts of the state for federal hearings. These arrangements for courtroom sharing were worked out among the Kentucky judges sitting on the U.S. Court of Appeals for the Sixth Circuit, those sitting in the U.S. District Courts for the Eastern and Western Districts of Kentucky, and individual state judges.

In early 1996, when the Suffolk County, Mass., courthouse experienced air quality problems that made parts of the courthouse unusable, the chief judge of the local U.S. district court offered the use of courtrooms in the federal courthouse for state trials.

Budgetary constraints on both state and federal courts may provide other opportunities and incentives for sharing facilities. One recent proposal to decrease federal operational costs involves closing federal courthouses that do not have resident judges, particularly in rural areas. Leasing courtroom space in state or county courthouses would use federal funds more efficiently as well as provide additional revenues for state and local governments. Where the arrangement is mutually beneficial, closed federal court facilities might be sold or leased to state and local courts. This proposal would require some modification to the U.S. General Services Administration requirements that other federal agencies have priority with respect to the use of closed federal office space. However, the potential savings to both the state and federal courts—avoiding new construction for state courts and converting existing federal courthouses to non-federal uses—might make such an exemption worthwhile at both levels of government.

3. Dual Services for State and Federal Judges

Federal law permits state court judges to serve as federal magistrate judges during periods when federal magistrate judges are unable to perform their duties. Judicial absences caused by illness, vacation, attendance at conferences and seminars, and unfilled bench vacancies can disrupt court-management efforts. Traditionally, temporary and part-time judges have bridged the gaps in covering court dockets. Recently, however, a number of federal courts—particularly those in the Ninth Circuit—have looked to state court judges to fill this need.

In Nevada, for example, the federal magistrate judge's clerk keeps a list of state court judges who have indicated their willingness to act as federal magistrate judges whenever the federal district judges and the local magistrate judges are unavailable. Typically, this only occurs when all of the district judges are out of town, such as during the Ninth Circuit annual conference. In most instances, the district judges cover the caseload for their magistrate judge when that magistrate judge is unavailable. The magistrate judge's clerk contacts a sufficient number of state court judges approximately two months before they will be needed.

The state court judges have been willing to assist in this manner and generally volunteer to be available for as long as needed on a pro bono basis. During the period that the state court judges are acting as federal magistrate judges, the district attorneys and police bring their petitions

for arrest and search warrants directly to the state court judge's chambers; for arraignments and other hearings, the state court judge sits in federal court.

The Western District of Washington has a practice of appointing a particular state court judge to serve as the federal magistrate judge. In fact, the federal judges have a great deal of confidence in the state court judge based on their past relationship with him when he was a U.S. attorney. In that jurisdiction, trials and hearings are held in the state courtroom to avoid disrupting the state court judge's routine. Judges in both systems have found no legal or ethical problems with this arrangement.

It is less clear, however, whether federal court judges could perform in a similar capacity for state court judges. Such a role would at least require some clarification in existing federal law and ethics opinions governing extracurricular activities by federal judges. An informal opinion released by the Administrative Office of the U.S. Courts suggested that the statute that prohibits magistrate judges from engaging in the practice of law might be interpreted broadly enough to include serving in a state judicial capacity.[47] That opinion also questioned whether serving as a state judge (or accepting compensation for such service) would compromise the independence of the federal judiciary or would constitute the appearance of impropriety as described in the U.S. Judicial Conference's Code of Conduct for U.S. Judges.

4. Sharing Pretrial Services

Melinda Wheeler, assistant manager for pretrial services for the Kentucky Administrative Office of the Courts, has promoted the idea of sharing pretrial services with her federal counterparts, including sharing criminal records and serving arrest warrants. In one case a federal pretrial services officer from a federal court in a neighboring state called Wheeler to inquire if she could assist with a person arrested on a federal warrant in the neighboring state but who lived in a rural area of Kentucky. Wheeler agreed to cooperate and assigned a state officer to supervise the case, saving the neighboring federal office a considerable sum of money. Wheeler has also made available to the U.S. probation officers in Ken-

47. Marilyn G. Holmes, *Can Magistrate Judges be Appointed as Judges Pro Tempore of Superior Court of a State?,* Court Administration Bulletin 4–5 (Administrative Office of the U.S. Courts, October 1994).

tucky criminal records for the entire state from a central information bank, relieving the federal office of the necessity of checking such records on a county-by-county basis (Kentucky has 120 counties).

Ms. Wheeler describes her program in the following memorandum from March 1996:[48]

> At the request of the Federal Judicial Center I participated in the training of Federal Pretrial Officers this year. One goal of this training was to expose these individuals to alternatives available to them based on state and local experiences. Through these initial discussions two areas of cooperation and interaction came to the forefront. These specific issues involve access to criminal histories and supervision of clients.
>
> My position with Kentucky Pretrial Services led to a question of how we obtained criminal history information. When using SCIC, federal officers within the seven states that border Kentucky had difficulty obtaining dispo sitions and comprehensive criminal history data from our state. Kentucky has 120 counties that often require direct contact to confirm arrest and information on dispositions.
>
> In order to provide comprehensive information for trial courts we collected information on all cases occurring in the state of Kentucky—from minor traffic to capital murder—and centralized the data at our Administrative Office of the Courts. As a service we now provide this information to any federal officer requesting access within ten minutes of their call to our central office. This process eliminated numerous calls and potentially extensive delays in the processing of record inquiries. Since the record is statewide the number of calls required has with most cases been reduced to one.
>
> The second area of interest, subsequent to this training, is that of courtesy supervision. With pretrial officers covering every county in the state, and solid contacts within the local criminal justice community, we can assist with the supervision of individuals whose risk of flight and danger are minimal yet a significant distance from a federal field office. The reciprocity necessary to make this a common practical alternative is limited only by the willingness to make the attempt.
>
> The National Association of Pretrial Services Agencies has member organizations in thirty-eight states and has them listed in a national directory. Many of these agencies are willing to assist in supervision or other duties, that time and distance may make impractical for individual offices. In the

48. Memorandum from Melinda Wheeler, Kentucky Administrative Office of the Courts, dated March 15, 1996 (on file with the Interjudicial Affairs Office, Federal Judicial Center).

era of downsizing and reduced budgets, failure of local, state, and federal court officers to cooperate in areas of common interest may subject the judicial branch to criticism. The dialogue initiated through joint training can be a starting point for more effective utilization of limited resources.

5. Joint Alternative Dispute Resolution (ADR) Programs

With many state and federal courts around the country using alternative dispute resolution (ADR) techniques, ADR has become an area of activity for cooperation between state and federal courts. Some courts have already begun cooperative activities. For instance, in the U.S. District Court for the Northern District of California, the ADR administrator conducts quarterly meetings with ADR administrators from the state and county courts in the San Francisco area to exchange ideas and discuss mutual problems. The ADR administrator of the federal court in the Northern District of Oklahoma chairs the ADR Committee of the state bar association, which regularly reviews ADR rules in state and federal courts.

Some ADR programs require a mediator, or "neutral," and some federal courts recognize service as a state judge as a qualification for this role. In the Southern District of Alabama, one of the qualifications for serving as a neutral is experience as a former judge of the Alabama trial court. This qualification also applies for ADR neutrals in the U.S. district courts for the Middle and Southern Districts of Florida, and the Western District of Missouri.

Cooperative or joint ADR programs in other states include the following:

Oklahoma—In 1988, the U.S. District Court for the Northern District of Oklahoma (Tulsa) began to operate an "Adjunct Settlement Conference Program" to encourage mediated settlements of cases in federal court. The program is staffed by approximately 42 "adjunct settlement judges"—attorneys who are especially trained in mediation techniques. All of the attorneys were hand-picked by the magistrate judge for the district generally due to their experience on both sides of legal disputes. They work on a pro bono basis, conducting approximately 12 mediations per year. The programs current caseload exceeds 500 mediations annually.

Beginning in 1991, the Oklahoma state and municipal courts expressed interest in setting up similar mediation programs and the federal magis-

trate judge has been involved in training their mediators. In addition, the magistrate judge will accept complex state cases for mediation from the state courts on a case-by-case basis.

The two systems in Oklahoma (state and federal) share the same underlying philosophy of noncoercion and use the same basic techniques and procedures for settling cases. Attorneys practicing in both state and federal courts in Tulsa appreciate the consistency between the two systems. The down side to these programs is that they take a lot of administrative time, particularly in matching the right mediator with the right client in terms of legal knowledge, personality, and availability. In addition, most jurisdictions may not have sufficient funding support for this kind of program.

Connecticut—In 1992, two committees were appointed, one by a state judge and the other by a federal judge, independent of one another, to determine which programs could be instituted for better case-management systems. Both committees recommended strong ADR programs. Judge Aaron Ment (Conn. Ct. Adm'r) was appointed to implement the state court program and Judge Robert Zampano (U.S. D. Conn.) was appointed to implement the federal court program. They met to exchange ideas and agreed to propose to their respective judges a joint state–federal ADR program. The proposed program would use senior sitting state judges as mediators. Its official name was Sta-Fed ADR, Inc.

Later the state enacted legislation to permit senior state sitting judges to participate as part of their official judicial duties. The exception applied only to Sta-Fed, not to any for-profit ADR programs. Within 6–8 months, Sta-Fed had a roster of forty-five superior court judges and four supreme court judges participating. There were no federal court judges participating in the Sta-Fed program. (Note: Sta-Fed closed on January 15, 1996, because of an insufficient number of case referrals by state and federal courts. The organization expected at least 700 cases per year for the first two years. It received only 450 in two years. Judge Zampano hopes to revive the program in a different form.)

Michigan—To facilitate mediation in the Eastern District of Michigan, state and federal judges in 1979 encouraged the formation of the Mediation Tribunal Association (MTA), a private, nonprofit ADR program. Local, state, and federal courts adopted nearly identical court rules permitting case referrals for mediation (see Mich. Court Rule 2.403 and Local Rule S3. 1, U.S. District Court, E.D. Mich.). The program is self-

supporting using mediation fees paid by the parties referred to mediation. The MTA director is a state court employee. The MTA has a pool of over 1,000 mediators. Chief Judge Julian Able Cook (U.S. E.D. Mich.) is on the MTA board of directors.

In 1993, the MTA conducted over 7,000 mediations from the state courts and 300 from the federal courts. In prior years they had more federal cases, but in recent years cases have moved expeditiously in the federal courts so there has been less incentive to use mediation.

Joint conduct of ADR in a particular case has also been used by some courts in appropriate cases, such as mass torts or cases in both systems arising out of a common statement of facts. *See* section I.B.12, *supra.*

6. Relations with Attorneys

Encouragement of Pro Bono Programs and Services

Encouragement by state and federal judges motivates lawyers to provide pro bono services. Moreover, coordinated administration of state and federal pro bono programs avoids duplicative programs and reduces competition for the pool of attorneys who regularly perform pro bono work. Legal communities across the country have been paying greater attention to their obligation to provide pro bono or reduced-fee services to individuals who would otherwise be unable to afford these services. Legal Aid and other publicly funded legal services organizations traditionally supplied a major portion of these services. Because of decreases in public funding—particularly with respect to politically unpopular causes and clients—these programs have been significantly reduced in scope in recent years.

To compensate for these reductions, a few jurisdictions have experimented with "mandatory" pro bono services. In most areas, however, the call for increased pro bono activity takes the form of public exhortations by the state bars in the name of professionalism and legal ethics. Even where pro bono services are strictly voluntary, state and federal judges can bolster enthusiasm and assist the local legal community by publicly acknowledging the need for these activities.

For example, the District of Columbia Bar Association credited judicial involvement with the high turnout at an organizational meeting to encourage greater participation in pro bono programs. More than 100 senior partners from the city's 70 largest law firms responded to letters from

the judges of the D.C. local and federal trial and appellate courts. "When the four chief judges [state and federal] call everyone together, people respond," said a managing partner of a D.C. law firm.[49]

The Detroit metropolitan area also consolidated its pro bono services for state and federal courts. The memo formally proposing the consolidation is included at Appendix 17, *infra*.

Attorney Admissions

Concern about perceived declines in legal practice standards has prompted some state and federal courts to become more involved in developing criteria for admission to practice law.

As a practical matter, the practice of "reciprocal admission"—using state licensure as the basis for admittance to practice before the corresponding federal courts—generates very little controversy. The states of Idaho and Hawaii have carried the concept of reciprocal admission one step further: They make a deliberate effort to coordinate state and federal court admissions. Scheduling the admission ceremonies for the state's supreme court and the U.S. district court on the same day saves newly licensed attorneys from having to make two separate trips to the state capital. To date, there have been no reports of simultaneous admission ceremonies for state and federal courts. Absent excessive logistical problems, however, the idea may be worth exploring.

Of somewhat greater concern to both state and federal judges is their perception that the criteria for state licensure—competence with core legal skills (e.g., research, writing, and trial and appellate advocacy), knowledge of substantive law, moral character, and behavioral temperament (e.g., civility toward the bench and the bar)—have undergone significant decline in recent years. In some cases, this perception has prompted state and federal judges to initiate substantive dialogues with various components of the state legal profession to raise the prevailing standards of practice. In Washington, for example, the Washington State–Federal Judicial Council invited representatives from the Washington State Bar and the deans of the University of Washington Law School and Gonzaga School of Law to participate in ongoing discussions about the criteria for licensure.

49. National L.J., Dec. 18, 1995, at 1 (quoting Paul F. Mickey, Jr.).

State and federal judges in many jurisdictions have declined to take a leading role in the reform of legal education, but are nonetheless present among the various professional organizations involved in this area.

Attorney Conduct Rules

State and federal courts traditionally guard with vigor their prerogatives with respect to attorney regulation. However, state and federal courts increasingly recognize the implications of perpetuating ambiguous or conflicting rules of attorney conduct and are beginning to explore ways of harmonizing them.

Differing expectations by state and federal judges about appropriate conduct by attorneys appear to raise thornier issues than those associated with attorney admissions. A recent U.S. Judicial Conference study[50] found that the rules regulating attorney conduct in federal district courts often differed substantially from those adopted by the corresponding state supreme court. In some cases, the district court rules also varied from those adopted by the federal circuit in which the district court was located.

In any given state or federal court, for example, the applicable rules governing attorney conduct might be the *ABA Model Code of Professional Responsibility* (1969); its successor, the *ABA Model Rules of Professional Conduct* (1983); a variant of one of these models as adopted by the state's supreme court; a variant of one of these models as adopted by the federal district court; a separate body of local rules established by either the state supreme court or the federal district court; or any combination of the above. Indeed, for a number of jurisdictions, there was substantial ambiguity as to which set or sets of rules the court had officially endorsed.

Subsidiary problems add to the complexity of disparate codes of conduct. The U.S. Judicial Conference study found, for example, that many district courts felt free to interpret their officially endorsed set of rules using case law pertaining to other versions of attorney conduct rules. Procedural due process, conflicts of laws, and separation-of-powers problems were among the other prominent issues discovered by the study. Home-grown rules were particularly susceptible to "void for

50. Daniel R. Coquillette, Report to the Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Regarding Local Rules Regulating Attorney Conduct in the Federal Courts (July 5, 1995).

vagueness" challenges. Multiforum litigation often raised *Erie*-doctrine and federal abstention complications.

Finally, the assertion by the U.S. Department of Justice that its attorneys are subject only to its own disciplinary rules, and thus exempt from those promulgated by state and federal courts, has created another layer of controversy focusing on the inherent powers of executive agencies to govern the conduct of their own employees. The contested issue in this dispute involves whether Justice Department attorneys may contact opposing parties without securing the consent of opposing counsel—a practice that is prohibited by the vast majority of disciplinary rules.

To date, no specific proposal for resolving these conflicts has generated strong support among state and federal courts. However, the bench and bar at both the state and federal levels recognize the difficulties inherent in the existing patchwork of state and federal professional conduct rules and are giving serious attention to several proposed solutions.

One approach calls for the federal courts to adopt a uniform code of professional conduct, based substantively on the *ABA Model Rules of Professional Conduct,* that would supersede conflicting state codes. Proponents of this approach argue that "federalizing" legal ethics would eliminate conflicts among the federal courts with little or no disruption to existing state legal ethics rules—particularly since the vast majority of states have adopted some version of the *ABA Model Rules.*

An alternate proposal would direct federal courts to adopt and apply the rules of professional conduct for the state in which the federal court sits. Conflicts that arise for cases involving multijurisdictional standards would be decided using established conflict-of-laws principles and *in personam* jurisdiction. The Conference of Chief Justices, a national organization representing the interests of state courts, tends to favor this approach.

The ABA House of Delegates also implicitly endorsed this approach in its recent amendment to Model Rule 8.5, the text of which appears below. Other proposals generally involve variations on one or both of these themes. Although the various proposals' advantages and disadvantages continue to be hotly debated, virtually everyone involved in the dispute—judges and lawyers alike—agree that adopting either approach, or one of their respective variants, is preferable to permitting the existing conflicts to continue unaddressed.

Rule 8.5 Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) for any other conduct, (i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and (ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Further Reading

Daniel R. Coquillette, Reports to the Committee on Rules of Practice and Procedure, Judicial Conference of the United States (July 5, 1995; Dec. 1, 1995; May 14, 1996)

Linda S. Mullenix & Bernard S. Ward Centennial, *Multiforum Federal Practice: Ethics and* Erie, 9 Geo. J. Legal Ethics 89 (1995)

Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation,* 88 Nw. U. L. Rev. 469 (1994)

Attorney Discipline

Most state and federal courts rely on state disciplinary agencies to investigate and make factual determinations about attorney misconduct. Federal courts are prohibited from relying conclusively on these findings as the basis for attorney discipline. However, most federal courts practice "reciprocal discipline" and impose sanctions identical to those imposed by the state courts. State disciplinary agencies and the National Lawyer Regulatory Databank provide notice to state and federal courts about instances of attorney misconduct.

Closely related to the problem of implementing consistent rules of attorney conduct are those associated with their enforcement (e.g., the investigation and imposition of sanctions for misconduct).[51] The ABA's *Model Federal Rules of Disciplinary Enforcement (*1978) proposes a system of attorney discipline in which federal courts refer complaints of suspected misconduct to the state disciplinary agency for investigation and adjudication. The state-based approach capitalizes on existing state resources and expertise in disciplinary enforcement, thus avoiding the creation of duplicative disciplinary agencies within the federal courts. For the majority of federal courts, reciprocity has been as satisfactory in matters of attorney discipline as in attorney admissions.

The general practice of federal courts, when receiving notice of disciplinary action against an attorney, is to issue a show cause order demanding a response from the attorney as to why the federal court should not impose an identical sanction. The show cause provision was established for compliance with *Theard v. United States*,[52] which held that due process considerations prohibit federal courts from relying conclusively on the findings of state disciplinary agencies. Rather, the federal courts "must satisfy themselves that the lawyer's underlying conduct warranted the discipline imposed."[53]

The sticking point in the administration of reciprocal discipline rarely involves whether the misconduct warrants a similar sanction. Rather, the major weakness in this system of disciplinary enforcement is the practical task of identifying the various courts to which the attorney is admitted and informing them that a disciplinary sanction has been imposed. Virtually all state and federal courts require attorneys to notify them of discipline imposed by another jurisdiction—it is not surprising, however, that attorneys so disciplined often fail to do so.

To address this problem, the ABA Center for Professional Responsibility maintains the National Lawyer Regulatory Databank to facilitate notice of discipline to all jurisdictions where the attorney is admitted. In receipt of over 6,000 notices annually of public sanctions imposed for attorney misconduct, the ABA distributes monthly reports to the state

51. For a discussion of this issue, see *Fieger v. Thomas*, 74 F.3d 740(6th Cir. 1995).

52. Theard v. United States, 354 U.S. 278 (1957).

53. American Bar Association, Standing Committee on Professional Discipline and Center for Professional Responsibility, Model Federal Rules of Disciplinary Enforcement 1 (1978).

and federal disciplinary agencies where the sanctioned attorneys are believed to be admitted. Inconsistent systems of attorney identification by disciplinary agencies tend to hamper efforts to match sanctioned attorneys with the jurisdictions in which they practice. One answer proposed by the ABA is the implementation of a uniform identification system, such as that used by Martindale-Hubbell, and recommending its adoption by state and federal licensing and disciplinary agencies.

7. Certification and Standards for Court Interpreters

State and federal courts are beginning to explore pooling resources to develop adequate training, reliable test instruments, and satisfactory standards of practice for foreign language interpreters. Sharing lists of certified court interpreters, recognizing respective state and federal certification standards, and sharing telephone and videoconference technology are additional methods that state and federal courts have devised to increase the pool of qualified court interpreters.

"If interpretation is improper, defendants may misunderstand what is taking place; the evidence heard by judge and jury may be distorted, if not significantly changed. When poor interpretation occurs, the English-speaking members of the court and the non-English-speaking litigants or witnesses *virtually do not attend the same trial*." (emphasis added) William E. Hewitt, Court Interpretation: Model Guides for Policy and Practice in the State Courts (National Center for State Courts 1995)

Dramatic increases in the numbers of non-English-speaking persons in the United States pose significant challenges for both state and federal judiciaries. By delivering inaccurate or incomplete translations, unqualified or poorly trained court interpreters impede equal access to justice for non-English-speaking persons participating in legal proceedings.

However, only a handful of jurisdictions have the necessary expertise and financial resources to conduct adequate training and testing or to develop standards of practice for foreign language interpreters—and for only a limited number of the most common languages. The problems associated with ensuring access to qualified court interpreters led four states—Minnesota, Oregon, Washington, and New Jersey—to form an interstate consortium to develop and administer court interpretation test and training programs. Since its inception, Maryland, New Mexico,

Utah, and Virginia have joined the consortium.[54] Through the interstate consortium, interpreters are tested and certified in foreign languages in which the federal courts do not currently certify interpreters. Thus, the stage is set for greater collaboration between state and federal courts, such as reciprocal recognition of certification.

State and federal courts also have explored technological methods of improving the availability of certified or otherwise qualified interpreters. The Administrative Office of the U.S. Courts, for example, operates a small off-site telephone interpreting program in Las Cruces, N.M. Similarly, the National Center for State Courts recently received grant funding to establish a pilot telephone interpretation program through the consortium. While waiting for these various programs to develop, several state–federal judicial councils are exploring how state and federal courts might share information about and access to qualified court interpreters. Interpreters can become certified in Oregon state courts, for example, by submitting proof of federal certification to the state court administrators.

The Hawaii state and federal courts have also agreed, on an informal basis, to recognize the professional qualifications of interpreters using objective testing criteria. Although the state and federal courts do not have a formal contract to share court interpreters, they exchange lists of qualified interpreters. Under the auspices of a committee of the Hawaii Supreme Court, the courts are also examining the state's certification process, its standards of interpreter ethics, continuing education requirements for certified interpreters, and fees and benefits for court-certified interpreters. Plans are being developed to identify individuals eligible for certification and establish an orientation program funded with fees for materials and training.

The Guidelines for Organization and Operation of the State Court Interpreter Certification Consortium appears as Appendix 18, *infra*. The Model Code of Professional Responsibility for Interpreters in the Judiciary appears as Appendix 19, *infra*. The Model Court Interpreter Act appears as Appendix 20, *infra*.

54. The standard membership fee is $25,000. The fee is adjustable for jurisdictions with non-English-speaking populations less than 100,000 or greater than 1,000,000.

8. Jury Issues

The similarities between the jury systems in the state and federal courts make cooperative efforts between these courts an obvious area for consideration. The data-processing functions that select the names of prospective jurors from source lists can be identical for state and federal courts. The qualifications for service are similar and the paperwork to qualify and summon persons to serve are similar if not identical. The functions performed by the jurors, and the jurors' experiences, both positive and negative, are very similar. It should not be surprising that the jury was one of the first areas where cooperation between the state and federal courts was accomplished.

Sources of Prospective Jurors

The current trend is to broaden representation among prospective jurors by drawing names from merged lists of voters and licensed drivers. State courts in all or part of at least twenty-eight states use merged lists; six use only licensed driver lists; and twelve states and a majority of the federal courts use only voter lists. Drivers lists include persons who have obtained an identification card from the licensing authority.

Since 1974, the U.S. District Court in Colorado has been using a merged voters and drivers list supplied by the state. The federal court requests a specific number of names from the counties encompassed by the different divisions of the court. The state randomly selects names and supplies them to the federal court via computer tape. The state does not screen the names for prior federal court service. The only expense to the court is the cost of the computer tape.

Ten other federal district courts use voter and driver lists supplied by the state—the lists are either premerged or merged after receipt. The federal courts using combined lists are the Northern District of California, the District of the District of Columbia, the District of Hawaii, the Central District of Illinois, the Eastern and Western Districts of Michigan, the District of New Hampshire, the Eastern District of New York, the Middle District of Tennessee, and the Northern District of Texas. In New Jersey each county (vicinage) merges its voters and drivers lists, and the federal court obtains these lists from the individual counties.

The Jury Selection and Service Act[55] requires that the names of prospective jurors be drawn in proportion to the size of the list of registered

55. 28 U.S.C. §§ 1861–1878 (1996).

voters for each county within the federal court's division or district. Combining all of the voters lists for all of the counties in a division and taking a random selection from that list would comply with the statute. However, when the voters list is combined with the drivers lists the merged lists will not necessarily be properly proportioned. This may be a result of the variation in the coverage of the drivers lists by county, but more likely it is caused by differences in the ability to eliminate duplicates, which is related to the format of the county list.

Federal courts randomly select names from merged lists, in the proportion to the size of that county's voters list to the list of voters for the entire division or district.

The increase in minority representation in the master jury wheels brings the representation on juries more in line with census figures. The experience in the California federal district court is typical of that in other state and federal courts using multiple source lists. The negative aspect of using multiple lists is that the undeliverable and nonresponse rates increase. The reason is that the names added when the lists are merged are those of persons who drive but are not registered to vote. This includes noncitizens, nonresidents, and some who cannot communicate in English. The increased administrative effort is the tradeoff for improved minority representation on prospective juror panels.

Cooperation in Data-Processing Efforts

It is possible for a federal court to take advantage of state data-processing efforts, which can be used by the federal court. For instance, the Maricopa County [Ariz.] Superior Court provides data-processing support for Arizona's federal district court. While both use a combined qualification and summoning process, the federal courts use just the voters list. The federal court found that the cost for the county's data-processing services was much less than for their previous support contractor.

Exemptions for State or Federal Service

State and federal courts can cooperate by recognizing service in one court as a valid exemption for or excuse from service in the other. This gives jurors a respite from having to serve again too soon and distributes jury service across a greater portion of the population, thereby enhancing community representation. Some state and federal courts recognize jury service within a given number of years as grounds for excuse from serving.

Many state courts have a one day/one trial term of service for jurors, which results in the use of many persons. Recognition of such abbreviated service in a state court by a federal court could result in significantly reduced lists of eligible jurors for federal court service. Therefore, some federal courts in states with such short terms of service do not recognize state jury service as an excuse from federal court service.

Juror Parking

In Los Angeles, the county contracts from a commercial provider for state juror parking. Each day over 600 persons are on jury duty in downtown Los Angeles. In all the locations of the Los Angeles Superior and Municipal Courts, about 7,000 persons serve each day as jurors. The federal district court for central California obtains parking for its jurors as part of this contract. The federal court reports a savings of over $250,000 annually by using the same contract and taking advantage of the larger volume price.

Juror Awareness Programs

A number of communities have instituted programs to increase public awareness of jury service. The first was developed by the Council for Court Excellence in Washington, D.C., a community-based organization that works for court improvement. Participating on the council are representatives of state (D.C. Superior) and federal courts.

The awareness program, called Jury Service Appreciation Week, takes place during one week each fall when the council publicizes the jury system on radio and television through public service announcements, newspaper advertisements, posters in subway cars, advertisements on buses, and presentations in schools. The council also sponsors programs for the bar and public on court issues including the jury system. Judges from both courts participate in these programs, and administrators and clerks from all the courts help in planning the events.

Other jurisdictions across the country have followed the lead of the Council for Court Excellence. Yet the effort in the District of Columbia remains the only one that draws on the resources of both state and federal courts.

9. Use of Court Technology and Equipment

Technological innovations encourage state and federal court cooperation in developing data exchange and public access systems, supporting demonstration projects and sharing resources.

Computer technology has dramatically affected court procedures in both state and federal courts. Automated docket-management systems are a standard component of modern judicial administration. Real-time transcription of court proceedings (stenotype transcript converted instantaneously to text on video monitors for judge or judge and jury), remote witness examination through video conference, laser disk compilations of discovery documents in mass tort cases, and public computer access to court information—ideas that existed in the realm of science fiction only decades ago—have been introduced in some courts and are becoming commonplace in some areas of the country.

For the most part, however, this technological revolution has occurred mainly on parallel but separate tracks in state and federal courts. Court technology experts have identified two potential opportunities for state–federal court cooperation—information exchange systems and shared technology. Both state and federal courts quickly recognized the potential for electronic data interchange (EDI), a popular technique for transferring information from one computer system to another using well-defined rules. Federal courts sitting in jurisdictions where many of the public roads run through federal lands—Nevada, for example—have found direct access to state driving while intoxicated (DWI) and other motor vehicle records immensely valuable. Indeed, the ability to access court information, such as case dispositions, sentencing, court orders, judgments, and bankruptcy filings, is attractive to a wide range of nonjudicial organizations, including executive branch agencies, educational and research institutions, and private commercial organizations.

Within state and federal courts, two separate organizations have been involved in the development of new EDI applications—the JEDDI (Judicial Electronic Data and Document Interchange) Corporation, a private, nonprofit corporation in the District of Columbia, and X12 EDI, a committee of the American National Standards Institute (ANSI). The JEDDI Corporation, composed of representatives from state and federal courts, the bar, and private industry, has encouraged experimental EDI demonstration projects at all levels of the judiciary. X12 EDI, operating under the auspices of the Government Subcommittee of the Accredited Stan-

dards Committee, develops technical standards for EDI court transactions. For example, X12 recently approved "court notice" and "court submission" EDI transactions as Draft Standards for Trial Use (DSTU). After a trial period to identify any potential "bugs" or limitations, ANSI can approve them as Full Use Standards.

The entire March 1996 issue of the *State–Federal Judicial Observer*, published by the Interjudicial Affairs Office of the FJC, is devoted to developments in electronic filing and the role of the JEDDI Corporation in promoting cooperation between state and federal courts in developing national standards. EDI developments presuppose the need for ongoing and continual exchanges of information between courts. A description of the JEDDI Corporation and its activities, taken from that issue of the *State–Federal Judicial Observer*, appears at Appendix 21, *infra*.

When the need for a particular type of technology is infrequent, some state and federal courts have found it more economical to use each other's existing system rather than develop their own sophisticated and complex interface capabilities. In Iowa, for example, the federal courts do not make extensive use of video conferencing technology, but they have found it convenient to use the state's fiber optic network for this purpose in isolated cases. Similarly, many state and federal courts have found that laser disk technology offers a cost-effective alternative method of compiling discovery documents in mass tort cases.

State–federal judicial councils provide a convenient forum for the demonstration of new technologies for both state and federal judges. The California State–Federal Judicial Council, for instance, has used its meetings to demonstrate the use of bar codes for filing and tracking cases and to discuss policies related to such use.

For additional information on state–federal cooperation concerning technology, see discussion in Appendix 22, *infra*.

10. Media, Public, and Legislative Relations

Bench-Bar-Media Committees

Participation on bench-bar-media committees provides state and federal judges with several avenues for improving relations with the press, including

- *providing a forum for judges and journalists to exchange views;*
- *developing media coverage guidelines for contested court cases; and*
- *resolving "fair trial v. free press" disputes between trial courts and journalists.*

Organized in 1964 by former Washington Supreme Court Chief Justice Richard Ott, the Washington Bench-Bar-Press Committee was one of the first of its kind in the United States. A federal judge sits on the executive council of the Bench-Bar-Press Committee.

Unlike many of its counterparts in other states, the Washington committee began with relatively cordial relations between its constituent members. Paul Conrad, executive director of the Allied Daily Newspaper association and the committee's first secretary-treasurer, commented on the creation of the committee:

> From the viewpoint of our association and its member newspapers, our relations with Washington's courts and with the legal profession in general have been excellent. We take some pride, and hope our friends on the bench and within the bar do too, in the atmosphere of mutual respect that sustains this relationship.[56]

The committee's early accomplishments included the development of bylaws, membership criteria, and promulgation of guidelines for press behavior during trials. Except for a brief period during the early 1980s,[57] the committee has provided a respected and valued forum for the state's bench, bar, and media to exchange information and opinions about their respective roles in contemporary society. (See Appendix 24, *infra*, Washington State Bench-Bar-Press Committee Statement of Principles and Considerations for the Judiciary.)

Despite the committee's apparent success at the state level, some of its members discovered during the 1970s that many lawyers, journalists, and state trial judges needed assistance in local fair-trial press conflicts. Thus was born the "Fire Brigade," a volunteer, liaison subcommittee formed to assist, on request, in the resolution of First versus Sixth Amendment disputes.

Just such a situation developed in May 1993 in connection with the trial of Westley Alan Dodd, who was tried on charges of aggravated murder in

56. Robert M. Henderson, *The Water Brigade: Carrying Water to an Undying Blaze*, 16–17 Judicial News (Dec. 3, 1993) (Seattle, Wash.).

57. *See* Federated Publications, Inc. v. Kurtz, 615 P.2d 440 (Wash. 1980). The Washington Supreme Court upheld the decision of a state trial judge to bar a local journalist from pretrial hearings in a criminal matter on the grounds that she repeatedly breached the "guidelines." The committee later redrafted the guidelines as voluntary "principles and considerations" to dispel judicial perception that the guidelines should be viewed as an enforceable contract with the media.

Clark County, Washington. Despite recommendations from the Fire Brigade not to publish a story, *Vancouver Columbian* editor Tom Koenninger decided to publish a story about Dodd's creation of a brochure designed to teach children how to avoid child molesters "like himself." Koenninger also published as an op-ed piece the Fire Brigade's conclusions about the potentially prejudicial impact of the story and his reasons for not following the recommendations of the committee members. He later complimented the Fire Brigade for its prompt and professional response during the incident.

According to Bob Henderson, public information officer for the Washington Office of the Administrator of the Court, the Fire Brigade receives requests for assistance between two and six times annually. These requests generally involve criminal cases in state courts—civil trials rarely generate enough press interest, according to Henderson. However, the Fire Brigade's services are available to the federal courts.

Washington State Court of Appeals Judge Gerry L. Alexander wrote a memo to the Bench-Bar-Press Liaison Committee members summarizing the committee's actions. The memo is included as Appendix 23, *infra*.

The Washington State Bench-Bar-Press Committee developed a statement of principles and considerations to guide the judiciary, members of the bar, and members of the media, in handling cases with media interest. This statement of principles and considerations appears at Appendix 24, *infra*.

Public Relations Efforts

Judicial education efforts and increased use of public relations specialists provide valuable assistance to state and federal courts for maintaining public confidence in the legal system.

"Judges infrequently grant interviews, almost never hold news conferences, and generally do not seek or welcome media attention, primarily because they fear their impartiality might be compromised. Remoteness enhances the impression that judges are a breed apart, doling out justice to lesser mortals." Doris Graber, Mass Media and American Politics (3d ed. 1989)

In spite of the many successful efforts of bench-bar-media committees, not all of judges' encounters with the press are amicable. All too often, the combination of judicial aloofness and poorly informed reporters results in disastrous public relations consequences for courts—regardless of the propriety of a specific judge's actions or decision in a particular case.

Judicial leadership at both the state and federal level now recognize that improved public relations skills are critical for the courts to maintain a high level of public confidence.

The California State–Federal Judicial Council began a public awareness project in 1994. The council established a subcommittee to examine ways that the two court systems could cooperate in their efforts to promote public confidence in the judiciary. The subcommittee's first project was to identify the programs throughout the state that were already in place for this purpose. It developed a directory of twenty-eight such programs, listing their titles, purposes, and coordinators. This directory was then circulated to state and federal judges, who were urged to contact persons connected with local programs and to become involved. In a second effort, the subcommittee became involved in the State Justice Institute (SJI) National Town Hall Videoconference Project in October 1995, and one of its members participated in the Los Angeles downlink conference program.

