



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

VOL.1, ISSUE 4

NOVEMBER 2003

In this issue.....

Bench Briefs

- Colloton Official New Nominee*
- McMillian Ceremony*
- Judges Speak*
- R. Arnold on Web*
- F. Gibson Tribute*

Time/Place/Manner

- Fee Increase*
- Panels 'On the Road'*
- Fillable Forms*
- Rules Approved*
- Multidistrict Case*

Association News

- Omaha Luncheon*
- Web Link*
- Program Suggestions?*
- Nominations?*

Issues on Appeal

- New Civil Rules*
- Finality & Severance*
- No Immunity Ruling*
- Pendent Appeal*
- Raising Jurisdiction*
- S. Ct. Remand*

Higher Authority

- 8th Circuit Cases -- cert. granted argument dates*

Footnotes

Bench Briefs

New Eighth Circuit **Judge Steven Colloton** will be **sitting with the Court** for the first time **November 20 and 21, 2003**, in St. Louis. The Senate confirmed Colloton's nomination in early September, and Judge Colloton took his oath privately around the end of the month.

Judge Colloton will maintain his chambers in Des Moines, where a public investiture ceremony is scheduled for December 5, 2003. Judge Colloton is reported to be the youngest current U.S. Court of Appeals judge.

For biographical information on Judge Colloton, visit www.usdoj.gov/usao/ias/smcolloton.htm.

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President George W. Bush on September 29, 2003, **nominated Raymond W. Gruender**, who currently is U.S. Attorney for the Eastern District of Missouri, to one of the two open seats on the Eighth Circuit. The Senate Judiciary Committee has not yet set a hearing on the nomination.

Gruender, a 1987 graduate of the Washington University School of Law, was an assistant United States Attorney in the Eastern District of Missouri from 1990 until 1994 and a partner at the St. Louis firm of Thompson Coburn from 1994 until his appointment as U.S. Attorney in 2000.

For additional biographical information on Gruender, visit www.usdoj.gov/olp/gruenderresume.htm.

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A crowd of almost 400 judges, lawyers, friends and family members attended the September 10, 2003, ceremony and portrait presentation **honoring Senior Judge Theodore McMillian**. The crowd filled the en banc courtroom at the Thomas F. Eagleton United States Courthouse in St. Louis and **overflowed** into three of the divisional courtrooms, where those in attendance could view the proceedings via closed-circuit television. Fifteen active and senior circuit judges attended.

Several speakers on the program recounted Judge McMillian's remarkable history. The Judge was born in poverty a few blocks from the site of the current courthouse. He was a commissioned officer in the Army in World War II, and he served in Europe – but in segregated units. He went to law school on the G.I. Bill and graduated first in his class at St. Louis University Law School; but because of his African-American heritage, no law firm even considered hiring him. He managed a theater to make ends meet.

In 1953, in an act of true political courage, Edward L. Dowd, Sr., hired Judge McMillian as the first African-American assistant prosecutor in the prosecuting attorney's office in St. Louis. Within two years, the Judge was the lead felony

prosecutor. In 1956, Governor Forrest Donnelly appointed Judge McMillian to the state trial bench in St. Louis. In 1972, Governor Warren Hearnes appointed Judge McMillian to the Missouri Court of Appeals, Eastern District. In 1978, President Jimmy Carter appointed Judge McMillian to the Eighth Circuit. In each of these judicial positions, Judge McMillian blazed the trail for other African-Americans to follow.

Former Missouri Supreme Court Justice Joseph Simeone, a professor of Judge McMillian's at St. Louis University Law School and later a colleague of Judge McMillian's on the Missouri Court of Appeals, quoted a song from the 1950's musical *Damn Yankees*, "You gotta have heart. Miles and miles and miles of heart." In overcoming all of the obstacles placed in his path, Simeone said, Judge McMillian has demonstrated at least the "Indianapolis 500 equivalent" of heart.

St. Louis attorney Harry Wilson, one of Judge McMillian's first law clerks, spoke about the atmosphere in the Judge's chambers: There was to be no discrimination; there were to be no harsh or derogatory words; and every clerk, every staffer, every litigant and every lawyer was to be treated with dignity and respect. The clerks were part of the Judge's family and vice versa; said Wilson, with Judge McMillian being like a "second father."

Judge Richard Teitleman of the Supreme Court of Missouri and F. William McCalpin, a distinguished St. Louis attorney, presented Judge McMillian with the Distinguished Service Award of the American Judicature Society.

