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News & Announcements

Tips of the Month
Welcome to our new members—and welcome back, returning members. As you will see, it has been a busy and eventful summer in the Eighth Circuit.

We are forced to bid farewell to Judge William Jay Riley, who is retiring after almost 16 years on the bench. Kari Scheer, one of Judge Riley’s former law clerks, has written an unforgettable article filled with stories and quotes about this great judge from Cornhusker State.

Rox Laird has been following the vacancies and nominations in our circuit closely. In this issue he fills us in on the latest nominations from President Trump. Mr. Laird writes about news and cases in the Eighth Circuit frequently at the On Brief: Iowa’s Appellate Blog. It’s a pleasure to have him as a contributor to our newsletter.

Punctuation is often compared to tools in the writer’s toolbox. But a better comparison may be to gremlins in the closet. Punctuation is seldom noticed until begins causing mischief. And rarely, if ever, does it cause more mischief than in legal writing. Ryan Marth and Steve Safranski show us one notorious little gremlin at work: the serial comma.

Finally, if you are in the Minneapolis-St. Paul area, look out for an announcement soon about our annual CLE discussing the Supreme Court Term in Review. It will be held in October during court week, and has been a popular and well-attended event. We hope to see you there!

Best wishes,

Benjamin J. Wilson
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THE HONORABLE WILLIAM JAY RILEY RETIRES FROM THE EIGHTH CIRCUIT COURT OF APPEALS

Kari Scheer

Judge William Jay Riley took senior status on June 30, 2017. He will close his chambers and release all staff effective August 31, 2017. At that time, Judge Riley’s long-time judicial assistant, Kristine Schneiss, will retire and Judge Riley will become an inactive senior judge.

Before the Bench

Judge Riley was born in Lincoln, Nebraska, to Donald and Marian Riley. Judge Riley married his wife, Norma, in December 1965. Together they have had three children. Despite all of his career successes, Judge Riley has been a devoted husband, father, and grandfather. Judge Riley attended the University of Nebraska, where he obtained his Bachelor of Arts degree in political science in 1969, and then pursued his law degree. During law school, Judge Riley was the editor-in-chief of the Nebraska Law Review. Following his graduation in 1972, with distinction, Judge Riley clerked for Judge Donald P. Lay of the Eighth Circuit Court of Appeals.

After his clerkship, Judge Riley began his career as a civil trial lawyer at Fitzgerald, Schorr, Barmettler & Brennan, in Omaha, Nebraska, where he quickly became known as a world-class trial lawyer. Kristine Schneiss began working as Judge Riley’s assistant at the firm in 1985. Before that, Mrs. Schneiss had been an assistant for Judge Lyle Strom, who left the law firm to take his seat on the bench. Incidentally, Judge Strom, Judge Riley’s longtime friend, law partner, and fellow judge, will also be retiring from the bench this year.

During Judge Riley’s 28 years at Fitzgerald Schorr, his excellence in trial practice was often recognized, and he was invited to be a Fellow of the American College of Trial Lawyers in 1992. Judge Riley was the Nebraska State Chair for the College from 1997-1999. Judge Riley is also a Life Fellow of the American Board of Trial Advocates, and has served as its treasurer and president. During his final years in private practice, Judge Riley was the head of his firm’s trial department. His excellence in trial practice has earned him a place in various listings, including Best Lawyers in America, Best Lawyers in Omaha, and Who’s Who in American Law.

Judge Riley has been quick to offer his expertise to help others over the years, particularly young people and developing lawyers. He has judged countless mock trial competitions at the local, state, and even national level. He taught trial practice as an adjunct professor at Creighton University School of Law from 1991 through 2009, and he taught trial advocacy at the University of Nebraska College of Law from 2006 to 2016.

Judge Riley has been a charter member, a master, and is now the counselor of the Robert M. Spire Inns of Court in Omaha. Judge Riley has also served as the Omaha Bar Association president and treasurer, chaired the Federal Practice Committee for Nebraska, chaired the Nebraska State Bar Association’s (NSBA) Ethics Committee, served as a delegate for the NSBA’s House of Delegates, been a member of the NSBA’s Professionalism Committee, been a fellow of the Nebraska Bar Association of the United States Court of Appeals for the Eighth Circuit SUMMER | 2017
State Bar Foundation, and served on countless other committees. He has consistently shared his knowledge and expertise with others, and his contributions to the state of Nebraska, even before his time on the bench, cannot be overstated.

Judge Riley’s community contributions also include many years of service as a Boy Scout leader, ten of which were as a Scout Master, and membership on the Board of Trustees of the Mid-America Council of the Boy Scouts of America.

Nomination and Confirmation

On May 23, 2001, President George W. Bush nominated Judge Riley to a seat on the Eighth Circuit Court of Appeals. Judge Riley had not considered becoming a judge until about 25 years into private practice, when his wife encouraged him to submit his name for the open district court position. He was interested in being a federal trial judge and was surprised to learn that his name was going to be submitted as one of five names to fill the Eighth Circuit seat vacated by Judge C. Arlen Beam.