The federal courts emphasized the importance of media relations in the 1990 *Report of the Federal Courts Study Committee*. The report recommended that each of the federal circuits designate a media contact person, that courts hold regular "press days" to facilitate communication between courts and the media, and that courts expand their publications programs to explain court operations to the public. Former Chief Justice Ellen Ash Peters (Sup. Ct. Conn.) reached the same conclusions at the 1992 National Conference on State–Federal Judicial Relations in Orlando, Fla. "If judges are going to be effective communicators about the needs they have, they have to enlist allies," Peters said. "[W]e probably have to learn to do something we as judges find very uncongenial, which is to enter into a dialogue with the press."

Some state and federal courts are hiring public information officers as integral parts of their court administration staff. These individuals not only respond to general press inquiries and develop consumer information materials, they also provide valuable training for judges and court staff about effective media communication skills. For example, the Minnesota Supreme Court Information Officer developed manuals on media relations and community outreach for district and county court administrators, a court information manual for journalists, and a media manual for judges including tips on managing high-profile cases, handling media crises, and responding to unjust criticism. These accomplishments sup-

plemented the officer's basic job responsibilities—filing over 3,000 stories with the media over a five-year period, responding to more than 500 media requests and 150 judge requests annually, and conducting seminars on public relations management for state court systems across the country.

Other actions state and federal judges can take to promote appreciation of the courts by the public and the media and to explain to the public and the media issues and problems facing the courts include the following:

- Put public relations for courts on the agenda of state–federal judicial council meetings to increase judicial awareness of the need for such, and develop a state-wide plan to promote judicial branch interests.
- Assign public relations duties to a court administrator with instructions to develop press kits and public information bulletins about the operations of courts and judicial duties, and prepare press releases and public announcements on appropriate occasions, such as immediately before the release of an important opinion or judgment.
- Develop ties to specific reporters in the local media, especially those who regularly cover court operations, and encourage informal visits by them for discussions about court operations to promote greater understanding.
- Sponsor with the local bar association, conferences and seminars held at a local courthouse, involving judges, court administrators, and media representatives, to promote better understanding of the operations of courts and the problems facing them.
- Establish a speakers bureau of local state and federal judges, perhaps combining one judge from each system to form a team, to lecture at civic clubs, other local organizations, high schools, and colleges about court procedures, court problems, and judicial administration.
- Turn an old courthouse or public building into a law museum and court education center for local school children and lay citizens.
- Assist in the design of a civics course for local high schools, and political science courses for local universities, colleges, and community colleges, that focus on the work of the judiciary and court operations.

- Develop, with the assistance of the state or local superintendent of public instruction or schools, a mock trial program to familiarize elementary and junior high school students with the operation of courts, as was done successfully in the state of Washington.
- Establish an annual lecture series that focuses on the operation of court systems and judicial administration.

Such activities do no harm to judicial integrity and judicial independence and have the potential for assisting in the ongoing need for effective communication between state and federal judges and courts and the public they serve.

"Defense of the Judiciary" Programs

Some state bar organizations provide assistance to state and federal judges who are subject to unfair media criticism. Sometimes the best public relations efforts will not ward off media criticism about the courts. The press, after all, fulfills a critical role in contemporary society by scrutinizing the activities of public institutions and officials. However, when media attention focuses on the actions or decisions of individual judges, the various codes of judicial conduct generally limit their ability to defend themselves—however fair or unfair the criticism might be.

To provide some protection for state and federal judges who face this predicament, the West Virginia State Bar established a "Defense of the Judiciary" committee to come to the assistance of judges who are unjustly criticized by the press. The committee, which establishes specific criteria for determining whether an official response is justified, has responded with press releases on behalf of individual judges on several occasions over the past six years. During the same period, they have also declined to respond in certain situations.

The West Virginia State Bar Association resolution relating to defense of the judiciary appears as Appendix 25, *infra*. The following is the text of a news release from May 1989 from the West Virginia State Bar responding to critical comments by a prosecutor against a state judge.

> The West Virginia State Bar objects to the comments made last week by Prosecuting Attorney of Kanawha County, William Forbes, regarding judicial actions taken by Kanawha County Circuit Court Judge Tod J. Kaufman. The bar, which encompasses the more than 3,700 lawyers licensed to practice law in the state, following appropriate review procedures, concluded

that unwarranted criticism of members of the judiciary, as occurred with Judge Kaufman, undermines the confidence of the public in the proper administration of justice. Personal attacks are inappropriate and harmful to the system of justice and diminish the dignity and credibility of its operation.

Attorneys at law serve as officers of the court. On specific occasions, there may be the need to make valid, constructive criticism of court decisions. However, there should never be personal remarks directed against the judiciary or the opinions it renders. Such actions are unprofessional and do harm to the justice system.

The majority of instances cited publicly by the prosecuting attorney include bail and bond cases which are matters within the discretion of a judge, in this case, Judge Kaufman. There are options available to the prosecuting attorney through the court system if he disagrees with a judge's decision. The making of public attacks on a judge is unjustified and is not such an alternative.

The state bar, through its Committee on Defense of the Judiciary, has in the past and will continue in the future to review those situations involving criticism of judges. The bar will respond in those instances, such as this one involving Judge Kaufman, where the statements are unwarranted and confuse the public's understanding and perception of the law and the judicial system.

11. Involvement in Intergovernmental Relations and Communication

Effective communication with state and federal legislators and executive officers is essential for securing adequate resources to support the respective judiciaries and for informing the legislative and executive branches about the impact of proposed legislation and regulatory practices on state and federal courts. State and federal courts can initiate communication by

- *telephoning or writing representatives about specific areas of interest or concern;*
- *inviting representatives to visit courthouses and chambers; and*
- *inviting representatives to attend selected judicial conferences and educational programs.*

Judges traditionally are reluctant to communicate with state and federal legislators and executive officers. Although interbranch communication does not involve the exercise of judicial power, some judges continue to fear that approaching legislators about legislative matters that affect the

judiciary violates separation of powers or invites legislative interference with judicial independence.

However, as Chief Judge J. Clifford Wallace (U.S. 9th Cir.) remarked during a seminar on federalism, "the separation of powers doctrine does not prevent representatives from the three branches of government from getting together to discuss problems and solutions." In fact, many legislators encourage judicial input about the impact on courts of pending legislation. Speaking at the 1992 National Conference on State–Federal Judicial Relations in Orlando, Fla., U.S. Congressman Hamilton Fish (N.Y.) urged judges to communicate with Congress. "We need to know more about the needs of the courts and the impact of legislation on your workload." He admonished judges not to "wait until the bills become law. Let's hear from you early in the process and more often."

A number of national and regional state–federal judicial organizations endorse judicial efforts to educate legislators about the needs of the judiciary and offer specific recommendations for accomplishing this goal. The Judicial Branch Committee of the U.S. Judicial Conference, for example, recommends that federal judges invite legislators to visit the federal courts to promote a general understanding of court operations and provide opportunities for discussion about court problems. State judges can make similar efforts with state legislative and executive officers. On an individual basis, judges may telephone or write to legislators directly about matters of specific interest or concern.

The task of improving communication with legislatures also provides opportunities for state–federal cooperation. The Tennessee State–Federal Judicial Council, for example, found that inviting key legislators to their regular meetings offered an opportunity to educate legislators about the judiciary and the impact of legislation on state and federal courts. In addition, providing a regular forum for interacting with legislators improved interbranch relations generally. Other types of judicial conferences and educational programs offer similar opportunities for improving interbranch communication about judicial matters.

III. State–Federal Judicial Councils

A. The Evolution of State–Federal Judicial Councils[58]

State–federal judicial councils date from the early 1970s, but they build on a longer tradition. In court systems, councils have long been a favored form of administrative organization. They operate by seeking consensus and providing an opportunity to air different views. They allow the formulation of mutually accepted strategies.

Judicial councils for state court systems emerged in the 1920s. Created by statute or court rule, and comprising judges, legislators, attorneys, and other citizens, they were a response to the failed effort to create rigid, hierarchical administrative schemes in state courts. The state judicial councils were mainly advisory and research bodies charged, in the words of a 1924 Massachusetts statute, with "the continuous study of the organization, rules, and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system."[59]

The state judicial council movement reached its zenith in the 1930s. Most councils have disappeared, although they remain key institutions in a few states, most notably California.

In the federal courts, the forerunner of the U.S. Judicial Conference was created in 1922 as the "Conference of Senior Circuit Judges," and re-

58. The following is a brief commentary on the development of state–federal judicial councils adapted from material in the 1993 Federal Judicial Center publication *Organizing and Maintaining a Council of State and Federal Judges.*

59. Mass. Gen. Laws, ch. 221 § 34-A (1924).

ferred to informally as the "federal judicial council." In 1939, Congress complemented the national Judicial Conference by mandating the creation of an all-judge council in each circuit. The circuit councils' statutory membership and authority has changed several times since 1939. They now are charged with promoting "the effective and expeditious administration of justice within [their] circuit[s]" and consist of equal numbers of circuit and district judges, with the chief circuit judge as chair. They are the only bodies in the federal judicial administrative hierarchy with the authority to issue orders.

The term "state–federal judicial council" entered the lexicon in 1970, when Chief Justice Warren E. Burger, in his first "state of the judiciary address" to the American Bar Association, listed as the first of eight "major steps for the future . . . that in each state there be created a state–federal judicial council to maintain continuing communication on all joint problems." Such councils would also try to mitigate the "friction in relations between state and federal courts" that had become especially troublesome in the 1960s.

The strength of the state–federal council movement has fluctuated. State and federal judges responded quickly to the chief justice's call, creating more than thirty state–federal judicial councils between 1970 and 1972. By 1978, Chief Justice Burger told the second National Conference on the Judiciary, in Williamsburg, Va., that thirty-seven states had councils. How many of those were active is unclear, but the councils were clearly in decline. A 1980 survey revealed nine active councils. In the 1980s, however, some state and federal judges undertook to revitalize the movement. As of April 1, 1996, there were thirty-four active councils in the United States and its territories.

State–federal councils were a topic at the April 1992 National Conference on State–Federal Judicial Relationships in Orlando, Fla., sponsored by the State Justice Institute and the Federal Judicial Center. Indeed, Chief Justice Rehnquist, in his opening remarks, urged the "revitalizing" of state–federal judicial councils "to facilitate judicial and administrative cooperation." Although most "state–federal councils" have been state-level bodies, a few have been formed in metropolitan areas and directed their attention to judicial federalism issues involving state and federal courts in the area.

The FJC, created by Congress in 1967 as the federal courts' agency for education, research, and planning, has monitored state–federal councils

since Chief Justice Burger's initial proposal, and, within the limits of its budget, has provided modest funding to federal judges to participate in council activities. This interest is one aspect of the Center's work in the area of judicial federalism, work encouraged in part by its statutory mandate "to cooperate with the State Justice Institute in the establishment and coordination of research and programs concerning the administration of justice." In 1992, in the wake of the National Conference on State–Federal Judicial Relationships, the Center created a small Interjudicial Affairs Office.

The Interjudicial Affairs Office of the Federal Judicial Center monitors existing state–federal judicial councils, assists in the organization of new ones or the revival of dormant ones, and publishes the *State–Federal Judicial Observer,* which reports on state–federal matters throughout the country.

B. Discussion Topics

One of the benefits of state–federal judicial councils is the opportunity for state and federal judges to meet together to discuss common problems and issues. Indeed, the function of most councils is to serve as a forum for discussion.

A compilation of all of the discussion topics that have been included on the agendas of various councils would consume several pages. The list would reveal the rich diversity of subjects which have occupied the attentions of state and federal judges, and the breadth of topics suggests the usefulness of councils in discussing matters of mutual concern. In some instances, discussion topics have led to concrete actions, such as the placing into effect of a plan for sharing facilities, the sharing of sources for jury lists, creation of gender bias task forces, and similar activities. The following is a list of some of the topics councils have discussed in recent years.

- adequate funding for courts
- ADR
- automatic stays in death penalty cases
- automation in the courts
- bankruptcy conflicts
- bankruptcy education programs
- calendar and scheduling conflicts
- cameras in the courtroom
- case workloads of judges
- certification of state law questions
- complex litigation
- court facilities

court management information systems
court mediation programs
court security
death penalty appeals
death penalty/habeas corpus rules
death penalty resource center
discipline of attorneys
federalization of state law
gender and racial bias in the courts
growing criminal caseloads
immigration cases and jurisdiction
improving relations between bench and bar
joint education programs
joint settlement of related cases
joint use of jury pool selection processes
jury management
law library cooperation and facilities sharing
long range planning for courts
new juror orientation programs
new rules for fax filings
overlapping jurisdiction in drug prosecutions
prison inmate grievance procedures
public relations for the courts
scheduling conflicts
sentencing guidelines
tracking of habeas corpus cases
trial advocacy program for judges
tribal court relations
use of legislative history in interpreting statutes
video teleconferencing for prisoner appearances

C. Activities

Although state–federal judicial councils serve primarily as forums for discussion and provide opportunities for social interaction, some councils actually plan and undertake specific activities. For instance, the West Virginia Council, after its organization in 1993, identified the following list of projects to be pursued in ensuing years, some of which have already been completed:

- Distributing a copy of the master edition of the topic index of recent opinions of Supreme Court of Appeals of West Virginia to the federal judges in the state.
- Assembling a state–federal judicial directory with listings for all state and federal appellate judges, trial judges, magistrate judges, prosecutors, public defenders, court reporters, probation officers, law enforcement officials, correction officials, interpreters, and vendors.

- Conducting joint education programs for the state and federal judiciary.
- Participation by the clerks of the federal district courts in the education conferences of the state clerks of the circuit courts.
- Developing a computer-based information system for tracking state and federal habeas corpus petitions.
- Coordinating alternative dispute resolution activities in the state and federal courts.

Activities of other councils include:

- Creation of a prisoner litigation subcommittee, which was instrumental in promoting and obtaining certification by the U.S. Department of Justice of a state department of corrections grievance procedure.
- Creation of a joint task force on gender bias.
- Sponsorship of two capital case symposia for state and federal judges.
- Sponsorship of two bankruptcy law symposia for state and federal judges.
- Drafting of a related case rule for adoption in state and federal courts.

D. Organization

The thirty-four state–federal judicial councils in existence as of April 1, 1996, provide a guide for judges and court administrators who may wish to organize a new council or revive a dormant one. Enough councils have been created, lapsed, and been reactivated to yield clues about getting them organized and keeping them going. The following suggestions are included to assist judges or administrators forming a council. The emphasis is on a state-level council, but the suggestions are also applicable to councils for metropolitan areas or other non-state units.

Four keys to successful councils stand out:

1. *Sustained and active involvement by the leadership of the state and federal court systems in the jurisdiction.* This factor is perhaps most often mentioned. Councils have persisted, for example, where state chief justices and circuit chief judges have personally,

or through surrogates, monitored council activity, attended and encouraged attendance at meetings, and received reports on follow-up actions.

2. *Staff support from court administrators in one or both of the systems.* When state court administrators, and federal court executives or clerks, coordinate their support for the council, judges from both systems feel more ownership of council business, and the coordination promotes interchange among the staffs.
3. *Council agendas that are assembled with specific attention to stimulating topics for discussion and opportunities for cooperative action.* Meeting simply for the sake of meeting is obviously unproductive, but so is letting opportunities for effective action slip by.
4. *Appreciating the range of potential benefits.* Councils often flourish when there are specific areas of tension, friction, or lack of coordination between state and federal courts. In states where councils have not existed, or where they have lapsed, judges often explain that there are "no problems of state–federal friction," or that state and federal judges "know each other well enough to handle problems that arise." Both can be true but may still not obviate the role of a council. A council can also identify joint projects even where there is little state–federal friction and can provide a forum for judges to discuss common problems.

Council size, meeting times, and other organizational considerations:

1. *Size.* The number of judges in councils has varied greatly, from as low as three to as high as twenty. Most active councils have memberships of between seven and fourteen. Although in the early councils federal judges often outnumbered state judges, equal membership seems preferable.
2. *Membership.* Consider extending the membership beyond the obvious categories of appellate and general jurisdiction trial judges to judges whose work often has implications for state–federal judicial relations (e.g., federal bankruptcy judges and magistrate judges) and to key court administrators and chief clerks, in either an ex officio or individual capacity. Also consider limitations on terms of members to broaden the number of judicial officers exposed to the workings of the council.

3. *Presiding and staffing.* Provide for a secretary or reporter for each meeting, and require preparation of minutes and a summary report of each meeting to be sent to members and other interested parties and organizations.

   Organizers should consider alternating the officers of the council among state and federal judges—i.e., have a state judge serve as chair of the council for a term, followed by a federal judge.

4. *Meeting times and sites.* Most councils meet twice a year, including once at the time of a state bar meeting or state judicial meeting. Avoid having council meetings at a courthouse, where meetings are prone to interruptions.

   Consideration should be given to limiting a council meeting to no longer than one day. With many councils, a half-day meeting is sufficient.

5. *Agenda.* Have a definite discussion agenda for each meeting. A limit of six agenda items would probably allow ample time for discussion of each item.

   Inviting an outside expert or resource person, such as an academic, a technical court personnel, or other persons with an interest in state–federal judicial and court relations, to make presentations or provide commentary on a specific topic scheduled for discussion has proved successful with many councils. Such persons could also be invited to meetings as observers.

6. *Outreach.* Some councils have one or more open meetings, which lawyers and other interested parties can attend. This option is especially attractive when councils meet at the same time as other legal groups in the state, such as the state bar association and state judges organizations, with whom the council could work on specific programs, activities, or projects.

Other possibilities include:

- adopting methods for making and maintaining contact with media organizations and for determining the advisability of issuing press releases on specific actions or activities of the council;
- asking committees of other legal or interested organizations to take on projects or work with the council or its committees on specific assignments; and

- encouraging the formation of state–federal judicial councils in metropolitan areas or specific regions of the state, and maintaining contact with and supporting such councils.

Practical Steps for Organizing a Council

The discussion below contains practical and procedural suggestions for organizing or revitalizing a council. These suggestions assume that communications between state and federal judges have been established for the purpose of considering the desirability of having a council. (Appendices 26–29, *infra*, include forms and templates for various instruments of organization. See section III.E, *infra*.)

1. Set a specific date, time and place for an initial or organizational meeting for a limited number of state and federal judges. Consider inviting an equal number of judges from each system.
2. Include as participants the state chief justice or chief judge of the system and the chief judge of the intermediate court of appeals, or the equivalent; and a resident judge from the U.S. court of appeals for the circuit in which the state is located and the chief judge(s) of the U.S. district court(s) in the state.
3. Include in the agenda for the initial meeting a discussion of the following topics:
   - the need for a council and its benefits;
   - a concise statement of purpose;
   - the composition and officers;
   - the frequency and place of meeting; and
   - the method of operations, including setting the agenda for each meeting, making meeting arrangements, providing for meeting minutes and reports, and providing written materials prior to each meeting.
4. At the initial meeting, appoint a small committee to draft an organizing document for the council.
5. At the initial meeting, set a date for a follow-up meeting to approve an organizational document and establish operating procedures. Such a meeting should be held within a reasonable time after the first meeting to provide momentum for the organization efforts.

Regional and Metropolitan Councils

Although most state–federal judicial councils are state-wide organizations, there are several regional councils. The state and federal judges in the Detroit metropolitan area, for instance, under the leadership of former Chief Judge Julian A. Cook, Jr. (U.S. E.D. Mich.) have organized a regional council. The California State–Federal Judicial Council promoted the idea of regional councils in four areas of that state corresponding to the geographical areas of the four U.S. district courts in California: Central California (Los Angeles area); Northern California (San Francisco area); Southern California (San Diego area); and Eastern California (Sacramento-Fresno area).

The Oklahoma State–Federal Judicial Council is actually composed of three regional councils corresponding to the geographical areas of the three U.S. district courts in that state: Eastern, Western, and Northern Oklahoma.

E. Forms for Organizing a Council

Forms for organizing a state-wide state–federal judicial council appear in the appendices, *infra*, as follows:

> Appendix 26—Sample State–Federal Judicial Council Charter;
>
> Appendix 27—Sample Notice of Organizational Meeting of a State–Federal Judicial Council;
>
> Appendix 28—Sample Notice of Regular Meeting of a State–Federal Judicial Council; and
>
> Appendix 29—Sample Charter for a Regional or Metropolitan State–Federal Judicial Council.

Judges or court administrators interested in forming or reviving a state–federal judicial council may wish to consult the Federal Judicial Center publication *Organizing and Maintaining a Council of State and Federal Judges*, available from the Interjudicial Affairs Office, Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20002, phone (202) 273-4161.

F. Anatomy of a Successful State–Federal Judicial Council

An article appearing in the September 1995 issue of the *State–Federal Judicial Observer* describes the history and methods of one of the most successful state–federal judicial councils, the one in California. The article appears at Appendix 30, *infra*.

G. Tribal Court Issues

State and federal judiciaries around the country in recent years have given increased attention to tribal courts, judges, and issues, and tribal judges have been given representation on state–federal judicial councils.

An example of this trend is the adoption in 1995 of a resolution by the (U.S.) Ninth Circuit Judicial Council relating to the inclusion of tribal judges on state–federal judicial councils of the states within the circuit. The resolution, submitted to the Judicial Council by its Task Force on Tribal Courts, chaired by Judge William D. Canby, Jr. (U.S. 9th Cir.), states:

> The Judicial Council of the Ninth Circuit, continuing its fifteen years of support for strengthening the viability of state–federal judicial councils, encourages the councils of this circuit, to the extent that they have not already done so, and to the extent that there are vital and functioning court systems of federally recognized Indian tribes in the state, to invite judges or other representatives of those tribal courts to fully participate in the state–federal councils' deliberations as equal members of such councils. The judicial council offers the services of its Task Force on Tribal Courts to assist councils in identifying appropriate tribal court representatives, in articulating tribal court issues for council agendas, and in providing such other assistance as will facilitate inclusion of tribal court judges and full and fair consideration of issues of mutual concern to the tribal, state, and federal court systems.

The Ninth Circuit Judicial Council adopted this resolution at its meeting on November 21, 1995. According to former Chief Judge J. Clifford Wallace (U.S. 9th Cir.), the resolution was sent to the eleven state–federal judicial councils in the geographical area of the Ninth Circuit.

In his report transmitting the resolution to the judicial council, Judge Canby noted that the task force, over the past several years, has devoted its efforts "toward easing jurisdictional tensions, promoting comity, and building mutual understanding and respect between the federal courts and the tribal courts of the various Indian nations that reside within Ninth Circuit boundaries."

Judge Canby noted the increased attention of federal and state judiciaries to tribal courts and tribal judges in recent years. He attributed this increased attention to several factors, including the leadership of certain federal judges, such as Judge Wallace and Judge Monroe McKay of the U.S. Tenth Circuit, and their desire to stimulate activity involving tribal courts and tribal judges at the local level; to the interest of U.S. Attorney General Janet Reno in both tribal courts and law enforcement issues in Indian country; and to the "increased complexity of life on tribal reservations and increased contacts between Indians and non-Indians, especially among those tribes that are involved in gambling casinos."

Judge Canby also said that many state judiciaries, such as the one in Arizona, have had a long interest in Indian matters and have been engaged in activities designed to lessen tensions between Indians and non-Indians.

Several state–federal councils in the west have already acted to include representatives: in November 1993, the Oregon State–Federal Judicial Council invited the chief judges of the Warm Springs and Umatilla Tribal Courts to become full voting and participating members; the Washington State–Federal Judicial Council has invited Judge Eldridge Coochise of the Hopi tribe to its meetings; the Arizona State–Federal Judicial Council is considering changing its charter to include representatives of tribes located within its borders; the Montana State–Federal Judicial Council is seeking to identify appropriate tribal court representatives to join its meetings; and in 1994 the Conference of Chief Justices changed the name of its committee on federal–state relations to the Standing Committee on Federal-State-Tribal Relations.

H. Long-Range Planning

"What kinds of joint efforts should be developed under renewed emphasis on a single judicial resource? I believe the first is the need for joint planning. It is clear that we have one overall problem: developing a legal system that meets the needs of our people. Therefore, we must have one

overall plan to meet those needs and this should involve long-range planning. . . . Long-range planning for the two systems could be developed at the state level by the various state–federal judicial councils."

Senior Judge J. Clifford Wallace, former chief judge, U.S. Ninth Circuit Court of Appeals

The following commentary by Senior District Judge William W Schwarzer (U.S. N.D. Cal.) is adapted from a longer article appearing in the October 1994 issue of the *State–Federal Judicial Observer*.

Any consideration of long-range planning for state and federal courts must be governed by realism. This is doubly true in the case of state–federal judicial councils because they are *ad hoc* bodies—they have no legal status and are invested with no regulatory or administrative authority. These characteristics do not take away from their utility. But these councils lack the implementation facility that is needed to engage in operative planning for the future. However, that does not mean that they have to shy away from activities that can contribute to long-range planning for the courts.

Institutionalizing Councils

Perhaps the initial long-range planning concern for councils should be their own future. Councils ought to give thought to institutionalizing themselves. Unlike government agencies that are hardy and often seem to survive long after the time when they are needed, state–federal judicial councils enjoy none of the security that comes from bureaucratic and political support. Lacking a constituency, councils must survive on their merits.

Perhaps opportunities will arise for their legislative recognition. One way this might occur is by statutory references to state–federal judicial councils, assigning them functions and recognizing them as sources for advice or counsel or as recognized coordinating bodies. Their capacity to survive can perhaps also be enhanced by strengthening their attachment to established *de jure* bodies, such as state judicial councils (at least in those relatively few states where they exist) and the judicial councils in the federal system.

One original reason for the formation of councils was the perceived existence of friction between state and federal courts. As that friction seemed to decline, councils began to fade away. There is good reason to believe that today there is, on the whole, relatively little need for councils to deal with friction between the systems. What are the needs that exist now or that can be foreseen? The answer to that question will vary from state to state. If councils are to plan for an effective future role, they should begin by undertaking an imaginative and thorough search for needs that they can meet.

Much of the common activity of councils addresses issues of immediate concern, such as coordinating habeas corpus review, dealing with problems created by bankruptcy stays, and improving communications between state and federal judges. These are important matters where councils play a useful role. But councils might do well to try to look beyond the present.

The Long-Term Problem of Resource Allocation

Perhaps the most serious long-term issue confronting both state and federal courts concerns resources. Courts face a future of increasing demand for services coupled with declining resources with which to provide them. It is likely that court systems will have to change in fundamental ways to cope with what seem quite clearly to be declining prospects for the future.

Councils are just beginning to think about whether and how state–federal cooperation and coordination might alleviate some of the resource problems being faced. Active measures, of course, have to be carried out through other agencies and channels. Implementing measures is not something councils should attempt to do. But councils can serve as catalysts by initiating thought, discussion, study, and analysis—by bringing together the actors in each system—leading ultimately to appropriate action.

Long-Range Planning

This catalytic function can be a useful adjunct to conventional long-range planning activity by established authorities. A major issue for long-range planners is the allocation of business between state and federal court systems. This is a source of political controversy and much debate. Councils can be a place where the issues are considered on a practical level, experiences are exchanged, and pragmatic answers to problems are developed. The work of councils in this area could inform the positions taken by the leadership of the judicial system and assist in bringing about enlightened executive and legislative decisions. One can well imagine that a communication from a state–federal judicial council would carry considerable weight with legislators.

Councils may be a place for constructive thought and exchanges of experience and views, leading to more informed action in the state and federal court systems. But to play that role, councils must ensure their own long-term future—their continuity as serious and effective bodies that can make a valuable contribution.

IV. Regional State–Federal Judicial Conferences

The National Conference on State–Federal Judicial Relationships in Orlando, Fla., in April 1992 stimulated interest in state–federal judicial relations. After the conference, judges and court administrators in two regions of the country organized and conducted regional conferences on state–federal judicial relationships. These two regional conferences in turn generated further interest in state–federal judicial relations and the formation of new state–federal judicial councils.

A. Ninth Circuit Regional Conference

Judges and court administrators of nine western states interested in promoting state–federal relations in their respective court systems met at a first-ever regional conference on state–federal judicial relationships, June 4–5, 1993, in Stevenson, Wash., funded by a grant from the State Justice Institute.

Over 125 judges, court administrators, law professors, and others attended the Western Regional Conference on State–Federal Judicial Relationships (WRC). Participants used the conference to establish state–federal priorities for each state.

A preconference survey of participating state and federal judges revealed interest in ten particular topics. Those topics, which were the focus of the conference, are as follows:

- federal review of state court cases;
- coordinating schedules of state and federal courts;

- bench/bar committees;
- media relations;
- coordinating bankruptcy procedures;
- certification of state law questions;
- joint education programs for judges and staff;
- inmate grievance procedures;
- sharing of space and facilities; and
- attorney bar admission.

The full proceedings of this conference can be found in 155 F.R.D. 233.

B. Fourth Circuit Regional Conference

Over eighty state and federal judges and court administrators from the Fourth Circuit gathered in Williamsburg, Va., on November 14–15, 1994, for the Middle Atlantic State–Federal Judicial Relationships Conference. This conference was also funded by the SJI.

The conference focused on four central themes: (1) administrative and litigation coordination between state and federal courts (including the role of state–federal judicial councils); (2) criminal case processing in state and federal courts; (3) funding processes and legislative initiatives affecting the judiciaries of the two systems; and (4) the future of judicial federalism.

Discussions of coordination of administration and litigation in state and federal courts centered on three areas: mass tort cases, bankruptcy cases, and state–federal judicial councils.

The full proceedings of this conference can be found at 162 F.R.D. 173.

C. Organizing and Conducting a Regional Conference

Following the Western Regional Conference on State–Federal Judicial Relationships (see previous section), Prof. John Oakley of the University of California-Davis Law School, the reporter for the conference, prepared a "cookbook" for others to follow in organizing such a conference: *Regional Conference Cookbook: A Practical Guide to Planning and Presenting*

a Regional Conference on State–Federal Judicial Relationships, State Justice Institute (1994). The following is a summary of that publication.

Planning for the conference began in the fall of 1991, more than eighteen months before it began on June 4, 1993. The assistant circuit executive for the U.S. Ninth Circuit prepared an eight-page concept paper and budget for the conference and submitted these to the State Justice Institute through the Nevada State–Federal Judicial Council.

A planning committee for the conference was formed consisting of twelve members: five federal judges, the conference coordinator from the Ninth Circuit's Office of the Circuit Executive, three state judges, a state court administrator, a senior staff associate from the National Center for State Courts, and a law professor who had been designated to serve as Reporter. A federal district judge and a state supreme court justice served as co-chairs.

The members of the planning committee were selected more than twelve months before the conference. The standard for selection was a geographical cross-section of state and federal representatives who had some experience in state-federal judicial relations.

Funding the Conference

The conference could not have occurred without the assurance of funding to pay the three main costs of such an undertaking: participant travel, speaker travel, and hotel meeting room expenses. In the final grant application completed on June 12, 1992, approximately one year before the conference, the planning committee requested the sum of $129,843. The conference ended up costing substantially less than budgeted, by as much as 15%, because of economies achieved in the planning process.

Convening the Planning Committee and Setting Up an Internal Decision-Making Structure

The first face-to-face meeting of the planning committee was held on June 5, 1992, one year before the conference. A total of twelve telephonic conferences were held at roughly monthly intervals during the remainder of the planning process. The use of a written agenda and supporting materials was essential to keep the teleconferences on track. The entire planning process was conducted on the basis of consensus developed through two early meetings of the committee as a whole, followed by regular teleconferences.

Selecting the Conference Site

The Planning Committee suggested five possible alternative locations and asked the Conference Coordinator to investigate them for cost, accessibility, and availability. The Conference Coordinator conducted a site visit, reported to the Committee and, with the approval of the Planning Committee by fax vote, signed a contract with the lodge.

Selecting the Conferees

The original concept paper developed by the Conference Coordinator contemplated inviting an equal number of state judges and federal judges to participate in the conference. The committee decided also that state court administrators of the nine states be invited to attend. For balance, their counterparts, federal circuit and district court clerks, were also invited to participate.

At the first planning meeting in June 1992, the committee determined that five state and five federal judges should be invited from each of the nine states in the circuit, for a total of ninety judicial officers. The planning committee recommended that the Chief Judge of the U.S. Court of Appeals for the Ninth Circuit select all of the federal judicial participants and that each state supreme court chief justice be invited to attend and to select four other judges from that state.

Developing and Presenting the Conference Program

The September 1992 "brainstorming" session of the Planning Committee in Las Vegas was the seminal event in determining the programmatic content of the WRC. The ideas generated at that face-to-face meeting were recorded. These topics were extensively reshuffled over several months. The members who had been responsible for the development of the various panel programs were asked to serve as the moderators of their respective panels. Each Planning Committee member who had program content responsibilities was also responsible for supplying any accompanying written materials.

The key ingredients of the integrated strategy of planning the conference were:

1. an initial brainstorming session to create a menu of potentially fruitful topics;
2. delegation of responsibility for developing potential topics to individual Planning Committee members, with frequent and ex-

tensive joint review, discussion, and revision of the short list of tentative program topics;

3. a preconference survey of the relative interest of the conferees in potential topics;
4. participation of the responsible planning committee members in the presentation of each program component; and
5. using small group discussions and reports back to incorporate feedback from the conferees into the proceedings of the conference as a whole.

Organizing Small Group Discussions and Reports Back

The first day's small groups were more-or-less randomly constituted to contain cross-sections of judicial personnel from the various states and courts participating in the WRC. The small group facilitators and reporters met on the afternoon before the conference for a 75-minute training session conducted by a judicial educator and the Conference Reporter. Each of the small group reporters and facilitators had received in advance a set of materials describing the objectives of the small group discussions and a sample list of small group discussion topics

Recording and Reporting the Proceedings

Most of the proceedings of the WRC were tape-recorded to assist the Conference Reporter rather than for archival purposes. The Conference Reporter was provided with the advance texts of all of the other individual speakers' presentations. With the exception of the unrecorded luncheon speech, the written texts of speeches included in the formal Report of the Proceedings were edited to conform to the actual content of the speeches as orally delivered and tape-recorded.

Pre- and Post-Conference Publicity and Materials

One of the chief objectives of the WRC was to help state and federal judges and court administrators become more aware of the value and importance of working together to improve the administration of justice.

Within two weeks after the conference, the Conference Coordinator prepared a three-page summary of the highlights of the conference, along with an offer to provide transcripts of the principal addresses upon request. This material was mailed to all conference attendees and distributed to all chief circuit judges, circuit executives, and state chief justices

and court administrators across the country. The full report was ready for distribution ten months after the conclusion of the conference.

Conclusion

This summary is only a guide to setting up a successful conference. Local involvement and local conditions must, of course, exert substantial control over the planning process. Several other resources outside of this guide should be considered by planners embarking on a project of this magnitude. The role of the State Justice Institute has already been mentioned. The members of the planning committee for the Western Regional Conference, and the conference coordinator and reporter stand ready to make themselves available to assist others in similar endeavors. Federal courts can also call the Interjudicial Affairs Office of the Federal Judicial Center for assistance in improving state–federal judicial relationships.

Appendix 1—Georgia Calendar Conflict Rule

Trial Scheduling Conflicts—Method or Resolution

Attorneys who choose to participate in multicourt trial and/or appellate practice will be expected to anticipate scheduled appearances in more than one courtroom on the same date. Upon the occurrence of such a scheduling conflict, attorneys shall make diligent efforts to resolve the conflict in accordance with the procedures outlined below. Attorneys who are members of a firm will be expected, upon the occurrence of a conflict, to arrange for appearances by other members of the firm when such substitution will not compromise the interests of the client.

(A) An attorney shall not be deemed to have a conflict unless:

(1) he or she is lead counsel in two or more of the actions affected; and

(2) he or she certifies that the matters cannot be adequately handled, and the client's interest adequately protected, by other counsel for the party in the action or by other attorneys in lead counsel's firm; certifies that he has complied with this rule and has nevertheless been unable to resolve his or her own conflicts; and certifies in the notice a proposed resolution by list of such cases in the order of priority specified by this rule.

