EIGHTH CIRCUIT BAR ASSOCIATION

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

NEWSLETTER

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EDITOR'S NOTE
Benjamin J. Wilson

As Fall arrives we are delighted to bring you a fine harvest of articles about the history, legal developments, and important events in the Eighth Circuit.

Thomas Boyd offers a remarkable portrait of a remarkable man, Circuit Judge Donald P. Lay, who served the judiciary and people of our Circuit for over 40 years. Judge Lay was one of the leading lights of our profession.

There are many things to be proud of in our Circuit, and one of the finest is the Judicial Learning Center at the U.S. Eagleton Courthouse in St. Louis. Glenn Davis, President of the Judicial Learning Center, describes the many innovative programs and educational initiatives of the JLC, with due credit to the earnest and hard-working individuals behind it.

On the news front, Stacey Tjon Bossart introduces Jennifer Klemetsrud Puhl. Ms. Puhl will likely be donning a robe soon as our newest Eighth Circuit Judge. She has sailed through the nomination process thus far and awaits final confirmation in the Senate.

The amendments to the Federal Rules of Civil Procedure were a long time coming. Michael Harriss has undertaken extensive research into these amendments and how they're faring in practice. Mr. Harriss's article analyzes recent decisions in the courts of the Eighth Circuit applying the new (or old, depending whom you ask) proportionality standard of Rule 26.

John Baker brings to our attention an interesting recent decision, Pierce v. Pemiscot Memorial Health Systems. It's one you may have missed, but it's important for all attorneys practicing in federal court: The peril of Rule 25(a).

Timothy Droske, who keeps his fingers on the pulse of the Supreme Court, provides us with an original and meticulous examination of the 2015 Supreme Court term. As you will see, the Eighth Circuit played a prominent role.

Finally, Joan Voelker, Archives Librarian for the U.S. Courts Library Eighth Circuit, celebrates the 125th anniversary of the U.S. Court of Appeals. Ms. Voelker charts the formation of the courts of appeals and gives a few noteworthy "firsts."

In our next issue, we will bid farewell to the Hon. Kermit E. Bye. After 16 years of service, Judge Bye formally stepped down from the bench on September 1st. We wish to honor him in our next issue. Please send me any memories and words you care to share for publication.

I thank all our authors for their outstanding submissions. Welcome to our Fall Issue!

Benjamin J. Wilson
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FIFTIETH ANNIVERSARY OF JUDGE LAY'S APPOINTMENT TO THE EIGHTH CIRCUIT

Thomas H. Boyd

Fifty years ago, on July 5, 1966, President Lyndon B. Johnson announced his nomination of the Honorable Donald P. Lay to the United States Court of Appeals for the Eighth Circuit. Judge Lay was confirmed and received his commission on July 22, 1966. And on August 26, 1966, he commenced his service as a federal judge. He was the second youngest federal circuit judge to have been appointed up to that time. He went on to serve with distinction for more than 40 years. Justice John Paul Stevens wrote: "As a judge, Don Lay was once one of the youngest, once one of the most-senior, and always one of the most respected by his colleagues in the federal judiciary."[17]

Judge Lay was a talented man, with a brilliant mind. He was always thinking—coming up with solutions and finding ways to get things done. He lived his life—and he approached his work, as well as all of his endeavors and undertakings—with extraordinary energy. His capacity for ceaseless work and activity was remarkable. He pressed to get everything done as quickly as possible, and then he immediately moved on to do more. He was always on the go. He was incredibly productive—but he did not cut corners and he did not sacrifice quality. He was thorough, and he paid attention to detail. He studied the cases and he combed through the record. His instinct was to take action. He felt that "justice delayed was justice denied," so he pressed to get cases decided and opinions filed as quickly as reasonably possible. He also sought out ways to improve the law and the administration of justice.

