

*Sixth Annual Judicial Symposium*

# THE LAW OF NUISANCE:

Bother, Bore, or Basis for Broad Causes of Action?

*Presented by*

NATIONAL FOUNDATION  
FOR JUDICIAL EXCELLENCE

**July 16–17, 2010**  
**Swissôtel Chicago**  
**Chicago, Illinois**



# PROMOTING EXCELLENCE AFFIRMING JUSTICE

**A** strong, independent, responsive judiciary adhering to the rule of law is one of the hallmarks of a democratic society. Although every citizen has an interest in the maintenance of an effective judicial system, as an officer of the court, the lawyer's obligation in this regard is of paramount importance.

It was with this in mind that DRI created the National Foundation for Judicial Excellence (NFJE) on October 7, 2004. NFJE is an independent, 501(c)(3) charitable foundation that provides judges with educational programs and other tools to enhance the rule of law and administration of justice.

For each of the past five years, the NFJE has successfully produced a first-rate symposium hosting nearly 400 appellate court judges from 44 states.

Judges' responses to the programs have been universally enthusiastic, and many have expressed appreciation for the high caliber and balanced nature of the program. Comments include:

- This was a fantastic program—intellectually stimulating and thorough.
- The speakers were excellent and the topics were timely. I anticipate next year's symposium.
- Thanks to everyone for a great program. I already look forward to next year's program.
- This is one of the best organized and informative seminars that I have ever attended. Keep up the good work.
- The program and the entire experience were excellent. I encourage the Foundation to continue this long into the future.
- The program was well planned and of high intellectual caliber.
- Bravo! Keep up the good tradition for which you have laid a sound foundation.
- Thank you for providing us with an opportunity to get together and compare notes with judges from other states.



## This Year's Program

**L**et us assume for the sake of argument that: the earth is warming and destroying our health and environment; the prevalence of firearms blights our society and endangers our commerce; lead paint is endemic and kills and sickens children. Is a legal theory that is intended to deal with “that which annoys and disturbs one in the possession of his property” (Ohio) the proper jurisprudence to be applied to these types of claims? Is a body of law historically applied to deal with wrongs that cause “annoyance, inconvenience, discomfort, or hurt” (Arizona) appropriately applied to matters that are the subject of significant public policy debate and economic consequence? How far has the law of nuisance moved beyond the question of a fence-line or shared wall? How far should it?

The common law of public nuisance is increasingly used in an effort to obtain recovery for mass torts. This raises numerous issues of judicial theory, *parens patriae*, ethics, and practicality. As the law surrounding these novel theories develops it will, as so much law does, evolve in the state appellate courts.

Join NFJE as we explore the reach and limits of the law of public nuisance and examine the constitutional and ethical aspects of mass tort litigation. Additionally, at the request of previous judicial attendees, there will be a presentation from a renowned authority on judicial writing.

*“The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people.”* — John Stuart Mill, *Liberty*, ch. 3 [1859]



# THE LAW OF NUISANCE: Bother, Bore, or Basis for Broad Causes of Action?

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## Schedule of Events

### Friday, July 16

6:00 – 7:30 p.m. Registration and Welcome Reception

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7:30 p.m. Dinner on your own

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### Saturday, July 17

7:30 – 8:30 a.m. Continental Breakfast

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8:30 – 8:45 a.m. Welcome and Introductions  
Richard T. Boyette, President  
Mary Massaron Ross, Program Chair

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8:45 – 9:45 a.m. *Public Nuisance: An Overview of the Use of an 800-Year-Old Doctrine to Support Mass Liability and Parens Patriae*  
Speaker: Professor Donald G. Gifford, *University of Maryland School of Law*  
*An introduction to the recent efforts to expand the tort of public nuisance to allow for mass liability in areas such as gun control, climate change, lead paint exposure, tobacco, the mortgage meltdown, and environmental contamination.*

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9:50 – 10:35 a.m. *Justiciability and Standing: Constitutional Defenses or Obstructions to Public Policy?*  
Speaker: Professor Thomas W. Merrill, *Columbia Law School*  
*An exploration of the defenses of justiciability and standing, both of which have been raised as defenses to public nuisance suits.*

