

NEWSLETTER

Summer 2020



Officers

Vince Chadick, Past President

vchadick@qgtlaw.com

Katherine Walsh, President

katherine.walsh@ago.mo.gov

Jeff Justman, President-elect

jeff.justman@faegredrinker.com

Landon Magnuson, Treasurer

lmagnusson@withersbrant.com

Jason Grams, Secretary

jgrams@ldmlaw.com

Michael Goodwin, Editor

michael.goodwin@ag.state.mn.us

In this Issue:

An Interview with Judge
Jonathan Kobes 2

What Happened *After* 1920?
The 19th Amendment and
Political Women..... 8

New 5-Part Webcast Series on
Appellate Practice in the
Eighth Circuit..... 10

Following a Varied Legal Career, Judge Jonathan Kobes Begins on the Eighth Circuit

By *Eric B. Boettcher*

On December 11, 2018, the United States Senate confirmed Jonathan A. Kobes to the United States Court of Appeals for the Eighth Circuit, to the seat vacated when the Honorable Roger L. Wollman assumed senior status. Judge Kobes sits in the federal courthouse in Sioux Falls, South Dakota.

I had the pleasure of interviewing Judge Kobes for this newsletter in May 2020. I spoke with Judge Kobes about his background, experiences starting on the Court, and views on legal writing and oral advocacy. I have reproduced our conversation below, with minor edits to improve readability.



The Hon. Jonathan Kobes

Q: To get started, I see that you had a diverse legal career prior to taking the bench, and that you served in all three branches of the federal government and also worked in private practice and in-house. How have you drawn on that experience as an Eighth Circuit judge so far?

A: That's a good question. I'm new enough that I hate to draw conclusions yet. Everything, almost everything, is still fairly new. I do think it helps, just to get perspective into the different parties that come before the court. I've been in business representing larger companies and middle-sized companies. When I was in private practice, largely we represented smaller businesses or individuals. And then I've been on the prosecution side as well. I just think it

gives me some broad context that, at least at this point, has been helpful. We'll see how that plays out going forward. I don't have the depth of experience necessarily that some people do in certain areas, but I do have a breadth, and I think that brings some different perspective at times.

Q: And that's obviously helpful because there are all kinds of cases that come before the Eighth Circuit.

A: Absolutely.

Q: What has your experience been like starting as an Eighth Circuit judge? What have some of the bigger adjustments been?

A: It's challenging, and it should be, I think. It's not an easy job. It shouldn't be an

Continued on next page

easy job. The cases that we take are important. Some of them are complicated. So, it's been a challenge. I joined the court essentially mid-term, and hired law clerks, some of whom trickled in several months after I started, so trying to get up to speed and catch up has been a bit of a challenge.

But the best part, in my mind, has been my colleagues. The other judges on the court have been outstanding, and are outstanding. Not that we always agree, but it's a very collegial court, and I had several judges over the last year-and-a-half or so call and offer help or advice or anything else that I need. I'm not alone in this. Sometimes it feels, especially these days, like you're a little bit alone, but that's not really the case on the Eighth Circuit.

Q: That's really great to hear. And, speaking of your colleagues, I saw that earlier in your career you clerked for Judge Wollman. Can you describe how it felt to take the seat that Judge Wollman vacated upon going into senior status?

A: Surreal. Absolutely surreal. Really never something that I thought would actually happen. And a huge honor. An absolute honor. He and I are generally the only two people on the third floor of the Sioux Falls courthouse these days. I don't see him often, given the current situation, but it's just an absolute honor. And to have him continue serving on the court is a huge benefit to me as well.

Q: Yeah. It's got to be a great feeling for things to sort of come full circle like that, where you end up working down the hall from Judge Wollman.

A: I got to sit with him and the Chief last year, and that was a particular honor and

an incredible experience. I think I sit with Judge Wollman next month as well, in June [2020]. So having those sorts of experiences are incredible.

Q: Has there been anything since you've started at the Eighth Circuit that especially surprises you, that you didn't really know from the outside before?