When Judge Riley received a telephone call from Courtney Elwood with the White House Counsel’s Office asking if he could come to the White House for an interview, he was convinced that the call was a joke. He received the call on a Thursday and was preparing for a two- to three-week jury trial, which was supposed to begin the following Monday. Speaking rather informally and skeptically, he told Ms. Elwood that he would need to talk to the judge and the other attorneys involved in the case and call her back. When she gave him her telephone number for the return call, which had a “202” area code, he began to realize that the call may not have been a joke after all. Judge Riley contacted the judge and the other lawyers on the case and received permission to take a break the following week to travel to Washington, D.C. Judge Riley then called Ms. Elwood to update her, and she asked him to come to the White House on Thursday. His response was that he teaches at Creighton on Thursday nights, so he could not come until Friday. After a long pause, Ms. Elwood advised him to be there at 1:30 on Friday afternoon. Judge Riley asked for a letter of confirmation, and her response was, “Do you think you really need one?” Judge Riley responded, “Yes, I don’t know where to go.” Ms. Elwood responded, “It’s the White House. We’re at 1600 Pennsylvania Avenue.” Judge Riley answered, “Oh, that White House.”

Despite all of that, the interview must have gone well. Judge Riley was asked to return for a Senate Judiciary Committee hearing. He was the first appointee of President George W. Bush to make it through the confirmation process successfully. Judge Riley’s nomination-to-confirmation process took only just over two months. He was sworn into office by Judge Strom on August 16, 2001.
On the Bench

Although Judge Riley was not appointed to the district court bench, he was able to regularly sit by designation on civil cases in federal district court. That is, until he became Chief Judge of the Eighth Circuit on April 1, 2010, and determined that he no longer had the time to handle district court cases. Judge Riley has made it clear that the work of his judicial assistant, Mrs. Schneiss, was critical to his service as Chief Judge of the Eighth Circuit. He credits her with going above and beyond the duties of an ordinary judicial assistant, and with “carefully and meticulously” protecting all of the work coming out of his chambers.

Just as he did in private practice, Judge Riley continued to serve on various committees while he was an appellate judge. Former Chief Justice William H. Rehnquist appointed, and Chief Justice John G. Roberts reappointed, Judge Riley to serve on the United States Judicial Conference Committee on Criminal Law for two terms from October 1, 2005, to September 30, 2011. In November 2012, Chief Justice John G. Roberts appointed Judge Riley to the seven-member Executive Committee of the Judicial Conference of the United States, which sets policy for and generally administers the federal judiciary and its related agencies. In September 2013, then-Chief Judge Riley became the Long Range Planning Coordinator for the federal judiciary and in 2014-2015 he facilitated and coordinated an update to the Strategic Plan for the Federal Judiciary.

Judge Riley also continued to receive recognition for his work on the Eighth Circuit bench. Not long into his career, he found himself named in Lawdragon, “The Lawdragon 500 Leading Judges in America.” Also of note is an article in the Missouri Law Review, which outlined a proposed “judicial evaluation tool,” and ranked federal court of appeals judges serving between 1960 and 2008. See Robert Anderson IV, Distinguishing Judges: An Empirical Ranking of Judicial Quality in the United States Courts of Appeals, 76 Mo. L. Rev. 315 (Spring 2010). Unsurprisingly to many, the judge who was recognized for “first-place” based upon the author’s proposed ranking methodology was our very own Judge William Riley.

When I asked Judge Riley what he would remember the most about his time on the Eighth Circuit bench, he answered that he would remember the personal relationships: with his law clerks, with his fellow judges, and with the court staff.

I was fortunate enough to be able to clerk for Judge Riley from 2008 until 2010. The experience was one of the greatest experiences of my adult life, and it helped shape me as a person and as a lawyer. At the time that I started my clerkship, the Eighth Circuit Court of Appeals put
together a law clerk orientation that all new law clerks would attend. Many of us were nervous. Judge Riley had been asked to talk to us about ethics. He began his presentation with a statement about how formal and serious we needed to be at all times, all the while wearing funny glasses with a big nose and a mustache. He put us at ease, and simultaneously grabbed our attention. I suspect many of us remember what he told us about ethics that day. I was one of the lucky ones who would be able to continue learning from him over the years that would follow.

But Judge Riley teaches his most-valuable life lessons, not by what he says, but by what he does. He treats everyone he meets with kindness, no matter who they are or what their station is in life. He is honest. When on the bench, he was never afraid to ask the tough questions, but he was never combative or confrontational in his manner. Sometimes, when attorneys would struggle, he would throw them a “softball” question, so the attorneys could pull themselves together and address the tough questions. Never kick a man while he is down.

Judge Riley is a man of great integrity. That is a trait he says he learned from his father. When I clerked for him, he told me, “Never do anything you wouldn’t be proud to have on the front page of the newspaper.” That lesson has stayed with me. It has stayed with others as well. His daughter put that saying on a plaque and it now sits on Judge Riley’s desk in his office.

