



Judicial Excellence

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18th Annual Judicial Symposium
State Courts at the Forefront:
Law at the Time of Change
July 15-16, 2022
Loews Chicago Hotel
Chicago, Illinois
Presented by
NFJE NATIONAL FOUNDATION
FOR JUDICIAL EXCELLENCE

Message from the President

President's Message

By Thomas E. Ganucheau, NFJE President



Since 2004, the National Foundation of Judicial Excellence has met its mission of addressing important legal policy issues affecting the law and the civil justice system through our Annual Judicial Symposium and timely Newsletters. Following the success of our online Judicial Symposium necessitated by COVID-19, we were able to again meet in person in 2021 for our Symposium *Lessons Learned, Challenges Ahead: Emphasizing the Importance of the Judiciary in the New Normal*. Our in-person program was met with great enthusiasm from our Program Committee, and renewed support from our appellate court judges. In this issue, Program Chair, Amy Miletich, reports on the success of our program.

Following the success of 2021, we are excited to present our 2022 Symposium *State Courts at the Forefront: Law at the Time of Change*. Program Chair Sara Kobak, Vice-Chair Mark Fahelson, and our dedicated program committee have again met the challenge and assembled an incredible group of speakers who will address a myriad of timely topics facing the judiciary. We are excited to again be in-person and to welcome our state appellate judges back to Chicago on July 15-16, 2022. Program Chair Sara Kobak reports on what attendees can look forward to this year.

Our Annual Symposium program is developed not only based upon the hottest issues of the day, but also upon NFJE-solicited feedback from attendees at the symposium, which results in programming tailored to the needs of appellate judges on matters of current importance. The program committee works hundreds of hours each year identifying topics worthy of presentation, planning the program, and seeking the best speakers on the topics to be presented, to provide the best and most engaging program. I express special thanks to all of our program committee members for their time and dedication.

The NFJE has consistently addressed important legal policy issues, and substantive law often evolving through our courts, to assure that appellate judges are prepared to meet those issues when they are presented to them. But the NFJE does not just address substantive law issues impacting civil litigants and our civil justice system. It also addresses issues affecting the civil justice system and the administration of justice, to assist appellate judges in meeting the challenges of the day.

The NFJE remains committed to its diversity efforts, including the diversity of the judiciary and its chambers. We are excited this year to be joined at the Annual Symposium by participants in The Appellate Project, a nonprofit organization dedicated to assisting law students of color succeed in appellate practice. Tillman Breckenridge is spearheading this relationship for NFJE, and he reports on what we hope will be an ongoing relationship to assist students in their careers. We hope that this relationship and the mentorship program will benefit all involved and the entire bar.

Finally, I must thank again all of our sponsors and supporters for their continued dedication to helping the NFJE meet its mission. Fundraising is always a challenge. We continually call on our supporters, and seek new supporters, to fund the NFJE's mission so that we can continue to provide cost-free, timely, and meaningful programming to appellate judges. For those who have supported our mission, we say thank you. For those who have not yet found a way to show your support, we ask that you consider making a tax-deductible donation to ensure our continued success.

Thomas E. Ganucheau
President

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2022 NFJE Symposium Preview

By Sara Kobak, 2022 Symposium Chair



As courts of general jurisdiction and the final arbiters of state laws and constitutions, state courts handle the vast majority of civil and criminal disputes and are the backbone of our judicial system—all while operating with limited resources and constrained budgets. As we emerge from the COVID-19 pandemic, state courts continue to face both opportunities and challenges in improving access to justice, promoting the rule of law and public trust in the judiciary, and ensuring impartial and fair resolution of legal disputes.

NFJE's 18th Annual Judicial Symposium—*State Courts at the Forefront: Law at the Time of Change*—focuses on the critical role of state courts at this time of tremendous changes and new challenges in our nation. We are honored to have the Honorable Jeffrey S. Sutton, Chief Judge of the United States Court of Appeals for the Sixth Circuit, as our keynote speaker. Judge Sutton is a leading scholar on state constitutional law and federalism. In his keynote address, Judge Sutton will be sharing insights from his newest book, *Who Decides? States as Laboratories of Constitutional Experimentation*, which examines the importance of state courts and state constitutions in our federalist system.

