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Association News

An **overflow crowd** gained insights from Eighth Circuit **Clerk** of Court Michael **Gans** and **five** Eighth Circuit **Judges** at the recent appellate practice **seminar co-sponsored** by the **Association**.

The May 11, 2005, program was held at the Saint Paul Hotel in Saint Paul, Minnesota; and hotel staff over the lunch break adjusted a moveable partition to create a larger room for the afternoon session.

Following the seminar, participants were able to **socialize** with the Eighth Circuit **Judges** and court staff at a reception at the hotel.

The seminar presentations of Gans, Eighth Circuit Judges Roger Wollman, Morris Arnold, Steven Colloton and Duane Benton, and Eighth Circuit Senior Judge Donald Lay are highlighted elsewhere in this edition of the newsletter.

Additional speakers were Minnesota Court of Appeals Judge Wilhelmina Wright, William Mitchell resident adjunct law professor Brad Colbert, and Minneapolis practitioner Eric Magnuson.

Colbert and Judge Wright gave a joint presentation on handling "difficult" issues on appeal. For example, they offered suggestions on how to catch the attention of the court when existing authority appears to be squarely against your client. They also played a brief audio clip, from an actual federal appellate argument, illustrating how *not* to handle that situation.

Among Judge Wright's and Colbert's suggestions were to check the authorities underlying the unfavorable opinion, to see if they squarely support it; to emphasize the potential "unfairness" of applying the unfavorable opinion in your case; and to say something provocative at oral argument to trigger questions and dialogue.

Colbert and Judge Wright also distinguished between hard but relevant questions from the bench, and actual hostile – i.e., caustic and demeaning – questions. They cautioned against responding in kind to hostile questions.

Magnuson, using a popular video game as an analogy, advised attorneys that if they did not learn technology, they would get "run over." He explained some basic document formatting concepts for attorneys and provided attorneys with citations to a variety of web sites relating to technology and the practice of law, including sites with information on electronic case filing.

He noted that the U.S. Seventh Circuit Court of Appeals already has electronic filing, although it does not use the CM/ECF system that the Eighth Circuit is planning to implement.

Seminar planning committee members Tom Boyd, John Baker and David Herr stated that they received a number of favorable comments from participants after the seminar and that Senior Judge Donald Lay even endorsed the idea of having similar programs in other cities within the Circuit.

More than 100 attorneys registered in advance for the seminar, which was co-sponsored by Minnesota Continuing Legal Education.

The following Minneapolis-area law firms provided financial support for the post-seminar reception: Fredrikson & Byron, P.A.; Gray, Plant, Mooty, Mooty & Bennett; Halleland Lewis Nilan & Johnson, P.A.; Johnson & Condon, P.A.; Maslon Edelman Borman & Brand, LLP; Rider Bennett, LLP; and Winthrop & Weinstine, P.A.

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The Association will be sponsoring a **breakfast** in conjunction with this Fall's Eighth Circuit **Judicial Conference** at the Boardroom in Colorado Springs. The breakfast will be held October 20, 2005, which is the first day of scheduled public educational programs for attorneys.

Details regarding any cost for the breakfast, and a possible speaker or program, are pending.

The Association also sponsored a breakfast at the July 2003 Judicial Conference. That event was free to Association members (and open to non-members for a price) and featured remarks by Senior Judge David Hansen.

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Association members should have received **renewal** notices by e-mail earlier this month. The Association **membership year** runs from July 1 to June 30, and all members other than those who joined after January 1, 2005, need to renew now.

Membership renewal is \$35, with a dues exemption for judicial and law clerk members of the Association.

According to membership committee chair Mark Marshall, several members had submitted their renewal payments on their own initiative, even before renewal notices went out.

The Association **currently** has **approximately 320 members** representing 13 states and the District of Columbia.

To obtain a copy of the 2005 renewal form or a new member enrollment form, click on the link "membership form" on the Association web site at www.law.ualr.edu/eighthcircuitbar.

Special Session

The new target date is **July 15, 2005**, for the on-line posting of **program** and **registration** information for the 2005 Eighth Circuit **Judicial Conference**. The Conference will be held at the Broadmoor in Colorado Springs, with public educational sessions for attorneys set for October 20 and 21.