Another important lesson Judge Riley taught me is that the best meals are served at dives. Never judge a book by its cover. I suspect Judge Riley has had a significant impact on all of his law clerks. Mark Hill, an Omaha attorney had this to say about his clerkship experience: “I am so thankful that I was able to work for Judge Riley. During my two-year clerkship, Judge Riley taught me much about the law, professionalism, and the pursuit of excellence. Judge Riley is deservedly recognized as a great trial lawyer, a brilliant jurist, and a man of wisdom and high integrity. Two of the qualities that I appreciate most, however, are his sense of humor and kindness to others. Anyone who spends time with Judge Riley quickly learns that he likes to laugh and make others laugh. I have watched him use storytelling and self-deprecating jokes to connect with people from all backgrounds. As Chief, he used these skills to foster collegiality among the judges, their clerks, the Eighth Circuit staff, and the Eighth Circuit bar. Through his actions, I learned the importance of collegiality in an often-contentious profession.”
Cheryl Murad, an Iowa attorney who clerked for Judge Riley and has served as Judge Gritzner’s career law clerk, stated, “Judge Riley has hired a broad spectrum of law clerks, each of whom brought different abilities, backgrounds, and life perspectives to his chambers. With these diverse perspectives came lively, insightful discussions. Although Judge Riley has always enjoyed light-hearted conversations and activities, when it came to case work, he implemented a very deliberate and methodical process. Through this process, Judge Riley always exhibited and encouraged collegiality between the members of his own chambers, as well as with the members of other judges’ chambers. As a Judge Riley law clerk, you felt like part of the Riley family. He was always quick to share the details—and I mean every single one of them—of family trips and events. My time as Judge Riley’s law clerk was enriching both professionally and personally. It was a true honor to serve as his law clerk.”

Carol Svolos, another Omaha attorney and former Judge Riley clerk, recalled, “Judge Riley famously disavowed all use of adverbs and other extraneous words in his opinions. Nary a word ending in ‘-ly,’ with the possible exception of ‘only,’ made it past his green editing pen, no matter how surreptitiously a clerk might try to add an adverb. This resulted in clean, concise opinions that plainly stated exactly what they meant. Indeed, beginning a sentence by stating, ‘Clearly, …’ was no help to the reader unless the statement of the law that followed was, in fact, clear, which made the opening adverb redundant. While I now spice up my writing with a persuasive adjective or adverb, I always ensure that the sentence can stand on its own two feet without the grammatical window-dressing eschewed by Judge Riley.”

Eric Kelderman, an attorney with the U.S. Department of Justice and former Judge Riley clerk, shared, “One of my fondest memories of Judge Riley was the way he developed personal relationships, not only with his own staff, but with people from other chambers, as well. Thus, because he was so friendly and personable, on numerous occasions, the Judge would forgo dinner with other judges and go to dinner or to a baseball game with law clerks from both his own chambers and those from other chambers. And as an avid hiker, he always welcomed exercise, so we often would walk to our destination, sometimes to a location a good distance away. I remember some in our company would arrive at our destination winded, because we walked at such a brisk pace to get there. The Judge seemed to relish the walking excursions, and I think it gave him some degree of satisfaction to have tired out others who usually were younger than him.”

Matt Schulz, an Assistant Federal Defender in the Middle District of Alabama and former Judge Riley clerk, observed, “Judge Riley is a true gentleman and true professional. But I will mostly remember him for never having let it go to his head. He is always down-to-earth, and treated everyone with whom he came into contact with genuine dignity and respect. His humor was also ever-present. I remember one time when he told us, his clerks, how shocked he was to have heard that one of his fellow judges took his clerks to a ‘topless bar.’ This sounded odd to us all. Later, when discussing this with the fellow judge’s clerks, it turned out the judge had taken them to a TAPAS bar. We all, including Judge Riley, had a good laugh about this. He was always ready to laugh, even if at himself. I am honored to have clerked for him, and the judiciary was bolstered by his presence.”

Omaha attorney and former Judge Riley law clerk, Jeanne Burke, recalled, “Judge William Jay Riley promoted collegiality on the Court and in his chambers. He innately understood that judging on the appellate bench is a group process. He actively engaged with his judicial colleagues drawing on their differences and working diligently to get
the law right. He welcomed and accepted feedback from his colleagues on draft opinions. He enjoyed socializing with his colleagues and often extended invitations to dinner and sporting events. He likewise promoted collegiality within his chambers. He and his wife Norma entertained law clerks in their home and invited clerks to attend Omaha Community Playhouse productions. Judge Riley joined his law clerks at many events, including Cardinal baseball games and Final Four basketball games. By fostering collegial relationships both on the Court and in his chambers Judge Riley enhanced both the quality and efficiency of his appellate work.”

Tory Lucas, a professor of law and former Judge Riley clerk, stated, “I loved clerking for Judge Riley and, for the most part, hearing his stories. But I’m not sure that I loved hearing his stories as much as he loved telling them. And retelling them. And retelling them. And retelling them. My wife, Megan, Judge Riley’s wife, Norma, and I often would hold up fingers to signify the number of times we had heard the latest story, e.g., three, four, etc. Sometimes it took two hands. No matter the total of fingers in the air, Judge Riley was not deterred in retelling his story. Thanks for your outstanding service to our great nation, Judge Riley, and congratulations on your well-deserved retirement!” Mr. Lucas once wrote a two-volume article in the Nebraska Lawyer Magazine about Judge Riley and Judge Strom, in which he opined that Judge Riley “has lived an exemplary life of service, professionalism, and excellence.” That seems to be a sentiment with which many of Judge Riley’s law clerks agree.

Jeff Mindrup, Judge Riley’s former career clerk shared, “It was a great privilege to work under such a distinguished and accomplished member of the federal judiciary. Judge Riley has a keen intellect, sound judgment, and commitment to justice. But what remains most prominent in my mind as I look back on my time with Judge Riley is the way he challenged, taught, and inspired his law clerks—always with good humor and practical wisdom. Despite the significant demands of the Court and the community, particularly while Judge Riley served as Chief Judge of the Eighth Circuit and as a member of the Executive Committee of the Judicial Conference of the United States, he always took time to share his vast experience and knowledge with his clerks, interns, and students from the Creighton University School of Law and his alma mater, the University of Nebraska College of Law. Throughout his time on the bench, he had a kind and gracious demeanor, never failing to share credit with those around him. I will always appreciate not only the professional opportunity to learn from him, but also the chance to know him as a mentor and a friend.

