



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

VOL.3, ISSUE 1

JANUARY 2005

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## Bench Briefs

Dedication to public service and possession of a keen intellect were the recurring themes at the **investiture** ceremony of Eighth Circuit **Judge Raymond W. Gruender** on October 14, 2004, at St. Louis University High School.

The motto of the all-male Catholic high school, which Judge Gruender attended and chose for his investiture, is "Men for Others." The school's President, the Rev. Paul Sheridan, SJ, observed that Judge Gruender has demonstrated the essential qualities of that motto during his legal career with his diligent pursuit of truth and his application of himself for the benefit of others.

Judge Gruender was the United States Attorney for the Eastern District of Missouri when he was appointed to the Eighth Circuit. He obtained JD and MBA degrees from Washington University in 1987. He then worked at Lewis, Rice & Fingersh in St. Louis until 1990, when he became an Assistant United States Attorney. In 1994, he joined one of St. Louis' largest law firms, Thompson Coburn; but in 2000, he gave up a partnership at that firm to again become an Assistant United States Attorney. The following year he became the United States Attorney for the Eastern District of Missouri.

Current U.S. Attorney James G. Martin, who was Judge Gruender's Executive Assistant United States Attorney, noted that Judge Gruender's accomplishments as United States Attorney included bringing public corruption cases involving government officials of both major parties and working with St. Louis officials on Project Safe Neighborhood, which has contributed to a significant decrease in the murder rate in St. Louis. Mr. Martin also commented on Judge Gruender's compassion, calling him a "**hard-nosed prosecutor with a big heart.**"

Other speakers referred to additional qualities, such as being a good listener, that make Judge Gruender particularly well-suited to be an appellate judge.

Classmate Michael Feder noted that Judge Gruender enjoyed great academic success – despite never studying for a test longer than it took to take the test.

[**Thanks** to Erv Switzer, Special Chief Counsel, Missouri Attorney General's Office, for this report]

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**Eighth Circuit Judge Duane Benton** at his ceremonial investiture on January 13, 2005, was recognized as being the only certified public accountant currently on any federal appellate court, and the first ever on the Eighth Circuit.

Judge Benton immediately prior to his appointment to the Eighth Circuit served on the Missouri Supreme Court, where he had the distinction of being the only certified public accountant on any state supreme court.

Judge Benton's investiture ceremony was held at the Thomas F. Eagleton Courthouse in St. Louis.

Judge Benton before joining the Missouri Supreme Court served as the director of the Missouri Department of Revenue; and his general counsel in the Department, Ray Wagner, recalled Judge Benton's reputation for caring about his employees. Judge Benton, according to Mr. Wagner, made a point of calling every employee on his or her birthday with a "Happy Birthday" wish – a practice that involved the making of approximately 2,000 "birthday" calls per year.

Mr. Wagner also commented on Judge Benton's academic credentials: The Judge graduated from Northwestern University *summa cum laude*, finished at the top of his class at Yale Law School, obtained an MBA from Memphis State University, and earned an LLM from the University of Virginia Law School.

Judge Benton in his own comments at his investiture recognized several groups to which he was grateful, including veterans, state employees, members of the Missouri Baptist Convention, and his private practice clients.

One of Judge Benton's first legal employers, Harvey Tettlebaum, opined that Judge Benton has the **patience of Job and the courage of Samson**.

Judge Benton took the Oath of Office from Eighth Circuit Senior Judge Theodore McMillian, whose seat Judge Benton now fills.

[**Thanks** to Erv Switzer, Special Chief Counsel, Missouri Attorney General's Office, for this report]

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The **intellect, gentle humor and compassion** of **Richard Arnold** proved to be a common theme among speakers at a special Eighth Circuit **memorial session** held to honor the late Judge.

Judge Arnold served with the Court from February 1980 until his death on September 23, 2004. He was Chief Judge from 1992 to 1998 before taking senior status in April 2001.

The memorial ceremony was held January 10, 2005, in the En Banc Courtroom at the Thomas F. Eagleton Courthouse in St. Louis.

Former Arkansas governor and senator Dale Bumpers, for whom Judge Arnold worked early in his career, opened by noting that "eulogizing somebody for whom there is such a woeful **shortage of superlatives** in our language is really a daunting task."