Speakers announced to date include U.S. Supreme Court Justice Clarence Thomas, former U.S. Solicitor General Ted Olson, legal reporter Linda Greenhouse, military law expert Eugene Fidell, and judge members of the U.S. Sentencing Commission.

Time, Place & Manner

The **temporary removal** of the divisional Eighth Circuit **Clerk's office** from the **Saint Paul Courthouse** has been pushed back to **late September** or **early October**, according to Clerk of Court Michael Gans.

The delay, which is attributable to a delay in progress on the planned remodeling of the Saint Paul Courthouse, will allow the Court to hear a full week of cases in September in Saint Paul. Gans said four divisions will sit at the Saint Paul Courthouse for the week beginning September 12, 2005.

After September, the Court hopes to be able to hold some special argument sessions in Saint Paul, at area law schools or other sites. The Court, however, will not be able to hold a full court week in Saint Paul again until it is able to move back into the Courthouse, said Gans.

Gans emphasized that the Circuit will continue to maintain a full-service clerk's office in Saint Paul, plus a small library. He said that the temporary location has not been finally identified but that he expects it to be within a block or two of the Courthouse.

The telephone number of the Saint Paul clerk's office should not change, Gans said, and the Court is trying to make arrangements to continue using the same mailing address.

Information about contacting and visiting the temporary Saint Paul clerk's office will be posted on the Eighth Circuit web site.

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Electronic filing should be available in the Eighth Circuit as soon as in any other circuit, according to Clerk of Court Michael Gans; however, that likely will not be until **late** in the **first quarter** of **2006**.

The Eighth Circuit will be implementing an appellate version of the CM/ECF system now used in many U.S. district courts, and Gans said the public filing portion of the software will not be available to the Circuit until late in 2005.

"CM/ECF" stands for "case management/electronic case filing," and the Court's **current focus** is on the **internal case management** portions of the system, according to Gans. He said that the Eighth Circuit has been selected as a "test court" for conversion of data to the electronic case management system, with testing expected by the end of the summer.

Data conversion is a necessary precondition to public electronic filing, Gans stated, as is internal staff training following receipt of the software.

The Court, while dealing with issues of conversion and internal training, also will be working on revisions to the Local Rules as necessary to implement electronic filing, with drafts of proposed new rules to be posted on the Eighth Circuit web site, for comment, later in the year. In addition, a "test" version of electronic filing may be on the web site by late 2005.

Gans said that while no decisions have been made, if he were a betting man he would bet that the Court, even with electronic filing, will continue to require the filing of paper copies of briefs, although possibly in reduced numbers. Many Judges, Gans predicts, will continue to want to read paper copies of briefs; and the Clerk's office cannot be a "mini print shop" reproducing and apply proper color covers to the numerous briefs filed.

Gans said that likewise no decisions have been made about appellate CM/ECF training for attorneys and their staff, but that options include in-person training in St. Louis and Saint Paul, on-line

tutorials and instructions, personal appearances in other cities if invited to continuing legal education programs, and possibly a tutorial on disk.

Gans said the Federal Judicial Center is working on preparation of some training materials.

A long-range goal with electronic filing, said Gans, is to make electronic briefs so helpful – for example, through inclusion of hyperlinks to the record and/or cases – that judges will prefer to work with briefs in electronic form, rather than on paper.

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Eighth Circuit **Clerk of Court Michael Gans** in recent remarks at a continuing legal education program announced an improvement to the Court's "VIA" electronic noticing system and offered practitioners **tips** and **insights** on a wide variety of subjects.

Gans also addressed progress toward implementation of electronic filing and the impact on the Circuit of the remodeling of the Saint Paul Courthouse. See the separate reports elsewhere in this newsletter on these issues.

Attorneys who participate in **VIA**, Gann announced, are no longer limited to having electronic notice sent to just one e-mail address or fax number. Rather, attorneys now can register three e-mail addresses, or two e-mail addresses and one fax number. This way attorneys can have notices sent also to staff members and/or colleagues, or to home e-mail addresses, reducing the concern with notices received when the **VIA** registrant is not in the office.

Current **VIA** participants should have received in recent weeks, by e-mail, a fillable form offering them the opportunity to update and expand their **VIA** registrations. Gans said that use of the **VIA** system, in addition to allowing attorneys to receive notices more quickly, has saved the Court around \$250,000 during the seven years it has been in operation.