(B)When an attorney is scheduled for a day certain by trial calendar, special setting or court order to appear in two or more courts (trial or appellate; state or federal), the attorney shall give prompt written notice as specified in (A) above of the conflict to opposing counsel, to the clerk of each court, and to the judge before whom each action is set for hearing (or, to an appropriate judge if there has been no designation of a presiding judge). The written notice shall contain the attorney's proposed resolution of the appearance conflicts in accordance with the priorities established by this rule and shall set forth the order of cases to be tried with a listing of the date and data required by (B)(1)–(6) below as to each case arranged in the order in which the cases should prevail under this rule. In the absence of objection from opposing counsel or the courts affected, the proposed order of conflict resolution shall stand as offered. Should a judge wish to change the order of cases to be tried, such notice shall be given promptly after agreement is reached between the affected judges. Attorneys confronted by such conflicts are expected to give written notice such that it will be received at least seven (7) days prior to the date of conflict. Absent agreement, conflicts shall be promptly resolved by the judge or the clerk of each affected court in accordance with the following order of priorities, regardless of the class of court involved:

(1) Cases required to be heard within a shortened time period by statutory mandate shall prevail over other civil and criminal actions. (Examples: (a) emer-

gency guardianship action for the mentally ill; and (b) juvenile cases in detention.);

(2) Criminal actions shall prevail over civil actions, custody over noncustody cases;

(3) Jury trials shall prevail over nonjury matters, including trials and administrative proceedings;

(4) Trials shall prevail over appellate arguments, hearings, and conferences;

(5) Within each of the above categories only, the action which was first filed shall take precedence; and

(6) A case in progress shall have the "right-of-way" and shall not be interrupted.

(C) Conflict resolution shall not require the continuance of the other matter or matters not having priority. In the event any matter listed in the letter notice is disposed of prior to the scheduled time set for any other matter listed or subsequent to the scheduled time set but prior to the end of the calendar, the attorney shall immediately notify all affected parties, including the court affected, of the disposal and shall, absent good cause shown to the court, proceed with the remaining case or cases in which the conflict was resolved by the disposal in the order or priorities as set forth heretofore.

(D) Failure to comply with this rule in a timely manner may subject an attorney and/or party to consequences as appropriate. Examples:

(1) contempt;

(2) dismissal of the case without prejudice;

(3) continuance of the case with an award of suffered expenses to the opposing party because of the noncompliance to include attorney's fees;

(4) continuance of the case with an assessment against the offending party for jury fees, court reporter fees, bailiff fees, and governmental expenses subject to calculation caused by the noncompliance;

(5) continuance of the case with a written order directing new counsel be obtained to assist or be substituted so that the case may proceed without future delays; and

(6) any combination of the above as fairness and justice dictate.

These examples are not meant to be exclusive of any other remedy the court may find appropriate.

Appendix 2—Scheduling Conflicts

States with statutes or court rules specifically addressing state–federal scheduling conflicts:

Arizona—Uniform Rules of Practice of the Superior Court of Arizona, Rule 5(j), Scheduling Conflicts Between Courts, in Arizona Rules of Court—State (West 1995)

Florida—Resolution of the Florida State–Federal Judicial Council Regarding Calendar Conflict Between State and Federal Courts (adopted January 13, 1995), in Florida Rules of Court—State (West 1995)

Hawaii—Rules of Supreme Court, Rule 18, Calendar Conflicts Between the United States District Court for the District of Hawaii and Hawaii State Courts, in Haw. Rev. Stat. Ann. (Michie 1995)

North Carolina—Guidelines for Resolving Scheduling Conflicts, in North Carolina Rules of Court—State (West 1995)

South Carolina—South Carolina Appellate Court Rules, Rule 601, Conflicts in Hearing Dates, in South Carolina Pocket Court Register (1991)

Texas—Dallas Civil District Court Rules, Rule 1.19, Conflicting Engagements of Counsel, in Texas Rules of Court—State (West 1995)

West Virginia—Rules for Resolution of Court Scheduling Conflicts, in West Virginia Rules of Court—State (West 1995)

Four additional states—Kansas, New Jersey, Oklahoma, and Oregon—have statutes or court rules applicable to scheduling conflicts among various state courts

Appendix 3—Notice of Related Actions

State and Federal Court Notice Requirements of Related Actions Pending in Other Courts:

California—Division II, Rules for Coordination of Civil Actions Commenced in Different Trial Courts, in California Rules of Court—State (West 1995); proposed "Notice of Related Case" rule

Colorado—Local Rules of Practice for the U.S. District Court for the District of Colorado, Rule 7.1(K) Motions (effective April 15, 1994), in Colorado Court Rules—State (West 1995)

District of Columbia—Superior Court, Civil Practice Rule 42(c) Consolidation Separate Trials, U.S. District Court (D.C.), Rule 405, Related Cases in D.C. Court Rules Annotated (Michie 1995)

Florida—U.S. District Court, Middle District, Rule 1.04, Similar or Successive Cases, Duty of Counsel, in Florida Rules of Court—Federal (West 1995)

Georgia—Uniform Superior Court Rules, Rule 4.8, Duty to Notify of Related Cases, in Georgia Court Rules and Procedure—State (West 1995)

Ohio—Local Rules of the U.S. District Court for the Southern District of Ohio, Rule 16.3, Suggestion of Complex Case by Counsel, Rules of the U.S. District Court for the Northern District of Ohio, Rule 2.1.3, Notification of Complex Litigation, in Ohio Rules of Court—Federal (West 1995)

Rhode Island—Local Rules of U.S. District Court for the District of Rhode Island, Rule 31, Notice of Pendency of Other Action or Proceedings, in Rhode Island Court Rules Ann. (1995)

Texas—Local Rules of the U.S. District Court for the Southern District of Texas, Rule 3(F), Related Litigation and Affected Non-Parties, in Texas Rules of Court—Federal (West 1995)

Appendix 4—Sample Initial Case-Management Order for Consolidated Cases

ORDER NO. _____

It appearing that the cases listed on Attachment __ which have been transferred to this court under 28 U.S.C. 1407, merit special attention as complex litigation, the court ORDERS:

1. Initial Conference. The court will conduct a conference under Fed. R. Civ. P. 16 and 26(f) at ____ a.m., on _____ in _____ at the _____ courthouse in _____.

(a) Attendance. To minimize costs and facilitate a manageable conference, parties are not required to attend the conference, and parties with similar interests are expected to agree to the extent practicable on a single attorney to act on their joint behalf at the conference. A party will not, by designating an attorney to represent its interests at the conference, be precluded from other representation during the litigation; and attendance at the conference will not waive objections to jurisdiction, venue, or service.

(1) Service List. This order is being mailed to the persons shown on Attachment ____, which has been prepared from the list of counsel making appearances with the Judicial Panel on Multidistrict Litigation (JPML). Counsel on this list are requested to forward a copy of the order to other attorneys who should be notified of the conference. A corrected service list will be prepared after the conference.

(2) Other Participants. Counsel for persons or entities who are not named as parties in the cases initially transferred by the JPML but may be later joined as parties or are parties in related litigation pending in other federal and state courts are welcome to attend the conference.

(b) Purposes; Agenda. The conference will be held for the purposes specified in Fed. R. Civ. P. 16(a), 16(b), 16(c), and 26(f). A tentative agenda is appended as Attachment ___.

(c) Preparations for Conference.

(1) Procedures for Complex Litigation. Counsel will familiarize themselves with the *Manual for Complex Litigation, Third*, and be prepared at the conference to suggest procedures that will facilitate the expeditious, economical, and just resolution of this litigation.

(2) Meeting of Counsel. Before the conference, counsel for the plaintiffs and counsel for the defendants shall separately confer and seek consensus to the extent possible with respect to the items on the agenda, including a proposed discovery plan under Rule 26(f), methods to obtain discovery of expert testi-

mony, and the timing for consideration of motions and for resolution of controversies regarding maintenance of one or more cases as class actions.

(d) Preliminary Reports. Counsel will submit to the undersigned by _____, a brief written report indicating their preliminary understanding of the facts involved in the litigation and what they expect to be the critical factual and legal issues. These statements will not be filed with the Clerk, will not be binding, will not waive other claims or defenses, and may not be offered in evidence against a party in later proceedings. To the extent feasible, the statement of parties with similar interests should be consolidated and submitted as a single document.

(1) List of Affiliated Companies and Counsel. To assist the court and other counsel in identifying any problems of recusal or disqualification, the reports should include as an appendix a list of all companies affiliated with the parties and of all counsel associated in the litigation.

(2) List of Pending Motions. The reports should briefly summarize the nature of pending motions.

(3) State Court Litigation. The reports should briefly summarize, to the extent known, the nature and status of similar litigation pending in state courts.

(4) Lead and Liaison Counsel; Steering Committees. Attorneys interested in serving as Lead, Liaison, or Coordinating Counsel or on a committee of counsel to assist in coordination and management of the litigation shall also submit information outlining how and at what rates they will expect to be compensated or reimbursed for services rendered to other parties and counsel and what agreements or commitments they have made respecting the role and responsibility of other attorneys in conducting pretrial proceedings, discovery, and trial.

2. Interim Measures. Until otherwise ordered by the court:

(a) Admission of Counsel. Attorneys admitted to practice and in good standing in any United States District Court are hereby permitted to appear pro hac vice in this litigation, without need for any other motion, order, or payment of fee. Association of local counsel is not required.

(b) Pretrial consolidation. The cases listed on Attachment A are consolidated for pretrial proceedings. This order does not constitute a determination that these actions should be consolidated for trial, nor does it have the effect of making any entity a party to an action in which it has not been joined and served in accordance with the Federal Rules of Civil Procedure.

(1) Master Docket and File. The Clerk will maintain a master docket and case file under the style "In re _____ Litigation (MDL-_____)" as master file number _____. All orders, pleadings, motions, and other documents will, when filed and docketed in the master case file, be deemed filed and docketed in each individual case to the extent applicable.

(2) Captions; Separate Filing. Orders, pleadings, motions, and other documents will bear a caption similar to that of this order. If generally applicable to all consolidated actions, they shall include in the caption the notation that

they relate to "All Cases" and shall be filed and docketed only in the master file. Documents intended to apply only to particular cases will indicate in their caption the case number of the case(s) to which they apply, and extra copies shall be provided to the Clerk to facilitate filing and docketing both in the master case file and in the specified individual case files.

(c) Pleadings. Each defendant is granted an extension of time for responding by motion or answer to the complaints until a date to be set at the conference.

(d) Motions.

(1) No motion shall be filed under Rule 11 or Rule 56 without leave of court.

(2) No motion (other than under Rule 12) shall be filed unless it includes a certification that the movant has conferred with opposing parties and made a good faith effort to resolve the matter without court action.

(e) Preservation of Records. Each party shall preserve all documents and other records containing information potentially relevant to the subject matter of this litigation. Subject to further order of the court, parties may continue routine erasures of computerized data pursuant to existing programs, but they shall (1) immediately notify opposing counsel about such programs and (2) preserve any printouts of such data. Requests for relief from this directive will receive prompt attention from the court.

(f) Discovery.

(1) Nonfiling of Discovery Documents. Pursuant to Fed. R. Civ. P. 5(d), discovery requests and responses will not be filed with the court except when specifically so ordered by the court or to the extent needed in connection with a motion.

(2) Pending and New Discovery. Pending the conference, all outstanding discovery proceedings are stayed and no further discovery shall be initiated. This directive does not (A) preclude informal discovery regarding the identification and location of relevant documents and witnesses; (B) preclude parties from stipulating to the conduct of a deposition that has already been scheduled; (C) prevent a party from voluntarily responding to an outstanding discovery request under Rule 33, 34, or 36; or (D) authorize a party to suspend its efforts in gathering information needed to respond to a request under Rule 33, 34, or 36. Relief from this stay may be granted for good cause shown, such as the ill health of a proposed deponent.

(3) Deadlines. Orders issued by transferor courts imposing dates for initiation or completion of discovery are vacated.

(g) Magistrate Judge. The undersigned expects to handle personally, to the extent practical, all matters requiring or deserving judicial attention, including discovery disputes. In the absence or unavailability of the undersigned, matters requiring immediate judicial attention are automatically referred, without need

for special order, to Magistrate Judge _____ for disposition or report and recommendation as may be appropriate.

(h) Later Cases. The interim orders contained in paragraph 2, including pretrial consolidation, shall apply automatically to actions later instituted in, removed to, or transferred to this court (including cases transferred for pretrial purposes under 28 U.S.C. § 1407) that involve claims relating to _____.

This the _____ day of _____ 199___.

Judge _____

Appendix 5—Sample Comprehensive Case-Management Order for Consolidated Cases

ORDER NO. _____

On _____ conferences were held pursuant to Rule 16 in _____. This order is entered as a result of discussions at those conferences. It supplements and, to the extent inconsistent, supersedes all prior orders and applies to all cases that have been or are subsequently filed in, removed to, or transferred to this court as part of the _____ Litigation, including any cases involving other liability claims considered suitable for inclusion in this litigation.

1. Admission of Counsel. Attorneys admitted to practice and in good standing in any United States District Court are hereby permitted to appear pro hac vice in this litigation without need for any other motion, order, or payment of fee. Association of local counsel is not required.

2. Pretrial Consolidation. All cases in this litigation are consolidated for pretrial purposes. This is not a determination that any of these actions should be consolidated for trial, and does not have the effect of making any entity a party to an action in which it has not been named and served

3. Filing of Papers with Courts. The purpose of the following instructions is to reduce the time and expense of duplicate filings of documents through use of a master case file, while at the same time not congesting the master case with miscellaneous pleadings and orders that are of interest only to the parties directly affected by them. It is not intended that a party would lose any rights based on a failure to follow these instructions.

(a) Master Docket and File. The Clerk will maintain a master docket and case file under the style *In re* Litigation (MDL _____) as master file number _____. Orders, pleadings, motions, and other documents bearing a caption similar to that of this order will, when docketed and filed in the master case, be deemed as docketed and filed in each individual case to the extent applicable and will not ordinarily be separately docketed or physically filed in such individual cases. However, the caption may also contain a notation indicating whether the document relates to all cases or only to specified cases.

(b) Separate Filing. A document that relates only to a specific case and would not be of interest except to the parties directly affected by it—such as an amended complaint adding a party or a motion to dismiss a party—should bear the caption and case number of that case rather than of the master case file. Such a document will be docketed and filed in that case and not in the master case file. Please note that cases removed or transferred to this court are assigned a new case number in this court.

(c) Address; Number of Copies. When filing documents with the court, send only one signed original to the Clerk, _____ Courthouse, _____. Documents should be stapled once and should not have blue backs or other cover sheets. Unless specifically requested by the court, do not submit additional copies to the Clerk or send informational copies to the judge's chambers.

(1) Telephone Numbers. The telephone number for the Docket Clerk handling these cases is _____. Access to PACER (a computerized service for obtaining docket information) is _____. The general telephone number for the Clerk's office is _____.

(2) FAX. Litigants may transmit documents to the Clerk by FAX only if advance approval is given by the undersigned. This approval should be requested only in exigent circumstances where transmission by other methods is not feasible. The Clerk's FAX number is _____.

(d) Briefs; Correspondence. Send to the judge's chambers _____ any briefs, correspondence, and other similar materials that are not due to be docketed. Send only one copy. Do not send a copy of such materials to the Clerk.

(1) Telephone Number. The telephone number for the judge's chambers is _____.

(2) FAX. Litigants may transmit documents to the judge's chambers by FAX only if advance approval is given by the undersigned. This approval should be requested only in exigent circumstances where transmission by other methods is not feasible. The chamber's FAX number is _____.

(e) Discovery Documents. Pursuant to Rule 5(d), discovery requests and responses are not to be filed with the Clerk or sent to the judge's chambers except when specifically so ordered by the court or to the extent needed in connection with a motion.

(f) Computer Files. Counsel using computers to prepare documents sent to the Clerk or to the judge's chambers are asked to retain computer-readable text files of these documents. The court contemplates that procedures will be established for maintaining an electronic library of these files for quick and inexpensive access by other litigants and interested parties.

4. Service of Original Complaints; Amendments Adding Parties.

(a) Acceptable Service. Exhibit ___ is a list of the "National Defendants"—that is, those entities that have frequently been named as defendants in these cases filed throughout the United States—showing also their national counsel and (according to their counsel) the states in which they are incorporated, in which they have their principal place of doing business, and in which they will or may contest personal jurisdiction. To eliminate disputes over service of process and reduce the expense of such service, these defendants have agreed to accept service of process in these cases (without, however, waiving any objections to personal jurisdiction or venue) if a copy of the summons and complaint is sent by certified mail, return receipt requested, to the person or address shown at Exhibit

___. This agreement applies to any case involving silicone gel product liability claims filed in any federal district court or in any state court of general jurisdiction.

(b) Extension of Time to Serve. Notwithstanding the provisions of Rule 4(i), plaintiffs shall have thirty days after the date of this order (or, if later, thirty days after the date a case is subsequently filed in, removed to, or transferred to this court) in which to effect service on defendants.

(c) Leave to Add Parties. Until otherwise directed, plaintiffs are granted leave, without need for any special motion or order, to add other plaintiffs to any pending (or subsequently filed, removed, or transferred) case if all plaintiffs in the case (1) will be represented by the same counsel (or if counsel for existing plaintiff consent to the intervention), (2) all plaintiffs are suing the same defendants, and (3) all plaintiffs had their implant(s) performed in the same state. The purpose of this authorization is to avoid unnecessary filing fees and the delays inherent in 28 U.S.C § 1407 transfers. The joinder of such parties will not be viewed as affecting subsequent motions by either plaintiffs or defendants for separate trials under Rule 42(b). Plaintiffs choosing to add parties under this authorization are, to the extent claims are made against any of the "National Defendants" listed in Exhibit ___, requested to send a copy of the amended complaint to such agent or address in addition to serving liaison counsel as specified in paragraph 5(a).

5. Service of Other Documents.

(a) National Liaison Counsel. Service of all orders, pleadings (other than the original summons and complaint), motions, briefs, and other documents will be effective on all parties when made on the following persons who, as provided in Order No. 2, have been designated as National Liaison Counsel:

(1) National Liaison Co-Counsel for Plaintiffs;

(2) National Liaison Counsel for Defendants.

Documents received by liaison counsel by 11:59 p.m. on Thursday of any week are considered served as of 4:00 p.m. on Friday of that week. Liaison counsel are responsible for promptly distributing copies to the parties for whom they are acting as liaison counsel on a "need to know" basis and for providing a convenient, inexpensive means by which any other parties for whom they are acting can obtain copies if desired.

(b) Additional Service.

(1) Defaults; Sanctions. Motions claiming default or seeking other penalties or sanctions against a party for failure to take some action within a time period measured from the date of service of a document must also be served on counsel of record for that party (or, if the party is listed in Exhibit __ on the national counsel for that party).

(2) Informational Copies. If a document affects only a particular party or a particular case—for example, a motion seeking to dismiss a party in a case or

to remand a case to state court—service of an additional copy upon counsel of record for that party or in that case (or, for those defendants listed on Exhibit __, their national counsel for this litigation) is encouraged, but not required.

(c) Computer Files. Counsel using computers to generate documents served on other parties are asked to retain computer-readable text files of these documents. It is contemplated that procedures will be established for maintaining a library of such materials for quick and inexpensive access by other litigants and interested parties.

6. Master Pleadings, Motions, Orders.

(a) Master/Sample Complaints. Plaintiffs' National Steering Committee has filed (1) a master complaint containing allegations that would be suitable for adoption by reference in individual cases, and (2) a sample complaint illustrating how allegations from the master complaint can be incorporated into an individual case. The allegations of the master complaint are not deemed automatically included in any particular case. However, in order to avoid possible problems with statutes of limitations or doctrines of repose, it shall be deemed (except to the extent a plaintiff thereafter files an amended complaint disavowing such claims and theories or limits its claims and theories to those contained in an amended complaint) that as of this date, for cases now pending in this court (or as of the date other cases are filed in, removed to, or transferred to this court), a motion is filed in each such case to amend the complaint to add any potentially applicable claims and theories from the master complaint not contained in the complaint actually filed in that case.

(b) Master Answers. By _____ each entity listed in Exhibit ___ will file in _____ a master answer that incorporates its defenses in law or fact to claims made against it in the various actions that are presently pending in this litigation, including any cross-claims it makes against other defendants. The answer will not attempt to provide a cross reference to particular paragraphs or counts of the various complaints. The answer will, however, in a generic manner admit or deny (including denials based on lack of information and belief) the allegations typically included in claims or cross-claims made against it as well as make such additional allegations as are appropriate to its defenses or cross-claims. This may be done through allegations such as "It alleges . . . that it is incorporated in State A; that it has its principal place of business in State B; that during the period from (date) to (date) it manufactured, sold, and distributed products intended to be used in _____ procedures; that these products were intended to be used only by trained, knowledgeable physicians and were accompanied by warnings and instructions that adequately explained such risks as were inherent and unavoidable in the products; that these products were not unreasonably dangerous, were suitable for the purposes for which they were intended, and were distributed with adequate and sufficient warnings; that it is without knowledge or information at this time sufficient to form a belief as to

any averment that one of its products was used in the implant procedure on which the plaintiff's complaint is based; that to the extent the plaintiff makes a claim for X (or under Statute Y) it is not liable because . . .; etc."

(1) When so filed in _____, these answers constitute an answer in each constituent case now pending or when hereafter filed in, removed to, or transferred to this court except to the extent the defendant later files a separate answer in an individual case.

(2) A defendant not listed in Exhibit __ *may* also file a master answer in _____ by _____, or within 45 days after the first case in which it is named as a defendant is filed in, removed to, or transferred to this court.

(c) Refinement of Pleadings. It is anticipated that an amended, more specific complaint and answer may be required before a case is scheduled for trial or remanded to a transferor court, but that amendments of pleadings prior to that time should generally be avoided.

(d) Motions; Orders. A motion, brief, or response that has potential effect on multiple parties (e.g., documents submitted in connection with a motion for partial summary judgment asserting that punitive damages are not recoverable with respect to implants performed in State A) will be deemed made in all similar cases on behalf of, and against, all parties similarly situated except to the extent such other parties timely disavow such a position. Additional motions, briefs, or responses addressed to such issues should not be filed or submitted by other parties except to the extent needed because of inadequacy of the original papers, to present unique facts, or a difference in positions. Orders resolving such motions will likewise be deemed as made with respect to all parties similarly situated unless the order indicates otherwise.

(e) Motions under Rule 11 and Rule 56. No motion shall be filed under Rule 11 or Rule 56 without leave of court.

(f) Effort to Resolve Without Court Intervention. Any motion relating to discovery or any other subject on which accord of affected parties might reasonably be expected shall contain a certificate that the movant has conferred with other affected parties and made a good faith effort to resolve the dispute without need for court intervention.

7. Discovery. [See Appendix 7, *infra*.]

8. Class Actions. In Order No. ___ this court extended indefinitely the time within which putative class members can elect to exclude themselves from the class action that was previously certified by the United States District Court in _____ (No. _____), which is now pending in this court as Case No. _____. This court has not determined whether the class certification in _____ will be retained, vacated, or modified, or whether a class should be certified in any of the other cases in which such a request has been or may hereafter be made. Such decisions will be made at a future date, with appro-

priate notification being given to persons to be affected thereby. Under current law, statutes of limitations are probably considered as tolled for members of the Dante class during the pendency of the class certification.

9. Trial(s). This court has not yet made any determination whether any cases should be consolidated for trial, whether some issues should be tried separately from others, whether any cases should be transferred to this court under 28 U.S.C. § 1404 or 1406, etc. For planning purposes, however, it is anticipated that some cases might be ready for trial on liability and damages as early as—but, absent extenuating circumstances, not earlier than—_____. There is the possibility that some special issues, such as the responsibility of one defendant for the actions of another, might be ready for separate trial prior to that time.

This the _____ day of _____, 199___.

Judge _____

Appendix 6—Sample Joint Scheduling Order

ORDER NO. _____
(Coordination with Proceedings in Other Courts)

It appearing that [the above-styled cases] [the cases listed on Attachment _____] share common issues with, and will involve common discovery with, certain cases pending in [list other court(s)] (the "related actions") and that pretrial proceedings in all these cases should be coordinated to avoid unnecessary conflicts and expense, conserve judicial resources, and expedite the disposition of all the cases, this court, after having consulted with counsel [and being advised that similar orders will be entered in such other court(s)], ORDERS:

1. Designated Counsel.

(a) Plaintiffs' Lead and Liaison Counsel. _____ and _____ are designated as Plaintiffs' Lead Counsel and Plaintiffs' Liaison Counsel, respectively, in this court, with the responsibilities prescribed in [Attachment _____] [*see, e.g.*, Federal Judicial Center, Manual for Complex Litigation, Third § 41.31 (sample court order delineating responsibilities of designated counsel)(1995)]. They may serve in similar capacities in the related cases if so authorized or permitted by the courts in which such cases are pending and, in any event, shall endeavor to coordinate activities in these cases with those in the related cases.

(b) Defendants' Liaison Counsel. _____ is _____ designated to serve as Defendants' Liaison Counsel with the responsibilities prescribed in [Attachment _____] [*see, e.g.,* Federal Judicial Center, Manual for Complex Litigation, Third § 41.31 (sample court order delineating responsibilities of designated counsel)(1995)]. Defendants' Liaison Counsel may serve in a similar capacity in the related cases if so authorized or permitted by such courts and, in any event, shall endeavor to coordinate activities in these cases with those in the related cases.

(c) Compensation. Attorneys designated as Lead or Liaison Counsel by this court and the other courts shall be entitled to reasonable compensation and reimbursement of expenses for services performed in such capacities, equitably apportioned among the parties in these and the related cases benefiting from such services. This court will cooperate with the other courts in making appropriate orders for such compensation and reimbursement if agreement cannot be reached between such counsel and the parties for whom they are acting.

2. Discovery. [See Appendix 7, *infra*.]

(a) Confidential Documents. Counsel in the related cases shall have access to confidential documents produced under the Confidentiality Order [*see, e.g.,* Federal Judicial Center, Manual For Complex Litigation, Third § 41.36 (sample Confidentiality Order and Acknowledgment)(1995)] entered in this court on the

same terms and conditions as counsel in the cases in this court. Counsel in the cases in this court obtaining access to documents marked confidential under similar orders entered in other courts shall be subject to the terms and conditions of such orders.

(b) Depositions. Depositions of persons whose testimony will likely be relevant both in these cases and in the related cases should ordinarily be cross-noticed for use in all such cases. [The parties in the cases before this court are directed to show cause within 60 days why the depositions previously taken in the related cases should not be usable in this court, subject to the right to conduct supplemental examination on a showing of need.]

(c) Consistency of Rulings. To avoid unnecessary conflicts and inconsistencies in the rulings of this and the other courts on matters such as discovery disputes and scheduling conflicts, [Alternate 1—Deferral to Prior Rulings]. This court will adopt a ruling already made on such matter by another court in a related case unless a different ruling is shown to be mandated by the laws and rules governing this court or justified by particular circumstances of the cases before this court. [Alternate 2—Lead Case] Such disputes will initially be presented in case no. _____, pending in [name of courts], and the ruling made in that case will be given effect in all [other] cases in this court unless a different ruling is shown to be [mandated by the laws and rules governing this court or] justified by particular circumstances of such cases. [Alternate 3—Joint Special Master] _____ is appointed under [Fed. R. Civ. P. 53(d) or corresponding state statute or court rule] to serve as Special Master in these cases (and under similar appointments by the other courts, in the related cases) (1) to assist the respective courts in preparing and monitoring schedules and plans for coordinated conduct of discovery and other pretrial proceedings; (2) to recommend to the respective courts appropriate resolution of discovery disputes, including controversies regarding limitations on the scope or form of discovery and questions regarding claims of privilege and confidentiality; and (3) to facilitate proper cooperation and coordination among counsel. [Alternate 4—Joint Hearings]

This court will be prepared to conduct consolidated hearings and pretrial conferences with judges of the courts where related cases are pending and to enter joint rulings (except to the extent differences may be mandated by different laws or rules governing the courts or justified by special circumstances in the various cases).

3. Other Litigation. Upon application, these provisions may be ordered applicable to cases involving the same common issues subsequently filed in other courts.

Dated: _____ Judge _____, _____ [Court]

Attachments

Appendix 7—Sample Order for Joint Discovery Plan

For all discovery in these consolidated actions, it is hereby ORDERED:

(a) Concepts and Objectives. The plan for document production, interrogatories, requests for admission, and depositions has been developed based on the following principles: (1) discovery should be conducted on the assumption that there may be a separate trial of each case (federal or state); (2) additional "true discovery" will not be needed with respect to many potential witnesses who have previously testified in depositions or in trials; (3) videotaped depositions (which are also stenographically recorded) should be taken for potential use as trial testimony of all persons whose testimony will likely be needed in a number of trials, thereby enabling trials to be conducted in different courts at the same time without complications arising from unavailability of witnesses; (4) through use of a joint plaintiff–defendant federal–state library, all parties in any federal or state court should have quick and inexpensive access to, and the ability to retrieve, (A) all existing and future depositions, interrogatories, requests for admission, and trial transcripts in text-readable and searchable computer files and (B) all potentially relevant documents from the defendants and other sources that are likely to be used during depositions or at trial in more than a single case; (5) claims of confidentiality and use of "protective" orders restricting use of materials should be kept to an absolute minimum; (6) some discovery will be "national" in scope (i.e., potentially needed in various cases throughout the country), while other discovery will be regional (e.g., depositions from plastic surgeons performing numerous implants) and still other discovery will be "case-specific" (e.g., depositions of plaintiffs and their treating or examining physicians); (7) the plan should be designed to accommodate coordinated, cost-efficient discovery in both federal and state courts; and (8) in order to minimize unnecessary burdens and expense of redundant discovery, parties should not submit document requests, interrogatories, requests for admission, and notices of depositions without first determining that the materials are not available in the library or are inadequate.

(b) Plaintiffs Steering Committee. The court has appointed a Plaintiffs' National Steering Committee to coordinate discovery and other pretrial proceedings on behalf of the various plaintiffs. The list of these attorneys is attached as Exhibit ___. The court reserves the right to change these appointments from time to time as appropriate.

(1) It is recognized that there are, and likely will continue to be, disagreements among plaintiffs with respect to various pretrial matters, particularly with respect to the planning for trial and as to whether class actions or consolidated trials may be appropriate. The designation of the Steering Committee is not intended to preclude the presentation to the court of divergent views from within

the Steering Committee or by attorneys for plaintiffs who disagree with positions taken unanimously by the Steering Committee. However, counsel for individual plaintiffs should not repeat arguments, presentations, or actions of the Steering Committee.

(2) The Steering Committee may organize itself into subcommittees and may designate additional counsel to assist in performing its responsibilities.

(3) At least in states in which a substantial number of implant cases have been or may be instituted (whether in federal or state court), there will also be a state (or local) liaison counsel or steering committee, with responsibilities for similar coordination in management of discovery that is primarily state-wide or local, such as discovery from surgeons or hospitals which have been involved in many implant and explant/removal procedures. It is expected that, if a person or committee is established by the state courts to coordinate implant litigation within that state, the same attorneys should ordinarily be designated to perform similar functions for the federal cases filed in that state.

(c) Document Depository. [See Appendix 10, *infra*.]

(d) Depositions.

(1) Schedule.

(A) National Defendants. Depositions of current and former employees of the national defendants may commence after _____, and are to be completed by March 31, 1993. These should be taken on the assumption they may be used as trial testimony. They should be recorded both on videotape and stenographically, with a computer disk in text-readable form also being obtained. The direct examination should be made by the party who would most likely be presenting the testimony of that person at trial. If a potential deponent has not previously testified in a deposition or at trial, it may be appropriate to arrange for a discovery deposition by opposing parties prior to the trial-type deposition.

(B) Plaintiffs. Depositions of plaintiffs may commence after _____. For most of these, the principal purpose will be for discovery purposes and will likely be noticed by defendants after the plaintiff has answered interrogatories providing core information about the plaintiff's condition and claims of damage. The parties are given leave to conduct these depositions by videotape recording (provided a stenographic record is also made), but there is no requirement for videotaping. No cut-off date can be established at this point in view of the potential for additional cases and the lack of certainty as to trial dates.

(C) National Experts. Depositions of national experts—those whose testimony may be used in different trials around the country—can commence after _____, and should be completed by _____. These should be taken on the assumption they may be used as trial testimony. They should be recorded both on videotape and stenographically, with a computer disk in text readable form also being obtained. The direct examination should be

made by the party who would most likely be presenting the testimony of that person at trial. If a potential deponent has not previously testified in a deposition or at trial, it may be appropriate to arrange for a discovery deposition by opposing parties prior to the trial-type deposition. It is recognized that supplemental depositions may be needed from time to time—for example, if there is a change in the state of knowledge regarding implants and their consequences.

(D) Plastic Surgeons; Hospitals. Depositions of surgeons and hospital personnel involved in implant or explant/removal procedures, some of whom may be named as defendants in some cases, may commence after _____. These depositions are likely to have two phases or aspects—first, general information that is not plaintiff-specific (e.g., education, what they knew or were told about implant materials and when, what they usually advised patients, etc.) and second, particular information that is plaintiff-specific. It is anticipated that this general information would be obtained in a trial-type videotaped deposition for potential use in all appropriate cases and that this could be accomplished by _____. Some plaintiff-specific depositions might be conducted as early as _____, but the time required for all of these will depend upon the number of procedures performed by the deponent and the potential trial dates for a particular plaintiff.

(E) Treating Physicians. Depositions of physicians who have treated plaintiffs may commence in some cases as early as _____. The time required to complete these will be set as potential trial dates are determined for particular cases.

(F) Defendant's Examining or Consulting Physicians. Depositions of physicians who examine plaintiffs under Rule 35 on the request of a defendant or who may otherwise be called by a defendant to express opinions regarding a plaintiff's condition should ordinarily be taken after the depositions of the plaintiffs' treating physicians. In some cases this might occur as early as _____. The time required to complete these will be set as potential trial dates are determined for particular cases.

(G) Other Witnesses. Depositions of other persons (e.g., members of plaintiff's family) will be scheduled based on the potential dates of particular cases. It is not expected that any of these would commence before _____. If a deposition is needed to provide the evidentiary foundation for admissibility of documents (e.g., under Evidence Rule 803(6) as evidence of the truth of assertions contained in a business record), it is expected that, to save costs, this would be accomplished either by a telephonic deposition or by a deposition under Rule 31.

(2) Method of Examination. When taking depositions for potential use in a number of cases: (A) start with full examination (direct, cross, and redirect) on the matters of general interest before proceeding into any additional interrogation that is plaintiff-specific; (B) avoid identifying items such as "I'm Mary

Smith and I'm representing Jane Doe" that could be confusing when the deposition is used in other cases; and (C) do not repeat examination merely to make it specific to a particular case. For example, if Dr. Don Jones testifies that he didn't tell any of his patients that there was a risk that X might happen, don't ask him for the same information about each individual plaintiff.

(3) Objections. Even in depositions taken primarily for use at trial, it is rarely necessary to state objections to questions during the deposition. Most objections can and should be made for the first time at trial when a deposition is offered. Any objections that are made during the deposition must be stated concisely and in a nonargumentative and nonsuggestive manner, such as would be appropriate if the examination was conducted before a judicial officer. A party may instruct a deponent not to answer a question only when necessary to preserve a privilege, to enforce a limitation on evidence imposed by the court, or to present a motion under Rule 30(d).

(4) Number of Examiners. Counsel should exercise self-restraint by not attending depositions that can be fairly conducted by others having a similar interest. One or two attorneys are to be designated by each side to conduct the principal examination of the deponent. While other counsel may ask additional questions, these should be limited to matters not already covered, and it is preferable that these additional questions be asked by the same counsel who have conducted the prior examination. It will be permissible to take periodic recesses during a deposition in order for examining counsel to consult with their colleagues about additional lines of examination, but such recesses should not be used to coach the deponent.

(5) Disputes During Depositions. Counsel should attempt to resolve disputes arising during depositions without need for court intervention. Disputes that cannot be so resolved may, if they might result in the need to conduct a supplemental deposition, be raised with this court by telephone, either to the undersigned or to the Magistrate Judge assigned to the case. It is expected that disputes between the parties should be addressed to this court rather than to the district court in which the deposition is being conducted, and that the undersigned will exercise the powers conferred by 28 U.S.C § 1407(b) to deal with disputes involving non-party deponents.