“I will always remember Judge Riley’s open door. In my many years of service, it was only closed a handful of times, and then only to conduct the sensitive business of the Court or the Executive Committee. Ordinarily, his door was open and you could walk right in and talk with him about anything—work, life, or his beloved Huskers. Judge Riley was always more than happy to stop what he was doing to share his sage wisdom or a story (or two) from his twenty-eight years as a successful trial lawyer, sixteen years as an outstanding jurist or most importantly from his fifty years of marriage to his wonderful wife, Norma. He will be missed.”

The End of an Era

On Friday, March 10, 2017, Judge William J. Riley’s reign as Chief Judge came to a close, as he passed the torch to the Honorable Lavenski Smith. Shortly thereafter, on Friday, May 12, 2017, Judge Riley sat on the bench to hear oral argument for the last time as an active Eighth
Circuit Judge. Some of his current and former law clerks were in attendance, including Omaha attorney, Kate Jones. Jones recalled that Judge Riley “was joined on the bench by Judges C. Arlen Beam and Bobby E. Shepherd, who both expressed their appreciation for his friendship and years of service to the Eighth Circuit, as well as his guidance and leadership during his tenure as Chief Judge. U.S. District Judge Robert F. Rossiter, Jr. led the courtroom gallery, which included Judge Riley’s Judicial Assistant Kris Schneiss and current and former law clerks, in a round of applause for Judge Riley. Judge Riley described the occasion as bittersweet, as he motioned to the judges’ courtroom door and stated, ‘It’ll be hard to walk through that door.’”

In his retirement, Judge Riley will continue to hold down one important job; that is, he will continue on in his true life-long career as a devoted husband and loving father and grandfather.

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*Our thanks to Joan Voelker, Archives Librarian at U.S. Courts Library 8th Circuit, for her generous assistance providing photos for this article.*
President Donald Trump is positioned to shape the federal circuit courts with 108 federal trial and appellate judgeships to fill when he entered office in January, twice the number when Barack Obama took office. And he shows every sign of moving aggressively to take advantage of this opportunity.

The president had as of Aug. 3 announced 44 nominations, including U.S. District Judge Ralph Erickson of the District of North Dakota, who would replace Judge Kermit Bye of North Dakota, and Minnesota Supreme Court Justice David Stras of the Minnesota Supreme Court, who would fill the vacancy created when Judge Diana Murphy of Minnesota took senior status last November. The White House on Aug. 3 announced the nomination of Omaha lawyer Steven Grasz to replace former Chief Judge William Jay Riley of Nebraska, who took senior status in June.

Presuming these three nominees are confirmed, President Trump will have appointed a third of the Eighth Circuit in his first six months in office. And, there could be three more vacancies during his first term, with Judges Roger Wollman and James Loken both already eligible to take senior status and with Duane Benton becoming eligible this year.

President Trump’s current and potential first-term appointment opportunities will not change the makeup of the court based on the party of the appointing presidents, however. Seven of the eight active judges on the circuit were appointed by GOP presidents, and six of those were appointed by either George H.W. Bush or George W. Bush. The court has just one Democratic appointee—Judge Jane Kelly of Cedar Rapids.

When the court was last at full strength, three of the eleven judges were appointed by Democrats. Comparing the active circuit-court judges by the appointing president’s party affiliation, the Eighth Circuit is the least balanced of all the circuit courts.

Chief Judge Lavenski Smith of Arkansas, appointed by President George W. Bush in 2002, is the court’s only African-American member, and Judge Kelly is the only woman member.

There was a chance that Kelly might have been joined on the court by another female Democratic appointee: Jennifer Klemetsrud Puhl of North Dakota was nominated by President Obama in 2016 to fill Judge Bye’s seat, but she never got a confirmation vote in the Senate and her nomination died in December at the close of the 114th Congress.

President Trump, on the other hand, is in the rare position to run the table with federal judicial appointments, at least early in this term.

First, the Republican-controlled Senate slowed the pace of judicial confirmations in Obama’s last year in office, which left the new president with those vacancies to fill along with new ones that have opened up since his inauguration. And, while Obama was criticized for being slow to make judicial appointments, Trump has in his first six months sent nominees to the Senate at three times the rate of the Obama White House.

Second, Republicans hold 52 seats in the Senate, which is enough to confirm federal circuit and district court judges without a single Democratic vote, thanks to a rules change by the Democrats in 2013 eliminating the 60-vote threshold for district- and circuit-court nominees.

For the Eighth Circuit, especially, there would seem to be no worries, what with Iowa’s Sen. Chuck Grassley in the Senate Judiciary Committee chairman’s seat.
TRUMP ADMINISTRATION HAS THREE VACANCIES TO FILL ON THE EIGHTH CIRCUIT

Rox Laird

All of which should mean smooth sailing for Judge Erickson’s nomination in North Dakota, where both Republican senators have issued supportive public statements about Trump’s nominee from that state.

