



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

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Association News

It is not too late to join the list of Association members who will be obtaining **CLE credit** and **visiting** with **Eighth Circuit judges** and **court staff** September 13-14 in St. Louis.

The **Eighth Circuit Appellate Practice Institute**, jointly sponsored by the Association and the *Journal of Appellate Practice and Process*, will run Monday afternoon September 13th and Tuesday morning September 14th, with participants invited to attend a reception with judges and court staff Monday evening.

Participants will also get to hear from Eighth Circuit Clerk Michael Gans and a panel of Eighth Circuit judges as part of the CLE program.

Former deputy U.S. Solicitor General Andrew Frey will speak on seeking U.S. Supreme Court review, while other presenters will address appellate ethics, use of Internet sources, and finality and error preservation.

The program has been approved for a total of at least 6 hours of credit, including ethics credit, in each state within the Eighth Circuit that has a mandatory CLE requirement. The program also has been approved for CLE credit in Kansas and Wisconsin.

Program registrations will be accepted at the door, but out-of-town participants need to make hotel reservations before **August 23** to be assured of receiving the **special room rate**. Attendance is not limited to Association members, although Association members receive a program discount.

This will be the fifth annual Eighth Circuit Appellate Practice Institute. The Association upon its founding last year joined the original sponsor, the *Journal of Appellate Practice and Process*, as co-sponsor.

For further information, link to the program brochure on the Association web site at www.law.ualr.edu/eighthcircuitbar.

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Association members are invited to have **dinner** with the **Court** August 25, 2004, in **Omaha**. Two panels of judges will be hearing cases in Omaha the next day; and the judges, plus members of the court staff, have been invited to dine with Association members on the eve of the arguments. This will be a great opportunity for Association members to meet and visit with some of our judges on an informal basis.

Judges scheduled to hear argument, and expected to be present at the dinner, are Chief Judge James B. Loken, Judges Kermit E. Bye, Roger L. Wollman, and William J. Riley, and Senior Judges C. Arlen Beam and Donald P. Lay.

The dinner will be held on Wednesday, August 25, 2004, at 6:30 p.m. at Rick's Café Boatyard located on the Riverfront in Omaha. Cocktail "hour" (cash bar)

will be held from 6:00 to 6:30 p.m., with dinner to follow. The cost of the dinner is \$20.00.

Invitations have been sent to all Association members with Nebraska business addresses.

Any other Association member who will be in Omaha the evening of August 25 is also welcome to attend. Please contact Vicki Star at the Woods Aitken Law Firm in Lincoln (402-437-8500) or Judy Holloway at Fraser Stryker Law Firm (402-341-6000) for more information and for **reservations**. Please **respond no later than noon** on Friday, **August 20, 2004**.

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The Association kicked off its first **membership renewal** drive in late June. Based on the dates when the Association was founded and when most original members joined, the Association has established a “membership year” of July 1 through June 30. All members who joined before October 1, 2003, are being asked to renew at this time.

Members who joined after October 1, 2003, will not need to renew their memberships until July 1, 2005.

No renewal fee is due from those members, such as judges and judicial law clerks, who were exempt from the initial membership fee.

Initial response to the renewal drive has been positive, with more than 50 percent of members having already sent in their renewals. The Association also continues to gain new members.

For membership information, visit the Association web site at www.law.ualr.edu/eighthcircuitbar. If you have questions, contact Association membership chair Mark Marshall at mmarshall@dehs.com.

Bench Briefs

The Eighth Circuit’s **two newest judges** will sit with the Court for the first time in **September** in **St. Louis**. **Judge Duane Benton** officially joined the Court in early July after being nominated in February and confirmed in late June. **Judge Raymond Gruender** officially joined the court in

late June after being nominated last September and confirmed in May.

Public investiture ceremonies are pending for both new Judges, but no dates have been set.

Judge Gruender, who most recently was U.S. attorney for the Eastern District of Missouri, has his home chambers in the U.S. Courthouse in St. Louis, while Judge Benton, who most recently was a Missouri Supreme Court Judge, has his home chambers in the U.S. Courthouse in Kansas City. Judge Benton reportedly told the local newspaper in Jefferson City, Missouri, that he will continue to reside there at least until his children finish high school.

