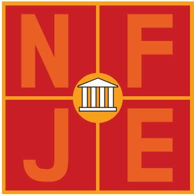

NFJE Symposium Explores Public Nuisance

By Michelle Parrini

As in the past, the sixth annual National Foundation for Judicial Excellence (NFJE) Symposium explored an important trend in legal practice: rising use of public nuisance in litigation. Over the last 15 or so years, public bodies, individuals, and plaintiffs' classes have increasingly attempted to use public nuisance to hold liable a range of product manufacturers, sellers, and distributors for various social ills, to hold liable oil, energy, and utility companies for harm attributed to greenhouse gas emissions, potentially to spur the legislative and executive branches to act in the absence of regulation, and perhaps, as theorized by a one symposium speaker, to resolve "social problems that have stalemated the political branches." Donald G. Gifford, *The Combination of Public Nuisance and Parens Patrie Standing: Using Ancient Doctrines to Support Mass Products Liability* at 8 (NFJE, July 2009), http://nfje.net/resources/2010%20Symposium%20Course%20Materials.pdf. The symposium, "The Law of Nuisance: Bother, Bore, or Basis for Broad Causes of Action?" was held in Chicago in the Swissôtel, July 16–17, 2010, attended by 100 judges from 31 states.

Bryan A. Garner

Offering a blend of stimulating, substantive presentations, a court-management-oriented presentation, and a skills-development session on judicial opinion writing, the program opened Friday evening with a presentation by Executive Vice President and General Counsel of the National Center for State Courts Robert N. Baldwin titled, "Principles-Based Reengineering of Court Services." Drawing from the center's work with courts that wish to fundamentally change, or "reengineer," court services, in part, to deal with anticipated, long-term budget shortfalls, Mr. Baldwin outlined several principles that have guided the center's work with courts. He also explained "Appellate CourTools," seven performance measures tied to values common to most appellate courts that can help courts discover how well they handle cases, treat constituents, and engage employees. Using the measures requires undertaking a series of steps to establish goals, plan, and make decisions about strategies to bring goals and plans to fruition. Still in development, three court systems are currently testing the performance measures: the Arizona Supreme Court and both divisions of the Arizona Court of Appeals, the Montana Supreme Court, and the Oregon Court of Appeals.

Saturday's events opened with a skills-development session on advanced judicial writing, led by Bryan A. Garner, author of more than 20 books on legal writing, whose company, LawProse, Inc., is one of the country's largest providers of legal writing and drafting CLE. "The writing that state judges do affects people more significantly than any other group of professionals," Mr. Garner began. He appealed to the attending judges to think of themselves as professional writers because judicial writing has "a profound influence on lives and affects the quality of justice." Partly because of that he urged the symposium participants "to assume a wide readership, not just lawyers, and especially not just specialists." "A smart high school kid should be able to read the opinion, understand it, and say, that's a wise opinion," Mr. Garner said.

Donald G. Gifford

Before moving on to the nitty-gritty of good judicial opinion writing, he offered 10 quick tips: (1) banish "pursuant to," "prior to," and "subsequent to" from writing; (2) use contractions occasionally; (3) call people by names, not "defendant" or "obligee," for example; (4) stop writing nonsequiturs; (5) never separate consequential sentences by more than 30 characters; (6) have two grammar usage books in every chamber; (7) require syllogistic bench memos—ask clerks to write them (a bench memo would state an appellant's contention, the opponent's contention, the clerk's view, and why he or she holds it); (8) promulgate a deep-issue rule for lawyers for briefs—a method of framing questions that results in a multi-sentence issue statement of 75 words that ends in a question mark; (9) implement a chamber rule of two suggested edits per page per reader for opinions, until issuing an opinion, and ask everyone to participate in editing and exercise the rule, including secretaries; and (10) establish a chamber culture in which good writing is encouraged.

On the last point, Mr. Garner observed that good writers read for technique and read a lot of good material. "You will always be two steps behind your reading in your writing. To become a better writer, you must become a better reader," he said.