Senator Bumpers spoke of Judge Arnold's "legendary intellect and his undaunted courage in dealing with the illness [cancer] that was first diagnosed in 1975." Senator Bumpers said Judge Arnold had been one of the most respected aides in the United States Senate, where his knowledge of the Constitution and history and "his knowledge of debates in the Senate of bygone days" were invaluable.

Senator Bumpers also fondly remembered staff parties in the Senate where one of the main incentives was to "hear Richard emote in Latin without notes."

Recognizing Judge Arnold's extraordinary attributes and character, Senator Bumpers said that he had felt "a God-given duty to use all of the powers of [his] office to get Judge Arnold appointed, not just to the District Court and the Circuit Court but the United States Supreme Court." He lamented the circumstances that prevented an appointment to the Supreme Court.

Senator Bumpers concluded by recognizing that Judge Arnold had studiously performed his "solemn duty to manifest our love of God by leaving the world better than when he entered it."

The next speaker, Arkansas attorney and long-time Arnold friend Phillip Anderson, described Judge Arnold as a "polymath of extraordinary modesty and humility." Judge Arnold, Mr. Anderson noted, **used his gifts "wisely and quietly"** – showing off only by making speeches in Latin – and never used his gifts to cause someone to suffer embarrassment or humiliation.

Mr. Anderson spoke of Judge Arnold's uniform treatment of everyone with "utmost civility, courtesy, kindness and patience" and remembered the Judge as funny, witty, serious and inspiring. Judge Arnold, Mr. Anderson said, "**made us all feel like we were better than we really are.**"

Polly Price and Price Marshall, former law clerks to Judge Arnold, offered their special perspective on the Judge, with Ms. Price noting the “respectful awe and great affection” with which the clerks viewed Judge Arnold. She described the bond among the clerks, who recognized how privileged they were to have had the opportunity to work with and for Judge Arnold. In addition, Ms. Price noted how important it was to Judge Arnold that members of the judicial branch, as public servants, treat members of the public with politeness and respect.

Former clerk Marshall quoted Lord Chesterfield’s words “gently in strength, strongly in substance” to describe Judge Arnold. He referred to Judge Arnold’s unfailing courtesy to fellow judges, clerks and lawyers and his heartfelt affection for court staff who allowed the court to run as effectively as it did. Like Ms. Price, Mr. Marshall expressed gratitude for the “priceless opportunity” to work in Judge Arnold’s presence and under his direction.

Jim Layton, immediate past president of the Eighth Circuit Bar Association, spoke on behalf of the members of the Bar and noted that when he solicited comments about Judge Arnold from members of the Bar, nearly all of those who responded described Judge Arnold as “gracious.”

Paraphrasing a statement made by Judge Arnold after the Judge had taken time out in the midst of the Eighth Circuit Judicial Conference to perform a marriage ceremony for an attorney and his wife, Mr. Layton said that honoring Judge Arnold is “the most important thing I and the other members of the Eighth Circuit Bar have to do today.”

Judge Deanell Tacha, Chief Judge of the Tenth Circuit Court of Appeals, told the audience about Judge Arnold’s long and dedicated service on the Judicial Conference and described him as a “judge’s judge” who **“taught us in many ways how to be judges.”**

Judge Tacha quoted Jonas Salk’s comment that he had spent a lifetime in research because he “was learning to be a good ancestor,” and said that Judge Arnold’s “great legacy was that he was our great ancestor.”

Eighth Circuit Senior Judge (and former Chief Judge) Donald Lay, drawing from tributes presented when Judge Arnold became Chief Judge in 1992, read the following passage from Justice William Brennan: “As those familiar with his full record will discover as they read on, Judge Arnold is undoubtedly one of the most gifted members of the federal judiciary, equally important in generosity of spirit that quite naturally made him enormously popular and beloved among colleagues and friends of the Bar, on the bench and throughout the world.”

Eighth Circuit Judge Morris Arnold, brother of Richard, spoke on behalf of the family, relating personal anecdotes that reflected Judge Richard Arnold’s intellect, strength of spirit, and gentle sense of humor.

**“Speaking with [Judge Richard Arnold] was a little bit like being a player in a large orchestra,”** Judge Morris Arnold said. “One could just strum idly along and feel like an important contributor to the total effect, most of which was actually the product of Richard’s virtuosity.”

