



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

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In this issue.....

Association News
New Officers
Membership
Membership Meeting
Tech Help Wanted

Bench Briefs
Argument Tips
Colloton Ceremony
Nominee Status
Visiting Judge

Time/Place/Manner
Being Chief Judge
Panel 'On the Road'
FRAP Proposals

Issues on Appeal
Panel Rehearing
Appeal of Class
Omitted Issues
Get the Transcript

Higher Authority
Appointed Counsel
8th Cir Case Status

Footnotes

Association News

Missouri State Solicitor James Layton became **president** of the **Eighth Circuit Bar Association** effective January 1, 2004, replacing Eric Magnuson of Minneapolis. Layton served as **secretary** during the Association's first year, and he is replaced in that position by South Dakota deputy attorney general Craig Eichstadt.

Eichstadt moves up from the position of **treasurer**. Krista Kester of Lincoln, Nebraska, assumes Eichstadt's former duties.

New **directors** include Bob Herman of St. Louis, representing the Eastern District of Missouri; Barry Pickens of Kansas City, representing the Western District of Missouri; Bob Rossiter of Omaha, representing Nebraska; and Mark Marshall of Sioux Falls, representing South Dakota.

Lajuana Counts of the U.S. Attorney's Office in Kansas City joins the board as an **at-large director**.

Tom Weaver, who previously represented the Eastern District of Missouri, remains on the board as an additional at-large director. For a complete list of Association directors, visit the Association's website at the address show at the bottom of this page.

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The Association has reached the approximate end of its **first year** of existence with **374 members**. Just over 100 of these members took advantage of the limited-time opportunity to become "charter members" by paying dues at a "premium" level to help establish the Association.

Leigh Chiles of Jonesboro, Arkansas, is the **new chair** of the **membership** committee. Membership correspondence should be addressed to her at ichiles@barrettdeacon.com, and applications and dues should be sent to her at P.O. Box 1700, Jonesboro, AR 72403.

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Plans are under way for an **inaugural meeting** of the **Association membership** to be held in **September** 2004, likely in St. Louis in conjunction with Eighth Circuit "court week." The meeting would be combined with a continuing legal education program.

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The Association is looking for **technology-savvy members** to assist in the establishment and upkeep of an **independent Association website**.

During the Association's inaugural year, then-president Eric Magnuson and his Minneapolis law firm (Rider Bennett) graciously hosted the website and provided the technical expertise to keep it current and running. The Association now is in the

process of identifying a new web host, evaluating and expanding site content, and planning for site maintenance and updating.

If you would like to volunteer for the website committee or otherwise have suggestions for the Association website, please contact Krista Kester (krista@woodsaitken.com) or Tom Weaver (tweaver@armstrongteasdale.com).

Bench Briefs

A panel of three Eighth Circuit judges, in a question-and-answer session at a continuing legal education program, offered attorneys **reason for seeking oral argument**.

Chief Judge James Loken estimated that oral argument causes him to reverse his initial opinion in approximately five percent of the cases he hears. He estimated that oral argument changes his understanding of the nature of the dispute in about 20 percent of the cases he hears.

Judge Steven Colloton said oral argument can be helpful to the parties because it gives counsel a chance to focus on those issues or points that are troubling the judges. He and **Judge Michael Melloy** agreed that counsel should welcome questions from the bench; in the absence of questions, Judge Melloy noted, counsel has less chance to influence the outcome of the case.

Judge Colloton suggested that attorneys should not begin their oral arguments with extensive recitations of the facts and should instead discuss the facts in the context of specific issues. The Court, Judge Colloton noted, will already know the facts from the briefs.

The Eighth Circuit clerk's office does the initial screening for oral argument, according to Chief Judge Loken, and the bias is in favor of granting argument. Moreover, when the clerk's office decides against argument, the case still goes to a three-judge panel for decision, and any one of those judges can direct that argument be heard.

Judge Melloy noted that a case usually will be set for oral argument if either side so requests.

Both oral arguments, and the briefs received by the Eighth Circuit, vary widely in quality, according to Judge Melloy. He noted in particular the lack, in some briefs, of adequate fact

development on the points actually important to resolution of the issues.

Judge Melloy advised that attorneys pay more attention to grammar and proofreading, and he suggested that attorneys check the "readability" of their briefs by having drafts read by staff or colleagues not familiar with the particular cases.

Chief Judge Loken emphasized that brevity is a "plus" in a brief. Likewise, he commented on counsel's lack of selectivity in some cases in compiling the appendix.

Counsel particularly should not include so much material in an addendum that the addendum must be bound separately from the brief; this, pointed out Chief Judge Loken, defeats the purpose of the addendum.

The question-and-answer session with Chief Judge Loken and Judges Melloy and Colloton was part of the Iowa State Bar Association Federal Practice Seminar held in Des Moines on December 12, 2003. Before taking questions from the audience, the Judges heard oral argument in an actual Eighth Circuit case.

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Senior Judge Laurence Silberman of the U.S. Court of Appeals for the District of Columbia Circuit joined active and senior Eighth Circuit Judges on the bench for the **investiture of new Eighth Circuit Judge Steven Colloton**. The ceremony was held December 5, 2003, in Des Moines, where Judge Colloton will maintain his chambers.

