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Association News

Five Eighth Circuit judges, plus Clerk of Court Michael Gans, are scheduled to appear on the **program** at the May **continuing legal education** seminar being co-sponsored by the Association.

The one-day session will be held **May 11, 2005**, at the Saint Paul Hotel in downtown **Saint Paul**. Following the program, those in attendance are invited to join Eighth Circuit judges and staff at a reception marking the anticipated temporary removal of Eighth Circuit operations from the Saint Paul Courthouse, due to the scheduled remodeling of that facility.

Cost for the program is \$165 for Association members. Registration information, including cost for nonmembers, is available at the web site (www.minncle.org) of program co-sponsor Minnesota State Bar Association Continuing Legal Education, or by calling that organization at 1-800-759-8840.

Two of the Court's **newer judges** – **Steven Colloton** and **Duane Benton** – will join with **Judge Roger Wollman** for an afternoon panel presentation on the “judicial perspective” on effective briefing and oral argument.

Judge Morris Arnold then will introduce the program's final speaker, Emory University Law Professor Polly Price, who will examine the legal legacy of Judge Arnold's brother and former Eighth Circuit colleague, the late Richard Arnold. Price early in her career served as a law clerk to Judge Richard Arnold, and she is working on a biography of the late judge.

Clerk of Court Gans will open the program with a presentation on “advanced tips” for appellate practitioners, to be followed by **Senior Judge Donald Lay's** insights into the importance for the appellate lawyer of concurring and dissenting opinions.

Additional speakers on the program are Minnesota Court of Appeals Judge Wilhelmina Wright, who will discuss handling the “difficult appeal,” and Minnesota practitioner (and past Association president) Eric Magnuson, who will discuss the potential uses of technology in appeals.

Application for six hours of continuing legal education is pending in Minnesota and other states within the Eighth Circuit.

Association members Tom Boyd and John Baker of Minneapolis took the lead in planning the program, with assistance from Association programs committee chair David Herr.

The latest edition of the Minnesota CLE “Eighth Circuit Appellate Practice Manual” will be available at a discounted rate to attorneys attending the program.

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Angela Campbell of the Federal Public Defender's Office in Des Moines is the **new Association Director** for the **Southern District of Iowa**. She replaces Margaret Callahan of Des Moines, who became Association secretary January 1, 2005.

Bench Briefs

Speakers ranging from U.S. Supreme Court Justice Clarence Thomas to a recent law clerk adopted a common theme – **balance of work and family** – in remarks last fall upon the **presentation** of the **portrait** of Eighth Circuit Senior Judge Pasco Bowman.

Justice Thomas, who is a personal friend of Judge Bowman, observed that the portrait will remind all who knew Judge Bowman of the “whole man” – i.e., not just Judge Bowman’s judicial abilities but “his warmth, his kindness, his gentle ways and his comforting words.”

Shannon Kimball, who served as a law clerk to Judge Bowman in 2000-02 and now practices in Atlanta, said that all of Judge Bowman’s law clerks have been inspired by the Judge’s success “not just in the law but in life.” Judge Bowman, she noted, illustrated the virtues of a balanced life by, for example, annually attending the Kansas City Royals opening day home baseball game with his law clerks, staff and family.

Kimball also commented on Judge Bowman’s practice of seeing the good in others and on his ability to make others feel at ease. In addition, she remarked on Judge Bowman’s sense of humor, noting that he has hanging in his chambers a piece of verse, entitled “Cow Poetry,” written on a cocktail napkin by one of his former law clerks.

Randy Coffey, a Kansas City attorney who served as a law clerk to Judge Bowman in the mid-1980s, remarked on Judge Bowman’s infectious enthusiasm, emphasis on accessibility in legal writing, and willingness to question conclusions – including his own.

Coffey recalled how his job interview with Judge Bowman turned into a four-hour conversation covering not just the law but politics, life and family.

Judge Bowman joined the Eighth Circuit in 1983 from the University of Missouri-Kansas City following an extensive career as a law school professor and dean. Judge Bowman served as Chief Judge for the Circuit from April 1998 to April 1999 and took senior status on August 1, 2003.

Judge Bowman’s portrait will hang in the Charles Evans Whittaker U.S. Courthouse in Kansas City, where Judge Bowman maintains his chambers and where the ceremony was held.

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Ceremonies upon the presentation of the **portrait** of **Senior Judge David Hansen** were held March 4, 2005, in Cedar Rapids, where Judge Hansen maintains his chambers.

