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Association News

Association members should mark their calendars for **September 13-14, 2004**, for a trip to **St. Louis**. The Association on those dates will be sponsoring a **reception** and co-sponsoring, with the Journal of Appellate Practice and Process, the Fifth Annual **Eighth Circuit Appellate Practice Institute**.

The Institute, which is expected to qualify for **six hours of continuing legal education**, will run from approximately noon on Monday, September 13 until approximately noon on Tuesday, September 14. The reception will follow the Monday afternoon program and will be free to Institute attendees. There will be a cash bar. Eighth Circuit judges and court personnel will be invited to the reception.

Featured national speaker for the Institute will be **former Deputy U.S. Solicitor General Andrew Frey**, who has argued more than 60 cases before the U.S. Supreme Court.

Other program highlights include a **panel discussion** featuring Eighth Circuit **Judge Roger Wollman** and **Senior Judges Pasco Bowman and David Hansen**, plus an update from **Clerk of Court Michael Gans**.

Rounding out the program will be presentations on ethical issues on appeal, the doctrines of finality and error preservation, and use of the Internet as factual authority in writing appellate briefs.

Fee for the program is \$160 for Association members and \$185 for nonmembers. All events will be held at the downtown Marriott Hotel in St. Louis, where a block of rooms will be available at a special rate.

Further information and a registration form soon will be available on the Association web site at www.law.ualr.edu/eighthcircuitbar.

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Mark Marshall of Sioux Falls, South Dakota, will be **taking over as chair** of the Association's **membership committee**. Marshall replaces Leigh Chiles, who will be accepting new employment outside the Eighth Circuit. Membership correspondence can be addressed to Marshall at mmarshall@dehs.com.

Chiles also has been serving as the Board of Directors representative from the Eastern District of Arkansas, but no replacement has yet been named.

Bench Briefs

The **Senate** on May 20, 2004, **confirmed** the nomination of **Raymond Gruender** to the Eighth Circuit Court of Appeals. Gruender, who currently is U.S. Attorney for the Eastern District of Missouri, was nominated in September 2003.

Gruender fills one of the two seats left vacant when Eighth Circuit judges Theodore McMillian and Pasco Bowman took senior status last summer.

The Senate **Judiciary Committee** on April 29, 2004, sent to the Senate floor with a favorable recommendation the nomination of Missouri Supreme Court Judge **Duane Benton** to fill the remaining Eighth Circuit seat.

Eighth Circuit Clerk of Court Michael Gans said that Gruender “for sure” would be available to sit with the Court in September, although no date has yet been set for Gruender’s taking of the oath or formal investiture ceremony.

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U.S. Supreme Court Chief Justice William H. Rehnquist has appointed Eighth Circuit **Senior Judge Pasco Bowman** to a new **committee** that is charged with investigating how the federal judicial system is dealing with **judicial misbehavior and disability**, according to a report in *The Third Branch*, the newsletter of the U.S. Courts Administrative Office.

Chief Justice Rehnquist in the newsletter links his appointment of the committee to recent Congressional criticism regarding the implementation in the courts of the Judicial Conduct and Disability Act of 1980.

For further detail, visit the Administrative Office web site at www.uscourts.gov and access the May 2004 issue of the newsletter by clicking on either “Library” or “Newsroom.”

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Eighth Circuit **Judge Diana Murphy** recently appeared on the panel “**Diversity Matters: A Perspective from the Bench**” at the Midwest Regional Conference for Women in the Law held April 21-23 in Minneapolis. Judge Murphy and her fellow panelists provided the audience with statistics showing that the number of women and minorities appointed to the bench is steadily increasing and discussed how the increase has affected practice before the courts, the quality of decision-making and the public’s perception of justice.

Judge Murphy confirmed that diversity does, indeed, make a difference. She noted that all judges

bring practical insights from their own experiences and background and that women judges have shown special understanding in areas such as child abuse, discrimination, and sexual harassment. She mentioned one of her cases as a district judge, *Jaycees v. McClure*, 534 F. Supp. 766 (D. Minn. 1982), that has had a major impact in opening opportunities for women.

The federal issue in the *Jaycees* case was whether the First Amendment prohibited Minnesota from applying its public accommodation law to require the United States Jaycees to open its regular membership ranks to women. The Jaycees contended that its constitutional right to freedom of association protected its “men only” policy. The St. Paul Chapter of the Jaycees brought the case to permit it to enroll women as full members, and the record contained much evidence on the lost opportunities women experienced by being excluded.

