

## Ninth Annual NFJE Symposium

# A Judicial Summer



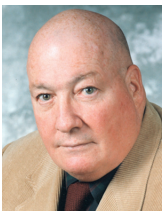
H. Mills Gallivan, NFJE Chair of the Board

By Patrick A. Long

A significant portion of the nation's state appellate judiciary gathered in Chicago last July for the Ninth Annual National Foundation for Judicial Excellence (NFJE) Symposium. We're talking members of the courts of appeal and supreme courts from 44 different states. Because I am fortunate enough to sit currently on the NFJE Board of Directors, and on the symposium planning committee, I was honored to attend the symposium.

In a minute I'm going to explain how this year's symposium may possibly have been the greatest, and the most appreciated by the justices in attendance, but first let me tell you about the symposia in general. There is something remarkable about sitting in a room with the gathered legal brain power of this group of men and women. Think about it, almost every attendee in the room, following law school, worked as a practicing attorney. Then most accepted an appointment or were elected to a position as a judge in their state's trial courts,

after which they were appointed to a court of appeal, and in some cases



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to their state supreme court. Each of them has participated in hundreds, if not thousands, of court decisions, which assists in making the case law for millions of our citizens across the nation.

These are folks with significant influence on our lives, and they are living embodiments of America's wonderful Constitution. As sung in a musical composed by Messers. Rodgers and Hammerstein, you can call me a cockeyed optimist, but I like to think that more often than not the justices in our state courts of appeal and supreme courts wouldn't have gotten to where they are on the ladder of success without superior brain power. Of course, I think the same of justices in our federal courts, but the NFJE Symposium is directed to state justices. And this brain trust gathers every summer to spend a couple of days listening to law school professors, high profile appellate lawyers, and other gifted folks discuss in detail issues likely to come before state appellate courts, including substantive law issues, operational problems, ethical considerations, and any other subject matter that would be of interest to a large and geographically diverse collection of appellate judges.

As you know, our Constitution is more than 200 years old. Times change; some issues remain the same over the years, but often our appellate courts are called upon to decide issues that couldn't have been dreamed of by the folks who put our Constitution together those many years ago. The NFJE symposia seek to assist our state court justices in maintaining a strong, independent, and responsive judiciary.

NFJE carefully selects its speakers so that the presentations on every issue are, to quote a certain television network, fair and balanced. In the case of NFJE, that quote is in fact true. I will leave it to each of you and your personal political sensi-



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bilities to determine whether the phrase accurately reflects the "M.O." of the television network. Some subject matters are assigned two speakers, one on each side of the issue under discussion. In certain situations there are panel discussions. But the bottom line, every year, for every topic discussed, is to present a discussion of that topic from both, or all, sides. As you might expect, the judges in attendance come from across the spectrum of philosophic, political, geographic, religious and lifestyles, but they are all intelligent, and can immediately sense when a particular topic is given weight in a certain direction.

Some conversations with a number of the attendees over the years have convinced me that they appreciate, value, and respect a fair presentation of both sides of an issue. Of course they know where we, as defense attorneys, stand, but I like to think they are inclined to give more serious consideration to our positions if we are confident enough to present a reasonably balanced discussion. Our attendees are not shy about letting us know they appreciate discussions that are clearly not one-sided, regardless of their personal legal approach.

Next year will be the tenth NFJE symposium, and there are many judges from several states who have attended every single symposium. I consider this quite remarkable, but I think I know at least some of the reasons. The subject matter for each symposium, and the recruitment of the speakers, is the responsibility of the NFJE programming committee. This committee, selected by the NFJE board and officers,



Rodney A. Smolla



Honorable Jean Hoefer Toal

consists of approximately 15 primarily appellate attorneys from around the country. At the conclusion of each symposium, the attending justices are asked to submit their written input as to subject matter for the next symposium, and the committee uses these suggestions as guidance in formulating the program for the next year. The attendees are also asked to comment as to the symposium just completed, and the effectiveness of each speaker, which is a help to the committee in selecting the next year's speakers, whether they should come from the ranks of practicing appellate lawyers, law school faculties, the political spectrum, or elsewhere.

Okay, that more or less completes my discussion about NFJE symposia in general. Now let me share with you some information about last July's symposium. The feedback seemed to indicate that this may have been one of, if not the, best of the nine symposia thus far. The subtitle for this year's program was "Emerging Issues in State and Federal Constitutional Law," and the following are some of the subject matters discussed.