Sen. John Hoeven, in announcing his support for Erickson’s nomination, said “Judge Erickson has tremendous experience having served for 23 years in various judicial positions from his start as a Magistrate judge to his current position on the U.S. District Court. Throughout his career, he has upheld the rule of law and shown deep respect for the Constitution. We look forward to moving his nomination through the Senate.”

Sen. Heidi Heitkamp said she, too, supports Erickson’s confirmation. “Judge Erickson has proven through his decades of experience, record of impartiality, and devotion to his work that he is a judicious and thoughtful lawyer who continues to follow the rule of law,” Heitkamp said in a June press release.

The same holds true for Grasz in Nebraska, where Senators Ben Sasse and Deb Fischer, who recommended Grasz for the Eighth Circuit vacancy, had high praise for his credentials and experience.

That is not the case in Minnesota, where Senators Amy Klobuchar and Al Franken—both Democrats and both members of the Senate Judiciary Committee—had solicited applications for the opening before the president announced Stras as his pick. Neither has so far committed, at least publicly, to supporting or opposing Stras.

Senator Franken said in a May press release: “Justice David Stras is a committed public servant whose tenure as a professor at the University of Minnesota underscores how much he cares about the law. I am concerned, however, by the fact that Judge Stras’ nomination is the product of a process that relied heavily on guidance from far-right Washington, DC-based special interest groups—rather than through a committee made up of a cross-section of Minnesota’s legal community. As President Trump’s nominee to the U.S. Court of Appeals for the Eighth Circuit, I will be taking a close look at his record and his writings in the coming weeks to better understand how he thinks about the important matters before the federal courts today.”

Following Senate tradition, either Franken or Klobuchar could gum up the works for Stras if they were to refuse to submit a “blue slip” to the Judiciary Committee, a tradition in which senators indicate support for a nominee from their state by submitting a blue slip of paper to the committee. In the past, that gave home-state senators veto power over a president’s nominee, but Senator Grassley has hinted he may dispense with the blue-slip tradition for circuit-court nominees.

That would be a departure for Grassley, who has long defended the blue-slip tradition, and it would surprise University of Richmond Law Professor Carl Tobias, an expert on the federal judicial appointment process, who said “senators see that as the last piece of patronage.”

Judge Riley’s seat, which just became vacant when he took senior status on June 30, is the last of the three current vacancies to be filled. Nebraska’s two U.S. senators—Republicans Ben Sasse and Deb Fischer—have invited applicants interested in the appointment to apply.

Justice David Stras

Stras is an associate justice on the Minnesota Supreme Court. He was appointed to the court by Gov. Tim Pawlenty in May 2010 and elected to a full six-year term in 2012.
Justice Stras is a graduate of the University of Kansas where he received his bachelor’s degree and a master of business administration. He received his law degree from the University of Kansas School of Law in 1999.

Stras clerked for Judge Melvin Brunetti of the U.S. Court of Appeals for the Ninth Circuit, for Judge J. Michael Luttig of the U.S. Court of Appeals for the Fourth Circuit, and for U.S. Supreme Court Justice Clarence Thomas.

Judge Ralph Erickson

Judge Ralph Erickson was appointed U.S. District Judge for the District of North Dakota by President George W. Bush in 2003. He was chief judge from 2009 to 2016.

Erickson earned a bachelor’s degree from Jamestown College in 1980 and a law degree from the University of North Dakota School of Law in 1984. He was in private practice for a decade, served as a magistrate, county, and state-court judge before joining the Eighth Circuit.

Steven Grasz

Grasz is senior counsel in the Omaha firm of Husch Blackwell, where he focuses on real estate, development and construction law. Before joining Husch Blackwell he was Nebraska’s chief deputy attorney general for 12 years. His appellate experience includes litigation before the U.S. Supreme Court, the Eighth Circuit, and the Nebraska Supreme Court.

Grasz earned a bachelor’s degree from the University of Nebraska-Lincoln in 1984 and a law degree from the University of Nebraska College of Law in 1989.

Rox Laird was an editorial writer at The Des Moines Register for more than 30 years where he was the lead writer on the courts, the U.S. and Iowa constitutions, legal issues, prisons, and criminal justice. Mr. Laird currently writes for On Brief: Iowa’s Appellate Blog.
In this era of texts, IM, tweets, and hashtags, it is becoming easier to dismiss the importance of mere punctuation in conveying meaning. Some have even predicted the eventual phase-out or slow death of the comma in standard English. And what about the much-debated Oxford comma, or serial comma? This is the comma used after the penultimate thing in a list of three or more, right before the “and” or the “or” (e.g., “paper, pens, and pencils”). This comma is already shunned by most newspapers, and some style guides, including the University of Oxford Style Guide (but not Fowler or Strunk & White), now deem it optional or generally unnecessary.

“Not so fast,” says the U.S. Court of Appeals for the First Circuit. In a triumphant moment for grammatical traditionalists, the Oxford comma took center stage in O’Connor v. Oakhurst Dairy, a class-action dispute over Maine’s overtime pay statute, causing the New York Times to declare, “Lack of Oxford Comma Could Cost Maine Company Millions in Overtime Dispute.” At issue was a dispute between Maine dairy-truck drivers who sought millions in unpaid overtime and the defendant dairy that invoked a statutory exemption to the overtime requirement. The Oxford comma—or lack thereof—was central to resolving the dispute.