Following Mr. Garner, Donald G. Gifford, the Edward M. Robertson Professor of Law, University of Maryland School of Law, introduced the day's topic with, "Public Nuisance: An Overview of the Use of an 800-Year-Old Doctrine to Support Mass Liability and Parens Patriae." Quoting from a Michigan Supreme Court decision that characterized public nuisance as "the dust bin of the law," and from William Prosser, who shortly after characterized it as "a species of catch-all low grade criminal offenses," Mr. Gifford remarked that some

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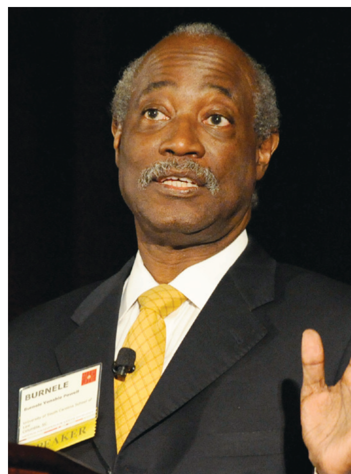
years ago it would have been inconceivable that an entire symposium would focus on public nuisance. Gifford, *The Combination of Public Nuisance and Parens Patrie Standing* at 5 (quoting *Awad v. McColgan*, 98 N.W.2d 571, 573 (Mich. 1959), and William L. Prosser, Private Action of Public Nuisance, 32 VA. L. REV. 997, 99 (1966)), URL provided above. Yet, today, many state attorneys general and city attorneys use public nuisance in lawsuits, in his view, "to illegitimately take over the regulatory process when they believe that Congress, legislatures, and regulatory agencies have failed." While acknowledging that torts have always had important regulatory and deterrent purposes, Mr. Gifford stated his belief that public nuisance is different, due to its historical origins, development, and intent. Describing public nuisance originally as a crime that gave the government a way to eliminate or ameliorate harmful interference with a collective, public land- or property-based right, he noted that it has evolved into a vaguely and variously defined tort that appears to encompass an array of conditions and facts. In his view, public nuisance is problematic because (1) it doesn't provide notice to defendants, (2) courts inconsistently apply and differently define it, and (3) it asks courts to play an inappropriate role in a constitutional democracy. In those situations, when courts try to fix social problems, he noted that courts "frequently fail." For instance, "most public health officials believe that the tobacco settlement was a failure," he said. Smoking rates did not decline.

Thomas W. Merrill

While he considered public nuisance, as defined in the Second Restatement and its historical origins, as potentially applicable to climate change issues, he thought it was inappropriately applied by courts to cases involving the manufacture, sale, and distribution of products. Because public nuisance traditionally focused on eliminating or ameliorating a nuisance, a defendant must have control of the nuisance or its instrumentality. And although he views the contours of public nuisance liability as changeable, he stated that he believes that before courts greatly expand it, they should admit that they would change history, view the political processes as no longer working, and have decided to rely on judge-made common law, the least legitimate source of legal authority, to address social problems.

After lunch, Thomas W. Merrill, the Charles Evan Hughes Professor of Law, Columbia Law School, offered three propositions about public nuisance: (1) he does not believe that public nuisance is a tort; it is a public action and the closest analogy is criminal law; (2) the legislature is the proper body to define it and specify who has a right to bring public nuisance suits; and (3) before public nuisance could proceed to court, the legislature must take action. He then elaborated on the three propositions. Why isn't public nuisance a tort? Because throughout history it has addressed public rights, and public rights are available to all community members. In case law, public rights "do not simply mean aggregating private rights or creating mass torts," he said. Additionally, public nuisance was prosecuted by the crown originally, not by private parties, and today, public "prosecutors" pursue public nuisance suits. As also pointed out by Mr. Merrill, public nuisance's purpose historically has been abatement, and a wrongdoer had a number of days to fix the problem. Today, to abate or eliminate a problem, we seek injunctive relief, but tort actions seek damages. "Public nuisance is the civil law analogue to criminal law—an aspect of police power implemented by the judiciary," Mr. Merrill said.