In addition to Judge Sutton, we are honored to be joined by other esteemed judges and legal scholars in exploring topics critical to the administration of justice in state courts. The symposium will kick off with a panel discussion on *Public Confidence in the Judiciary and the Rule of Law*, featuring the Honorable Allison H. Eid of the Tenth Circuit, the Honorable Susan P. Graber of the Ninth Circuit, and the Honorable Leslie H. Southwick of the Fifth Circuit, with leading national appellate attorney Tillman Breckenridge serving as the moderator. All three panelists have unique insights into this critical topic, as all three served as state appellate court judges before moving to the federal bench.



Our other planned speakers and topics are equally compelling. Recognizing the importance of clear and understandable judicial opinions in promoting public trust in our judicial system, the Honorable Robert E. Bacharach of the United States Court of Appeals for the Tenth Circuit will share strategies on improving legal writing from his new book, *Legal Writing: A Judge's Perspective on the Science and Rhetoric of the Written Word*. We also will be joined by the Honorable Peter M. Reyes of the Minnesota Court of Appeals, who will speak about judicial ethics and the use of social media as a tool for state courts. Continuing our conversation on racial justice and equity issues in state courts, Judge Darleen Ortega of the Oregon Court of Appeals and Chief Justice Collins J. Seitz, Jr. of the Delaware Supreme Court, will speak on different initiatives for improving diversity and inclusion in the bench and bar, as well as promoting equitable and fair treatment of all litigants.

Our program also will address important changes coming soon to state courts. A critical issue in civil disputes is the gatekeeping role of courts in ensuring the reliability of expert opinions and evidence. With

expected amendments to clarify Rule 702, Professor Daniel J. Capra of Fordham University School of Law will be joined by the Honorable Joan N. Ericksen of the U.S. District Court for the District of Minnesota, the Honorable Iain D. Johnston of the U.S. District Court for the Northern District of Illinois, and the Honorable Thomas D. Schroder of the U.S. District Court for the Middle District of North Carolina. Moderated by our program vice chair Mark Fahleson, we will conclude the symposium with an *All Speakers Panel* to provide an opportunity for attendees to interact and ask questions of all speakers.

Finally, we are thrilled that this symposium will provide an opportunity for state court judges to connect with each other to share ideas and to enjoy community in person again. After the conclusion of each day of the programming, we will have social receptions for our attendees and speakers to see old friends and to meet new ones.

We are deeply appreciative of our speakers for sharing their time and expertise. We also are very grateful to the program committee and the staff at NFJE for their work in putting together such a terrific program. I look to seeing everyone in Chicago.

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NFJE and The Appellate Project

By Tillman Breckenridge



The NFJE has been working hard over the years to advance diversity in appellate practice—notoriously perhaps the least diverse practice area. We always have had an eye toward creating diverse faculties for the Symposia, and we recently have added diversity presentations to some of the educational opportunities we provide.

Ultimately, however, diversifying appellate practice depends on strengthening the pipeline of talent coming into it. As a former adjunct professor who founded and ran an Appellate and Supreme Court Clinic, I know America’s law schools are brimming with talented students of color who are interested in appellate practice, but are discouraged by the current state of the practice area and the barriers to entry. In support of that mission, I am happy to announce a new initiative.

Starting with this year’s Symposium, we take the next step by inviting local mentees involved with The Appellate Project to attend a special session for the students on developing in appellate practice, Friday’s Keynote, and the reception that evening. For those who are unaware, [The Appellate Project](#) is a nonprofit organization that works to empower law students of color to succeed in the appellate field. It runs a mentorship program that pairs law students of color with mentors in the appellate field, and students also receive appellate-focused resources throughout the year. But mentorship does not end with an assigned mentor. Students need to develop other relationships, and they need to develop their skills toward making the most of any relationship with people who can help them better understand how to reach their goals.