That statute exempted several job duties from overtime pay, specifically: “the canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of” various food products. The central question in the appeal: Does the phrase “packing for shipment or distribution” convey two exempted activities or one? Slip Op. at 4. The dairy contended that the phrase referred to two separate activities, “packing for shipment” and “distribution.” Because the drivers were “distributing” dairy products, the argument goes, they were exempt from the law. Id. at 4. The district court agreed. Id. at 1. The drivers appealed, arguing that the language in question referred to only one activity, namely “packing” materials that are intended for either shipment or distribution.

The First Circuit agreed with the drivers, relying on the absence of an Oxford comma, which if present, would have clearly conveyed an intent to list “distribution” of food as its own exempted activity. Even though Maine statute-drafting guides actually instructed the legislature not to include the Oxford comma in lists of three or more items, the court was persuaded by the drivers’ rejoinder that the same drafting manual also instructs the legislature to include the comma if omitting it would create ambiguity. Id. at 15. If the Maine legislature actually intended distribution to be a separate exempted activity, the failure to use an Oxford comma was a costly mistake.

While the First Circuit found that the lack of an Oxford comma prevented “distribution” from being read as an activity separate from packing, it is important to keep in mind that punctuation was only part of the interpretive analysis. The court weighed other textual arguments, such as the dairy’s argument that the “or” in the clause, “packing for shipment or distribution”—the only “or” in the list—signalized that “distribution” was a new item in the list. It was also persuaded by the drivers’ argument that the “packing” set off a new item but “distribution” did not because all other items were gerunds—i.e., “ing” words. After weighing the textual arguments on both sides the court conceded that raw textual analysis “has not gotten [it] very far. Id. at 17. To “break the tie” that it found was created by the text, the court resorted to the statute’s legislative history and the canon that wage-and-hour laws are interpreted in favor of employees.

In short, although the court’s focus on the missing Oxford comma grabbed headlines, it was hardly the end of the court’s analysis. While O’Connor is (for what it’s worth) the most high-profile example of punctuation’s role in the interpretation of legal texts, it is by no means alone.
United States v. Lara-Ruiz

The Eighth Circuit has also placed punctuation in a prominent position in parsing legal texts. With echoes of the First Circuit’s analysis in O’Connor, the Eighth Circuit in United States v. Lara-Ruiz, relied on the lack of a comma to adopt an expansive interpretation of an exception to a nonprosecution clause in a plea agreement. 681 F.3d 914 (8th Cir. 2012).

As part of a plea agreement for methamphetamine possession, federal prosecutors had agreed “not to bring any additional charges against the defendant” for related offenses. This nonprosecution agreement contained an exception, though:

for an act of murder or attempted murder, an act or attempted act of physical or sexual violence against the person of another, or a conspiracy to commit any such acts of violence or any other criminal activity of which the United States Attorney … has no knowledge.

When the prosecutors charged the defendant Lara-Ruiz with firearms offenses that they knew about at the time of the plea agreement, the defendant argued that such prosecution was barred, reasoning that they charged “acts or attempted acts of physical or sexual violence against another,” and that the “no knowledge” language limited each of the exceptions to the nonprosecution agreement, including this one.

The Eighth Circuit disagreed, relying almost entirely on commas to side with the government:

All the clauses in the exception are separated by commas and the last clause is separated from the previous clauses by the disjunctive “or.” Also, there is not a comma before the words “of which” in the last clause. As such, the paragraph at issue plainly contains multiple independent clauses and the phrase “no knowledge” only applies to the last clause.

681 F.3d at 919. Apparently, placing a comma before the “no knowledge” phrase could have pulled it out of the last clause and made it an overarching limitation on the entire series of exceptions.

All was not lost for the defendant, however, because the Eighth Circuit applied the “plain error” doctrine to find another reason that the exception to the nonprosecution agreement did not apply. Commas or no commas, possession of a firearm simply did not constitute “an act or attempted act of physical . . . violence against the person of another,” requiring the reversal of the defendant’s conviction.

United States v. Rigas

Every student of punctuation at some point asks, what is the difference between a comma and a semicolon? When do you use one versus the other? In United States v. Rigas, the Third Circuit sitting en banc answered that the difference and punctuation choice can mean as much as five years in federal prison. 605 F.3d 194 (3d Cir. 2010).

Rigas involved the federal conspiracy statute, which provides that a criminal conspiracy occurs “if two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof” and one of those persons commits an act in furtherance of that conspiracy. 18 U.S.C. § 371. The statute thus prohibits two types of conspiracies—those to commit any offense against the United States, and also those to defraud the United States or any of its agencies. But successive prosecutions of the same person
for violating both parts of the statute raised an interesting question under the Double Jeopardy Clause of the U.S. Constitution—one that was partially answered by the rules of punctuation and the difference between a semicolon and a comma.

John and Anthony Rigas, former officers and directors of the bankrupt Adelphia Communications cable company, were tried and convicted in the U.S. District Court for the Southern District of New York for violating § 371 by conspiring to commit an offense against the United States—namely bank fraud and wire fraud. Then a grand jury in the Middle District of Pennsylvania indicted the Rigases for violating the other part of § 371; they allegedly conspired to defraud the United States through tax evasion. The double-jeopardy issue turned on whether the two prongs of § 371 constitute different means of committing one offense, which cannot be prosecuted twice, or constitute two distinct offenses, which can.