Burnele Venable Powell

Why is the legislature the appropriate institution to establish conduct constituting public nuisance? Because, according to Mr. Merrill, if we accept that public nuisance is analogous to criminal law, over time, common law crimes have been repudiated so that they no longer have a place in the federal system. Judicial crime creation disappeared entirely over time, driven by due process and the advent of separation of powers concepts, in Mr. Merrill's estimation, also probably because intuitively the courts understood that "the institution best suited and reflective of community norms" was the legislature. Although he did not think that the legislature was the only institution to identify public nuisance, he explained that "the legislature should identify criteria for evaluation," determine who had standing, and identify "rights common to the general public." In other words, the legislature should provide public nuisance legal "tools" to the courts.

Next, Burnele Venable Powell, the Miles and Ann Loadholt Professor of Law, University of South Carolina School of Law, spoke. In prefacing the talk, "Ethical Dilemmas in Nuisance Litigation Pay-to-Play Lawyering," Mr. Powell described himself as part of a generation of ethics professors who entered teaching after the emphasis on memorization had passed. Today, legal ethics "examine the structure within which we make lawyers practice to understand why they will behave as they do and structure ethics teaching to help lawyers" navigate those structures, Mr. Powell said. That structure was key to his talk's subject. He referred to a hot topic in the *Wall Street Journal* in particular, which heartily condemned the practice. According to the *Journal*, some lawyers have made contributions to political candidates, the politicians have hired supporters to pursue lawsuits against businesses in those states, and the contributor lawyers have transplanted those lawsuits to other states. *See also* Burnele Venable Powell, *Ethical Dilemmas in*

Nuisance Litigation Pay-to-Play Lawyering: Sometimes It's a Nuisance; Sometimes It's More than a Nuisance—It's Unethical at 147 (NFJE, July 2010), URL provided above. Mr. Powell explained, "The legal profession had been called on to address this." Model Rule of Professional Conduct 7.6, Political Contributions to Obtain Legal Engagements or Appointments by Judges, eventually resulted: "A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment."

When initially introduced to the ABA House of Delegates, the rule failed for several reasons, which Mr. Powell explained. First, the rules already prohibited "pay-to-play," specifically, Model Rule 7.2(b), Advertising. Second, many people believed that the rule dumped Securities and Exchange Commission responsibilities on the ABA when the ABA did not have authority to take action or enforce it. Third, some lawyers asked, are we really going to criminalize lawyers' political contributions? Would the rule pass constitutional tests? Many people believed that lawyers as businesspersons networked with politicians no differently from the way Wall Street interacted with its constituents. Although the ABA did finally adopt the rule, Mr. Powell explained that recently the "wind has been blowing against the *Wall Street Journal*," as marked by *Citizens United v. Federal Elections Commission*, 558 U.S. 50 (2010). Although it didn't directly deal with "pay-to-play lawyering," Mr. Powell thought that *Citizens United* indicated that the state did not intend to regulate indirect contributions since it differentiated between indirect and direct contributions. Did this mean, he asked, that we could anticipate a time when law firms contribute to political campaigns? To answer he said that he did not see much of a distinction between a pharmaceutical company and a limited liability company that was a law firm. Elaborating further, however, he noted that sometimes payment modes for lawyers hired by elected officials on behalf of states can create problems for the profession. After listing the four main ways that outside lawyers are paid, hourly fee, contingent fee, lump sum, or "value billing," and recognizing the benefits of different payment arrangements, Mr. Powell asked, "What happens when an outside counsel has authority to proceed on the public's behalf?" Especially what happens if that counsel has been hired under a contingent fee arrangement? In public nuisance cases, he argued, "The defendants are part of the public," and public prosecutors are charged with making sure that justice is done on behalf of the public, creating conflicts of interest. A lawyer's self interest can undermine representing a state and the public's interest evenhandedly without sufficient "institutional controls" or supervision. Powell, *Ethical Dilemmas* at 153–54 (discussing in *People ex. Rel. Clancy v. Superior Court*, 705 P.2.d 347 (Cal. 1985)), URL provided above.