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10:35 – 10:50 a.m. Break

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- 10:50 – 11:50 a.m. ***Ethical Dilemmas in Mass Tort Litigation***  
Speaker: Professor Burnele Venable Powell, *University of South Carolina School of Law*  
*A discussion of ethical issues posed in the area of class actions generally, in the use of private lawyers to serve as attorneys general suing under the parens patriae doctrine, and in issues surrounding fees, including contingent fees.*
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- 11:55 – 12:10 p.m. ***Opinion Writing for Judges — 15-Minute Introduction***  
Speaker: Bryan A. Garner, *LawProse, Inc.*
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- 12:10 – 1:15 p.m. **Luncheon**
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- 1:15 – 3:00 p.m. ***“If you would not be forgotten...either write things worth reading, or do things worth writing.” — Poor Richard’s Almanac: Opinion Writing for Judges***  
Speaker: Bryan A. Garner, *LawProse, Inc.*
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- 3:00 – 3:15 p.m. **Break**
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- 3:15 – 5:00 p.m. ***Litigation Lessons: Instructive Cases in the Real World of Mass Tort***  
Moderator: Daniel F. Polsenberg, *Lewis and Roca LLP*  
Speakers: Bonnie J. Campbell, *Campbell Law Firm*  
James P. Dorr, *Wildman, Harrold, Allen & Dixon LLP*  
Philip L. Harris, *Jenner & Block LLP*  
Tracie J. Renfroe, *King & Spalding LLP*  
*This interactive discussion will feature several attorneys who have been involved in different areas of public nuisance litigation. The speakers will provide summaries of their cases, including what theories were pleaded, which defenses were raised, reception by the courts, and the current status of the litigation, if ongoing.*
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- 5:00 p.m. **Closing Remarks**  
Richard T. Boyette, President
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- 5:00 – 6:30 p.m. **Reception**
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- 6:30 p.m. **Dinner on your own**
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## Keynote Speaker



In his first week of law school at the University of Texas—a time when most One-L's forget about eating or sleeping, let alone taking up new hobbies—**Bryan A. Garner** heard words being used in new ways. He began collecting notes on legal usage and gradually filled a cabinet with three-by-five cards. The result was his first book: *A Dictionary of Modern Legal Usage*, first published in 1987.

Today, he is the author of more than 20 books on legal writing and language in general. His magnum opus is the third edition of *Garner's Modern American Usage*, published by Oxford University Press last year. He is best known as editor in chief of the venerable *Black's Law Dictionary*, now in its ninth edition.

Another recent work, *Making Your Case*, was a collaboration with Justice Antonin Scalia. It recently won the Burton Award for Law Book of the Year. *Garner on Language and Writing* was published last year by the American Bar Association. It pulls together more than 800 pages of Mr. Garner's shorter works: articles, correspondence, speeches, tributes to friends, and more. Justice Ruth Bader Ginsburg provided a foreword, saying that it was required reading for her law clerks.

Mr. Garner's other works include *The Elements of Legal Style*, *The Winning Brief*, *The Redbook: A Manual on Legal Style*, and *Legal Writing in Plain English*. He also contributed the 94-page chapter on grammar and usage for the current edition of *The Chicago Manual of Style*.

Since 1991, he has taught more than 110,000 lawyers, judges, and paralegals in continuing legal education seminars throughout the U.S. and abroad. His company, LawProse, Inc., of Dallas, is the country's largest provider of legal writing and drafting CLEs.

The late novelist and essayist David Foster Wallace, writing in *Harper's*, called Garner “a genius, though of a rather particular kind. . . . He's both a lawyer and a lexicographer (which seems a bit like being both a narcotics dealer and a DEA agent).”

## Speakers



**Bonnie J. Campbell** was elected Attorney General of Iowa in 1990 and served through 1994. She is the only woman to have held that office in her state. In 1995, she was selected by President Clinton to head the Justice Department's newly created Office on Violence Against Women. As director, Ms. Campbell oversaw a \$1.6 billion program to provide services and shelter to victims in local communities.