On the other hand, the Court continues to expend resources, in staff time, to remedy defects in briefs. Gans estimated that **35 percent** of **briefs** filed in the Eighth Circuit are **defective**, primarily through the omission or incorrect ordering of required sections. With the Court receiving around

125,000 copies of briefs annually, the clerk's office staff ends up re-assembling and re-stapling some 40,000 copies of briefs each year.

Gans noted that attorneys, in addition to consulting the "briefing tips" prepared by the Eighth Circuit, can use the briefs on the Circuit's web site as samples.

In one change, however, Gans noted that the **summary and request for oral argument**, required immediately inside the front cover of initial briefs, **no longer has to be strictly limited to one page** and may run a **few lines over**. Gans said counsel in drafting this section should aim to prepare a summary that would make the case understandable to the "lay person."

In other comments relating to briefs, Gans reminded attorneys that the Court does **not favor overlength briefs**. The Judges, he said, believe the rules already are too generous in this regard. He told the story of how on one occasion, when he granted permission for an overlength brief and counsel exceeded even the expanded limit, the judges rejected the brief and gave the attorney fewer extra pages than Gans had.

Gans noted that by Local Rule (Rule 28A(h)), permission to file an overlength brief must be sought at least a week in advance of the briefing deadline.

Gans also noted that the reference in the Federal Rules of Appellate Procedure (Rule 32(a)(7)) to a 30-page limit for initial briefs is a "safe harbor": Permission is not needed to file a brief longer than 30 pages if the brief meets either the word-count or line-count standard.

Another concern of the Eighth Circuit Judges, according to Gans, is the **sealing of portions of the record**, with the Judges believing that district courts sometimes are too lenient in this regard. Gans reminded attorneys that a **motion** and Court **permission** are necessary to file materials under seal. When permission to seal is granted, attorneys should prepare two versions of their briefs and appendices, with the sensitive portions redacted in the "public" versions of the briefs and excluded from the "public" versions of the appendices.

On the topic of oral argument, Gans advised that attorneys for two reasons visit the Eighth Circuit web site (www.ca8.uscourts.gov) before

appearing before the Court. First, attorneys can listen to arguments involving the members of their panel for possible insights into the questioning styles of those Judges. Second, attorneys can check for the most recent opinions by panel members in similar cases. Some Judges, Gans said, may be offended if attorneys do not cite the Judge's most recent decisions.

Appellants, according to Gans, **should always seek argument**. Gans himself screens criminal cases for argument, while deputy clerks in St. Louis and Saint Paul screen the civil cases. They err on the side of argument, granting it in approximately 85 percent of attorney-handled (in contrast to pro se) cases.

The panel of judges to whom a case is assigned can, however, remove a case from the argument schedule; and according to Gans, this is happening more frequently, with the newer Judges on the Court having different ideas than the "old school" Judges about the need for argument.

When a case initially is screened for non-oral submission, the attorneys receive notice and an opportunity to object; and the case will be moved to the argument calendar if a single judge so requests.

Gans said it takes **60 or more days to put together an argument calendar**, with attorneys receiving about 30 days' notice of their argument dates. Attorneys thus should not expect argument until about three months or more after the completion of briefing. Because of the Court's July-August recess from hearing arguments, cases that become ready in April or later will not be heard until Fall, said Gans.

Once the calendar is set, only the Judges – and not Gans himself – can change it. Gans said that the Judges **will not lightly change the calendar**, particularly once they have already spent time on the case. Thus, Gans advises that attorneys let him know in advance of conflicts, so that he can take them into account in setting the calendar, if possible.

For similar reasons, Gans suggested that an attorney who wishes to seek **certification** of a question of **state law** should file a separate motion to that effect, so the issue will come to light before the calendar is set. Gans said, however, that the motion should be filed with the brief, rather than

before, so that the Court can refer to the brief, to see the context in which the issue arises, in considering whether certification of the state question is appropriate.

Gans also addressed the issue of requests for **extensions of time**, of which he said the Clerk's office receives about 75 each week. Gans made the following basic points: a letter may be used instead of a motion; the letter or motion may be submitted by fax; the letter or motion should state the existing deadline, the proposed deadline and the reason for the request; and the reason must be stated with some specificity, although a weighty reason is not needed for a first request (i.e., a vacation or another deadline is an acceptable reason). Counsel need not submit an affidavit or proposed order.

