



YEAR END ISSUE

*Association of the Bar
of the United States Court
of Appeals for the Eighth Circuit*

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EIGHTH CIRCUIT BAR ASSOCIATION ELECTS NEW OFFICERS

The Board of Directors of the Association of the Bar of the United States Court of Appeals for the Eighth Circuit, a/k/a the Eighth Circuit Bar Association, recently elected new officers for the coming year. Barry L. Pickens with Spencer, Fane, Britt & Browne, LLP, in Kansas City, Missouri, has been elected President. Diane B. Bratvold, an appellate attorney with Briggs and Morgan, P.A., in Minneapolis, Minnesota, will become President-Elect. Jeremiah J. Morgan with the law firm of Bryan Cave LLP in Kansas City, Missouri, is the new Secretary. Karl E. Robinson of Winthrop & Weinstine, P.A., in Minneapolis, Minnesota, has been elected Treasurer. Mark F. Marshall, with the firm of Davenport, Evans, Hurwitz & Smith, L.L.P., in Sioux Falls, South Dakota, will serve as Immediate Past President.

JUSTICE O'CONNOR SPEAKS AT UNIVERSITY OF ARKANSAS SCHOOL OF LAW DEDICATION

The Honorable Sandra Day O'Connor, retired Associate Justice of the United States Supreme Court, was the keynote speaker at the University of Arkansas School of Law building dedication this fall. The dedication, which took place on October 3, 2008, celebrated the 64,000 square foot expansion to the law school's facility in Fayetteville.

Justice O'Connor's address noted the socially progressive history of the University of Arkansas School of Law and, in particular, the story of the "Six Pioneers"—who were the first six African-American students who enrolled at the law school. The University of Arkansas was the first university in the south to allow integration of their law school without mass protests or violence. One of the conference rooms in the newly expanded law school is named for these pioneering African-American law students.

"The treatment of African-American students at this very university law school," Justice O'Connor observed, "was a result of decades of struggles by countless leaders across the country." Included among those leaders was her late colleague on the Supreme Court, Justice Thurgood Marshall, whose trail blazing civil rights work she praised.

Justice O'Connor told the graduates "you will witness your generation's own movements for social change." She observed that, "in a sense these movements don't have a beginning or an end. They're part of our nation's ongoing efforts to secure fundamental liberties for our citizens. If you seek them out, you will have opportunities to help in that endeavor, whether as public servants like Justice Marshall . . . or as pioneers living lives of example like your Six Pioneers here" at the University of Arkansas School of Law.

JUDGE MORRIS ARNOLD DOCUMENTARY

The Honorable Morris Sheppard Arnold was the subject of a documentary that aired in November on the Arkansas Educational Television Network. The documentary entitled, "Men and Women of Distinction: Judge Morris Arnold," provides a portrait of Judge Arnold beginning with his earliest days as perhaps the most famous Texarkana-born individual after Ross Perot.

This documentary describes Judge Arnold's extraordinary career in the law and as a member of the federal judiciary up through and including his service on the Eighth Circuit, as well as his distinguished work as an historian and his tireless research into Arkansas' past. The program also illustrates the important contributions made by the federal judiciary and, in particular, the federal Court of Appeals' role in most cases as the "court of last resort."

Additionally, on November 18, the Museum of Regional History in Texarkana opened an exhibit entitled, Arnold Family Portraits, which depicts the wide, deep influence that several generations of Judge Arnold's family have had upon the law and politics of Texarkana, the State of Arkansas, and the Nation since the 19th century.

CEDAR RAPIDS FEDERAL COURTHOUSE TO BREAK GROUND IN THE SPRING

What does it take to get your federal courthouse project moved up the construction priority list? For Cedar Rapids, it took the devastating June 2008 floods. Previously idling away at 7th or 8th on the list, and often passed up by other "emergency" projects as it lingered on the list of courthouse projects for a decade, the Judicial Conference gave the new federal courthouse in Cedar Rapids priority status after the Cedar River flooded two floors of the current 75-year-old federal courthouse.

The architects acted quickly to modify building plans for the new courthouse, which is to be built along the banks of the same river. Plans for the first floor of the new courthouse were bumped up 4 feet, and the first floor will reside 8 feet above the existing lot, or one foot above this summer's flood levels, with only parking below that level. Facing a \$12 million price tag to return the flooded courthouse to a usable state as a federal courthouse, Iowa Senators Grassley and Harkin were able to get \$182 million for the new courthouse put into a special disaster relief package approved by Congress in late September.

The project is set to break ground this spring, with a completion date slated for 2012. Construction of the new courthouse, which features a glass-walled seven-story atrium, will provide a huge boost to the recovering downtown district. Featuring five courtrooms, the new courthouse will house the district, magistrate, and bankruptcy courts, clerk's

facilities, Congressional offices, and, for the first time since federal circuit judges began chambering in Cedar Rapids, Eighth Circuit judges' chambers.

