



# ASSOCIATION OF THE BAR OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## Bench Briefs

**Senior Judge Theodore McMillian** will be honored at a ceremonial session of the Eighth Circuit to be held Wednesday September 10, 2003, at 3 p.m. The program will include the unveiling of Judge McMillian's **portrait** and the **presentation** to Judge McMillian of an American Judicature Society award.

The ceremonial session, which will be held in the Thomas F. Eagleton U.S. Courthouse in St. Louis, is open to the public. Attorneys who plan to attend should remember to leave extra time for parking and for passing through building security.

Judge McMillian as of September will have been on the Eighth Circuit bench 30 years. He was appointed by then-president Jimmy Carter in September 1978 and took senior status this past July.

Individuals scheduled to make remarks during the ceremony include Senior Eighth Circuit Judges Donald Lay and Richard Arnold, retired Missouri Supreme Court Justice Joe Simeone, Ann Carter Stith, Chief Judge Carol Jackson of the U.S. District Court for the Eastern District of Missouri, former McMillian law clerk Harry Wilson, and current and long-standing McMillian law clerk Marilyn Tanaka. Missouri Supreme Court Justice Richard Teitelman and F. William McCalpin will present the American Judicature Society award.

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The Senate **Judiciary Committee** on July 31, 2003, unanimously sent to the Senate floor the nomination of Steven M. **Colloton** to the Eighth Circuit Court of Appeals. No floor action has yet been scheduled.

Colloton, who currently is the U.S. Attorney for the Southern District of Iowa, was nominated in February to the seat left vacant when Judge David Hansen of Cedar Rapids took senior status. President Bush has not yet nominated a successor to either Judge Theodore McMillian of St. Louis or Judge Pasco Bowman of Kansas City, both of whom took senior status this summer.

## Time, Place & Manner

Attorneys soon will be able to **fill out Eighth Circuit forms on line** and, in some cases, send forms in by e-mail. According to Eighth Circuit Clerk of Court Michael Gans, the upgraded forms will be available on the Eighth Circuit web site within a month, and possibly within less than two weeks. Attorneys should watch the Eighth Circuit home page for an announcement of the availability of the new "fillable" forms.

Another new web site feature is already in place. Specifically, the court calendar now contains a link directly to the appellant's brief for each case set for argument during the week. Web site visitors, by using these links, can now more

easily identify the nature of the cases and types of issues to be heard during the particular court session. Gans says this feature was developed in response to comments from members of the media.

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The **public comment** period has just begun for a series of **proposed amendments** to the **Federal Rules of Appellate Procedure** which, if approved at all stages, would go into effect December 1, 2005. The text of the proposed amendments is now posted on the web site of the Administrative Office of the U.S. Courts. The summary also posted at that site suggests that the amendments address three major areas.

First, as discussed by Judge Hansen at the Association breakfast at the Judicial Conference (see *infra*), the proposed amendments call for the addition of a new Rule 32.1 addressing, on a limited basis, the issue of **citation of “unpublished” opinions**. Under the Rule as proposed, each Circuit would be required to allow the citation of “unpublished” opinions but would remain free to decide for itself the precedential effect – if any – to be accorded such decisions. A party who cited an “unpublished” opinion would be required to file and serve copies only if the opinion was not available in a publicly accessible electronic database.

Second, the proposed amendments call for the modification of Rule 4 to clarify when and how the time for filing a notice of appeal may be re-opened.

Third, the proposed amendments call for the modification of Rule 35 to clarify how the number of votes necessary to constitute a “majority” shall be determined in the context of petitions for en banc hearing when one or more judges is disqualified from sitting on the particular case.

The proposed amendments also call for the addition of a new subpart to Rule 27 to establish typeface and type-style requirements for motions and the addition of a new Rule 28.1 to collect in one place existing provisions relating to the briefing and argument of cross-appeals and to supplement those provisions.