To answer this question, the en banc majority turned to the statutory text, including its punctuation. The majority observed that “[w]hen Congress crafts a statute to create distinct offenses, it typically utilizes multiple subsections or separates clauses with semicolons to enumerate the separate crimes.” 605 F.3d at 209. But “unlike most statutes that create multiple offenses § 371 is a single sentence, divided only by commas.” Id. This punctuation choice was influential to the court’s decision that § 371 creates only a single offense, but not the chief reason behind it. What was most persuasive to the court was the use of the word “either” to introduce the ways in which a conspiracy could violate the statute: this word “demonstrates that these objects provide alternative means of creating a single type of offense rather than creating separate offenses.” Id. at 208. The punctuation served to underscore the meaning conveyed in the words that Congress used.

Sometimes words and punctuation pull the reader in opposite directions along the interpretive spectrum. That was the case in NACS v. Board of Governors of the Federal Reserve Systems, where the D.C. Circuit considered a legal challenge to Federal Reserve Board regulations capping the debit-card transaction fees that merchants pay to issuing banks. 746 F.3d 474, 480 (D.C. Cir. 2014), cert. denied, 135 S. Ct. 1170 (2015). The validity of the regulations turned on the interpretation of a provision of the enabling legislation, the Dodd-Frank Financial Reform Act, which directed the Federal Reserve Board in setting transaction fee caps not to consider “other costs incurred by an issuer which are not specific to a particular electronic debit transaction.” Id. at 483 (citation omitted). Defending its regulation from a challenge by retailers arguing the caps should be lower, the Board argued that the clause beginning with “which” should be read restrictively, limiting this category of costs that the Board was prohibited from including to those that are not specific to a particular transaction. The retailers argued the opposite: that the dependent clause should be read descriptively and all “other costs incurred by an issuer” were off-limits to being included in the cap.

The statutory interpretation question presented a face-off between the word “which” and the absence of a preceding comma—both of which are ordinarily used to introduce a descriptive clause. As the appeals court recognized, good writers ordinarily use the word “which” to describe and the word “that” to restrict. Id. at 486. But the Court was unwilling to disregard the absence of a comma, which those same good writers use to set apart a descriptive phrase:

The idea that we should entirely ignore punctuation would make English teachers cringe. … Following
the merchants’ advice and stuffing punctuation to the bottom of the interpretive toolbox would run the risk of distorting the meaning of statutory language. After all, Congress communicates through written language, and one component of written language is grammar, including punctuation.

* * *

Punctuation’s pivotal role in interpreting legal text—statutes, contracts, and patents for instance—is nothing new. As a Supreme Court justice famously observed nearly 200 years ago, “men’s lives may depend on a comma.” United States v. Palmer, 16 U.S. (3 Wheat) 610, 611 (1818) (Johnson, J., dissenting) (placement of comma pivotal in defining the offense of piracy). Rarely will the outcome of a case depend on punctuation, but for courts, advocates, and readers alike, “stuffing punctuation to the bottom of the interpretive toolbox” would be a mistake. NACS, 746 F.3d at 486. Words, periods, commas, and semicolons all form part of a single textual fabric that underlies any exercise in textual interpretation.

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NEWS AND ANNOUNCEMENTS

Special Session of Court for the Honorable Harold Vietor

The United States District Court for the Southern District of Iowa will hold a Special Session to honor the late Judge Harold D. Vietor on September 22, 2017, at 2:00 p.m. at the United States Courthouse in Des Moines. All are welcome to attend this public session. Public reception to follow. Please respond to Adams_rsvp@iasd.uscourts.gov by September 15, 2017, if you plan to attend.

U.S. District Judge Kornmann Honored with McKusick Award

On June 23 at the Annual Meeting of the State Bar of South Dakota, the Student Bar Association of the University of South Dakota School of Law presented U.S. District Judge Charles B. Kornmann of the U.S. District Court for the District of South Dakota with the Marshall M. McKusick Award for his exemplary service to the legal profession.

“On behalf of the Student Bar Association and future legal professionals within South Dakota, I am honored to present Judge Kornmann the McKusick Award,” said Morgan Nelson, a third-year law student and president of the Student Bar Association at the University of South Dakota School of Law. “Judge Kornmann’s extensive history of public service as well as his dedication to the Judiciary and legal profession is truly inspiring as an aspiring attorney.”

“Judge Kornmann served the community of Aberdeen, South Dakota, through 30 years of distinguished private law practice,” said Judge Jeffrey L. Viken, Chief U.S. District Judge of the U.S. District Court for the District of South Dakota. “[He] played a critical role in restoring to service the federal courthouse in Aberdeen, the only federal court location for the northeast quadrant of South Dakota.”

“Thanks again for all your kindness in giving me this award. I am, as I said, deeply honored,” said Judge Kornmann. “Having had at one time the third highest criminal caseload in the country, I have told some defendants who claimed to have found God while awaiting sentencing, ‘I have brought almost as many people to Jesus as Rev. Billy Graham.’”

Born in Watertown, South Dakota, Judge Kornmann attended St. Thomas University before earning his juris doctorate degree from Georgetown University Law School in 1962.

Active in public service and South Dakota politics, Judge Kornmann served as a capitol police officer in Washington D.C. from 1959-62, as a campaign assistant on George McGovern’s U.S. Senate campaign in 1963, and executive director of the South Dakota Democratic Party from 1963-65. He also served as a captain in the South Dakota National Guard from 1963-72.

In 1974, he was appointed by the South Dakota Supreme Court to the Constitutional Revision Commission that made recommendations for amendments to the South Dakota Constitution.