While Eighth Circuit Judges David R. Hansen and Michael J. Melloy have returned to their respective leased chamber spaces in downtown Cedar Rapids, the federal district court will remain at its temporary location until the new courthouse is completed.

SECOND CIRCUIT JUDGE OVERSTATES “COW-TIPPING” PROBLEMS IN EIGHTH CIRCUIT

The Eighth Circuit was mentioned during a recent argument in New York City before the Second Circuit. Sitting en banc, the Second Circuit was considering the district court's discretion in imposing criminal sentences in *United States v. Cavera*, a case that involved urban weapons trafficking in violation of federal laws. While mindful of the goal that the sentencing guidelines should be applied to reduce sentencing disparities among the various federal districts around the country, District Judge Charles Sifton had concluded that a disparity was warranted in that case because of the greater damage inflicted by guns in urban areas due, in part, to the population density in those areas. During oral argument on appeal, Circuit Judge Dennis Jacobs asked why a national system could not tolerate regional disparities, and observed: “Having a gun is a serious problem in New York City. Maybe in the Eighth Circuit they worry about cow-tipping or something.” It appears Judge Jacobs was misinformed. A text search of opinions on the Eighth Circuit's website yielded no cases dealing with “cow-tipping.”

PROGRAM EXAMINES GENDER EQUITY IN FEDERAL COURTS

On October 17, 2008, the University of St. Thomas School of Law in Minneapolis, Minnesota, hosted a program that focused on gender equity and the equality of judicial administration in the federal courts of appeals. The program was entitled, “Leadership Gender and Judicial Selection,” and featured Professor Sherrilyn Ifill of the University of Maryland Law School faculty. Professor Ifill is a noted scholar who has gained a national reputation for her research and writing in the areas of judicial diversity and selection, race, and impartiality in judicial decision making.

The program was cosponsored by the St. Thomas School of Law, the Thomas E. Holloran Center for Ethical Leadership in the Professions, and the Infinity Project, which is an organization that was formed earlier this year by a group of lawyers, legal scholars, and political scientists to promote the appointment of women to the United States Court of Appeals for the Eighth Circuit.

In addition to Professor Ifill's comments, the program also included a panel discussion entitled, “Preparing for Diversity: A Primer on the Work of a Federal Appellate Judge,” which was moderated by Professor Carol Chomsky of the University of Minnesota Law School and included the Honorable Diana E. Murphy and the Honorable Michael J. Melloy of the Eighth Circuit.

During the program, Judge Murphy was honored with the establishment of the Judge Diana Murphy Legacy Award, which will be presented in the future to individuals who advance the mission of the Infinity Project and otherwise carry forward Judge Murphy's legacy.

EIGHTH CIRCUIT BAR ASSOCIATION HOSTS CLE PROGRAM AND RECEPTION IN KANSAS CITY

On October 16, 2008, the Eighth Circuit Bar Association sponsored a continuing legal education program and reception at the Charles Evans Whittaker Courthouse in Kansas City, Missouri. The event was well attended and the participants gave the event very high marks.

During the initial portion of the program, Michael Gans, the Eighth Circuit's Clerk of Court, provided helpful pointers to attendees regarding practice before the Court of Appeals and the use of the Court's new electronic filing procedures. Mr. Gans displayed examples from the Court's CM/ECF website to illustrate that, by early 2009, records in criminal appeals will be generated electronically with a feature that will be added to each district court's CM/ECF website and then filed with the Court of Appeals electronically thereafter. He noted that the Court has not yet decided how the record will be handled in appeals taken in civil cases. Mr. Gans also advised attendees at the program that, beginning in 2009, the Court will likely have appellants file electronic versions of their opening briefs. The Court's case manager will then examine the e-version of the brief for compliance with the rules and, if it complies, will give electronic notice to the appellant, triggering the appellant's duty to file and serve paper copies of the opening brief.

During the second half of the program, Jeremiah Morgan moderated a question-and-answer session with Eighth Circuit Judges William J. Riley of Omaha, Nebraska, Duane Benton of Kansas City, Missouri, and Steven M. Colloton of Des Moines, Iowa. All three of the judges offered helpful pointers regarding oral argument.

While the judges on the panel all agreed that oral argument is not as likely to shape the outcome in an appeal as the quality of the briefs, they nonetheless noted several ways in which attorneys can be more effective in oral argument before the Court of Appeals. They advised attendees to try to strike a conversational tone in oral argument in order to

engage the panel in a discussion about the issues on appeal. Judge Benton told attendees to start strong and end strong.

He also recommended listening to prior arguments involving the three judges on the panel, which are available through audio recordings that are archived on the Court's website. Judge Benton reminded attendees that the Court releases the names of the judges on the argument panel at least 30 days in advance of the argument, and thus an attorney could ascertain if any of the three judges on the panel authored or participated in the key cases cited in the parties' briefs.