From the very beginning, Judge Lay was highly competitive, and he strove to achieve excellence. As a youth, he was an Eagle Scout, and he excelled in athletics and debate. He enlisted in the Navy in 1944, and was later selected to attend the U.S. Naval Academy. However, a serious football injury ended his Naval career, and plagued him with back problems for the rest of his life. He enrolled at the University of Iowa where he earned his bachelor's degree in 1949 and his law degree in 1951. He was articles editor for the Iowa Law Review and Order of the Coif. Everyone at the law school knew that Judge Lay was destined for great things.

Embarking on his 55-year career in the law, he seems to have taken to heart Justice Holmes's famous advice: "Don't be content to be a lawyer; be a lawyer in the grand manner." He went into private practice in Omaha and, in the 15 short years following his graduation from law school, Judge Lay became one of the premier trial lawyers in the Midwest. He tried literally hundreds of cases to verdict. He was dogged, tenacious, persistent, and above all else, extremely competitive in preparing for trial and trying cases. He was in his element, and he gained enormous satisfaction from trial work.

Judge Lay went at his work as a judge with the same energy and enthusiasm that he had applied as a trial lawyer, and with his abiding belief in the adversarial process. "The whole tradition of the common law is based on the adversary system of trial, a tradition that thrives upon the theory that the best test of truth is to thoroughly and vigorously debate both sides of the question." Judge Lay had a great appreciation for the role that lawyers play in the shaping of the common law.

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In a wonderful article he entitled, *How to Putt on Wet Greens*,[18] Judge Lay wrote that he approached "each case . . . as a great and new adventure" that requires "reaching out for answers which aren't always there." "[T]he exhilaration of judging is in engaging the full resources of an inquiring mind." He proclaimed that, "when a judge is prepared and applies all of his or her resources to the case, the exhilaration can be like skiing down a precipitous mountain, traversing white water in a canoe, scoring the touchdown as the gun goes off, or sinking the 40-foot putt on a wet green."

But Judge Lay didn't just work all of the time. He had great lifelong friends in Omaha and all over the country with whom he had a lot of fun over the years. They socialized together, traveled together, and played a lot of golf together. He continued to expand this circle of friends and acquaintances throughout his life. Socializing and fellowship were a big part of his life. He always found time to have fun—and he also always found time to play golf. Indeed, to say he loved golf would be the greatest understatement anyone could make about Judge Lay.

Portrait of Judge Lay reprinted here with the gracious permission of the artist, Gilbert G. Early.

Judge Lay was also a great family man. He was married to Miriam Lay for 57 years. He said that she "kept his compulsive tendencies on track," and he would not have accomplished what he did "without her love and guidance." The Lays had a son, Stephen, who died at a young age, and five wonderful daughters—Catherine, Cindy, Betsy, Debbie, and Susan.

Judge Lay's production as a federal judge over more than 40 years is truly staggering. During his career as an appellate judge, Judge Lay sat with panels that filed 6,263 reported cases. In addition, he participated in many multiples of this number in terms of unreported decisions, administrative actions, deciding petitions, and the like. Judge Lay wrote 1,268 signed and reported opinions for the appellate court (not counting per curium opinions). In addition, he wrote more than 400 separate concurrences and dissents—those writings that Chief Justice Charles Evans Hughes referred to as "appeal[s] to . . . the intelligence of a future day." And apart from his appellate work, he frequently sat by designation on the district court where he presided over numerous trials.

In addition to the enormous volume of work he generated in the form of judicial opinions, Judge Lay also wrote and published well over a 100 scholarly articles, essays, speeches, and other writings on a variety of topics that appeared in the leading law journals and other publications throughout the country. These writings—just as his opinions—were thoughtful, thorough, heavily annotated, provocative, and inspiring.

Judge Lay was also a teacher and mentor to hundreds and hundreds of law students over the course of six decades. His teaching activities included affiliations with the Creighton Law School, the University of Minnesota School of Law, and William Mitchell College of Law. He was also a visiting lecturer and a jurist-in-residence at scores of law schools around the country.

FIFTIETH ANNIVERSARY OF JUDGE LAY'S APPOINTMENT TO THE EIGHTH CIRCUIT

Thomas H. Boyd

Judge Lay became Chief Judge of the Eighth Circuit in 1980—a post that he would hold until he took senior status in 1992. Signaling the bold and innovative leadership that would characterize his service as chief judge, he moved his chambers from Omaha to St. Paul—a move that revitalized and strengthened the Court's presence in the northern states of the Eighth Circuit. St. Paul's status as the second home for the St. Louis-based Eighth Circuit was fortified and continues today.