Judge Murphy ruled that the right asserted by the Jaycees was outweighed by the state’s compelling policy interest in preventing discrimination in public accommodations and that there was no reason to believe that opportunities for men would be restricted or that they would not be able to take full advantage of Jaycees activities and programs if women were admitted to membership. The U.S. Supreme Court reached a similar conclusion in upholding Judge Murphy’s decision (*Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984)).

Judge Murphy in addressing the Conference also observed that women’s progress in the courts has been remarkable over the last thirty years, but she noted that she remains the only woman to have been appointed to the Eighth Circuit Court of Appeals in its 114-year history.

Judge Murphy was joined on the “Diversity Matters” panel by the Honorable Ann Walsh Bradley, Associate Justice of the Wisconsin Supreme Court; the Honorable Esther M. Tomljanovich, former Justice of the Minnesota Supreme Court; the Honorable Natalie Hudson, Judge of the Minnesota Court of Appeals; Professor Carol Chomsky, University of Minnesota Law School; and Professor Sally Kenney, the Humphrey Institute, University of Minnesota. Minneapolis

attorney Katherine MacKinnon served as moderator.

The Conference, which was sponsored by Minnesota Women Lawyers, drew a diverse audience of women attorneys, judges, law students and legal employers to hear programming on the theme, "Defining Success: All Ages, All Stages." Additional speakers included Carol Moseley Braun, Esq., former ambassador, U.S. Senator and 2004 presidential candidate; Mara Liasson, White House Correspondent for National Public Radio; Diane Yu, Chair of the ABA Commission on Women in the Profession and Chief of Staff and Deputy to the President, New York University; and the Honorable Ann Williams of the Seventh Circuit.

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Eighth Circuit **Senior Judge Richard Arnold** in March was named the 2004 recipient of the **Morton Brody Judicial Service Award**. The award honors former U.S. District Court Judge Morton Brady of Maine and is presented through Colby College in Waterville, Maine, where Judge Brady for many years lived and taught.

For more information, visit the web site for the award (www.colby.edu/brody) or visit the Colby College home page (www.colby.edu) and check the news releases for March 2004.

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One "new" and two "repeat" **visiting judges** sat with the Eighth Circuit in St. Paul in May.

Judge Richard E. Dorr of the U.S. District Court for the Western District of Missouri sat with the Eighth Circuit for the first time. Prior to his appointment to the district court bench in 2002, Judge Dorr had been in private practice in Springfield, Missouri, since 1973. He served as a Judge Advocate in the United States Air Force beginning in 1968, and he continued in that capacity in the USAF Reserve until his retirement in 1991. Judge Dorr maintains his chambers in Springfield.

Senior Judge Clyde H. Hamilton of the Fourth Circuit previously sat with the Eighth Circuit in 2001. Senior Judge Hamilton was appointed to the Fourth Circuit in 1991 following service as a

U.S. District Judge for the District of South Carolina. Before that, Senior Judge Hamilton was in private practice from 1961-1982. Senior Judge Hamilton maintains his chambers in Columbia, South Carolina.

Senior Judge Richard W. Goldberg of the U.S. Court of International Trade, New York, has sat with the Eighth Circuit a number of times dating back to 1995. Senior Judge Goldberg was appointed to the Court of International Trade in 1991 and prior to that time served in various capacities including assistant state's attorney in Fargo, North Dakota; Air Force Judge Advocate; private practice; North Dakota State Senate; and deputy undersecretary for International Affairs and Commodity Program.

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According to various web sites, Eighth Circuit **Judge Roger Wollman** last fall took part in a **panel discussion** that has twice been shown on C-Span as part of that network's weekly "America and the Courts" series. The subject before the panel was the **differences in state and federal constitutional law**, and U.S. Supreme Court Chief Justice William Rehnquist was among the other panelists.

The panel discussion originally was part of a day-long conference held in Williamsburg, Virginia, and sponsored by the National Center for State Courts, the Institute of Bill of Rights Law at the William & Mary College of Law, and the Conference of Chief Justices.

A video of the panel discussion is available through the C-Span online store.

Time, Place & Manner

An **initial extension of time** is as close as an attorney's **fax machine**, according to **Eighth Circuit Clerk of Court Michael Gans**. Speaking at a recent Nebraska continuing legal education seminar, Gans stated that an attorney who has not previously sought an extension of time now can merely send to the Clerk's office, by fax, a letter reciting the original due date, a reason for the needed extension (which need only pass the

"straight face" test), and how much extra time will be needed.