The judges noted that, while the Clerk of Court's office initially decides whether to grant oral argument in every appeal, cases that are not scheduled for oral argument by the clerk will be set for argument if any one of the three judges on the panel requests argument in the case. In discussing the role of amicus briefs, Judge Benton and Judge Colloton noted that such briefs are relatively uncommon in this Court, but are generally helpful when they are filed. Judge Colloton discussed the bases upon which the Court will grant rehearing or rehearing en banc. Judge Benton advised that rehearings en banc are granted so infrequently (on average, the Court grants only about five requests out of an average of 3,600 cases per year), there is a far better chance of obtaining a panel rehearing, especially where there is a dissent.

Finally, the judges discussed the process the Court employs following oral argument in preparing the opinion in a given appeal. The presiding judge generally assigns who will write the opinion, unless the presiding judge will dissent, in which case the next senior active circuit judge on the panel will make the writing assignment. Judge Riley noted that, almost without exception, the post-argument conference is the first time the judges on the panel will discuss their views of an appeal. He contrasted the Eighth Circuit's approach with the practice in other appellate courts where responsibility for writing opinions in the cases may be assigned prior to argument.

A brief reception followed the program. The judges and Mr. Gans attended, and the majority of the CLE program attendees also attended the reception. The continuing legal education component of the program has been approved for two hours of CLE credit in Missouri and Kansas. All in all, the event was a resounding success.

PROGRAM AND RECEPTION CELEBRATES REOPENING OF RENOVATED WARREN E. BURGER COURTHOUSE IN ST. PAUL

The Eighth Circuit Bar Association hosted a continuing legal education program and reception on November 12, 2008, at the recently reopened United States Courthouse in St. Paul, Minnesota. The courthouse, which has been named for the late Chief Justice Warren E. Burger, was closed for three

years while undergoing a major renovation project. Following a successful "dry run" in which one panel of judges heard cases for a week in October, the Eighth Circuit returned to St. Paul in force one month later with a full complement of judges who made up three panels to hear cases during the week of November 10 to 14. The Clerk of Court's office has also returned to the Burger Courthouse and is fully functioning with the fine staff led by Deputy Clerk of Court Maureen Gornik.

The November 12 program was intended to benefit attorneys who practice in the Eighth Circuit. Michael Gans, the Eighth Circuit's Clerk of Court and Clerk for the Bankruptcy Appellate Panel, made a presentation on "Technology and the Appellate Courts." Mr. Gans has led the Court through the conversion to electronic Case Management (CM) and now the Electronic Case Filing (ECF) system. He made a presentation similar to the remarks he made in the Kansas City program in October (reported earlier in the newsletter).

Following Mr. Gans' remarks, the participants broke up into small groups for discussions with the Eighth Circuit judges. These small group discussions encouraged informal conversation with the judges about practicing before the Court of Appeals. There were groups of six to eight attorneys with each judge, which enabled everyone to feel comfortable and resulted in good dialogues that helped the participating attorneys pick up helpful and meaningful information for their practice in the Eighth Circuit. The Eighth Circuit judges who participated in the small group discussions included Roger L. Wollman of Sioux Falls, South Dakota; William J. Riley of Omaha, Nebraska; Michael J. Melloy of Cedar Rapids, Iowa; Lavenski R. Smith of Little Rock, Arkansas; Duane Benton of Kansas City, Missouri; C. Arlen Beam of Lincoln, Nebraska; and David R. Hansen of Cedar Rapids, Iowa.

The program has since been approved for continuing legal education credit in both Iowa and Minnesota. The program was followed by a reception in the first floor lobby of the courthouse. The reception was well attended by the judges and the program participants. All in all, this was an excellent event and a wonderful way to recognize the return of the Eighth Circuit to St. Paul.

EIGHTH CIRCUIT JUDICIAL CONFERENCE SPECIAL REPORT

The Eighth Circuit Judicial Conference took place in Chicago, Illinois, from August 11 to 15. It was an enormous success and greatly enjoyed by all who attended. The Judicial Conference was held at the Chicago Marriott Downtown Magnificent Mile and was well suited for the various programs and related events. The early part of the week was made up of court-related meetings. Thereafter, several continuing legal education programs were presented in the af-

ternoon of Wednesday, August 13, on a variety of interesting and worthwhile topics. The General Session then opened bright and early the following morning, Thursday, August 14, and recessed by 11:30 a.m. to enable conferees to attend a White Sox baseball game that afternoon. Upon their return from the game, the Eighth Circuit Bar Association hosted a very successful reception for the various federal judges and attorneys attending the Judicial Conference, along with their guests. The General Session resumed on Friday, August 14, with presentations that were capped off by remarks from the Eighth Circuit's Circuit Justice, the Honorable Samuel A. Alito, Jr.

General Session "Wrap-Up"

The General Session proceedings began on Thursday, August 14, with a lively debate entitled, "Original Intent, the Living Constitution, and How to Think about Constitutional Cases." Professors Steven G. Calabresi of Northwestern University Law School and Pamela S. Karlan of Stanford University Law School could not have been more knowledgeable or more in disagreement on the topic. Professor Calabresi, advocating for original intent, said the U.S. Constitution should not be read any differently than other legal documents in which the courts emphasize intent; good examples of this are legislation, wills, trusts, and contracts. Although opponents of original intent criticize being led by "the dead hand of the past," Professor Calabresi argued this was actually a matter of deciding "which dead people they should be ruled by."