As Chief Judge, he was always searching and pressing for ways to improve the judicial system, and therefore better serve the individuals who were impacted by the work of the courts. Truth be told, his endless stream of memos and proposals surely rankled his colleagues at times. But he persisted and worked hard to institute innovations that greatly improved and modernized the workings of the court.

When Judge Lay stepped down as Chief Judge and took senior status, he was one of the distinguished "elder statesmen" of the federal judiciary. But he did not slow down. During the next 14-plus years, Judge Lay sat with every federal circuit court in the country, with the exception of the D.C. Circuit. In addition to his judicial duties, he taught law at Minnesota and William Mitchell, and even spent a semester teaching in Sweden. He also continued to be a strong and active voice for reform, particularly on the subject of criminal sentencing.

Judge Lay frequently spoke of the important role that attorneys and judges play in our society. He said often that he was "so proud to have been a lawyer, especially a trial lawyer and [then] a judge." He said, "The satisfaction of helping people as a lawyer and as a judge is immeasurable. It is the lawyer and the law who stand between the autocratic abuses of government and the freedom of liberty of the individual." Judge Lay believed in and practiced civili-

ty, decency, and mutual respect. He was always respectful of lawyers at oral argument, and he endeavored to engage in a meaningful and constructive conversation with the attorneys who appeared before the court.

He wrote that the Court "must be concerned that the power of the government does not encroach upon the fundamental liberties of the individual," and that '[t]he Court above all must remain the guardian and the watchdog of these individual rights." In a statement to the U.S. House Judiciary Committee, he expressed the view that, "The rights of the best people are only secure as long as the rights of the worst people are preserved."

Judge Lay cared deeply and profoundly for the dignity and well-being of his fellow men and women. He believed in common decency, civil discourse, and mutual respect. He saw the Constitution as the great bulwark that protected the basic human rights and personal dignity of all people in this country. "[W]e should ceaselessly embrace the concept of human dignity as the core of our constitutional ideal." In this spirit, Judge Lay vigilantly, zealously, and vigorously sought to protect the fundamental liberties of the individual. "We should thank God every day that we live in a country that values the rights and freedoms of individuals, and that there exists a system of law that so recognizes it."

The Honorable Donald P. Lay lived and worked with great energy and enthusiasm; he cared deeply about people; and he served the Eighth Circuit and the citizens of our Nation with the greatest distinction.

Thomas H. Boyd is a shareholder with Winthrop & Weinstine, P.A. in Minneapolis where he practices primarily in commercial litigation and civil appeals. He has served on the Board of Directors of the Historical Society of the United States Courts in the Eighth Circuit since 1990, and is currently President of the Court of Appeals Branch and the District of Minnesota Branch of the Eighth Circuit Historical Society.

THE JUDICIAL LEARNING CENTER: AWARD WINNING, INNOVATIVE OUTREACH

Glenn E. Davis

There is a living and breathing educational forum on the rule of law and the role of our federal and state courts on the first floor of the Thomas F. Eagleton U.S. Courthouse in St. Louis. The Judicial Learning Center, as its name implies, is more than a museum with plaques and dusty exhibits on historical events or old noteworthy cases that seem far removed from society's current consciousness. No. It is so much more than a space with a mock courtroom and exhibits. There are important oral histories and interactive tools that breathe life into the past and compellingly teach the continuing impact of landmark decisions, renowned jurists, and the current functions of the federal courts in our circuit and their sister Missouri state courts. Here, life lessons for young and old on how our independent judicial system administers justice in the face of today's challenges are effectively delivered every day.