Gans said that attorneys who wish to be on the list to accept Criminal Justice Act or pro bono civil appointments on appeal should send a letter to the Clerk's office.

Gans' presentation opened the May 11, 2005, Appellate Practice Seminar in Saint Paul co-sponsored by the Association and Minnesota CLE. Reports on the program as a whole, and on other of the presentations, appear elsewhere in this newsletter.

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The Eighth Circuit has taken the **first step** toward **seeking an additional judgeship**, according to Clerk of Court Michael Gans.

The U.S. Judicial Conference has recommended to Congress that Congress authorize an additional, temporary, judgeship for the Eighth Circuit. A "temporary" judgeship, according to Gans, expires upon the retirement of the person first appointed, unless Congress renews the judgeship. A temporary judgeship thus could last anywhere from a short time to 30 or more years.

The number of judges to which a Circuit is entitled, said Gans, depends on a statistical analysis conducted every two years. He said that the Eighth Circuit has qualified for an additional judgeship for a number of years but that the Judges have been happy with the current size of the Court.

In asking for an additional judgeship now, Gans said, the Court is looking toward the future,

because even if the Eighth Circuit eventually receives the judgeship, the authorization process likely will take three or four years. The nomination and confirmation process then would take additional time.

The Eighth Circuit currently is entitled to 11 active judgeships, a figure which has not changed for approximately 15 years. The eleventh judgeship was authorized in 1990 and was first filled by now-Senior Judge David Hansen, who was appointed to the Eighth Circuit bench in 1991.

Bench Briefs

Eighth Circuit Judges Roger Wollman, Steven Colloton and Duane Benton identified **common attorney mistakes** and offered **briefing and argument tips** in a panel presentation May 11, 2005, in St. Paul.

The Judges' appearance was part of a continuing legal education program jointly sponsored by the Association and Minnesota CLE, as reported elsewhere in this issue.

A main theme of the Judges' advice was that attorneys should **focus** their **arguments**, both orally and in briefs. The Judges generally advised that attorneys limit briefs to two or three issues (except in death penalty cases) and that attorneys at oral argument start with their most important point, repeat it often and not spend time on unnecessary factual recitation.

A **good argument summary** section in the brief is important, as the various Judges either read the argument summary first when starting a new case or use the argument summary as a "refresher" when they come back to a case before oral argument. The argument summary should not be too short and should contain analysis and key cases, rather than merely restating the argument headings.

Judge Wollman observed that attorneys, however, frequently cite too many authorities in the actual argument sections of their briefs. Few cases are lost, according to Judge Wollman, because the briefs are too short.

Attorneys both in briefing and argument, and also in preparing the appendix, should keep in mind that an important part of their role is to distill

the district court record for the “busy appellate judge.”

In addition to the proper selection of content (the full district court record is available to the Eighth Circuit anyway), an **adequate index** is essential if the **appendix** is to assist the Judges. For example, exhibits should be individually listed, with a page number given for the start of each exhibit.

In an appropriate case, counsel may want to consider including a significant exhibit, picture or chart in the actual brief, as the Judges read briefs at home or other settings outside the office but do not generally carry around the appendices.

Also, counsel should pay attention to their particular circumstances in meeting the requirement for inclusion, in the **addendum** to the appellant’s brief, of the district court or agency opinion. By way of illustration, Judge Colloton noted that when an appellant challenges, for example, a ruling on motion to suppress, the Judges will want to find in the addendum not just the ultimate judgment in the case but also the ruling which shows the district court’s reasoning on the suppression issue.

If counsel wishes to use graphics at **oral argument**, counsel should keep it short, use only one or two graphics, make sure the graphics are large enough to read from the bench, give copies of the graphics to the panel in advance, and make sure the graphics are supported, without dispute, in the record. The use of graphics during oral argument can be distracting, and some members of the Eighth Circuit don’t like to see graphics used at argument.