The comment period runs through February 16, 2004. For a copy of the proposed rules and

details on where to direct comments, go to the web site of the Administrative Office of the U.S. Courts ([www.uscourts.gov](http://www.uscourts.gov)), click on “Federal Rulemaking,” and then look for the button at the top left labeled “Proposed Rules Amendments Published for Comment.”

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The Eighth Circuit is in the process of **revising its Rules Governing Complaints of Judicial Misconduct and Disability**. Proposed draft rules can be found on the Eighth Circuit web site under “COA Information – Publications.” Attorneys may submit comments, through September 5, 2003, by writing to the Clerk’s Office or Circuit Executive’s Office at the U.S. Courthouse in St. Louis or by directing an e-mail to the circuit executive at [rules@ce8.uscourts.gov](mailto:rules@ce8.uscourts.gov).

The proposed amendments to the Rules take into account changes in the underlying federal statute relating to judicial discipline. Until late last year, the judicial discipline provisions appeared as subpart (c) in a code section (28 U.S.C. §372) jointly addressing judicial discipline and disability retirement. As a result of legislation passed in November 2002, however, the judicial discipline provisions now appear, with certain modifications, as 28 U.S.C. §§351-364. The proposed Eighth Circuit Rules contain updated statutory references and other revisions as necessary to be consistent with the November 2002 legislation.

The new statutory provisions, and thus the revised Eighth Circuit rules, retain the basic framework by which the Chief Judge may dismiss complaints of judicial misconduct on certain preliminary grounds (e.g., complaint directly relates to the merits of a decision; action no longer necessary due to intervening events) but otherwise must refer complaints to a special committee for investigation and submission to the Eighth Circuit Judicial Council. A party aggrieved by a preliminary dismissal retains the right to seek Judicial Council review of the Chief Judge’s action; however, under the proposed revised rules, a petition for review would be considered first by a five-judge “review panel,” as newly authorized by 28 U.S.C. §352(d). Petitions would be referred to

the full Judicial Council upon the request of any review panel or Judicial Council member. *See* Proposed Rule 8.

The proposed revised Eighth Circuit rules include a new provision pursuant to which the Chief Judge could restrict an individual's use of the complaint procedure if the individual filed repetitive or harassing complaints or otherwise abused the complaint procedure. Rule 1(f). In addition, the proposed revised Eighth Circuit rules (1) provide for notice to the complainant of the option of contacting state or federal criminal authorities when a complaint involving non-frivolous allegations of criminal conduct is dismissed as being outside the jurisdiction of the disciplinary process; (2) address additional contingencies regard the disqualification of Judicial Council members from acting on certain complaints; and (3) allow Judicial Council members, in limited circumstances, to participate in the disposition of complaints against themselves. Rules 4(i), 14(k) and 18(f) & (g).

This is the first time the Circuit has directly sought comment from the general Eighth Circuit Bar with regard to proposed local rules changes. In the past, the Circuit has sought comment through the Advisory Committee maintained by the Circuit pursuant to 28 U.S.C. §2077(b).

## Association News

A large number of members and prospective members attended the **Eighth Circuit Bar Association breakfast** at the Eighth Circuit Judicial Conference in Minneapolis in July. Those present had the opportunity to mingle with a number of federal judges and to hear remarks from **Senior Judge David Hansen**. Judge Hansen challenged members to take an active role in commenting on the most recent proposed amendments to the Federal Rules of Appellate Procedure (see discussion above). In particular, Judge Hansen directed the attention of attorneys to proposed new Rule 32.1, concerning the citation of "unpublished" opinions, which he suggested might significantly impact practice in the Eighth Circuit.

Circuit Executive Millie Adams expressed appreciation for the contributions of the Association to the Judicial Conference and has challenged the

Association to increase its contributions for the next conference.

