Sabbaticals for Judges: Necessary in the Pursuit of Judicial Excellence

Ira P Robbins
Roles of State and Federal Courts Examined at Mass Tort Conference

by James G. Apple

Critical questions about the role in society of both state and federal courts were raised at the first National Mass Tort Conference, which was held in Cincinnati from November 13-15.

Participants at the conference included 130 state judges and 46 federal judges, as well as state court administrators, lawyers, and legal scholars.

The conference opened with a video-taped address by Chief Justice of the United States William H. Rehnquist, who reminded the attendees of Alexander Hamilton’s description of the state and federal systems as “one and the same.” Judge Robert M. Parker (U.S. 5th Cir.) told the audience that “a fundamental issue raised by modern complex mass tort cases is: ‘What role do we want our courts to play in our society?’”

He described the relevance of courts in modern times is in direct relationship to how well we meet the expectations of our citizens.

“Are we ‘going to remain with an 1825 model for courts?’” he asked.

Zoë Baird, senior vice-president and general counsel of Arista Insurance Company, sounded a similar theme in her report: “A common and often independent experts for the evaluation of scientific evidence; early resolution of scientific issues; sanction of computer technology such as CD-ROM to keep track of documentary evidence and all counsel in specific cases and to keep track of the existence and status of cases in different state and federal courts; establishment and use of central document depositories; use of state–federal judicial councils for communication between state and federal judges on specific issues and for education of state judges on mass tort case issues and procedures; making jury trials more comprehensible to judges and juries by such innovation.”

See MASS TORT, page 3

Administrative, Litigation Coordination Emphasized at Williamsburg S–F Meeting

Over 80 state and federal judges and court administrators gathered in Williamsburg, Va., on November 14 for a two-day convention on state–federal relationships in the Middle Atlantic states.

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

Discussions of coordination of administration and litigation in the two court systems centered on three areas: mass tort cases, bankruptcy cases, and state and federal judicial councils. Judge Johanna L. Fitzpatrick (Va. Ct. App.) moderated a panel discussion that included an analysis of approaches to the resolution of complex mass tort cases by Judge Larry V. Starcher (W. Va. 17th Cir.) and Judge Matthew J. Perry, Jr. (U.S. D. S.C.). Richmond litigator Deborah M. Russell reviewed in detail class actions and pretrial consolidation applying to such cases. U.S. Supreme Court Justice Sandra Day O’Connor gave the keynote address to open the conference. She said that “part of the beauty of our federalism is the diversity of its viewpoint, it brings to bear on legal problems. Under our system, the 50 state supreme courts, 13 United States courts of appeals, and countless trial and intermediali ate appellate courts may bring diverse experiences to bear on questions that, because of the Supreme Court’s influence, are not subject to control.”

She reminded the audience that “main tenance of the federal–state balance is the responsibility of both the federal and state courts—it is not unlike a successful marriage. Reciprocal awareness of their experiences to bear on questions that, because of the Supreme Court’s influence, are not subject to control.”

See WILLIAMSBURG, page 2

What State Judges Need to Know About Bankruptcy

Bankruptcy cases create a major area of friction between state and federal courts—especially in the processing of state court lawsuits. Much of the friction arises because state trial judges lack understanding of how bankruptcy law works. More detailed information about bankruptcy cases can be found in the American Bankruptcy Institute’s most recent publication, Bankruptcy Issues for State Trial Court Judges 1993. Developed through a grant from the State Justice Institute, Copies of this publication ($10 each) can be obtained from the American Bankruptcy Institute, 510 Street N.E., Washington, D.C. 20002, phone (202) 543-1234. (Note: Some of the information in the publication may have been affected by recent changes in the bankruptcy laws.)

1. Question: What sort of actions, motions, and orders in a bankruptcy court are not stayed by a bankruptcy filing? Answer: Certain actions are excluded by statute from automatic stay. The following are common ones: most criminal actions against the debtor; all actions, motions, or orders against property other than property of the bankruptcy estate (e.g., collections from property acquired after the debtor files bankruptcy); payments to creditors, and police and 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).