A: We have administrative and screening panels, and when I was clerking twenty years ago, I had no insight into what the judges did behind the scenes. I handle most of those myself. So the behind-the-scenes, non-hearing panel work, is something that I wasn't really aware of.

What else? The Eighth Circuit judges communicate and are very collegial I've noticed, but we wind up communicating in formal ways, in memos. That's something I had not been doing previous to this. Every communication is a matter of courtesy to the panel, generally in writing, as you may know from your clerkship. That's something I also was not involved in with Judge Wollman, so that was a little bit of a surprise to me, but it seems to work fairly well.

Q: Shifting gears a little bit, you mentioned law clerks earlier. How do you go about choosing clerks? I know you probably have a big stack of applications to sift through, and I was wondering what stands out to you typically?

A: You know, that's a work in progress. I'm very happy with the clerks I hired the first year. Again, it was odd because it was mid-term. I essentially started making calls in December, so I have several experienced law clerks at this time. But, like I said, I'm learning how

Continued on next page

to hire law clerks yet. There are a lot of good applicants.

What stands out for me? It's hard to say yet. Some connection to the Midwest I appreciate. I'm not necessarily focused on the top fifteen law schools. I think this coming year I've got, for example, a Kansas graduate coming in, and a Creighton grad. So it's odd; it's kind of a personality fit plus the academic credentials that I look for. And Sioux Falls is a smaller town, so I need to get people who are interested and willing to live here and, ideally, in some cases, people that would like to stay in the Midwest after the clerkship.

Q: Yeah. For people coming from the coasts, it might be a bit of an adjustment moving to the Midwest.

A: Yeah, and I think a lot of people are willing to do it, but not everyone is aware of really what they might be getting into.

Q: Fair enough. Turning to legal writing, as an Eighth Circuit judge, you have to read a tremendous amount of legal writing. I was wondering what you think are some of the characteristics of good legal writing?

A: As a new judge, I hesitate to offer firm opinions on this. I can tell you what I appreciate at this point. Simplicity and clarity. Highlighting what the key arguments are, even if you've got additional arguments. Don't waive those, but focus your time and effort on the essence of the case. Honesty; don't cut corners on some of the facts. These are general principles, I think, that apply. Brevity, if possible. In some cases, brevity is not possible, and I appreciate that. Certainly capital cases, and things like that, I expect longer briefs. But

sometimes you get a lengthy, lengthy brief that's really not justified. But again, there are several different styles, and people have different styles. I'm still learning how to absorb some of the different styles that people bring to the court.

Q: Right. You get all types of lawyers writing the briefs, and then also you're reading cases from many, many different judges, so it's a lot to take in, I imagine.

A: Yeah. I've been fairly impressed with the quality of briefing at the Eighth Circuit, I will say. From the plaintiff and the defense bar, the government lawyers, public defenders, I've seen some exceptional briefing already in my time.

Q: That's great to hear. And, with the understanding that you're still learning, how would you describe your writing style for your own opinions?

A: Well, it's aspirational at this point. But, simplicity. I lean towards simplicity. My opinions tend to be shorter, if possible. It's not always possible. But other than that, I guess the goal is to explain to the parties why. And sometimes that's difficult, sometimes the decision is difficult, but just to explain why we are doing what we're doing in the simplest terms possible. And it's a little intimidating in this court because we have many excellent writers on the court. So it's a high bar on the Eighth Circuit, I think.

Q: Yeah, it certainly is. Was it a little nerve-racking turning in your first opinion? How did that process feel?

A: You know, it wasn't as nerve-racking as

Continued on next page

it should have been. It's more nerve-racking now, when I've got more coming through the pipeline. At the beginning, you've got to get these done, you've got to get them going. But, yeah, it is. When you send them out, for a new judge, at least for me, it's a little intimidating. But the feedback, even if people disagree, is almost always positive and constructive. Even if I'm in dissent, or I get a dissent, that experience has been very favorable and very positive for me. And oftentimes the input from the other judges will tweak the opinion or change the opinion in ways that I hadn't considered, and that are very positive. So I'm very happy that we have that sort of environment.