Gans, however, warned, "Do not expect all that you ask for!" In civil cases, the "rule of thumb" is a 14- to 20-day extension; in criminal cases, it is a 14-day extension.

Gans further noted that opposing a motion for extension (especially a first one) is a waste of time.

Gans in other portions of his presentation stressed the need to follow the Federal Rules of Appellate Procedure and Eighth Circuit Local Rules relating to briefs. As an example, Gans pointed to the "all-important **'Summary of the Case'**" and discussed the importance of that summary in the screening process.

In addition, Gans noted for attorneys that out of the approximately 500 motions for **rehearing en banc** received each year, the Eighth Circuit generally **grants fewer than 10**.

The Nebraska State Bar Association sponsored Gans' appearance as part of its April 16, 2004, appellate practice seminar. Other speakers on the program included Nebraska Chief Justice John V. Hendry and Associate Justice John M. Gerrard. Eighth Circuit Senior Judge Arlen Beam was in attendance and was recognized by Gans.

Gans began the federal portion of the program by providing a statistical overview of the Eighth Circuit's caseload. For example, Gans noted that, of the 3,500 appeals processed by the Eighth Circuit each year, roughly 1,600 are *pro se* appeals. Gans also noted that the Eighth Circuit's disposition time of around eleven months is at the low end among all federal circuits.

Gans next explained the Eighth Circuit's web site and the availability and utility of the daily summaries of decisions. He reminded attorneys that the web site includes Eighth Circuit opinions back through 1994 plus more than 10,000 searchable briefs.

Gans congratulated the U.S. District for the District of Nebraska as being a leader in use of the CM/ECF electronic filing system and indicated that the Eighth Circuit expects to receive the software and hardware necessary for the implementation of that system in November or December of 2004. He indicated that it is his hope that by the early summer

of 2005, electronic filing – whatever its final scope is determined to be – will be available in the Eighth Circuit.

Gans noted that many peripheral issues – such as whether a paper appendix will still be required – remain to be sorted out.

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Two Eighth Circuit panels will **sit** in **Duluth**, Minnesota, June 14-16, 2004, before joining a third panel in St. Paul for the balance of June court week.

According to Eighth Circuit Clerk of Court Michael Gans, the Duluth sitting is in **honor** of **Senior Judge Gerald Heaney**, who maintains his chambers in Duluth. Gans said that to the best recollection of anyone with the Circuit – including Senior Judge Heaney, whose service dates to 1966 – the Circuit has not previously sat in Duluth.

Five active and three senior judges will join Senior Judge Heaney in making up the panels in Duluth.

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According to a report available on the web site of the U.S. Courts Administrative Office, the **Advisory Committee on Appellate Rules** at its April meeting **approved**, with only minor technical changes, the **proposed amendments** to the Rules of Appellate Procedure circulated for public comment last August. The proposed amendments next will be considered by the Committee on Rules of Practice and Procedure, which is scheduled to meet June 17-18, 2004.

The most controversial amendment involves proposed new Rule 32.1, which would allow the citation generally of unpublished opinions but would not reach any issue regarding the precedential value to which such opinions might, or might not, be entitled. According to a report in the May issue of *The Third Branch* (the newsletter of the U.S. Courts Administrative Office), the Advisory Committee at its April meeting heard testimony on proposed Rule 32.1 from several federal judges and practitioners before voting 7 to 1,

with one abstention, to approve the proposed new rule.

Web sites which have more in-depth reports regarding testimony offered at the hearing, and the nature of opposition to the rule, include www.law.com/jsp/article.jsp?id=1081792928522; www.abanet.org/journal/ereport/a23unpub.html; and www.fedbar.org/washwatch.html. *U.S. Law Week* identifies Eighth Circuit **Senior Judge Myron Bright** as among those testifying against new Rule 32.1 and quotes Judge Bright as expressing concern about the effect of the Rule on judicial workloads due to the greater amount of time needed to write an opinion that can guide future litigants. *See* 72 U.S.L.W. 2627.

Other substantive amendments circulated last summer and approved by the committee would clarify issues, under Rule 4, regarding reopening of the time for filing a notice of appeal and standardize the practice, under Rule 35, for determining a “majority” when one or more of a circuit’s active judges is disqualified from voting on a particular request for rehearing en banc.

Amended Rule 27 and new Rule 28.1 would address technical issues relating to, respectively, motions and cases involving cross-appeals.

For more information, visit the U.S. Courts Administrative Office web site at www.uscourts.gov.