Judge Richard Arnold, according to his brother, had a “wide ranging” mind and learned Hebrew late in life, taught himself Italian by reading Dante’s *Inferno* in the original, and often drew praise from native speakers for his Italian, French, and German accents.

Referring to his brother’s equanimity, Judge Morris Arnold said, “The truth is that Richard **could hardly bring himself to say anything bad about anyone.** . . . He was careful about what he said. He frequently exercised his right not to speak. Words were not toys. It was as simple as that. . . He was not given to abstraction. He never mistook the obscure for the profound.”

Judge Morris Arnold closed his comments with a story of a conversation he had with his brother a few days before he died, during which his brother asked him what southern writers meant when they wrote about “a sense of place.” “I lied and said, ‘I don’t know,’ and let it go. He knew the answer. All he had to do was look inside himself.”

Eighth Circuit Senior Judge Theodore McMillian closed the program, speaking fondly about his work with Judge Arnold during the more than 20 years they shared as members of the Court.

He described Judge Arnold as “a brilliant lawyer and judge, a generalist and a supportive colleague and a most wonderful friend, . . . a man of enduring faith, modesty . . . and great kindness.”

In conclusion, Judge McMillian stated that after more than 25 years with his colleagues on the Court, he would “**miss most Judge Arnold’s warm friendship and his gentle humor.**”

A video of the memorial ceremony has been posted on the home page of the Eighth Circuit web site ([www.ca8.uscourts.gov](http://www.ca8.uscourts.gov)).

[**Thanks** to Association director Thomas Weaver of St. Louis for this report.]

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Supreme Court Justice Clarence Thomas was among the dignitaries present for the October 29, 2004, ceremonial **presentation** of the **portrait** of **Senior Judge Pasco Bowman**.

The ceremony was held in the Charles Evans Whittaker Courthouse in Kansas City, with a reception afterwards at the same site.

The newsletter’s plan to obtain a fuller report of the ceremony has gone awry. The newsletter apologizes to Judge Bowman for giving the appearance of slighting him and will pursue and report additional details in the next issue if possible.

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The **typical work** of an Eighth Circuit judge consists about **80 percent** of **reading** and only **20 percent** of **writing** and editing, a panel consisting of Judges William Riley, Michael Melloy and Steven Colloton told students in a question-and-answer session after hearing oral arguments at Drake University Law School last November.

Judge Melloy noted that he particularly spends a lot of time reading the week before he hears cases, because a judge usually hears five or six cases a day for the entire week, for a total of 25 to 30 cases.

Judge Colloton expressed regret that he could not spend more time writing, quoting a judge for whom he served as a judicial clerk as saying that judges don’t really think hard about and fully grasp

issues until they actually try to write about them. Judge Colloton, however, noted the reality, given the Court’s workload, that judges often would not have as much time to write as they would like.

The Judges agreed that **briefs** are **more important** than **oral argument** in the decision of appeals. As Judge Melloy put it, the brief is the judge’s first impression of a case; and as in anything else, first impressions matter. Judge Riley noted that lawyers in writing briefs have the opportunity to carefully draft their arguments.

Judge Riley further noted, however, that oral arguments are still helpful to defined things for the court and that oral argument make judges more solid in their thinking and may even change the minds of judges who were “on the fence.”

Judge Riley said that judges at oral argument ask two kinds of questions: (1) serious questions on points about the case they find troubling; and (2) questions intended to emphasize particular points to the other panel members, since the judges do not discuss cases in advance. He said attorneys at oral argument should welcome questions as opportunities, rather than fearing them as problems.

Consistent with the emphasis on briefs, Judge Colloton identified **legal writing** as the **most important thing taught in law school**. He estimated that 90 to 95 percent of what lawyers and judges do involves written work product and advised students to place a premium on learning how to communicate effectively in writing. Good analytical skills, Judge Colloton said, are also important as being necessary to put ideas in writing.

Judge Melloy agreed that writing and analytical skills are what stays with a lawyer after law school. He said that when his daughter, who is a first-year law student, recently asked him about the rule against perpetuities, he had “no idea.”

Judges Melloy, Riley and Colloton also emphasized to students the need to develop a **good reputation** and to learn to **act ethically and professionally**.

Judge Melloy noted that with some lawyers the Court tends to believe what they write while with other lawyers the Court will check everything they say. He noted that the issue was not necessarily one of ethics but instead might involve

merely sloppiness and lack of attention to details. He advised lawyers to strive to be in the category of lawyers whose statements judges deem reliable.