Today, Ms. Campbell's practice focuses on providing legal, crisis, and reputation management counseling to businesses confronted with highly visible legal matters. Her vast experience provides a reasoned voice to

clients as they navigate issues with the public, the media, and an array of government agencies, regulatory bodies, and state attorneys general. Ms. Campbell draws upon her extensive knowledge of politics and the law to develop communications strategies surrounding sensitive litigation and high-profile crisis issues.



**James P. Dorr** is a partner in the litigation department of Wildman, Harrold, Allen & Dixon LLP in Chicago. For over 30 years, Mr. Dorr's practice has focused on national litigation management and trial of complex commercial, product liability, and mass tort litigation. He has appeared in the trial or appellate courts of over 90 percent of the states and has tried cases to verdict as lead trial counsel in approximately one third of the states.

Mr. Dorr has extensive experience defending novel aggregative claims brought by governmental officials, class representatives, and individuals asserting theories of public nuisance, negligent marketing and distribution, deceptive trade practices, and unjust enrichment. He has argued these issues on appeal before the U.S. Court of Appeals for the Third Circuit, the Supreme Courts of Illinois, Indiana and Ohio, and multiple intermediate appellate courts. He also has been actively involved in public nuisance issues related to firearms litigation and lead paint litigation, including the Rhode Island lead paint litigation prior to the dismissal of his client from that litigation.



**Donald G. Gifford** is the Edward M. Robertson Professor of Law at the University of Maryland School of Law, whose principal research and teaching specialty is mass products torts. Professor Gifford is the author or editor of four books, including a highly renowned torts casebook, and numerous articles about topics including mass torts, products liability, and medical malpractice. In July 2008, the Rhode Island Supreme Court relied on Professor Gifford's analysis when it rejected the State's public nuisance claims against lead pigment

manufacturers. In March 2010, the University of Michigan Press published his work, *Suing the Tobacco and Lead Pigment Industries*, a critical analysis of actions brought by states and municipalities against manufacturers of products that cause public health problems.



**Philip L. Harris** is a partner in the litigation department of Jenner & Block LLP in Chicago. He focuses his practice on the defense of complex product liability, mass tort and commercial cases for large corporations, with a concentration in the automobile industry. Mr. Harris has served as national, regional and generic defense counsel for companies facing repetitive exposure issues. In that capacity, Mr. Harris has developed generic strategies for trial and motion practice; identified, retained and supervised local counsel throughout the United

States; and developed strategies for lowering defense costs and settlement or indemnity dollars. He has developed and implemented effective strategies for lowering average settlement costs even as defense costs were reduced. Mr. Harris has extensive experience in early resolution and case management techniques.



**Thomas W. Merrill** is the Charles Evans Hughes Professor of Law at Columbia Law School. He was previously a professor of law at Yale Law School and Northwestern University School of Law. He served as Deputy Solicitor General in the Department of Justice from 1987 to 1990. Professor Merrill has undergraduate degrees from Grinnell College and Oxford University, and a law degree from the University of Chicago. He clerked on the D.C. Circuit (for Chief Judge David Bazelon) and the U.S. Supreme Court (for Justice Harry Blackmun). Professor

Merrill is the author of several books and over 75 scholarly articles, and devotes most of his scholarly energies to topics involving property and administrative law. He often files briefs in cases in the U.S. Supreme Court, most frequently in cases involving takings of property and federal preemption of state law.



**Daniel F. Polsenberg** is a partner in the appellate practice group of Lewis and Roca LLP in Las Vegas. Mr. Polsenberg was the first Nevadan to be named a fellow of the American Academy of Appellate Lawyers. He has 25 years of experience representing clients in cases ranging from tort to tax and constitutional to commercial law. Mr. Polsenberg has personally argued over 200 appeals and has written briefs in hundreds more. He had previously been president of Beckley Singleton, which partnered with Lewis and Roca LLP in 2007. He is a

past president of the State Bar of Nevada.