Professor Karlan, on the other hand, argued that supporters of original intent are inconsistent. Contrary to their stated ideals, originalists are actually interested in consequences, even when they claim they are only looking for original intent. She used the example of the recent U.S. Supreme Court decision in *District of Columbia v. Heller*, where a majority of the Court held the Second Amendment provides for an individual right to bear arms. "All nine judges agree that you cannot take a gun into a federal courthouse. Why?" Karlan asked, rhetorically. The audience laughed and she added, "They care about consequences."

The debate was followed by a dramatic multi-media presentation entitled, "Little Rock School Desegregation Case: *Cooper v. Aaron*," which revolved around the case which was decided by the U.S. Supreme Court in 1958. The presentation followed the lawsuit from 1956—when Little Rock parents were prevented from registering their children for public school—to 1972 when all Little Rock schools were finally integrated. Throughout, the Eighth Circuit interpreted the law in favor of desegregation. The program incorporated video, audio, and original documents, along with a live narration. The program was produced by Brian Rosenthal of the Rose Law Firm and narrated by Drake Mann, a Little Rock attorney, and by Arkansas Public Ser-

vice Commissioner Colette Honorable. The hour-long program incorporated video footage, still photos, archival Supreme Court oral argument recordings, a taped segment by Justice Stephen Breyer, and popular music from the 1950s. The show's live narration and original graphics guided the audience chronologically through the actions of state and federal officials both directly and peripherally involved in the case of *Cooper v. Aaron*, the historic case concerning the 1957 integration of Central High School in Little Rock, Arkansas. The program was an inspirational vehicle for highlighting the importance of the Rule of Law in America from the seminal case of *Marbury v. Madison* in 1803 through *Cooper v. Aaron* in 1958.

The final segment on Thursday focused on the recent release of a book chronicling the history of the Eighth Circuit entitled, *Establishing Justice in Middle America*, written by Professor Jeffrey Morris of Touro College. Judges Myron Bright and Michael Melloy presented an award to Thomas Boyd, President of the Eighth Circuit Bar Association, for his role in securing an author and funding for the book, which was published by the Eighth Circuit Historical Society. Thereafter, Professor Morris, along with Judge Bright and Judge Melloy, explained the genesis of the book. Professor Morris noted that he was extremely grateful for the lengthy interviews granted by at least 15 federal judges in the Eighth Circuit. In particular, Professor Morris commented that Judge Gerald Heaney was the "sparkplug of the project." He added that the regional concerns of the Eighth Circuit—bankruptcy of farms, railway receiverships, water rights and land conflicts, along with Native American issues—provided "big lessons for a boy from Queens." The panelists gave several examples of how the unique geography and economic differences in the Eighth Circuit have contributed to the decisions handed down by the court over the years.

The following morning, Friday, August 15, began with the traditional federal practice committee breakfast, along with a new feature that enabled attendees to pose questions to the Eighth Circuit judges from their region. These breakfast programs were well attended and highly informative. When the General Session resumed later that morning, Judge John R. Gibson of Kansas City, Missouri, introduced Landon Rowland, who is currently director and chairman emeritus of Janus Capital Group. Mr. Rowland presented remarks entitled, "Rule of Law and the Impact of U.S. Courts on American Business." Mr. Rowland referred to the judges and federal practitioners as the guardians of the Article III branch of government which, in turn, makes them the "final guardians" of the Rule of Law. He discussed the various global and economic changes that have occurred over the past few decades since the fall of the Berlin Wall and the corresponding significance of a stable legal system in economic development. Mr. Rowland emphasized that the

Rule of Law and a well funded and independent judiciary are essential for economic development around the world. He argued that, without the Rule of Law, there is no room for economic growth because there is no likelihood of securing investment. In turn, in his experience, the only way to establish a stable and reliable Rule of Law is through a legitimate, independent judiciary with the power to declare actions of the government unconstitutional, in the manner in which those institutions have been established in America.

Professor Suzanna Sherry, formerly of the Minnesota Law School and now on the faculty of Vanderbilt University Law School, presented the “Supreme Court Year in Review.” As always, Professor Sherry’s presentation on the Court’s recent decisions was a tour de force, highlighting the recent Supreme Court Term’s blockbuster cases, such as the Second Amendment decision in *District of Columbia v. Heller*; the death penalty cases in *Kennedy v. Louisiana* and *Baze v. Rees*, and, of course, the watershed decision on sentencing guidelines in *Gall v. United States*, as well as sharing insights and observations on other significant cases decided during the past term.