2. Question: Could a state court judge ancora violate a bankruptcy stay? Answer: Yes. While it is more likely that a party or counsel for a party would be acting contrary to the automatic stay, a state court judge could violate it in a myriad of ways, ranging from conducting a pretrial conference in a mortgage foreclosure action to a trial of a contract dispute. Essentially any act outside the bankruptcy court that moves a matter forward on a claim against a debtor in possession of property of the estate during the pendency of a bankruptcy violates the stay. As a practical matter, however, only acts in willful violation of the stay would result in sanctions, from which state court judges probably would be immune.

There are several areas where the automatic stay and the discharge injunction entered by the bankruptcy court are necessary to prove liability as a prerequisite to recovery from the liability insurer.

(a) Can the case proceed? Answer: No. In a state 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 or remove any doubt about the effects of proceeding with the action. (See answer to Question 3.)

(b) Can the plaintiff in the tort action proceed if such action is necessary to prove liability as a prerequisite to recovery from the liability insurer? Answer: (a) Yes. 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 or remove any doubt about the effects of proceeding with the action. (See answer to Question 3.)

(c) Can the defendant in the bankruptcy case be tried together, then the case could not be stayed by the bankruptcy court? Answer: No. The case should not proceed until the plaintiff or a codebtor obtains relief from the automatic stay.

3. Question: In a lawsuit before a state judge, three defendants are alleged to be joint tortfeasors. The state law provides for percentage apportionment of liability. One of the three defendants files bankruptcy. (a) Can the case proceed? Answer: No. In a state 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 or remove any doubt about the effects of proceeding with the action. (See answer to Question 3.)

(b) Can the plaintiff in the tort action proceed if such action is necessary to prove liability as a prerequisite to recovery from the liability insurer? Answer: (a) Yes. 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 or remove any doubt about the effects of proceeding with the action. (See answer to Question 3.)

(c) Can the defendant in the bankruptcy case be tried together, then the case could not be stayed by the bankruptcy court? Answer: No. The case should not proceed until the plaintiff or a codebtor obtains relief from the automatic stay.

4. Question: A defendant in a tort suit files bankruptcy. All parties before the state judge acknowledge that the defendant is covered by insurance and that the liability of the defendant will be limited by the extent of the coverage. Does the state judge need a bankruptcy court order to proceed with the tort action while the bankruptcy case is pending? Answer: (b) Once the discharge injunction has been entered and the bankruptcy case closed, may the plaintiff in the tort action proceed against the debtor in state court as a nominal defendant if such action is necessary to prove liability to a person offering to recover from the liability insurer? Answer: Yes. 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 or remove any doubt about the effects of proceeding with the action. (See answer to Question 3.)
Zobel Named FJC Director; Will Assume Duties in April

Judge Rya W. Zobel (U.S. D. Mass.) has been selected by the Board of the Federal Judicial Center to become the next director of the Center, succeeding Judge William W. Schwarzer (U.S. N. Cal.). Judge Zobel will assume her duties as director on May 1, 1995. Judge Schwarzer will have completed his term as director at that time.

Judge Schwarzer served for six years as director of the Federal Judicial Center, established in 1965. Judge Schwarzer was appointed director by President Gerald R. Ford in 1975 to serve the remainder of the term of Judge Frank J. Johnson, who was appointed by President Lyndon B. Johnson. Judge Schwarzer was renominated by President Ronald Reagan in 1981 and by President George H. W. Bush in 1987 and 1991.

As director, Judge Schwarzer worked with the administrative and program staffs of the Center to pursue the Center’s mission of improving the administration of justice by providing high-quality educational programs and technical assistance.

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Goodwin, Proctor & Hoar

Earlier this year she completed a four-year term as chair of the National Center for State Courts’ Board of Directors. She also chaired the Board of Directors of the National Conference of State Trial Judges in 1991–92. She will be the seventh director of the Federal Judicial Center, which was established in 1967.

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respective roles helps each partner carry out its joint responsibility. There must be a healthy dialogue on open federal ques-
tions and respect for the interests and needs of each partner.

Judge William W. Schwarzer, director of the Federal Judicial Center, outlined the advantages of state–federal judicial cooperation.