The Concept and the Reality

A collection of leading lawyers and jurists first conceived of the Judicial Learning Center in Y2K, upon the completion of the Eagleton courthouse. Their vision, of an accessible court with a real outreach function for the public, was unprecedented. Veryl L. Riddle, Thomas R. Greene, and other leading lawyers, together with former Chief District Judge Edward L. Filippine, began investigation and planning for the project in mid-2000. From the beginning, the project received enthusiastic support from the Eighth Circuit Court of Appeals and its clerk, Michael Gans. Originally incorporated as a 501(c)(3) corporation on October 19, 2000 as the "United States Courts Learning Center," the organization held its first Board of Directors meeting on December 13, 2000. Prominent lawyers Allen S. Boston, W. David Wells, and Douglas F. Ritterkamp were among the first directors at that meeting.

As federal courts are constrained in fundraising efforts, the lawyers on the JLC Board launched a fundraising campaign, and the Board expanded. Lawyers and law firms gave generously to achieve the original $1M goal to make the concept a reality. Leadership Gifts were provided by Bryan Cave LLP and Thompson Coburn LLP; Major Gifts by Gray Ritter & Graham P.C., Husch Blackwell LLP, and the Law Offices of Thomas R. Green; and Special Gifts by the Federal Practice Memorial Trust, Holloran White Schwartz & Gaertner LLP, Lewis Rice & Fingersh LC, and Senniger Powers LLP. The Bar Association of Metropolitan St. Louis Bar Foundation, Dowd Bennett LLP, the Jordan Charitable Foundation, and Sonnenschein LLP provided additional friends support.

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The JLC created an Education Task Force and began planning, with input from the Missouri Historical Society, the Missouri Bar Association, and several local school districts, for both static and interactive exhibits and designs for build-out of the first educational center of its kind. The court, with the cooperation of the General Services Administration, identified first-floor space, and the Board enlisted Taylor Studios, Inc. for design and layout assistance to create an open, inviting, and purposeful space. On February 25, 2009, retired U.S. Supreme Court Justice Sandra Day O'Connor helped dedicate the opening of the Judicial Learning Center.

Delivery on the Promise

From the mid-2000s to date the Judicial Learning Center has enjoyed an unbroken upward trajectory. It became a passion for former Clerk of the District Court Jim Woodward and has benefited from the Court's 2010 engagement of an enthusiastic and talented Public Education and Community Outreach Administrator, Rachel Marshall, whose contributions have been immense. Former Chief Judge Catherine D. Perry and District Judge E. Richard Webber have provided countless hours of enthusiastic support and work. As the outreach mission took shape, the Judicial Learning Center Board attracted other leading lawyers and supporters, including Joseph P. Conran; Robert F. Ritter; former Board President Thomas E. Wack; the Honorable Richard Teitelman from the Missouri Supreme Court; Monica Allen, General Counsel of Washington University; Millie Aubur, Director, Citizenship Education for the Missouri Bar; Board Secretary Mary M. Bonacorsi; and others. The dedication, diversity, and depth of talent of the Board is extraordinary.

To promote public understanding of the judicial branch and its value, especially at the federal level, the Judicial Learning Center engages in a wide spectrum of activities. We support and provide the educational jumping-off point for courthouse tours, provide grant funds for transportation of hundreds of secondary students from throughout the district to educational field trips to the court, provide online learning tools for students (our online Student Center) and lesson plans, classroom resources, and tests for secondary school social studies, civics, and history teachers (our online Educator Center). We have developed close working relationships with the St. Louis City schools and other districts with high hurdles. Both the Boy Scouts and Girl Scouts have programs through the center. Students also participate in an essay contest, this year focused on Miranda rights. We

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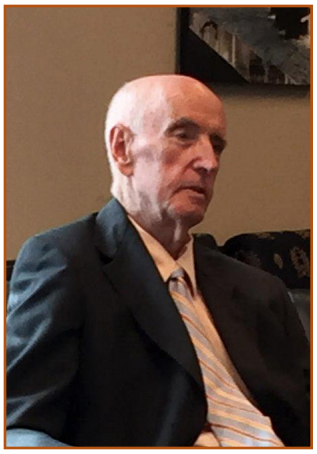

have co-sponsored the Danforth Lecture Series, including such notable speakers as former Eighth Circuit Judge and CIA Director William H. Webster. Additionally, we have provided summer teacher workshops to teach the teacher and co-sponsored widely acclaimed Street Law Workshops in St. Louis with the Missouri Bar. We also assist with senior groups for continuing education, including our partnership with the OASIS Program. With the assistance of Judge Webber, we also share unique perspectives through video oral histories of great former judges covering memorable events.

