

*Twelfth Annual Judicial Symposium*

# WHEN STATE COURTS DISAGREE: Competing Approaches to State Law in the Appellate Courts

*Presented by*

NATIONAL FOUNDATION  
FOR JUDICIAL EXCELLENCE

**July 15–16, 2016**  
**Loews Chicago Hotel**  
**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, lawyers (as officers of the court) have an even keener interest in this.

It was with this in mind that DRI created the National Foundation for Judicial Excellence (NFJE) in 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 twelve years, the NFJE has successfully produced a first-rate symposium, hosting nearly 1,200 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 Symposium

State appellate judges play a unique and vital role in our judicial system. They are regularly called upon to resolve a host of increasingly complex legal disputes. The 2016 NFJE Symposium aims to provide in-depth perspectives and expert insights on the variety of issues confronted by state appellate judges.

The Symposium consists of multi-speaker panels addressing topics spanning from cutting-edge issues raised by internet research to age-old quandaries about the role of appellate courts in reviewing jury verdicts. Nationally known speakers from both the bench and academia will provide their insights on these topics, as well as engage participants in the type of interactive learning process that makes the study of complex topics not only fruitful, but enjoyable.

The Symposium begins on Friday, July 15, with keynote speaker Ross Guberman, author of *Point Taken: How to Write Like the World's Best Judges*. That work explores the components of effective judicial prose by examining real-world examples from 34 esteemed judges, from Learned Hand to Antonin Scalia. Mr. Guberman is the president of Legal Writing Pro LLC and has taught more than a thousand programs on legal writing on three different continents. He has spoken before judges, bar associations, and prominent law firms. He is also a Professorial Lecturer in Law at the George Washington University Law School, where he teaches a seminar on drafting and writing.

The Symposium continues on Saturday, July 16, with panels addressing topics at the forefront of the state appellate process, including:

- The effect of social media and the Internet on judicial decision making and the role of publicly available information in resolving appeals even when that information might not be in the record;
- The methodologies for interpreting state constitutions and the process by which state constitutional law develops;
- The importance of insurance in the modern litigation system and the various, interlocking ways in which insurance disputes may be resolved;
- Divining those circumstances when it is appropriate for appellate courts to peel back the veil of a jury verdict and review the outcome of a jury trial for possible misconduct by jurors or attorneys; and
- The role of public policy in developing state common law and in construing statutes.

Please join our nationally recognized panel of judges, attorneys, and scholars for the 2016 NFJE Symposium.



# WHEN STATE COURTS DISAGREE: Competing Approaches to State Law in the Appellate Courts

## Schedule of Events

### Friday, July 15

4:00–5:00 p.m. Registration

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5:00–6:00 p.m. *Secrets of the Great Opinion Writers*  
In this session, Ross Guberman, author of the acclaimed new book *Point Taken: How to Write Like the World's Best Judges*, will share concrete tips on how to improve key parts of appellate opinions.  
Ross Guberman, *Legal Writing Pro LLC, Washington, D.C.*

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6:00–7:30 p.m. Welcome Reception

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7:30 p.m. Dinner on your own

### Saturday, July 16

7:30–8:15 a.m. Continental Breakfast

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8:15–8:30 a.m. Welcome and Introductions  
Peter J. Hersha, NFJE President  
Mary Massaron, 2016 Symposium Program Chair

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8:30–9:30 a.m. *Information Gathering by Appellate Courts: Is It Ever Permissible for an Appellate Judge to Gather Information from the Internet?*  
Hear an academic and two appellate judges discuss competing considerations regarding when, if ever, an appellate court should look at information on the Internet not cited by the parties, whether the judge has an obligation to advise the parties that he or she has done so, and related issues.  
Moderator | Michael B. Wallace, *Wise Carter Child, Jackson, Mississippi*  
Professor Edward K. Cheng, *Vanderbilt Law School, Nashville, Tennessee*  
Judge Sharon Keller, *Texas Court of Criminal Appeals, Austin, Texas*  
Judge Michael E. Keasler, *Texas Court of Criminal Appeals, Austin, Texas*

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9:30–9:45 a.m. Break

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9:45–11:15 a.m. *Insurance Fundamentals*  
Insurance occupies a central position in the realm of civil litigation. But the availability of insurance, in all its forms, also is necessary to the very existence of an advanced society. This reality often invests the adjudication of individual insurance coverage disputes with far-reaching economic and social ramifications. A court's consideration of such disputes will be enriched by a basic knowledge of insurance fundamentals, including principles of underwriting, policy structure, how layers of coverage operate, regulatory mechanisms, and the application of common law doctrines to the interpretation of policies.  
Moderator | Michael B. King, *Carney Badley Spellman, Seattle, Washington, D.C.*  
Daniela M. Ames, *Ford Motor Company, Dearborn, Michigan*  
Laura A. Foggan, *Wiley Rein LLP, Washington, D.C.*  
Colleen Shiel, *Property Casualty Insurers Association of America, Chicago, Illinois*  
Carla van Dongen, *State Farm Insurance Companies, Bloomington, Illinois*