The NFJE hopes and expects that this is the beginning of a strong relationship where we can expand on our offerings in the coming years to help provide students of color with resources to level the ability to take advantage of opportunities to develop in the appellate field so that the lawyers who appear in appellate courts will more accurately reflect the legal profession and society as a whole. This also will allow us to help provide participating law firms and judges the ability to find highly capable talent to make their offices and chambers even stronger than they already are. In the meantime, we, and The Appellate Project mentees look forward to seeing you at the Symposium.

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Feature Articles

Lessons Learned, Challenges Ahead: *Reflections on the 2021 Judicial Symposium*

By Amy L. Miletich, Vice President



For seventeen years, appellate court judges from more than forty states have come together annually to share legal knowledge and to promote the continued administration of justice. In light of COVID-19's profound impact on our nation's legal system, the 2021 judicial symposium—"Lessons Learned, Challenges Ahead: Emphasizing the Importance of the Judiciary in the New Normal"—focused not only on the past challenges faced by the judiciary, but also on how the legal community has and will continue to change and adapt to such tests.

The keynote speaker was the Honorable Richard M. Gergel. Judge Gergel's book, *Unexamined Courage: The Blinding of Sgt. Isaac Woodard and the Awakening of President Harry S. Truman and Judge J. Waties Waring*, was featured on an episode of PBS' *American Experience*. It details how the horrendous racial injustice faced by Sgt. Woodard forever changed the course of civil rights in America. Judge Gergel began the symposium by sharing Sgt. Woodard's story and his effect on President Truman and Judge Waring, which includes a legal legacy that laid the framework for *Brown v. Board of Education*.

Against the backdrop of the challenge of COVID-19 and the pandemic's effect on the judicial system, the symposium also highlighted the innovation that has arisen from COVID-19 restrictions, including the adaptation of court hearings to fit a virtual space. Symbolic of the lessons and advancements of 2021, the symposium also explored innovation, cybersecurity, and racial equality and justice. In his presentation, "Hopeful Signs from a Hard Year," the Honorable Jeremy Fogel, Executive Director of the Berkeley Judicial Institute, discussed the legacy that the COVID-19 era has left on our judiciary, from combating structural inequality to strengthening judicial independence. We also heard from a panel of members from the plaintiffs bar and the defense bar

about how virtual trials represent both new possibilities and new difficulties.

The symposium also included a program entitled "Unringing the Cybersecurity Bell: The Court's Role in Mitigating Cybersecurity Risks Invited During the Discovery Process." The panel provided insights from defense counsel, a cybersecurity expert, and the Honorable Joseph C. Iannazzone, concerning the balance among confidentiality, security, and truth-finding when faced with disclosing sensitive information in discovery.

Finally, in their presentation, "Ensuring Racial Equality and Justice for All in State Courts," the Honorable Tanya M. Bransford, the Honorable Susan F. Maven and the Honorable Veronica Galván discussed the commitment by many state courts to combat racism and promote equality and justice for all.

The feedback from the judges who attended the 2021 judicial symposium was overwhelmingly positive and included comments such as:

- "As always, the faculty was exceptional."
- "Top notch! Bravo!!!"
- "Outstanding program!!!!!"
- "As always NFJE is leading the discussion of subjects being confronted by the judiciary."
- "This is one of the best presentations that I have participated in over the last 40 years."

I am honored to be a part of the NFJE and last year's program chair. I look forward to another excellent judicial symposium in 2022.

Amy L. Miletich, Vice President

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Feature Articles

Technology and the Courts: *From cybersecurity to the virtual trials: How the Covid-19 pandemic accelerated the courts' crash course on the risks of technology.*

By: Imoh E. Akpan



As the world exits the pandemic stage of the COVID-19 outbreak, one thing is clear: technology is no longer just a luxury; it is a staple of everyday life. From on-demand food delivery to virtual meetings, Americans learned how to function in a world where in-person interaction went from the rule to the exception. The moratorium on in-person gatherings along with social distancing protocols significantly impacted the U.S. legal system, as courts figured out how to keep the legal system running, including preserving litigants' access to the courts and the right to jury trials (civil

and criminal). One of the current challenges is how to clear the backlog of cases that were on hold during the height of the pandemic, while also handling the influx of new case filings, which were held due to the tolling of statutes of limitations in several states.