Judges Gruender and Benton are already taking part in Eighth Circuit business such as the voting on petitions for rehearing en banc.

The Eighth Circuit now has its full complement (11) of active judges, plus 11 senior judges.

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Senior Judge Richard Arnold has been honored with a **lifetime achievement award** from Scribes, the American Society of Writers on Legal Subjects. The award was scheduled to be presented at the organization’s annual meeting in early August.

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Eighth Circuit **Judge Steven Colloton** gave a 30-minute overview of federal appellate practice as part of a recent continuing legal education program geared toward newer Iowa lawyers. The Iowa State Bar Association sponsored the program, which was held in Des Moines.

Time, Place & Manner

The Judicial Conference Committee on Rules of Practice and Procedure at its June meeting **declined to approve a proposed new rule** of appellate procedure that would have allowed the **citation** generally of **opinions** designated as “**unpublished**.” The Committee, however, did not

outright reject the proposed Rule 32.1 but instead referred it back of the Advisory Committee on Appellate Rules for further study.

Proposed Rule 32.1 was one of a variety of proposed amendments to the Federal Rules of Appellate Procedure circulated for public comment last summer and approved by the Advisory Committee on Appellate Rules in April. The Committee on Rules of Practice and Procedure **adopted all of the other pending proposed amendments**. Those amendments – which involve generally the reopening of time for appeal, the counting of votes for hearing en banc, and procedural and format issues relating to motions and cross-appeals – now go to the Judicial Conference for consideration by that body.

Proposed Rule 32.1, according to the Advisory Committee report, was the subject of far more public comment than any of the other proposed amendments. Opponents of the proposed rule focused on the potential burdens on courts and litigants, in terms of costs and delay, if unpublished opinions could be freely cited. The Rules Committee in sending the proposed rule back for further study reportedly asked for empirical information comparing case disposition times for circuits currently allowing, versus circuits currently not allowing, citation of unpublished opinions. *See* 72 U.S.L.W. at 2767.

The Committee on Rules also expressed concern with proceeding with any amendment absent a consensus among federal judges. *Id.*

The May 2004 Advisory Committee report sending proposed Rule 32.1 (and the other proposed amendments) to the Committee on Rules is now available on the U.S. Courts Administrative Office web site and includes an extensive summary of the comments in favor of and against proposed Rule 32.1. According to this report, Eighth Circuit Chief Judge James Loken submitted a written comment noting that **7 of 9 active Eighth Circuit judges** and **3 of 4 senior Eighth Circuit judges** expressing a view **opposed** proposed Rule 32.1.

To view the report, go to www.uscourts.gov and click on “Federal Rulemaking” and then on “Dockets, Minutes, Reports,” and then on “Reports of Rules Committees.” Materials on proposed Rule 32.1 start around page 42 of the report, with the

summary of public comment starting around page 52 of the report.

As noted in the June issue of this newsletter, Eighth Circuit **Senior Judge Myron Bright** appeared at the April Advisory Committee meeting and testified against the proposed rule. Senior Judge Bright noted that when he came on the bench (1968), the Eighth Circuit gave each case “full treatment,” including a published opinion, unless the appeal was pro se or dismissed summarily as frivolous. He indicated that the Circuit adopted its nonpublication rule in 1973 as a response to growing caseloads. The nonpublication rule, according to Senior Judge Bright, allows judges to concentrate on getting the right result while resolving more cases because they do not have to focus on the detail necessary to published opinions.

Senior Judge Bright advocated that each circuit be allowed to handle its own caseload as it felt best.

A transcript of the April Advisory Committee hearing, including Senior Judge Bright’s comments, can be found at www.nonpublication.com/aphearing.htm. That web site, which is sponsored by an organization dedicated to promoting full publication of judicial opinions, includes a collection of other materials relating to proposed Rule 32.1.

For a summary of the proposed amendments that were approved by the Committee on Rules, see the August 2003 edition of this newsletter (available on the Association web site); or a full account of those amendments, visit the U.S. Courts Administrative Office web site at the address noted earlier in this article.