A number of Eighth Circuit Judges were in town for the whole day, as three panels heard cases in special sittings at various Cedar Rapids sites (see separate story *infra*).

Highlights of the speakers’ remarks from the ceremony should be available for the next newsletter.

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A **transcript** of the September 2003 ceremony upon **presentation** of the **portrait** of **Senior Judge Theodore McMillian** appears in the front of 389 F.3d.

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The Eighth Circuit Library Newsletter reports **Senior Judge Gerald Heaney** is **co-author** of a book, *Unending Struggle: The Long Road to an Equal Education in St. Louis*, and that Judge Heaney visited St. Louis last fall for a book-signing.

As described in the Library Newsletter, Judge Heaney’s book tells the story of efforts toward **equal education** in **St. Louis** for African-Americans, with a detailed look at the Eighth Circuit case of *Liddell v. Board of Education*. Judge Heaney’s co-author, Dr. Susan Uchitelle, was involved in the implementation of the interdistrict portion of the St. Louis desegregation plan.

For more detail, visit the Eighth Circuit Library web site (accessible through the Eighth Circuit home page at www.ca8.uscourts.gov) and go to the November/December 2004 newsletter issue, or visit the web site of the book’s publisher, Reedy Press of St. Louis, at www.reedypress.com.

According to the web site for St. Louis public radio station KWMU (www.kwmu.org), Judge Heaney and his co-author appeared on the station's "St. Louis on the Air" program last November 8. Audio of the program apparently is currently available in the station's six-month on-line archive.

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All but two of the Eighth Circuit's eleven **senior judges** sat with the Court during at least five of the ten court weeks during the **2003-04 term**. Senior Judge George Fagg of Des Moines led the way, sitting with the Circuit for all or part of nine court weeks.

Meanwhile, based on a non-comprehensive search of decisions from other jurisdictions, seven Senior Eighth Circuit Judges sat outside the Eighth Circuit as **visiting judges** at least once during the 2003-04 court term, lending assistance to a total of **seven different circuits**.

Senior Judge John R. Gibson sat with five other circuits – the First, Second, Third, Ninth and Eleventh – while Senior Judge Frank Magill sat with four other circuits – the Third, Fifth, Ninth and Eleventh. Judges Gibson and Magill sat with the Eighth Circuit four times and twice, respectively, during the 2003-04 court term.

The Ninth Circuit made the greatest use of visiting Eighth Circuit Senior Judges, with Senior Judges Donald Lay, Myron Bright, Arlen Beam and David Hansen joining Judges Gibson and Magill in sitting with that Circuit at some point during the 2003-04 court term.

The Third Circuit benefitted from the services of Judges Lay and Bright, in addition to Judges Gibson and Magill, for a total of four visiting Eighth Circuit Senior Judges.

Senior Judge Pasco Bowman joined Judges Beam and Hansen as a visiting judge in the Fourth Circuit.

Apparently no Eighth Circuit Senior Judge sat with any of the Sixth, Seventh or Tenth circuits during the 2003-04 court term, although Judge Bright has already sat with the Sixth Circuit during the current term.

The Eighth Circuit now has ten senior judges, with the death of Richard Arnold this past September.

Former Eighth Circuit **Senior Judge Donald Ross retired** in the **Fall of 2003**, without sitting during the 2003-04 court term. Judge Ross, who maintained his chambers in Omaha, joined the Court in December 1970 and took senior status in 1987.

Special Session

Former U.S. Solicitor General Ted Olson and legal reporter Linda Greenhouse are among the **additional speakers** who will be joining U.S. Supreme Court Justice Clarence Thomas on the program for the **2005 Eighth Circuit Judicial Conference**.

The Conference, which is scheduled for **October 19-21, 2005**, will be held at the **Broadmoor** in Colorado Springs.

On-line registration for the Conference is scheduled to begin June 15, 2005, at www.ce8.uscourts.gov/judconfpub/. Attorneys also may contact the Circuit Executive's Office at 314-244-2600 for registration information.

Greenhouse, who works for the New York Times, has written a book on former U.S. Supreme Court Justice Harry Blackmun, with publication scheduled for later this year.

Other presentations confirmed for the Judicial Conference include "Guantanamo Bay and All That," by military law expert Eugene Fidell; a look at the future of federal sentencing and the U.S. Sentencing Commission by the three judges currently serving on the Commission and the Commission's general counsel; and a Supreme Court update from leading scholars including John Yoo of the University of California at Berkeley.

Invitations are pending to additional distinguished speakers.

All attorneys who practice within the states making up the Eighth Circuit are eligible to attend.