- The evolving meaning of free speech for sitting judges and practicing lawyers
- Federal preemption
- Emerging technology and privacy questions
- Funding and judicial independence



Mary Ellen Callahan



Akhil Reed Amar



Catherine M. Sharkey at the lectern.



J. Michael Weston



John R. Kouris, Diane Bratvold and Richard Boyette

- Judicial takings after *Stop The Beach Renourishment, Inc. v. Florida Department Of Environmental Protection* (2010)
- How to read America's constitutions, state and federal

While most of us may not practice appellate law, or face such issues on a daily basis, the decisions of our state courts of appeal and supreme courts impact our lives, the welfare of our clients, and the lives of every American. The list of speakers

this year was outstanding. Leading off on the question of the meaning of free speech for judges and attorneys was Professor Rod Smolla, President of Furman University in South Carolina. Following Professor Smolla's presentation were Professors Catherine Sharkey and Richard Epstein, both of New York University Law School, Professor Jane Kirtley of the Minnesota Law School, and Professor Akhil Reed Amar of Yale Law School. Other speakers included the Honorable Jean Hoefer Toal, Chief Justice of the South Carolina Supreme Court, Mary Ellen Callahan of Jenner & Block, Timothy Thelen of GlaxoSmithKline, and Allison Zieve of Public Citizen Litigation Group in Washington, D.C. NFJE colleagues Mills Gullivan, Leslie Packer, and Brooks Magratten also participated.

The concluding portion of the symposium is worthy of special comment. After a full day's discussion of the topics listed above by the speakers, an additional hour and a half was set aside for a panel discussion by all of the speakers who also took questions from the attendees, and engaged in colloquy with them. This panel discussion and question and answer session is always a special treat for attendees, who can raise any issue they think significant based upon the previous presentations.

Perhaps as important as the presentations, the attendees have easy access to one-on-one conversations with the speakers during the breaks and the breakfast and lunch periods. However, one other thing that struck me as interesting during the symposia I have attended was the eagerness with which the attendees sought each other out for casual conversation, questions, and comments about differences in their respective jurisdictions. A supreme court justice from the Midwest discussed the use of amicus briefs with a court of appeals justice from Arizona. A justice from New England inquired about the use of appellate law clerks in Oregon.

So you ask, what's on tap for next year? I can tell you that the planning committee meets every other week (or more often if necessary) by phone to put the program together, and while all of the facets of next year's symposium are not yet nailed down, it's shaping up to be as phenomenal as this year's program. Based on comments and suggestions from this year's attendees, next

year's theme might perhaps be summarized as exploring the different aspects of what makes a superb appellate justice. This overall concept can lead to substantive as well as operative and procedural issues, and can take many avenues. Because the final decision on actual presentations is still under discussion, I'll need to leave you hanging at this point.

As important as is the work of the planning committee in putting together the subject matter of the program, equally important is the need to lock down the very finest speakers from all over the country. Because the NFJE speakers fit that category in their various areas of expertise, it's crucially important that they be contacted as early as possible to secure their availability. By the time you receive this magazine, the planning committee will have finalized the specific subject matter for next year's presentations and will be in the process of contacting potential speakers.

I hope that the above will provide you with a general sense of this past summer's extremely successful NFJE symposium and also supply some information about how our symposia are put together. I wish I had time and space to outline for you the general content of the first eight programs and the level of speakers participating. I am confident you would be very pleased. NFJE is something of a well-kept secret in that it has neither magazine nor newsletter, appears on no billboards, and no one attends its annual programs, except of course a very large number of court of appeal and supreme court justices from all over the country. It is most probably the single most important informational conduit assisting the folks who make the decisions that directly impact us, our families, our clients, and our country.

Lastly, how does NFJE exist? Well I'm glad you asked. NFJE arose from the inspiration of DRI past president Richard Boyette, and is a 501(c)(3) charitable foundation; it is supported by contributions from all of us, and I mean that in a very wide sense. Many members of DRI contribute, specifically members of the board of directors, officers, and committee and SLDO leaders, as well as a number of our clients. Silent auctions at DRI's Annual Meeting also benefit NFJE. Does NFJE need to increase the level of contribu-

tions? Hmm, do the Irish like to celebrate St. Patrick's Day? The answer to both questions obviously is yes. The folks who work so hard to make NFJE the success that it is would be grateful if you would loosen your purse strings a little and favor NFJE with a small contribution (or large if you insist).

God bless our country, our Constitution, our judiciary, and our colleagues who have worked so hard to make NFJE what it is. **FD**