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- 11:15 a.m.–12:15 p.m. ***Competing Approaches to State Constitutional Doctrine***  
What are the differing sources that the state appellate courts look to when interpreting state constitutions? What are the varied approaches that the state courts have embraced as a mode of decision making? When can and should they interpret their constitutions differently from constitutional interpretations of similar provisions in the United States Constitution?  
Moderator | Mark J. Crandley, *Barnes & Thornburg LLP, Indianapolis, Indiana*  
Justice Jeffrey S. Boyd, *Supreme Court of Texas, Austin, Texas*  
Professor David A. Carrillo, *University of California Berkeley, Berkeley, California*  
Justice Randy J. Holland, *Delaware Supreme Court, Dover, Delaware*
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- 12:15–1:30 p.m. **Luncheon**
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- 1:30–2:45 p.m. ***What Is a Fair Trial? Keeping the Ball in the Fairway***  
Courts have said that a litigant is entitled to a fair trial, not a perfect one. Whether due to flagrant attorney misbehavior, biased or autocratic judging, or confounding jury findings, when does a trial become so “unfair” (or so imperfect) that the appellate court should reverse? Our distinguished panel, with the help of audience polling, will explore this topic.  
Moderator | J. Michael Weston, *Lederer Weston Craig PLC, Cedar Rapids, Iowa*  
Professor Cassandra Burke Robertson, *Case Western Law School, Cleveland, Ohio*  
Judge Margaret G. Robb, *Indiana Court of Appeals Fifth District, Indianapolis, Indiana*  
Chief Judge Michael Talbot, *Michigan Court of Appeals, Detroit, Michigan*
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- 2:45–3:00 p.m. **Break**
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- 3:00–3:45 p.m. ***Public Policy in Judicial Decision Making: Where Is It Properly Found and What Are Its Limits?***  
Judge Ruggero Aldisert wrote in his treatise for judges on opinion writing, that “[n]o discussion of opinion writing theory can be complete without a reference to judicially declared policy.” But when is public policy appropriately employed as a tool of decision? And where is it to be properly found? Listen to an engaging discussion of these and other issues related to the use of public policy as a tool of judicial decision making.  
Moderator | Mary Massaron, *Plunkett Cooney PC, Bloomfield Hills, Michigan*  
Justice Mary Jane Theis, *Illinois Supreme Court, First District, Chicago, Illinois*  
Judge Kurtis T. Wilder, *Michigan Court of Appeals, Detroit, Michigan*
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- 3:45–5:00 p.m. ***Speaker Panel***  
Our speakers and audience participants will engage in a lively discussion of topics generated from the symposium sessions, addressing the competing approaches to state law.  
Moderator | Daniel F. Polsenberg, *Lewis Roca Rothgerber, Las Vegas, Nevada*
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- 5:00 p.m. **Closing Remarks**  
Peter J. Hersha, NFJE President
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- 5:00 – 6:00 p.m. **Closing Reception**
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- 6:30 p.m. **Dinner on your own**

## Speakers

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**Daniel M. Ames** joined Ford Motor Company as a risk analyst in 1998 and is presently the associate director of corporate insurance. Mr. Ames is responsible for all global, regional, and local insurance programs insuring Ford, its affiliates and subsidiaries, and major joint venture operations. Mr. Ames previously held various positions in the insurance industry, primarily in the retail insurance space.



**Hon. Jeffrey S. Boyd** was appointed to the Texas Supreme Court in December 2012 and was elected to a full term in 2014. After earning his law degree at Pepperdine University, he clerked for Judge Thomas M. Reavley on the U.S. Fifth Circuit Court of Appeals. He practiced as a litigator with Thompson & Knight LLP for a total of 15 years and worked as deputy attorney general for civil litigation. In January 2011, he served as general counsel for the governor's office and, after, as the governor's chief of staff.



**David A. Carrillo** is the founding executive director of the California Constitution Center at the University of California, Berkeley School of Law. Dr. Carrillo actively practiced law for 16 years. Among other positions, he was a deputy attorney general with the California Department of Justice and a deputy city attorney in San Francisco. Dr. Carrillo currently serves on the board of the National Advisory Council of the Institute of Governmental Studies. Dr. Carrillo earned his degrees from the University of California at Berkeley.