(6) Use at Trial. A deposition taken pursuant to this plan (including, when filed in the document depository, depositions previously taken in these cases and depositions previously or subsequently taken in any other [case involving the subject matter of the] litigation in federal or state courts) shall be considered as satisfying the requirements of Rule 32(a) for use at trial in any federal court action involving [the subject matter of this litigation] (subject to meeting the conditions stated in one of the numbered paragraphs of that subdivision) against any entity that

(A) at the time the deposition is taken is a party in any case then consolidated in this court under _____, or

(B) after the deposition is taken becomes a party in any case consolidated in this court under _____, unless within 45 days after first becoming a party it files with this court a written request that one or more specifically identified depositions not be used in the case(s) in which it is a party. If such a request is filed, other parties wanting to use the deposition(s) in the case may thereafter notice the deponent for a supplemental deposition, including one by telephone or on written questions under Rule 31. In such depositions the deponent should first be asked whether he or she reaffirms the testimony previously given. If the answer is "yes," further examination of the deponent should be limited to issues and items not covered in the original deposition.

The parties to this litigation are hereby ENJOINED from raising, with respect to any deposition usable against them in federal court actions, any objection in any state court action involving silicone gel implants to the use of the deposition based upon the fact that the deposition was not taken in the state court action. Any request for relief from this injunction must be filed with this court within 30 days from the date the deposition is filed in the depository or from the date it first becomes a party in this litigation.

These provisions do not preclude objections to use of a deposition premised upon the availability of the deponent to be called in person, nor do they preclude objections to the admissibility of particular items of testimony in a deposition on evidentiary grounds such as relevance, hearsay, etc.

To facilitate usability of depositions in state court actions involving entities that are not and may never be parties in the federal cases, the parties are encouraged, if no other procedures have been established by the state courts, to issue cross notices of depositions to the additional state-court parties.

(e) Interrogatories.

(1) To Plaintiffs. The National Defendants will, after conferring with Plaintiffs' National Steering Committee, file by _____, a single master set of interrogatories and document requests designed to elicit (to the extent not previously obtained) from each named plaintiff (but not from putative class members) "core" information needed to conduct an efficient deposition of the plaintiff. While plaintiffs may be asked to identify potential "fact" witnesses relating to liability or damage claims, they are not to be asked so-called contention interrogatories. Plaintiffs are to serve answers and make documents available by _____ (or within 30 days after the case is filed in, removed to, or transferred to this court as a part of _____) but the parties are granted leave to agree (and are expected to agree) on appropriate extensions of time, taking into account the number of plaintiffs that a particular law firm may be representing and the time when counsel would realistically be ready to proceed with a deposition of a particular plaintiff.

(2) To Defendants. Plaintiffs' National Steering Committee will, after conferring with counsel for each of the National Defendants, serve by _____, a set of interrogatories directed to that defendant. These interrogatories should be limited to questions eliciting information (e.g., its relationship to other defendants and trade organizations to which the defendant belongs) that might reasonably be expected to be used as evidence at a trial. So-called contention interrogatories will not be allowed. Given the limited purpose of these interrogatories, defendants should be able to serve their answers within 30 days after being served with the interrogatories.

(f) Additional Discovery Requests. The parties will confer concerning, and attempt in good faith to agree upon, any additional discovery requests not described above. The court expects that any such requests should not seek information already obtained and available from the depository absent good cause to believe that the available information is inadequate or incorrect.

(g) Deadlines Imposed by Other Courts. Orders issued by other courts imposing dates for initiation or completion of discovery are, when a case is removed or transferred to this court, vacated and replaced by the schedule provided in this order _____.

(h) Exceptional Cases. Any party may move for relief from the prescribed discovery schedule when merited by special circumstances, such as when a plaintiff is "in extremis" or to obtain information pertinent to critical preliminary issues (e.g., forum nons convenience issues respecting claims by foreign plaintiffs).

(i) Special Master. Pursuant to Rule 53(a), the court hereby appoints _____ as Special Master for the purpose of assisting this court in the fair and efficient coordination of discovery conducted in federal court with that conducted in the various state courts in which similar cases are or may hereafter be filed.

Appendix 8—Sample Order for Joint Discovery Master

It appearing that submission of claims of privilege to a special master appointed under Fed. R. Civ. P. 53 is warranted by the expected volume of such claims and by the likelihood that *in camera* inspection may be needed to rule on these claims and should be accomplished, to the extent possible, by someone other than the judge to whom this litigation has been assigned, the court hereby [with the consent of the parties] ORDERS:

1. Appointment. _____ is appointed under Rule 53 as special master for the purpose of considering all claims of privilege (including claims of protection against disclosure for trial preparation materials) that may be asserted during the course of discovery in this litigation and for such other matters as may be referred to such special master by the court, such as resolution of disputes under the Confidentiality Order.

2. Procedures. The special master shall have the rights, powers, and duties provided in Rule 53 and may adopt such procedures as are not inconsistent with that rule or with this or other orders of the court. Until directed otherwise by the special master or the court, any person asserting a privilege shall specifically identify the document or communication sought to be protected from disclosure, including the date, the person making the statement, the persons to whom or in whose presence the statement was made, other persons to whom the statement was or might have been revealed, the general subject matter of the communication (unless itself claimed to be privileged), the particular privilege(s) or doctrine(s) upon which protection against disclosure is based, and any other circumstances affecting the existence, extent, or waiver of the privilege. When appropriate, the special master may require that this documentation of claims of privilege be verified.

3. Reports. The special master shall make finding of fact and conclusions of law with respect to the matters presented by the parties and shall report expeditiously to the court pursuant to Rule 53(e) as applicable in nonjury actions. Unless directed by the court or believed advisable by the special master, the report shall not be accompanied by a transcript of the proceedings, the evidence, or the exhibits. Such parts of the report, if any, as may be confidential shall be filed under seal pending further order of the court.

4. Fees and Expenses. Compensation at rates mutually agreeable to the special master and the parties shall be paid to the special master on a periodic basis by the parties, together with reimbursement for reasonable expenses incurred by the special master. The special master may employ other persons to provide clerical and secretarial assistance; such persons shall be under the supervision and control of the special master, who shall take appropriate action to insure that such persons preserve the confidentiality of matters submitted to the special master

for review. Final allocation of these amounts shall be subject to taxation as costs at the conclusion of the case at the discretion of the court.

5. Distribution. A copy of this order shall be mailed by the clerk to the special master and to Liaison Counsel for the parties.

Dated: _____

Judge _____, _____ [Court]

Appendix 9—Sample Order for the Joint Use of Discovery Materials

Use at trial. A deposition taken pursuant to this plan (including, when filed in the document depository, depositions previously or subsequently taken in any other related litigation in federal or state courts) shall be considered as satisfying the requirements of Rule 32(a) for use at trial in any federal or state court action involving _____ against any entity that:

(a) at the time the deposition is taken is a party in any case consolidated in this court, or

(b) after the deposition is taken becomes a party in any case consolidated in this court, unless within 45 days after becoming a party it files with this court a written request that one or more specifically identified depositions not be used in the case(s) in which it is a party. If such a request is filed, other parties wanting to use the deposition(s) in the case may thereafter notice the deponent for a supplemental deposition, including one by telephone or on written questions under Rule 31. In such depositions the deponent should first be asked whether he or she reaffirms the testimony previously given. If the answer is "yes," further examination of the deponent should be limited to issues and items not covered in the original deposition.

The parties to this litigation are hereby enjoined from raising, with respect to any deposition usable against them in federal court actions, any objection in a state court action involving the subject matter of this litigation to the use of the deposition based upon the fact that the deposition was not taken in the state court action. Any request for relief from this injunction must be filed with this court within 30 days from the date the deposition is filed in the depository or from the date it first becomes a party in this litigation.

These provisions do not preclude objections to use of a deposition premised upon the availability of the deponent to be called in person, nor do they preclude objections to the admissibility of particular items of testimony in a deposition on evidentiary grounds such as relevance, hearsay, etc.

To facilitate usability of depositions in state court actions involving entities that are not and may never be parties in the federal cases, the parties are encouraged, if no other procedures have been established in the state courts, to issue "cross notices" of depositions to the additional state court parties.

Appendix 10—Sample Orders for Common Depository for Documents

[Alternate 1]

It is ORDERED:

1. Establishment of Depositories. Document depositories shall be established in [specify city] at such locations as the parties may agree upon. In the absence of agreement, the court upon motion shall designate such locations. Documents produced by plaintiffs pursuant to formal or informal request shall be placed in a plaintiffs' depository maintained at the expense of the plaintiffs; those produced by defendants pursuant to formal or informal request shall be placed in a defendant's depository maintained at the expense of defendants. Each depository will contain equipment for producing copies and separately counting the copies that are made for each party.

2. Filing System. The filing party shall place the documents in the depository in sequential order according to the document numbers, and the documents shall be organized in groups in accordance with the document identification prefixes. Documents without identification numbers shall be organized in an orderly and logical fashion. Existing English translations of all foreign-language documents shall be filed with the documents. [Provisions may be made for use of CD-ROM or other appropriate technology.]

3. Access, Copying, Log. Counsel appearing for any party in this litigation and the staffs of their respective law firms working on these cases shall have reasonable access during business hours to each document in any such depository and may copy or obtain copies at the inspecting parties' expense. Such inspection shall not be subject to monitoring by any party. A log will be kept of all persons who enter and leave the depository, and only duplicate copies of documents may be removed from the depository except by leave of court. [Access to, and copying of, confidential documents is subject to the limitations and requirements of the order protecting against unauthorized disclosure of such documents.]

4. Subsequent Filings. After the initial deposit of documents in the depository, notice shall be given to both Liaison Counsel of all subsequent deposits.

Dated: _____ Judge _____, _____ [Court]

[Alternate 2]

It is ORDERED:

A. Joint Depository. A joint plaintiffs–defendants federal–state document depository and library will be maintained in the _____ and supervised by _____. The depository will store all materials produced by parties and third parties that may be needed in more than a single case, including docu-

ments, interrogatories, requests for admission, requests for production of documents, depositions, trial transcripts, and similar materials. These materials will be made available to litigants in any federal or state case involving implant product liability claims. It is anticipated that materials in the depository should be available from the depository for such distribution by _____.

(1) The expenses of the depository, including the costs of imaging of documents and the compensation paid to _____ to the extent not payable as an employee of the federal judiciary, shall be initially divided equally between the Plaintiff's National Steering Committee and the national defendants listed in Exhibit B.

(2) Reimbursement of these expenses may be obtained by imposing user fees, but these fees will be kept to the minimum necessary to fund the costs of the depository incurred by reason of this litigation. The depository will not be conducted as a "profit center."

(3) Plaintiffs' Steering Committee has indicated that it expects to establish additional regional electronic depositories.

(a) Numbering. All materials will be uniquely identified by a prefix of as many as three letters and a page number of as many as nine digits. This combination of letters and digits should then be used throughout the discovery process and at trials whenever referring to a particular document or page. All reasonable efforts should be made to avoid having the same page being assigned more than one such identifying number except when there is a need to account for different copies of the same document or page—for example, because of special notations being placed on a document.

(b) Documents.

(i) Documents produced by the plaintiffs, defendants, and third parties pursuant to Rules 33 and 45 will be submitted to the depository, as will a copy of interrogatories (and responses), requests for admission (and responses), depositions, trial transcripts, and other similar materials.

(ii) Defendants have been directed to submit to the depository by _____, the documents previously requested from them.

(A) Some additional time may be needed by some defendants to produce some of the requested documents. These are to be submitted as soon as possible after the due dates.

(B) The documents to be produced include all nonprivileged materials that are potentially relevant in any of the cases or that are reasonably calculated to lead to relevant evidence. After the production has been accomplished, the Plaintiffs' National Steering Committee and the particular defendant will prepare a joint statement describing the nature and scope of the documents produced that can serve as the functional equivalent of a Rule 34 request and response, enabling other litigants to understand what has been produced.

(C) Each defendant shall file by _____, a list of any otherwise relevant documents that are not produced based on a privilege or a protection (such as for work-product materials). Documents may be withheld only if privileged or protected against disclosure in each court (federal or state) in which they have been sued.

(D) The objective that defendants producing documents under this plan be relieved of redundant requests from plaintiffs in other federal and state cases can be accomplished only if plaintiffs can be reasonably confident that all potentially relevant documents are either produced or are specifically identified as withheld pursuant to a legitimate claim of privilege or protection against disclosure. A defendant's failure to either produce or identify as withheld a relevant document will be viewed by the court as a serious infraction of its orders, justifying appropriate sanctions unless exceptional circumstances justify its failure. Upon learning that there are any additional relevant documents in its possession or under its control which have not been produced or identified, a defendant is under an obligation to promptly make known the existence of the documents (including the reason for its failure) and submit the documents to the depository or, if withheld under a claim of privilege or protection, identify the documents.

(iii) Pleadings, interrogatories, trial transcripts, and similar materials will, to the extent feasible, be stored in computerized text-readable and searchable format. Depositions will be stored both in the form of text-readable and searchable computer files and on videotape. Other documents such as letters, reports, photographs, etc. (including those appended to a deposition) will be "imaged" under a contract with DocuQuest approved by the court in Order No. 4 and then made available to litigants on CD-ROM or other suitable media unless, because of the nature of the materials, they are unlikely to be used in other than a single case (e.g., medical history records of a particular plaintiff).

(iv) A summary will be prepared by Plaintiffs' National Steering Committee and reviewed by the defendants, which identifies by number and describes (in neutral words that would be suitable for use by a court in preparing a list of exhibits) the various documents. This summary will be prepared in a computerized database format and made available to all parties, who then may add private, work-product comments as separate fields in their own copy of the database.

(v) Any party seeking to impose restrictions on access to or use of any materials under Rule 26(c) shall file by _____, a motion identifying with particularity the materials for which the protection is sought and the proposed terms and conditions of any such protection. If materials are subject to a protective order entered by another court in a case that is not part of MDL926, the affected parties are expected to waive, to the extent feasible, any rights under such orders to keep such materials confidential and, if necessary, to seek relief from the court in which the protective order was entered. To the extent any ma-

terials remain or become subject to a protective order, that fact will be indicated in a separate field on the summary described in paragraph (4) above.

(vi) [The supervisor of the depository] will prepare and make available before _____, an informational booklet explaining how materials can be obtained from the depository.

(vii) Each party shall preserve all documents and other records and exhibits potentially relevant to the subject matter of this litigation. Subject to further order of the court, parties may continue routine erasures of computerized data pursuant to the existing program, but they shall (A) notify opposing counsel about such programs and (B) preserve any printouts of such data. Requests for relief from this directive will receive prompt attention from the court. The parties are to confer and attempt to agree on arrangements for the preservation or disposition of explanted/removed materials.

Appendix 11—Joint Opinion and Order on Pretrial Motion

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
AND
IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

IN RE: ORTHOPEDIC BONE SCREW PRODUCTS LIABILITY LITIGATION	:
_____	: MDL DOCKET NO. 1014
THIS DOCUMENT RELATES TO ALL ACTIONS	: COURT OF COMMON PLEAS : PHILADELPHIA COUNTY
_____	: NO. 9408-0002

MEMORANDUM AND ORDER

BECHTLE, J. MARCH 8, 1996
MOSS, J.

Presently before these courts is the motion of defendants Sanford Davne, M.D., Neal A. Jewell, M.D., Robert G. Johnson, M.D., South Texas Orthopaedic & Spinal Surgery Associates, P.A., Jeffrey D. Carter, D.O., James Pollifrone, D.O., and John K. Burkus, M.D. (collectively "the physician defendants"), for partial summary judgment against plaintiffs' informed consent claims based on FDA regulatory status (docket #506), plaintiffs' opposition thereto, and the parties' reply and supplemental reply briefs. For the reasons stated below, the court will grant said motion.
[Memorandum of law followed.]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
AND
IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

IN RE: ORTHOPEDIC BONE SCREW PRODUCTS LIABILITY LITIGATION	:
_____	: MDL DOCKET NO. 1014
THIS DOCUMENT RELATES TO ALL ACTIONS	: COURT OF COMMON PLEAS : PHILADELPHIA COUNTY
_____	: NO. 9408-0002

PRETRIAL ORDER NO. ____

AND NOW, TO WIT, this _____ day of March, 1996, upon consideration of the physician defendants' motion for partial summary judgment against plaintiffs' informed consent claims based on FDA regulatory status (docket #506), plaintiffs' opposition thereto, and the parties' reply and supplemental reply briefs, IT IS ORDERED that said motion is **GRANTED**.

_____
LOUIS C. BECHTLE, J. [federal judge]

_____
SANDRA MAZER MOSS, J. [state judge]

Appendix 12—Procedural Order for Joint Conduct of Trial

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

VAUGHN G., et al.	*	
Plaintiffs	*	
v.	*	CIVIL ACTION NO. MJG-84-1911
MAYOR and CITY COUNCIL OF BALTIMORE, et al.	*	
Defendants	*	

* * * * * * * * * * * * * * * *

PROCEDURAL ORDER

I. INTRODUCTION

Vaughn G., et al. v. Mayor & City Council of Baltimore, et al., Case No. MJG-84-1911 ("the Federal case") is a lawsuit brought by the Maryland Disability Law Center to obtain compliance with federal law requiring the Baltimore City Public Schools ("BCPS") to identify students with educational disabilities and provide them appropriate services in a timely manner. In its present posture, the case involves an effort by the plaintiffs, joined by the defendant, State of Maryland, to have the federal Court place the entire Baltimore City Public School System, or at least its special education aspects, in receivership.

Bradford, et al. v. Maryland State Board of Education, et al., Case No. 94340058/CE189672 (Circuit Court for Baltimore City) and *Board of School Commissioners of Baltimore City, et al. v. Maryland State Board of Education*, Case No. 95258055/CL202151 ("the State cases") are lawsuits in which *inter alia*, (1) the *Bradford* Plaintiffs seek an Order requiring the state to provide the schoolchildren of Baltimore City with an adequate public school education, (2) the City seeks an order requiring the state to provide the City with additional funds for use by the BCPS, and (3) the state seeks a restructuring of the Baltimore City Public School System.

It became apparent to the judges assigned to the federal case (Honorable Marvin J. Garbis of the United States District Court for the District of Maryland) and the state cases (Honorable Joseph H.H. Kaplan of the Circuit Court for Baltimore City) that a coordination of their efforts would be in the public interest. The federal case and the state cases present different questions for judicial resolution. However, the evidence to be presented in the cases overlaps substantially.

Federal judge Garbis and state judge Kaplan have decided that the federal case and the state cases shall be tried together. In so doing, however, the federal judge will be conducting a federal trial and the state judge will be conducting a state trial. As set forth below, there is to be no sharing or delegation of judicial duties. In every sense, what will occur will be the separate, although simultaneous, trial of the federal case and the state cases. Therefore, following trial, there will be a federal trial record for decision of the federal issues by the federal judge and, as necessary, appellate review in the federal system. There will also be a state trial record for decision of the state case issues by the state judge and, as necessary, appellate review in the Maryland judicial system. The procedure set forth herein has been agreed upon by all parties.

II. FILING OF PAPERS

The parties shall file papers separately in the federal case and the state cases so that each court shall have a complete record of the matters presented to that court. It is recognized that, at times, the parties may be filing papers in both courts that are identical save for the caption.

III. LOCATION

The trial of the cases shall, for the most part, be conducted in the state court facility. However, it is anticipated that some portion will be conducted in the federal courthouse.

IV. STIPULATION RE: PARTY PARTICIPATION

Counsel for Baltimore City and related parties shall enter their appearances in the federal case and state cases. Similarly, counsel for the Maryland Department of Education and related parties shall *enter* their appearances in the federal case and the state cases.

Counsel for the federal case *Vaughn G.* plaintiffs and counsel for the state cases *Bradford* plaintiffs shall each represent their own respective clients. Accordingly, absent a stipulation, actions by counsel for the *Vaughn G.* plaintiffs would not be part of the record of the state cases and action by counsel for the *Bradford* plaintiffs would not be part of the record in the federal case. However, all parties have stipulated, and the court hereby orders, that the record of the trial of the state cases shall be deemed to be included in the record of the federal case and *vice versa* subject to one exception. There is an exception for any evidence expressly excluded from the federal case by the federal judge or from the state cases by the state judge.

V. THE TRIAL RECORD

A. Proceedings

The federal record of proceedings shall be recorded by a federal court reporter. The state record of proceedings shall be recorded by the circuit court recording system for all proceedings held in the state court facility. Appropriate arrangements shall be made for production of a state record for any part of the proceedings that may be held in the federal court facility or elsewhere.

B. Exhibits

All exhibits shall be marked as both federal case and state case exhibits with name identification, e.g., "City Exhibit 27." The party offering an exhibit shall provide one copy for the federal case and one copy for the state cases. The respective federal and state clerks shall maintain separate lists of exhibits that have been admitted in evidence in the respective cases. Hence, it is possible that the hypothetical City Exhibit 27 would be admitted in the federal case, but excluded in the state cases or *vice versa*.

VI. EVIDENTIARY RULINGS

Evidence shall be presented in two phases to ensure the orderly creation of a state record reflecting state judge rulings and a federal record reflecting federal judge rulings.

In the first phase of each witness's testimony, the state judge shall rule on evidentiary questions. Following the first phase, which includes direct examination, cross-examination, redirect, etc., there shall be a supplemental federal phase. In the federal phase, the parties may seek (1) to have the federal judge exclude from the federal record evidence admitted in the state case phase or (2) to have the federal judge receive in the federal case evidence which the state judge excluded in the first phase.

VII. CONCLUSION

The Court notes that Judge Kaplan is entering a substantially identical order in the state cases.

SO ORDERED this 5th day of November 1996.

_____

Marvin J. Garbis
United States District Judge

Appendix 13—Case Tracking System for Capital Cases (U.S. Ninth Circuit)

April 26, 1991

Memorandum to State Attorneys General
Death Penalty Contacts

Re: Case Tracking System

As you are all probably aware, the Ninth Circuit Judicial Council's Death Penalty Task Force developed a form for tracking death penalty cases from the state courts within the Ninth Circuit to the federal courts. The purpose of this case tracking system serves at least two purposes. One is to give the federal courts some idea of when a case may be moving into the federal courts, and the second purpose is to use the information to assess what additional resources the courts may need to deal with these cases.

It is my understanding that this form was developed after a fairly lengthy process and that many of you were involved in its development. The purpose of this memorandum is to request that you begin to provide this office with these reports on a regular basis. A copy of the form, as it is used in California, is enclosed.

If you have any general questions, please feel free to contact me. If you have specific questions about the form, I would suggest you contact Ward Campbell.

Sincerely,

Cathy A. Catterson
Clerk of Court

Name (last, first): Harris, Robert A.
Trial Court: San Diego Co. Case No. 44315
Place of Incarceration: San Quentin
Warden's Name & #: Daniel Vasquez (415) 485-1443
Defense Counsel's Michael McCabe (619) 231-1181
Names & ##: Chas. Sevilla (619) 232-2222
Prosecution's Louis Hanoian (619) 237-7281
Names & ##: Jay Bloom (619) 237-7750
Size of Record: 7500
U.S. District Court: S.D. Cal. Judge: Enright
Court of Appeals Panel Members: Alarcon, Brunetti, Noonan
EXECUTION DATE 4/3/90 STAYED

CASE HISTORY	DATE	COURT	CASE NO.	CITE
FIRST PETITION				
STATE APPEAL				
Affirmed	2/11/81	Cal. S.C.	20888	28 Cal. 3d 935
CERTIORARI				
Filed	5/19/81	U.S.S.C.		
Denied	10/5/81			__ U.S. __
STATE COLLATERAL				
Filed	12/7/81	Cal. S.C.		
Denied	1/13/82			
CERTIORARI				
Filed	3/7/82	U.S.S.C.		
Denied	6/7/82			
DIST. CT. HABEAS				
Filed	3/5/82	S.D. Cal.		
Denied	3/12/82			
PC Granted	3/1/82			

	DATE	COURT	CASE NO.	CITE
FEDERAL APPEAL				
Filed	3/12/82	9th Cir.		
Rem.	9/15/82			692 F.2d 1189
CERTIORARI				
Filed	12/29/82	U.S.S.C.		
Granted	3/21/83			
Rev. & Rem.	1/23/84			465 U.S. 37
DIST. CT. HABEAS (on remand)				
Denied	10/17/84	S.D. Cal.		
FEDERAL APPEAL				
Filed	11/14/84	9th Cir.		
Sub. W/drawn	11/5/86			
Affirmed	7/8/88			
Reh. EB Filed	8/5/88			
Reh. Den.	9/28/89			
CERTIORARI				
Filed	11/10/89	U.S.S.C.	89-767	
Denied	1/16/90			110 S. Ct. 854
FIRST SUBSEQUENT PETITION				
STATE COLLATERAL				
Filed		Cal. S.C.		
Denied	6/30/82			
DIST. CT. HABEAS				
Filed	8/13/82	S.D. Cal.		
Cons. w/1st Pet.	4/23/84			

SECOND SUBSEQUENT PETITION
STATE COLLATERAL

	DATE	COURT
Filed	1/5/90	Cal. S.C.
OPP. Filed		
Denied	3/16/90	

Date Report Generated _____

EXECUTIONS

	DATE	COURT
Date – 7/7/81		
Stay Req. Filed	5/19/81	U.S.S.C.
Stay Granted	6/22/81	
Date – 12/15/81		
Stay Req. Filed	12/7/81	Cal. S.C.
Stay Granted	12/9/81	
Date – 3/16/82		
Stay Req. Filed	3/5/81	S.D. Cal.
Stay Den.	5/12/82	
Stay Req. Filed	3/12/82	9th Cir.
Stay Granted	3/12/82	
Date – 4/3/82		
Stay Req. Filed		Cal. S.C.
Stay Den.	3/16/90	
Stay Req. Filed	3/26/90	S.D. Cal.
Stay Den.	3/28/90	
Stay Req.	3/29/90	9th Cir.
Stay Granted	3/30/90	
App. to Vac. Stay	3/30/90	U.S.S.C.
App. Den.	4/2/90	

EXECUTION STAYED

Date Report Generated _____

KEY
STATES

Ari.
Cal.
Ida.
Mont.
Nev.
Ore.
Wash.

COURTS
____ S.C. (State Supreme Court)
____ D.C. (Federal District Court)
9th Cir. (9th Circuit Court of Appeals)
U.S.S.C. (United States Supreme Court)

ACTIONS

En Banc (EB)
Filed
Granted
Denied
Affirmed
Reversed (Rev.)
Remanded (Rem.)
Submission Withdrawn (Sub. W/drawn)
Application (App.)
Consolidated (Cons.)

Appendix 14—Avoiding Federal Problems

Footnotes from this article have been removed. A complete version of this article is on file with the Interjudicial Affairs Office, Federal Judicial Center.

A Brief Overview of Federal Habeas Corpus Law

by William W Schwarzer

The purpose of this memorandum is to address a problem that state and federal courts share: federal post-conviction review of state court judgments. The writ of habeas corpus permits a prisoner to challenge his conviction on federal constitutional grounds. Although the writ provides important protection for the constitutional rights of defendants, its widespread use has also been a source of tension between the state and federal judicial systems and of public dissatisfaction with the administration of criminal justice. Whether the conditions for granting federal post-conviction relief should be tightened has been a subject of great controversy. But, however the debate is resolved, the most immediate concern is, and will continue to be, how to reduce the causes for post-conviction relief.

This memorandum examines the principal grounds on the basis of which federal courts, principally the Ninth Circuit Court of Appeals, which has jurisdiction of California, have granted relief to defendants convicted in state courts. It is intended simply to report what the federal courts have done and how they might be expected to deal with particular problems or situations. It is not intended to suggest to state court judges how they should conduct trials in their courts. The assumption underlying this memorandum is that, although state court judges are thoroughly familiar with California law, they may not have the opportunity to follow federal habeas law. The objective is, through greater familiarity with relevant federal law, to advance the common interest of state and federal judges in reducing the incidence of meritorious habeas petitions.

Because of time and space constraints, this memorandum is not exhaustive. It covers the taking of guilty pleas, evidentiary rulings, some aspects of the right to counsel, jury instructions, exposure of jurors to extrinsic evidence, and prosecutorial misconduct. Some issues, such as jury selection, ineffective assistance of counsel, competency to stand trial, vindictive sentencing, double jeopardy, and mistrial motions, are not covered. The main objective in selecting case citations was to find clear statements of rules and representative fact patterns, not to cite every case on point.

I. Guilty Pleas.

A guilty plea forecloses all grounds for habeas corpus relief except that the plea itself is not voluntary and intelligent. If the defendant is fully aware of the direct penal consequences of his plea, including the significance of any commitments

made to him by the court, the prosecutor, or his own attorney, then the plea is valid unless it is induced by threats, misrepresentations, mistake, or unenforceable or unethical promises. If the defendant pleads guilty on the advice of counsel, the plea is voluntary unless counsel was ineffective. If the defendant waived his right to counsel, that waiver itself must have been voluntary and intelligent.

A habeas court determines whether a plea was voluntary and intelligent based on a review of the entire record, especially the record of the plea proceeding. Therefore, the making of an accurate and complete record of the proceeding is vital. The representations made by the defendant, his attorney, and the prosecutor at such a proceeding, as well as any findings made by the judge accepting the plea are presumed to be true and will generally be accepted by the habeas court at face value.

Pre-plea questioning by the court on the record should cover the following matters: that the defendant is mentally competent and not under the effects of drugs or alcohol; that the defendant understands the relevant law in relation to the facts; that the defendant understands the charge against him and the elements that the state must prove; and that a sufficient factual basis exists for the plea.

The court should also ask the defendant, his attorney, and the prosecutor what promises have been made to the defendant as part of the plea agreement. And the court should make sure that the defendant understands that, although the prosecution is bound by the agreement, the court is not bound and is free to exercise its judgment in imposing sentence. The court must inform the defendant of the direct penal consequences of pleading guilty. Direct consequences include the giving up of the constitutional rights against compulsory self-incrimination, to trial by jury, and to call and confront witnesses; the maximum and, where applicable, the minimum punishment provided by law; a mandatory parole term or ineligibility for parole; restitution; and anything within the discretion of the sentencing judge. Under current law, the court need not inform the defendant of the indirect consequences of pleading guilty, although in cases where they are significant it is well to include them. Indirect consequences include the possibility that sentences may run consecutively:

- the possibility of early release;
- the possibility that parole may be revoked;
- the possibility that the defendant may be deported;
- civil tax liability;
- the possibility of an undesirable military discharge;
- the possibility of civil commitment;
- the possibility that a juvenile may later be sentenced as an adult if youth authorities determine that he is not amenable to youth authority treatment; and

- anything that depends on the subsequent behavior of the defendant or is in the control of an agency independent of the sentencing judge.

Finally, if the defendant is represented by counsel, the court should ask whether he is pleading guilty on the advice of counsel, and, if so, whether he has fully consulted with counsel and is satisfied with the advice. The questioning should be sufficient to preclude a subsequent Sixth Amendment attack on the ground that counsel was ineffective. A failure to satisfy these constitutional requirements may be excused if it can be shown that the defendant received the missing advice and information from other sources, such as his attorney, or if the failure is harmless beyond a reasonable doubt.

II. Evidentiary Rulings.

Erroneous evidentiary rulings do not afford a basis for federal habeas corpus relief unless they violate the defendant's federal constitutional rights. The principal relevant constitutional provisions are the Fourteenth Amendment due process clause and the Sixth Amendment confrontation clause. A federal court will not hear a claim that evidence was obtained as a result of a search or seizure violating the Fourth Amendment if the defendant had a full and fair opportunity to litigate the merits of that claim in state court.

A. *Due Process Analysis.* Erroneous admission or exclusion of evidence violates the defendant's due process rights only if it renders the trial "fundamentally unfair." Only in rare cases will a petitioner be able to meet this standard; the survey conducted for this memorandum did not turn up any case in which relief was granted on due process grounds for erroneous admission of evidence. Where the claim is based on exclusion of evidence, the petitioner must satisfy a rigorous balancing test that accords substantial weight to the state's interests in preserving orderly trials, in judicial efficiency, and in excluding unreliable or prejudicial evidence. Unless the state's interest is weak, constitutional error will be found only if the excluded evidence is shown to be critical, reliable, and highly probative evidence.

B. *Confrontation Clause.* The Sixth Amendment guarantees a defendant the right to confront and cross-examine the witnesses against him. This is a fundamental right of great importance. Confrontation clause issues typically arise in three situations: when hearsay statements by a non-testifying declarant are admitted against the defendant; when a nontestifying codefendant's confession is admitted; and when the trial court restricts the defendant's cross-examination of a witness on an issue.

1. *Hearsay.* If a hearsay declarant is not present for cross-examination, the confrontation clause ordinarily requires the state to show that he is unavailable and that the statement bears adequate "indicia of reliability." Reliability may be inferred if the statement falls within "a firmly rooted" hearsay exception. These principles have been applied mainly to prevent introduction of prior testimony

of an unavailable witness. The statements of a co-conspirator in furtherance of the conspiracy, whether technically hearsay or not, are binding on each member of the conspiracy and therefore are admissible against them, regardless of the unavailability of the declarant.

2. *Confession of non-testifying codefendant.* It is error to allow the jury to hear the confession of a codefendant that implicates the defendant unless the defendant has an opportunity to cross-examine the codefendant. This error, frequently referred to as *Bruton* error, is not cured by an instruction that the jury should not consider the confession against the implicated defendant, or by the admission of the implicated defendant's own confession. Error may be prevented, however, by redacting the confession to remove any reference to the existence of the nonconfessing defendant. Again, relief will be denied if the state demonstrates that the error is harmless beyond a reasonable doubt. If the implicated defendant has also confessed, his confession may be used in determining whether the error was harmless.

3. *Trial court limitation of cross-examination.* The confrontation clause is violated when the trial court restricts the defendant's cross-examination of a witness to show a "prototypical form of bias." The harmless error test applies to such violations. Relevant factors for determining whether the error was harmless include the significance of the witness's testimony, the presence or absence of corroborating or contradictory evidence, the extent of cross-examination permitted, and the strength of the prosecution's case.

III. Right to Counsel.

The Sixth Amendment guarantees a criminal defendant's right to the effective assistance of counsel. Most claims of ineffective assistance are based on facts that the trial court may observe, evidence of ineffectiveness, as where counsel is asleep during the trial or fails to appear; in such cases, the court should take prompt action. The more common situations requiring trial court action are conflicts of interest and defendants seeking to proceed pro se.

A. *Counsel with Conflicts of Interest.* The right to effective assistance of counsel includes a right to counsel free from conflicts of interest. Existence of a conflict of interest that adversely affected the attorney's representation of the defendant can amount to constitutional error. If the trial court has reason to suspect that a defendant's counsel has a conflict of interest, the court should hold a hearing. Conflicts may arise when the same attorney represents more than one defendant in the case before the court or in a related matter, when the attorney's own interests conflict with the defendant's interests, or when the attorney is hired by another defendant or a third party who has an interest in the case. If the court finds that a conflict exists, it must appoint new counsel to represent the defendant unless the defendant effectively waives the conflict.

Like all waivers of constitutional rights, a waiver of conflict must be voluntary and intelligent and on the record. If the court finds that the conflict or potential conflict is sufficiently serious, it may decline to accept a waiver, although doing so may create another problem by violating the defendant's qualified right to choose his attorney. When the trial court declines to accept a waiver, it should make findings on the record explaining why the state interest in ensuring that the judgment will withstand appeal should prevail over the defendant's qualified right.

B. *Conflicts Between Defendant and Counsel.* Compelling a defendant to stand trial represented by an attorney with whom he has an irreconcilable conflict may violate the defendant's Sixth Amendment right to counsel. When a defendant requests substitute counsel, the trial court should consider the following three factors in determining whether the conflict requires granting the request: (1) whether the defendant's request is timely; (2) whether it is supported by reasons; and (3) whether the conflict between the defendant and his attorney has resulted in such a lack of cooperation as to prevent an adequate defense. The timeliness of a motion for substitution of counsel depends on when the motion is made, any reasons for delay, and the need for a continuance of the trial if the motion were granted. If the defendant's motion for substitution of counsel is made immediately before or during trial and the defendant has not articulated reasons for the delay, denial of the motion is justified if substitution would require a continuance. In contrast, a motion made at a pretrial appearance is timely, and late consideration of the motion for reasons not attributable to the defendant will not render the motion untimely.

In considering the defendant's reasons for his dissatisfaction with counsel, the court should hold a hearing at which the defendant has the opportunity to state specific reasons for his dissatisfaction with counsel. The "court must take the time to conduct such necessary inquiry as might ease the defendant's dissatisfaction, distrust, and concern." The court, however, need not ask specific questions regarding the defendant's reasons for his dissatisfaction if the court has sufficient information to make a decision. Likewise, the court need not interrogate the defendant or his counsel about their confidential communications.