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Association members are invited to **copy the Association** on any **comments** submitted to the Rules Committee with regard to the **proposed amendments** to the Federal Rules of Appellate Procedure. Depending on the level of participation, the Association then would share member comments, for example, by compiling the comments for circulation to members, by including excerpts from the comments in the next newsletter, and/or by posting the comments on the Association web site. If you are willing to share your comments with Association members, direct a copy of your comments to Association president Eric Magnuson ([ejmagnuson@riderlaw.com](mailto:ejmagnuson@riderlaw.com)); secretary James Layton ([James.Layton@mail.ago.state.mo.us](mailto:James.Layton@mail.ago.state.mo.us)); or treasurer Craig Eichstadt ([craig.eichstadt@state.sd.us](mailto:craig.eichstadt@state.sd.us)). Please include your name and contact information.

## Special Session

The next Eighth Circuit **Judicial Conference** will be held October 18-21, 2005, at the Boardmoor in Colorado Springs, Colorado.

Nearly 600 persons attended the Conference this past July in Minneapolis. The general session presentations were not only informative and interesting but, on the subject of homeland security, occasionally controversial. The presentations qualify for continuing legal education credit, and attorneys who have questions in this regard should contact the Circuit Executive's office at (314) 244-2600.

## Issues on Appeal

The Eighth Circuit recently **refused to dismiss** an appeal on the ground that the defendants' post-trial motion was defective, for lack of detail under Fed. R. Civ. P. 7, and thus did not toll the time for appeal. *See Andreas v. Volkswagen of Am.* (No. 02-2309, decided 7-21-03). The

defendants, in a motion for judgment as a matter of law pursuant to Rule 50(b), had merely indicated their intent to challenge particular portions of the award of damages. Their supporting brief, while filed according to a time schedule set by the court, was filed outside the ten-day period for the filing of Rule 50(b) motions. The Eighth Circuit held that because the plaintiff had **fair notice of the Rule 50(b) issues** as a result of the defendants’ prior Rule 50(a) motion, the purpose of Rule 7 – the giving of notice as to the basis of a motion – was met and the Rule 50(b) motion, under the circumstances, was adequate.

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The Eighth Circuit in a recent decision applied the statutory ban on immediate appeal of certain remand orders in the context of an argument of **fraudulent joinder**. See *Filla v. Norfolk Southern Railway* (No. 02-2358, decided 7-22-03). The defendants had removed on grounds of diversity, asserting fraudulent joinder as to the non-diverse parties; and the district court in remanding had merely held that the defendants had not shown that the state in question would not recognize the causes of action pled against those parties. This remand, the Eighth Circuit concluded, was a **non-reviewable remand based on jurisdiction** even though the district court stopped short of determining that state claims actually existed as to the non-diverse parties, because joinder is not fraudulent, and diversity jurisdiction is lacking, so long as a reasonable basis exists for predicting that the state might impose liability against the non-diverse parties.

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The Eighth Circuit in its most recent **en banc decision** resolved a variety of issues arising under the **Hague Convention** and the International Child Abduction Remedies Act. See *Silverman v. Silverman* (No. 02-2496, decided 8-5-03). A majority of seven judges, in an opinion written by Senior Judge Arlen Beam, found that the United States was not the “habitual residence” of the children whose custody was at issue and that the

exception for “grave risk of harm” was not available to avoid return of the children to their habitual residence. The majority applied the de novo standard of review on the “habitual residence” issue.

Four judges, in a dissent written by Senior Judge Gerald Heaney, disagreed with the majority’s conclusion on “habitual residence” and further argued that the majority in analyzing the Hague Convention exceptions improperly failed to take into account the risk to the children of psychological harm and the older child’s objections to a return to the alleged “habitual residence.” The dissent further took the position that review on the “habitual residence” issue should be de novo only as to the district court’s application of facts to law, with review of factual findings limited to clear error.

Judge Michael Melloy in a separate opinion agreed with the majority in all respects except that he would have remanded for further consideration of the “child’s objection” exception.