He told the participants that “judges talking to each other is the most effective form of education.”

“Sabbatical is a great untapped resource” for judges from both systems, he stated. “And state–federal judicial councils provide the most effective form of education between state and federal judges.”

Plato Cacheris, a criminal defense lawyer of the D.C. and Alexandria, Va., moderated a panel of state and federal judges and prosecutors that focused on the effect of increased caseloads on the prosecution of criminal cases in state and federal courts.

The panel used a hypothetical case and discussed it in the context of the federal crime bill enacted earlier this year.

Former congresswoman Robert W. Kastenmeier (D. Wis.) sits on the Committee on the Judiciary of the U.S. House of Representatives and chaired the House Judiciary Subcommittee on the Administration of Justice and Intellectual Property, outlined congressional action from 1965 to 1994 that affected the state judiciary and recommend possible steps for directly or indirectly state–federal cooperation.

Kastenmeier told the participants that “Congress needs knowledge and input” through hearings and other means about “the impact of federal legislation on state courts.”

The conference concluded with comments by two legal academics who special-
ize in the study of judicial federalism, Prof. Thomas E. Baker, of Texas Tech University School of Law, and Prof. Daniel J. Meador, of the University of Virginia School of Law.

Baker discussed judicial federalism in the 21st century, covering such sub-
jects as privatization of litigation procedures, user fees as replacements for filing fees, pro bono and computerized courtroom, paperless clerks’ offices, and col-
aboration and cooperation between state and federal judges.

For resolving problems arising from the federalization of crime and for increasing pressures between state and federal courts, Prof. Meador suggested the follow-
ing ideas: the creation of state–federal pro-
secutors’ panels; development of guidelines for state and federal prosecutors for cases with overlapping state–federal juris-
diction; interbranch seminars at the state and federal level, and state–federal pro-
grams at U.S. circuit judicial conferences.

Judge F. Gordon Battle (N.C. Super. Ct.), a judge of the North Carolina superior court, said that the presentations were very helpful in demon-
strating the need for more communica-
tion between state and federal judges. I think we will see that happen in North Carolina.”

A summary of the conference proceedings will be prepared and distributed by William K. Slate, advisor–reporter for the conference. The conference was funded by a grant from the State Justice Institute.

State–Federal Judicial Observer

a joint publication of the Federal Judicial Center and the National Center for State Courts

by Professor Ira P. Robbins

Washington College of Law

The American University

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Circuit; Senior Judge Monroe G. McKay, U.S. Court of Appeals for the Tenth Circuit; Judge Robin J. Zobel was appointed U.S. district judge in 1979. She graduated with honors from Radcliffe College in 1953, and then from the University of California at Berkeley School of Law. She served in private law practice after serving as a law clerk to Judge George C. Sweeney (D. Mass.), becoming a partner in the firm

Wendy James Goodwin, formerly of Goodwin, Proctor & Hoar.

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State–Federal Judicial Observer welcomes comments on articles appearing in it and ideas for topics for future issues. The Observer will consider for publication short articles and manuscripts on subjects of interest to state and federal judges, letters, comments, and articles should be submitted to Interjuridical Affairs Office, Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.W., Washington, D.C. 20003-8003.

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alimony, or attorney fees made in a divorce action.
(b) If so, to what extent?

Answer: (a) Yes. 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, except as provided for in 11 U.S.C. § 523(a)(15).
(b) Bankruptcy courts will not be bound by the characterizations or labels given to debts in a state decree or settlement. Accordingly, bankruptcy courts may undid state court awards if their characterizations are inconsistent with the parties’ true intentions and dischargeability rights.

6. Question: (a) Once a party to a lawsuit before a state judge has filed bankruptcy, can he or she more of the parties remove the entire lawsuit or part of it to the bankruptcy court for determination?
(b) Can the bankruptcy court remand the case back to the state judge for determination?

Answer: (a) Yes. All or part of the state court lawsuit can be removed.
(b) Yes. The bankruptcy judge will likely remand state lawsuits that are traditionally determined in state court.