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Eighth Circuit Judges **Kermit Bye** and **Michael Melloy** and Senior Judge **David Hansen** took part in two separate programs October 25, 2003, in Des Moines in conjunction with move of the American Judicature Society from Chicago to the campus of Drake University in Des Moines.

Judges Bye and Melloy appeared on a morning panel on federal judicial selection. Each commented on how delay, and other aspects of the selection and confirmation process, make it difficult for private practitioners to seek federal appellate

judgeships. Judge Bye, who was in private practice at the time of his nomination, noted that two years passed from the time when his identification as a possible nominee first began to affect his practice until the time of his confirmation.

In the afternoon, Senior Judge Hansen shared the podium with, among others, U.S. Supreme Court Justice Anthony Kennedy, at the dedication ceremony for the refurbished historic home that will serve as the new American Judicature Society headquarters.

The American Judicature Society is an independent nonpartisan organization of judges, lawyers, and members of the public. It focuses on issues in the administration of justice such as judicial independence, merit selection of state judges, juror service and selection, and dealing with and assisting pro se litigants.

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Eighth Circuit **Senior Judge Richard Arnold** was the guest for the most recent installment of the recurring feature "**Twenty Questions for the Appellate Judge**" on the "How Appealing" web blog of attorney Howard Bashman. Judge Arnold advises attorneys to pay more attention in their briefs to grammar and proofreading and to put more emphasis on the statement of facts. Judge Arnold also advises attorneys to get to the point at oral argument and to welcome rather than be irritated by questions.

Judge Arnold as part of the interview also responded to several questions on the issue of non-precedential decisions.

To access the Judge Arnold feature, go to www.appellateblog.blogspot.com and look under the date of November 3, 2003.

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A transcript of the April 2002 special session in honor of the **late Honorable Floyd R. Gibson**, former Eighth Circuit Judge and Chief Judge, appears in the front of Volume 330 of the Federal Reporter 3rd.

Time, Place & Manner

Effective November 1, 2003, the **cost** of filing a notice of appeal to the Eighth Circuit more than **doubled**, to \$255. The docketing fee required under 28 U.S.C. §1913 is now \$250 (up from \$100), while the filing fee to which the district court is entitled under 28 U.S.C. §1917 remains \$5.

The increase in docketing fee applies also to original actions filed directly with the Eighth Circuit.

The Judicial Conference of the United States approved the increase on September 23, 2003.

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A panel of Eighth Circuit judges **heard cases** in **Nebraska** on October 20 and 21, 2003. Judges William Riley, and Lavenski Smith and Senior Judge Arlen Beam heard four cases on October 20 at the Roman L. Hruska U.S. Courthouse in Omaha and four cases October 21 in Lincoln at the University of Nebraska law school.

Plans are in progress for an Eighth Circuit panel to hear a single case in **Des Moines** on December 12 as part of the Iowa State Bar Association’s annual Federal Practice Seminar. Panel members after the argument will participate in a question-and-answer session.

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Eighth Circuit Clerk of Court Michael Gans reports that attorneys are discovering and using the **“fillable” forms** now available on the Eighth Circuit web site. He reports that the appearance and calendar acknowledgement forms have been the most popular since the new on-line feature became available in early September.

Gans recommends that attorneys appointed pursuant to the Criminal Justice Act try the fillable reimbursement forms, because the on-line calculation feature should make use of the fillable forms easier than use of the paper forms.

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The Eighth Circuit’s **revised Rules Governing Complaints of Judicial Misconduct and Disability went into effect October 23, 2003**, following their approval that day by the Judicial Council.

The revised Rules are not substantially different from the draft posted for public comment. Frenchette Prince of the Circuit Executive’s Office reports that the Court received minimal public comment on the draft rules and that most comments focused on issues of editing, rather than substance.

The revision of the Judicial Complaints Rules follows the passage of the Judicial Improvements Act of 2002, which rewrote statutory provisions relating to judicial discipline. The Eighth Circuit Rules include a provision (Rule 1(f)) dealing with the filing by individuals of multiple frivolous complaints.

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The Eighth Circuit recently, albeit briefly, was the **home** for **consolidated proceedings on 13 petitions for review** of a Federal Communications Commission order relating to local telephone competition. The 13 petitions were filed in 11 different circuits (all except the 10th), and the Eighth Circuit was randomly selected, pursuant to 28 U.S.C. §§1407 & 2112(a)(3), as the circuit in which the petitions were to be consolidated.

