EIGHTH CIRCUIT BAR ASSOCIATION

Bar Association of the United States Court of Appeals for the Eighth Circuit

NEWSLETTER

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OFFICERS & EDITORS

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President's Note
by Vincent Chadick

Dear members:

Thank you, returning members, for continuing your affiliation with the Association of the Bar of the U.S. Court of Appeals for the Eighth Circuit.

And, new members: thank you for joining and welcome.

As an Association, we aspire—as described in our mission statement—"to improve and facilitate the administration of justice within the courts of the Eighth Circuit; to raise the standards of proficiency and integrity in federal practice; to develop and implement effective, efficient, and uniform rules of practice and procedure within the courts of the Eighth Circuit; and to assist the judiciary of the Eighth Circuit in whatever manner requested."

Over the past decade-plus, the Association has expanded its offerings to its members, all in furtherance of these core principles. This monthly newsletter is becoming a must-read for members. We plan to continue our recent efforts of offering and co-sponsoring continuing legal education programs that have taken place in most of the states within the Circuit, and offering to membership free admission to CLE programs wholly sponsored by the Association. For more than two years, the Association also has sent to its members a monthly "e-alert" shortly in advance of each court session. The e-alert highlights particularly important or interesting cases that the Court will consider in the upcoming session, a notable oral argument from the previous session, pending cases for which en banc review has been granted, and pertinent news about the Court or its operations. The Association's website (**www.eighthcircuitbar.com**) has been enhanced to include additional resources, particularly for its members.

Every other year, the Chief Judge of the Eighth Circuit convenes a conference of attorneys, judges and staff. The Association has an important presence at Eighth Circuit Judicial Conferences. We sponsor a reception for attendees of the conference and, in what has become one of the highlights, we bestow the Richard S. Arnold Awards for Distinguished Service, given to one lawyer in each of the Circuit's districts who best represents the qualities of distinguished service reflective of the late Judge Arnold's character.

The Association is managed by five officers and a board of directors that is made up of representatives of every district in the Circuit as well as several at-large representatives. The board and its officers welcome the involvement of members in all the Association's activities, and in its governance. I encourage you to contact me, one of the other officers, or your district's representative if you have any questions about the Association or suggestions about how we can better contribute to the experience of our members.

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Review: Business and Commercial Litigation in Federal Courts
(4th ed. ABA/Thomson Reuters, Robert L. Haig, ed. 2016)
by David F. Herr

One of the joys of practicing as an appellate lawyer is the challenge of dealing with a different substantive area of the law in every case. In my own experience, this variety has led me to be momentarily knowledgeable about federal logging and land management practices, the Surface Transportation Board, various environmental statutes, employment law, numerous aspects of federal securities regulation, the FDA medical device approval process, as well as several provisions of the U.S. Constitution encountered in civil rights litigation. The list could go on. Appeals are taken to different agencies or courts with different rules and predilections. A recurring challenge is figuring out how to become knowledgeable about new areas of the law and the sometimes-arcane statutes that apply to them. In many areas, there is no obvious "leading" treatise or handbook that will provide everything one needs.

I have found a resource that is often the first—and sometimes the last—place I look for that background research: BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS, now in its Fourth Edition. This remarkable work now includes 153 chapters spanning 14 volumes, kept up-to-date annually. It is also available on Westlaw. The chapter authors are prominent lawyers and judges with deep experience in their respective areas.

In addition to the deep coverage across the myriad substantive areas encountered in a federal litigation practice, this invaluable treatise includes 74 chapters (beginning with subject-matter jurisdiction and ending with civility) dealing with discrete parts of the litigation process, all comprehensively covered and thoughtfully analyzed. Removal to federal court earns its own chapter (ch. 12), as do complaints (ch. 7), responses to complaints (ch. 8), multidistrict litigation (ch. 14), and litigating international disputes (ch. 21). That level of detail continues across all aspects of the litigation process. It is hard to imagine that anyone could read one of these chapters and not learn something new.

We are fortunate in the Eighth Circuit to have the Eighth Circuit Appellate Practice Manual (Minn. CLE 8th ed. 2018). (Disclaimer: As an editor of all eight editions of this work, I have to admit to a bit of bias about it.) But the Business and Commercial Litigation treatise has a much broader scope, including several chapters explaining trial court procedures as well as the host of chapters dealing with substantive

issues. Nonetheless, it also includes several helpful chapters that deal explicitly with appellate issues. In addition to several that discuss preserving error for appeal generally, chapter 54 covers trial and post-trial motions in detail, chapter 55 is devoted to judgments, and chapters 60 and 61 address appeals to the courts of appeals and to the Supreme Court, respectively. Chapter 60 comprises 148 subsections of text spanning 267 pages. It covers discrete aspects of appellate practice in the courts of appeals, including both forms and checklists. One example is useful for guidance in many appeals: § 60.33 provides useful guidance on a potentially vexing decision for the appellate litigator: whether to file a cross-appeal in a case with mixed results.