The work of the Judicial Learning Center has gained national attention. In both 2014 and 2015 the American Bar Association bestowed on the Judicial Learning Center and the Eagleton Courthouse its prestigious Law Day Awards for best student activities associated with Law Day. In 2012 the St. Louis Bar Foundation gave its Spirit of Justice Award to the center, for "demonstrated accomplishment, leadership, and integrity in fostering and maintaining the rule of law and in facilitating and promoting improvement of the administration of justice. " And we are serving as a model for courts across the country trying to establish similar education centers for public outreach. We are humbled and grateful for these recognitions and they challenge us to keep at the forefront of court outreach and education.

The Future Is an Open Book That Will Be Well Written

The Judicial Learning Center has a proud past and an exciting future. In the most recent Board Retreat, plans for a Teacher Advisory Board, JLC Educator of the Year Award, JLC Student of the Year Award, updated interactive and historical artifact displays, careers-in-law information, attorney visits to classrooms through the Ready Readers program, work with the ABA Civics and Law Academy, and many other future possibilities were discussed. We also hope to more actively engage our rich university, museum, corporate counsel, and law-school-dean communities.

In our time, the needs for enhanced learning for young and old on the rule of law and the primacy of independent administration of justice are great yet underserved. The notes we receive from students who have experienced the center are a tribute to the power of education and offer hope for the future. Whatever directions we take, you can rest assured they will be well considered and will further public understanding and justice.

There is so much more to know; please visit our websites or Facebook page for more information. Our primary website, underwritten by Gray Ritter & Graham, P.C., is particularly robust (www.judiciallearningcenter.org). If you would like to become involved or have innovative ideas to share, we welcome your involvement and support. Please do not hesitate to contact us through our website or you can reach me directly at glenn.davis@heplerbroom.com.

Glenn E. Davis, JLC Board President. Mr. Davis is a partner with HeplerBroom LLC in St. Louis. His practice involves complex business trial and appeal matters, including antitrust, securities, and corporate disputes. Mr. Davis also leads the HBCyberGroup, which is focused on information security compliance and response legal issues.

JENNIFER KLEMETSRUD PUHL, ASSISTANT U.S. ATTORNEY FOR THE DISTRICT OF NORTH DAKOTA, APPOINTED TO EIGHTH CIRCUIT BY PRESIDENT OBAMA

Stacey E. Tjon Bossart

On January 28, 2016, President Obama nominated Jennifer Klemetsrud Puhl, Assistant U.S. Attorney for the District of North Dakota, to serve as a U.S. Circuit Judge of the Eighth Circuit Court of Appeals. Her nomination follows Judge Kermit Edward Bye taking senior status on April 22, 2015. On June 21, 2016, Ms. Puhl appeared before the Senate Judiciary Committee regarding her nomination.

During the hearing, she thanked the Chairman, Sen. Chuck Grassley, and the Ranking Member, Sen. Patrick Leahy, for holding the hearing on her nomination, and North Dakota Senators Heidi Heitkamp and John Hoeven for their bi-partisan support of her nomination and the kind remarks made during the hearing. Ms. Puhl likewise gave praise to the former U.S. Attorneys she served under; namely, Drew Wrigley, now Lieutenant Governor of the State of North Dakota, and Tim Purdon.

On July 14, 2016, the Senate Judiciary Committee reported her nomination to the full Senate by voice vote. In nominating her, President Obama stated, "Throughout her career, Jennifer Klemetsrud Puhl has shown unwavering integrity and an outstanding commitment to public service. I am proud to nominate her to serve on the United States Court of Appeals." Her nomination currently remains pending before the full Senate.