To meet these challenges, courts had to be creative with docket management and fully embrace the use of technology and online platforms. As a result, courts have increased access by developing remote services both to conduct essential functions – bail reviews, online dispute resolution, motions hearings and virtual trials – and to provide greater flexibility for court users and court staff. *What impact will this increased reliance on technology have on courts?*

The court system maintains innumerable amounts of documents and data. While most of this information, including pleadings, motions, briefs, and court orders, is meant to be publicly available, the courts also maintain information that is often highly sensitive, such as medical records, financial data, trade secrets, etc. Security of this information through controlled access was easily achieved when physical documents were maintained. There were one or more copies of the documents stored at a controlled location (clerk's office).

As technology has permeated every facet of everyday life, the courts have used technology to streamline not only public access to information, but also how that information is received and stored. The federal judiciary implemented its Public Access to Court Electronic Records ("PACER") in 1988 and its case management and electronic case filing system ("CM/ECF") in 2003. The majority of states have followed suit with similar public access websites and electronic filing systems. The digital access and exchange of information has increased the efficiency throughout the legal system. No longer are judges, litigants or court



clerks forced to coordinate with the clerk’s office to access court documents. Instead, authorized users can review documents stored on a file server from their offices or practically any other location with internet access. This ease of access by authorized parties has also increased the risk of unauthorized access.

The COVID-19 pandemic has had an unprecedented impact on the landscape of cybersecurity and IT infrastructure. Prior to the pandemic, private companies and government agencies were protected from cyberattacks because of their slow progress in digitizing their information and maintaining records on cloud-based networks. Accessing critical data used to be cumbersome, as you would have to be physically inside the office or courthouse, bypass multiple methods of verification, and access the equipment locally. The COVID-19 pandemic forced courts to switch to using digital technology to accommodate a remote workforce. Unfortunately, the move to digital, cloud technology created security and privacy issues, because some courts’ IT infrastructure was outdated. With remote and wireless work, a remote employee could use any computer on any network to access crucial information with little to nothing protecting or segmenting this access. Cyberattacks launched from anywhere around the world would not face as many challenges as to a non-cloud-based storage system. In January 2021, James Duff, the director of the Administrative Office of the U.S. Courts, announced that the Case Management/Electronic Case Filing system had been breached as part of the SolarWinds

hack that compromised other U.S. government agencies and companies. Director Duff said “certain sealed filings in CM/ECF ... contain sensitive non-public information that, if obtained without authorization and improperly released, could cause harm to the United States, the Federal Judiciary, litigants, and others.” Duff asked all courts to “issue a standing or general order or adopt some other equivalent procedure requiring that highly sensitive documents (HSDs) will be accepted for filing only in paper form or via a secure electronic device.” He added that sealed court orders and any other sealed documents should not be uploaded into the CM/ECF, PACER or any other system connected to a network or the internet. The SolarWinds attack was of particular concern, because government officials could not rule out that hackers still had access to the filing system. Several government agencies at the state and local level have experienced similar cybersecurity incidents during the pandemic, including the Alaska Court System, which was forced to shut down its online services in May 2021.

How do courts balance the benefit of remote filing and interfacing over the internet with the increased risk of cyberattacks? Should state courts mirror the federal judiciary’s move to paper documents for highly sensitive information in the court system? The answers to these important questions are critical as the courts enter the “new normal” of the post-pandemic hybrid work environment.