Time, Place & Manner

Three panels of Eighth Circuit judges heard cases the morning of March 4, 2005, in **Cedar Rapids, Iowa**. The judges were in town for the portrait ceremony for Senior Judge David Hansen, who maintains his chambers in Cedar Rapids.

Each panel sat at a different site – Division I at the U.S. Courthouse in Cedar Rapids; Division II at the Linn County (Iowa) Courthouse; and Division III at the Cedar Rapids Public Library.

According to Clerk of Court Michael Gans, Judge Hansen of Cedar Rapids conducted some historical research and could find no record of the Court previously having sat in Cedar Rapids.

All cases heard during the special sitting were from the Northern District of Iowa.

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A **panel** consisting of Eighth Circuit Judges Morris Arnold and William Riley and Eighth Circuit Senior Judge Pasco Bowman heard three cases at **Washington University** in St. Louis during the Tuesday afternoon of March court week.

The Court has now sat at four different law schools since the start of the 2004-05 term. During November court week, a panel in Saint Paul sat at the William Mitchell College of Law while a panel in St. Louis sat at St. Louis University School of Law.

Also, in early November a panel sat in a special session at Drake University in Des Moines, Iowa.

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The Eighth Circuit this term has been hearing a relatively **greater proportion** of its **scheduled oral arguments** in **Saint Paul**, as compared to St. Louis, according to Clerk of Court Michael Gans.

He attributed the shift to the large number of criminal appeals in the northern states (including Iowa) within the Circuit and to the increased number of immigration cases, many of which arise out of Minnesota because of its border location and large immigrant population.

In addition, Gans indicated the Court was making a special effort to clear its docket of cases that normally would be heard in Saint Paul, because the pending remodeling of the Saint Paul Courthouse will prevent the scheduling of arguments in Saint Paul for the 2005-06 court term, and possibly longer.

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The **temporary removal** of the Eighth Circuit from its space in the U.S. Courthouse in **Saint Paul** likely will not take place until **near or after July 1, 2005**, according to Eighth Circuit Clerk of Court Michael Gans. He said the Court does not yet have an address to which it will be moving but that he expects the temporary quarters will be within a few blocks of the Courthouse.

Issues on Appeal

Following the Supreme Court's issuance on January 12, 2005, of its decision in *Booker*, holding unconstitutional the mandatory application of the federal sentencing guidelines, the **Eighth Circuit** has **applied Booker** in a number of cases.

The Eighth Circuit had already selected two cases – *United States v. Mooney* (No. 02-3388) and *United States v. Pirani* (No. 03-2871) – for en banc review; and the Court requested supplemental briefs in *Pirani* and heard that case en banc in Saint Paul on March 9, 2005.

Pirani presents the issue of whether a sentence in violation of *Booker* constitutes “**plain error**,” such that a defendant who failed to challenge the constitutionality of the sentencing guidelines before the district court may now obtain relief on appeal.

Mooney, however, will not be heard en banc after all, as the panel on March 28, 2005, issued a new decision remanding the case to district court for a determination as to whether or not the defendant did in fact raise the *Booker* issue below, and for further proceedings if appropriate.

The panel in its new decision in *Mooney* noted that while district courts under *Booker* are not obligated to sentence in accordance with the federal sentencing guidelines, district courts must consult

the guidelines, with the sentence imposed to be upheld if “reasonable.”

The Eighth Circuit in *United States v. Rogers* (400 F.3d 640) for apparently the first time in a published case **reversed a sentence** under the *Booker* “**reasonableness**” standard.

Defendant Rogers, who was a felon in possession of firearms with a criminal history category of VI, sought a non-guideline sentence based on his extraordinary post-offense rehabilitation, and the district court sentenced him to probation. The suggested penalty under the guidelines was 51 to 63 months imprisonment; and the Eighth Circuit on appeal vacated and remanded for re-sentencing, stating that “[i]t is unreasonable to expect that defendants with similar records, guilty of similar conduct, would receive probation.” The panel further stated that a significant deviation from the guidelines was unreasonable in light of Rogers’ multiple supervised release/parole violations, knowing association with felons, multiple convictions, and history of drug abuse.

The Eighth Circuit has twice addressed the impact of *Booker* on **appeal waivers in plea agreements**, with different results. A panel in *United States v. Killgo* (397 F.3d 628) addressed the issue only in footnotes, stating that the appeal waiver in question extended to a constitutional challenge to the sentencing guidelines even if the defendant was not aware at the time of the plea agreement of that potential argument. The panel reviewed the sentence under the *Booker* “reasonableness” standard and upheld the sentence.