The reasons typically stated by defendants for their dissatisfaction with counsel are insufficient in themselves to require substitution of counsel. Disagreement with counsel's recommendation to plead guilty does not require replacement of counsel if the recommendation was within the reasonable range of competence. Likewise, unless there is a total breakdown in communication, a defendant's disagreement with counsel's trial strategy does not require substitution of counsel. The defendant's assertion that counsel is not adequately prepared does not require substitution unless the conflict has resulted in a total breakdown in communication or the court finds that counsel has not prepared an adequate defense. Finally, antagonism between the defendant and his counsel does not re-

quire substitution of counsel unless the hostility has prevented counsel from preparing a defense.

In determining whether there is a total lack of communication, the court should focus on the effect of a breakdown in communication on counsel's ability to prepare a defense. If the conflict between defendant and his counsel does not result in such a loss of communication that counsel is unable to adequately prepare a defense, then the court need not grant the motion to substitute counsel. Even a complete lack of communication may not require substitution if counsel is able to prepare and competently represent the defendant at trial. In contrast, if the lack of communication is so complete that the attorney cannot prepare a defense, substitute counsel must be appointed even if the failure to cooperate stems from the defendant's refusal to cooperate.

C. *Waiver of the Right to Counsel.* A criminal defendant has a qualified right to give counsel and proceed pro se. If the defendant's waiver of the right to counsel is voluntary and intelligent, if he is competent to represent himself, and if his motion to represent himself is timely, then the trial court must grant his request. When the defendant indicates his desire to represent himself, the trial court should make a record establishing that the defendant is aware of the dangers and disadvantages of self-representation to establish that waiver of the right to counsel. The court should also question the defendant to determine whether he is competent to represent himself. Competency does not depend on technical legal knowledge as such, but on the defendant's ability to present his case to the trier of facts. If the defendant wishes to proceed pro se, the court may appoint, over the defendant's objection, standby counsel to aid the defendant when he requests help and to be available to represent the defendant if the defendant turns out to be incompetent to represent himself. However, the defendant is entitled to control of the case and it may be constitutional error if the actions of the standby counsel destroy the jury's perception that the defendant is in control of his defense.

IV. Jury Charge.

Federal habeas corpus relief may be given where error in the jury charge is so prejudicial as to have infected the entire trial, rendering it "fundamentally unfair," thereby violating due process. A challenge claiming error under state law only does not state a claim cognizable in federal habeas corpus proceedings. Nor does one on the ground that the instructions are "undesirable, erroneous, or even 'universally condemned.' The federal court will evaluate the effect of the allegedly erroneous instruction or of the allegedly erroneous failure to give an instruction in the context of the record as a whole, including the entire charge to the jury, and compare the instructions given with those that should have been given."

The trial court must instruct the jury on all of the elements of each offense charged. Failure to do so violates due process because a defendant may be convicted only upon proof beyond a reasonable doubt of every element of the crime with which he is charged. For that reason, due process also bars evidentiary presumptions in a jury charge that would allow the jury to infer one element from proof of another element, such as an instruction that allows the jury to infer malice from the use of a deadly weapon. Due process requires the court to instruct the jury on the defendant's theory of the case when that theory is supported by case and a rational connection can be drawn between the extrinsic evidence and a prejudicial jury finding, then a writ will be granted, even if the connection is improbable.

Due process requires the court to instruct the jury on the defendant's theory of the case when that theory is supported by the law and the evidence. However, refusal to give such an instruction does not alone render the trial fundamentally unfair, and omission of an instruction is less likely to be prejudiced than a misstatement of the law.

Even if there is constitutional error in the jury charge, it will not be ground for relief if it was harmless beyond a reasonable doubt. An error is harmless if the facts found by the jury were such that if the error had not occurred its verdict would have been the same. Examples of error that were found to be harmless include:

- failure to instruct the jury on a necessary element of the crime charged if that element is not disputed or if the arguments of counsel adequately define that element and make clear to the jury that it must be proved; and
- an instruction that may be understood by the jury to allow it to infer a necessary element when that instruction is followed by a clear statement that the state is required to prove all elements beyond a reasonable doubt or when the evidence of that element is overwhelming.

The only recent reported examples of reversible error arising in the Ninth Circuit are:

- the trial court's failure, in a capital case, to instruct sua sponte on second degree murder when the evidence would support such a lesser included charge; and
- instruction on a charge if the indictment or information does not provide the defendant with notice adequate to prepare a defense against that charge.

Thus, jury instructions that are reasonably clear, that state each element of the charged offenses, and that clearly place on the prosecution the burden of proving each element beyond a reasonable doubt will pass constitutional muster. To this end the trial court should be careful to identify the disputed material issues and to instruct on those issues.

V. Exposure of Jurors to Extrinsic Evidence.

Exposure of the jury to extrinsic evidence violates the defendant's Sixth Amendment confrontation right unless the state proves that it was harmless beyond a reasonable doubt. If the extrinsic evidence relates directly to a material aspect of the case and a rational connection can be drawn between the extrinsic evidence and a prejudicial jury finding, then a writ will be granted, even if the connection is improbable.

The trial court can take steps prior to exposure and after it learns of the exposure to reduce the risk of error. The court should admonish the jury regularly that it should not consider any evidence except that which is admitted by the court. The court can also ensure that extrinsic evidence, such as court files, reference books, or magazines, is excluded from the jury room.

If the court learns that the jury has been exposed to extrinsic evidence, it should conduct an evidentiary hearing (ordinarily through individual voir dire of each affected juror) to determine what extrinsic evidence the jury was exposed to, which jurors were exposed, how the jury was exposed to the evidence, whether and to what extent the jury discussed the evidence, whether the evidence was introduced before a verdict was reached, and anything else that may bear on whether the exposure affected the verdict. The court should determine whether the extrinsic evidence relates directly to a material aspect of the case and, if so, whether a rational connection can be drawn between the extrinsic evidence and a prejudicial jury finding. If the jury has not yet reached a verdict, the trial court should consider whether the problem can be solved by removal of tainted jurors and a curative instruction to consider only the evidence that the court admitted. A ruling by the trial court following procedures such as have been described is likely to avoid constitutional error.

VI. Prosecutorial Misconduct.

A. *Effect of Misconduct.* Prosecutorial misconduct violates the defendant's due process rights if, in the context of the entire proceedings, it renders the trial "fundamentally unfair." Misconduct may also violate the defendant's Fifth Amendment right against self-incrimination or his Sixth Amendment right to counsel. If one of the defendant's constitutional rights is violated the state has the burden of demonstrating that the misconduct was harmless beyond a reasonable doubt. The most important factor in determining the prejudicial effect of prosecutorial misconduct is whether the trial court issued a curative instruction. The jury normally is presumed to disregard inadmissible evidence when instructed to do so unless there is an "overwhelming probability" that it would be unable to do so and there is a strong likelihood that the effect of the misconduct would be "devastating" to the defendant. Other factors affecting the prejudicial effect of prosecutorial misconduct include whether it was invited by inappropriate comments by the defense, whether a comment manipulates or mis-

states the evidence, the weight of the evidence against the defendant, whether the misconduct is an isolated incident or part of an ongoing pattern of misconduct, and whether the misconduct relates to a critical part of the case.

B. *Forms of Misconduct.* Prosecutorial misconduct can take many forms, but may be divided into two main classes: misconduct in the courtroom, which the trial court can recognize and correct, and misconduct outside the courtroom, of which the trial court cannot know unless it is brought to the court's attention.

1. *Misconduct in the courtroom.* Prosecutorial misconduct in the courtroom typically takes the form of inappropriate comments, frequently in the summation. *United States v. Young,* 470 U.S. 1, 13 (1985) (defense misconduct does not excuse prosecutorial misconduct but is relevant for determining prejudicial effect of prosecutorial misconduct); *see also United States v. Robinson*, 108 S. Ct. 864, 869 (1988) (prosecutor's remark in summation that defendant could have testified does not violate Fifth Amendment after defense summation argued that government had not given defendant an opportunity to explain his side of the story).

The prosecutor may not make comments that express personal opinions on the credibility of witnesses, the weight of the evidence, or the guilt of the defendant, or that implicate a specific constitutional right of the defendant such as the right against compulsory self-incriminations or the right to counsel. Misconduct that implicates the defendant's right against compulsory self-incrimination takes two basic forms: questioning the defendant about his prior silence, and commenting, in the summation, on the defendant's failure to testify. If the defendant chooses to testify, the prosecutor may not cross-examine him on why he did not tell his story to the police after he received *Miranda* warnings. However, the prosecutor may cross-examine the defendant on why he did not tell his story to the police prior to his arrests or after his arrest but before he was warned.

The prosecutor may not directly call attention to the defendant's failure to testify or make a comment that the jury naturally would take as a comment on the defendant's failure to testify. However, when the defendant advances his own theory of the case, the prosecutor may comment on the failure of the defense to produce evidence or witnesses supporting that theory.

2. *Misconduct Outside the Courtroom.* Misconduct outside the courtroom can take several forms. The most significant is failure of the prosecution to furnish information to the defendant. If the defense makes a specific formal request for such information, then the prosecutor must turn over any evidence that is material to the guilt or innocence of the defendant or to punishment. If the defense does not make such a request, then the prosecutor must turn over any evidence that might create a reasonable doubt that otherwise would not exist.

3. *Dealing with Misconduct.* Because the trial court is in the best position to weigh the prejudicial effect of the misconduct and to decide whether a curative instruction would be effective, it is important for it to do so, whether or not the

defendant objects. If the court decides that a curative instruction would be effective, it should give one, such as an instruction that the arguments of counsel are not evidence, or that the jury should not draw an inference of guilt from the defendant's failure to testify, or even that a particular action of the prosecutor was inappropriate and that the jury should disregard it. If the court determines that a curative instruction would not be sufficient to render the trial fair, it should declare a mistrial.

Appendix 15—Additional Commentary on Preemption

The following is taken from the "Obiter Dictum" column by Justice Susan P. Graber (Sup. Ct. Ore.) on preemption in the October 1994 issue of the *State–Federal Judicial Observer*, pg. 2. Citations to cases and statutes have been omitted.

Most of the conferences and writings on state–federal judicial relationships concern court procedures and communications. There are, however, certain substantive legal issues that both cause and reflect some of the tensions between the two systems. The following is a discussion of some of the kinds of cases and legal issues that arise on the federal side yet implicate the operations of the state courts.

A. Abstention Doctrines

A fundamental issue in state–federal judicial relationships is the problem of overlapping and conflicting state and federal jurisdiction. A number of complex, often interrelated judge-made abstention doctrines are relevant to that question. The doctrines constitute a rejection of the absolute right to a federal forum where federal jurisdiction exists and have the common purpose of dealing with uncertain, or at least ambiguous, issues of state law.

The first of those doctrines was enunciated by the Supreme Court of the United States in *Texas v. Pullman Co*. In that case, a railway company sought to enjoin enforcement of an order of the state railroad commission, claiming that the order violated its rights under the Fourteenth Amendment. The Court held that, when a state's action is being challenged in federal court as contrary to the federal constitution, and there are questions of state law that may be dispositive of the case, the federal court should abstain, although it may retain jurisdiction while the parties' rights are determined in the state forum. Thus, the *Pullman* abstention doctrine requires the presence of a federal constitutional challenge. However, for abstention by the federal court to be appropriate, the state law must be "fairly subject to an interpretation that will render unnecessary or substantially modify the federal constitutional question."

Two years later, in *Burford v. Sun Oil Co*., the Supreme Court held that a federal district court, despite having jurisdiction by reason of diversity of citizenship of the parties, properly dismissed a suit challenging an order of the Texas railroad commission relating to the drilling of oil wells. Although a question of federal due process was involved, the abstention was directed at avoiding needless conflict with the state's administration of its own affairs. The Court stated that "it is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy."

In 1959, in *Louisiana Power & Light v. Thibodaux,* the Court reasoned that eminent domain cases were analogous to equitable proceedings. Thus a federal court may stay a federal diversity action in these cases; there is no requirement that federal law be at issue in the matter.

The Supreme Court, in *Younger v. Harris,* articulated a doctrine known not as an abstention doctrine but as the doctrine of "our federalism," a reference to the concept of comity that is the essence of the opinions propounding the doctrine. The Court held that "a federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit except in very unusual situations, where necessary to prevent immediate irreparable injury."

The doctrine has now been extended to civil proceedings; it is intended to restrain federal courts from hearing constitutional challenges to state action in which federal action is regarded as an intrusion on the right of a state to enforce its own laws in its own courts. As elaborated in *Middlesex County Ethics Committee v. Garden State Bar Association,* the *Younger* doctrine requires the federal court to examine the nature of the state proceeding (whether it implicates "important state interests"); the timing of the state proceeding (whether it is ongoing); and the ability of the federal plaintiff to litigate its federal constitutional claims in the state proceeding. Where the state proceeding demonstrates bad faith, harassment, or similar circumstances, abstention is inappropriate.

Finally, in 1976 the Court enunciated what is perhaps the most controversial of the abstention doctrines, one that is based purely on considerations of judicial economy and convenience. In *Colorado River Water Conservancy District v. United States*, the court held that pendency of an action in a state court is not a bar to proceedings concerning the same matter in federal court, other than in exceptional circumstances. Six factors are relevant to the decision whether to stay or dismiss a federal proceeding in deference to state adjudication: (1) the order in which jurisdiction was obtained over the action (the "priority" factor); (2) the law that provides the rule of decision on the merits (the "choice of law" factor); (3) the convenience or inconvenience of the forum; (4) the desirability of avoiding piecemeal litigation; (5) the adequacy or inadequacy of state law proceedings in protecting the defendant's rights; and (6) in an action involving property, which court first assumed jurisdiction over the property in dispute (the "jurisdiction over the res" factor).

Some of the abstention doctrines described above may involve postponement of federal jurisdiction, rather than its abdication. When the federal court retains jurisdiction—that is, does not dismiss the case—litigants may return to federal court for adjudication of federal issues. A return to federal court is not appropriate, however, in the case of a *Burford*-type abstention, involving a dismissal on the ground of a state's interest in administering its own affairs.

B. Selected Areas of Substantive Law

There are a number of substantive areas of law that present questions of overlapping and conflicting state and federal jurisdiction, some of which are addressed by federal statutes. A few examples will suggest the extensive opportunities both for common ground and for conflicts.

Under the Anti-Injunction Act, federal courts are prohibited from enjoining most state proceedings, with certain exceptions: where such injunctions are expressly authorized by Congress; where they are necessary in the aid of the federal court's jurisdiction; and where they are necessary to protect or effectuate the federal court's prior judgments (the "relitigation exception"). To constitute an express authorization, a congressional act need not mention Section 2283; exceptions to the Anti-Injunction Act have been found in relation to the Civil Rights Act of 1871 and the Clayton Act relating to monopolies and restraints of trade.

The "in aid of jurisdiction" exception implies that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's authority in that regard. Factors to be considered include the significance of the federal interest in the substance of the case; the importance of the exercise of the federal court's expertise in the development of the federal law; the burden imposed by the conduct of concurrent proceedings; the order in which the actions were filed; and the substantiality of the investment of state resources in the case.

One federal statute provides for civil rights removal jurisdiction. Under it a case may be removed from state to federal court in three circumstances: where a person has been denied or cannot enforce in state court a civil right of equality (the "denial" clause); where a defendant is being sued or prosecuted for performing any act under color of authority derived from any law providing for equal rights (the "authority" clause); and where a defendant is being sued for refusing to perform an act that would be inconsistent with such a law (the "refusal" clause). Pursuant to the statute, if it appears before final judgment that the case was removed improvidently and without jurisdiction, the district court may remand the case to state court; however, a federal district court may not remand after removal merely because its docket is crowded.

The Declaratory Judgment Act provides that, with certain exceptions, a federal court may declare the rights or legal relations of interested parties seeking such declaration. In some instances, those rights or legal relations implicate questions of state law.

Under the Tax Injunction Act, federal courts may not enjoin the collection of state taxes "where a plain, speedy and efficient remedy may be had in the courts of such State."

Suits for violations of contracts between an employer and a labor organization representing employees may be brought in federal court, under the Labor Management Relations Act.

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 provides that civil actions to which the FDIC is a party may be removed from state court to federal district court.

At least two federal statutes pertain to jurisdiction over bankruptcy actions. One provides for non-exclusive federal jurisdiction of matters arising under or related to bankruptcy [for a discussion of the factors the federal court should consider in deciding whether to assume jurisdiction, see *In re Eastport Associates*]. Another provides for automatic stay of all judicial proceedings brought against a debtor who has filed for Chapter 13 bankruptcy, including actions to collect a claim against the debtor; the stay does not apply to the commencement or continuation of a criminal proceeding against the debtor.

Under the Revised Interstate Commerce Act, federal district courts have concurrent jurisdiction with other courts of the United States and of the states to prevent certain acts that relate to taxation of rail transportation property and that are discriminatory against interstate commerce.

A specific federal statute provides that federal district courts have original jurisdiction of all civil action brought by recognized Indian tribes in which the matter in controversy arises under the Constitution, laws, or treaties of the United States. Another statute provides for jurisdiction of civil actions arising under state law brought by enumerated Indian tribes in certain specified states.

As noted in *United States v. Taylor,* the dual sovereignty doctrine holds that successive criminal prosecutions by separate sovereigns for crimes arising out of the same acts are not barred by the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution. The Supreme Court held in *Bartkus v. Illinois*, however, that such prosecutions may be barred where one prosecuting sovereign is acting as a "tool" for the other or the second prosecution amounts to a "sham and cover" for the first. A federal court before which a habeas corpus proceeding is pending may stay a state court proceeding against the detained person. An application for a writ of habeas corpus shall not be granted unless it appears that the applicant has exhausted state remedies.

Areas of substantive law that are subject to exclusive federal jurisdiction include antitrust actions, ERISA patents, plant variety protection, copyrights, trademarks, and unfair competition; actions against mission members, consuls, or vice consuls of foreign states; securities, cases in admiralty, and offenses against the laws of the United States.

C. Conclusion

Increasingly, legislatures are attending to issues of potential state–federal judicial friction. For example, the Oregon legislature recently amended its antitrust law in order to reduce the opportunity for duplication and conflict in that area.

Substantively, Oregon's antitrust statute mirrors federal law in most respects. The state statute also provides, however, that once a trial on an antitrust claim begins in federal court, the parallel state claim is abrogated unless there is a later determination that the federal court lacked jurisdiction. This means that a supplemental state claim usually need not be litigated.

At the Congressional level, grants of exclusive jurisdiction, as in some of the substantive areas listed above, definitively eliminate jurisdictional conflicts. Notwithstanding legislative awareness and action, however, there will continue to be room for the operation of judge-made abstention doctrines.

Appendix 16—Relations with Tribal Courts

The Interrelations of State, Tribal, and Federal Courts

The Tribal Justice Act

Enacted in 1993 to improve conditions for tribal court operations, the law was debated for about four years. An important ingredient was that tribes participate in the policy making of how training, technical assistance, and resources for tribal courts were to be dealt with in Indian Country and not leave it up to one person in the Bureau of Indian Affairs (BIA) to make the policy decisions for everyone. As a consequence, the BIA's branch of judicial services was elevated to the Office of Tribal Justice. Just the name changed. Funds for tribal court operations were increased from $12 million to $50 million, but there has been no advocacy for appropriating the $50 million; the actual increase in FY 1996 was $6 million, not for tribal justice funds, but for BIA. There was no increase for the two prior fiscal years. There is a special courts fund, which is part of the $12 million; $1.4 million for training and technical assistance in the operation of the BIA was zeroed out by the House because the funds were not obligated.

- The law calls for a survey of tribal court needs.
- The survey of tribal court needs was to have been completed in June of 1994, but no one has been selected yet to conduct the survey.
- A formula must be developed to distribute the $50 million BIA funds to the tribal courts in a fair and reasonable manner.

The Tribal Court Perspective

"Non-Indian litigants are afraid to come into Navajo courts, fearing bias against them and favoritism for the Navajo party." Some state courts have found ways to reject tribal court judgments. Contradictory rulings have been issued by the three court systems. Indians can point out the bias against them; for example, Indian inmates are overrepresented in the jails and prisons. Other areas of disagreement and conflict include jurisdiction, comity, extradition, and full faith and credit. In response, a policy to address the problem has been initiated. The traditional Navajo approach is to devise a solution. In the Navajo tradition, a person respects someone outside of the clan, including a non-Navajo, until that person fails to respect the Navajo individual. This is called *k-eh*. The state and tribal judges started to talk about problems and solutions. These meetings were successful as the participants developed respect for the different judicial systems and the people in them.

"In our Navajo justice thinking, anything that gets in the way of a successful life is called Na-yéé, a monster.... We have these monsters; the Na-yéé is here to

hurt people. And we say that bias is a monster. That discrimination is Na-yéé. And the question is how do we fight this monster, bias and discrimination? We say that we do it with knowledge, with communication, with talking things out, with respect. The respect way is the successful way in the Southwest. I know that some of you are probably here wondering, 'That sounds wonderful,' and you might ask me the question, 'I don't deal with reservation Indians in my court; I deal with urban Indians. What about them?' And you might have another question, 'I don't have Indians in my court. I get black people, all kinds of other people, Latinos, but no Indians.' Well, whoever you deal with, whatever color, the answer is the same. If you build a climate of respect like the way that we are doing it, you can respond to bias and discrimination. You can through communication. The Navajo traditional justice method is to talk things out in a climate of equality and respect."

Chief Justice of the Navajo Nation Robert Yazzie

The Federal Perspective

One reason for the problems that we have today is that for the last 50 to 75 years the criminal justice system as it operates in Indian Country has been neglected. The justice system infrastructure is not a quarter of what it needs to be to provide effective justice, to respond effectively to criminal activity, to provide the services that victims require, and to handle the defendants in an appropriate way, since the federal government has a tendency to take a "one size fits all" approach The U.S. Attorney has the responsibility to remind the federal government to be flexible and to be open-minded For example, some tribal courts do not want to assume jurisdiction over nontraditional domestic, internal tribal matters.

A History of Neglect by the Federal Prosecutors

There is a cry coming from Indian Country for law enforcement to respond fairly, promptly, and effectively to criminal activity. The current U.S. Attorney General has identified Indian Country justice issues as one of the top five issues that U.S. attorneys will be charged with addressing. This has resulted in more interest and concern among the U.S. attorneys. Under prior administrations, the Indian affairs subcommittee of the U.S. attorneys' association was inactive. Now, they meet every quarter for three to four days. One of the major issues is that the only facility in the federal system for incarcerating juveniles is located in California. Recently, U.S. Attorney John Kelly and the chief judge spent the day with the Navajo law enforcement officials to discuss the handling of non-Indian perpetrators on the reservations.

The State Court Perspective

The state court trainer suggested that the state, federal, and tribal courts start first with the noncontroversial issues on which there is common ground, thus

building a history of good relations and success, and then tackle the issues on which there is disagreement. The trainer gave four indisputable propositions: Everyone should have an equal opportunity to serve on the jury. Victims of all races should be protected. People ought to be held accountable for their actions. Court intervention should be avoided when it causes, rather than solves, problems. The trainer went on to discuss some of the problems that Indian people have when addressing these four propositions.

Jury Duty

How do you get Indians into court to serve on state court juries? How do you get non-Indians in tribal court to serve on tribal juries? An equal opportunity to serve on the jury in Indian Country does not happen because of legal requirements:

- State courts do not have jurisdiction to issue subpoenas to tribal members on reservations.
- Traditionally, Indians do not vote in high numbers in state elections; likewise, Indians do not own state driver's licenses, so many are not called to serve on state juries.

Addressing these issues requires working agreements between the tribal and state courts to get the summons issued, share accurate source lists, and enforce jury summons. Jurors who travel great distances need overnight accommodations. The current rules were designed for urban dwellers. In order to get to the court building, Navajos have to travel 120 miles from Utah, into Arizona, and back into Utah, over back roads. Statutory requirement of ability to read and write in English are sometimes used by reservation members as a convenient excuse to get out of jury service because many reservation members do not read or write English. Some judges will release, without inquiry, any Indian who does not want to serve on the jury.

Protection of Victims of All Races

Protective orders do not get enforced across reservation boundaries. An order can protect a woman at home, on the reservation, but not protect her when she goes to work in town. If she is married to a non-Indian, the tribal court does not have the criminal jurisdiction to enforce the order even on the reservation. The state court does not have the jurisdiction to issue a civil order affecting the reservation, unless the complicated process of establishing that jurisdiction is invoked. To establish civil jurisdiction over non-Indians, the Supreme Court has established a four-part test. If the state court has established civil jurisdiction, the court may be able to enforce the order if the man shows up at work or somewhere else off the reservation to harass her, but it still cannot enforce a criminal order if he shows up on the reservation to beat her.

One solution is to have the judge of the issuing court perform the functions of all three courts, federal, tribal, and state.

Accountability

If someone has been convicted of four DUIs in the reservation tribal court, is the individual a first-time offender in state court for the fifth DUI? How can the state court judge even know about the existence of the tribal court convictions since the different systems do not communicate with each other? What about vice versa? Is the tribal court a fresh start? Should the tribal court ignore the family violence history in the state courts? Some states have laws that block tribal court access to information on domestic violence.

Court Intervention Should Be Avoided When It Causes Problems Rather than Solves Problems

The three court systems do not coordinate. For example, a child abuse and domestic violence situation was worked out in the tribal court. All parties agreed to its terms and workability. Then, a federal case was brought against the father, who, as a result, was incarcerated. The mother started drinking, and the child was put into foster care and later ran away, never to be seen again.

Recommendations for Systemic Things That Can Be Done in the Short Term

• The three systems need to eliminate duplication and share resources: jails, juvenile detention centers, juvenile services, counselors, probation officers, probation services, treatment and rehabilitation centers, and foster homes. There is no need to ship a juvenile off to California.

- Share information and access to records among the courts.
- Service of process.
- Post judgment collection remedies.
- Subpoenas.
- Protective orders.
- Restraining orders.
- Education on the Indian Child Welfare Act. Law since 1978, but still not understood by juvenile and domestic attorneys and judges.
- Information services.
- Child support enforcement.

Recommendations for Things That We Can Do as Individuals

Sensitize others in your culture. Cross-cultural sensitivity is needed not only by judges, but by jurors, attorneys, and others in the judicial system.

Appendix 17—Local Pro Bono Program

To: Honorable Julian A. Cook Jr. Chief Judge (U.S. E.D. Mich.)
From: Roger S. Lennert, Executive Director, Detroit Bar Association
Date: March 25, 1992
Re: Proposal for Consolidation of Pro Bono Activities

Background Information. Since February 1992, meetings have occurred with representatives of the Detroit Bar Association, the court, and the Federal Bar Association concerning the consolidation of pro bono activities. Specifically, the meetings have focused on whether the Detroit Bar Association would assume responsibility for administration and implementation of the Federal Pro Bono Program. The Federal Pro Bono Program provides volunteer attorneys for representation in pro se prisoner rights and employment discrimination cases. The Volunteer Lawyers program of the Detroit Bar Association provides volunteer attorneys for representation in a variety of civil matters. If the two programs were consolidated, it is expected that the consolidation would result in a positive and more productive way of handling a variety of legal matters and assure that the programs were not competing for the same pool of volunteer attorneys.

Volunteer Attorney Pool. Presently, there are approximately 150 attorneys who participate in the Federal Pro Bono Program. The Detroit Bar Association would be glad to initiate additional recruitment efforts. For example, the annual [phone drive] to recruit new volunteer attorneys could be held biannually, or more often as needed. New sources could be investigated, but two natural starting points would be the membership of the Detroit Bar Association and the Federal Bar Association.

Professional Liability Insurance. Currently, the professional liability Insurance is provided by the state bar of Michigan through an insurance policy with the National Legal Aid and Defender Association. The Detroit Bar Association would expect continuation of this coverage. Contact will be made with the appropriate personnel within the state bar of Michigan to assure continuation of the coverage.

Funding. Currently, the Federal Pro Bono Program budgets between $7,000–$8,000 for reimbursement of case-related costs. In the future, the Detroit Bar Association would explore additional funding sources and prepare grant proposals as appropriate. Funding schemes might also include dues check-off systems, direct contributions from firms and individuals and annual fundraising events sponsored by the Detroit Bar Association.

Implementation. The proposed target date for implementation of the consolidated programs is October 1, 1992. The current manager of the Detroit Bar Asso-

ciation's pro bono activities . . . would also coordinate management of the federal program. . . .

Conclusion. The Detroit Bar Association would be most pleased to assume responsibility for administration of the Federal Pro Bono Program. The pro bono activities at the Detroit Bar Association date back to 1985. Since that time, more than 2,000 clients have been served through the Volunteer Lawyers Program. Effective May 1992, the Detroit Bar Association will be launching a domestic assault injunctions project where volunteer attorneys will be interviewing clients and preparing pleadings to assist in securing injunctions. It has been our experience that participation by volunteer attorneys increases as pro bono opportunities become more diverse. Accordingly, adding another component to the Detroit Bar Association's current pro bono activities would be viewed as a very positive experience for staff and volunteer attorneys. We await your feedback on this proposal.

Appendix 18—Guidelines for Organization and Operation of State Court Interpreter Certification Consortium

State Court Interpreter Certification Consortium
Guidelines for Consortium Organization and Operation
June 23, 1995

Introduction: Background and Purposes

Audits of interpreted court proceedings in several states have revealed that untested and untrained "interpreters" often deliver inaccurate, incomplete information to both the non-English-speaking party and the trier of fact. Poor interpreting constrains equal access to justice for non-English-speaking persons involved in legal proceedings. Every state which has examined interpreted court proceedings has concluded that interpreter certification is the best method to protect the constitutional rights of non-English-speaking court participants.

It is beneficial to the court systems and non-English-speaking persons residing in various states to pool resources for developing and administrating court interpreter test and training programs by creating the State Court Language Interpreter Certification Consortium ("Consortium"). Founding states are Minnesota, New Jersey, Oregon, and Washington. A steering committee has been established for the purpose of planning and drafting these policies. Members are Sue Dosal (chair, representing Minnesota), Kingsley Click (representing Oregon), Robert Joe Lee (representing New Jersey), and Joanne Moore (representing Washington).

The following generalized test standards shall be developed by the steering committee in order that uniformity and quality shall be assured. Such standards shall be reflective of statutory and case law mandates.

The National Center for State Courts ("NCSC") shall, upon development of an initial program, invite other states to become members of the consortium.

1.0 Consortium Role, Conditions for Membership and Costs

It will be the function of the consortium to establish court interpretation test development and administration standards, and provide testing materials, in order that individual states and jurisdictions may have the necessary tools and guidance to implement certification programs.

1.1 To establish the consortium, the founding states agree to make available the following test contributions, in addition to the financial contributions each founding state has already made to plan and organize the consortium:

Washington:

Two versions of its existing Spanish test; and one version each of its Vietnamese and Korean tests.

New Jersey:

Two versions of its existing Spanish test; one version of its existing Haitian Creole French test; one version of its existing Portuguese test; and one version of its new Arabic, French, Italian, Mandarin Chinese, Polish, and Russian tests as they are developed.

Minnesota:

Pay one-half of the expenses to modify New Jersey's Spanish test and Washington's tests in Vietnamese and Korean to meet the consortium test standards; and contribute a Russian language test by January 1, 1996.

Oregon:

Pay one-half of the expenses to modify New Jersey's Spanish test and Washington's tests in Vietnamese and Korean to meet the consortium test standards; and contribute a Russian language test by January 1, 1996.

1.2 Each new state joining the consortium will pay an entry fee of $25,000, except in the following circumstances:

1.2.1 States with estimated populations of non-English-speakers greater than one million may be required to pay a higher fee, subject to negotiations with the steering committee.

1.2.2 States with estimated populations of non-English speakers less than 100,000 may pay a lesser fee, subject to negotiations with the steering committee.

1.2.3 Where two or more states establish a regional certification partnership, the partnership shall be considered a "state" for the purpose of estimating the population of non-English-speakers and for other purposes under these standards.

1.2.4 Applications for membership in the consortium by jurisdictions other than states (e.g., individual county or district trial courts) will be considered on a case-by-case basis by the steering committee.

1.2.5 The entry fee may be waived or reduced by the steering committee if the state contributes to the testing bank.

Comment: The standard entry fee represents a contribution of lesser value than the contributions made by the founding states, in keeping with the consortium goals of reducing costs to all the states for establishing and maintaining a court interpreter testing and certification program. The entry fee will be used by the consortium for the following purposes:

1. Revising existing tests donated by founding consortium members, to meet consortium test standards;

2. Creating new test versions and revising them periodically as required by 3.6 and 3.7, below;

3. Developing new language tests, as determined by the steering committee; and

4. Activities required of the NCSC in support of the consortium, as described below in Section 2.0.

1.3 All consortium tests, whether new or modified, will reflect standardized testing objectives related to the general professional responsibilities of interpreters and the common needs of state courts, as defined by the consortium steering committee. Deliberations and decisions of the consortium's steering committee regarding testing objectives; test development and modification procedures; qualifications for test development consultants; and test rating and evaluation procedures will be documented by the NCSC within six months of the establishment of the consortium and made available to all consortium members and other interested parties, on request.

1.4 Tests contributed or offered in lieu of financial consideration must meet or exceed the generalized test standard set by the steering committee. If a test is offered in lieu of an entry fee, the state offering that test shall pay for costs of determining whether the test meets the standards and, if the standards are not met, must pay the costs of test modification to meet the standards. The consortium may negotiate a combination test contribution and fee in lieu of the entry fee, considering factors such as: (1) the value of the test to the participants—whether the language is in demand; (2) how many versions of the test are being offered; (3) the quality of the test; and (4) other factors, including, but not limited to, prior usage and security considerations.

1.5 New language tests may be developed by the consortium itself, at the discretion of the steering committee and subject to available funds. Languages should be selected based on population needs in the member states.

1.6 Initial tests donated by states may be copyrighted and remain the property of those "donor states," at their option, and shall be licensed to the consortium. Any tests developed by the consortium shall be the property of the consortium. Member states may make reasonable use of tests licensed to or developed by the consortium in compliance with these guidelines.

1.7 Member states are responsible for the costs of administering individual tests in their state.

2.0 NCSC Role

2.1 NCSC shall act as the test repository, storing all scripts and test tapes, act as a clearinghouse of information regarding consortium activities, and coordinate applications for new memberships.

2.2 NCSC shall receive and account for state fees and other consortium revenues, and shall process and account for all consortium expenditures in the same manner as similar services are provided to other NCSC constituent groups for secretariat services.

2.3 NCSC shall supervise the writing of new tests, under the direction of the steering committee, pursuant to 1.5 above. Activities related to new test development include contracting with test writing experts and interpreter experts; providing or arranging for facilities for test writing; providing for test review and pilot tests, and contracting for psychometric consultations as needed.

2.4. Upon a state's application for membership in the consortium, a needs assessment shall be conducted by the state in consultation with the NCSC. The needs assessment shall include a general determination of the state's current interpreter needs and services, estimates of the number of interpreters working in the state, training (if any available), languages needed and prioritization of those needs. It will be the applicant's responsibility to provide the information required for the needs assessment.

2.5 In addition to the testing functions described above, NCSC will staff the steering committee and evaluate each state's plan to provide pretest training for interpreters pursuant to section 4.0 below. At the state's option, the NCSC will arrange for and supervise pretest training as a component of the state's test administration plan, as per 2.6, below.

2.6 Under separate contracts with a state, NCSC will oversee or directly serve the following functions to ensure that the consortium standards for test administration and test instrument security are preserved when tests are not administered by states pursuant to 3.1 below: hire and pay test raters; supervise rater training; provide testing instruments; supervise the state's arrangement for test facilities and supplies (blank tapes, tape players and recording machines); make travel arrangements for raters, and collect and record test results from test raters; record test result data in a computerized database and report test scores back to the states in a uniform manner; and assist the certifying state in managing the appellate process for grade disputes.

3.0 Standards for Test Administration

3.1 Member states may administer consortium tests directly, including tests which originated in their states, when their test administration procedures are approved by the steering committee as conforming with consortium procedural requirements.

3.2 All raters shall be approved by the steering committee. Prior to each test administration cycle, test raters shall participate in test rater training which shall include at a minimum: test item content review; test scoring dictionary review; test security standards; protocols for interactions with candidates before, during, and after the testing process; procedures for completing rating forms; and procedures for resolving differences regarding test item scoring decisions.