Ms. Puhl, a native of Devils Lake, North Dakota, graduated from the University of North Dakota School of Law in 2000. Thereafter, from 2000 to 2001, she served as a law clerk to then-Justice Mary Muehlen Maring of the North Dakota Supreme Court, whom she also thanked during her Senate Judiciary hearing. From 2001 to 2002, she worked as an associate attorney in a Minneapolis law firm.

In 2002, Drew Wrigley hired Ms. Puhl as a prosecutor in the Criminal Division. In her position with the U.S. Attorney's office, she has prosecuted various criminal matters and served in multiple capacities, including as Computer Hacking and Intellectual Property Coordinator, National Security Cyber Specialist, Human Trafficking Coordinator, and Project Safe Childhood Coordinator.

Ms. Puhl is married to Jacob Puhl, a high-school teacher in Fargo. She and Jacob have three children, Isabelle, Julia, and Owen.

Stacey E. Tjon Bossart is a partner in the law firm of Haugen Moeckel & Bossart located in Fargo, North Dakota.

PROPORTIONALITY AND RULE 26(B)(1): AN IMPACTFUL CHANGE, OR A MERE SHIFTING OF WORDS?

Michael E. Harriss

Nearly nine months after the amendments to the Federal Rules of Civil Procedure took effect, it is time to take stock as to whether we have truly scrapped "reasonably calculated" in favor of "proportionality." While the intent behind the change to Rule 26(b)(1) was not to impose a new requirement, the change was nevertheless intended to be significant. Indeed, Chief Justice John Roberts's 2015 Year-End Report on the Federal Judiciary focused on these amendments, which he admitted are a "big deal."[1] With respect to Rule 26(b)(1) specifically, the Chief Justice reported that it "crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality." In short, "[t]he amended rules … mark significant change, for both lawyers and judges, in the future conduct of civil trials." At this point in time, however, the question worth asking is: have we have treated these changes as a "big deal" marking a "significant change" in our practice?

Sanctions for Citing the Old Rule?

Under the old Rule 26(b)(1), every attorney could recite the provision permitting discovery of relevant but inadmissible information if it appeared "reasonably calculated to lead to the discovery of admissible evidence." That provision, however, has been deleted. Under the amended Rule 26(b)(1) the scope of discovery is now as follows:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

As such, the proportionality principle, and the specific proportionality factors, have taken center stage under the amended Rule 26(b)(1). Notably, the new scope-of-discovery standard does not include any reference to discovery appearing "reasonably calculated" to lead to the discovery of admissible evidence. Instead, the scope of discovery—and thus, our discovery requests, responses, and objections—is now defined by not only what is "relevant" to a claim or defense, but also what is "proportional to the needs of the case."

As a result, references to the prior version of the Rule (or case law applying the prior version of the Rule) must be avoided or used with extreme care. In a recent decision from the U.S. District Court for the Western District of Washington, Judge James L. Robart imposed sanctions on an attorney for, among other things, premising a motion to compel on case law applying the previous version of Rule 26(b)(1) rather than the amended version. *See Fulton v. Livingston Fin. LLC*, C15-0574JLR, 2016 WL 3976558, at *8-9 (W.D. Wash. July 25, 2016). The court found the attorney's citations to pre-amendment case law "inexcusable," as the attorney made absolutely no reference to the proportionality requirement. To the court, the attorney's conduct in not only "misrepresent[ing] the scope of discoverable information" by failing to mention proportionality, but also relying solely upon pre-amendment case law was tantamount to "bad faith" constituting sanctionable conduct. The frustration expressed by Judge Rabot in the *Fulton* decision was unquestionably warranted. More importantly, however, his frustration was entirely avoidable. Sanctions for citing the old Rule 26(b)(1) may seem harsh, but such sanctions—and the frustration underlying them—can easily be avoided by being aware of the new Rule 26(b)(1) and recent decisions from within the Eighth Circuit applying the proportionality standard.

PROPORTIONALITY AND RULE 26(B)(1): AN IMPACTFUL CHANGE, OR A MERE SHIFTING OF WORDS?