The General Session proceedings were capped off by remarks from the Honorable Samuel A. Alito, Jr., who serves as Circuit Justice for the Eighth Circuit. Justice Alito was given a warm introduction by Judge William J. Riley from Omaha, Nebraska. Justice Alito’s remarks were thoughtful and interesting, and illustrated his sense of humor. He provided an entertaining analysis of the Supreme Court’s past term, accompanied by observations regarding the Court’s case load, the justices’ voting patterns, the relative value of unanimous opinions, the importance of amicus briefs, statutory interpretation, and the wide variety of authority that is now being cited by the Court in its opinions. Justice Alito was well received and his speech served as a fine note upon which to conclude this very successful Judicial Conference.

Judicial Conference CLE Programs “Wrap Up”

As noted, in addition to the General Session, the Eighth Circuit Judicial Conference featured a number of interesting and insightful continuing legal education programs on Wednesday, August 13. These programs focused on topics of interest to the federal practitioner, and were well presented by an array of highly experienced and impressive attorneys as well as a number of distinguished judges.

E Discovery 202

Dan Nelson of Armstrong Teasdale LLP in St. Louis and Steve Sherman of Thompson Coburn LLP in St. Louis presented a program entitled, “Practical E Discovery, or What’s Under the Hood?” The presentation focused on the practical or technical aspects of e-discovery, rather than on the more commonly discussed legal developments in the area. The presenters began by emphasizing the need for practitioners

to recognize the crucial differences between paper documents and electronic data. While traditional documents are essentially two-dimensional, electronic information should be viewed as three-dimensional. Electronic data includes substantially more information than mere paper files, such as the date the document was created and a history of changes to the document, as well as notes, formulas, and comments which might not be part of a box of paper documents. Because of this fundamental difference, it is important to think of the information being gathered as “electronically stored information” (“ESI”), rather than using the misleading term “electronic documents,” which inaccurately suggests documents that are simply copied into or stored on a computer.

Practitioners and parties must take an inventory of potential ESI sources, which include the following: servers, work stations, laptop computers, personal digital assistants (“PDAs”), personal home computers, voicemail, digital printers or copiers, and cell phones. In addition to the above, other ESI sources include backup tapes and additional media devices such as cd-roms, dvds, floppy disks, zip disks, removable hard drives, thumb drives, and digital camera media.

Once all potential sources of ESI have been identified, perhaps the most crucial task for the practitioner is to ensure that all steps are taken to preserve exact copies of the client’s data, which is accomplished through “hashing.” “Hashing” is a method of applying a unique identifying label to any collection of data. This involves using a mathematical algorithm that looks at the precise order of the identifying “1’s” and “0’s” in any volume of data, and applying a specific label to that data. An e-discovery vendor can “hash” anything from a one-sentence email to the entire archive data of a large company.

There are two major “hashing” standards used today: SHA-1 and MD5. These procedures are used both to verify that copies of data are exact duplicates and to eliminate duplication of documents prior to review or production. Both of these procedures do the same thing and are equally valid for e-discovery purposes. These standards are reliable in ensuring an accurate assessment that an exact duplicate copy of data is being provided. For example, under the MD5 standard, the odds that different documents will have the same hash value are about 18 quadrillion to one.

Messrs. Nelson and Sherman then discussed a few technical –“under the hood”—procedures for gathering and preserving ESI, using the example of data on a CEO’s computer. They discussed the relative ease with which the information may be gathered, beginning with removal of the Target Hard Drive from the computer. The data from the Target Hard Drive is copied onto a separate hard drive, using devices such as the “Imagemaster Solo III,” and a complete chain of custody printout and hash value readings are obtained. The

approximate time to open the computer, pop the hard drive, connect the drives to the Imagemaster and copy the disk, remove the drives, replace the original hard drive, and generate the chain of custody paperwork is a total of about 45 minutes. After the information has been copied onto a new hard drive, the following steps are necessary to continue to protect and preserve the required ESI: safely store the Target Hard Drive; review the second hard drive to determine its content; de-duplicate the data (i.e. eliminate duplicative data on the hard drive); perform an index and search of the collected data to determine the information contained on the hard drive; and extract, review and produce the requested ESI. As highlighted below, the most time consuming (and expensive) parts of the e-discovery process are not the initial steps in collecting the data, but the later stages of review and production.

The presenters then discussed common misconceptions about the computer “delete” key. The delete key does not delete data. It merely tells the computer that the space is free to accept new data, while preserving the data that previously occupied the “deleted” space. Even a hard drive that has been erased and reformatted can often still yield 99% of its original data. Like other data on the computer, emails also do not disappear simply when someone hits the delete key. When an email is sent, it goes from the email sender to an email server, then to a receiving email server, and then to the email recipient. Deleting emails does not eliminate the emails from the various email servers, or from back-up storage where they may also be maintained.