The Eighth Circuit, however, subsequently granted a motion for transfer of the consolidated petitions to the D.C. Circuit, based on the D.C. Circuit’s involvement in prior proceedings and the predominance in the case of D.C. counsel. Visit the home page of the Eighth Circuit web site for a direct link to orders relating to the Eighth Circuit’s involvement in the consolidated proceedings.

Association News

In keeping with its mission, the Association took the occasion of the October 20 sitting of an Eighth Circuit panel in **Omaha** to host a **luncheon** where association members and guests could visit with the Eighth Circuit judges while enjoying the hospitality of Creighton University School of Law.

Approximately 55 attorneys from Lincoln and Omaha attended.

The three members of the panel, Judges William Riley and Lavenski Smith and Senior Judge Arlen Beam, were in attendance, as were their judicial clerks and members of the Court staff. Following lunch, Judge Smith addressed the group with respect to his impressions of effective (and not-so-effective) practice before the Eighth Circuit. All three judges joined in an informal question-and-answer period before the luncheon adjourned.

Invitations to the luncheon were sent to Association members in Nebraska and Iowa as well as to prospective members in the Omaha area.

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A **link** to the **Association web site** now appears on the home page of the Eighth Circuit web site.

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Association members are invited to submit **suggestions** for the types of **programs** or other functions they would like to see from the Association, including when and where these programs should be held. Suggestions should be directed to program committee chair David Herr at dherr@maslon.com.

The Association Board of Directors at its most recent meeting appointed an *ad hoc* committee to consider specifically the issue of whether or not the Association should hold an **annual meeting of the members**. Directors Tom Weaver, David Herr, Tom Sullivan and Diane Kutzko will make up the committee, with assistance from Director Krista Kester. For e-mail contact information for these individuals, visit the Association web page at the address shown at the bottom of each newsletter page.

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The **annual meeting** of the Association **Board of Directors** will be held December 11, 2003, by telephone. Association President Eric Magnuson, secretary Jim Layton and treasurer

Craig Eichstadt are serving as the **nominating committee** for potential new officers and directors. If you would like to volunteer or nominate someone, please visit the Association web page for contact information for those individuals.

Issues on Appeal

New Federal Rules of Civil Procedure 23(h) and 51(d), which are scheduled to take effect December 1, 2003, absent intervening Congressional action, address **issues** of importance to **appellate practice**. In each instance, however, the intent of the amendment, according to the advisory committee notes, is primarily to formalize existing practice.

New Rule 23(h), which addresses attorney fee awards in class actions, expressly makes class action fee proceedings subject to the provisions of Rule 58 regarding entry of judgment and time for appeal.

New Rule 51(d)(1)(B), which relates to jury instructions, provides that when the district court makes a definitive ruling rejecting an instruction requested by a party, the party, to preserve error, need not further object to the failure to give the particular instruction.

New Rule 51(d)(2) expressly recognizes that even in the absence of proper objection, an appellate court may review civil jury instructions for “plain error.” While the circuits, according to the advisory committee note, currently are split on this issue, the Eighth Circuit already reviews civil jury instructions on this basis. *E.g., Risdal v. Halford*, 209 F.3d 1071 (2000). The advisory committee note identifies four factors that, among others, should shape civil jury instruction “plain error” review.

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The Eighth Circuit in its recent decision in *Reinholdson v. Minnesota* (Nos. 02-3525 & -3529, decided 10-23-03), addressed the relationship between orders for **severance** and the **final judgment** rule. The district court, in addition to dismissing a variety of claims, had severed the remaining claims of the nine plaintiffs into

“individual cases.” The Eighth Circuit found the nature of the district court’s severance order ambiguous, noting that while severance under Rule 21 of the Federal Rules of Civil Procedure would have created separate actions, making the dismissal of the various claims potentially appealable, severance under Rule 42(b) of the Federal Rules of Civil Procedure merely involves the separate trial of claims or issues which remain part of a single case.

The plaintiffs as part of their appeal challenged the severance order, and the Eighth Circuit agreed that the district court abused its discretion to the degree it intended in its order to provide for Rule 21 severance. The Eighth Circuit thus interpreted the district court’s order as merely providing for separate trials under Rule 42 and remanded for further proceedings without reaching any of the parties’ additional challenges to the district court’s rulings.