Q: Let's turn to oral advocacy. What aspects of oral argument do you find to be the most useful to you?

A: It depends on the case and depends on the lawyer. Homing in on particular issues and clearing up any confusion or ambiguity I have following the briefs. I tend not to be that active of a questioner, at least so far. But getting concessions or clearing out ambiguity is one of the things that is helpful. Or trying to put a finer point on some of the parties' arguments, if that's possible during oral argument. I have to say, the other, more experienced judges tend to be much better questioners than I am, so hearing the other judges' questions. Without identifying the case, in one case I heard, another judge was questioning, and I turned my opinion on the case based on oral argument. Not from what I was asking, but from what one of the other judges was asking. So it is very helpful.

Q: That makes sense. Have you enjoyed court weeks so far, getting to see some of your colleagues in person that you're so often writing with?

I find in some briefs, counsel kind of gets lost in the details. And then, you put down the brief and you say, "All right, what do I do with it?" So the really good briefs really close the loop, and say, "Here is how the case should be resolved."

-The Hon. Jonathan Kobes

A: Absolutely. And I miss it. I last sat in St. Paul in March. In April, most of the court took cases without argument [due to the COVID-19 pandemic], and then I was off in May. Next month we're doing video conferencing. So, I miss it. I'm hopeful that we can go back to in-person argument in September because the job can be isolating, especially these days. The opportunity to meet colleagues and law clerks and hear argument and see lawyers and the court staff is invaluable.

Q: Yeah, I bet. Do you have any tips for oral advocates? Or are you developing what you think is effective?

A: You know, I would probably be the one asking oral advocates for tips, rather than the other way around. But, be as concise as you can, and be as honest as you can. The judges have read the briefs and, depending on the case, we've got our views on the case which may or may not be firm. If you've got a weak part of your case, admit it, and then move on to the strong point. Lawyers that kind of resist that don't do themselves a service in oral argument because we've read the case, I've had a clerk look at the case,

Continued on next page

and I've read the authorities. So I think it's better just to be honest and upfront on where your weakness is.

Some of the best advocates I've seen in my brief time on the court, when confronted with directly contrary authority, they admit, "This is a problem, and here's how I think the court should get around it." So, there are lots of different styles that are good, but I think that is one of the key elements for me.

Q: That makes sense. And, I imagine, especially with the time limitations, it doesn't serve a lawyer well to hold their ground on something that isn't going to be fruitful, in any event.

A: Yeah, absolutely. I've seen some great oral advocacy from, for example, federal public defenders who have some tough cases that they bring up. And conceding the weakness in their case and still advocating for their client is some of the most effective lawyering I've seen yet.

Q: And probably one of the more difficult skills to master, I imagine.

A: I think so. But I think it's universally appreciated on the court.

Q: Since you've started, are there any aspects of practice in the Eighth Circuit that you've seen lawyers maybe overlook but that could have a larger practical effect on judges than people might think?

A: I hesitate to offer too many opinions again since I'm new. One thing that one of my clerks mentioned the other day that he thought he was taking away from it, which I think he's right, is lawyers sometimes get stuck in the weeds of their case and they forget to tell us, or suggest to us, how the best way to resolve the

case is. For example, if you've got a case with multiple difficult issues, some of the good briefs, as my clerk noted, are the ones that tell you, "Here's how you can do it. You don't need to address this. If you resolve this issue, here's how it goes away." In other words, giving you a roadmap to resolving the cases. And I find in some briefs, counsel kind of gets lost in the details. And then, you put down the brief and you say, "All right, what do I do with it?" So the really good briefs really close the loop, and say, "Here is how the case should be resolved."

Q: That makes sense, and I can definitely understand the tendency where you're dealing with very complex law, to forget how it relates to the specific posture of the case and make sure that it doesn't come off reading like an exposition on what the standard of the law is, in a vacuum.

A: Right.

Q: So you're working with clerks, obviously. Do you have any advice for law students or newer lawyers who are considering their options or considering potential career paths?