Definitions of basic, common terms used in discussing ESI were also provided. “Metadata” is “data about the data” such as the author, date opened, dates revised, and similar information that may not otherwise appear on the screen or in a printout. “Embedded data” is data incorporated in the user’s operations but often not shown in print (e.g. spreadsheet formulas). “Latent data” is data still residing on the computer after it has been “deleted” by the user. “Slack data” is residual data left in unused portions of the clusters of information in which a computer saves collected data. The potential cost of complying with email discovery requests was discussed, using an estimated cost model developed by Browning Marean of DLA Piper Rudnick in San Diego. The cost model uses assumptions as to the cost of various stages of the e-discovery process, and assumptions as to the amount of data remaining for processing or review at each stage of the process. The model addresses the cost of each stage of the process, including collection, de-duplication and early searching, population for review, level-one review by staff attorneys, level-two review by trial counsel, privileged log preparation, and production. The model estimates costs ranging from approximately \$160,000.00 for e-discovery involving five gigabytes (“GBs”) of data (one GB of data might equal six months of post-spam email) to

\$1,000,000.00 for an e-discovery project involving 50 GBs of information. Approximately 80% of the cost incurred relates to human review of the documents and privilege logging. The majority of discovery cost increases resulting from e-discovery is attributable to the volume of information being generated and stored, much of which in the past would never have been generated or saved in any similarly reviewable format.

The presenters concluded by identifying the following seven “deadly sins” of e discovery: (1) failure to communicate, particularly between legal and IT personnel; (2) erroneous assumptions about what exists and what needs to be done to preserve it; (3) failing to understand the differences between hard copy documents and electronic data; (4) failing to plan for e discovery; (5) failing to preserve ESI when the possibility of litigation first appears; (6) failing to follow up on preservation and production; and (7) confusing “server” and “backup tape.”

Overall, this presentation provided a different and helpful perspective on e-discovery. Instead of focusing on legal requirements or enforcement and sanction issues, Messrs. Nelson and Sherman focused on the practical steps involved in and the realities of e-discovery that clients, practitioners, and judges should understand in addressing discovery issues.

Voir Dire

DeMaurice Smith, a litigator at Patton Boggs in Washington, D.C., the Honorable Joan N. Ericksen, Judge of the United States District Court for the District of Minnesota, and Dr. George Speckart, a trial consultant with Courtroom Sciences, Inc. in Dallas, Texas, presented a spirited panel discussion entitled Speaking the Truth About Voir Dire, in which they offered their differing perspectives about voir dire. Mr. Smith served as moderator.

Using clips of the juror deliberations in the classic film *Twelve Angry Men*, the panel members discussed the objectives, scope and limits of voir dire. The dialogue often highlighted the tension between trial attorneys, who would like to obtain as much information as they can get about potential jurors, and trial judges, who are trying to effectively allocate the court’s limited time and resources. These different perspectives about voir dire reflect different goals: trial lawyers who are focused on obtaining a favorable jury verdict, and trial judges whose goal is to safeguard and protect the process.

Mr. Smith discussed voir dire as an end-game, with the attorneys focusing on the ultimate objective of a favorable verdict. To achieve this objective, attorneys evaluate the factors that might be important to jurors and how jurors decide a case, and then work back to determine what infor-

mation might foretell how individual jurors will respond to the evidence and arguments. According to Mr. Smith and Dr. Speckart, trial lawyers generally seek to identify jurors who have favorable and unfavorable biases, and then try to keep the former on the jury and eliminate the latter. From the lawyers' standpoint, the more information they have, the better off they will be in obtaining a jury that will be receptive, or at least not antagonistic, to their client's arguments and evidence.

Judge Ericksen stated that, as a trial judge, she focuses on a different goal—to ensure a fair and efficient trial. When asked whether she would grant a lawyer's request for more voir dire, Judge Ericksen acknowledged the goals of trial counsel, but questioned the premise that more information is necessarily more likely to result in a trial that is fair to both sides. In evaluating the proposed scope of voir dire, Judge Ericksen indicated she wants to know whether proposed additional, and often more intrusive, questions will result in a better or fairer jury, and whether expanded voir dire is going to improve the process.

Judge Ericksen would prefer to spend the limited time available for trial on presenting evidence rather than on selecting the jury, particularly when the additional time spent on jury selection may not result in a better or fairer jury. Judge Ericksen is more willing to give latitude in voir dire or with questionnaires if counsel for a party can convince her the case is special or unique in some way that warrants a departure from common limitations on the jury selection process in federal court. She believes that voir dire should properly be used to identify someone who is going to be so opinionated that they cannot listen to the evidence, and not to enable counsel for the parties to try to pick the juror most likely to rule in their favor. Judge Ericksen is not opposed to the parties obtaining necessary information, but she is not inclined to allow the parties to turn the case “upside down” in search of the ideal jury panel.

The panel discussion then turned to the issue of preemptory strikes, and specifically whether there should be more or fewer preemptory strikes, or whether preemptory strikes should be eliminated altogether. While parties and lawyers may be strong proponents of preemptory strikes, Judge Ericksen expressed concerns that preemptory strikes can be used to undermine fairness in a trial rather than facilitate and achieve fairness.

Using the jurors from the film *Twelve Angry Men* as examples of different juror personalities, the panel discussed the type of information that may be used to try to identify whether jurors are leaders, followers, bullies, indifferent, or excessively opinionated. According to Dr. Speckart, the parties can generally obtain three sources of information during voir dire: verbal content, mannerisms, and tone.

