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Association News

Senior – and former Chief – **Judge David Hansen** will be the **speaker** for the **free** Association **breakfast** to be held in Minneapolis in conjunction with the Judicial Conference. Coffee and rolls will be available beginning at 7:30 a.m. this Thursday (July 17) at the Hyatt Regency Hotel, where the Judicial Conference is being held. You do not have to be signed up for the Judicial Conference to attend the breakfast, but please notify an Association officer as soon as possible (see the Association web site, shown at the bottom of the page, for names and addresses) if you plan to be present for the breakfast. Your colleagues who are not yet members of the Association may join at the door or may attend the breakfast for \$12.

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Association membership as of July 10 stood at 321, an increase of 56 from the date of the first newsletter. **Blue ribbons** will be available at the **Judicial Conference** for Association members to attach to their name tags, so members can identify and network with their fellow members and promote the Association to nonmembers who are curious about the ribbons.

Copies of the initial newsletter and of the minutes from additional Board meetings have now been added to the Association **web site** (see address at bottom of page). Also, Liaison Committee chair John Baker has filled out his committee and posted committee member names and contact information on the web site. The purpose of the **Liaison Committee** is to facilitate communications and cooperation between the new Eighth Circuit Bar Association and existing state, local, and federal bar associations.

Additional Association **committees** include the Membership Committee, the Programs Committee, and the Communications Committee. Contact information for the former two committees also can be found on the Association web site. To volunteer either your services or your ideas for the Communications Committee, contact committee chair Margaret Callahan at mccallahan@belinlaw.com or vice chair Annamary Dougherty at adougherty@cgwg.com.

Special Session

There is still time to register for the Eighth Circuit **Judicial Conference**, scheduled for **this week** in Minneapolis. Social events begin with a reception Wednesday evening July 16, and the general session runs from Thursday morning through Friday noon. For further details on cost and registration, see the Circuit Executive's web site at www.ce8.uscourts.gov.

The opening reception Wednesday evening will be held in the rotunda of the Minneapolis Institute of Arts. The galleries will remain open for attendees, and

docents will be present. Judge Diana Murphy, Conference Chair, is especially excited about the new Asian rooms at the museum, showcasing Chinese scholars' residences.

The theme for the general session is "Legal Issues in a New World," and the first morning's speakers – including Asa Hutchinson, Judge Michael Davis, Steven Brill, and Judge William Webster – possess a wealth of knowledge on topics relating to America and the world after 9/11.

The luncheon speaker will be Alan Page, Minnesota Supreme Court Justice and member of the professional football hall of fame, while afternoon topics will include bankruptcy, employment law trends, and ethical issues surrounding cloning, stem cells and reproductive technology.

For Friday morning, the program includes a panel on litigation challenges in the 21st Century, a U.S. Supreme Court update, a discussion of how the media covers crime, and a talk by U.S. Senator Norm Coleman of Minnesota on "Perspectives of a New Senator."

Attendees particularly should try to arrive early Friday morning to catch the presentation of the colors by a Native American Honor Guard. A Marine Color Guard will open the Thursday session.

Bench Briefs

Judge Theodore McMillian took **senior status** July 1, 2003. Judge McMillian, who maintains his chambers in St. Louis, was appointed to the Court in 1978. President Bush has not yet nominated a replacement for Judge McMillian.

President Bush also has not yet nominated a replacement for Judge Pasco Bowman, who plans to take senior status August 1, 2003; and the Senate Judiciary Committee has not yet scheduled a hearing on the nomination of Steven M. Colloton to succeed now-Senior Judge David Hansen.

Appealing Site

The advent of word processing software and printers has taken us far from the old typewriter formats for briefs. The Federal Rules of Appellate Procedure reflect this change, but few attorneys have thought through some of the **subtle aspects of typography**. Judge Lavenski Smith, speaking at this Spring's Eighth Circuit Appellate Practice Institute, referred to – and endorsed – an excellent discussion of typography published by the U.S. Court of Appeals for the Seventh Circuit as part of that Circuit's "Practitioner's Handbook for Appeals." Chapter XX of the Handbook, in addition to addressing the requirements of the Federal and Seventh Circuit Local Rules, explains the reasoning behind the requirement for use of "serif" fonts, discusses the use of underlining, italics and capitalization for emphasis, and urges attorneys to use book-like fonts such as those used by the U.S. Supreme Court and the Solicitor General of the United States.

You can find the Seventh Circuit Handbook online at www.ca7.uscourts.gov/Rules/handbook.pdf, or you can link directly to the typography chapter by going to the Eighth Circuit web page (ca8.uscourts.gov) and clicking on "COA Information," and then on "Rules & Publications."

Time, Place & Manner

A panel of the Eighth Circuit will sit **July 24, 2003**, in St. Paul to hear **argument** in a case involving the temporary closure, by order of the National Indian Gaming Commission, of the Meskwaki Casino in Iowa. The Eighth Circuit web site home page features a special link to the briefs and important orders in this **high-publicity case**.

The parties, in addition to the National Indian Gaming Commission, include the federally recognized Meskwaki tribal council and a group led by the "hereditary" Meskwaki tribal chief. The legal issues involve federal jurisdiction over tribal affairs and administrative procedure and exhaustion

of remedies before the National Indian Gaming Commission. The case arises out of the alleged physical removal by one group of the other with regard to the operation of the casino.