Judge Riley emphasized the importance of establishing a good reputation from an early age, noting that in the federal judicial confirmation process, potential nominees are asked if they have said or done anything that will embarrass the President if made public and the Justice Department and other bodies seek out the nominees' acquaintances even from high school.

Apart from the issue of possibly someday wanting to be a judge, however, Judge Riley advised students that their work life as lawyers would be easier if their word could be trusted.

[**Thanks** to Danielle Shelton of Drake University for sharing her notes of the Judges' question-and-answer session.]

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J. Leon Holmes, District Judge for the Eastern District of Arkansas, sat with the Eighth Circuit as a **visiting judge** for two days in **November** 2004 in St. Paul.

Judge Holmes assumed the district court bench in July 2004 after a number of years in private practice in Little Rock, Arkansas.

Judge Holmes earned both a master's degree and a doctorate degree before attending law school. His first post-J.D. position was as a law clerk to a Justice of the Arkansas Supreme Court.

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The **first** signed, published **opinions** of new Eighth Circuit Judges Raymond **Gruender** and Duane **Benton** are now "in the books."

Judge Benton on October 29, 2004, wrote for the panel in *Hayes v. Faulkner County* (388 F.3d 669), in which the Court upheld a verdict in favor of an arrestee detained 38 days before being granted an initial appearance.

Judge Gruender on November 12, 2004, wrote for the panel in *United States v. Mitchell* (388 F.3d 1139), in which the Court affirmed the sufficiency of the evidence to support a conviction

for aiding and abetting the making of a material false statement to a federal immigration official.

Judges Gruender and Benton both joined the Eighth Circuit in Summer 2004 and both sat for the first time in September 2004.

## Association News

Krista Kester of Lincoln, Nebraska, on January 1, 2005, became the **third president** of the Eighth Circuit Bar **Association**, replacing Missouri State Solicitor James Layton. South Dakota deputy attorney general Craig Eichstadt is president-elect.

Barry Pickens of Kansas City replaces Kester as treasurer, while Margaret Callahan of Des Moines replaces Eichstadt as secretary.

Thomas Boyd of Minneapolis joins the Board as an at-large director, assuming a position previously occupied by Tom Sullivan of the University of Arkansas at Little Rock. Sullivan remains on the Board as the director representing the Eastern District of Arkansas.

Layton, as past president, also remains on the Board of Directors.

Eric Magnuson of Minneapolis, who served as the Association's initial president in 2003, now passes off the Board.

Two director positions – those for the Southern District of Iowa and Western District of Missouri – remain open. The Board expects to receive and act on nominations for those positions at its February meeting.

The changes stated above were approved by the outgoing Board at its annual meeting, held December 8, 2004, by teleconference. The Board expresses its sincere thanks to Layton for his service as President in 2004.

An updated list of directors is posted on the Association's web site at the address shown at the bottom of this page.

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On the evening of October 28, 2004, at The Fairmont Hotel at the Plaza in Kansas City, the **Association** held a **reception** honoring and celebrating **Senior Judge Pasco M. Bowman's** tenure on the Eighth Circuit bench.

The event was scheduled in conjunction with the ceremonial presentation of the portrait of Judge Bowman. In addition, three panels of the Court heard oral arguments in Kansas City that morning.

More than 60 persons attended the reception, with guests including Eighth Circuit judges and court staff, district and magistrate judges from the Western District of Missouri, and numerous Association members.

The Association's President at that time, Jim Layton, offered a few remarks before presenting Judge Bowman with a commemorative clock and paperweight. Judge Bowman expressed his appreciation for the Association's work with the Court.

The Association thanks the following law firms for partially underwriting the event: Spencer Fane Britt & Browne; Byran Cave; Lathrop & Gage; and Stinson, Morrison Hecker.

## Issues on Appeal

The Eighth Circuit has **already twice relied** on the U.S. Supreme Court's recent decision in *U.S. v. Booker* (No. 04-104, Jan. 12, 2005), in **remanding** a criminal case for **resentencing**.

At the same time, the **Supreme Court Monday remanded more than two dozen cases to the Eighth Circuit** itself for reconsideration in light of *Booker*.