Ninety percent of the information provided during voir dire is non-verbal, including both body language and the tone or attitude with which information is provided. In addition to analyzing the content of answers provided by jurors, the attorney must be able to evaluate the “emotion” attached to those answers. In some situations, the intensity of the response is more important than the substance of the response. During voir dire, the attorneys must evaluate the adapters that may reveal a juror's personality or character, like repetitive movements or the length of time a juror takes to answer a question. On the other hand, Dr. Speckart warned that counsel should not blindly accept myths about the meaning often attached to certain conduct, such as crossed arms and eye contact, which are less useful in evaluating jurors' responses than other information.

Dr. Speckart and Mr. Smith also discussed differences between questionnaires and open court responses, including which method is more reliable in obtaining relevant information. The indications are that jurors may be more open in responding to questionnaires rather than in their open court responses, when they may feel more intimidated by the setting.

Mr. Smith concluded the presentation with a list of “do's” and “don'ts.” He identified five mistakes often made by trial attorneys: (1) evaluating a juror based on whether the attorney “likes” the juror; (2) wasting time during voir dire with unhelpful questions or speeches; (3) sacrificing credibility during voir dire; (4) relegating jury selection strategy to a secondary place in trial preparation; and (5) overemphasizing jury selection while underemphasizing case presentation. These last points, in particular, highlight the need to find the proper place for jury selection in overall trial preparation. The basic list of “must-do” steps for voir dire included the following: know your judge (and what she or he will let you do in voir dire); know your case; execute your voir dire plan; engage the jury; and decide in advance who is picking the jury, so that there is no question (and potential disruption) at trial.

Finally, Mr. Smith offered some suggestions for judges in dealing with voir dire: recognize that some cases are different and require special treatment during voir dire; appreciate the need to balance efficiency with fairness and to avoid sacrificing the former for the latter; and recognize different perspectives on justice and how to accomplish it.

White Collar Crime 101

One of the most entertaining and informative of the continuing legal education programs presented at the Eighth Circuit Judicial Conference was entitled, “White Collar Crime 101 for the Civil Practitioner, or When to Push the Panic Button (and What that Button Looks Like).” This program was presented by a panel of lawyers moderated by Mark E. Wein-

hardt, of Belin Lamson McCormick Zumbach Flynn, P.C., in Des Moines, Iowa. The other panelists included Leon F. Spies, of Mellon & Spies in Iowa City, Iowa; Philip H. Hilder, of Hilder & Associates, P.C., in Houston, Texas; and Robert M. Stephenson, of Locke Lord Bissell & Liddell, LLP, in Chicago, Illinois.

Mr. Weinhardt started the program by highlighting the importance of white collar criminal issues to civil practitioners in today's legal environment. He noted that a quick scan of recent newspaper headlines shows that many significant criminal sentences have been imposed on "white collar" criminals who committed various forms of financial fraud or obstruction of justice. One particular example that was noted involved Chalana McFarland, a real estate attorney who was sentenced to 30 years imprisonment for, among other things, bank fraud, wire fraud, mail fraud, identity theft, money laundering, obstruction of justice, conspiracy, and perjury.

The panel presented valuable information and practical tips that were interspersed with movie clips from such Hollywood hit films as *Michael Clayton*, *Wall Street*, *Office Space*, *The Postman Always Rings Twice*, and *Baby Face*. These practical tips included dealing with a client who expects his or her attorney to simply "fix" their problems, rather than understanding why he or she has been or may be indicted by a grand jury. Tips also included how to communicate with prosecutors to obtain information about criminal investigations, determining whether a client is a "target" of a grand jury, and how to advise a client subpoenaed by a grand jury, including whether and when a client should refuse to answer questions and assert his or her Fifth Amendment rights.

Other practical advice included how to ensure that a client understands that federal agents investigating white collar crimes are very sophisticated. Examples reflecting their sophisticated tactics included how federal law enforcement agents might purposefully arrive at the client's home while family and friends are present—often at dinner time—and are able to obtain "voluntary" but harmful information and cooperation from the client. As a result, the client must be well prepared for such situations to assert that he or she is represented by an attorney and that all questions must be directed to the attorney.

Panel members also noted the increased risk of obstruction of justice charges based on a client's mistaken actions in attempting to destroy evidence, influence testimony of other witnesses, or otherwise engage in their own misdirected version of damage control. Panel members gave several examples of such client actions that can lead to disastrous consequences, such as attempts to delete or destroy emails and other electronic information, as well as communications with witnesses which could be perceived as improper

attempts to change their testimony. Accordingly, the panel members stressed that it is important for attorneys to issue clear directives to their clients, as well as the corporation's general counsel and other employees, to preserve documents and coordinate communications with witnesses to protect against such risks.

Panel members also noted that there are important issues concerning internal investigations conducted by the corporate entity that must be considered by attorneys representing individual corporate executives or employees. In particular, such internal investigations, when done incorrectly, can lead to claims of attempts to illegally influence or intimidate witnesses or obstruct justice. The panel members stressed that it is smart to start with the presumption that each individual client should have their own lawyer to represent them—a lawyer who does not represent the corporate entity.