Similarly, chapter 61 includes more than 100 pages of cogent advice from experts on appeals to the Supreme Court. Experienced appellate lawyers will find these chapters useful; for those of us with only occasional need to have the Supreme Court look at a case, the advice is invaluable.

The treatise also covers another important corner of federal litigation: administrative practice (in ch. 139) before the full gamut of federal agencies, as well as a separate chapter on regulatory litigation (in ch. 78).

It is difficult to describe the wealth of information in this treatise. In addition to the helpful and authoritative discussion in each chapter, the references to secondary authorities and important cases are abundant.

BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS is updated annually, and new editions regularly add new chapters as needed to maintain the work's comprehensive coverage. For example, the current Fourth Edition includes an informative chapter on Social Media (ch. 67). One can only imagine what would have been said on this subject in the First Edition in 1998. There are few works that can eclipse this work in value and reach; fortunately for us, this is one where its reach does not exceed its grasp. Go to it once, and you'll return many times.

David Herr is an experienced appellate litigator who has handled well over 100 appeals, including filing, briefing, arguing, and successfully petitioning for review, in multiple courts, including the United States Supreme Court. He is one of the founding members of the Eighth Circuit Bar Association and has been an editor of every edition of the Eighth Circuit Appellate Practice Manual *(Minn. CLE), now in its Eighth Edition. He practices with Maslon LLP in Minneapolis.*

Circuit Judges Offer Oral Advocacy Tips
by Landon W. Magnusson

After the day's oral arguments, a special panel of Eighth Circuit judges assembled in Kansas City, Missouri on February 13, 2019 to present an hour-long CLE they called "Views from the Bench." About eighty people gathered to hear from Chief Judge Lavenski Smith, Kansas City-resident Judge Duane Benton, and recently-appointed Judge David Stras who, as a Kansas University graduate, regarded his first hearings in Kansas City as a homecoming of sorts.

What made this panel discussion different was the judges' focus on oral advocacy. As many judges tend to do, they began their discussion by offering general observations about the privilege and responsibilities of our profession as lawyers and made sure to repeat that shorter is almost always better when it comes to brief sizes. But the conversation's focus quickly developed after Judge Benton asked the group: Do oral arguments even matter?

The answer, according to the panel, is an emphatic yes—no lawyer should ever take oral advocacy lightly. All three claimed that good oral arguments have changed their minds in about one out of every six cases heard. Explaining that this is nothing new, Judge Benton cited a 1984 written by two former Eighth Circuit judges where the authors tracked their cases for ten months and found that oral arguments had changed their minds 17 to 31 percent of the time. Myron Bright & Richard S. Arnold, *Oral Argument? It May Be Crucial!*, 70 A.B.A J. 68 (1984). Judge Stras drew upon his experience at the Minnesota Supreme Court to opine that the importance of oral argument in an intermediate court, such as the Eighth Circuit, can reasonably be more significant than in a court of last resort because an intermediate appellate judge's case load is much larger, and many of the cases are tremendously more fact-intensive.

With the importance of oral arguments set, the judges offered several tips for advocates when each gets his or her own fifteen minutes.

First, they all agreed that the most effective oral advocates begin their entire argument with a single sentence summarizing the case, telling the court how it should rule and why. If you are allowed to present that single sentence without interruption, the judges stated that you may follow that first sentence with a roadmap. But after Judge Benton remarked that he finds traditional roadmaps to be outdated, the panel advised that short roadmaps are always preferable.

Second, always listen carefully to questions as they are posed, pause for a moment, and then answer that question directly. A yes or no question almost always deserves an immediate yes or no response, even if further explanation is required.

Third, do your best to anticipate the panel's questions. An effective advocate has rehearsed his arguments and worked in advance to know most of a panel's questions before they are asked. It is rarely effective to repeatedly tell a court that you can "brief the question" for them after arguments have concluded.

Fourth, good advocates are absolute masters of the record and relevant cases, and they express themselves with complete candor. An advocate who demonstrates significant time spent reflecting on the issues in the case and unquestionable openness and honesty earns the Court's respect and trust. The opposite is also true.

Lastly, all three judges observed that it is not helpful to rush through a scripted argument. In fact, some of the best oral advocates seem to plan short pauses in their arguments where they anticipate questions will be posed in order to allow the judges to interject. And while advocates may think they know the most important parts of their case, they should never brush aside a judge's questions to get there.