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Featured Articles

Virtual Jury Trials in the COVID-19 Era

By Michael King



The challenges created by the COVID-19 pandemic for trials, and particularly trials by jury, were set forth by a panel of distinguished advocates, several of whom had already tried their hand at the “brave new world” of virtual jury trials. Michael Wallace of Wise Carter Child & Caraway PA, in Jackson, Mississippi, moderated a presentation by three trial lawyers, all of whom had experienced virtual jury trials: Lisa P. Oberg, of Husch Blackwell LLP, Oakland, California; Mark Scheer, of Scheer.Law PLLC, Seattle, Washington; and Michael S. Wampold, of Peterson Wampold Rosata Feldman Luna, Seattle, Washington. Michael King of Carney Badley Spellman, Seattle, Washington, offered an appellate counsel’s perspective.

The panel’s West Coast “tilt” reflected the fact that California and Washington State courts pioneered virtual trials. Ms. Oberg described the experience of the Alameda County state courts, which held the country’s very first virtual jury trials. As the panel’s trial counsel explained, *every* step of a virtual jury trial is conducted without any of the participants—judge, lower bench, jury members, counsel for the parties, the witnesses—gathered in a single place. Zoom and other platforms, virtually unknown to the legal world before the onset of the pandemic in March 2020, had to be mastered—and in some ways reconfigured—to bring the judge, jury, counsel and witnesses together in a workable way on screen. And the transition already underway in some jurisdictions, at least partially shifting away from paper as the primary medium to embody key “pieces” of the trial—briefs, motions, instructions, order, exhibits—suddenly accelerated to “after-burners,” because everything had to be rendered into an electronic form that could be used in the new virtual courtroom.

Take just one example of the familiar rhythm of a trial—use of exhibits. Exhibits are still marked, they are still shown to the witness for identification, and



they are still offered into evidence. But now all that has to be done by an electronic process that played out visually on the computer monitor. The trial court panelists described how counsel and courts worked together to put in place a virtual substitute for each of these steps (*e.g.*, “sharing” an exhibit not yet in evidence with the witness on the witness’s screen, opposing counsel’s screen, and the judge’s screen, but not the jury’s screen until the exhibit had been admitted).

The same process of cooperation was applied to create a virtual counterpart to each phase of the trial: voir dire, opening statement, objections during the trial’s course, hearing of trial motions, working through jury instructions, closing arguments, handling jury questions during deliberations, taking the verdict. The panelists described how each stage of the case was worked into a virtual form that allowed the process of conducting jury trials to continue.

The panelists also discussed the unique challenges presented by virtual jury trials, such as the problem of keeping members of the jury focused on the matter at hand, when they are not in the courtroom in their seats in the jury box. The judge and counsel had to

acknowledge and also police the temptation for jurors to treat the trial as just another Zoom meeting, when multitasking by checking one's phone for texts is commonplace. And counsel found themselves no longer in the three-dimensional space of the courtroom but participants in a multi-location, live production, with all the adaptation this required in the ways they approached the presentation of evidence and argument, to the judge and the jury.

By the time our panelists gathered in Chicago, virtual jury trials had become almost commonplace in certain

parts of the country. Some of these trials had generated appeals that were starting to make their way through the appellate process. Appellate courts will soon be grappling with a host of issues raised by this new justice platform, such as what to do about the witness whose testimony was obscured by a hurricane passing close by their location. Perhaps most fundamentally, appellate courts will have to wrestle with whether this innovation can be reconciled with what is essential to making a jury trial truly a jury trial. This may be a fruitful topic for a future symposium presentation.



Welcome back to Chicago!



Registration

We are once again at the wonderful Loews Chicago Hotel - close to dining, shopping, Navy Pier, Millennium park and more. We hope you take advantage of a Windy City summer during your stay.

To register:

Phone: 312.698.6202

Email: tparks@nfje.net

Hotel and Travel

Registration for the 18th Annual Judicial Symposium is first come first served. Once you register on www.NFJE.net, you are welcome to make reservations at the Loews Hotel under the NFJE room block. In order for your (up to) two night stay to be covered, you must be registered for the program. We will reimburse you for up to \$500 for flight and other transportation costs, including ground transportation, with proper receipts following attendance at the program.

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Cancellations are accepted up to three weeks in advance, please email your request in writing to tschorle@NFJE.net