Judges Wollman, Colloton and Benton emphasized the Court’s rule discouraging the splitting of oral argument (at least absent separate parties with separate positions), noting in particular the drawbacks of having different attorneys argue different issues – i.e., the issues are frequently interrelated, and the Judges in any event sometimes “skip around” in the subjects of their questions at oral argument. The panel hearing a case generally will not grant additional argument time when counsel attempt to split argument and one counsel takes part of the “other counsel’s time.”

Judges Wollman, Colloton and Benton also discussed generally their procedure in deciding cases, starting with a post-argument conference where they engage in a “give and take” regarding

the issues. This conference, according to Judge Benton, may not always have an atmosphere of “congeniality” but does always have an atmosphere of “collegiality.”

No two Judges will discuss an opinion outside the presence of the other panel member, and the Judges attempt to reach opinions that all panel members can join. Judge Wollman shared his impression that Eighth Circuit Judges write fewer concurring opinions than the judges in some circuits, which he feels is easier on attorneys who practice before the Circuit.

Counsel may influence the decision as to whether an Eighth Circuit decision is published by writing a letter to the Clerk’s Office. Clerk of Court Michael Gans will refer the letter to the panel that decided the case and, according to Judge Wollman, the panel then usually will decide to publish the opinion.

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The **late Richard Arnold’s real ambition** was to be a U.S. **Senator**, revealed Eighth Circuit Judge Morris Arnold in recent remarks about his late brother and former colleague on the Eighth Circuit.

Judge Morris Arnold introduced Professor Polly Price, who gave a presentation on the legacy of Eighth Circuit Judge Richard Arnold at the May 11, 2005, appellate practice seminar co-sponsored by the Association (see additional articles elsewhere in this newsletter). Professor Price, who teaches at Emory Law School, is a former Richard Arnold law clerk and is working on a biography of the late Judge.

Richard Arnold made two unsuccessful runs for Congress, and Judge Morris Arnold recalled driving a sound truck in small Arkansas towns in support of his brother. Richard’s love of politics, however, also served him well as an Eighth Circuit Judge, noted Judge Morris Arnold, as Richard enjoyed being involved in court administration and legislative relations as a member of the Judicial Conference.

Professor Price said Richard Arnold began thinking about campaigns and politics when he was five and that he was only 29 when he first ran for

Congress. Richard's positions on the issues, as a candidate, included opposition to busing, gun control and the Vietnam War.

Richard also showed an interest in constitutional issues at an early age, writing a paper, at 13, arguing against the interpretation of the due process clause of the Fourteenth Amendment as "incorporating" other rights. At Harvard Law School, Richard was deemed "**too conservative**" to obtain a U.S. Supreme Court **clerkship** with his **first choice** of Justice, Felix **Frankfurter**. Professor Price noted that Richard, however, was embarrassed, as a law student at Harvard, by the civil rights problems back in Arkansas.

Richard ended up clerking for Justice William Brennan when his grandmother sent a note on his behalf to Justice Tom Clark and Justice Clark passed the note down the bench during oral argument. Richard's experience with Justice Brennan, combined with the writings on the Bill of Rights of Justice Hugo Black, substantially influenced Richard's judicial philosophies.

Judge Morris Arnold noted that his brother once, in congressional budget testimony, identified the judiciary as the "most important law enforcement agency" – with the Bill of Rights as part of the law to be enforced.

Richard himself identified his two opinions in *Miller v. United States*, 643 F.2d 481 (1981)(panel dissent and en banc majority), as illustrative of his judicial philosophy.

More recently, Richard became known for his opinion, subsequently vacated as moot, in *Anastasioff v. United States*, 223 F.3d 898 (vacated by 235 F.3d 1054), holding unconstitutional the practice of denying precedential value to unpublished opinions.

Richard **almost did not become an Eighth Circuit Judge**, according to Professor Price. President Jimmy Carter had promised to see that each circuit had a female judge, and the Eighth Circuit had none. However, a potential female nominee was rated "not qualified" by the American Bar Association, plus the selection of Richard allowed President Carter to meet another part of his judicial diversity promise by appointing an Afro-American to the seat Richard then held on the U.S. District Court in Arkansas.

Professor Price as background for her presentation showed a variety of photographs of Richard Arnold – including a presumably rare **photograph** of Richard wearing a **regular tie**, rather than a bow tie. The photograph was from the time of one of Richard's early congressional campaigns.