The Judicial Conference will meet in September, while the next Appellate Rules Advisory Committee meeting is scheduled for November.

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The Eighth Circuit, in an unusual **August sitting**, will hear cases in Omaha on August 26, 2004, in the Court of Appeals courtroom in the Roman L Hruska courthouse. Two panels will each sit for a half day.

The Eighth Circuit most recently sat in Omaha for two days in March, and before that sat one day in Omaha, and one day at the University of Nebraska-Lincoln, in October 2003.

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The Eighth Circuit, after hearing only two cases **en banc** during its entire 2003-04 term, has already scheduled **six cases** for en banc argument this fall. As noted elsewhere in this newsletter, a **seventh** case has been accepted for en banc consideration but not yet set for argument.

Three of scheduled en banc cases will be heard in St. Louis in **September** on the Wednesday of court week.

The first September case, *U.S. v. Allen* (357 F.3d 745), involves the application of *Ring v. Arizona*, 122 S. Ct. 2428, and the Fifth Amendment Indictment Clause to vacate a death sentence on the ground that the indictment failed to allege all elements necessary for imposition of the federal death penalty. The panel in its first opinion (247 F.3d 741) upheld the death sentence; but the U.S. Supreme Court vacated that decision and remanded for reconsideration in light of *Ring*. The panel on reconsideration then concluded that the indictment was defective and, with one judge dissenting, that the error was not harmless.

The second September case, *ACLU Nebraska Foundation v. City of Plattsmouth* (358 F.3d 1020), involves the constitutionality of the City of Plattsmouth's display of a Ten Commandments monument in a city park. The panel, with one dissent, held that the display constituted an impermissible establishment of religion. Senior Judge Richard Arnold in a separate concurring opinion expressed the view that the monument also reflected impermissible governmental discrimination among religions.

The third September case, *King v. Hartford Life & Accident Co.* (357 F.3d 840), involves the interpretation of the term "accident" in a life insurance policy providing extra benefits for accidental death. The panel rejected an argument that the death in question was the result of a "self-inflicted injury," rather than an "accident," when

the deceased voluntarily became intoxicated and crashed his motorcycle.

The Court will hear the second three scheduled en banc cases during October court week in St. Paul.

Issues on Appeal

The Eighth Circuit is one of several circuits that has already been faced with the issue of the **impact on federal sentencing guidelines** of the U.S. Supreme Court's June 24, 2004, decision in *Blakely v. Washington*, 124 S.Ct. 2531.

The Supreme Court in *Blakely* invalidated a sentence under a Washington statutory guidelines scheme on the basis of the rule, announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that any fact, other than a prior conviction, that increases a sentence beyond the statutory maximum must be found beyond a reasonable doubt by a jury. The statutory maximum, *Blakely* holds, is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

The decision in *Blakely* has led to a flurry of conflicting rulings, decisions and opinions from district court and appellate judges throughout the nation.

A panel of the Eighth Circuit in *United States v. Mooney* (No. 02-3388, July 23, 2004) relied on *Blakely* to hold, with one dissent, that the entire federal sentencing guidelines system is unconstitutional. However, on August 6, 2004, the Court on own its motion granted rehearing en banc, thereby vacating the July 24, 2004, panel decision. The date of the en banc hearing is yet to be announced.

Other courts of appeals have been divided as to whether or not *Blakely* applies to the federal sentencing guidelines, and if applicable, what type of system would now be appropriate for sentencing federal defendants. For example, the Seventh Circuit in *United States v. Booker* (No. 03-4225, July 9, 2004), in a 2-to-1 decision authored by Judge Posner (with Judge Easterbrook dissenting), in essence held that the application of the federal sentencing guidelines violates the Sixth Amendment as interpreted by *Blakely*.

Likewise, the Ninth Circuit in *United States v. Ameline* (No. 02-30326, July 21, 2004), found that *Blakely* applied to the federal sentencing guidelines, stating that “[T]here is no principled distinction between the Washington Sentencing Reform Act at issue in *Blakely* and the United States Sentencing Guidelines.”