3.3 Repeat candidates will be given an alternative test version, unless no alternative test is available.

3.4 Raters should not test candidates they know. Candidates' names will be provided to raters in advance of the test to check for potential conflicts. If raters discover immediately before the test that they know a candidate, the test may be given by one rater for in-person grading and the candidate's tape will also be submitted to an independent rater for the second opinion (the process will be explained to the candidate and the candidate's consent will be obtained for the record).

3.5 At least two raters shall serve on each testing panel. At least one rater must have previously served as a rater for two or more test administrations of a consortium test. A representative or designee of the consortium member's administrative office shall be present at the testing location when tests are administered and may be present during the administration and rating of tests.

3.6 Each test version will be reviewed by the steering committee or its designee no less than every two years, and revised, if necessary. Test revision will cover, among other items, substitution of memorable lines, phrases, or words (e.g., idioms).

3.7 For each new language added to the testing bank, at least two test versions will be developed within two years to provide an alternative test that will be administered as described in 3.3 above. Third and subsequent versions of tests in any language will be developed at the discretion of the steering committee when repeated administrations of a test create a likelihood that the reliability of a testing instrument has been compromised by overexposure.

4.0 Training. The steering committee believes that adequate training programs go hand in hand with testing and certification. Experience in states and local jurisdictions where testing programs have been initiated amply demonstrates that very few "interpreters" will pass certification tests without access to skill training. The following represent minimum standards for training which are required for consortium members and recommended standards for programs which members are encouraged to observe.

4.1 All member states shall establish or maintain standards for training candidates for interpreter certification. These standards shall include one or more of the following: (1) short term interpreter orientation sessions offered prior to the test which include the elements described in "Workshop One—Introduction to Court Interpreting," Chapter 4 of *Court Interpretation: Model Guides to Policy and Practice* (NCSC, 1995); or (2) on-the-job training for salaried interpreters, under the supervision of experienced and certified interpreters, that includes the elements described in Chapter 4 of *Court Interpretation: Model Guides to Policy and Practice* (NCSC, 1995); or (3) access locally to formal interpreter training programs offered by academic institutions. The training programs shall include orientation to certification requirements; provide practice materials for skills improvements; and make instructors available who will give students feedback on language knowledge and interpreting proficiency in their languages. The adequacy of such pretest training will be determined by the steering committee or its designee.

4.2 In languages for which formal education or training is not otherwise available through educational institutions or other agencies, the state shall develop or provide for at least 16 to 24 hours of language-specific classroom instruction for candidates who appear to have potential for passing the certification test. This training shall be made available to potential candidates prior to the administra-

tion of tests in that language. Comment: The steering committee intends to seek funding to develop more detailed written standards and/or recommendations to govern intensive skills training programs, and to develop a condensed training package which will be provided to the member states. If the consortium develops its own package, it will be designed to be a self-study package and include a curriculum and practice tapes for simultaneous interpreting. As an alternative, states may wish to obtain copies of commercially available training materials. The consortium should also provide guidelines for selecting instructors. In addition to the self-study package, significant language-specific classroom instruction should be provided to candidates in each member state.

4.3 States are encouraged to develop continuing education requirements for certified interpreters.

5.0 Security Standards for Court Interpreter Testing Programs

5.1 Confidentiality

5.1.1 The text of each test, the master tape for the simultaneous component, and the dictionary of acceptable and unacceptable scoring units shall be strictly confidential. All other aspects of a test (e.g., overviews of the test, introductory memoranda explaining the testing procedure, description of how the test was developed or what it measures, names of test developers and examiners) are public information. These standards apply only to the text, the simultaneous tape, and the dictionary. The phrase "the test" applies only to the confidential components, i.e., the text, the simultaneous tape and the dictionary.

5.1.2 As a condition of employment, any consultant hired to assist in the development of a new test or administer an existing test must agree contractually to protect the confidentiality of the test. Contracts must include assurances that the contents of the test shall not be revealed to any unauthorized person through any means whatsoever, including but not limited to: (1) allowing any unauthorized person to review a consortium test verbally or by other means, (2) disclosing the contents of a test to an unauthorized person, or (3) by recording any portion of the test. Further, any consultant, as a condition of employment, must abide by whatever other security and confidentiality standards that may be established.

5.2 Access to the Test

5.2.1 Examiners. Examiners shall have access to the test only during examiner training and while administering tests. They shall not be permitted to have access to the test at any other time without prior authorization.

5.2.2 Test Development Consultants. Test development consultants shall have access to the test only while actively engaged in test writing or revision. At the conclusion of test development work, test development consultants shall forward all completed work products related to the test to the NCSC for permanent storage. Consultants shall not maintain duplicate copies of tests or test drafts, except by specific agreement with the NCSC.

5.2.3 Observers. Generally, unauthorized personnel will not be permitted to observe testing procedures. However, certain court officials and other official observers may be allowed to observe a testing session upon written permission from the NCSC after showing a legitimate purpose for observation. Persons who are granted permission to observe any testing session will be required to complete and sign an affidavit that they will not disclose any information about the test or any examinee's performance.

5.2.4 Examinees. Examinees will not be provided with copies of original scoring sheets which include test item content. A copy of the official scoring report summary prepared by the examination team will be provided on request. The information provided on the scoring report summary will include both objective test scores and subjective observations of the examiners.

5.3 Storage of the Test. The provisions of this section apply to the NCSC acting as custodian for consortium tests, including tests licensed to or developed by the consortium.

5.3.1 Paper Copies. The original master and all copies of the test shall be stored in a secure location. A list of all persons who have access to the secure location shall be maintained and no other persons shall be authorized to have access to the tests, subject to the provisions of 5.5, below.

5.3.2 Other Copies. When the test is stored on the hard drive of a PC or a diskette, access into the PC must be secured through the use of a password that prevents unauthorized persons from having access. Any diskettes containing test files must be securely stored in the same manner as hard copies of tests.

5.3.3 Simultaneous Tape. The recording tape which is used to administer the simultaneous portion of the test shall be secured, as are hard copies per 5.3.1.

5.3.4 Test Sites. The test administrator at each test site is responsible for preserving the security of the test. All components of the test must either be in the test administrator's personal possession or under lock and key in a secure location (e.g., a safe or locked cabinet in the office of a court administrator). "Personal possession" does not include being left in a locked briefcase, a car, or in an unlocked room. The consortium will monitor security of tests during test sessions.

5.4 Security During Test Administration

5.4.1 Examinees. Examinees shall agree, either verbally or in writing (or both), not to discuss the test with or disclose any of the contents of the test to anyone. Furthermore, examinees shall be required to provide positive identification as proof of their identity. A photo identification is preferred.

5.4.2 Prevention of Security Breaches. The test administrator shall take steps to secure the testing room and protect the testing process from the possibility of surreptitious recording of the test by anyone. Options for accomplishing this include putting belongings examinees bring into the test room as far away from the testing area as possible; covering such belongings with a heavy coat or put-

ting them in a cabinet; allowing examinees to bring into the test room only see-through items (e.g., personal items in a plastic bag, but no purses); searching examinees for electronic recording devices; and searching the room for such devices before starting the testing day.

5.4.3 Alternation of Tests. When there are two or more versions of the same test, it is recommended that the different versions be given in alternating or random fashion to examinees throughout the test day. That way the day's first examinee may take version C, the second examinee may take version A, and the third examinee may take version B.

5.5 Examiners' Copies of the Test

5.5.1 All other copies of the test used by examiners during the administration of the test shall be returned to NCSC and destroyed as soon as possible after the testing date by shredding. Until such time as they are shredded, they shall be kept secure pursuant to 5.3.1.

5.5.2 The tape recording of each examinee's test shall be secured in a manner consistent with 5.3.1 until they are erased or destroyed.

5.5.3 Examinee's tape recordings shall be preserved by the NCSC for no longer than is required for each jurisdiction to complete the results reporting process and allow a reasonable period of time for processing and completing action on examinee test review requests or complaints.

6.0 Provisional Terms of Governance of the Consortium

6.1 This document represents the terms and conditions of membership in the consortium which all members agree to observe.

6.2 Authorized Signators. For the states, signators must be the chief administrative official of the state court system or an authorized designee of that official. For the NCSC, the signator must be the president of the NCSC or his authorized designee.

6.3 Effective Date of Membership. Membership in the consortium for the founding states is effective on the date this agreement is signed by the authorized official. Membership in the consortium for other states begins when a signed copy of this agreement and either payment of the consortium fee or a letter of commitment to pay the fee within 90 days are received at the National Center for State Courts. Signed agreements, letters of commitment and fee payments shall be addressed to: Comptroller, National Center for State Courts, 300 Newport Ave., Williamsburg, VA 23185.

6.4 Steering Committee Membership and Decision Making. The consortium steering committee shall consist of the officials representing the founding members (Section 1.0). A representative of each consortium member state shall be invited to attend and participate in all meetings of the steering committee, subject to the same standards for travel expense reimbursement that are allowed for members of the steering committee. All member states shall receive notice and the agenda for each meeting at least 30 days in advance of the scheduled meeting

date. An official of the NCSC designated by its president shall serve ex officio as a representative of the NCSC at all steering committee meetings.

6.5 Operating Budget and Management. No consortium revenues obtained through membership fees shall be expended except in accordance with a budget prepared by the NCSC and approved by the steering committee. Following approval of the budget, management of consortium activities shall be controlled by the consortium project manager according to standard project management policies of the NCSC. The project manager shall be William E. Hewitt. Administrative oversight of consortium project activities shall be jointly shared by the NCSC vice presidents for the Court Services and the Research Divisions.

6.6 Permanent Bylaws. By no later than January 1, 1997, the steering committee shall propose bylaws for continuing consortium operation and membership, including a permanent plan for selecting Steering Committee members. Those bylaws will become effective upon approval by a two-thirds majority vote of all consortium members.

6.7 Modifications or Revisions of the Guidelines. Pending adoption of permanent bylaws, amendments or revisions to these guidelines and provisional terms of governance of the consortium may be proposed to the membership with the unanimous approval of all steering committee members. Amendments or revisions proposed to the membership by the steering committee shall become effective upon a two-thirds majority vote of the member states.

6.8 Possibility of Future Assessments. Revenues to support the consortium's operations during 1995 and 1996 consist of funds provided by the states of Minnesota and Oregon and consortium membership fees. Options for continued funding to meet the consortium's objectives and maintain its program standards in subsequent years include grants and awards, and fee-for-service arrangements with members of the interpreting and legal community. It is possible, however, that consortium members may prefer to fund continued consortium operations in the future through supplemental membership assessments. A mechanism and rules for determining the need for additional assessments and for enacting them will be included in the permanent consortium bylaws.

6.9 Protection of the Investment of Founding and Other Member States. For good cause, a member state that has licensed original tests to the consortium may withdraw any or all of its tests from the consortium test bank at any time within the first two years of that state's membership in the consortium. "Good cause" includes discovery that tests licensed to the consortium are not being administered in accordance with these guidelines, or that permanent bylaws adopted by the consortium members do not conform to a state's requirements for test security or for maintaining appropriate professional standards. Similarly, a state that does not contribute tests to the consortium may within the first two years of the state's membership in the consortium withdraw from consortium membership and be entitled to a refund of up to 50% of the state's membership

fees if: (1) a test that was advertised as available or scheduled for development on the date the state joined the consortium is no longer available, and (2) the state needs and is prepared to test in that language. To provide for this contingency, the National Center for State Courts shall exclude from its calculations of revenues available for the consortium operating budget that portion (50%) of new state membership fees that are subject to reimbursement under this section.

6.10 Consortium Rights to Modified Versions of Licensed Tests. Tests licensed to the consortium by member states may be modified to meet consortium testing needs. In the event a member state withdraws a test from the consortium test bank that has been used in part or in whole as the basis for a consortium-modified test version, the consortium shall retain the right to continued use of the consortium-modified version. A "consortium-modified" test version means a test that has at consortium expense undergone modifications of its text and scoring units through substitution, additions, or deletions, followed by steering committee-approved professional review or pilot-testing.

6.11 First Meeting of the Consortium. Upon establishment of the consortium, on or about July 1, 1995, a date shall be established for the first meeting of the consortium steering committee. Subject to availability of the steering committee members, that meeting shall be held during the month of September 1995, or as soon as possible thereafter. Notice of the meeting date and location shall be sent to representatives of all states who are members as of that date.

Appendix 19—Model Code of Professional Responsibility for Interpreters in the Judiciary

PREAMBLE

Many persons who come before the courts are partially or completely excluded from full participation in the proceedings due to limited English proficiency or a speech or hearing impairment. It is essential that the resulting communication barrier be removed, as far as possible, so that these persons are placed in the same position as similarly situated persons for whom there is no such barrier. As officers of the court, interpreters help assure that such persons may enjoy equal access to justice and that court proceedings and court support services function efficiently and effectively. Interpreters are highly skilled professionals who fulfill an essential role in the administration of justice.

Applicability

This code shall guide and be binding upon all persons, agencies and organizations who administer, supervise use, or deliver interpreting services to the judiciary.

Commentary:

The black letter principles of this Model Code are principles of general application that are unlikely to conflict with specific requirements of rule or law in the states, in the opinion of the code's drafters. Therefore, the use of the term "shall" is reserved for the black letter principles. Statements in the commentary use the term "should" to describe behavior that illustrates or elaborates the principles. The commentaries are intended to convey what the drafters of this model code believe are probable and expected behaviors. Wherever a court policy or routine practice appears to conflict with the commentary in this code, it is recommended that the reasons for the policy as it applies to court interpreters be examined.

CANON 1: Accuracy and Completeness

Interpreters shall render a complete and accurate interpretation or sight translation, without altering, omitting, or adding anything to what is stated or written, and without explanation.

Commentary:

The interpreter has a twofold duty: (1) to ensure that the proceedings in English reflect precisely what was said by a non-English-speaking person, and (2) to place the non-English-speaking person on an equal footing with those who understand English. This creates an obligation to conserve every element of information contained in a source language communication when it is rendered in the target language. Therefore, interpreters are obligated to apply their best skills and judgment to preserve faithfully the meaning of what is said in court, in-

cluding the style or register of speech. Verbatim, "word for word," or literal oral interpretations are not appropriate when they distort the meaning of the source language, but every spoken statement, even if it appears nonresponsive, obscene, rambling, or incoherent should be interpreted. This includes apparent misstatements. Interpreters should never interject their own words, phrases, or expressions. If the need arises to explain an interpreting problem (e.g., a term or phrase with no direct equivalent in the target language or a misunderstanding that only the interpreter can clarify), the interpreter should ask the court's permission to provide an explanation. Interpreters should convey the emotional emphasis of the speaker without reenacting or mimicking the speaker's emotions, or dramatic gestures. Sign language interpreters, however, must employ all of the visual cues that the language they are interpreting for requires—including facial expressions, body language, and hand gestures. Sign language interpreters, therefore, should ensure that court participants do not confuse these essential elements of the interpreted language with inappropriate interpreter conduct. The obligation to preserve accuracy includes the interpreter's duty to correct any er ror of interpretation discovered by the interpreter during the proceeding. Inter preters should demonstrate their professionalism by objectively analyzing any challenge to their performance.

CANON 2: Representation of Qualifications
Interpreters shall accurately and completely represent their certifications, training, and pertinent experience.

Commentary:

Acceptance of a case by an interpreter conveys linguistic competency in legal settings. Withdrawing or being asked to withdraw from a case after it begins causes a disruption of court proceedings and is wasteful of scarce public resources. It is therefore essential that interpreters present a complete and truthful account of their training, certification, and experience prior to appointment so the officers of the court can fairly evaluate their qualifications for delivering interpreting services.

CANON 3: Impartiality and Avoidance of Conflict of Interest
Interpreters shall be impartial and unbiased and shall refrain from conduct that may give an appearance of bias. Interpreters shall disclose any real or perceived conflict of interest.

Commentary:

The interpreter serves as an officer of the court and the interpreter's duty in a court proceeding is to serve the court and the public to which the court is a ser vant. This is true regardless of whether the interpreter is publicly retained at government expense or retained privately at the expense of one of the parties. The interpreter should avoid any conduct or behavior that presents the appearance of favoritism toward any of the parties. Interpreters should maintain professional

relationships with their clients, and should not take an active part in any of the proceedings. The interpreter should discourage a non-English-speaking party's personal dependence. During the course of the proceedings, interpreters should not converse with parties, witnesses, jurors, attorneys, or with friends or relatives of any party, except in the discharge of their official functions. It is especially important that interpreters, who are often familiar with attorneys or other members of the courtroom work group, including law enforcement officers, refrain from casual and personal conversations with anyone in court that may convey an appearance of a special relationship or partiality to any of the court participants. The interpreter should strive for professional detachment. Verbal and nonverbal displays of personal attitudes, prejudices, emotions, or opinions should be avoided at all times. Should an interpreter become aware that a proceeding participant views the interpreter as having a bias or being biased, the interpreter should disclose that knowledge to the appropriate judicial authority and counsel. Any condition that interferes with the objectivity of an interpreter constitutes a conflict of interest. Before providing services in a matter, court interpreters must disclose to all parties and presiding officials any prior involvement, whether personal or professional, that could be reasonably construed as a conflict of interest. This disclosure should not include privileged or confidential information. The following are circumstances that are presumed to create actual or apparent conflicts of interest for interpreters where interpreters should not serve: (1) The interpreter is a friend, associate, or relative of a party or counsel for a party involved in the proceedings; (2) The interpreter has served in an investigative capacity for any party involved in the case; (3) The interpreter has previously been retained by a law enforcement agency to assist in the preparation of the criminal case at issue; (4) The interpreter or the interpreter's spouse or child has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that would be affected by the outcome of the case; (5) The interpreter has been involved in the choice of counsel or law firm for that case. Interpreters should disclose to the court and other parties when they have previously been retained for private employment by one of the parties in the case. Interpreters should not serve in any matter in which payment for their services is contingent upon the outcome of the case. An interpreter who is also an attorney should not serve in both capacities in the same matter.

CANON 4: Professional Demeanor
Interpreters shall conduct themselves in a manner consistent with the dignity of the court and shall be as unobtrusive as possible.

Commentary:

Interpreters should know and observe the established protocol, rules, and procedures for delivering interpreting services. When speaking in English, interpreters should speak at a rate and volume that enable them to be heard and under-

stood throughout the courtroom, but the interpreter's presence should otherwise be as unobtrusive as possible. Interpreters should work without drawing undue or inappropriate attention to themselves. Interpreters should dress in a manner that is consistent with the dignity of the proceedings of the court. Interpreters should avoid obstructing the view of any of the individuals involved in the proceedings. However, interpreters who use sign language or other visual modes of communication must be positioned so that hand gestures, facial expressions, and whole body movement are visible to the person for whom they are interpreting. Interpreters are encouraged to avoid personal or professional conduct that could discredit the court.

CANON 5: Confidentiality
Interpreters shall protect the confidentiality of all privileged and other confidential information.

Commentary:

The interpreter must protect and uphold the confidentiality of all privileged information obtained during the course of her or his duties. It is especially important that the interpreter understand and uphold the attorney–client privilege, which requires confidentiality with respect to any communication between attorney and client. This rule also applies to other types of privileged communications. Interpreters must also refrain from repeating or disclosing information obtained by them in the course of their employment that may be relevant to the legal proceeding. In the event that an interpreter becomes aware of information that suggests imminent harm to someone or relates to a crime being committed during the course of the proceedings, the interpreter should immediately disclose the information to an appropriate authority within the judiciary who is not involved in the proceeding and seek advice in regard to the potential conflict in professional responsibility.

CANON 6: Restriction of Public Comment
Interpreters shall not publicly discuss, report, or offer an opinion concerning a matter in which they are or have been engaged, even when that information is not privileged or required by law to be confidential.

CANON 7: Scope of Practice
Interpreters shall limit themselves to interpreting or translating, and shall not give legal advice, express personal opinions to individuals for whom they are interpreting, or engage in any other activities which may be construed to constitute a service other than interpreting or translating while serving as an inter preter.

Commentary:

Since interpreters are responsible only for enabling others to communicate, they should limit themselves to the activity of interpreting or translating only.

Interpreters should refrain from initiating communications while interpreting unless it is necessary for assuring an accurate and faithful interpretation. Interpreters may be required to initiate communications during a proceeding when they find it necessary to seek assistance in performing their duties. Examples of such circumstances include seeking direction when unable to understand or express a word or thought, requesting speakers to moderate their rate of communication or repeat or rephrase something, correcting their own interpreting errors, or notifying the court of reservations about their ability to satisfy an assignment competently. In such instances they should make it clear that they are speaking for themselves. An interpreter may convey legal advice from an attorney to a person only while that attorney is giving it. An interpreter should not explain the purpose of forms, services, or otherwise act as counselors or advisors unless they are interpreting for someone who is acting in that official capacity. The interpreter may translate language on a form for a person who is filling out the form, but may not explain the form or its purpose for such a person. The interpreter should not personally serve to perform official acts that are the official responsibility of other court officials including, but not limited to, court clerks, pretrial release investigators or interviewers, or probation counselors.

CANON 8: Assessing and Reporting Impediments to Performance
Interpreters shall assess at all times their ability to deliver their services. When interpreters have any reservation about their ability to satisfy an assignment competently, they shall immediately convey that reservation to the appropriate judicial authority.

Commentary:

If the communication mode or language of the non-English-speaking person cannot be readily interpreted, the interpreter should notify the appropriate judicial authority. Interpreters should notify the appropriate judicial authority of any environmental or physical limitation that impedes or hinders their ability to deliver interpreting services adequately (e.g., the courtroom is not quiet enough for the interpreter to hear or be heard by the non-English-speaker, more than one person at a time is speaking, or principals or witnesses of the court are speaking at a rate of speed that is too rapid for the interpreter to adequately interpret). Sign language interpreters must ensure that they can both see and convey the full range of visual language elements that are necessary for communication, including facial expressions and body movement, as well as hand gestures. Interpreters should notify the presiding officer of the need to take periodic breaks to maintain mental and physical alertness and prevent interpreter fatigue. Interpreters should recommend and encourage the use of team interpreting whenever necessary. Interpreters are encouraged to make inquiries as to the nature of a case whenever possible before accepting an assignment. This enables interpreters to match more closely their professional qualifications, skills, and experience to

potential assignments and more accurately assess their ability to satisfy those assignments competently. Even competent and experienced interpreters may encounter cases where routine proceedings suddenly involve technical or specialized terminology unfamiliar to the interpreter (e.g., the unscheduled testimony of an expert witness). When such instances occur, interpreters should request a brief recess to familiarize themselves with the subject matter. If familiarity with the terminology requires extensive time or more intensive research, interpreters should inform the presiding officer. Interpreters should refrain from accepting a case if they feel the language and subject matter of that case is likely to exceed their skills or capacities. Interpreters should feel no compunction about notifying the presiding officer if they feel unable to perform competently, due to lack of familiarity with terminology, preparation, or difficulty in understanding a witness or defendant. Interpreters should notify the presiding officer of any personal bias they may have involving any aspect of the proceedings. For example, an interpreter who has been the victim of a sexual assault may wish to be excused from interpreting in cases involving similar offenses.

CANON 9: Duty to Report Ethical Violations

Interpreters shall report to the proper judicial authority any effort to impede their compliance with any law, any provision of this code, or any other official policy governing court interpreting and legal translating.

Commentary:

Because the users of interpreting services frequently misunderstand the proper role of the interpreter, they may ask or expect the interpreter to perform duties or engage in activities that run counter to the provisions of this code or other laws, regulations, or policies governing court interpreters. It is incumbent upon the interpreter to inform such persons of his or her professional obligations. If, having been apprised of these obligations, the person persists in demanding that the interpreter violate them, the interpreter should turn to a supervisory interpreter, a judge, or another official with jurisdiction over interpreter matters to resolve the situation.

CANON 10: Professional Development

Interpreters shall continually improve their skills and knowledge and advance the profession through activities such as professional training and education, and interaction with colleagues and specialists in related fields.

Commentary:

Interpreters must continually strive to increase their knowledge of the languages they work in professionally, including past and current trends in technical, vernacular, and regional terminology as well as their application within court proceedings. Interpreters should keep informed of all statutes, rules of courts and policies of the judiciary that relate to the performance of their professional duties. An interpreter should seek to elevate the standards of the profession

through participation in workshops, professional meetings, interaction with colleagues, and reading current literature in the field.

Appendix 20—Model Court Interpreter Act

1. Policy Declaration—It is hereby declared to be the policy of this state to secure the rights, constitutional and otherwise, of persons who, because of a non-English speaking cultural background, are unable to understand or communicate adequately in the English language when they appear in courts or are involved in justice system proceedings. It is the intent of this Act to provide for the certification, appointment, and use of interpreters to secure the state and federal constitutional rights of non-English-speaking persons in all legal and administrative proceedings.

Commentary: A statutory preamble, introduction, or policy declaration should articulate with precision the purpose of the Act and the policy which the Act is designed to implement and support.

2. Definitions—For the purpose of this Act, the following words have the following meaning: A. "Appointing authority" means a trial judge, administrative hearing officer or other officer authorized by law to conduct judicial or quasi-judicial proceedings. B. "Non-English-speaking person" means any principal party in interest or witness participating in a legal proceeding who has limited ability to speak or understand the English language. C. "Legal proceeding" means a civil, criminal, domestic relations, juvenile, traffic or an administrative proceeding in which a non-English-speaking person is a principal party in interest or a witness. D. "Certified interpreter" means a person who: (1) is readily able to interpret simultaneously and consecutively and to sight translate from English to the language of the non-English-speaking person or from the language of that person into English; (2) is certified according to procedures approved by the Supreme Court; and (3) satisfies the standards prescribed and promulgated pursuant to this Act and the Code of Professional Responsibility for Interpreters established in this state. E. "Principal party in interest" means a person involved in a legal proceeding who is a named party, or who will be bound by the decision or action, or who is foreclosed from pursuing his or her rights by the decision or action which may be taken in the proceeding. F. "Witness" means anyone who testifies in any legal proceeding.

Commentary: The Act should define with precision the terms used in the policy declaration and throughout the Act. These definitions should identify those individuals for whom an interpreter is required, state clearly the proceedings in which an interpreter should be used, and establish what is meant by a certified interpreter. Court interpretation is a specialized and highly demanding form of interpreting. It requires skills that few bilingual individuals possess, including language instructors. The knowledge and skills of a court interpreter differ substantially from or exceed those required in other interpretation settings, including social service, medical, diplomatic, and conference interpreting. Interpreters

who routinely work noncourt settings often cannot perform adequately as a court interpreter. The term "certified interpreter" is broadly defined to allow flexibility in the certification standards which may vary for particular languages according to the extent of their usage within each state, the availability of bilingual persons to serve as interpreters, and other practical considerations. This Act establishes criteria only for "certified interpreters." There is no use of, reference to, or definition of the term "qualified interpreter." Attempting to define a level of interpreter below that of a "certified interpreter" is problematic and unworkable.

3. Implementing Responsibilities—A. The Supreme Court shall be responsible for ensuring language interpreter certification, continued proficiency, and discipline. The Supreme Court shall prescribe standards and procedures for the recruitment, testing, certification, evaluation, compensation, duties, professional conduct, continuing education, certification renewal, and other matters relating to interpreters as prescribed in this Act.

Commentary: The establishment of a comprehensive court interpreter program is a significant undertaking requiring specialized experience and expertise. The Supreme Court should understand the size and complexity of the undertaking and be prepared to provide the support and encouragement required to see the establishment of such a program to its conclusion. Neither the Supreme Court nor the typically configured state administrative office has the expertise or experience in language interpretation to develop, on its own, detailed policies and procedures required to implement a state-wide interpreter program. That specialized expertise must be recruited and used to develop and recommend to the Supreme Court the standards for the appointment of interpreters, as well as the criteria for interpreter qualifications, duties, professional conduct, and compensation. Such expertise is available in most states from professionals employed in the fields of languages, interpreting, occupational testing, and from judges and attorneys who have worked extensively with interpreters. Experience in states with well-developed programs suggests that the advice and services of such individuals can be obtained pro bono through the formation of a Court Interpreter Advisory Panel. Expertise and assistance can also be obtained from the administrative offices of the courts in some states (e.g., California, Massachusetts, New Jersey, Washington) and from the National Center for State Courts.

B. Staff and administrative support required by the Supreme Court to implement the interpreter certification program shall be provided by the administrative office of the courts.

Commentary: The establishment and implementation of a state-wide interpreter program is a substantial undertaking. It is recommended that the state supreme court initiate such an effort through the establishment of a Court Interpreter Advisory Panel made up of a broad range of trial and appellate judges, court administrative staff, lawyers, court interpreters practicing in the state, and

experts in linguistics, interpretation, education, and occupational testing and certification. Such a panel, in conjunction with the administrative office of the courts, should conduct studies of the language interpreter needs of the courts of the state and make recommendations to the supreme court and to the administrative office of the courts concerning interpreter needs and interpreter program implementation. The recommendations should address such matters as: (1) the designation of those languages for which there should be certification programs; (2) the establishment and monitoring of a statewide interpreter testing and certification program; (3) the establishment of periodic interpreter certification renewal requirements; (4) the promulgation of guidelines to assist judges in determining when a noncertified interpreter may be permitted to act as an interpreter in the absence of a certified interpreter, and (5) the establishment of statewide standards of practice and appropriate professional conduct for interpreters. The Court Interpreters Advisory Panel, in conjunction with the administrative office of the courts, should assist in developing policies regarding interpreter training, mandatory continuing education, and recruitment of potential interpreters. Of primary significance is the initial determination by the Court Interpreters Advisory Panel of those languages which, because of their predominance, require a testing and certification program. These determinations may require surveys of individual court needs for interpreters and the examination of demographic trend data. It is anticipated that this Advisory Panel would be reimbursed only for travel expenses related to attendance at Advisory Panel meetings. The panel would rely on the state court administrative office for staff and clerical support. Special note on testing and certification programs: There is growing recognition among the states and the professional community of court interpreters for the need to develop interstate testing and certification programs as a way to make testing and certification in many languages affordable for all states. The standardized tests can be shared among states and incorporated by reference into state laws, rules promulgated by supreme courts, or by administrative regulations of administrative offices of the courts. Prior to drafting legislation or rules, policy makers in the states should explore whether progress has been made toward establishing programs and standards that can be adopted by reference or used as the foundations for state programs.

C. Pursuant to Supreme Court rule, the administrative office of the courts shall administer and manage the operations of the State Court Interpreter Program.

Commentary: The administrative office of the courts must undertake to develop the structure and the mechanics necessary to administer a court interpreter program. The specific responsibilities of the [administrative offices of the courts] should be established by supreme court rule and may include some or all of the following: (1) to establish interpreter proficiency standards; (2) to designate languages for certification; (3) to establish programs for the recruitment, training,

legal orientation, testing, evaluation, and certification of interpreters consistent with the proficiency standards; (4) to develop resources for interpreter continuing education and recertification; (5) to establish, maintain, and publish a current directory of certified interpreters; (6) to adopt and disseminate to each court an approved fee schedule for certified and noncertified interpreters; (7) to set interpreter certification fees as may be necessary; (8) to establish procedural standards and guidelines for in-court interpreted proceedings to address such matters as: modes of interpreting, appropriate procedure for correcting interpretation mistakes, interpreter fatigue and time limits for continuous in-court interpretation, and when the use of multiple interpreters working in shifts or concurrently is indicated; and (9) to establish, administer or recommend a process to review and respond to allegations of violations the code of professional conduct for interpreters, including decertification or other disciplinary measures. The certification process encompasses recruitment, training, testing, and evaluation of interpreters. The specialized language proficiency standards, testing criteria, and evaluation processes clearly require detailed language expertise. Part of the certification process should involve a comprehensive orientation of interpreters to the judicial system to ensure their familiarity with the legal system, including the nature of the various criminal, civil, and other judicial proceedings, legal terminology, and the roles of officials involved in various legal settings. Furthermore, a court interpreter program should include a component responsible for the continuing education or recertification of existing interpreters. Ideally, this program should include a system for evaluating and monitoring interpreter performance and should have the capacity to evaluate any questions of conflict of interest or ethical violations involving certified court interpreters. In addition, the administrative office of the courts must maintain and disseminate a current list of certified interpreters to the courts throughout the state. This certification list should be updated on a regular basis to be a reliable source for courts in appointing certified interpreters. The administrative office of the courts may also establish and promulgate standards or recommended guidelines and set forth appropriate levels of compensation that should be paid to interpreters, either in the form of salary or fees. Such standards or recommended guidelines may include salary schedules, rates for per diem or contract interpreters, and minimum compensation standards for an appearance in court. Rules that govern travel expense reimbursement for other court employees, or in exceptional cases for expert witnesses, should also apply to court interpreters. The compensation schedule may be standard for all jurisdictions throughout the state, or it may reflect cost of living differentials or other relevant local conditions. Regardless of the method employed to compensate interpreters, the compensation standards should be adequate to ensure the availability of interpreters.

D. The director of the administrative office of the courts shall collect and analyze statistics pertinent to interpreter utilization. This report may be made a part

of the annual report of the judiciary, and contain analyses and recommendations for the improvement of the court interpreter program.

Commentary: It is important to have an accurate overview of the extent of the need for and use of certified and noncertified interpreters statewide for both management and budgetary reasons. Collecting data regarding the need for interpreters is complex, since records are not normally kept of services that cannot be provided. Data regarding the actual use of interpreters should be more readily available. The interpreter services programs should maintain records regarding the number of salaried interpreter employees, if any, and the number and cost of each interpreter appointment. In any case, the cost of interpreter services for each jurisdiction and statewide, and trends in interpreter requests and use rates, should be monitored for program management and planning purposes.

4. Certified Interpreter Required

A. When an interpreter is requested or when the appointing authority determines that a principal party in interest or witness has a limited ability to understand and communicate in English, a certified interpreter shall be appointed.

Commentary: The right to an interpreter accrues to the "party in interest." Recognition of the need for an interpreter may arise from a request by a party or counsel for the services of an interpreter, from the court's own voir dire of a party or witness, or from disclosures made to the court from parties, counsel, court employees or other persons familiar with the ability of the person to understand and communicate in English. When a judge recognizes that a "party in interest" requires an interpreter, an interpreter shall be appointed. This portion of the Act embodies and implements the policy declaration set out in section 1 of the Act: to provide certified interpreters in all state legal and administrative proceedings where the services of an interpreter are required to secure the rights of non-English-speaking persons or for the administration of justice. As a result of that policy declaration, the statute is unequivocal in asserting that an individual who has a limited ability to speak or understand the English language, who is a party in interest or a witness, is entitled to the assistance of a certified interpreter throughout the legal proceeding, or for the duration of the witness's testimony. Events included in legal proceedings encompass interviews between counsel and client, advisements regarding procedure or rights that are conducted out of the presence of counsel or the judge, and readings or other translations of court documents that are evidence in the case or that are relied on for dispositional decisions by the court.

B. The appointing authority may appoint a noncertified interpreter only upon a finding that diligent, good faith efforts to obtain a certified interpreter have been made and none has been found to be reasonably available. A noncertified interpreter may be appointed only after the appointing authority has evaluated the totality of the circumstances including the gravity of the judicial proceeding and the potential penalty or consequence involved.

Commentary: Allowance is made for the appointment of a noncertified interpreter, but only after diligent, good faith efforts are made to secure a certified interpreter. A provision for the use of a noncertified interpreter reflects the practical realities of court operations. The exception to the general rule that certified interpreters must be provided acknowledges that jurisdictions may not have access to certified interpreters in all languages for all cases. The uniqueness of the language required, the geographical location of the court, the season of the year, and dozens of other reasons may militate against the availability of a certified interpreter for a particular language on any given date and time. The noncertified interpreter alternative should be used only as a rare exception to the general rule requiring certified interpreters. A review of the totality of the circumstances is required, because whether a certified interpreter is "reasonably" available depends as much on the gravity of the proceeding and the jeopardy the party is placed in, as on how difficult it is to locate and obtain the services of a certified interpreter. For example, for a felony criminal trial a certified interpreter residing in a distant jurisdiction might be considered "reasonably available"; whereas in a misdemeanor case, or in a procedural hearing required to consider the release of a defendant from jail, "reasonable" availability may extend only to the geographic boundaries of the court.

