

NFJE Symposium a Tremendous Success



The National Foundation for Judicial Excellence (NFJE) held its Second Annual Judicial Symposium July 7–8 in Chicago. This year's Symposium, entitled *Essential Elements of Justice: Judicial Independence and Client Privileges in the Modern Courtroom*, built upon the success of the 2005 event with 138 judges representing 38 states in attendance.

Saturday morning's sessions addressed current theories on the use and abuse of the attorney-client privilege and the use of protective orders and confidentiality agreements. **Chilton Davis Varner** of King & Spalding in Atlanta led off the day with an overview of the attorney-client privilege before exploring several recent issues of relevance. Among the issues addressed was the effect of disclosure of internal investigations to government prosecutors: in particular, the Department of Justice standards under the last two executive administrations, which encourage federal prosecutors to seek waiver of attorney-client privilege in exchange for more lenient treatment in the context of corporate prosecutions. Ms. Varner also discussed what is now required to prove the existence of privilege as courts continue to interpret the broad language and unanswered questions from the seminal case, *International Paper v. Fibreboard Corp.* Developments in the electronic discovery arena, as well as the debate over whether Internet questionnaires (client "trolling") are privileged were among the other issues that Ms. Varner discussed. Noting the complications involved in the corporate context (e.g., who can waive? Business or Legal advice?), she lamented the frequent misperception that the attorney-client privilege is some sort of "sinister bar to the truth." This privilege, according to



William A. Coates (left) and Paul R. Rice debate the role of confidentiality and privileges in the administration of justice.

Ms. Varner, is supposed to have "teeth" and deserves attention and respect.

Theresa M. Gillis, of Jones Day in New York City, followed with a presentation on protective orders and confidentiality that reviewed representative precedent, as well as some of the more comprehensive state statutes to deal with the matter. Proclaiming herself an "advocate of protective orders," Ms. Gillis also highlighted practical considerations that should be addressed when crafting protective orders, e.g., who can have access, "clawback" provisions, and the treatment (sealing, redacting) of judicial records.

The morning break was followed by a lively moderated debate on the issue of

whether "confidentiality and privileges are essential to the administration of justice and the resolution of disputes in the courts" between **Paul R. Rice**, Professor of Law at American University, Washington College of Law and **William A. Coates** of Greenville, South Carolina's Roe, Cassidy, Coates & Price, PA. **Matthew Y. Biscan** of Clisham Satriana & Biscan in Denver served as moderator.

Among Professor Rice's contentions were the ideas that the attorney-client privilege does not really work in the corporate context (too much confusion about who is actually represented), that it is overly

complex and expensive to deal with, and that it simply makes no sense to suppress relevant information that is important to litigation in the corporate context. Mr. Coates supported confidentiality, suggesting that it is, "if not a bright line, at least a first line" in the preservation of the integrity of the adversarial process. While pointing out that the privilege of confidentiality is, from a historical and utilitarian perspective, designed to be construed narrowly and operate as the least restrictive "obstacle" possible, it is nonetheless invaluable for the protections it affords, not the least of which being the sense of sanctity that people feel about conversations with attorneys.

The myriad issues surrounding infringements upon judicial independence were addressed in the afternoon sessions, including luncheon keynote speaker **Arthur R. Miller**, the Bruce Bromley Professor of Law at Harvard Law School. Calling the concept of judicial independence unclear and complicated, where "one size does not fit all," Professor Miller reviewed how "attacks on judicial independence have been part of our life since Genesis, and, whether we like it or not, will be part of our life until Armageddon." He cited a better public understanding of how our justice system works and



From left: Chair of the NFJE Board Lloyd Milliken, Jr., keynote speaker Harvard Law School Professor Arthur R. Miller and NFJE President Robert E. Scott, Jr.

how it affects our lives, the enhanced public policy role of courts, and the ever-increasing media attention devoted to almost everything judges do (“Nancy Grace and Bill O’Reilly are not your friends!” quipped Miller) as support for the notion that judicial independence will no time soon lose its status as a major topic. In light of all of this, however, we must not forget to recognize the many ways that judicial independence has found a way to shine through: whether seen in troop deployment to enforce school desegregation in the wake of *Brown v. Board*, or the fact that, despite its polarizing nature, *Bush v. Gore* did not result in rioting in the streets, or, perhaps most telling, the truth that no federal judge has ever been impeached as a result of one of his or her decisions.

Describing the burden of judges as being the “black-robed line separating society from the jungle,” Professor Miller urged support for public education and the enlistment of help from organizations such as the NFJE to make all Americans realize the importance of judicial independence to their lives. He warned against disengaging from media, the public and from politicians. He asked the audience to be vigilant and proactive in this matter, and to speak out.

The remainder of the afternoon was devoted to the topic of judicial independence. The first speaker was Professor **Sherrilyn Ifill** of the University of Maryland. Professor Ifill’s presentation, “Jurisprudential Review of Judicial Independence,” complemented Professor Miller’s address wonderfully as she delved further into aspects of judicial independence from his-



Speakers on judicial independence partipate in a panel discussion (from left): D. Dudley Oldham, Sherrilyn Ifill and the Honorable Thomas R. Phillips.

torical, structural and constitutional points of view. Attorney **D. Dudley Oldham** of Fulbright & Jaworski’s Houston office delivered a compelling presentation on “How Limits on Judicial Independence Affect Litigants, the Courts and the Public,” where he outlined many ways in which judicial independence promotes a healthy government and society, including the separation or powers/checks and balances, the protection of commerce and personal liberties, and public trust and confidence in the justice system. He stressed the importance of support for the judicial branch and increased judicial salaries, and the opposition of jurisdiction-stripping legislation. The final afternoon speaker was the Honorable **Thomas**

R. Phillips, the former Chief Justice of the Texas Supreme Court, who gave the audience some very practical tips and action plans that will aid in preserving and fostering judicial independence. The final segment of the afternoon program was a panel discussion among the three afternoon speakers who answered many questions from the attending judges.

Lloyd Milliken, who completed his term as the NFJE’s first president on July 9, was extremely pleased by the success of the second Annual Judicial Symposium. “The defense community should recognize and applaud what the NFJE has accomplished in the 21 months of its existence. The two judicial symposiums were attended by almost 20 percent of the state appellate judiciary, almost all of whom were extremely compli-



Christopher Tompkins served as the Program Chair for the second year.

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mentary and positive,” Milliken said.

To the present, funding for the NFJE to bring the judges to Chicago has been through the generosity and commitment of DRI.

In that regard, Mr. Milliken stated “it is now time for the defense community to step forward and financially support the NFJE. Without such broad-based support, the future success of the Foundation cannot be assured.”

Contributions to the NFJE may be made by contacting NFJE Managing Director Margot Vetter at 150 N. Michigan Ave., Ste. 310, Chicago, Illinois 60601, (312) 698-6280, nfje@nfje.net.