A different panel in *United States v. Lea* (400 F.3d 1115) remanded for re-sentencing in a per curiam decision. The panel noted that the defendant had raised the constitutional issue in district court and rejected the government’s argument that a reference in the plea agreement to the applicability of the guidelines reflected an express waiver by the defendant of the constitutional argument. The panel also rejected an argument that there was no *Booker* violation because the district court relied on facts admitted or stipulated to by the defendant, and it rejected an argument that the district court’s treatment of the guidelines as mandatory rather than advisory could be dismissed as harmless error.

The Eighth Circuit has already granted **en banc** review in another *Booker* case, *United States v. Coffey*, to address the issue of whether a **general objection** to the drug quantity used in sentencing is sufficient to **preserve a Booker argument** on appeal. The panel (395 F.3d 856), without expressly addressing the preservation of error issue, remanded for re-sentencing based on the district court’s pre-*Booker* attribution to the defendant of a greater drug quantity than found by the jury.

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The Eighth Circuit in the last two months has **heard three cases en banc**.

Most recently, during **April** court week in St. Louis, the Court en banc took up the issue of whether the removal a **passenger’s garment bag** from the luggage compartment of a cross-country bus, and the taking of the bag to a back room of the bus terminal, constituted a “**seizure**” of the bag.

The Eighth Circuit panel, in a split decision on interlocutory appeal, affirmed the district court’s order of suppression. *United States v. Va Lerie*, 385 F.3d 1141.

Judge Michael Melloy, however, authored a concurring opinion in which he suggested that the Court revisit its precedents to give more weight to the length of the detention of the bag; and Judge William Riley in dissent argued that an existing line of Circuit precedent already supports that approach and should have been applied to deny the motion to suppress.

Earlier, in **March 2005**, the Court in a special en banc sitting in Saint Paul heard two cases involving **federal sentencing** issues. The first case, *U.S. v. Pirani*, raised a *Booker* issue and is discussed elsewhere in this issue.

The second case, *United States v. Alvarado-Rivera* (386 F.3d 861), involved the proper analysis of evidence on the issue of whether a criminal defendant provided **full and truthful information** to the government, as necessary to qualify for relief, under 18 U.S.C. §3553(f), from a statutory mandatory minimum sentence.

The panel, in a 2-1 decision, held that once a defendant offers evidence of a full and truthful disclosure, the government must adduce contrary

evidence and cannot rely on the mere assertion that the story told by the defendant is too improbable to be true.

Judge Diana Murphy in dissent argued that the majority holding improperly shifted the burden of proof from the defendant to the government.

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The Eighth Circuit in its recent **en banc** decision in *Terrell v. Larson* (396 F.3d 975) extended **qualified immunity** to all defendant police officers in a civil action alleging denial of substantive due process based on the death of an innocent bystander in a collision involving a **speeding police vehicle**.

The Court en banc held that the same principles apply regardless of whether the police are engaged in high-speed pursuit of a fleeing suspect or merely responding to a disturbance call and that the decision to engage in high-speed driving is protected so long as the officers subjectively believed they were responding to an emergency and had no intent to commit harm.

The panel, in a split decision (371 F.3d 418), had affirmed the denial of qualified immunity to the driver of the police vehicle; and three judges dissented from the en banc decision.

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The Eighth Circuit last fall in its **en banc** decision in *United States v. Palmer* (380 F.3d 395) unanimously reversed its interpretation of 18 U.S.C. §3583(h) and held that the **maximum allowable sentence upon revocation** of a criminal defendant's **supervised release** depends on the period of supervised release authorized by statute for the offense in question, and not the period of supervised release initially imposed.

The Court noted that its new ruling would be consistent with precedents in other circuits and expressly overruled its 1996 decision in *United States v. St. John* (92 F.3d 761).

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The recent case of *Taylor v. Norris* (No. 04-1117, Mar. 21, 2005), is an unusual example not just of a grant of rehearing by the panel but of a grant of **rehearing** at the **request** of the **prevailing party**. The case involved a state habeas corpus petition, and the panel replaced its initial decision, in which it reached the merits and found no constitutional error, with an opinion holding that it could not reach the constitutional issue due to the petitioner's procedural default in state court.

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A panel of the Eighth Circuit recently affirmed, in *United States v. Bordeaux* (400 F.3d 548), that when the Court on appeal finds **error** in the **admission** of certain **evidence**, the Court nevertheless **takes that evidence into account** in reviewing a challenge, by motion for acquittal, to the **sufficiency** of the **evidence**.