All judges agreed that consideration of the Hague Convention issues was not barred, under the Rooker-Feldman doctrine, by a prior state court child custody decision because the state court was not asked to and did not decide the Hague Convention issue.

## Higher Authority

In apparently the only **Eighth Circuit case** fully argued before the U.S. Supreme Court this **past term**, the Supreme Court vacated the judgment of the Eighth Circuit. See *Sell v. United States* (123 S. Ct. 2174, vacating 282 F.3d 560). The case involved an order approving the involuntary administration of antipsychotic drugs to a criminal defendant, and the Supreme Court clarified the factors to be considered before involuntary medication can be justified solely on the ground that it is necessary to render the defendant competent to stand trial.

Three justices in dissent disagreed with the majority’s determination that the medication order was subject to immediate appellate review under the collateral order doctrine.

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The U.S. Supreme Court this past term in *Khanh Phuong Nguyen v. United States* (123 S. Ct. 2130) addressed the issue of when a **defect** in the **composition of a Court of Appeals panel** requires vacation of the panel’s judgment. All Justices agreed that the use of a non-Article III visiting judge (in this case, the Chief Judge of the District Court for the Northern Mariana Islands) was impermissible under the relevant statutes. Neither party, however, had objected in the Court of Appeals to the composition of the panel; and the Justices split five-four in concluding that the error was of such a serious and fundamental nature as to support vacation of the judgment under the “plain error” doctrine.

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The Eighth Circuit apparently will need to refine its **Eleventh Amendment** jurisprudence in light of the U.S. Supreme Court’s decision late last term in *Nevada Dep’t of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003). The Supreme Court held that Congress, in enacting the **Family and Medical Leave Act**, did have the power to abrogate the states’ Eleventh Amendment immunity, at least insofar as a claimant seeks relief for a violation of the right to leave to care for a spouse, child or parent with a serious health condition. The Eighth Circuit in *Townsel v. Missouri*, 233 F.3d 1094 (8th Cir. 2000), had held, without reference to the nature of the violation alleged, that the FMLA did not reflect a valid abrogation of state Eleventh Amendment immunity.

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The U.S. Supreme Court last term resolved a **circuit split** relating to **removal** jurisdiction contrary to the position taken by the Eighth Circuit in a 1947 case. See *Breuer v. Jim’s Concrete of Brevard, Inc.* (123 S. Ct. 1882); *Johnson v. Butler Bros.* (162 F.2d 87). Both cases involved wage/overtime claims under the **Fair Labor Standards Act**, and the Supreme Court rejected the argument that 29 U.S.C. § 216(b), which authorizes the bringing of such claims in state as well as

federal courts, constitutes an express limitation on removal within the contemplation of 28 U.S.C. §1441(a). (The language of §1441 actually has been amended since the Eighth Circuit’s 1947 decision, but the Circuit apparently has not yet been presented with the opportunity to reconsider the issue under the new language.)

## Footnotes

Minnesota Continuing Legal Education, a non-profit division of the Minnesota State Bar Association, this summer released the second edition of its **Eighth Circuit Appellate Practice Manual**. Senior Judge Donald Lay continues as one of the editors of this publication. For further information, visit [www.minncle.org](http://www.minncle.org).

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A variety of Minnesota legal organizations are combining to solicit and train attorneys to handle **pro bono appeals** to the Eighth Circuit of administrative denials of **asylum requests**. A free half-day program, set for October 3, 2003, will be particularly geared to attorneys who have never handled either an asylum case or an Eighth Circuit appeal. Eighth Circuit Clerk of Court Michael Gans will be among the speakers.

For further information, visit the Minnesota State Bar Association web site ([www.mnbar.org](http://www.mnbar.org)), go to the page for the New Lawyers Section, and click on “asylum appeal project.”

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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](mailto:mccallahan@belinlaw.com)) or vice-chair Annamary Dougherty ([adougherty@cgwg.com](mailto:adougherty@cgwg.com)). The committee would welcome additional members and/or occasional contributors.