Judge Colloton began his legal career as a law clerk to Judge Silberman, and Silberman administered the oath of office to Judge Colloton at the investiture.

The program also included remarks from former D.C. Circuit Judge and former Solicitor General Kenneth Starr, for whom Colloton worked while Starr was serving as independent counsel for the "Whitewater" investigation. Starr emphasized Judge Colloton's commitment to his Midwest roots and made allusion to Judge Colloton's interest in (and skill at) basketball.

Judge Colloton, after taking the oath, offered brief comments thanking his family and supporters,

expressing his humility upon becoming a judge, and noting the judicial role of determining the will of others.

Eighth Circuit Chief Judge James Loken, in closing the ceremony, expressed his personal pleasure in having a second Chicago Cubs fan on the Court.

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The Senate **Judiciary Committee** held a **hearing** January 22, 2004, on the nomination of Raymond W. **Gruender** to a judgeship on the Eighth Circuit. Gruender, who currently is U.S. Attorney for the Eastern District of Missouri, was nominated September 29, 2003, to one of the two seats left vacant when Judges Theodore McMillian and Pasco Bowman took senior status on July 1 and August 1, 2003, respectively.

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District Judge Daniel Hovland will be sitting as a **visiting judge** with the Eighth Circuit in **February** in St. Paul. Judge Hovland is the Chief Judge for the District of North Dakota.

Judge Hovland assumed the bench in November 2002 after spending nearly 20 years in private practice in Bismarck. His began his legal career as a law clerk to a justice of the North Dakota Supreme Court and also has served in the North Dakota attorney general's office and as a state administrative law judge.

Time, Place & Manner

Chief Judge James Loken and former Chief and now **Senior Judge David Hansen** shared insights into court administration during a **joint appearance** at a December 12, 2003, continuing legal education program in Des Moines.

Judge Hansen, who was Chief Judge when he took senior status at the end of March 2003, noted the number of new courthouses recently completed or planned throughout the Circuit and also offered some statistics showing the **effect of new technology** on court operations.

For example, Judge Hansen said that the Eighth Circuit web site receives an average of 1,200 "hits" daily between 10 a.m. and 11 a.m., when new rulings are posted. Also, Judge Hansen said that the Circuit now saves approximately \$40,000 in postage annually as a result of voluntary attorney participation in the electronic noticing system.

Judge Hansen noted that during his 14-month tenure as Chief Judge he had to review more than 70 judicial misconduct complaints made against judges at all levels throughout the Circuit. He observed that a substantial number of those complaints essentially reflected merely continued attempts by losing litigants to challenge unfavorable rulings on the merits.

Chief Judge Loken presented a variety of **statistics** regarding the Eighth Circuit's **caseload**, noting first a 25 percent increase in annual filings from the time when he joined the Court in 1991.

Around 55 percent of the Court's docket now consists of criminal and inmate (habeas and §1983) matters; however, Chief Judge Loken said that civil matters still occupy more of the Court's time because many of the civil cases are more complex.

Filings for direct review of agency action are up eight percent, according to Chief Judge Loken, with immigration appeals now being common. Pro se filings, on the other hand, now make up only 43 percent of the Court's docket – down from approximately 50 percent. Many of these pro se filings, Chief Judge Loken noted, can be disposed of summarily for frivolity or lack of jurisdiction.

Chief Judge Loken also reported that the **Eighth Circuit is among the most current** of the Circuits with regard to its caseload and that the average time from filing of the appeal to issuance of an opinion is now about 10 months.

Finally, Chief Judge Loken commented on the amount of time spent, as Chief Judge, reviewing Criminal Justice Act requests for compensation in excess of the statutory maximum. He urged that attorneys seeking above-maximum compensation offer good explanations, so as to assist in the evaluation of such requests.

Senior Judge Hansen and Chief Judge Loken made their joint appearance at the annual Federal

Practice Seminar sponsored by the Iowa State Bar Association.

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An Eighth Circuit **panel** will **sit** in **Iowa City**, Iowa, on February 19, 2004. Judges William Riley and Mike Melloy and Senior Judge David Hansen will hear three cases in the courtroom of the University of Iowa College of Law.

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Attorneys have just a few more days to **submit comments** on the **proposed amendments** to the Federal **Rules of Appellate Procedure** published last August. Deadline for comment is February 16, 2004.

The amendments, if adopted, would go into effect December 1, 2005, at the earliest.

The proposed amendments and accompanying committee notes can be viewed by clicking on “Proposed Rules Amendments Published for Comment” on the federal rulemaking page at www.uscourts.gov. Attorneys can submit comments electronically by using the “comment submission form,” or they can use the link near the top of that form to find directions for mail or fax submission.

The proposed amendments, in major part, are aimed at establishing a uniform national rule on four points on which the Circuits currently have divergent rules or practices. These points are (1) the type of notice of judgment necessary to trigger the seven-day period for filing a Rule 4(a)(6) motion to reopen the time for appeal; (2) the formal requirements for briefs in cases involving cross appeals; (3) the permissibility of citing unpublished opinions; and (4) the method for determining a “majority” for purposes of a motion for hearing or rehearing en banc.