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The Eighth Circuit in its recent *per curiam* opinion in *Schatz v. Gierer* (No. 02-3886, decided 10-16-03), emphasized that an **interlocutory appeal** is available to review a **denial of qualified immunity** only when the **district court expressly rules** on the qualified immunity issue. Appellants had raised the issue of qualified immunity as one of several grounds on motion to dismiss, and the district court had stated the standard under which the qualified immunity issue was to be considered. The district court, however, had then denied the motion to dismiss without any analysis or further discussion of qualified immunity. The Eighth Circuit raised the issue of appellate jurisdiction *sua sponte* and dismissed the appeal.

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The Eighth Circuit’s recent decision in *McCoy v. City of Monticello*, (Nos. 02-2941 & -2942, decided 9-8-03), provides an **example** of circumstances in which the exercise of **pendent appellate jurisdiction** is **not appropriate**. The Court decided on interlocutory appeal the defendant police officer’s challenge to a denial of qualified immunity, but the Court refused to assert

jurisdiction over the plaintiffs’ cross-appeal of the dismissal on summary judgment of plaintiffs’ claims against the officer’s superiors. The Court held that the issues regarding the superiors’ liability were factually distinct from the issues regarding the officer’s qualified immunity, such that the test for pendent appellate jurisdiction was not met.

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The Eighth Circuit’s recent decision in *Kessler v. National Enterprises*, (Nos. 02-3715 & -3774, decided 10-30-03), illustrates how **seriously** the Court takes the **issue of federal jurisdiction**. The case had already been before the Eighth Circuit three times; the Court on the third occasion had found in favor of the plaintiff class on liability and remanded for a determination of damages; and the defendants had not raised an issue in the district court as to the amount in controversy for purposes of diversity jurisdiction. Nevertheless, the Court on the **fourth appeal** held that the case did not meet the statutory amount-in-controversy standard and remanded with directions that the district court in turn remand the case to state court.

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The Eighth Circuit on **remand** from the **U.S. Supreme Court** reached a **different result** in *Koste v. Dormire* (No. 00-3791, decided 10-7-03). The Court in its initial decision in 2001, published at 260 F.3d 872, had upheld an ineffective assistance of counsel claim based on the defendant’s counsel’s conflict of interest at the time of a change-of-plea hearing. The U.S. Supreme vacated and remanded for reconsideration in light of *Mickens v. Taylor*, 535 U.S. 162 (2002); and the Eighth Circuit this time rejected the ineffective assistance claim based on a lack of evidence that the conflict of interest adversely affected the attorney’s performance.

Higher Authority

The U.S. Supreme Court on October 14, 2003, **granted certiorari** in the **Eighth Circuit case** of *United States v. Sabri*, 326 F.3d 937 (2003).

The case involves the issue of whether Congress exceeded its powers in enacting 18 U.S.C. §666, which makes it a federal crime, in certain circumstances, to bribe the agent of a local government that receives federal funds. A panel of the Eighth Circuit upheld the statute, with Judge Bye dissenting.

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The U.S. Supreme Court on December 10, 2003, will hear **oral argument** in the **Eighth Circuit case** of *United States v. Fellers*, 285 F.3d 721 (2002).

The case involves two principal questions: (1) Did the 8th Circuit err when it concluded that Fellers’ Sixth Amendment right to counsel under *Massiah v. United States*, 377 U.S. 201 (1964), was not violated because he was not “interrogated” by government agents, when the proper standard under Supreme Court precedent is whether the government agents “deliberately elicited” information from him; and (2) Should second statements, preceded by *Miranda* warnings, have been suppressed as fruits of an illegal post-indictment interview without the presence of counsel, under this Court’s decisions in *Nix v. Williams*, 467 U.S. 431 (1984), and *Brown v. Illinois*, 422 U.S. 590 (1975)?

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The U.S. Supreme Court on January 12, 2004, will hear **oral argument** in the **Eighth Circuit case** of *Missouri Municipal League v. Federal Communications Comm’n*, 299 F.2d 949 (2002). The case involves the issue of whether 47 U.S.C. §253 preempts state laws that limit the

ability of political subdivisions to offer telecommunications services. A panel of the Eighth Circuit accorded the federal statute preemptive effect.

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The U.S. Supreme Court on January 21, 2004, will hear **oral argument** in the **Eighth Circuit case** of *United States v. Lara*, 324 F.3d 635 (2003). The Court en banc, with four judges dissenting, found a violation of double jeopardy in the indictment of the defendant for a federal crime after he had already been convicted for the same act in an Indian tribal court. The dispute concerns the source of tribal authority over the defendant, who was not a member of the tribe in question. The Eighth Circuit panel had found no double jeopardy violation.

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 to Mark Arnold of St. Louis for his report on the McMillian ceremony. 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.