**Edward K. Cheng** is a professor at Vanderbilt Law School. His scholarship focuses on scientific and expert evidence and the interaction of law and statistics. He is co-author of the five-volume treatise *Modern Scientific Evidence* and past chair of the Section of Evidence of the Association of American Law Schools. Professor Cheng holds a J.D. from *Harvard Law School*, where he served on the *Harvard Law Review*. He has an M.A. in statistics from Columbia, an M.Sc. in information systems from the London School of Economics, and a B.S.E. in electrical engineering from Princeton.



**Laura A. Foggan** chairs Wiley Rein's Insurance Appellate Practice. She is a nationally recognized insurer counsel with over 20 years of experience. She regularly handles emerging risks, environmental coverage, data breach, product liability, construction, personal and advertising injury, and bad faith. Ms. Foggan has participated in over 200 insurance appeals nationwide. She is a DRI member and fellow in the American College of Coverage and Extra Contractual Counsel.



**Ross Guberman**, the president of Legal Writing Pro LLC, conducts workshops for prominent law firms, state and federal judges, and dozens of agencies and associations. He authored *Point Made: How to Write Like the Nation's Top Advocates* and *Point Taken: How to Write Like the World's Best Judges* and co-authored *Deal Struck: The World's Best Drafting Tips*. Mr. Guberman holds degrees from Yale, the Sorbonne, and the University of Chicago Law School.



**Peter J. Hersha** is senior vice president, trial division, with Nationwide Mutual Insurance Company in Columbus, Ohio. He has been with Nationwide since 1981 and led the trial division since 1999. He is a graduate of St. John Fisher College and the Syracuse University College of Law. He currently serves on the board and as president of the NFJE and on the board of A Portable Theatre, Inc.





**Hon. Randy J. Holland** was appointed to the Delaware Supreme Court in 1986. He has written, co-authored, or edited nine books, including *State Constitutional Law, the Modern Experience*. He teaches state constitutional law at Vanderbilt University. Justice Holland is the past national president of the American Inns of Court Foundation and co-chairs the advisory committee to the National Center for State Court's Center for Judicial Ethics. He has received numerous awards, including the 2014 American Inns of Court Powell Award for Professionalism and Ethics.



**Hon. Michael E. Keasler** has been a judge of the Texas Court of Criminal Appeals since 1999. He received his undergraduate and law degrees from the University of Texas. After two years of private practice, he joined the Dallas County District Attorney's Office, where he served for 12 years. He has taught at the National Judicial College since 1992 and served on the Faculty Council there. He is a member of the American Law Institute and the ABA Appellate Judges Conference and a fellow of the American Bar Foundation.



**Hon. Sharon Keller** was first elected to the Texas Court of Criminal Appeals in 1994. The first woman to serve on the court, she has been elected to presiding judge three times. She holds a B.A. from Rice University and a J.D. degree from Southern Methodist University School of Law. Judge Keller is the chair of the Texas Indigent Defense Commission and a member of the board of the Council of State Governments Justice Center and the Timothy Cole Exoneration Review Commission. She is a life fellow of the Texas Bar Foundation and a member of the Judicial Advisory Council to the Community Justice Assistance Division of the Texas Department of Criminal Justice.



**Michael B. King** is a principal of Carney Badley Spellman in Seattle. His practice focuses exclusively on appellate litigation. Mr. King has argued over 140 cases to full merits panels. He has represented clients before state and federal appellate courts across the United States, including numerous cases involving insurance issues. Mr. King is a fellow of the American Academy of Appellate Lawyers, past president of the Washington Appellate Lawyers Association, and past chair of the DRI Appellate Advocacy Committee.



**Mary Massaron** is a past president of DRI. She is president-elect of the Lawyers for Civil Justice and chairs its Class Action Reform Committee. She is a fellow in the American Academy of Appellate Lawyers, a member of the American Law Institute, and has served as chair of the ABA Council of Appellate Lawyers, a division of the Appellate Judges Conference, the ABA TIPS Appellate Advocacy Committee, and the Appellate Practice Section of the State Bar of Michigan. She also chairs the Advocates Guild of the Michigan Supreme Court Historical Society and co-chairs the Michigan Appellate Bench Bar Conference Foundation. She is the program chair for this year's NFJE Symposium.



**Daniel F. Polsenberg** has more than 30 years of experience representing clients in cases ranging from tort to tax and constitutional to commercial law. He is past president of the State Bar of Nevada and he is the first Nevadan named a fellow of the prestigious American Academy of Appellate Lawyers. Mr. Polsenberg had previously been president of Beckley Singleton, which partnered with Lewis Roca Rothgerber Christie in 2007.



**Cassandra Burke Robertson** is a professor at Case Western Reserve University School of Law. She is the Laura B. Chisolm Distinguished Research Scholar and serves as the director of the Center for Professional Ethics at the University. Prof. Robertson received her B.A. from the University of Washington and graduate and law degree from the University of Texas. She clerked for the Texas Supreme Court and served as assistant solicitor general in the Office of the Texas Attorney General.