Judge Kornmann served as president of the South Dakota State Bar Association from 1988-89 and was also the president and director of the South Dakota State Bar Foundation. He served on the Bar Foundation board of directors from 1989-94 and was president of the Bar Foundation from 1994-95.
NEWS AND ANNOUNCEMENTS

New U.S. Magistrate Judge in Western District of Missouri

Willie J. Epps, Jr. has been selected to serve as magistrate judge for the U.S. District Court for the Western District of Missouri, in the Central Division based in Jefferson City. Judge Epps was previously Associate General Counsel & Head of Litigation at Edward Jones in St. Louis, where he was responsible for all lawsuits, arbitrations, and complex disputes. He led a team of in-house litigators and paralegals, and coordinated with outside counsel throughout the country.

Judge Epps is a graduate of Amherst College and Harvard Law School. Since 2012, he has served on the Teaching Faculty for Harvard Law School’s Trial Advocacy Workshop. He also served as general counsel, pro bono, for the Missouri State NAACP.

Retirement of U.S. District Judge Carol E. Jackson

August 31, 2017 will be a bittersweet day in the Thomas F. Eagleton Courthouse, as U.S. District Judge Carol E. Jackson will retire. Judge Jackson formally announced her retirement by letter to the Chief Justice of the United States and to the President late last year.

Chief Judge Rodney W. Sippel expressed the sentiments of the Court upon Judge Jackson’s retirement, saying, “Judge Jackson has been a model of civility, professionalism, and service to all of us on this Court, and her tenure as Chief Judge set a tone of collegiality within the Court that we still strive to meet today. More importantly, we will miss having our friend here in the courthouse with us every day.”

Judge Jackson began her tenure with the Court as a U.S. Magistrate Judge on January 2, 1986, becoming the first African-American Magistrate Judge in the Eastern District of Missouri’s history. She was then nominated by President George H.W. Bush to serve as a U.S. District Judge, and on August 17, 1992 she became the first African-American female District Judge in the Eastern District of Missouri’s history. She then became the first African-American Chief Judge for the Eastern District of Missouri, serving from 2002-2009.

Judge Jackson was also a trailblazer for the Court’s treatment court programs. In 2008 she helped found the Court’s intensive drug treatment program for offenders under supervision, and she presided over the program until 2014. She has also served on the Judicial Conference of the United States' Committee on the Administration of the Magistrate Judges System, and on the Federal Judicial Center’s District Judge Education Advisory Committee. She has served as a board number for a number of civic organizations as well, such as the St. Louis Children’s Choirs, the St. Louis Art Museum, and the Missouri Botanical Garden.

Judge Jackson is a graduate of Wellesley College and the University of Michigan Law School. Before her time on the bench Judge Jackson practiced with Thompson Mitchell (now Thompson Coburn) and with Mallinckrodt, Inc.

Judge Jackson reflected on her career on the bench, saying, “The racial, gender, and ideological diversity of the federal judiciary has increased over the years and has proved to be a source of strength. It has enhanced public confidence in the judicial system, and having the benefit of a wider array of ideas and experiences has enabled the courts to improve the services provided to the public and the bar. I am proud of the great strides we have made in the Eastern District of Missouri and am grateful for the privilege of being a member of this court.”
U.S. District Judge Lyle E. Strom Announces Transition to Inactive Senior Status

District Judge Lyle E. Strom of the U.S. District Court for the District of Nebraska has announced his transition to inactive senior status effective December 1, 2017, following 32 years of very distinguished service on the federal district-court bench.

Judge Strom's legacy of service to the court, the bar, the legal education system, and the community—especially youth—is unparalleled. He has led by example during his 64 years in the legal profession, always promoting collegiality, civility, professionalism, and good humor. His many contributions to the federal court will long endure, including the Roman L. Hruska U.S. Courthouse, which Judge Strom envisioned and pursued during his tenure as chief judge from 1987-94.

The Court expressed its gratitude to Judge Strom for his leadership, his friendship, his humanity, and for the very high bar he set for those who follow.

Proposed Amendments Published for Public Comment

The Judicial Conference Committee on Rules of Practice and Procedure has approved publication of proposed amendments to the following rules and forms:

- Appellate Rules 3, 13, 26.1, 28 and 32;
- Bankruptcy Rules 2002, 4001, 6007, 9036, 9037, and Official Form 410;
- New Criminal Rule 16.1;
- Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts;
- Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts; and
- Evidence Rule 807.

The comment period opened in August 2017 and closes on February 15, 2018. The text of the proposed amendments and supporting materials are here:

“When preparing for oral argument, anticipate as many questions as you can, including off-brief hypothetical questions. Keep a running list and prepare your answers, as well as any helpful transitions to related portions of your argument.”

- Gretchen Garrison, Gray, Ritter, & Graham, P.C., St. Louis, Mo.

“Start and end your brief with a meaningful statement of what you want, and why you should get it. A conclusion that says ‘For the foregoing reasons, the judgment of the District Court should be affirmed/reversed’ says nothing. It may be the first thing a judge reads, and not the last.”

- Eric Magnuson, Robins Kaplan, LLP, Minneapolis, Minn.

“Review a draft of your brief on an iPad before you finalize it. Adjust the font, the margins, and anything else that makes the brief easier to read and eliminates visual distractions.”

- Brian Walsh, Bryan Cave LLP, St. Louis, Mo.