James P. Dorr

Laura E. Ellsworth

Stephen G. Morrison

Philip L. Harris

Tracie J. Renfroe

After reviewing the scenario in *People ex. Rel. Clancy v. Superior Court* and mentioning other cases, Mr. Powell specified that making a campaign contribution to a government official in the hopes of securing business did not necessarily create a conflict of interest for an outside attorney, nor did agreeing to a contingent fee arrangement. A conflict would, however, probably arise if the attorney had great independence in exercising state powers to act in the public interest to end a public nuisance. *See also* Powell, *Ethical Dilemmas* at 154, 155, URL provided above.

In concluding, Mr. Powell asked, "What do these cases tell us about public nuisance law?" First, he answered, we can expect lawyers' ethical conflicts issues to arise more often in public nuisance suits. Second, when they do arise, the relevant questions are, do we have a situation in which an attorney has been asked to represent the public as parens patriae but also to sue for the state? And does that attorney have adequate supervision that will ensure that the state hasn't relinquished policy-making to that attorney? Public officials will need to retain control over public nuisance cases when they hire outside counsel to work on them, he summarized.

The symposium concluded with a panel of distinguished defense attorneys, each of whom had defended against public nui-

sance suits and had provided outstanding papers about the law as it applied to those cases to symposium participants. The panel was moderated by Stephen G. Morrison, a partner with Nelson Mullins Riley & Scarborough LLP in its Columbia, South Carolina, office and a DRI past-president. *See generally* Course Materials, *The Law of Nuisance: Bother, Bore, or Basis for Broad Causes of Action?* (NFJE, July 2010), http://nfje.net/resources/2010%20Symposium%20Course%20Materials.pdf. Panelists included James P. Dorr, a partner with Wildman Harrold Allen & Dixon LLP in Chicago, who has served as lead defense counsel in firearms mass-tort public nuisance litigation; Laura E. Ellsworth, the partner-in-charge of the Pittsburgh office of Jones Day and a lead lawyer in the landmark public nuisance case in which the Rhode Island Supreme Court rejected an attorney general's attempt to apply public nuisance law to the manufacture and sale of products; Phillip L. Harris, a partner in Jenner & Block LLP's Chicago office and co-chair of the firm's Product Liability and Mass Tort Practice Area; and Tracie J. Renfroe, a litigation partner in King & Spaulding's Houston office and counsel of record for an energy company in the *Comer* and *Kivalina* climate change nuisance cases.

Mr. Morrison led participants through the elements and stages of a public-nuisance case hypothetical, asking the panelists to describe how those elements and stages played out in the cases that they had defended after first working through that element or stage of the hypothetical with symposium attendees. Mr. Morrison moved the hypothetical and actual cases defended by the panelists from the claims and the players, to trial preparation and the defendant's and plaintiff's theories, to jury instructions and verdict forms.

After completing the exercise, Mr. Morrison asked the panelists for final comments about public nuisance law today. Ms. Ellsworth observed that it doesn't provide a sound basis for decision-making. Currently public nuisance "can be all things to all people," and in product and warning cases it "cuts away all traditional defenses. … We cannot have a legitimate rule in the law through which defendants lose because they have no defenses," she said. Mr. Harris predicted that science would evolve so that experts could more easily apportion contribution and liability in climate change cases, and that we will experience a rise in regulatory standards, as well as litigation. As a result, he thought that "judges will be reluctant to dismiss [those types of cases] for standing and causation." Mr. Dorr expressed optimism that consensus would develop that the legislature was best suited to grapple with public nuisance in air cases, also commenting that when products have been involved, many courts have already said that "these cases are really product liability law cases." And Ms. Renfroe remarked that no policy determinations have yet been made about who should bear liability for climate change, no limits or caps have been imposed in the country, and "these cases cannot be litigated because no legal standard exists against which judges can measure conduct."