The proposed new rule regarding citation of unpublished opinions would not affect a court’s ability to both designate opinions as “unpublished” and refuse to accord those opinions precedential value, nor would the proposed rule address any constitutional issues in that regard. Rather, the proposed rule would merely ensure that in all

Circuits attorneys would be able to freely cite unpublished opinions for their persuasive value, subject only to Circuit rules applying equally to published decisions.

The February 16 deadline for public comment on the proposed appellate rules amendments also applies to a variety of proposed amendments to the civil, criminal and bankruptcy rules. **Proposed new Criminal Rule 59** has **implications for appellate practice**, as it would establish a procedure for the initial appeal of **nondispositive magistrate judge rulings** to the district court. The proposed rule represents a response to the Ninth Circuit’s holding, in *United States v. Abonce-Barrera*, 257 F.3d 959, 966-69 (2001), that a party in a criminal case, unlike a party in a civil cases, does not waive appellate review by failing to seek district court review of a nondispositive magistrate judge ruling.

Issues on Appeal

The recent decision in *United States v. Johnson* (Nos. 02-2382 & -3127, decided 12-8-02) provides a **rare example** of the Eighth Circuit granting a request for **rehearing by a panel**. The case involved a criminal defendant who was subject to two different indictments and sought to exclude certain evidence, on Sixth Amendment grounds, at trial under either indictment. The Eighth Circuit initially addressed suppression only with regard to trial under the first indictment, deeming it unnecessary to address suppression of the same evidence at trial under the second indictment. (*See* 338 F.3d 918). As a result of the motion for rehearing, the panel became convinced the indictments, and thus the suppression issues, were distinct and issued a second opinion addressing suppression with regard to trial under the second indictment.

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The Eighth Circuit in its recent decision in *Liles v. Del Campo*, 350 F.3d 742 (2003), **declined** to exercise its discretion to **permit** an **immediate appeal**, under Federal Rule of Civil Procedure 23(f), of an order conditionally certifying a class.

The Court noted the existence in other Circuits of a variety of tests as to when **Rule 23(f)** interlocutory appeal should be permitted but held that immediate appeal was inappropriate in the case before it, under any of those tests, because the class certification was only conditional and an appeal would have unnecessarily delayed the litigation and eaten into the only resources available to satisfy the plaintiffs' claims.

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The Eighth Circuit in its recent published per curiam decision in *United States v. Wheeldon* (No. 03-2086, decided 12-18-03) invoked, in the context of an appeal after **resentencing**, its rule against considering **an issue that could have been raised as part of a prior appeal**. The criminal defendant in his first appeal had successfully challenged the calculation of the base offense level (313 F.3d 1070). After the district court imposed a reduced sentence on remand, the defendant appealed again and sought to raise the issue of the district court's failure to grant a downward departure.

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Two different Eighth Circuit panels this fall issued "reminders" that an appellant's **failure** to **submit** a **transcript** of an evidentiary hearing (or, alternatively, to prepare a summary statement of evidence) can be **fatal** to an appeal. In *Shields v. Potter* (No. 03-1973, decided 11-14-03) and *Thomas v. City of West Memphis* (No. 03-1424, decided 11-20-03), the Court in unpublished, per curiam opinions summarily affirmed the respective district court rulings on the ground that the issues the appellants sought to raise could not be reviewed due to the absence of evidentiary transcripts.

Higher Authority

The U.S. Supreme Court has granted **certiorari** in a **Sixth Circuit** case that may be of interest to attorneys who accept **appointments** to **represent criminal defendants on appeal**. The

case involves a Michigan statute that prohibits a judge, except in limited circumstances, from appointing appellate counsel on behalf of a defendant who pleads guilty. The Sixth Circuit en banc held that attorneys who would otherwise accept such appointments have standing to challenge the statute and that the prohibition on appointment of counsel violates due process. *Tesmer v. Granholm*, 333 F.3d 683. Five Sixth Circuit judges dissented in part or in full.

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The U.S. Supreme Court on March 3, 2004, will hear **oral argument** in the **Eighth Circuit case** of *United States v. Sabri*, 326 F.3d 937 (2003). As previously noted, the case involves the constitutionality of a federal bribery statute (18 U.S.C. §666) insofar as that statute is interpreted as applying even in the absence of a nexus between the bribe and the expenditure or use of federal funds.

The U.S. Supreme Court **this term** has also heard arguments in **three additional Eighth Circuit cases**: *United States v. Fellers*, 285 F.3d 721 (argued Dec. 10, 2003)(alleged "interrogation" violation under Sixth Amendment); *Missouri Municipal League v. Federal Communications Comm'n*, 299 F.3d 949 (argued Jan. 12, 2004)(telecommunications preemption); and *United States v. Lara*, 324 F.3d 635 (en banc)(argued Jan. 21, 2004)(Indian tribal authority and double jeopardy).

The U.S. Supreme Court granted full hearing in only one Eighth Circuit case during the entire 2002-03 term.

Footnotes

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