A: Write, write, and write. Oral advocacy is a wonderful thing, and I certainly appreciate that, but a quality brief, to me, is worth far more than a brilliant advocate, at least in my world. Well, that's probably not different in the Supreme Court. So just mastering the ability to write and the skill, the art of writing is absolutely critical for what we do as lawyers. The other thing I will say for younger lawyers is I never planned this career path. Had I planned it, I never would have believed this. So you really need to think about what it is you want to

Continued on next page

do and then follow your passions. There's no telling what might happen. There are lots of opportunities for lawyers out there, hopefully they continue in this market after this pandemic. But, for a lawyer, you can do anything. You can go in-house, you can teach, you can go to a law firm, big firm, small firm, government work, so there are so many opportunities. I think it's worth people thinking very hard about what it is they want to ultimately accomplish and then be willing to take forks in the road as they come.

Q: Yeah. It seems like your own career has been a testament to that, given the range of your experiences.

A: Yeah, I never really planned things out, and sometimes I wish I would have. I wish I would have done a couple of years at a bigger firm. I really do. But, it worked out. The law offers so many opportunities. I haven't regretted that once, following this career path.

Q: We've talked about your job and what your experience has been like on the Eighth Circuit so far. What do you like to do when you're not on the bench?

A: I've got four kids so that takes a lot of my time. I don't have a ton of hobbies. I remember Judge Wollman at his portrait ceremony said that he liked pulling fence posts at his farm. I work in my yard. The other family hobby we have, which has kind of been put on hold, is we like to travel. My kids have been to Europe three or four times, we travel in the West. Other than that, a little bit of reading here and there. It's basically family stuff.

Q: Do you have any trips planned, or do you

have any trip in mind for when the pandemic ends?

A: We were supposed to go to New York this summer. I was going to do the NYU appellate judge seminar, and my oldest daughter was going to be a Senate page this summer. So that was the plan, and that is now cancelled. My daughter graduates from high school next May. So the hope would be, at that point, either to go Israel or go to Africa, depending on what we can get for tickets and what the world situation is. So we'll see if that happens. I'm optimistic.

Q: I'm optimistic, too. Let's hope that will be able to work out. So, focusing on Sioux Falls, what are some of your favorite things about it?

A: It's just a very nice town to live in. We're a small city, but we have a nice mix of some of the bigger city benefits. We've got a nice event center here that was built a couple years ago. We've got nice bike trails around the city and the Big Sioux River. And it's very decent people. I grew up in Iowa, maybe 60 miles from here, so this really is home for me. It's comfortable. Great place for kids. And, being on the Eighth Circuit, I get a chance to travel. In my previous jobs, I did too, so I kind of get the best of both worlds. I get to live here and I get to travel to other places, cities, restaurants, things like that. So very comfortable here. Obviously I'm here for good now, but I'm happy about that.

Eric B. Boettcher is an associate at Robins Kaplan LLP in Minneapolis, practicing in the areas of complex civil litigation and appellate litigation.

What Happened *After* 1920?

The 19th Amendment and Political Women

By Kristi Andersen

When we learn the basics about the movement for woman suffrage, we read about the 1848 Seneca Falls convention that produced a “Declaration of the Rights of Women”; the work of Susan B. Anthony and her colleagues; and protest marches in front of the White House. It all ends with the passage of the 19th Amendment in 1920. Then the struggle was (presumably) over, success achieved, and we don’t learn much about what happened afterwards -- perhaps not until the “Year of the Woman” in 1992.

The historians who took the story beyond 1920 often did so with an air of disappointment: women did not “clean up politics,” did not produce more progressive leaders, or radically change public policy. There were, in fact, a few policy changes in the 1920s that would probably not have happened in the absence of the 19th Amendment. Soon after suffrage, women’s groups engineered the passage of the Shepard-Towner Act, which supported state programs for maternal and infant health, , as well as the Cable Act, which allowed women to retain their citizenship when they married foreigners. But these successes were limited, and it became clear that women were not a unified political force.

Women as Voters

Although the Constitution had been amended, each state had to change its laws, and states and counties had to undertake the work of registering women voters. There were many questions to be answered: for example, women in many states had already been allowed to vote in school board elections – could those registration lists be used in other elections?