The Fifth Circuit, in contrast, in *United States v. Pineiro* (No. 03-30437, July 13, 2004) held that *Blakely* did not render the federal sentencing guidelines unconstitutional and that, in the absence of a Fifth Circuit en banc or Supreme Court case on point, the court was bound to following existing precedent.

The Fourth Circuit, in an en banc sitting, issued an order in *United States v. Hammoud* (No. 03-4253, August 2, 2004) in which it declared that *Blakely* “does not operate to invalidate Hammoud’s sentence under the federal Sentencing Guidelines.” The Circuit en banc instructed courts in the Fourth Circuit to sentence under the guidelines but to also announce alternative sentences, pursuant to 18 U.S.C. 3553, which would treat the guidelines as advisory only.

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The Eighth Circuit in its recent decision in *United States v. Blue Bird*, 372 F.3d 989, clarified the **standard of review** for challenges to **evidentiary rulings**. In interpreting and applying most rules of evidence, the Eighth Circuit observed, the district court makes determinations of law that are subject to de novo review. *Id.* at 991. When the rule of evidence at issue requires a balancing, however, the Eighth Circuit still will accord deference to the district court’s discretion. *Id.* *Blue Bird* involved the application of Rules of Evidence 404 and 413, and the Court characterized its review as de novo. *Id.*

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The Eighth Circuit in a recent **en banc** decision **reinstated** a state **death sentence** that the panel had vacated due to perceived Eighth and Fourteenth Amendment violations in the exclusion during the penalty phase of a favorable character

letter. *Brown v. Luebbers*, 371 F.3d 458 (superseding 344 F.3d 770).

The Court en banc as an initial matter concluded that the state court had reached the constitutional issues, such that the deferential standard of review of 28 U.S.C. §2254(d) applied. The Court, however, then held that it would find no constitutional violation regardless of the applicable standard of review.

Seven judges joined the majority decision, with Judge Steven Colloton also filing a separate concurrence to defend the appropriateness of reaching the standard of review issue even though the government had not raised the point prior to seeking rehearing. Two additional judges concurred in the judgment, agreeing as to the proper standard of review and finding any constitutional error harmless.

Three judges in dissent disagreed with the majority both as to the proper standard of review and the absence of prejudicial constitutional error.

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The Eighth Circuit’s recent decision in *Younts v. Fremont County*, 370 F.3d 748, should serve as a “wake-up call” for counsel representing **parties** who **die** while their cases are pending. The Court in *Younts* held both that it had no authority to hear the appeal absent the **substitution** of a property party for the deceased plaintiff and that it had no authority to order substitution when neither party invoked the procedures of FRAP 43. *Id.* at 752.

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The Eighth Circuit recently has addressed a variety of **issues** of **appellate procedure** specific to its growing docket of **immigration** cases.

For example, the Court twice recently has interpreted the provisions of 8 U.S.C. §1252 regarding judicial review of immigration proceedings. In *Onyinkwa v. Ashcroft* (No. 03-2160, 7-15-04), the Court held that it had no jurisdiction to review an immigration judge’s refusal to grant a continuance of removal proceedings. Then, in *S-Cheng v. Ashcroft* (No. 03-

3232, 8-12-04), the Court held that it had no jurisdiction to review the government's choice to initiate removal proceedings, in preference to exclusion proceedings.

The Court also recently held, in *Ngure v. Ashcroft*, 367 F.3d 975, that it could not review the Board of Immigration Appeals' determination that a particular case should not merely be affirmed but should be affirmed *without opinion*. The Court noted that other circuits had reached varying conclusions on the reviewability of the procedural "no opinion" determination. *Id.* at 987-88 & n.6.

On the other hand, the Court in *Rife v. Ashcroft*, 374 F.3d 606, held that despite recent statutory changes, an appellate court still has the ability to stay the running of an alien's time for voluntary departure pending the resolution of an appeal. The Court noted that the alien must file an appropriate motion before the expiration of the time for voluntary departure, and it identified the elements necessary for the granting of a stay.