The Supreme Court in *Booker* held that the U.S. **sentencing guidelines** as written are **unconstitutional** because they require that judges impose enhanced sentences based on facts beyond those found by juries. The Supreme Court, however, declined to require the making by juries of the relevant factual findings.

Rather, the Court identified, and excised as severable, two provisions of the sentencing guidelines – 18 U.S.C. §3553(b)(1), which makes the guidelines mandatory; and 18 U.S.C. §3742(e), which requires de novo review on appeal.

The effect of the removal of these two provisions, according to the Court, is to make the guidelines advisory, rather than mandatory: The sentencing judge still must consider the guidelines

factors but may tailor the sentence to additional statutory concerns.

An appellate court on review, the Court held, should affirm unless the sentence imposed is “unreasonable” in light of the relevant factors.

The Supreme Court in *Booker* expressly held that its decision regarding the guidelines would apply to all pending cases; however, the Court also noted that its decision would not necessarily require resentencing in all cases due to doctrines such as preservation of error and harmless error.

A panel of the **Eighth Circuit first applied Booker** in *U.S. v. Coffey* (Nos. 2176 & 2247, Jan. 21, 2005), holding that because the defendant had preserved the issue of the constitutionality of the sentencing guidelines, he was entitled to a **remand for new sentencing** proceedings. The Court in a **footnote** observed that it was not presented with a question as to the “outer limits of precisely what will preserve the issue” or with a question of whether *Booker* would apply on “plain error” review.

The next business day another Eighth Circuit panel cited *Booker* in an unpublished *per curiam* remand for resentencing. (*U.S. v. Burgess*, No. 04-1543, Jan. 24, 2005).

Serious dispute as to the constitutionality of the federal sentencing guidelines has existed since June 2004, when the U.S. Supreme Court in *Blakely v. Washington*, 124 S. Ct. 2531, held unconstitutional a similar mandatory sentencing scheme used by the State of Washington.

A panel of the Eighth Circuit, relying on *Blakely*, held the federal sentencing guidelines unconstitutional in *U.S. v. Mooney* (No. 02-3388, July 23, 2004); and the Court had granted rehearing en banc in that case, as well as in the subsequent case of *U.S. v. Pirani* (No. 03-2871, Aug. 5, 2004), when the U.S. Supreme Court announced it would be considering the issue on an expedited basis in *Booker*.

The Eighth Circuit on September 27, 2004, issued an administrative order that provided for the preservation of “Blakely” issues while allowing cases to proceed. Eighth Circuit Clerk of Court Michael Gans estimates that **maybe as many two hundred pending Eighth Circuit cases** involve “Blakely” issues.

The Eighth Circuit en banc “*Blakely*” cases have been “on hold,” and Gans said no decision has yet been made on the scheduling of argument in those cases. The second of those cases (i.e., *Pirani*) presents the “plain error” question.

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An **error preservation “trap”** relating to challenges to the sufficiency of the evidence at jury trials would be **eliminated** under a **proposed amendment** to the Federal Rules of Civil Procedure now being circulated for public comment.

The amendment to **FRCP 50**, if approved, would eliminate the requirement that a party make a motion for judgment as a matter of law specifically at the close of all evidence. Instead, to preserve the right to make a post-judgment challenge to the sufficiency of the evidence, a party would need only to make a motion for judgment as a matter of law at some point during trial.

A post-judgment motion for judgment as a matter of law is necessary to preserve the issue of sufficiency of the evidence for appeal, absent “plain error.” (E.g., *Southern Pine Helicopters v. Phoenix Aviation Managers*, 320 F.3d 838, 840 (8<sup>th</sup> Cir.).)

According to the Advisory Committee on Civil Rules of the U.S. Judicial Conference, some circuits already have been relaxing the existing FRCP 50 requirement, a trend which the Committee feels will lead to uncertainty and increasing appeals. The Committee believes that a motion for judgment as a matter of law made at any point during trial serves the same function as a motion made specifically at the close of all evidence.

Deadline for public comment on the proposed FRCP 50 amendment is February 15, 2005. To view the language of the proposed amendment and related Committee comments, or for more information on how to submit comments (including by e-mail), visit the U.S. Courts web site at [www.uscourts.gov](http://www.uscourts.gov) and click on “federal rulemaking.”

Under the proposed amendment to FRCP 50, the post-judgment motion would still be limited to the same grounds raised in the motion for judgment as a matter of law made during trial. Also, the proposed FRCP 50 amendment would

have no effect on the relationship between the making of a post-judgment motion and the time for appeal.