The most persuasive advocates will combine these attributes to have a perfect combination of logic, personal appeal, passion, and knowledge of the record, and will be able to convey each of these traits in the most conversational manner possible. According to Chief Judge Smith, it should be like having dinner with the judge, where each person is engaged in a meaningful discussion.

Landon W. Magnusson is an associate at Withers, Brant, Igoe & Mullennix, P.C. in Liberty, Missouri. An experienced appellate advocate, Mr. Magnusson clerked in the Eighth Circuit for the Hon. Duane Benton and on the Supreme Court of Missouri for the Hon. Patricia Breckenridge. He currently serves on the Board of Directors of the Eighth Circuit Bar Association.

Judge Jane Kelly Offers Lively Conversation on Appellate Advocacy for Newer Lawyers

by Kyle R. Kroll

Attendees join Judge Kelly (center) for a photo.

On February 12, 2019, Judge Jane Kelly of the Eighth Circuit joined newer lawyers from the District of Minnesota for a lively conversation about appellate advocacy at the Warren E. Burger Courthouse in St. Paul. Judge Kelly fielded questions prepared by the Newer Lawyers Committee and the audience, gave a fascinating overview of her background and legal perspective, and provided appellate advocacy tips for newer lawyers.

Judge Kelly hails from Indiana. Before she decided to become a lawyer, she wanted to be a veterinarian or pilot. She attended Duke University and studied abroad in New Zealand. In 1988, she began her first year at Harvard Law School, where she shared classes with then-student Barack Obama. Years later in 2013, President Obama appointed Judge Kelly to fill the seat vacated by Judge Michael J. Melloy when he took senior status.

Public service has been Judge Kelly's life-long calling. After law school, she clerked for Judge Donald J. Porter in the District of South Dakota. She then clerked for Judge David R. Hansen on the Eighth Circuit in Cedar Rapids, Iowa, where she would later chamber. Judge Kelly reflects that her experiences clerking for these exemplary judges helped demystify the law and legal process.

After clerking, Judge Kelly served for almost 20 years as a federal public defender in the Northern District of Iowa until the U.S. Senate unanimously confirmed her nomination for continued public service as a judge on the Eighth Circuit. She is currently the only judge

nominated by a Democratic President in the Eighth Circuit.

The most important tip Judge Kelly offers to newer lawyers is to "know your case" at an intricate level so you can answer the panel's questions not only as to the specifics of your case, but also from a global perspective. That brought up another tip: do more than just "answer the question"; play with it! She observes that lawyers often resist engaging with the panel's questions and hypotheticals, but the most effective advocates heartily address the implications that hypothetical rules pose for their cases and others. For this reason, lawyers who stick to a script likely will not be as effective during oral argument.

Speaking of answering the question, Judge Kelly advises that some of the most effective rebuttal oral arguments are those that answer a question posed to the other side. Use rebuttal to provide a different answer from your perspective. This has the dual benefit of addressing a point of interest for the panel and countering the other side's position. Similarly, the best reply briefs do not rehash prior law or facts, but instead explain why the appellant wins despite the appellee's arguments.

Do not be a victim of hubris! Judge Kelly warns that overconfidence is one of the most common mistakes lawyers make. Be prepared to discuss—and anticipate questions about—the best and worst cases and facts for your side.

Lawyers frequently worry about developing a thorough record in the district court. Judge Kelly recommends creating a checklist of the elements needed to prove your case and consulting the list regularly throughout trial to determine what more is needed to prove each of those elements. Newer lawyers need to stay focused on proving each element throughout the life of the case. Thinking about the elements regularly and proactively will likely prevent any record-related issues on appeal. Similarly, lawyers should take every opportunity to object to adverse rulings. Do not forget to make your opposition known, or it might be waived!

Although comprehensiveness is key at the trial court level, Judge Kelly advises that the best appellate advocates are extremely focused on the main issues. Lawyers should not include unnecessary arguments, facts, and/or issues because such detail distracts the judges from reading and remembering the most important facts and arguments. Although a key fact may be mentioned somewhere, its importance may

not always be apparent to the judges if it is lost in a sea of insignificant facts. The same is true for arguments.

Judge Kelly encourages newer lawyers to find their own style—a style that works for them. You need to "be yourself," she says, and "don't try to be something you're not." Judge Kelly's last word of advice to newer lawyers is: "Love what you do."

The Newer Lawyers Committee greatly thanks Judge Kelly for taking time out of her busy schedule to share her wisdom.

Kyle Kroll is an attorney with Winthrop & Weinstine in Minneapolis and focuses on business litigation, especially matters involving intellectual property, antitrust, unfair competition, fraud, and appellate work. He is co-chair of the Minnesota FBA's Newer Lawyers Committee.