C. Before appointing a noncertified interpreter, the appointing authority shall make a finding that the proposed noncertified interpreter appears to have adequate language skills, knowledge of interpreting techniques, familiarity with interpreting in a court or administrative hearing setting, and that the proposed noncertified interpreter has read, understands, and will abide by the Code of Professional Responsibility for language interpreters established in this state.

Commentary: In order for a noncertified interpreter to be appointed, the judge or administrative hearing officer must inquire and be assured that the proposed noncertified interpreter appears to have the requisite knowledge and skills to perform adequately the task for which he or she is appointed. Equally important, the inquiry into the interpreter's skills and experience must include a verification that the interpreter has read, understands, and will abide by the requirements of the Code of Professional Responsibility established for interpreters. It is recommended that the administrative office of the courts develop and make available a standard voir dire guide for use by the court for the purpose of inquiring into the experience and qualifications of noncertified interpreters.

D. A summary of the efforts made to obtain a certified interpreter and to determine the capabilities of the proposed noncertified interpreter shall be made on the record of the legal proceeding.

Commentary: The requirement to make these findings on the record not only underscores the importance of using certified interpreters whenever possible, but provides a ready record for review of the circumstances under which a noncertified interpreter was used. It is recommended that standard language for this

voir dire and finding be developed for use by the judge when inquiring into the efforts made by court administrative personnel to secure the services of a certified interpreter.

5. Waiver of Interpreter

A. A non-English-speaking person may at any point in the proceeding waive the right to the services of an interpreter, but only when (1) the waiver is approved by the appointing authority after explaining on the record to the non-English-speaking person through an interpreter the nature and effect of the waiver; (2) the appointing authority determines on the record that the waiver has been made knowingly, intelligently, and voluntarily; and (3) the non-English-speaking person has been afforded the opportunity to consult with his or her attorney.

B. At any point in any proceeding, for good cause shown, a non-English-speaking person may retract his or her waiver and request an interpreter.

Commentary: The intent of this portion of the statute is to ensure that the non-English-speaking parties or witnesses are made fully aware of their right to an interpreter. The waiver of the right to an interpreter must be knowing and voluntary, and with the approval of the judge or administrative hearing officer. States may wish to develop a list of questions, analogous to the questions that are asked when a criminal defendant waives his or her rights to a jury trial and enters a plea of guilty, to demonstrate the knowing and voluntary waiver of the right to an interpreter.

6. Interpreter Oath

All interpreters, before commencing their duties, shall take an oath that they will make a true and impartial interpretation using their best skills and judgment in accordance with the standards and ethics of the interpreter profession.

Commentary: This is standard statutory language that appears in a variety of current statutes. An interpreter should take an oath for the same reason that any person testifying in court takes an oath—to safeguard against the possibility of knowing and willful falsification of testimony. The Code of Professional Responsibility addresses the various ethical responsibilities of interpreters for accuracy and completeness, impartiality, confidentiality, and other matters relating to the professional conduct of interpreters. The appointing authority should be alerted to potential conflicts of interest or other violations of the Code of Professional Responsibility that may arise. The sanction of removal is justified for any violations of that Code. It is common practice for such oaths to be sworn to and maintained on file for all interpreters who are regularly employed by a court. This simplifies the court's inquiries on the record during procedural hearings. It is recommended, however, that an oath be read and sworn to in open court in all proceedings conducted before a jury.

7. Removal of an Interpreter in Individual Cases

Any of the following actions shall be good cause for a judge to remove an interpreter: being unable to interpret adequately, including where the interpreter self-reports such inability; knowingly and willfully making false interpretation while serving in an official capacity; knowingly and willfully disclosing confidential or privileged information obtained while serving in an official capacity; and failing to follow other standards prescribed by law and the Code of Professional Responsibility for interpreters.

Commentary: It is important to recognize that interpreters are sometimes called to court to interpret for someone who speaks a different language from that spoken by the interpreter. This section authorizes the appointing authority to remove interpreters who are not competent to interpret for a case for this or any other reason, or who violate the Code of Professional Responsibility which each state should adopt as a companion to legislation. For a more complete discussion of the elements of such a code, see the Model Code of Professional Responsibility published by the National Center for State Courts as a companion to this Model Act. Appointing authorities should guard against appointing interpreters who may have an interest, or the appearance of an interest, in the outcome of the legal proceedings in which the interpreter is serving. A conflict of interest exists when an interpreter acts in a situation where the interpreter may be affected by an interest in the outcome of the case or is otherwise biased. For example, an interpreter should not serve as an interpreter for someone with whom the interpreter has a familial relationship, for someone with whom the interpreter has shared a residence, or for someone with whom the interpreter has a continuing business or professional relationship. The trial court must be assured of interpretations that reflect the precise language of questions and answers of the witness. The interpretation should not be affected by any personal interest of the interpreter in the witness's case.

8. Cost of Interpreter Services

In all legal proceedings, the cost of providing interpreter services shall be borne by the court or administrative agency in which the legal proceeding originates.

Commentary: A wide variety of funding mechanisms for courts and ancillary court services are used throughout the country. The Model Act takes the position that providing a certified interpreter is a basic and fundamental responsibility of the court, and that the court should bear the burden of the costs associated with providing an interpreter as a cost of the court proceeding. This approach does not foreclose subsequent assessments of costs for interpreter services to parties when that is appropriate, according to the same standards or rules that are applied to court costs in other litigation. Drafters of this statute considered and rejected an approach that attempts to initially allocate the responsibility for acquiring and paying for the cost of the interpreter to the governmental entity

which initiates the proceeding, for example, a local prosecutor, state's attorney, public defender, legal services office, or welfare service agency.

9. Appropriation

To achieve the purposes of this Act, $_____ is appropriated for the administrative office of the courts to establish and operate a state-wide court interpreter program.

Commentary: Funding is sure to be a difficult and contentious issue. As with indigent defense, however, the costs of an interpreter program are essential to the administration of a fundamentally fair justice system. A realistic assessment of the start-up costs of an interpreter program should be made by the administrative office of the courts. Efforts should be made to enlist the voluntary service of available experts to serve on the Court Interpreters Advisory Panel. Courts should also look to other states for program models and for the formation of interstate or other interjurisdictional service agreements. Nevertheless, administrative office of the courts staff and administrative support will require state funding during the implementation stage. As with all court appropriations, this expenditure will require detailed and specific justification and substantiation. To defray some of the costs of administering the interpreter certification program, the administrative office of the courts should be authorized to assess a court interpreter certification fee or fees if necessary. Such fees may be designed to operate the court interpreter testing program on a self-sustaining basis once the start-up costs, secured through a state appropriation, are expended. Certification fees may cover administrative costs of testing, certification, and recertification.

Appendix 21—The JEDDI Corporation

The JEDDI (Judicial Electronic Data and Document Interchange) Corporation, a nonprofit corporation representing widely divergent interests, was formed to pursue and promote the establishment of national communications standards for computers in state and federal courts. While the accelerating effort to automate courts has brought major benefits to individual overloaded court systems, each court, whether state or federal, has largely marched to its own tune. Each court system, whether for docket control, scheduling, jury management, case management, imaging, or electronic filing was developed independently, often with little thought of outside communications. Yet the courts are the one institution that communicates with virtually every aspect of our society. Some people became concerned that the courts might be building their own "Tower of Babel."

But such chaos need not be. The American National Standards Institute's (ANSI) Accredited Standards Committee X.12 (X.12 Committee) has long addressed communications compatibility among computers. The general term for such communications is electronic data interchange (EDI). Industries such as banking, retail, credit cards, and trucking have long established voluntary, industry-wide EDI standards for communicating data. However, this data is largely alphanumeric, rather than purely textual. Hence, a large segment of the information handled by the courts falls outside the traditional EDI ambit, requiring standards other than those already developed by the X.12 Committee.

In June 1990, lawyer members of the X.12 Committee recruited interested judges and lawyers from the American Bar Association (principally the Judicial Administration Division and the Section of Science and Technology), the Federal Judicial Center, private law firms, and others to explore the creation of EDI standards for use in the legal industry. The need was clear and the response strong.

A judicial EDI consortium was formed to pursue the creation of new standards. The consortium added representatives of the National Center for State Courts, court management associations (National Association of Court Managers, Conference of State Court Administrators), several software and legal service corporations, and the Administrative Office of the U.S. Courts. The consortium agreed to establish a working group to develop national standards for electronic filing and data interchange among courts, judicial and executive branches, state and federal courts, and practicing attorneys.

The group analyzed the types of information that need EDI standards, citing court filings, lawyer-to-lawyer communications, criminal justice and bankruptcy information, court-management data, and judicial–executive branch interface information. Although broad, that list was clearly not inclusive. The group identified seven needs both of filers and the courts:

1. The need to provide legally sufficient authentication of documents transmitted electronically.

2. Transmission of exhibits and other documents attached to pleadings.

3. Format (e.g., the appearance of the document filed).

4. Document standards (e.g., margins, lines per page, page breaks, and paragraphs).

5. Filing verification.

6. Storage and retention.

7. Security of documents and integrity after filing.

The consortium set itself three tasks: (1) establish broad-based participatory working groups that want to develop electronic filing standards for the courts; (2) establish a well-defined process for creating those standards; and (3) establish several standards that bring immediate and dramatic benefits to users. Initially the consortium saw itself as a threshold approval body that would coordinate and supervise any new standards development and shepherd it through the X.12 Committee approval process. In reality, however, any organization developing a new standard wanted complete control of its own work. Thus, the consortium evolved into a forum for information, a mechanism for conducting seminars to develop basic concepts, and a place where interested parties could find technical resources needed to pursue developmental efforts.

Early on, the Administrative Office of the U.S. Courts stepped up to initiate the first pilot project. In late 1990, the bankruptcy courts were overwhelmed with paper. Bankruptcies were running from 700,000 to 1 million per year, and each of the larger cases involved tens of thousands of claims. The AO had automated the bankruptcy courts more than any other segment of the federal courts, revising some 50 standard forms used in these courts, including the initial filing, to be computer readable. They ultimately developed, and the X.12 Committee approved, Standard Forms 175 and 176, the first ever in the legal industry. Those standards are available for use in other courts, and a pilot project at the Nuclear Regulatory Commission will seek to establish their use for administrative adjudications.

Ultimately, the consortium became the JEDDI Corporation, a nonprofit 501(c)(3) entity pursuing the same goals, with one change. JEDDI now seeks to promote and support all electronic filing projects on the theory that it is too early to choose just one standard such as EDI. In fact, the second most completely developed electronic filing system is in Utah and uses the Internet and the Hypertext Markup Language (HTML) made famous by the World Wide Web. JEDDI's board of directors includes state and federal judges, practitioners, information providers, and hardware and software developers. JEDDI's most important objective now is to establish national compatibility standards for electronic filing.

Although the ultimate number of standards may be large and the problems mind-boggling, the benefits could revolutionize our legal system. Attorneys could both file in court electronically and search court records nationally, all from their offices. For litigators, the proverbial "race to the courthouse" would be reduced to a nanosecond. State and federal courts could build central systems from those filings to manage the entire range of their work, from dockets to trials to orders to reports to instant communication with executive agencies dealing with traffic, the criminal justice system, and child support.

Appendix 22—Technology Issues Relating to State and Federal Courts

Electronic Data Interchange and Bankruptcy Automation, Rich Goldschmidt, et al. (Technology Enhancement Office, Administrative Office of the U.S. Courts, revised March 1995)

The high volume of bankruptcy filings, and the paper intensive nature of bankruptcy, have encouraged the federal judiciary to seek new ways to improve productivity. There were more than 835,000 bankruptcy filings in 1994. Nation-wide there are about 52 million bankruptcy notices a year printed and mailed. The number of bankruptcy claims is similar in magnitude at many millions nationwide. Electronic Data Interchange (EDI) is one technique for managing the exchange of this volume of information that offers great potential benefit.

EDI is a widely used form of electronic commerce in which well-defined business transactions are exchanged and processed by companies' computers with much less need for human intervention than previous paper-driven processes. For example, EDI allows the court to send a notice electronically rather than print a notice, stuff it in an envelope, pay the postage, and experience postal delivery times. Likewise, creditors could electronically submit their claims, and not have to print or type them and mail them. The court receiving the claims electronically would not have to open mail, sort loose paper documents, manually enter the data into a computer system, spend the time and take the space to file them, manually retrieve them on demand, and suffer the consequences of data entry errors, misfiling, and lost files.

These kinds of shared benefits from mutual exchange of information are typical of EDI. EDI can be used to enable the submitter's computer to exchange data with the court's computer according to well-defined rules. These rules are standardized EDI transactions agreed to by all the interested parties in an industry or area of government. An electronic version of a purchase order is a good example of a transaction which has been standardized. Another example is the set of EDI transactions used by the Internal Revenue Service (IRS) to transmit tax information electronically. To ensure that EDI transactions are defined in a consistent and uniform manner, the creation of EDI transactions is overseen by the X.12 EDI Committee which is accredited by the American National Standards Institute.

Based on the existing standardized paper forms, the Technology Enhancement Office (TEO) of the Administrative Office of the U.S. Courts began the process of defining EDI transactions for court notices and court submissions. The latter transaction supports the bankruptcy proof of claim, bankruptcy petition and list of creditors, and the bankruptcy schedules, as well as adding value to the submis-

sion of other kinds of documents like pleadings. Pleadings are different from the other documents listed because they have only a small amount of structured data, and are mostly text. To accommodate the transmission of formatted text, the Portable Document Format (PDF) provides a standardized method for document exchange which supports complex documents and preserves the integrity of page layout.

EDI can carry additional structured information about document content, like case number, court name and type, motion type, or citations, which can supplement the significant benefits related to electronic case files. EDI makes possible an electronic link between law office software and court case-management software which can improve the productivity of both information sharing partners. This approach holds the promise of creating a large standards-driven market for court and law office software which will benefit the entire legal community.

This paper discusses the use of EDI and other information processing standards, in the context of an experimental plan to explore the costs and benefits of electronic case files.

A. *Background—Claims Processing.* Initial efforts to automate bankruptcy claims processing began with the formation of a Claims Scanning Subcommittee of the Bankruptcy Clerks Advisory Committee. This group included Bankruptcy Clerks Karen Eddy (S.D. Fla.), Cecilia Lewis (S.D.N.Y.), Carol Ann Robinson (E.D. Mo.), and Jim Waldron (D.N.J.). They reviewed policies, procedures, and technologies; and they proposed an experiment in one or two courts. The proposal was endorsed by the Judicial Conference Committee on Automation and Technology at its June 1991 meeting. Carol Ann Robinson and Jim Waldron were named as project sponsors for a Bankruptcy Claims Processing Project.

The functional requirements for the Bankruptcy Claims System were produced by a user group during a Joint Application Design (JAD, a facilitated design method) session in September 1991. EDI was one requirement, along with use of scanning and bar codes and/or OCR (optical character recognition) for capturing data from claim forms. The claims system prototype was designed to be a stand-alone platform for handling only claims. It exchanges information about creditors with a bankruptcy noticing system. This was viewed as an ideal platform for experimentation with EDI because of its narrow scope and because the stand-alone nature of the system eliminated requirements for significant changes to existing bankruptcy case-management systems.

Electronic Filing of Pleadings. A separate project was begun in 1988 to experiment with electronic filing of court documents. The Eastern District of Pennsylvania became the first operational site in 1989, accepting ASCII text documents filed electronically via dial-in transfer. A major upgrade in 1991 added the capability to accept WordPerfect documents and to account for filing fees. The Western District of Texas was added [as] a second site, which accepted documents for

both district and bankruptcy courts. There are many lessons we have learned from these experimental sites, which will be discussed below. We also present a preview of plans for the next generation prototype for electronic filing.

JEDDI. A parallel effort to encourage the use of court-related electronic data and document interchange led to the formation of an ad hoc group, the Judicial Electronic Data and Document Interchange (JEDDI) consortium, headed by Administrative Judge B. Paul (Tony) Cotter (Nuclear Regulatory Commission). This group consists of interested parties from the local, state, and federal judiciary, the bar, and private industry. They developed a position paper (June 1991) describing the potential benefits of EDI for the judiciary.

The Need for National Standards for Judicial EDI. They focused on the need for experimental projects at each level of the judiciary to demonstrate the benefits of the electronic exchange of documents and data. The Common Legal Data Work Group, which first met at the National Center for State Courts' JEDDI Guidebook Workshop in May 1993, has worked with the federal courts to develop generic EDI court standards.

X.12. Another important group involved in EDI is the national standards organization. The Accredited Standards Committee (ASC) X.12 is the working group for the Electronic Data Interchange (EDI) standard. The group is accredited by the American National Standards Institute (ANSI) and carries out the work of developing standardized transactions. Once a group of potential EDI partners have drafted a proposed standard transaction, a work request is submitted to X.12. It is then assigned to the appropriate standards development subcommittee.

The courts have been involved with the government subcommittee. When a subcommittee completes the work for a proposal, the work is reviewed by the technical assessment subcommittee and the procedures review board to check for technical or procedural flaws. It is then brought to the X.12 membership as a whole for a vote. If it passes, then the transaction set is published as a Draft Standard for Trial Use (DSTU). Draft Use Standards are reviewed by ANSI on a regular basis. After ANSI approves it, a transaction becomes a Full Use Standard. The court notice and court submission were developed and approved by X.12, and published as DSTUs. Both transactions are currently being enhanced through the data maintenance process to add new functionality and make them more generic.

B. *Bankruptcy Claims Processing—Automation of Paper Process.* The Bankruptcy Claims Processing Project was funded from the technology assessment budget of TEO. TEO staff have produced a reviewed JAD document for functional requirements, an *Analysis of Technology* report, a *Preliminary System Architecture* report, and a preliminary cost benefit analysis of electronic noticing. *Preliminary System Architecture* describes a phased implementation. The first phase supports in-court automation of paper forms processing, including scan-

ning the forms, recognition of the creditor number of court printed forms, and storage of the scanned images and claim data in a claims database. This work has been implemented and is operational in three major bankruptcy courts: District of New Jersey, Southern District of Florida, and Eastern District of Missouri.

Next Phase Adds EDI. The second phase of this experiment will add EDI exchange of notices and claims with major creditors . . . and the capability for fax dissemination of claims to the public. Fax dissemination is a necessary supplement to existing public access methods commonly used by federal courts because of the high bandwidth requirements for interactive access to image files. The EDI claims application has been designed and is now being implemented. TEO defined an initial version of EDI transactions for bankruptcy notices and claims through an inclusive process, with comments from court managers, noticing experts, major creditors, and commercial vendors.

The court notice transaction supports a structured case description, and a description of court events using an event—action—qualifier syntax which allows substantial flexibility. The event construct is central to the expressive power of these transactions, and it resembles the natural language capabilities of subject-verb-object in its flexibility. This case and event data, used in the court submission transaction, can help automate docketing for electronic submissions.

Benefits of EDI Claims. Adding EDI to this imaging system may substantially improve its cost effectiveness. We expect to obtain the traditional EDI benefits of elimination of most data entry associated with a claim, rapid multiuser access, and paper storage space savings related to electronic files. EDI will also support the capability for creditors to include supplementary documents in either image or text form, instead of the mandatory scanning of supplementary documents in image form. The single largest cost of imaging systems is the cost of storing the large image filed either on-line, or "near-line" in a database. If documents are submitted in text form, as they could be using EDI, they require less than 5% of the comparable storage for the same document in image form, a reduction in storage requirements by a factor of twenty. Text documents are also available for text search so their contents are more useful to the court and its users. While there are some unique documents which require an image to serve as evidence, many supplementary documents now being submitted with bankruptcy claims might be equally well treated as text. We expect to reduce on-line storage requirements significantly through electronic submission of text supplementary documents.

Benefits of EDI Notices. The most significant short-term benefit for bankruptcy courts from EDI will be a substantial savings in the cost of producing and delivering notices. A preliminary cost benefit analysis indicates that replacing printed notices with electronic notices using EDI will save the federal courts about $4 million a year if only 25% of the nationwide notice volume can be sent electronically. This appears to be a reasonable estimate of what might be achieved in a

nationwide implementation phased in over several years. Initial noticing experiments will add two additional courts (N.D. Ill. and S.D. Iowa) to the courts already participating in the claims processing project listed above. Planning for national implementation of electronic bankruptcy noticing has already begun based on the favorable cost benefit analysis.

Standards for Party Names. Standardization of creditor names is a significant problem which must be solved in order to achieve *accurate* electronic noticing. There is very little standardization of naming for creditors now. This problem is often described as a "quality control" issue related to data entry, but it really has its roots in the forms filed by the debtor. The same creditor may be listed in many slightly different ways by different debtors. For example, New York, New York City, The City of New York, or City of New York. In one court we found more than a dozen different ways of representing Sears.

All these different names really refer to one creditor, and the notices need to end up in one electronic mailbox. It is possible to develop pattern-matching software which would help map these different names to the same electronic address. We are pursuing this as a partial solution. However, this approach has some shortcomings. A more attractive approach is to develop standard lists describing the most common creditors (in a district). Commercial bankruptcy forms software could be made capable of reading the standard creditor list, or they could be distributed in paper form as a checklist. This would allow bankruptcy attorneys to check off which of the common creditors will be listed in a filing (probably including account numbers and amounts owed). This would make their forms preparation faster and more accurate, and the use of standard creditor names would facilitate electronic noticing. This will be a first step towards EDI with debtors' attorneys.

Bankruptcy Case Opening. The court submission transaction has been enhanced to carry the data needed for voluntary and involuntary bankruptcy petitions and the list of creditors (matrix). Several courts have expressed an interest in having this EDI transaction implemented by vendors of debtor attorney software, and the software vendors have responded favorably. These courts are developing software to enter data in this standardized format into court databases.

The court submission transaction is being further enhanced to support the bankruptcy schedules, which are also commonly filled out using commercial bankruptcy forms software. . . . Trustees, like the court, can use the data in EDI format to open cases automatically. Furthermore, the EDI transactions can be placed on electronic public access computers in the courts to facilitate public access to this frequently requested data. Having the data in EDI format will also benefit those public users who want to create bankruptcy databases.

Future Use of EDI. The court EDI transactions developed are capable of supporting requirements for additional court types. Some state courts are considering use of the court notice for arrest warrants (which include a detailed physical

description of a suspect), for reporting case dispositions and sentencing, which could provide input for criminal history repositories (like those required by the Brady handgun control bill), and for reporting orders and judgments . . . . There has also been interest expressed in using EDI for criminal incident reporting, for traffic citations, and for helping to maintain national databases of driver records. Future bankruptcy experiments may use EDI for more extensive data exchanges with both debtor and creditor attorneys for submission of the initial bankruptcy petition and schedules of assets and liabilities, as well as for the submission of pleadings and the delivery of low volume notices.

We intend to encourage participation by developers of commercial bankruptcy software in these future experiments, both for standardizing creditor naming and for experimentation with EDI to support petitions, schedules, pleadings, and comprehensive court noticing. Trustees may also benefit from using existing EDI transactions to facilitate financial management, and several trustees have expressed an interest in the design of EDI for bankruptcy plans and periodic business operating statements.

C. *Electronic Filing of Pleadings—Electronic Filing Overview.* The federal courts have been experimenting with electronic filing in two courts for more than five years. The scope of these experiments has been somewhat limited, but there are several important conclusions which can be drawn based on our experience. One fundamental lesson is that ASCII text alone is insufficient as a vehicle for electronic filing. Both lawyers and judges find that enhancements in fonts (like bold and italics), and in style (like footnotes at the bottom of a page), add value and information to presentations.

One of the major shortcomings of an ASCII-only approach is the inability to include graphics or images used as exhibits, a requirement for many court submissions. Another important limitation of the approach we have taken so far is that the court receives some filings in electronic form and some in paper form. Keeping a mixed format case file is difficult, and the result has been that the court has printed a copy of electronically filed documents for its paper case file. This has the disadvantage of turning the court into a printer for the law firm, and fails to realize some of the advantages of electronic files. However, the electronic files are available for text search to both court staff and those attorneys who participate in the electronic filing program, and much of the docket information associated with these electronic filings could potentially be entered automatically.

Signature Requirements. Signature requirements have not proven to be an obstacle for existing experiments. The two courts have chosen slightly different methods to meet signature requirements, but both methods have two things in common: (1) there is an advance authorization with a physical signature at the court, and (2) there is a login and password required to submit documents. The General Counsel's Office of the Administrative Office of the U.S. Courts wrote

an opinion for one of the courts suggesting that there is no general legal impediment to the use of a facsimile signature in lieu of a manual signature, in the context of an advance agreement defining the terms of electronic filing.

The EDI court submission transaction allows a personal identification number to be embedded in the submission and would commonly be used in conjunction with a signed trading partner agreement, a login, and a password. More powerful security techniques, like the federal digital signature standard, which guarantee document integrity as well as the identity of the filer are available if required.

Document Format. One of the key issues for electronic filing of documents with courts is document format. EDI as a standard does not address issues of document format. The court submission transaction can carry documents in *any* format, including compressed proprietary formats. However, there are problems with choosing a proprietary word processor format as a judiciary standard. There are three reasons a proprietary product is a bad choice: (1) restraint of trade and fairness issues, (2) conversion problems, and (3) document retention requirements.

Proprietary Products. If the federal courts were to decide, for example, that WordPerfect was the standard for electronic submission to the court, we might face lawsuits from Microsoft, which makes Word, as well as many other vendors of word processing software. Choosing a standard for public access is not the same as a decision by a court to buy a particular product for its own internal use. The choice of a proprietary product as a standard for public access dictates that lawyers and other court users must buy a particular product to do business with the court; this could be ruled a restraint of trade. Document format issues can only be resolved by choosing an appropriate, widely available standard.

Conversion. There has been some suggestion that courts can get around the issue of standards by using software which converts between different proprietary formats. While this appears possible in principle, it fails in practice. The fundamental reason why this approach does not work is that there is not much incentive for vendors to facilitate these conversions. They market their products based on features, and if they offer different features than some other product, those features may not convert. Different ways of implementing the same feature lead to many common conversion problems, like footnotes becoming embedded in the body of a document when it gets converted. There are other more subtle conversion problems which still lead to a very different appearance between the original and converted document, and in some instances to different content as well as appearance. Preserving the appearance of the document is important, since it is common practice to reference page and line numbers in discussions of documents. Many judges and attorneys have indicated they want documents to look identical when printed in the law office and the judge's chambers.

Document Retention. Court documents often have very long retention periods. Federal courts are required to retain many case file documents permanently.

Proprietary software products undergo very rapid change which does not lend itself to long-term retention. It would be difficult to read a WordPerfect 3.1 document from only a few years ago. While WordPerfect is popular now, seven or eight years ago a court might easily have chosen Wang as the popular proprietary standard.

These kinds of problems have led the National Archives to severely limit what kind of information they will accept. They currently will not accept any binary data, which would exclude electronic documents in a proprietary format and compressed image files. They will accept nine-track tapes with ASCII data, and silver-based microfiche and microfilm with reduced pictures which can be viewed with magnification. These limits have been the subject of active discussion for several years, but they are an important constraint at present. So what are the choices for document format standards which might meet these constraints? There appear to be two main contenders at present: Standardized Generalized Markup Language (SGML) and Portable Document Format (PDF).

SGML. SGML was designed for a publishing environment to preserve document structure in a one-to-many relationship where the publisher controls tag standards for a group of documents. Its application to legal documents requires users to insert tags into their documents to mark content items and depends on a proprietary software product to mark some style features in a document. Many proprietary products cannot automatically tag style features (e.g., bold and italics) and font changes which are unrelated to document structures (e.g., chapter titles). SGML tagging currently requires substantial manual intervention. It is important to note that SGML tags are not standardized.

Different proprietary markup products convert the same document into different SGML output. This returns a court to the problems of choosing a particular proprietary product as a standard for access. The vendors of these products recently formed a standards group to address some of these issues. Whenever they complete their standards work, and the new standards get implemented, the ability to uniformly mark document style and structure may be within reach. SGML also lacks standards for document type definitions and output specifications. The concern here is that different courts will choose different definitions and make it more difficult for attorneys who practice in more than one jurisdiction.

SGML does not preserve page integrity. SGML will not preserve line breaks, and preserving page breaks currently requires manual intervention. So SGML documents can, upon printing or display, appear different from the proprietary version of the original with respect to page and line numbers. This fails to meet important requirements identified by judges and attorneys that documents look identical when printed in a law office and in chambers. Using SGML tags to define data fields is an area where SGML is a poor match as a standard. SGML was never designed to carry data, and it lacks many critical features needed to

properly support structured data. It has very limited ability to validate data values, and it is not capable of enforcing syntactic and semantic constraints at the level of individual values (i.e., this value's use is required, optional, or conditional) and between related values (paired or value-related usage constraints).

A major concern here is that since most tagging is manual, submissions with incorrect data may be a common occurrence, unless systems level software like that available in an EDI translator is provided for lawyers. The ability to enforce syntactic and semantic constraints is built into commercial EDI software and is used by the EDI court transactions. EDI was designed to carry data, has a well-developed and mature standards development process, decades of commercial experience, off-the-shelf software, and well-defined national standards for the relevant data fields and their formats. The concept of an "intelligent document" depends on extracting data from documents to make them more useful. Carrying this data is where EDI is the most powerful as an adjunct to text documents, regardless of whether the text is in SGML or some other format.

The combination of manual tagging and lack of support for detailed error-checking turns out to be very expensive in practice. The Defense Printing Agency compared SGML and PDF in a study for the U.S. Congress. They converted millions of documents and found that conversion to SGML was four times as expensive as converting the same document to PDF. This difference was attributed primarily to the time needed for manual tagging and quality control. As a result, SGML is expected to play a much smaller role in many documentation efforts (like CALS) than was earlier anticipated, and PDF will play a more important role.

Postscript/PDF. The federal courts expect to pursue future experiments in electronic filing with either Postscript or its next general version, called Portable Document Format (PDF). Unlike SGML, Postscript accurately preserves page layout integrity, so that documents will appear identical wherever they are printed. Postscript has been adopted as a federal standard page description language by the National Institute for Standards and Technology (NIST). The Postscript standard was published in book form and has been implemented as a commercial or public domain product from at least six different sources. Furthermore, the popularity of Postscript printers means that every modern word processing package can produce Postscript output.

The PDF standard (available now as Acrobat, a commercial product from Adobe Systems, Inc., and supported by several other vendors) is currently under consideration by NIST for acceptance as a Federal Information Processing Standard (FIPS). The technical description of the standard has been published in book form. It is based on Postscript and supports many new capabilities which will be needed to create multimedia documents, including built-in support for several common bitmapped image standards. It also solves some of Postscript's font dependence problems and provides a much more compact file representa-

tion—but font substitution issues may require some attention. Adobe has developed a printer driver which installs under Microsoft Windows (or Macintosh) and creates a PDF file from any application output directed to the printer.

There is not dependence on the application software used to produce the original document, whether it is a unique word processing product, a spreadsheet, or a graphics package. Both Adobe and other vendors have produced text search and conversion products for PDF documents. PDF certainly has competitors in the document interchange market, but none of the competing products have (1) the wide availability of Postscript, (2) a published format, or (3) status as a national standard. A blue-ribbon panel of government users advising NIST on a portable document delivery format recent[ly] recommend[ed] that NIST adopt the PDF standard as a FIPS. NIST expects to issue a draft FIPS in the next few months. If the National Archives agrees to accept archival data in PDF format as a result of the FIPS process, this will remove a major obstacle to the long-term retention of electronic records which include graphics and image data.

D. *Potential Information Sharing Partners.* The Internal Revenue Service (IRS) is listed as a creditor in more than half of all bankruptcies filed. They currently use EDI for electronic exchange of tax information and have discussed electronic data exchange on an informal basis with several bankruptcy courts. The IRS has also expressed interest in combining electronic noticing with EDI for claims submission. Receiving timely notice is important for the IRS (and other creditors) because when a debtor files for bankruptcy, all enforcement actions by creditors must be suspended.

The IRS cannot seize the assets of a debtor in bankruptcy. However, when listing the IRS as a creditor, most debtors incorrectly list the address where they file tax returns, rather than the address where IRS collections are managed. The normal process of mailing a paper notice, routing it to the proper location, entering the data into a computer system, and acting on its content, can be quite time-consuming. The IRS found that the time-critical nature of notices created a much stronger motivation for it to participate in an EDI experiment with bankruptcy courts than the benefits to the IRS of EDI for handling claims alone. This kind of incentive for creditors emphasizes the importance of combining EDI high-volume notices to creditors with EDI submission of claims in the same experiment. It is also typical for EDI information exchanges to flow in both directions, providing mutual benefits to both information sharing partners.

The courts can expect significant cost savings from electronic noticing, even if only a modest number of creditors sign agreements with courts requesting their notices electronically. The eight largest creditors account for 30% of all notices in the Eastern District of Missouri. There is a similar concentration of volume for claims. The top five creditors account for more than 10% of claims in the Western District of Texas. We expect most of the initial EDI partners will be large organizations which are already using EDI. Large financial institutions like Citi-

bank, federal and state taxing authorities, and large retailers like Sears and Federated Department Stores are examples of the kinds of organizations which we expect might be among the first to participate. These kinds of organizations routinely use EDI for many business transactions like purchase orders, invoices, and requests for quotes.

We have already reviewed the court EDI transactions with some of them and will continue to seek their input on how we can improve the transactions and encourage participation. Educational conferences will be held at the courts participating in the electronic bankruptcy noticing experiment to provide additional information on the process and [to] facilitate participation by major creditors. We plan to contact vendors of commercial bankruptcy software to encourage their participation in future efforts to exchange data electronically with debtor and creditor attorneys. The first step in this process is for the courts and creditors to develop a table of standard names and addresses for the major creditors in each district.

This table can be distributed by floppy disk, via PACER, or by other electronic means, to participating law offices. The debtor attorneys' software should be enhanced to read this table, and let law office staff pick from the list of creditors named in the case they are preparing. This approach makes form preparation faster for the law office since they do not need to enter name and address data for all the most common creditors. They need only enter account numbers and amounts owed to complete the schedule. Future efforts in this area will seek to provide EDI support for the bankruptcy petition and schedules, and for case opening documents for other kinds of federal courts. The long-term goal is to facilitate other kinds of filings like pleadings, perhaps through bidirectional information exchange between courts and lawyers.

E. *The Judicial Rules Process—Background.* Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure are first drafted by committees of the Judicial Conference [of the United States]. After the Judicial Conference approves a proposed rule, it must also be approved by the Supreme Court and Congress. This process typically takes several years. This long lead time for rules changes causes us to seek authority within existing and already proposed rules to whatever extent possible, rather than depend on rules changes for the success of small-scale experiments with new technologies. The Advisory Committee on Bankruptcy Rules has been particularly forward-looking in exploring rules changes to facilitate technological change in the courts.

Rule 9036. Current bankruptcy rules require the clerk to give notice to creditors, or the court may delegate that duty. Authority for electronic bankruptcy noticing comes from the Federal Rule of Bankruptcy Procedure 9036. This rule permits electronic notices instead of paper notices, and requires that the sender of electronic notices must receive confirmation of delivery. Acknowledgments of transactions are a part of the EDI protocol and may also be generated by

value-added networks acting as an agent of the recipient. Rule 9036 took effect in August 1993.

Form Standards. The Judicial Conference has approved some existing standard bankruptcy forms, while some others are approved by the Director of the Administrative Office of the U.S. Courts. The EDI transactions which replace these forms might be considered a new version of the paper forms they replace, even though the information content is the same. If so, then these transactions may require Judicial Conference approval. The Advisory Committee on Bankruptcy Rules has not been inclined to request this approval to date.

Rule 11. Existing federal rules regarding electronic filing are primarily aimed at preventing abuse of filing via facsimile transmission. Two courts currently experimenting with electronic filing of case documents (E.D. Pa. and W.D. Tex.) have adopted local rules intended to satisfy the signature requirements of Federal Rules of Civil Procedure 11. We expect similar local rules will be established to satisfy signature requirements for the prototype EDI demonstration courts. The Judicial Conference committees for bankruptcy, civil, and appellate rules have recently proposed a draft rule which addresses signature requirements in a manner that facilitates electronic filings. These proposals have been issued for public comment, and would become effective no earlier than December 1996. As currently drafted, they rely upon local rules to define procedures until the Judicial Conference establishes national procedures and technical standards for electronic filings. The importance of electronic case files suggests that the policy issues of electronic signature and electronic filing are likely to be addressed by the Judicial Conference.