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A **concurring opinion** is "**really a dissent**," Eighth Circuit Senior **Judge Donald Lay** told attorneys at a recent appellate practice seminar co-sponsored by the Association. Judge Lay's topic for the May 11, 2005, seminar (for more on the seminar, see the article elsewhere in this issue) was "Concurrences, Dissents & the Appellate Lawyer."

Judge Lay estimated that he to date has written more than 100 dissents in his nearly 40 years on the Eighth Circuit bench, and he predicted he might be writing dissents at an even greater rate over the next couple of years.

His favorite dissent, according to Judge Lay, was in *Morrissey v. Brewer* (443 F.2d 942), an en banc decision regarding a defendant's right to a hearing upon the revocation of parole for an alleged parole violation. The U.S. Supreme Court subsequently granted certiorari and recognized the due process right Judge Lay urged in his dissent.

Judge Lay said dissents "keep the law vibrant." He said dissents, while perhaps of some help in getting certiorari, are of greater help in getting en banc review.

Judge Lay also commented that he sees a **trend** toward **less interest**, among Eighth Circuit Judges, in **oral argument**. He said that "old school" judges, such as he and Senior Judges Gerald Heaney and Myron Bright, consider oral argument as important as, or more important than, the written briefs.

A case is not worthy of appeal, according to Judge Lay, if it is not worthy of oral argument. He advised that attorneys object to the denial of a request for oral argument, because reversal is not likely when the Court deems oral argument unnecessary.

Judge Lay was among the youngest U.S. Court of Appeals judges at the time of his appointment to the Eighth Circuit bench in 1966.

Judge Lay has had a selection of his dissenting opinions compiled into a book, not for publication but for private distribution, and he gave away a number of copies of his book to seminar attendees, in a drawing.

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The May 7, 2005, edition of the “America & the Courts” program on C-SPAN included footage of Eighth Circuit Judge Duane Benton speaking on “The Burger-Blackmun Relationship: Lessons for Collegiality.”

Judge Benton gave the speech as part of the February 2005 symposium “Reflections on Judging: A Discussion Following the Release of the Blackmun Papers,” sponsored by the University of Missouri-Columbia School of Law. Judge Benton is an adjunct professor at that school.

Check the C-Span web site (www.c-span.org), under the heading “America & the Courts,” for a possible link to video of the broadcast.

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A transcript of the ceremony upon the presentation of the portrait of Eighth Circuit Senior Judge John R. Gibson appears in the front of 398 F.3d. The ceremony was held November 1998 in Kansas City, where Judge Gibson maintains his chambers.

Issues on Appeal

Approximately 300 Eighth Circuit appeals have raised *Booker* issues, according Eighth Circuit Clerk of Court Michael Gans; and the Circuit’s recent en banc decision in *United States v. Pirani*, 406 F.3d 543, should simplify the resolution of a number of the remaining *Booker* appeals.

Booker is the case in which the U.S. Supreme Court held (125 S. Ct. 738) that to avoid the Sixth Amendment violation that occurs when the judge, rather than the jury, finds certain facts

essential to a defendant’s sentence, the U.S. Sentencing Guidelines are to be treated as advisory, rather than mandatory.

The Eighth Circuit en banc in *Pirani* addressed two issues central to the appellate review of sentences handed down pre-*Booker*.

First, the Court held that a defendant, to have preserved error, must have asserted in the district court that the sentence violated *Apprendi* or *Blakely* or must have referred to the Sixth Amendment or questioned the constitutionality of the Guidelines.

Second, the Court held that when error has not been preserved, such that review is only for “plain error,” a defendant is not entitled to a remand for re-sentencing unless the defendant can show a “reasonable probability” that the district court would have imposed a more favorable sentence with the Guidelines merely advisory, rather than mandatory. The Court noted that neither a sentence at the lower end of a Guidelines range, nor a judge’s general expressions of dislike for the Guidelines, would be adequate to carry this burden.

The Eighth Circuit in the “plain error” approach thus adopted described itself a taking a position consistent with that of the First, Fifth and Eleventh circuits.

Judges Morris Arnold and Lavenski Smith, in dissent, would have adopted the approach of the Seventh Circuit, pursuant to which a “plain error” case is subject to a limited remanded for certification from the district judge as to whether or not the judge would have imposed a different sentence if at the time the Guidelines had been advisory rather than mandatory.