Issues on Appeal

The Eighth Circuit on June 27, 2003, in a case heard **en banc** last September, enforced an **appeal waiver** in a plea agreement as barring the defendant's challenge to the conditions of his supervised release. (United States v. Andis, No. 01-1272). **Four** judges wrote **separate opinions**, with none commanding a majority.

The dispute focused on the "miscarriage of justice" exception to the enforceability of appeal waivers, with a plurality of the court, in an opinion written by Judge Michael Melloy, agreeing that a defendant pursuant to this exception could challenge an "illegal" sentence but that the defendant's challenge to the conditions of his supervised release was not a challenge to "legality."

Four judges, in a concurrence written by Judge Morris Arnold, argued that no principled basis exists for distinguishing between errors that render sentences "illegal" and other sentencing errors and that an appeal waiver should be enforced, without further inquiry, if made knowingly and voluntarily. Judge Kermit Bye in a brief concurrence responded that plea agreements could not be treated as ordinary contracts due to the imbalance of power between defendants and prosecutors. Senior Judge Bright, in an opinion joined by now-senior Judge Theodore McMillian, agreed with the plurality's statement of the general principles regarding enforceability of appeal waivers but found the "miscarriage of justice" exception applicable in this case.

The plurality, in a footnote, declared that the opinion in *United States v. Rutan*, 956 F.2d 827, 829-30 (8th Cir. 1992), is no longer good law insofar as that opinion might be read as suggesting that an illegal sentence can be challenged only on post-conviction relief, and not on direct appeal.

Higher Authority

The Eighth Circuit's analysis in **employment discrimination** cases appears **subject to change** in light of the U.S. Supreme Court's June 9, 2003, decision in *Desert Palace, Inc. v. Costa* (123 S. Ct. 2148). The Court in that case held that a plaintiff need not offer "**direct evidence**" of discrimination to obtain a "**mixed motive**" jury instruction on a Title VII claim.

The Court described the Courts of Appeals as being divided over the issue and cited *Mohr v. Dustrol, Inc.*, 306 F.3d 636 (8th Cir. 2002), as showing that the Eighth Circuit required direct evidence. The Court in reaching a contrary result found it unnecessary to analyze its prior *Price Waterhouse* (490 U.S. 228) decision and instead relied on the clear language of the subsequent Civil Rights Act of 1991.

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The U.S. Supreme Court in its two highly publicized cases regarding **affirmative action** in **college admissions** gave further guidance on issues that the Eighth Circuit apparently has never had to address. Apparently the **only reported Eighth Circuit case** on college affirmative action is *Henson v. University of Arkansas*, 519 F.2d 576 (1975), and the Court dismissed the claim their for lack of standing (a holding which might be questioned in light of subsequent Supreme Court equal protection decisions (see, e.g., 508 U.S. 656)).

Should the issue reach the Eighth Circuit in the future, the Court will now have the guidance of the U.S. Supreme Court's June 23, 2003, decision in *Gratz v. Bollinger*, regarding a University of Michigan undergraduate admissions policy under which applicants from underrepresented minority groups automatically received 20 admissions points – one-fifth of the total necessary for guaranteed admission. The Court rejected the notion that diversity could not constitute a compelling state interest, but it found that the policy of automatically awarding 20 points to every single applicant from an underrepresented minority group was not narrowly tailored to goal of achieving educational diversity. The Court explained that there needed to

be more individualized consideration made by the university instead of an automatic distribution of points.

The Court in *Grutter v. Bollinger*, also decided June 23, 2003, upheld the Michigan Law School's more flexible race-conscious admissions policy as being narrowly tailored to meet the diversity interest.

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While the U.S. Supreme Court in its June 26, 2003, decision in *Lawrence v. Texas* **overruled** its prior decision in *Bowers v. Hardwick* (478 U.S. 186), that reversal should have limited effect on existing Eighth Circuit precedents. The **Eighth Circuit** has **cited** *Bowers* in only a half-dozen decisions, and only two of those decisions involved claims brought by homosexuals.

In *Hartnagel v. Norman*, 953 F.2d 394 (1992), the Eighth Circuit merely upheld a summary judgment due to lack of evidence that a sheriff's office in investigating a series of threats and petty

crimes singled plaintiffs out for questioning based on their sexual orientation. In *Richenberg v. Perry*, 97 F.3d 256 (1996), the Eighth Circuit followed the lead of other Circuits in rejecting a challenge to the military's "don't ask, don't tell" policy.

Lawrence involved the convictions for deviant sexual behavior of two adult males discovered "in the act" in a private residence by a police officer responding to a report of a weapons disturbance. The U.S. Supreme Court held that the state statute under which the men were convicted violated the men's liberty and privacy interests as protected by the Due Process Clause of the Fourteenth Amendment. The Court described the conduct as private and consensual and not causing harm to others and characterized the *Bowers* decision as demeaning the lives and relationships of homosexual persons.

The Court found that there was no individual or societal reliance on *Bowers* of the sort that could counsel against overturning that decision.