



## Justice in Jeopardy?

# NFJE Explores New Age Litigation at 2008 Symposium

Each year the National Foundation for Judicial Excellence (NFJE) and its Program Content Committee puts a great deal of effort into identifying a topic that is timely and of particular significance to the judiciary for its annual symposium. This diligence once again paid off as the NFJE held its fourth Annual Judicial Symposium on July 11–12, 2008, at The Drake Hotel in Chicago, with this year's program entitled "Justice in Jeopardy: The Search for Due Process, Statutory Construction and Ethics in New Age Litigation." From complex mass torts to consumer class actions to complex litigation of every kind, the NFJE tackled the question, what is different—what is *new*—about so-called New Age Litigation? Essentially, what is different comes down to first, the size and complexity of the litigation, and second, the genuine and very real tension between the needs for efficiency and of due process. Posing the question is critical because the answers that we receive from appellate courts over the next several years will begin to let us know how well our industry has handled the onset of this "new age."

This year's program, which was chaired by Patrick Lysaught, a member with the Kansas City, Missouri, office of Baker Sterchi Cowden & Rice, L.L.C., utilized a hypothetical fact pattern to illustrate several of the issues for New Age Litigation. The fact pattern centered on the development of a synthetic fuel product (Synthefuel) that was marketed and distributed throughout the United States by scores of regional utility and distribution companies and thousands of retailers. After medical studies revealed potential correlation between Synthefuel exposure and a plenitude of increased health risks (including cancer), almost overnight, litigation exploded.

One case in particular involved a consolidated action of product liability and con-

sumer protection act claims. The action originally consisted of 47 plaintiffs from 14 states who suffered a range of illnesses and symptoms ranging from cancer to mental distress. Eighteen defendants were involved—all but one were residents of states other than the state in which the case was pending. A variety of pretrial motions

for punitive damages been met? Was due process implicated by a multi-plaintiff case?

Professor Douglas McFarland, professor of law at Hamline University in St. Paul, Minnesota and of the Phoenix School of Law, was the first to attempt to sort out what he called "a difficult fact pattern to get your mind around," in the morning session, "Procedural Posture—The Critical Juncture of Personal Jurisdiction, Venue and the Operative Pleadings." Professor McFarland delved into several procedural hurdles presented by the hypothetical with a sophisticated review of issues surrounding personal jurisdiction (long arm statutes and due process limits, as well as minimum contacts), venue, joinder of parties and claims, and consolidation of claims for trial.

Next, William C. Cleveland III, of Buist Moore Smythe McGee P.A. in Charleston, South Carolina, delivered the "plaintiffs' perspectives," which included a breakdown of why the defendants in the case had sufficient contacts with the forum state. These contacts, Mr. Cleveland argued, were based upon factors common to New Age Litigation, such as ubiquitous and pervasive marketing and distribution throughout the country, including the ability—via the Internet—to market more effectively than ever to virtually every citizen in the United States.

Former DRI President and current NFJE Board Chair Sheryl Willert, Managing Director of Williams Kastner in Seattle, was called upon—in the pinch—to lead off the mid-morning session entitled, "The Construct between Complex Litigation, Technology and Ethics in New Age Litigation." As an eleventh-hour emergency replacement speaker, Ms. Willert more than delivered with her review of the ethical dilemmas surrounding the "new age" of mass tort and high tech, including advertis-



Clockwise from top left: Douglas McFarland, Sheryl Willert, Edward D. "Chip" Robertson, Jr. and William C. Cleveland III.

were all denied by the trial court, and a \$220 million verdict was returned.

Several complex procedural questions raised by the hypothetical were pondered by the symposium's speakers and attendees, among them: Did the court have personal jurisdiction over all the defendants? Was venue proper as to all the defendants? Were the claims properly joined? Was the Consumer Protection Act of another jurisdiction properly applied? Had require-



The Honorable Alexander M. Sanders, Jr., Mary Kay Kane, Robert H. Klonoff, Bernard Taylor, Sr. and Michael D. Jones,

ing and client solicitation, and the creation of unintended client relationships. Edward D. “Chip” Robertson, Jr., of Bartimus, Fric-kleton, Robertson & Gorny, P.C., wrapped up the morning sessions by continuing the comparison of “classic torts” with New Age Litigation, presenting the plaintiffs’ perspective on ethical issues raised by the hypothetical.

est ratings across the board on attendee evaluations. Some comments by attendees included:

- “This was one of the very best and most inspiring speeches I have ever heard. Thank you so much for inviting Judge Sanders”
- “Excellent, brilliant, entertaining!”
- “I was proud to be a judge.”

of new science and technology with the ability to file cases on behalf of large numbers of plaintiffs. In light of this climate, Mr. Taylor explored litigants’ expectations and what we should consider fair and just.

Robert H. Klonoff, dean and professor of law at Lewis and Clark Law School in Portland, Oregon, reviewed the due process considerations presented by the hypothetical, both procedural and substantive, from a constitutional perspective, and also explored evidentiary issues in complex multiparty litigation. The substantive portion of the day ended with an entertaining and informative presentation by Michael D. Jones, partner in the Washington, D.C., office of Kirkland & Ellis entitled, “Everything You Want to Know about New Age Litigation and Aren’t Afraid to Ask.”

A reception followed, and afterward the judges enjoyed the wonderful sights, sounds and tastes of Chicago, either on their own or in dine-around groups that had been set up by symposium organizers.

**T**he 2008 Judicial Symposium was well-received by the state appellate court judges in attendance. Below are just a few comments drawn from attendee evaluations:

**“All (speakers) were excellent—informative & first-rate.”**

**“I liked the balanced approach—hearing from different backgrounds and perspectives.”**

**“I enjoyed the entire program. Attorneys run into these cases all the time, while appellate judges see them rarely. I appreciated the perspectives.”**

**“Keep up the excellent work to make presentations balanced. Before the seminar, I had concerns about this. No more.”**

**“Good conversation—thanks for bringing us together.”**

**“Continue as you have over the last four years—a great symposium!”**

At lunch, the attendees received a true treat—the keynote speaker—the Honorable Alexander M. Sanders, Jr. While admitting that it’s a difficult job, Judge Sanders implored attendees to realize that they have the best job in the world—which hasn’t changed from what he described as his days of “Old Age” litigation, and which won’t change—neither with advent of New Age Litigation, nor beyond. Being a judge is among the most important jobs in the world, according to Judge Sanders, as the independent judiciary is what separates the United States from other countries, and the continued success of American democracy depends on the survival of this feature. Judge Sanders received the high-

The afternoon session was designed to explore due process, choice of law, evidence and pretrial motions by asking the question, “Does New Age Litigation require different and more focused guidance from our appellate courts?” Mary Kay Kane of the University of California Hastings College of Law delivered a paper on why choice-of-law and interlocutory appeals issues were necessary components to achieving improvements in the handling of New Age Litigation-type cases by the judicial system.

Bernard Taylor, Sr. of the Atlanta firm Alston & Bird LLP spoke next on appellate perspectives on pre-trial motions, including *in limine*, *Daubert* and summary judgment. He reviewed the current intersection

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Save the Date!

## 5th Annual NFJE Judicial Symposium

July 10–11, 2009  
The Drake Hotel  
Chicago, Illinois

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**A balanced judiciary benefits all of us.**