**Colleen Reppen Shiel** became legal counsel for the Property Casualty Insurers Association of America in 2012. She oversees PCI's amicus activity and direct litigation efforts and supports PCI's strategic efforts to advance its members' advocacy agenda in courts and legislatures across the country. Ms. Shiel worked in insurance litigation for over 25 years before joining PCI, managing the staff counsel office for Prudential Property & Casualty Insurance Company and Nationwide Mutual Insurance Company.



**Hon. Michael J. Talbot** is the chief judge of the Michigan Court of Appeals. Previously, he had been appointed a judge of the Wayne Circuit, Detroit Recorder's, and Detroit Common Pleas courts. He was a member of the Judicial Tenure Commission from 2004 to 2010 and presently serves by appointment of the Michigan Supreme Court as chair of the Court Reporting Board of Review. In 2013, Judge Talbot was appointed by the Michigan Supreme Court to be the special judicial administrator of the 36th District Court. He was appointed chief judge of the Court of Claims in 2014 and reappointed in 2015.



**Hon. Mary Jane Theis** is a justice of the Illinois Supreme Court. She began her career as an assistant public defender. She was a trial court judge and served 17 years on the appellate court before joining the Illinois Supreme Court in 2010. She teaches judicial education programs at Loyola Chicago, Northwestern, and John Marshall law schools. She received the Lifetime Achievement Award from the Illinois Judges Association, the Access to Justice Award from the Illinois State Bar, and is a recipient of the American Constitution Society Legal Legend.



**Carla Cowles van Dongen** is associate general counsel for State Farm Mutual Automobile Insurance Company in Bloomington, Illinois, and currently leads State Farm's Claim Litigation Section. She oversees 38 staff counsel offices across the United States. She has been actively engaged in the development and implementation of civil justice policy and initiatives for State Farm. Ms. van Dongen graduated cum laude from the Indiana University School of Law. In 2007, she was awarded the designation Chartered Property & Casualty Underwriter.



**Michael B. Wallace** is a partner in the Jackson, Mississippi, office of Wise Carter Child & Caraway. His practice is concentrated in commercial litigation at the trial and appellate levels. Mr. Wallace served as a law clerk for Justice Harry G. Walker, Supreme Court of Mississippi, and for Associate Justice William H. Rehnquist, Supreme Court of the United States. He served as special impeachment counsel to Senate Majority Leader Lott for the impeachment trial of President Clinton. He formerly served as chair of the DRI Appellate Advocacy Committee.



**J. Michael Weston** is a founding member of Lederer Weston Craig PLC in Cedar Rapids, Iowa. He is the vice president of the NFJE and a past president of DRI. Mr. Weston is a fellow of the American College of Trial Lawyers and a member of FDCC, ABOTA, IADC, and ADTA. He has also held leadership positions in several other defense, bar, and business groups. He practices primarily in the areas of commercial litigation, product liability/toxic torts, and insurance coverage and bad faith.





## Loews Chicago: It's Happening in Chicago

There is no place more captivating 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.

The Loews Chicago is close to many Chicago attractions, including Navy Pier, Millennium Park, and the Magnificent Mile. Other nearby attractions include The Hancock Building, the Museum of Modern Art, the Art Institute, 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** 312.698.6230

**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 (Business) \_\_\_\_\_ Suite \_\_\_\_\_

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

Telephone (Business) \_\_\_\_\_ Fax \_\_\_\_\_ E-mail (required) \_\_\_\_\_

Will a spouse or guest be traveling with you?  Yes  No If yes, please indicate his/her name \_\_\_\_\_

Luncheon  I will attend  Spouse/guest will attend

## 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. Please note: If you do not receive an email confirmation within 48 hours, you will need to contact the NFJE directly. Please be advised you will need to secure your hotel reservations on or before June 15, 2016.

NFJE will pay for the cost of a standard room for the nights of Friday, July 15 and Saturday, July 16, as well as transportation costs (air, rail, ground) not to exceed \$500. When making your travel arrangements, please plan to arrive by 3:00 p.m., Friday, July 15. *If you would like to extend your stay at the hotel, you are welcome to do so at your own expense.*

**Loews Chicago Hotel**  
455 North Park Drive  
Chicago, Illinois 60611  
Phone: 312.840.6600  
[www.loewshotels.com/chicago-downtown](http://www.loewshotels.com/chicago-downtown)

## Cancellations

*If you must cancel your attendance, please do so at least three weeks before the symposium, so a judge on the waiting list may attend. All cancellations must be received in writing via fax (312.795.0748) or email ([tcaldwell@dri.org](mailto:tcaldwell@dri.org)).*

**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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