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A **party** to a case **may not obtain immediate review** of a **contempt** order, the Eighth Circuit reaffirmed last fall in *Coca-Cola Co. v. Purdy*, 382 F.3d 774. The district court had entered a preliminary injunction against the defendant's use of certain Internet domain names; and the Eighth Circuit, while reviewing the injunction (*see* 28 U.S.C. §1292(a)), held that the defendant had to await final judgment before seeking review of the district court's order imposing sanctions for violation of the preliminary injunction.

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The Eighth Circuit's footnotes and unpublished per curiam opinions from the past several months contain the following **appellate practice "reminders"**:

****The table of contents to the appendix should identify individually the different papers included, rather than combining items under a limited number of general headings. (*McIntosh v. Monsanto Co.*, No. 03-3993, 3-7-05).**

****The Court will not consider arguments raised on behalf of a party not named as an**

appellant in the notice of appeal. *Roddy v. Banks* (No. 03-3735, 2-25-05).

**The time for appeal begins to run when the district court affirms a dispositive ruling of a magistrate judge, even if the district court ruling is not accompanied by a separate entry of judgment otherwise required by FRCP 58. (*United States v. Matlock*, No. 04-1513, 8-13-04).

**A pretrial motion to sever the counts against a criminal defendant does not preserve error for appeal unless renewed during or after trial. (*U.S. v. Fox*, No. 04-2859, 4-5-05).

**A magistrate judge’s recommendation for the denial of injunction relief is not immediately appealable; rather, 28 U.S.C. §1292(a)(1) authorizes appeal only after the district court passes on the magistrate’s recommendation. (*Williams v. Minn. Dep’t of Corr.*, No. 04-1733, 9-30-04).

Higher Authority

The U.S. Supreme Court recently **reversed** the **Eighth Circuit** on the issue of whether an **individual retirement account** is **exempt** from the holder’s **bankruptcy estate** to the extent provided by 11 U.S.C. §522(d)(10)(E) relating to pension, profit-sharing and similar plans. See *Rousey v. Jacoway* (No. 03-1407, Apr. 4, 2005), reversing 347 F.3d 689.

The Supreme Court held that individual retirement accounts are protected because early withdrawal penalties and other limits effectively tie the accountholder’s receipt of payments to the accountholder’s age. The Court noted that its ruling resolved a circuit split.

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The U.S. Supreme Court in its recent decision in *Rhines v. Weber* (No. 03-9046, Mar. 30, 2005) **rejected** the **Eighth Circuit position** on the handling of **state habeas** corpus petitions containing a **mixture of exhausted and unexhausted claims**.

The Supreme Court approved on a limited basis the practice, adopted in some other circuits, of holding a habeas petition in abeyance to allow the petitioner to pursue the unexhausted claims in state

court. Such a stay, the Supreme Court held, may be granted only when the petitioner shows good cause for the failure to exhaust, the unexhausted claims are not plainly without merit, and the petitioner is not guilty of intentional delay.

The Eighth Circuit in its per curiam decision in *Rhines* 346 F.3d 799, relied on its prior decision in *Akins v. Kenney*, 341 F.3d 681, in which it interpreted Supreme Court precedents as foreclosing any use of a stay to deal with a petition containing both exhausted and unexhausted claims.

The Supreme Court remanded *Rhines* to the Eighth Circuit for an exercise of discretion with regard to the potential issuance of a stay. The Supreme Court likewise, in a separate summary order, vacated and remanded *Atkins*, as to which a petition for certiorari was still pending.

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The U.S. Supreme Court on March 7, 2005, **granted certiorari** in the Eighth Circuit case of *Reeder-Simco GMC v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701 (2004).

The case involves a finding of “secondary line” **price discrimination** under the Robinson-Patman Act, 15 U.S.C. §13, in a context where the industry norm is customer use of competitive bidding, such that the plaintiff dealer had to rely on price quotes from the defendant manufacturer in responding to customer requests for bids but purchased vehicles from the defendant manufacturer only in those instances when the customer accepted the dealer’s bid.

The Eighth Circuit panel, in a 2-1 decision, upheld the jury’s finding of a statutory violation, including an award of treble damages.

Footnotes

This **newsletter** is compiled by the communications committee of the Association of the Bar of the United States Court of Appeals for the Eighth Circuit. Comments and suggestions should be addressed to committee chair Margaret Callahan (mccallahan@belinlaw.com) or vice-chair Annamary Dougherty (adougherty@cgwg.com).