The proposed amendment to FRCP 50 is part of a package of proposed Civil Rules amendments first circulated for public comment last August. FRCP 50 also potentially would be amended to establish a time limit for the making of a motion for judgment as a matter of law when the jury fails to return a verdict.

The proposed amendments to FRCP 50, **if approved** at all necessary stages, would become effective no earlier than **December 1, 2006**.

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The Eighth Circuit recently in *U.S. v. Johnson* (391 F.3d 946) held that it did **not have jurisdiction** to review the **discretionary decision** of the Eighth Circuit **Chief Judge** to deny a request for reimbursement in excess of the maximum under the Criminal Justice Act. The Court noted that such a decision was merely an administrative decision made by the Chief Judge in the performance of a statutory duty and suggested that the proper remedy for an aggrieved defendant would be mandamus to the Supreme Court.

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A panel of the Eighth Circuit in an unpublished opinion in *Williams v. ConAgra Poultry Co.* (03-2976, Nov. 4, 2004), held that in a case of sufficient magnitude, a prevailing civil rights plaintiff may recover, as part of an **appellate fee award**, argument preparation time and travel expenses for a **second attorney to attend oral argument**. The court, however, denied additional portions of the request for appellate fees, including a request for reimbursement of the plaintiff’s own travel expenses in attending mediation during the appellate process.

## Time, Place & Manner

Four to five people are working daily to implement **electronic case management** in the Eighth Circuit, according to Clerk of Court Michael

Gans. The **immediate focus**, however, is on portions of the electronic case management system that attorneys will never see – i.e., the internal accessing of cases, the establishment of case “diaries” with pending deadlines, and the generation of reports for court use.

The electronic filing portion of the electronic case management system is not yet available to the Eighth Circuit, according to Gans, and is not expected to be available until late spring or early summer.

The Eighth Circuit electronic case management implementation committee, chaired by Judge Diana Murphy, presented an internal report and recommendations to the Court earlier this month.

Gans said that when the electronic filing portion of the new case management system is available for testing, the Court anticipates establishing committees to interact with the district court and the bar, respectively, regarding various issues in the implementation of electronic filing.

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A **proposed amendment to Rule 25** of the Federal Rules of **Appellate Procedure** would formally authorize a circuit’s potential choice ultimately to require **electronic filing** of some or all papers.

Currently, FRAP 25(a)(2)(D) provides that a circuit may by local rule “permit” electronic filing. The proposed amendment would provide that a circuit could by local rule “permit or require” electronic filing.

Interested attorneys may submit written comments on the proposed amendment through February 15, 2005. The amendment, if approved at all necessary stages, would become effective no earlier than December 1, 2006.

Corresponding amendments to the Federal Rules of Civil Procedure and Bankruptcy Rules likewise have been proposed for public comment and are subject to the same timetable. According to a November 24, 2004, memorandum from the Committee on Court Administration and Case Management to the Standing Committee on Rules, more than 50 district and bankruptcy courts already

require electronic filing. The amendments to those rules thus will essentially conform the rules to existing practice.

The Appellate Advisory Committee note to the proposed FRAP 25 amendment suggests that circuits will need to make exceptions for parties who cannot easily file electronically and observes that such exceptions may be best recognized on an individualized “good cause” basis, rather than being established by rule.

For information on submitting written comments (including a link for e-mail submission), or to view the amended rule and other documents cited in this article, visit the U.S. Courts web site at [www.uscourts.gov](http://www.uscourts.gov) and click on “federal rulemaking.”

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The Eighth Circuit has placed a link on the home page of its web site calling attention to the December 2004 **increase in compensation to appellate counsel** appointed under the **Criminal Justice Act**.

The link takes counsel to a copy of a memorandum dated December 8, the effective date of the increase. According to the memorandum, counsel who perform any CJA-compensable work on direct criminal or habeas appeals after December 8, 2004, can receive a statutory maximum of \$5,000 in compensation, an increase of \$1,300 from the prior statutory maximum of \$3,700.

The memorandum notes increases in the maximums for other CJA services and directs attorneys to another portion of the Eighth Circuit web site for further detail.