Judge Kermit Bye, also dissenting on the “plain error” analysis, would have adopted the “presumptive prejudice” approach used in the Sixth Circuit, with a remand for re-sentencing required unless the government established that the district court would have imposed the same sentence with the Guidelines advisory.

Senior Judge Gerald Heaney in dissent expressed agreement with Judge Bye’s “presumed prejudice” argument but would have found that the defendant, by challenging the factual predicate for the Guidelines enhancement to the sentence,

adequately preserved error, making “plain error” analysis unnecessary.

The Eighth Circuit has already cited *Pirani* – which was just decided April 29, 2005 – some 80 or more times in disposing of appeals.

For examples of the Eighth Circuit finding plain error in the absence of a *Booker* objection, see *United States v. Rodriguez-Ceballos* (407 F.3d 937) and *United States v. Valdivia-Perez* (No. 03-3987, June 6, 2005). In each of those cases, the district judge had expressly indicated dissatisfaction with the sentence required by the Guidelines in the specific case.

[Thanks to Assistant United States Attorney Phil Koppe for assistance in the preparation of this article.]

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The Eighth Circuit in its recent unanimous **en banc** decision in *United States v. Allen*, 406 F.3d 940, found **harmless error** in the government’s **failure to include in the indictment** even one of the **statutory aggravating factors** necessary to the jury’s ultimate imposition of the **death penalty**.

The Court in reaching its decision held that the defendant, despite the defective indictment, had adequate notice of the State’s allegations and intent to seek the death penalty and that any rational grand jury, based on the evidence actually presented at that time, would have found probable cause to charge at least one of the aggravating factors.

The Court en banc held, as had the panel (357 F.3d 745), that the failure to include any aggravating factor in the indictment was constitutional error and that the error, not being “structural,” did not require automatic reversal. The majority of the panel, however, had found that the error was not harmless.

The case was before the Court on remand from the Supreme Court for reconsideration in light of *Ring v. Arizona* (536 U.S. 584), which was decided after the initial Eighth Circuit decision (247 F.3d 741) upholding the conviction and death penalty.

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The Eighth Circuit **en banc** recently in *Doran v. Eckold* (No. 03-1810, June 6, 2005) **reversed** a \$2 million “**excessive force**” **jury verdict** in favor of an individual who was shot by police as they made a forcible entry, to execute a search warrant, without first knocking and announcing their presence.

The six-member majority found that the two officers in question reasonably believed the “**no knock**” **entry** was justified by **exigent circumstances**, based on the information known to those officers and their right to rely on information from other officers and on orders from superiors.

The majority rejected the argument that because essentially all the information used to support the claim of exigent circumstances was known when the officers sought the warrant, the officers were obligated to seek permission from the magistrate, through a “no knock” warrant, to execute the search in that fashion.

The panel, in a 2-1 decision (362 F.3d 1047), had rejected the officers’ claim of exigent circumstances; and four judges adopted that position in an en banc dissent, pointing to a number of ways in which the evidence of exigent circumstances was stale, uncorroborated and speculative.

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A panel of the Eighth Circuit on remand from the U. S. Supreme Court **reinstated** its **original decision** in *United States v. Menteer*. See 408 F.3d 445 (per curiam)(reinstating 350 F.3d 767 (2003)).

The case involved the **sentencing** of a defendant under the “**violent felony**” **provisions** of the Armed Career Criminal Act (18 U.S.C. §924(e)), and the Supreme Court vacated and remanded for further consideration in light of *Shepard v. United States*, 125 S. Ct. 1254 (2005).

The Eighth Circuit panel on remand distinguished *Shepard* on the ground that the sentencing judge in *Shepard* had had to make findings of fact to determine whether a prior guilty plea was to an offense that qualified as a “violent felony.”

The panel found no Sixth Amendment concern with judge (in contrast to jury) fact finding in *Menteer* because the defendant, by failing to object to the facts set forth in the pre-sentence report regarding his prior guilty plea, admitted the facts necessary to support the finding that the plea was to a “violent felony.”