Finally, the Court in *Esenwah v. Ashcroft* (No. 03-1785, 8-5-04) reaffirmed that it does have jurisdiction to review the Board of Immigration Appeals' denial of a motion for reconsideration but that review is limited to an inquiry into whether the Board abused its discretion in denying reconsideration. The merits of the underlying decision, in the absence of a prior timely appeal, will be at issue only tangentially. The Court in early June addressed this same issue in *De Jimenez v. Ashcroft*, 370 F.3d 783, 788-89.

Higher Authority

The U.S. Supreme Court on June 28, 2004, granted **certiorari** in the **Eighth Circuit case** of *Rhines v. Weber*, 346 F.3d 799 (*per curiam*).

The case involves the issue of whether a federal district court, when presented with a §2254 **habeas** petition containing both exhausted and unexhausted claims, may stay proceedings on the exhausted claims while the petitioner pursues available state remedies on the unexhausted claims. The Eighth Circuit, relying on its prior decision in *Akins v. Kenney*, 341 F.3d 681, held that the district court was without authority to enter such a stay. A

number of circuits, in contrast, hold that a stay is permissible. *See id.* at 685-86.

Rhines is the **fourth Eighth Circuit case** already on the **docket** for review by the U.S. Supreme Court during its **2004-05 term**. Oral argument on the first of these cases, *Jama v. Immigration & Naturalization Service*, 329 F.3d 630, is set for October 12, 2004.

The Supreme Court fully heard and ruled on four Eighth Circuit cases during its 2003-04 term after fully hearing and ruling on only one Eighth Circuit case during its 2002-03 term.

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The U.S. Supreme Court in its recent decision in *Pennsylvania State Police v. Suders*, 124 S. Ct. 2342, **resolved a circuit split contrary** to the position taken by the **Eighth Circuit** on an issue relating to employer Title VII liability for a **constructive discharge** attributable to a hostile work environment.

Pursuant to the Supreme Court's 1998 *Faragher* decision (118 S. Ct. 2275), an employer faced with a hostile work environment claim that does not include allegations of a "tangible employment action" can assert an affirmative defense based on factors such as the employer's maintenance of an anti-harassment policy and the employee's failure to complain.

In *Suders*, the Supreme Court held that the *Faragher* affirmative defense is available even when the hostile work environment results in a constructive discharge unless the employee's decision to quit was triggered by a "tangible employment action."

The Eighth Circuit in *Jaros v. Lodgenet Entertainment Corp.*, 294 F.3d 960, 966 (2002), had held that a finding of constructive discharge established the occurrence a "tangible employment action" and made the *Faragher* affirmative defense unavailable.

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The U.S. Supreme Court in its March decision in *Crawford v. Washington*, 124 S. Ct. 1354, **abrogated** one of its own **prior decisions** on

the issue of the **Confrontation Clause** and the use at trial of **out-of-court statements**. Specifically, the Court in *Crawford* held that “testimonial” out-of-court statements may not be admitted at trial unless the defendant had an opportunity for cross-examination, thus overriding the focus in *Ohio v. Roberts*, 100 S. Ct. 2531, on reliability.

The Eighth Circuit has cited *Roberts* more than 60 times since that case came down in 1980; and the Eighth Circuit has already cited *Crawford* in four opinions, calling it a “case of great importance.” *United States v. Manfre*, 368 F.3d 832, 838 n.1. The Eighth Circuit, however, in each post-*Crawford* case so far has found the statements in question to be “non-testimonial.”

In addition, the Eighth Circuit in one of its new cases suggested that *Crawford* in any event would not apply retroactively. See *Evans v. Luebbers*, 371 F.3d 438.

The U.S. Supreme Court in *Crawford* seemingly disapproved the Eighth Circuit decision in *United States v. Papajohn*, 212 F.3d 1112 (2000),

by including that case in a list of examples of the admission, under the disapproved *Roberts* standard, of testimonial statements despite the absence of opportunity for cross-examination. 124 S. Ct. at 1372.

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. **Special thanks** this issue to Randy Armentrout of Des Moines for reporting assistance. Comments and suggestions should be addressed to committee chair Margaret Callahan (mccallahan@belinlaw.com) or vice-chair Annamary Dougherty (adougherty@cgwg.com). The committee would welcome additional members and/or occasional contributors.