## Special Session

**Planning** is under way for the **2005 Eighth Circuit Judicial Conference**, to be held at the Broadmoor in Colorado Springs, Colorado. The educational programs open to attorneys are scheduled for Thursday, October 20 and the morning of Friday, October 21, 2005.

Senior Judge Pasco Bowman is heading the planning committee for the 2005 Judicial

Conference. The Eighth Circuit's Circuit Justice, Supreme Court Justice Clarence Thomas, is expected to make the closing presentation.

The Eighth Circuit Bar Association expects to sponsor an event and/or program at the Conference. Association President Krista Kester and Association program chair David Herr are members of the planning committee and would welcome suggestions from Association members.

## Higher Authority

The Supreme Court recently in *Kowalski v. Tessmer* (125 S. Ct. 564) held that **potential appellate counsel did not have third-party standing** to assert the constitutional rights of indigent criminal defendants allegedly improperly deprived of counsel.

The State of Michigan forbids the appointment of appellate counsel for indigent criminals who plead guilty; and two counsel who routinely accept indigent appointments, along with three indigent defendants who had pled guilty, brought suit in federal court for injunctive relief.

The three indigents ultimately were dismissed from the case on grounds of *Younger* abstention, due to their pending criminal proceedings; but the Sixth Circuit (333 F.3d 683, en banc) found that the attorneys had third-party standing to assert the indigents' rights and found a constitutional violation.

The Supreme Court, among other arguments in denying third-party standing, held that the indigent defendants had adequate opportunity to pursue the issue for themselves, citing cases in which defendants acting pro se had challenged deprivations of counsel in Michigan state courts and had even petitioned to the U.S. Supreme Court for certiorari.

The propriety of the *Younger* dismissals was not at issue before the Supreme Court.

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The Supreme Court earlier this month in *Jama v. Immigration & Customs Enforcement* (No. 03-574, Jan. 12, 2005) **affirmed** the **Eighth Circuit's** conclusion that in identifying the country

to which an **alien** is to be removed, advance approval is not in all instances needed from the prospective receiving country. *See* 329 F.3d 630.

The result turns on the statutory interpretation of 8 U.S.C. §1231(b)(2).

## Appealing Site

Attorneys who want to "**read what the judges read**" should check the "How Appealing" web blog at [www.legalaffairs.org/howappealing](http://www.legalaffairs.org/howappealing).

The site consists of a daily catalog of, with links to, legal-related news and commentary appearing on other web sites. The emphasis is on reports of appellate decisions and other issues particularly relevant to appellate, in contrast to trial, practice.

A number of the Eighth Circuit judges, as well as Clerk of Court Michael Gans, have mentioned at least occasionally visiting the site. Reportedly one Eighth Circuit judge even commented from the bench, during oral argument, that attorneys should be reading it.

A highlight of the site is the feature "Twenty Questions for the Appellate Judge," where each month or so a different appellate judge responds to twenty questions posed by Pennsylvania appellate practitioner Howard Bashman, proprietor of the How Appealing blog. The late Richard Arnold of the Eighth Circuit was the "Twenty Questions" guest for November 2003. His responses, as well as those of other guest judges, remain in an archive on the web site.

Bashman was a guest speaker and participant at the joint Eighth Circuit/Federal Judicial Center conference last September on issues in implementing appellate electronic case management and electronic filing.

## Footnotes

The Eighth Circuit, compared to other circuits, currently has the **highest percentage of Republican appointees** among active judges, according to an article appearing in the December 2004 issue of "Bench & Bar," the official publication of the Minnesota State Bar Association.

Nine of 11 active Eighth Circuit judges – 82 percent – were appointed by Republican presidents. The circuits with the next highest percentages, according to the article, are the Fifth and Seventh circuits, each with approximately 75 percent Republican appointees among active judges.

The focus of the article in which these statistics appear is the potential impact on the Eighth Circuit of the appointment since 2001 of six new judges – i.e., a majority of the Court – by the second President Bush.

The article combines biographical information about each of the new judges (including comments from persons familiar with the judges) with a brief look at the opinions to date of each.

Attorneys can access the article through the Minnesota State Bar web site, [www.mnbar.org](http://www.mnbar.org).

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

Additional members are Andrew Faulkner and Kris Baker of Little Rock, Lajuana Counts of Kansas City, and Bob Rossiter of Omaha.

Special thanks to Association director David Herr for news tips for this issue.

The committee would welcome additional members and/or occasional contributors.