Some state election officials quickly expanded times for registration and installed new voting machines to accommodate the expected expansion of the electorate. But not surprisingly, given the widespread opposition to female suffrage, many local election officials resisted making changes to rules and practices. The Kansas City Commissioner of Elections ruled that women voters who married following their registration could not vote, because changing their surnames meant that they “ceased to exist as registered voters.” Throughout the South in particular, male politicians did everything they could to prevent women from voting in 1920, including deliberately providing women with misinformation about how and where to register.

Despite efforts of suffragists and the newly-formed League of Women Voters, women in the 1920s turned out to vote at a much lower rate than men. Like men, women responded to their political environment, registering and voting at higher rates where both parties were strong and when elections were competitive. It took women *sixty years* to vote at the same rate as men. But today, American women consistently turn out to vote at higher rates than their male counterparts – in the last few national elections, female turnout has been about five percentage points higher. And this difference is more pronounced among younger people.

Women as candidates and officeholders

For the most part, the idea that women should run for public office was not part of the argument for suffrage. Nonetheless, the number

Continued on next page

of women holding office – particularly at county and local levels – rose slowly during the 1920s. For example, there were 37 women in state legislatures in 1921, and 146 by 1931. Certain positions – including school superintendent and county treasurer – were (relatively) often occupied by women. Male voters, newspaper reporters, and women themselves gradually got used to the idea of female government officials. Nonetheless, representation of women in state and national political office has remained low in the United States. Despite significant increases in recent years, women still make up only 23% of the members of the House of Representatives, while in parliaments in countries such as Spain, Norway, Finland and France, women make up over 40% of the membership.

Conclusion

Beyond the numbers of voters and candidates, there are several ways in which the entry of women into party and electoral politics in the 1920s changed American politics. First, allowing the feminine half of the population into politics shifted conceptions of voting as a way of exercising citizenship. Voting no longer took place in saloons and other exclusively male spaces – it moved to village halls and school auditoriums. It was no longer a strictly “male” activity, and women were – gradually – seen as autonomous political individuals, not just political reflections of their husbands, fathers, and brothers.

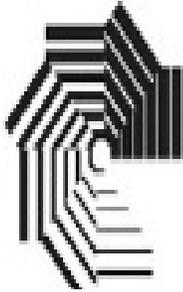
Related to this, suffrage and the political activism of women and women’s organizations helped to decrease the importance of political parties and increase the importance of interest groups. Before and after suffrage, women’s groups pioneered lobbying as we know it today. The idea of non-partisan organizations working to educate both the public and legislators arose at this time, largely due to women’s work for suffrage and, afterwards, for protective labor legislation, better parks and schools, and cleaner cities.

Representation of women in state and national political office has remained low in the United States. Despite significant increases in recent years, women still make up only 23% of the members of the House of Representatives, while in parliaments in countries such as Spain, Norway, Finland and France, women make up over 40% of the membership.

Finally, women’s involvement in politics helped to change ideas of what “politics” encompassed and what issues should be on the national agenda. Eleanor Roosevelt wrote in 1940 that she saw a connection between women’s suffrage and the fact that “on the whole, during the last ten years, government has been taking increasing cognizance of humanitarian questions, things that deal with the happiness of human beings, such as health, education, and security.”

Kristi Andersen is a Professor Emeritus of Political Science at Syracuse University, where she was a member of the Maxwell School Faculty from 1984 to 2016. She graduated from Smith College and received her Ph.D. from the University of Chicago.

Editor’s Note: This article was adapted from a presentation Professor Andersen prepared for the Eighth Circuit Judicial Conference, which was cancelled because of the COVID-19 pandemic.



MINNESOTA CLE

Your Success Is Our Goal



New 5-Part Webcast Series on Appellate Practice in the Eighth Circuit!

