



## Judges Consider Admissibility of Scientific Evidence

State appellate judges from 41 states gathered in Chicago in mid-July to examine issues relating to the admissibility of scientific and other expert evidence. They also heard an insider's view of the United States Supreme Court, presented by Nina Totenberg of National Public Radio.

The event, entitled "Justice and Science," was the first annual symposium of the National Foundation for Judicial Excellence. The NFJE, founded in 2004, is an independent 501(c)(3) charitable organization that provides educational programs and other support to enable judges and other officers of the court to perform at their highest levels. In addition to the Annual Judicial Symposium, the Foundation will publish scholarly works and engage in other efforts to enhance the rule of law and the administration of justice. During its first year, the NFJE has been supported by DRI.

The symposium was organized by the 13 Officers and Directors of the National Foundation for Judicial Excellence, most of whom are practicing defense trial lawyers, with staff support from the Chicago headquarters of the Foundation. A Program Content Committee of the NFJE, led by William R. Sampson of Kansas City and Christopher W. Tompkins of Seattle, developed the educational elements of the symposium.

Nearly 140 judges attended the Chicago symposium. They heard formal presentations by law professors, observed a demonstration of an evidentiary hearing that

examined an expert witness, and discussed relevant legal issues in informal "roundtable" settings.

The judges were welcomed by Lloyd H. Milliken, Jr., of Indianapolis, President of the NFJE, and by Robert D. Monnin, of Cleveland, Chair of the Board of Directors. The program chair, Christopher Tompkins, also served as moderator. He introduced the main speakers, kept the program on schedule, and generally maximized the attendees' opportunities for learning.

Three law professors, whose scholarly interests are in the fields of torts and evidence, especially scientific evidence, made major presentations to the judges. They examined, in particular, the impact of the Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals* in the state courts. While many states now rely on *Daubert*—and its progeny—as the standard for admission of scientific and other expert evidence, many others continue to follow the guidelines set forth in the 1923 case of *Frye v. United States*, and still others have devised their own rules. The primacy of Federal Evidence Rule 702, and its state counterparts, was emphasized by the speakers. They dealt with a variety of difficult and provocative issues relevant to scientific evidence.

The law professors have published in-depth scholarly papers on expert scientific evidence. In addition to their oral presentations, they distributed some of their writings to the symposium attendees.

Professor David E. Bernstein, of George Mason University School of Law, surveyed the history of expert evidence in the courts. He pointed out that the *Daubert* test, while originally embraced by many state courts, has only been adopted in full by a minority of states, primarily because it is seen by some judges as being too strict. As a result, litigants who wish to use experts may avoid federal court and look for jurisdictions that have more liberal standards of admissibility.

Reliability is the keystone in evaluating the admissibility of expert testimony, said Professor Jennifer L. Mnookin of the UCLA School of Law in her presentation. But how can a jury, following the *Frye* rule of "general acceptability," be expected to properly evaluate reliability? Professor Mnookin compared the "atomistic" approach to the "holistic," or aggregate, approach, and opined that the latter, as set forth in *Daubert*, is more likely to yield an accurate assessment.

Professor Edward K. Cheng of Brooklyn Law School described his research into the practical impact of differing standards on admissibility of scientific evidence. He concluded that whether a state follows *Daubert* or *Frye* probably makes little difference in the way scientific evidence is handled in practice. What *Daubert* has done in most states, regardless of whether *Daubert* or *Frye* is ruling precedent, is to tighten the requirements for the admissibility of proffered expert opinion.

Following the professors' speeches, the



Judges gather in breakout groups to discuss how to improve procedures in their respective states.



Above left: Nina Totenberg; middle: Professors David E. Bernstein (from left), Jennifer L. Mnookin, and Edward K. Cheng; right: Lloyd H. Milliken, Jr.

Justice and Science symposium featured an interactive demonstration of the defense's challenge to evidence presented by plaintiff's expert. Two Chicago lawyers, Lise T. Spacapan and Lori E. Iwan, represented the plaintiffs and the defendants; they examined an expert toxicologist/physician, Dr. Nathan J. Karch of Washington, D.C. The hypothetical lawsuit was based on claims by plaintiffs who sued a manufacturer of an allegedly toxic chemical to which they had been exposed, allegedly causing lung cancer and brain cancer. The jurisdiction had previously adopted a *Frye* general acceptance test for the admissibility of scientific evidence, and had not expressly addressed whether to adopt *Daubert*.

The first part of the demonstration was a pre-trial evidentiary hearing, at which the plaintiffs presented their expert's qualifications, followed by a cross-examination of the expert by the defense. The second demonstration was an argument to the trial court on the admissibility of the expert's scientific opinions. The defendant asked the court to apply *Daubert*; the examination and argument reflected how that approach differed from the *Frye* rule. The key question that both the plaintiff and the defendant urged on the court was whether the methodology used by the expert was generally accepted. The two attorneys had opportunity to respond to and comment on their adversary's arguments.

The judges attending the symposium then gathered in breakout groups of ten, seated at round tables, for candid discussion of the points raised in the speeches and practical demonstrations. This approach resulted in a valuable exchange of experiences and views toward the admissibility of scientific evidence. Judges from different states described the procedure each fol-

“There have been no Frankfurters, Douglasses, or even O’Connors (state court) nominated to the Court in recent years.” The other trend is the huge amount of money—perhaps as much as \$100 million—that will be spent by various interest groups in urging the President and the Senate to select and confirm a particular type of person. There are as yet no rules on disclosure of the source of such money and no limits on amount.

At the close of the symposium, judges were heard to express their satisfaction with this inaugural educational effort by the National Foundation for Judicial Excellence. “A very valuable experience in learning more about an important issue facing the courts, as well as an opportunity to meet ‘brethren’ from



Lise T. Spacapan



Dr. Nathan J. Karch



Lori E. Iwan

lowed, with ideas and comments on how those procedures might be improved.

At lunch, Nina Totenberg, NPR's acclaimed legal affairs correspondent, gave a keynote speech to the judges primarily focused on the process by which nominations for the United States Supreme Court are made. She pointed out that, for better or for worse, politics does play a huge role in this process—in both the White House and the Senate.

Ms. Totenberg mentioned two relatively recent trends in the Supreme Court nomination process. One is the absence of potential Justices with a professional background other than as a federal appellate judge.

across the nation” was a typical comment. Others remarked that the symposium was excellently planned and superbly executed, and that the judges were pleased with the arrangements. While recognizing that the primary impetus for NFJE comes from the defense bar, many judges were impressed by the balanced, non-advocacy approach to the examination and discussion of legal issues.

Lloyd Milliken, President of NFJE, noted that the success of the symposium was proven by the fact that, “after a long day of high-level education, at 5:00 on a beautiful summer day in Chicago, all of the judges were still in their seats!”