7. Question: (a) What state court judgments are nondischargeable under the deferent bankruptcy chapters?
(b) Can such nondischargeable judgments be collaterally attacked in the bankrupcy court?

Answer: (a) Examples of final state court judgments that may be nondischargeable in a subsequent chapter 7 case of an individual debtor include the following: money judgments based on fraud, embezzlement, larceny, willful or malicious injury to the person or property of another; and money judgments for death or personal injury arising from intoxicated driving incidents. The reorganization chapters (11, 12, and 13) generally 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 initiate an adversary proceeding in bankruptcy court. Certain adversary proceedings must be brought in bankruptcy court within a speciﬁc time frame. 11 U.S.C. § 522(c)(1). The state court has concurrent jurisdiction to deter- mine the dischargeability of certain debts. A creditor’s failure to initiate an adversary proceeding, particularly where some type of wrongdoing is alleged (fraud, willful and malicious injury, etc.), is likely to result in a discharge of that judgment.

Note: A state court judgment that is based on speciﬁc and appropriate ﬁndings of fact and conclusions of law is more likely to be adopted by, or otherwise served to stop, a bankruptcy court when the court is presented with the issue of dischargeability of that judgment.

(b) Yes. Default judgments or issues not fully litigated in state court are subject to collateral attack in bankruptcy court, but collateral estoppel applies in bankruptcy proceedings to matters that have been fully litigated in state courts.

8. Question: If a debtor ﬁles a chapter 13 bankruptcy, can he or she discharge judgments for embezzlement, fraud, intentional torts, and driving under the inﬂuence of alcohol or drugs?
Answer: 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 proceedings, debtors usually agree to pay creditors from future in- come over an extended period of time pur- suit to a plan approved by the bankruptcy court. Such a debtor is not entitled to discharge until the successful completion of payment under the plan.

9. Question: Are there any circumstances where restriction or ﬁnes in a state criminal case are dischargeable?
Answer: Fines and restitution in state criminal cases are nondischargeable in bankrup- cy cases ﬁled before or after October 22, 1994. Both ﬁnes and restitution in state criminal actions are nondischargeable in chapter 7 cases ﬁled before October 22, 1994. Restriction is nondischargeable, but ﬁnes are dischargeable in chapter 13 cases ﬁled after that date.

10. Question: The defendant in a collect- ion suit in state court aﬃrmatively alleges discharge in bankruptcy. Can the state court resolve this issue, or is the dischargeability issue only within the jurisdiction of the bankruptcy court?
Answer: Only bankruptcy courts can deter- mine 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.

11. Question: A lawyer for a party calls and says that a client has ﬁled bankruptcy. How can this be veriﬁed?
Answer: The state judge or his or her clerk may call the bankruptcy court clerk’s of- ﬁce, or seek access to the docket electroni- cally if such technology is available. Phone numbers for clerks’ offices appear in the ABI publication referenced above and in the ‘Government Listings’ of most tele- phone books issued by United States Government, Courts, District Court (of Name of Federal District). Bankruptcy Court, Clerk’s Office. An alternative is for the state judge to require the debtor’s law- yer to call with the state court date-stamped copy of the debtor’s ﬁled bankruptcy peti- tion, and/or the Ofﬁcial Bankruptcy Form 9, “Notice of Filing Under the Bankruptcy Code, Meeting of Creditors and Fixing of Dates,” after such form has been issued by the bankruptcy court. Q

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tions as jury note taking and use of modern computer and communications technology; and

• recognition in appellate courts of diﬀerences between mass tort cases and "garden variety" cases to allow more ﬂexibility in thinking about them.

Participants also visited the Potter Stewart U.S. Courthouse in Cincinnati for technology demonstrations in one of the courtrooms.

Judge Carl B. Rubin (U.S. S.D. Ohio) and members of his staff gave a review of his courtroom’s facilities, including three video monitors in front of a jury box, demonstrated how such monitors are used in the courtroom.

Complex Litigation Automated Docketing (CLAD), a paperless docketing system created for the justices of the superior court, and its high volume of corporate cases, was the subject of a discussion by Judge Susan C. Del Percio (Del. Super. Ct.), who originated the concept for the computer program.