Minnesota CLE and the Eighth Circuit Bar Association are excited to present a series of five all-new webcasts designed to serve as a companion to Minnesota CLE's *Eighth Circuit Appellate Practice Manual*. During the month of October, join 17 of the *Manual's* esteemed editors and authors as they discuss recent developments in Eighth Circuit Appellate Practice. You will also receive complimentary access to the electronic version of the *Manual*. For more information and to register for this webcast series, please go to the Minnesota CLE website [HERE](https://www.minncle.org/seminar/1633822101). <https://www.minncle.org/seminar/1633822101>

Wednesday, October 14, 2020 – 12:00 – 1:30 p.m.

Overview of Eighth Circuit Practice

The Clerk of Court for the Eighth Circuit Court of Appeals will provide an overview of procedures regarding the filing and processing of new appeals, as well as motions, briefs and petitions for rehearing. The clerk will also highlight frequently violated local and federal rules and provide tips on complying with the rules and working with the clerk's office. Further, the clerk will answer questions posed by two experienced appellate practitioners on local practices as well as address how the court is adapting to the COVID-19 pandemic.

- Michael E. Gans; Clerk of Court, Eighth Circuit Court of Appeals
- David F. Herr; Maslon LLP
- Thomas H. Boyd; Winthrop & Weinstine, P.A.

Thursday, October 15, 2020 – 9:00 – 10:30 a.m.

Perfecting the Appeal

A panel of distinguished appellate experts will have a discussion regarding perfecting an appeal to the Eighth Circuit. The topics will include: the appellate court's jurisdiction, initiating an appeal from a district court's decision, and motions practice and summary disposition.

- Jonathan P. Schmidt; Hennepin County Attorney's Office
- James R. Layton; Tueth Keeney Cooper Mohan Jackstadt P.C.
- Liz Kramer; Solicitor General, Minnesota Attorney General's Office
- Jason Marisam; Minnesota Attorney General's Office
- Jacob Campion; Minnesota Attorney General's Office
- Erica Holzer; Maslon LLP

Wednesday, October 21, 2020 – 2:00 – 3:30 p.m.

The Record and Briefing an Eighth Circuit Appeal

Preserving and presenting a complete record for review by the court of appeals is vital. An appeal brief's purpose is to help the court efficiently resolve appeals. Thus, the heart of the appellate process is briefing. A good brief is the difference – often, the only difference – between victory and defeat. Join our esteemed panel of Eighth Circuit

Appellate Practice experts as they discuss the importance of the record and briefing on appeal and provide practical tips in preparing for your next appeal.

- Justice Dana Oxley; Supreme Court of Iowa
- Katherine S. Barrett Wiik; Best & Flanagan LLP
- Brian C. Walsh; Bryan Cave Leighton Paisner LLP – St. Louis, MO

Wednesday, October 28, 2020 – 9:00 – 10:30 a.m.

Oral Argument

Oral argument is the highlight of most every appeal. The panel will discuss both theory and practice, and based on their extensive experience, will address, how the judges prepare for oral argument, what judges are looking for during oral argument, and how the oral argument experience has changed in the era of video presentations.

- Judge David R. Stras; U.S. Court of Appeals for the Eighth Circuit
- Justice Dana Oxley; Supreme Court of Iowa
- Eric Magnuson; Robins Kaplan LLP

Wednesday, October 28, 2020 – 2:00 – 3:30 p.m.

Decision, Mandate, Rehearing, and Supreme Court Review

A party who loses in the Eighth Circuit and who wishes to pursue further recourse can either seek a motion for rehearing or pursue certiorari review by the United States Supreme Court. Our panel of Eighth Circuit Appellate Practice experts will address the rules on rehearing, the grounds for rehearing and a party's odds on rehearing. This course will also address the factors that make a case a good candidate for certiorari – and a petition for certiorari a persuasive one – as well as the technical requirements for petitions and responses to petitions. Further, our panelists will highlight recent developments in certiorari review and provide practical tips for drafting amicus briefs and other procedural submissions.

- Aaron D. Van Oort; Faegre Drinker Biddle & Reath LLP
- Alethea M. Huyser; Fredrikson & Byron P.A.
- Nicholas J. Nelson; Faegre Drinker Biddle & Reath LLP