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An annual U.S. Courts **statistical report** entitled *The Judicial Business of the United States Courts* shows that statistics are not just for sports fans. The latest edition of the report, which covers the 12-month period ending September 30, 2003, was recently posted on the web site of the U.S. Courts Administrative Office.

The report compares the circuits in a variety of measures ranging from number and types of filings to case disposition rates to use of unpublished opinions and visiting judges. Additional portions of the report break down circuit filings according to the judicial district of origin.

Some of the statistics may be surprising. For example, the report shows that the Eighth Circuit for the period in question was the **leader**

among all circuits in number of **filings involving homicides**.

Other statistics are less surprising, or not surprising at all. For example, the report shows that for the period in question the Western District of Missouri sent more than 500 appeals to the Eighth Circuit while the District of North Dakota generated only 77.

Other statistics reach details on which the practitioner likely has no particular preconception. For example, the report shows that among the judicial districts making up the Eighth Circuit, only the Northern District of Iowa and the District of Nebraska generated more criminal than civil appeals.

Some statistics will be of particular interest to the practitioner. For example, the report shows that the Eighth Circuit was the **fourth most difficult circuit** in which to obtain a **reversal**, granting such relief in just of 8 percent of cases terminated on the merits. The reversal rate for all circuits combined was only 9 percent, but that figure was drawn down by a miserly reversal rate of just over 1 percent in the Second Circuit.

The Eighth Circuit actually reversed in more than 12 percent of civil and bankruptcy terminations on the merits – but in only about 6 percent of criminal terminations on the merits and in only 2.5 percent of agency terminations on the merits.

The report also shows that the Eighth Circuit during the period in question used **unpublished opinions** in just over **60 percent** of the cases terminated on the merits – the fourth-lowest percentage among the circuits. Overall, the report shows, the Courts of Appeals used unpublished opinions in nearly 80 percent of cases terminated. The Sixth Circuit even disposed of about a dozen cases with oral rulings.

In a figure perhaps of particular interest to the Clerk’s Office and Judges, the report shows that the Eighth Circuit during the period in question terminated only about **100 cases** (out of nearly 2,900) for **jurisdictional defects**. Sixty percent of Eighth Circuit terminations were on the merits, compared to 48 percent for Court of Appeals terminations overall.

The report further shows that for cases terminated on the merits during the 12-month

period ending September 30, 2003, the decision-making panels in the Eighth Circuit consisted 74 percent of active judges, 24 percent of in-circuit senior judges, and only 2 percent of visiting judges. The comparable overall figures for Courts of Appeals, in contrast, were 78 percent, 16.4 percent, and 5.7 percent respectively, showing a relatively heavy reliance in the Eighth Circuit on its own senior judges.

A summary at the front of the statistical report focuses on the continued increase (i.e., ninth consecutive year) in the volume of Court of Appeals filings nationally. The Eighth Circuit, however, actually experienced a decrease in filings, albeit of less than one percent, during the 12-month period in question. Only two circuits (Tenth and Eleventh) experienced substantial decreases (4.5 and 6.5 percent, respectively), while overall Court of Appeals filings increased nearly 6 percent.

The report shows that the Eighth Circuit during the same period experienced a substantial decline (8.9 percent) in number of terminations, leading to a substantial increase (19.4 percent) in pending cases. Nevertheless, the Eighth Circuit median time to disposition of 8.4 months was second best among the circuits.

To view this report, visit the Administrative Office web site at www.uscourts.gov and click on “library” and then on “statistical reports.”

Higher Authority

The U.S. Supreme Court recently in *United States v. Lara*, 124 S.Ct. 1628, **reversed the Eighth Circuit** regarding the source of Indian tribal jurisdiction to prosecute nonmembers for crimes on tribal land. The Supreme Court held that 25 U.S.C. §1301(2), which states the existence of such jurisdiction, reflects not a delegation of federal authority but an affirmation of inherent tribal sovereignty, such that double jeopardy does not prevent a subsequent federal prosecution for the same wrong.

The initial Eighth Circuit panel reached this same conclusion (294 F.3d 1004 (2002)), but the Eighth Circuit en banc, in a 7-4 decision, disagreed and found a double jeopardy violation (324 F.3d 635 (2003)).

The Eighth Circuit already has used the new Supreme Court decision to reject a double jeopardy argument in an unpublished per curiam opinion. *See United States v. Archambault* (No. 02-2411, decided 5-12-04).