A recurring and troubling issue noted by the panel was timeliness in providing representation to individuals involved in internal corporate or governmental investigations of companies. Executives often think they are represented by the corporation's lawyers, when in fact the company's lawyer is acting solely on behalf and in the interests of the corporate entity and not the individual executives. The interests of the corporate entity and the individual executive are often very different and may be in conflict. Thus, while the corporation's lawyers are acting in the best interests of the company, that may be detrimental to the individual executive. These circumstances can pose serious problems when, for example, the corporate entity attempts to throw the individual executive "under the bus" in its dealings with the government.

Finally, the panel briefly discussed the practical issue of who will pay for the individual employee's criminal defense costs. The panel explained that such attorneys' fees may, consistent with ethical rules, be paid by a party other than the individual employee, such as the corporate entity or through insurance proceeds. However, the panel members stressed that attorneys must follow the ethical rules regarding disclosures concerning payments by third parties, and must remember that the duty of loyalty, duty of confidentiality, duty to zealously represent the client, and other ethical obligations run directly to the individual client, rather than to the entity or party who is paying the legal costs.

Sanctions in the Eighth Circuit

Professor Margaret Raymond of the University of Iowa College of Law presented a program entitled, "The Sting of the Lash: An Evaluation of Judicial Sanctions in the Eighth Circuit," during which she discussed preliminary results of her academic study of lawyer sanctions imposed by the Eighth Circuit. Professor Raymond reported that she undertook the study to examine certain fundamental questions: Are certain lawyers sanctioned more often than others? What

types of sanctions are imposed? And, how often are sanctions imposed? Professor Raymond reported one obvious conclusion of her study was that sanctions are more diverse across lawyers, practice areas, type of sanction, and amount of monetary sanctions imposed than may have been assumed by lawyers and judges.

Professor Raymond's study examined 96 sanction cases that cover the timeframe from January 1, 2004 through the summer of 2008. She excluded certain cases from her study, including bankruptcy cases, contempt of court cases, and stand-alone attorney discipline cases.

Professor Raymond's study showed that frivolous conduct was present in approximately one third of the cases in her sanctions study. Sanctions for frivolous conduct were three times more common than the second-largest cause of sanctions in the study—failure to comply with discovery orders or rules.

Professor Raymond also noted that the legal authority for sanctions imposed on lawyers was drawn from a diverse pool of different legal authority, including 28 U.S.C. § 1927, Federal Rules of Civil Procedure 11, 16, 26, and 37, and the inherent powers of the court, as per *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). Professor Raymond found that Rule 37 was the basis for sanctions in 37% of the cases in her study. However, because many of the matters in the 96 case sample were from the Baycol multi-district litigation products liability action in the District of Minnesota and included sanctions for a party failing to appear for his or her deposition, Professor Raymond also looked at the statistics for the case sample excluding these Baycol cases. Statistics from this more limited sample showed that 20% of the sanctions were based on Rule 11, 12% were based on the inherent authority of the Court, 9% were based on a combination of authorities, and 8% were based on Section 1927.

Imposition of fees and costs was the most common type of sanction, appearing in approximately three quarters of the cases studied. Professor Raymond noted that Courts were creative in imposing other types of sanctions, including fines, and imposing requirements that money be paid to a philanthropic organization, such as legal aid. In approximately 10% of the cases, the Court imposed some type of non monetary sanction, which included letters of apology and requirements to attend a law school course on legal ethics. Professor Raymond noted there were few referrals for attorney discipline in the study cases.

The amount of the monetary sanctions imposed in the cases varied greatly, with approximately one third of the cases awarding less than \$200, but amounts greater than \$50,000 were awarded in approximately 6% of the cases. Approximately 80% of the sanctions were imposed after a party had

brought a motion seeking sanctions, approximately 13% of the discipline cases were originated sua sponte by the Court, with the balance unclear based on the information in the Court's opinions. Professor Raymond stressed that her study did not reveal any "hanging judges"—i.e., judges who are more likely to sanction lawyers than others. Instead, she found a broad scattering of sanctions across the Circuit and imposed by a variety of judges. Professor Raymond noted that, excluding the Baycol cases, 42 different judges had imposed sanctions in the Eighth Circuit, and that no one judge had imposed sanctions in more than five cases during the period studied.

Professor Raymond's study showed that plaintiffs' counsel in civil rights cases were the most likely group of lawyers sanctioned, representing approximately 26% of the sanction cases. Other notable groups included plaintiffs' counsel in commercial cases, representing approximately 16% of the sanction cases, and defendants' counsel in commercial cases, representing approximately 9% of the sanction cases.

Finally, Professor Raymond noted that it is often unclear who—as among the individual lawyer, law firm, or client—is required to pay the sanctions imposed by the Court. It is also sometimes unclear to whom the monetary sanctions are to be paid—as between the Court, opposing party, or a third party organization.

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