**Burnele Venable Powell** is the Miles and Ann Loadholt Professor of Law at the University of South Carolina School of Law, where he served as dean (2004–2006) following a prior deanship at the University of Missouri-Kansas City School of Law (1995–2003). Before UMKC, Mr. Powell was Professor of Law at the University of North Carolina-Chapel Hill (1979–1995), where he began teaching the first two of his three current subject areas: legal ethics, administrative law, and constitutional law.

Professor Powell's current professional activities include chairing the Editorial Board of the ABA/BNA Lawyers' Manual on Professional Conduct and memberships on the ABA Center for Professional Responsibility Coordinating Council, the ABA Center for Professional Responsibility Strategic Development Committee, and the *ABA Journal of the Professional Lawyer* Editorial Board. He has published numerous articles and his current project is "The Good 'Bad Man': Why Courage Trumps Context" (*in draft*).



**Tracie J. Renfroe** is a partner in the litigation practice group in King & Spalding LLP's Houston office. Ms. Renfroe currently represents a number of defendants in climate change-related lawsuits. She also represents energy companies, refiners, chemical and polymer manufacturers, pipelines and pipeline shippers, aerospace contractors, manufacturing conglomerates and engineering firms in environmental contamination, toxic tort, product liability and commercial disputes, including complex multi-party litigation in state and

federal courts. Ms. Renfroe has tried cases in state and federal courts, and has successfully argued cases in Texas appellate courts, including the Texas Supreme Court. She was listed in *The Best Lawyers in America* in 2009.



## Swissôtel Chicago: It's Happening in Chicago

There is no place more exciting than Chicago in the summer. The weather is ideal, the city's beautiful lakefront is a flurry of activity and there is an abundance of cultural, sporting, entertainment, and dining offerings.

Located at the confluence of the Chicago River and Lake Michigan, The Swissôtel Chicago offers fabulous panoramic views of the city's lakefront. It is close to many Chicago attractions, including Navy Pier, Millennium Park and The Magnificent Mile.

Other nearby attractions include: Willis Tower, the Art Institute of Chicago, the Theatre District, and the Museum Campus featuring the Field Museum of Natural History, the John G. Shedd Aquarium, and the Adler Planetarium.

## Registration

### To register:

**Phone** 312.698.6280  
**Fax** 312.795.0748  
**Online** [www.nfje.net](http://www.nfje.net)

## Contact Information

First Name \_\_\_\_\_ Middle Initial \_\_\_\_\_ Last Name \_\_\_\_\_

Preferred Name \_\_\_\_\_ Title \_\_\_\_\_

Court \_\_\_\_\_

Street \_\_\_\_\_ Suite \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_

Business Telephone \_\_\_\_\_ Fax \_\_\_\_\_ E-mail \_\_\_\_\_

Will a spouse or guest be traveling with you?  Yes  No

If yes, please indicate his/her name.

If yes, will your guest attend the luncheon?  Yes  No

## Hotel and Travel Arrangements

This program has limited attendance. Registration is on a first-come, first-served basis. Once NFJE receives your completed registration form, you will be sent an e-mail confirmation with instructions about making your hotel and travel reservations. If you do not receive an email confirmation within 48 hours, you will need to contact NFJE directly. Please be advised that you will need to secure your hotel reservations on or before June 16, 2010.

NFJE will pay for the cost of a deluxe room for the nights of Friday, July 16 and Saturday, July 17, 2010, as well as transportation (air, rail, ground) costs not to exceed \$500. When making your travel arrangements, please plan to arrive by 5:00 p.m., Friday, July 16. *If you would like to extend your stay at the hotel, you are welcome to do so at your own expense.*

**Swissôtel Chicago**  
333 East Wacker Drive  
Chicago, IL 60601  
Phone: 312.565.0565  
Fax: 312.565.0540  
[www.swissotel.com/chicago](http://www.swissotel.com/chicago)

## Cancellations

*If you must cancel your attendance, please do so at least three weeks prior to the event so a judge on the waiting list may attend. All cancellations must be received in writing via fax (312.795.0748) or email ([sford@nfje.net](mailto:sford@nfje.net)).*

**The Annual Judicial Symposium is a tuition-free program for state appellate court judges.  
Transportation and hotel accommodations are provided at NFJE's expense.**



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