Chief Judge Sam C. Pointer, Jr. (U.S. N.D. Ala.) demonstrated the computer soft- ware system he developed for the coordin- ation of breast implant cases pending in state and federal courts nationwide.

The national conference of judges and court oﬃcials was the ﬁrst to deal with the issue of mass tort cases in the courts.

Conferences of the proceeding will be reported in a forthcoming issue of the Texas Law Review.

The conference was sponsored by the State Justıce Institute, the Federal Judicial Center, the Judicial Conference of the United States, the Maryland Attorney General’s Office, the Conference of Chief Justices, the National Center for State Courts, and the National Judicial College.

Ann Tyrrell Cochran, standing to right, claims administrator for the Silicon Breast Implant Settlement Fund, leads one of the small-group discussions at the mass tort conference in Cincinnati in November. Also present are Judge Edward Reade (U.S.D. Cdt.), left, and Justice Joan L. Lobes (N.Y. Sup. Ct.), seated to right.
The restoration project that transformed historic Union Station in Tacoma, Wash., into the home for the U.S. District Court for the Western District of Washington received a 1994 Honor Award from the National Trust for Historic Preservation. The award was presented at the Trust’s annual fall conference in Boston in October.

The project was cited for the “unique and creative reuse of [a] historic railroad depot by putting courts into the building” and “high quality rehabilitation.” It was one of 17 awards presented by Richard Moe, president of the National Trust.

Peter H. Brink, vice president for programs, services, and information at the National Trust, said that he had visited the new court building and saw it as a model for state and federal courts throughout the country.

“I hope the Honor Award will inspire state and federal courts in every state not only to preserve historic courthouses but to consider other historic buildings in the community for adaptive reuse for courthouse replacement or expansion projects,” Brink said.

Chief Justice Randall T. Shepard (Ind. Sup. Ct.), a trustee of the National Trust, said that “the Tacoma project suggests that the elegance usually associated with courthouse facilities, such as train stations, that make them appropriate for adaptation as court facilities.”

The Honor Award is the first given to a courthouse project since 1976, when the restoration of the Old Federal Court Building in St. Paul, Minn., was recognized. In 1992, the restoration in Philadelphia of the Wannamaker Department Store, which includes a center for complex litigation for the Philadelphia court system, won an Honor Award. The Honor Awards, begun in 1971, “recognize individuals, corporations, and organizations that demonstrate exceptional achievement in the preservation, rehabilitation, restoration, and interpretation of America’s architectural and cultural heritage.”

Judge Robert J. Bryan (U.S. W.D. Wash.), a tenant of the building, wrote in support of the nomination of the project for the award that “not only has the restoration of Union Station been successful in terms of being faithful to historic features, but it is also successful in its transformation into a modern United States courthouse.”

The architectural design is a marvelous combination of historic preservation and modern usage.

Tacoma’s restored Union Station, which now houses courtrooms and offices of the U.S. District Court for the Western District of Washington, received an Honor Award from the National Trust for Historic Preservation in Boston in October.

Nominations Being Solicited for 1995 Award

The National Center for State Courts’ (NCSC) board of directors has chosen Keith O. Boyum, the John Brown Mason Professor of political science at California State University, Fullerton, to receive the 1994 Warren E. Burger Award. The award is presented annually by NCSC’s Institute for Court Management (ICM) to honor outstanding achievement in the field of court administration.

Boyum was editor-in-chief of ICM’s Justice System Journal from 1989 to 1994. The Justice System Journal is a refereed journal focusing on judicial administration and processes. According to Ingo Keilitz, vice president in charge of ICM, “Boyum successfully and admirably steered the Justice System Journal through an ever-changing landscape of justice system scholarship and praxis. In doing so, he helped define and shape that landscape.”

The NCSC is seeking nominations for the 1995 Warren E. Burger Award. The recipient will be chosen by NCSC’s board of directors at its April 1995 meeting.

Nominations should have some significant contributions to court management in one or more of the following areas: management and administration; education and training; and research and consulting.

Nominations and supporting information must be received by January 15, 1995.