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A panel of the Eighth Circuit on remand from the U.S. Supreme Court again upheld the defendant’s conviction in *United States v. Fellers*, 397 F.3d 1090, but sent the case back to district court for re-sentencing. The panel held that the initial **Sixth Amendment violation** found by the U.S. Supreme Court (see 124 S. Ct. 1019) did **not require exclusion** of the defendant’s subsequent **statements made after** a knowing and voluntary **Miranda waiver**.

The panel further held that the admission of the post-waiver statements in any event was harmless beyond a reasonable doubt.

Because, however, the district court had imposed a sentence based on a drug quantity in excess of that found by the jury, the panel remanded for re-sentencing under *Booker*.

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The **Class Action Fairness Act** of 2005, which went into effect February 18, 2005, provides a new right to certain litigants to seek **discretionary interlocutory review**.

The Act expands federal jurisdiction and removal rights with regard to certain class actions and “mass actions” filed in state court and provides for immediate review, at the discretion of the Courts of Appeals, of grants and denials of motions to remand. *See* 28 U.S.C. §1453.

The new discretionary review provision requires expedited action by the Courts of Appeals, with an appeal being deemed automatically denied if not resolved within 60 days from the date of filing. A Court of Appeals may extend the decision period by 10 days with the consent of all parties or for good cause.

Absent the special discretionary review provision of the new Act, review of class action and mass action remands generally would not be available at all in light of 28 U.S.C. §1447(d), which prohibits review of most remand orders.

The Act contains no standards to guide Court of Appeals discretion in determining when to grant interlocutory review of a covered remand order.

Higher Authority

The U.S. **Supreme Court** recently in *Johanns v. Livestock Marketing Ass’n*, 125 S. Ct. 2055, **reversed** the **Eighth Circuit** on the issue of the constitutionality, under the First Amendment, of a federal program pursuant to which beef producers were required to fund generic beef advertising.

The majority of the Court found the funding scheme permissible on the basis that the generic advertising constituted speech by the government itself and individuals can be compelled to provide financial support to government programs, including government speech.

A panel of the Eighth Circuit (335 F.3d 711) had unanimously found the provisions in question unconstitutional.

The Supreme Court’s decision in *Livestock Marketing* is its fourth full decision this term in a case from the Eighth Circuit, and the Supreme Court has reversed in three of those four cases.

The Supreme Court likewise during its 2003-04 term heard four cases from the Eighth Circuit and reversed in three.

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The U.S. Supreme Court in two recently decided cases reached opposite results regarding the permissibility, under the **First Amendment**, of **displays** of the **Ten Commandments** on public property.

Both decisions may be of particular interest to the **Eighth Circuit**, which heard **en banc** last fall, but has **not yet ruled on**, a case involving a display of the Ten Commandments in a city park.

The U.S. Supreme Court in *McCreary County v. ACLU* (No. 03-1693, June 27, 2005), by a

5-4 vote, upheld an injunction against displays of the Ten Commandments in two county courthouses in Kentucky. The Court focused on the counties' religious purpose in displaying the Commandments and particularly took into account the evolution of the displays.

On the other hand, the U.S. Supreme Court in *Van Orden v. Perry* (No. 03-1500, June 27, 2005) found no constitutional violation in the State's acceptance of a gift, from a national civic organization, of a monument inscribed with the Ten Commandments and placement of that monument among other monuments and historical markers on statehouse grounds. No opinion gained the support of a majority of the Justices.

The Eighth Circuit, outside of the now-vacated panel opinion in *ACLU Nebraska Foundation v. City of Plattsmouth* (358 F.3d 1020 (2004)), apparently has never addressed, in a published opinion, the issue of the constitutionality of a Ten Commandments display. The panel, by a 2-1 vote, found the *Plattsmouth* display unconstitutional.

Footnotes

Minnesota Continuing Legal Education, a non-profit division of the Minnesota State Bar Association, in May released the **third edition** of its

Eighth Circuit Appellate Practice Manual. Senior Judge Donald Lay continues as one of the editors of this publication.

The third edition comes with a disk containing the entire text of the volume in "pdf" format, making the text "searchable."

Minnesota CLE made this edition available at a discount to attorneys in attendance at the May appellate practice seminar jointly sponsored by Minnesota CLE and the Association.

For further information on the third edition, visit www.minncle.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) or vice-chair Annamary Dougherty (adougherty@cgwg.com).

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