F. *A Vision of the Future for Electronic Case Files.* A long-term goal for the federal courts is to transition to a "paperless" (or "less paper") court of the future, based on electronic case files. While there is much the courts can do themselves to achieve these goals, the maximum benefits are achieved only with the full participation of attorneys and creditors who submit their forms and documents electronically. This is not a one-sided picture, though, since the courts can give attorneys information electronically which can make their jobs easier. The attorneys can only make the best use of this court-supplied data if they have commercial software which facilitates their business process.

This partnership of courts, creditors, attorneys, and software vendors needs well-defined standards to make substantive progress toward achieving mutual benefits. The most important potential benefits to the courts that will arise from using electronic case files will be: (1) space savings, (2) reduced paper handling, (3) reduced data entry, (4) enhanced information access, and (5) enhanced information security.

Space Savings. The amount of space required to store documents can be substantially reduced by using electronic case files. One million pages of documents takes about 500 linear feet of shelf storage, or about 50 four-drawer file cabinets.

Those million pages can be stored as images in about 50 gigabytes, or a space of about a half a file drawer with magnetic disk technology (using six commercially available nine gigabyte hard drives), and the commonly used CCITT Group 4 image compression. This means courts need only 1% of their current file storage space if they image all their documents. If they had documents submitted in text form instead, there is a further reduction in the electronic storage required by another factor of twenty, for a total space savings of more than three orders of magnitude. And text documents can be accessed by content using text search tools, which makes them even more useful than paper documents are today.

Some combination of text and images will be required to support the need for pictures and diagrams as evidence and attachments to submissions.

Staff Time Savings. Paper handling accounts for more than half the staff time spent processing a bankruptcy claim, far more than data-entry time. This includes opening mail, removing staples, sorting documents by case number, punching holes, fetching paper case files, inserting documents in the case file, and returning the files to the shelf. Add the time spent serving front counter and chambers case file requests which require retrieving and returning case files from shelf storage. The most costly staff effort occurs when a document or case file is misfiled or misplaced, sometimes requiring many hours of search. The considerable staff overhead in handling paper documents can be reduced or eliminated with electronically submitted documents.

Reduced Data Entry. Electronically submitted documents can be self-docketing, requiring only a quality assurance step to ensure the accuracy of submitted information. EDI can carry the case number, case type, court type, and court identification. It can also carry a court event description which can include the kind of motion being filed or hearing requested. EDI can also carry the names and roles of parties in the case including the relationships between multiple attorneys and clients. It can carry references to related cases both in the same court and in different courts. Monetary claims can be described in detail (and transferred to a spreadsheet easily).

Enhanced Access. Electronic files provide simultaneous access to many users, as opposed to whoever gets the paper case file first. Problems of missing files or documents can be substantially reduced, although probably not eliminated. Text search tools can allow access by content, so it becomes easy to revisit that one memorable phrase in a hundred-page document. Imagine a "citation macro" in WordPerfect which copies citation data to a file for translation to EDI format to accompany the document. EDI identifies this data as a citation to an opinion or a statute, and can use this data to drive a computer-aided legal research system. The reader of a document could "click" on a citation and have the statute or case appear beside the original text. New tools can be developed and used to enhance the value of "intelligent" electronic documents. Automated legal research tools

and financial analysis using spreadsheets extend these capabilities to new areas, but they require the availability of structured data.

Enhanced Security. Security for electronic documents can be substantially better than the current paper system. Several active authentication methods are available to ensure the identification of the submitter, including login and password, and digital document signature which mate the identity of a document and its content with its submitter using encryption techniques. The document database can also track all data accesses and modifications. The claims system described above keeps old versions of records and tracks who changed what when. It can roll back changes to show what the data looked like before it was changed. Audit trail and rollback capabilities, combined with appropriate controls for data access and physical access to equipment, can provide a higher level of security than current paper case files.

Interactive Partnership. Courts can offer benefits to attorneys. The court can send electronic notices to parties and their attorneys with EDI data about case events. [Electronic notices] can interact with law office case-management software to build a law office docket sheet. The dates and times of hearings and appearances can drive a calendar system to create appointment schedules and perhaps initiate electronic messages between the parties and the court to work around schedule conflicts without human intervention. The case-management data generated by the court can be used in the law office to facilitate the creation of new documents, which will be submitted in the case, automatically preparing both the EDI data and text coversheets.

Integrated document management could automate even more of the document preparation task for those documents which are routine responses to an event. Electronic service is possible since the parties can include their e-mail addresses, and deliver documents to other parties electronically. The court might decide to serve as a public repository and notify parties electronically when documents are filed. The same citation support which drives the court's legal research system can drive the law office legal research system from other parties' documents. Add a legal expert system driven by structured case-event data and lawyers could get suggestions for possible strategy and tactics. Vendors have more opportunity to add value in a larger standards-driven market than they have now in the fragmented market of custom systems.

The future offers many possible benefits from new ways of pursuing the business of the courts. Information processing standards are key building blocks for these systems of the future in all three major information categories: structured data; unstructured text; and the wide variety of graphics and images available. To realize these possibilities, vendors, attorneys, creditors, and courts must work together to build powerful products based on enabling information processing standards.

Appendix 23—Fire Brigade Action Summary

Summary of Fire Brigade Action, May 23–25, 1993

On Wednesday, May 23, I received a phone call from Clark County Superior Court Judge Robert L. Harris. He indicated to me that he was requesting the assistance of the fire brigade regarding an issue that had arisen over newspaper coverage of (Westley) Alan Dodd, an individual who is charged in Clark County with first-degree aggravated murder. This is a death penalty case and it is alleged that Dodd killed three young children in Clark County after sexually abusing them. The case is apparently attracting a great deal of media attention in Clark County and throughout the state as well as the state of Oregon.

Harris indicated that Cynthia Tank, a reporter with the *Vancouver Columbian,* recently visited with Dodd in the Clark County jail. This visit occurred without the knowledge of the prosecuting attorney or Dodd's defense counsel. Tank did not discuss the murder charges or the impending trial with Dodd, but rather, discussed Dodd's efforts to develop a brochure which he is designing for children so that they might know how to avoid sexual predators. Harris was concerned that this story, which he believes would incriminate Dodd, would be of great public interest, thus making it more difficult to obtain juries in Clark County for Dodd's trials.

Because charges have been severed, Dodd has two trial dates. The first is in June and the second is in September. Harris had earlier denied a defense motion for a change of venue. He has, however, written a letter to all prospective jurors advising them not to read or listen to anything about *State v. Dodd*. Harris told me that he had scheduled a meeting with Tom Koenninger, the editor of the *Columbian*, in an effort to get the paper to hold off on the story until Dodd's trial, or at least until juries are selected.

I advised Harris that our committee could only act in an advisory capacity, but we would be happy to render an opinion about the propriety of the paper's action if requested. I suggested that he discuss the possibility of our committee's involvement with Koenninger. Koenninger called me the next day. He initially expressed reluctance about our committee being involved, but said he would get back to me. He called later and said he would welcome an opinion, but he did request prompt action because he had a printing deadline of noon on Friday for the Sunday edition. He told me the article was scheduled to run on pages 1 and 3 of the Sunday edition and it contained a picture of Dodd.

The content of the article was as described by Harris and it was, in Koenninger's opinion, a big story. He believed that it would not create any more difficulty in picking a jury in Clark County because there had already been a great deal of publicity about the case. He expressed his concern that if the paper

held up on the story until June or September, it would likely lose this "exclusive" story to another newspaper or other news agency. As far as I was able to determine, there was no effort afoot by the state or defense to seek a court order inhibiting the publishing of the *Columbian*'s story. I immediately set about arranging for a telephone conference of our committee. Luckily, I was able to contact all members of the committee, including Ted Natt, who was attending a meeting in California. Norm Maleng was not able to get in on the conference call but he did express his views on the matter to me after I briefly explained the situation to him.

At the conference, I explained the facts to all of you as I knew them—generally as outlined above. I tried, also, to fairly describe the opposing views of the judge and the newspaper. I also summarized Norm Maleng's view on the matter. After extensive discussion, the committee agreed unanimously that the paper had an absolute right to print the story and I was instructed to so advise the judge and editor. The committee agreed, however, that the paper should be advised by me to examine its conscience about several things before it published the story. First, it should realize that the publishing of the story could very well make it difficult, if not impossible, to find a fair and impartial jury in Clark County for Dodd's cases. Second, it should consider that the article may disclose information about Dodd that is not admissible at trial, thus affecting the ability to find a jury and increasing the chance that any jury which is selected might be tainted. Third, the paper should recognize that there is a possibility that Dodd is using the newspaper in an effort to develop a defense for the penalty phase of the case.

After the conference, I called Judge Harris and Tom Koenninger and advised them of the committee's action and the concerns summarized above. I do not know if the article ran in the *Columbian*, although I suspect it did.

Appendix 24—Washington State Bench-Bar-Press Committee Statement of Principles and Considerations for the Judiciary

Preamble

The Bench, Bar, and Press (comprising all media of mass communication) of Washington:

(a) Recognize that reporting by the news media of governmental action, including the administration of justice, is vital to our form of government and protected by the Constitutions of the United States and the State of Washington.

(b) Seek to preserve the constitutionally protected presumption of innocence for those accused of a crime until there has been a finding of guilt in the appropriate court of justice.

(c) Believe both constitutional rights and the need of the public to be informed can be accommodated without conflict by careful judicial craftsmanship and careful exercise of discretion by the bench, the bar, and the news media.

Principles

To promote a better working relationship between the bench, bar, and news media of Washington, particularly in their efforts to protect both the constitutional guarantees of freedom of the press and of the right to a fair and impartial trial, the following statement of principles is suggested for voluntary consideration to all members of these professions in Washington. Any attempt to impose these Principles and Considerations as mandatory is contrary to the intent of the Bench-Bar-Press Committee and contrary to the stated goals of these Principles and Considerations.

1. Accurate and responsible reporting of the news media about crime, law enforcement, and the criminal justice system enhances the administration of jus tice. Members of the bench and bar should make available information concerning that process to the fullest extent possible under their codes of conduct and professional responsibility.

2. Parties to litigation have the right to have their cases tried by an impartial tribunal. Defendants in criminal cases are guaranteed this right by the Constitutions of the United States and the State of Washington.

3. Lawyers and journalists should fulfill their functions in such a manner that cases are tried on the merits, free from undue influence by the pressures of news media reports. To that end, the timing and nature of news reports should be carefully considered. It is recognized that the existence of news coverage cannot be equated with prejudice to a fair trial.

4. The news media recognize the responsibility of the judge to preserve courtroom decorum and to seek to ensure both the open administration of justice and a fair trial through careful management.

5. A free press requires that journalists decide the content of news. Journalists in the exercise of their discretion should remember that readers, listeners, and viewers are potential jurors.

6. The public is entitled to know how justice is being administered. However, lawyers should be aware that the timing and nature of publicity they create may affect the right to a fair trial. The public prosecutor should avoid taking unfair advantage of his position as an important source of news, even though he should release information about the administration of justice at the earliest appropriate times.

7. Proper judicial, journalistic, and legal training should include instruction in the meaning of constitutional rights to a fair trial, open justice, and freedom of the press, and the role of judge, journalist, and lawyer in guarding these rights. The bench, the bar, and the press will endeavor to provide for continuing education to members of each respective profession concerning these rights. Open and timely communications can help avoid confrontations. Toward that end all parties are urged to employ the Bench-Bar-Press Committee Liaison Subcommittee [the "Fire Brigade"] when conflicts or potential conflicts arise.

Considerations in the Reporting of Criminal Proceedings

The Bench-Bar-Press Committee offers the following recommendations for voluntary consideration of all parties. They may be of assistance in educating law enforcement, the press, bar, and bench concerning the exercise of rights, duties, and obligations outlined in the Statement of Principles.

The bench, bar, press, and law enforcement officials share in the responsibility for the administration of an open and fair system of justice. Each has a special role which the other should respect, and none should try to regulate the judg ment of the others.

Public interest in the administration of justice may be particularly great at times prior to trial. Pretrial proceedings often are as important to the open administration of justice as the actual trial. The bench should help ensure both openness and fairness through commonly accepted judicial procedures consis tent with these principles. The bar should carefully consider the timing and nature of the publicity it creates. The media should contribute to openness and fairness by careful evaluation of information that may be kept from the jury at trial and by exercise of restraint in reporting that information.

All parties should be aware that the jury system has the capacity to provide an unprejudiced panel even in cases of great public interest and substantial media coverage.

1. It is appropriate to make public the following information concerning the defendant:

(a) The defendant's name, age, residence, employment, marital status, and similar background information. There should be no restraint on biographical facts other than accuracy, good taste, and judgment.

(b) The substance or text of the charge, such as complaint, indictment, information, and, where appropriate, the identity of the complaining party.

(c) The identity of the investigating and arresting agency and the length of the investigation.

(d) The circumstances immediately surrounding an arrest, including the time and place of arrest, resistance, pursuit, possession and use of weapons, and a description of items seized at the time of the arrest.

2. The release of certain types of information by law enforcement personnel, the bench, and the bar and the publication thereof by news media generally tends to create dangers of prejudice without serving a significant law enforcement or public interest function. Therefore, all concerned should be aware of the dangers of prejudice in making pretrial public disclosures of the following:

(a) Opinions about a defendant's character, his guilt or innocence.

(b) Admissions, confessions, or the contents of a statement or alibis attributable to a defendant.

(c) References to the results of investigative procedures, such as fingerprints, polygraph examinations, ballistic tests, or laboratory tests.

(d) Statement concerning the credibility or anticipated testimony of prospective witnesses.

(e) Opinions concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial.

Exceptions may be in order if information to the public is essential to the apprehension of a suspect or where other public interests will be served.

3. Prior criminal convictions are matters of public record and are available to the news media through police agencies or court clerks; law enforcement agencies should, if requested, make such information available to the news media. The public disclosure of this information by the news media may be highly prejudicial without any significant addition to the public's need to be informed. The publication of such information should be carefully considered.

4. Law enforcement and court personnel should not prevent the photographing of defendants when they are in public places outside the courtroom. They should not encourage pictures or televising nor should they pose the defendant.

The media should recognize that a judge is subject to the Code of Judicial Conduct's Canon 3(7), which provides:

> A judge may permit broadcasting, televising, recording and taking photographs in the courtroom during sessions of the court, including

> recesses between sessions, under the following conditions: (a) Permission shall have first been expressly granted by the judge and under such conditions as the judge may prescribe; (b) The media personnel will not distract participants or impair the dignity of the proceedings; and (c) No witness, juror or party who expresses any prior objection to the judge shall be photographed nor shall the testimony of such a witness, juror or party be broadcast or telecast. Notwithstanding such objection, the judge may allow the broadcasting, televising, recording or photographing of other portions of the proceedings.

Artists' renditions sketched in the courtroom are not governed by this canon and should not be curtailed unless such actions unduly distract participants or impair the dignity of the proceedings.

5. Photographs of a suspect may be released by law enforcement personnel provided a valid law enforcement function is served thereby. It is proper to disclose such information as may be necessary to enlist public assistance in apprehending fugitives from justice.

6. The media are free to report what occurs in the course of judicial proceedings. All participants in the administration of justice should work to keep the entire course of judicial proceedings, including pretrial hearings, open to public scrutiny. The bench should consider using all means available to ensure protection of a defendant's constitutional rights without interfering with the criminal justice system. The closure of a judicial proceeding should be used only as a last resort.

7. The bar and law enforcement officials should expect that their statements about a case will be reported in the media. Such statements should be made in a time and manner contributing to public understanding of law enforcement and the criminal justice system, rather than influencing the outcome of a criminal trial.

Appendix 25—West Virginia State Bar Association Resolution Relative to the Defense of the Judiciary

RESOLVED, that it is the judgment of the Board of Governors that it is the duty of the legal profession to

1. Defend judges and courts from improper attack;

2. Take steps to help ensure that confidence in the orderly processes of our courts is maintained among the citizens of this state and the nation;

3. Explain the difference between valid, constructive criticism of the decisions of our courts and baseless charges;

4. Assist the public in understanding the difficult burden of the courts to strike the proper balance in criminal cases between the constitutional rights of the accused and the rights of society which must be protected from violence;

5. Assist the public in understanding the operation of courts and judicial procedures and the manner of accomplishing improvements in the administration of justice;

6. Bring to the attention of duly constituted authorities, and, if necessary, to the public, fair and well-founded criticisms of the manner in which the system of administering justice is operated.

AND IT IS FURTHER RESOLVED, in order to implement the foregoing, that the Board adopts the following guidelines and procedures for responding to unwarranted criticism of the judiciary (within the area served by The West Virginia State Bar):

1. Nature of cases:

A. A response by the State Bar is appropriate:

(1) When criticism is directed against a judge but is actually an attack upon another element of the system of justice, e.g., grand jury, law enforcement, penal institutions, etc.

(2) When a response provides the opportunity to educate the public about an important aspect of the administration of justice, e.g., factors in sentencing, bail, fundamental rights, nature of evidence, etc.

(3) When the critic is so obviously uninformed about the judicial system that a correction can be made on a factual basis.

B. A response by The West Virginia State Bar is not appropriate:

(1) When the dispute is between the critic and the judge and is largely local.

(2) When the judge may adequately defend himself.

(3) Where there is likelihood that a complaint against the judge will or could be presented before the Judicial Inquiry Commission.

(4) When a time-consuming investigation would be necessary to determine the facts.

(5) When the issue is one about which reasonable people may disagree.

2. Nature of Response

A. The response should be concise and accurate, without the emotional or subjective terms.

B. The response should be informative, in layman's terms, not condescending and, if possible, phrased with a view toward inclusion in a newspaper or television news story.

C. The response should include a correction of the inaccuracies, citing authorities (state law, etc.) where appropriate.

D. When appropriate, the response should point out that the judge had no discretion or control (e.g., was bound by legislative or executive authority).

E. When appropriate, the response should include an explanation of the process involved, e.g., sentencing, temporary restraining order, etc.

F. The response should not include ad hominem attacks on the critics, such as by attacking the competence, good faith, motives or associates of the critic.

G. The response should not overact nor should it defend the indefensible.

H. When appropriate, the response should be consistent with responses by The West Virginia State Bar and other bodies of the organized Bar to prior similar instances of unfair criticism.

I. The response should be prompt, preferably within 24–48 hours of the criticism. Deadlines of the appropriate news media should be considered. However, the need for promptness must not justify a response containing, or based upon, inaccurate facts.

3. Procedures

A. A Committee on Defense of the Judiciary is hereby established, which Committee shall be comprised of the President, First Vice-President, Second Vice-President, Chairperson of the Board of Governors, and Chairperson of the Committee on Judicial Improvement.

B. A member of the Bar should, in the event any unwarranted criticism of the judiciary comes to his attention which appears to warrant a response, direct a request for review and possible response to any member of the Judiciary Criticism Committee.

C. The judge or court criticized may request the intervention of the State Bar orally or in writing by contacting any member of the Committee on Defense of the Judiciary.

D. The recipient of such request shall promptly notify the other members of the Judiciary Criticism Committee, and the Judiciary Criticism Committee shall formulate a plan for responding to the alleged unfair criticism.

E. In formulating a plan, the following alternatives shall be considered:

(1) A response is not advisable.

(2) Advise the judge to respond on his own.

(3) Cause a response on behalf of the State Bar to be prepared.

(4) Request others to respond, either alone or in conjunction with the West Virginia State Bar.

F. The response shall be promptly released by the staff on behalf of the State Bar in an appropriate number. This may include a release to the specific news media involved, a general news release, news conference, etc.

Appendix 26—Sample State–Federal Judicial Council Charter

Charter of the State–Federal Judicial Council of _____ (name of state)

1. Name

The council shall be known as the State–Federal Judicial Council of _____ _____ (name of state)

2. Purpose

The purpose of the council is to seek improvement in the administration of justice in the state and federal courts of the state through cooperative efforts; to promote and encourage judicial relationships between the two court systems; to share materials and information that may have application or impact on the two systems; to develop methods to improve the operation of the two systems, including methods to use scarce judicial assets to benefit the two systems; to eliminate any conflicts or misunderstandings that have or could develop among the judges of the two systems; and to suggest legislation to the state legislature and the Congress of the United States and court rules that the council believe will improve the administration of justice.

3. Composition

The council shall consist of at least ____ representatives from the state judiciary and ____ representatives of the federal judiciary.

State Representation. Representatives of the state judiciary shall consist of justices of the supreme court, one of whom shall be the chief justice, judges of the court of appeals, and (circuit, superior court) judges.

Federal Representation. Representatives of the federal judiciary shall consist of all U.S. circuit court of appeals judges who are residents of the state and U.S. district judges, U.S. bankruptcy judges, and _____ U.S. magistrate judges.

Appointments. The state court representatives shall be appointed by the chief justice of the state. The federal court representatives shall be appointed by the (chief judge of the circuit court of appeals) (chief judge(s) of the district court(s)) in the state.

Administrative Members. The chief administrator of the _____ (name of state) court system and the (circuit executive) (chief clerk(s)) of the federal district court(s)) in the state shall serve as *ex officio* nonvoting members of the council who shall supply administrative support for the council.

A judge who is a member of the council by virtue of his or her office shall remain a member of the council while he or she holds that office. A judge who is a member of the council by virtue of his or her designation by another judge shall remain a member of the council for the period of his or her designation or until the designating judge shall designate a successor.

4. Meetings

Regular semi-annual meetings of the council shall be held in the spring and fall of each year, at a place within the state at a time designated by the chair or executive committee. The chair, with the concurrence of the executive committee, may call special meetings of the council to consider only matters specified in a written notice of the meeting mailed to the members at least ten days before the meeting.

5. Officers

(a) Chair. The chief justice of the state shall preside at the initial meeting of the council. At the first meeting of the council the members shall elect a chair, who shall serve a term of two years. The chair of the council shall rotate every term between members of the state and federal judiciary. The chair shall fix the date of meetings, preside over meetings, establish agendas for the meetings, and speak for the council.

(b) Vice-Chair. The vice-chair shall serve in the absence of the chair, and shall perform such other duties as may be assigned by the council.

(c) Executive Secretary. The (chief administrator of the state courts) (chief clerk of the federal district court) shall serve as executive secretary to the council. The executive secretary shall provide administrative assistance to the chair and shall take minutes of council meetings, provide notice for and arrange meetings, and perform such other duties as may be assigned by the chair or the council.

6. Voting

All motions, resolutions, and other actions of the council shall be adopted by majority vote of the council taken among the duly appointed members in attendance at the meeting where the action is considered (except for amendments to the (charter) (articles) (agreement)), providing a quorum is present.

7. Administrative Support

Administrative support for the council shall be furnished by the chief administrator and staff of the state courts and/or the chief clerk(s) and staff of the U.S. district court(s) in the state.

8. Quorum

_____ (number) members of the council shall constitute a quorum, at least _____ of whom shall be state judges and _____ of whom shall be federal judges.

9. Committees

(a) There shall be a standing executive committee, consisting of the chair, the vice-chair, and four other members of the council appointed by the chair to serve for the duration of the chair's term of office. Three members of the executive committee shall be state judges and three members shall be federal judges. The executive committee shall, except at times when the council is in session, represent the council in all matters except as otherwise directed by the council. The executive committee may conduct its business by mail or telephone, or at meetings called by the chair.

(b) The council or executive committee may, from time to time, authorize and appoint additional standing committees. The council, standing executive committee, or chair may also, from time to time, authorize and appoint special committees.

10. Amendments

The _____ (name of document) may be amended by majority vote at any regular or special meeting provided that, except by unanimous consent, no amendment may be considered unless, ten days or more prior to such meeting, the members have been notified by mail, by the secretary or proponent of the amendment, that the subject matter of the amendment will be considered at such meeting.

Adopted this day of _____, 199__.

APPROVED:

For the state judiciary:		For the federal judiciary:	
_____,	_____	_____,	_____
(name of judge)	(title of judge)	(name of judge)	(title of judge)

Appendix 27—Sample Notice of Organizational Meeting of a State–Federal Judicial Council

Notice of Organizational Meeting for State–Federal Judicial Council of _____ _____ (name of state)

To: _____ (name and address of judge)

You are cordially invited to attend a meeting of members of the state and federal judiciary in _____ (name of state) to discuss the formation of a state–federal judicial council in the state. The meeting will be held at _____ (time of meeting) on _____ (date of meeting) at _____ (location of meeting).

The agenda for the meeting will include the following:

1. Purpose of the council.
2. Composition of the council.
3. Officers of the council.
4. Frequency and place of meeting.
5. Method of operations, including setting the agenda for each meeting, making meeting arrangements, providing for meeting minutes and reports, and providing written materials prior to each meeting.
6. Other.

We hope you will join us for this initial meeting.

Chief Justice of _____ (name of state)

Chief Judge, United States District Court for _____ (name of district)

Appendix 28—Sample Notice of Regular Meeting of a State–Federal Judicial Council

Notice of Meeting for State–Federal Judicial Council of _____ (name of state)

To: _____ (name and address of judge)

A regular meeting of members of the State–Federal Judicial Council of _____ (name of state) will be held at _____ (time of meeting) on _____ (date of meeting) at _____ (location of meeting).

The agenda for the meeting will include the following:

1.
2.
3.
4.
5.
6.

We hope you will join us for this meeting.

Chair, State–Federal Judicial Council of _____ (name of state)

Appendix 29—Sample Charter for a Regional or Metropolitan State–Federal Judicial Council

Charter of the State–Federal Judicial Council of _____ (name of metropolitan area or region)

1. Name.

The council shall be known as the State–Federal Council of _____ (name of metropolitan area or region).

2. Purpose *(sample)*.

The purpose and objectives of the council shall be to improve and expedite the administration of justice by the state and federal courts in _____ (name of metropolitan area or region); to promote and encourage judicial relationships between the two court systems in this geographical area; to share materials and information that may have application or impact on the two systems, to develop methods to improve the operation of the two systems; including methods to use scarce judicial assets to benefit the systems; to eliminate any conflicts or misunderstandings which have or could develop among the judges of the systems; to suggest legislation to the state legislature and to the Congress of the United States and court rules which the council believes will improve the administration of justice in _____ (name of metropolitan area or region) and generally to strive for the improvement of justice in both systems within this area.

3. Geographical Boundaries.

The geographical boundaries for the council shall be _____.

4. Composition *(sample)*.

The council shall consist of at least _____ representatives from the state judiciary and _____ representatives of the federal judiciary within the geographical boundaries of the council.

State Representation. Representatives of the state judiciary shall consist of the highest ranking judge in _____ (name of metropolitan area or region).

Federal Representation. Representatives of the federal judiciary shall consist of all U.S. judges in _____ (name of metropolitan area or region).

Administrative Members. The local chief administrator of the _____ (name of state) court system and the chief clerk of the federal district court in the _____ (name of metropolitan area or region) shall serve as *ex officio* nonvoting members of the council and shall supply administrative and staff support for it.

5. Meetings *(sample)*.

The council shall meet at least twice a year at such times and places as designated by the chair of the council. The council may from time to time designate other meetings as may be required or desirable.

6. Officers *(sample)*.

(a) Chair. The highest ranking judge of the state in _____ (name of metropolitan area or region) shall preside at the initial meeting of the council. At the first meeting of the council the members shall elect a chair, who shall serve a term of two years. The chair of the council shall rotate every term between members of the state and federal judiciary. The chair shall fix the date of meetings, preside over meetings, establish agendas for the meetings, and speak for the council.

(b) Vice-Chair. The vice-chair shall serve in the absence of the chair and shall perform such other duties as may be assigned by the council. The vice-chair shall be elected in the same manner and for the same term as the chair.

(c) Executive Secretary. The local director of the administrative office of the courts in _____ (name of state) shall serve as executive secretary to the council. The executive secretary shall provide administrative and staff assistance to the chair and shall take minutes of council meetings, provide notice for and arrange meetings, and perform such other duties as may be assigned by the chair or the council.

7. Voting *(sample)*.

All motions, resolutions, and other actions of the council shall be adopted by majority vote of the council taken among the duly appointed members in attendance at the meeting where the action is considered (except for amendments to the charter), providing a quorum is present. A quorum shall consist of a majority of the members of the council.

8. Amendments *(sample)*.

This charter may be amended from time to time by a two-thirds majority of the members of the council.

Adopted this _____ day of _____ , 199___.

APPROVED:

For the state judiciary:		For the federal judiciary:	
_____,	_____	_____,	_____
(name of judge)	(title of judge)	(name of judge)	(title of judge)

Appendix 30—Anatomy of a Successful State–Federal Judicial Council

There are currently thirty-four active state–federal judicial councils in the United States. The make-up, structure, meeting schedules, and manner of meeting vary greatly. Some councils are small, with as few as four members, have very little formal structure, and meet informally. Other councils exceed twenty members, have a formal organizational structure with a written charter, and function with a well-developed schedule of meetings and planned agendas.

But success doesn't flow from structures or schedules—it follows and is ultimately measured by results, by what is achieved.

One successful state–federal judicial council is the California State–Federal Judicial Council.

The council consists of seven state and seven federal judges who serve staggered three-year terms. The council meets twice a year.

The following are four successful programs of the California council:

- Sponsorship of a series of capital case symposia—usually two each year, in different parts of the state—for state and federal judges to promote understanding of the pitfalls in the handling of capital cases, the tensions that arise between state and federal judges while handling them, and the procedures that can both reduce tensions and expedite the handling of such cases. The symposia held by the council in 1994 attracted over forty state and federal judges for each of the two sessions.
- Promotion of a "public confidence in the judiciary" program, first by including the subject on the agendas of several meetings of the council, and then by directing the preparation of a resource list of judges and programs involved in "public confidence in and understanding the judiciary." The list contained twenty-eight contacts in different parts of the state and included judicial members of local and statewide bench/bar/media committees; judicial history programs; law day committees; meet the judges programs; and bar association public relations, public information, and public outreach committees.
- Conduct of an education program for state and federal judges, by bringing court interpreters to the council meeting to air grievances and develop appropriate standards for court interpreters.
- Sponsorship of a program to provide law clerks for state judges to assist in the handling of capital cases and the conduct of legal research necessary for such cases (funded by a grant from the State Justice Institute; the grant application was prepared by the California council).

Council meetings have also been forums for discussions between state and federal judicial members on a wide variety of topics. Some of the subjects for discussion on the agendas of recent council meetings include the following:

- early warning system for habeas cases;
- certification of state law questions;
- federal court study committee recommendations;
- coordinating multiparty and mass tort litigation;
- resources for coordination of large cases;
- certification of inmate grievance procedures;
- cross-designation of U.S. attorneys and district attorneys for prosecution of crimes;
- FAX filing in California state courts;
- continuing legal education requirements for federal law clerks and legal staffs;
- impact of federalization of crimes; and
- long-range planning for the courts.

California Chief Justice Malcolm Lucas, in commenting on the success of the council, said that "as far as I am concerned the success of a state–federal judicial council starts at the top. [A council] succeeds because of the dedication and devotion of judicial leaders. Chief Judge [Clifford] Wallace and I have worked together constantly for almost five years on our council."

"We alternately co-chair our council meetings," said Justice Lucas, "and we encourage perfect attendance of our members."

Other factors contributing to the success of the council, according to Justice Lucas, are:

- equal numbers of state and federal judges on the council;
- inclusion of bankruptcy judges on the council, "which has added another dimension to our meetings"; and
- selection of state judges for membership who have had some federal experience, such as working in a U.S. attorney's office, and selection of federal judges, who have had some experience with the state judiciary.

The California council also has strong staff support through the offices of the California State Court Administrator and the Office of the Circuit Executive of the U.S. Ninth Circuit Court of Appeals.

William Vickery, California state court administrator, has designated a member of his staff, David Halperin, to support the council, and Mark Mendenhall, assistant circuit executive for the U.S. Ninth Circuit Court of Appeals, provides staff support from the federal side.

These staff members assist in the planning of meetings, setting agendas, contacting members and speakers about times and places for meetings, and preparing minutes and follow-up papers for the council.

The California council, although formally organized with a charter in 1988, actually came into existence on September 29, 1980, when state and federal

judges met in Monterey in conjunction with the annual meeting of the California Judges Association.

An account of that meeting refers to the impetus from it—the remarks in 1970 of the late Chief Justice of the United States Warren Burger at the annual meeting of the American Bar Association. He argued that state and federal judges should meet at judicial councils "to deal with sensitive areas in the relationship between the two systems" and to promote "informal dialogue between members of the two systems."

The first agenda for the first meeting of the council reflects the enthusiasm of the judges for dialogue:

1. What is the effect of federal court diversity case decisions on state courts? Should such federal cases be published?
2. Certifying unsettled state law questions to the California Supreme Court.
3. The new bankruptcy law and its effect on the state courts.
4. Presentation of the case-management system utilized by federal courts and an exchange of ideas on increasing efficiency.
5. Joint state–federal trials.
6. Consolidation of discovery in certain cases.
7. Use by one court of another's courtroom.
8. State–federal scheduling conflicts.
9. Open discussion—ideas for future council meetings.

State and federal judges formally organized the California council in 1988 and approved a charter for the organization on October 27 of that year. The Chief Justice of California is an *ex officio* member of the state delegation and appoints the other delegates from the state courts. The Chief Judge of the U.S. Ninth Circuit Court of Appeals (or designate) is the *ex officio* member of the federal court delegation and appoints the other federal representatives.

A recent project of the council has been to stimulate the organization of regional councils within the state. As a result of discussion at several council meetings and follow-up actions and meetings by state and federal judges in different localities, seeds have been planted for the organization of the three regional councils—in Los Angeles, Eastern California (Sacramento area), and Southern California. The purpose of regional and local councils is to take the work of the state–federal council one step closer to the day-to-day work of the judges from both systems.

There are at least eighteen states that do not have state–federal judicial councils. Reasons given for the lack of action in those states often reflects an ignorance of the potential for such councils.

One state judge remarked that there was no reason for a council in his state because "we get along well with our federal judges." Such an attitude ignores the real potential of state–federal judicial councils, as exemplified by the one in California—joint action and activities on issues of common concern, working

out common solutions to common problems, and providing ideas for sharing resources at a time of scarcity.

The California council is not the only successful council in the United States but it amply illustrates the worth of the councils and a formula for their success. Considering its past and the enthusiasm of its present leaders, it is probably safe to make the same prediction about the California council that was made fifteen years ago about it: "Unlike some other councils across the nation, dormancy is not likely to be the fate of California's State–Federal Judicial Council."

The Federal Judicial Center

About the Federal Judicial Center

The Federal Judicial Center is the research, education, and planning agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and six judges elected by the Judicial Conference.

The Court Education Division develops and administers education and training programs and services for nonjudicial court personnel, such as those in clerks' offices and probation and pretrial services offices, and management training programs for court teams of judges and managers.

The Judicial Education Division develops and administers education programs and services for judges, career court attorneys, and federal defender office personnel. These include orientation seminars, continuing education programs, and special focus workshops.

The Planning & Technology Division supports the Center's education and research activities by developing, maintaining, and testing technology for information processing, education, and communications. The division also supports long-range planning activity in the Judicial Conference and the courts with research, including analysis of emerging technologies, and other services as requested.

The Publications & Media Division develops and produces educational audio and video programs and edits and coordinates the production of all Center publications, including research reports and studies, educational and training publications, reference manuals, and periodicals. The Center's Information Services Office, which maintains a specialized collection of materials on judicial administration, is located within this division.

The Research Division undertakes empirical and exploratory research on federal judicial processes, court management, and sentencing and its consequences, often at the request of the Judicial Conference and its committees, the courts themselves, or other groups in the federal system.

The Center's Federal Judicial History Office develops programs relating to the history of the judicial branch and assists courts with their own judicial history programs.

The Interjudicial Affairs Office serves as clearinghouse for the Center's work with state–federal judicial councils and coordinates programs for foreign judiciaries, including the Foreign Judicial Fellows Program.

The National Center for State Courts

About the National Center for State Courts

The National Center for State Courts promotes justice through leadership and service to the state courts.

Leadership activities include developing policies that improve state courts; fostering state courts' adaptation to future changes; securing sufficient resources for state courts; strengthening state court leadership; facilitating collaboration among state courts and with the federal government and other nations; and providing a model for organizational administration.

Service activities include helping courts solve problems; creating knowledge about judicial administration; informing and educating judges, administrators, and other court personnel; and supporting court organizations.