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The U.S. Supreme Court recently in *Sabri v. United States* (No. 03-44, decided 5-17-04) **affirmed an Eighth Circuit** panel decision upholding the constitutionality of 18 U.S.C. §666(a)(2), which imposes federal criminal liability in certain instances for the bribery of state and local officials. *See* 326 F.3d 937 (2003). The statute applies so long as the state or local body to be influenced receives at least \$10,000 annually in federal funds; and the Supreme Court rejected the argument that the statute was unconstitutional because it did not require proof of some link between the between particular bribe and federal dollars.

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The United States Supreme Court on May 24, 2004, granted two petitions for **certiorari** arising out of the **Eighth Circuit** case of *Livestock Marketing Ass’n v. U.S. Dep’t of Agric.*, 335 F.3d 711 (2003). The Eighth Circuit panel unanimously held that the Beef Promotion and Research Act of 1985 (7 U.S.C. §2901 et. seq.), and the implementing Beef Promotion and Research Order (7 C.F.R. Part 1260), violate the First Amendment because they require beef producers to pay assessments to fund, among other activities, generic beef advertising with which not all beef producers agree.

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The U.S. Supreme Court on June 7, 2004, **granted certiorari** in the **Eighth Circuit case** of *Rousey v. Jacoway*, 347 F.3d 689. The issue involves the interpretation of the bankruptcy exemption contained in 11 U.S.C. §522(d)(10)(E) as applied to funds rolled over from employer pension plans into individual retirement accounts.

The Eighth Circuit held that such funds are not exempt but recognized the conflict between its position and the position taken by a number of other circuits.

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The U.S. Supreme Court recently in *Jones v. R.R. Donnelley & Sons Co.*, 124 S. Ct. 1836, **resolved a circuit split contrary to** the position taken by the **Eighth Circuit**. The Court held that 28 U.S.C. §1658, the four-year “catch all” statute of limitations for post-1990 federal statutory causes of action, applies to a claim under 42 U.S.C. §1981 insofar as the plaintiff would have not had a valid §1981 claim prior to the amendment of that statute in 1991.

The Eighth Circuit previously had held that the most analogous state statute of limitations would continue to govern all §1981 actions. *E.g.*, *Madison v. IBP, Inc.*, 257 F.3d 780, 798. The Eighth Circuit has already applied the new Supreme Court ruling to reverse the dismissal of a §1981 harassment/wrongful discharge claim. *Jackson v. Homechoice* (No. 03-2288, May 21, 2004, *per curiam*).

Issues on Appeal

The Eighth Circuit in its recent **en banc decision** in *U.S. v. LeBrun*, 363 F.3d 715, rejected arguments that a **confession** was obtained in violation of the defendant’s *Miranda* rights and was the product of coercion.

The Court in reaching its conclusion held that **appellate review** of a *Miranda* “in custody” determination should be **de novo**. The Court noted that its past cases were inconsistent and expressly overruled its past cases insofar as they call for the use instead of the “clear error” standard.

The district court in *LeBrun* had found both that the defendant was “in custody” and that the confession was involuntary, and a divided Eighth Circuit panel had affirmed on both issues. *See* 306 F.3d 545.

The Court en banc split 7-4, with the dissent focusing on evidence put forth as establishing that

the government had promised the defendant immunity from prosecution and otherwise indulged in extensive falsehoods.

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The recent *per curiam* decision in *United States v. Woods*, 364 F.3d 1000, provides an example of an Eighth Circuit **panel**, on motion for **rehearing**, modifying its ruling. The case involved an issue as to the availability of a downward departure under the sentencing guidelines as amended; and the government, in response to the defendant’s motion for rehearing and rehearing en banc, abandoned its position that the Eighth Circuit’s pre-amendment precedent, categorically precluding a downward departure, still controlled.

The panel vacated its prior opinion (359 F.3d 1061) in part and remanded to the district court for a fact-specific inquiry on the downward departure issue. The panel commended the U.S. attorney for clarifying the government’s position.

In **another recent case** an Eighth Circuit panel, in response to motions for rehearing and rehearing en banc from both sides, declined to change its result but **replaced its prior opinion** with an amended and substituted opinion containing an expanded discussion on one issue. *See Kuha v. City of Minnetonka*, 365 F.3d 590 (superseding 328 F.3d 443)(individual and municipal liability for an alleged excessive use of force involving a police dog).

Footnotes

This **newsletter** is compiled by the communications committee of the Association of the Bar of the United States Court of Appeals for the Eighth Circuit. **Special thanks** this issue to Mary Vasaly of Minneapolis for the Judge Murphy report and to member David Herr of Minneapolis for news tips. 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.