Michael E. Harriss

(Contrasting) Proportionality Decisions from Within the Eighth Circuit— An Impactful Change, or a Mere Shifting of Words?

A few courts within the Eighth Circuit have addressed the amended Rule 26(b)(1) and the proportionality principle when ruling on the merits of various discovery disputes. In *Design Basics, LLC v. Ahmann Design, Inc.*, for example, Chief Magistrate Judge Jon Stuart Scoles took the opportunity presented by a motion for a protective order and cost-shifting in a copyright-infringement case to acknowledge that the civil rules amendments "made clear" that "discovery must be proportional to the needs of the case." *Design Basics, LLC v. Ahmann Design, Inc.*, C16-0015, 2016 WL 4251076, at *4 (N.D. Iowa Aug. 10, 2016). In that case, Design Basics alleged that certain custom and stock plans sold by Ahmann Designs for home construction improperly infringed on Design Basics's copyrighted plans. As part of its discovery, Design Basics requested that Ahmann produce "all documents relating to every home design created by Ahmann in the last 23 years." According to Ahmann, however, that request would reach "more than 1,100 stock plans and more than 10,000 custom plans." Even worse, these were contained in "hundreds of thousands of pages, the vast majority of which are not found in computer storage but are, instead, located in banker boxes."

According to the court, the proportionality principle was restored to its place in defining the scope of discovery in the new Rule 26(b)(1) and could not "justify production of hundreds of thousands of pages by manually copying house plans extending back more than 20 years." That being said, the proportionality principle also could not operate to exclude these documents from discovery altogether. Instead, the court allowed a representative of Design Basics to go to Ahmann's storage location and inspect the documents "to look for evidence of copyright infringement." The court limited the inspection to a single day, but held that additional inspections or production could be ordered depending upon "what evidence, if any, is discovered in the first inspection." Recognizing the restored focus on proportionality, and in consideration of the specific proportionality factors identified in Rule 26(b)(1), the court reached the type of common-sense conclusion likely envisioned by Chief Justice Roberts.

The U.S. District Court for the District of South Dakota also issued a decision in *Sprint Communications Co. L.P. v. Crow Creek Sioux Tribal Court*, relying on the amended Rule 26(b)(1) to resolve a discovery dispute. *See* 4:10-CV-04110-KES, 2016 WL 782247, at *4 (D.S.D. Feb. 26, 2016). In the *Sprint* decision, the court explicitly relied upon Chief Justice Roberts' Year-End Report when setting forth the legal standard under the new Rule 26(b)(1), and specifically referenced the Chief Justice's comment that amended Rule 26(b)(1) "crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality."

In reaching the merits of the discovery disputes, however, proportionality took a less prominent role in the *Sprint* court's analysis. Once, it was to note that the objecting party failed to make any showing that the request was not proportional (which may be an indication as to why proportionality played a lesser role in the court's analysis of the other issues). The next time, though, the court denied the requested production of relevant information, which was of a different type than that which the objecting party had earlier failed to show was not proportional. For this particular set of information, the court found that the requested production was "disproportionate to the needs of the case" and would not be compelled. Thus, in the *Sprint* decision, the court clearly recognized the import of the amended standard of discovery under Rule 26(b)(1). While proportionality was not a central focus of the

analysis, it directly impacted the court's resolution of at least one dispute between the parties.

The *Design Basics* decision adopted a more wholehearted recognition that the civil rules amendments "made clear" that discovery "must be proportional to the needs of the case," and the *Sprint* decision did the same while referencing Chief Justice Roberts' comments in his Year-End Report. Other decisions, however, reflect a reluctance to conclude that the amendments created any significant shift in the standards governing discovery. In *Gowan v. Sentinel Ins. Co.*, for example, the U.S. District Court for the District of South Dakota set out a side-by-side comparison of old Rule 26(b)(1) and new Rule 26(b)(1). *Gowan v. Mid Century Ins. Co.*, 5:14-CV-05025-LLP, 2016 WL 126746, at *5 (D.S.D. Jan. 11, 2016). The court then noted that proportionality "is hardly new," as the proportionality factors had previously been codified in old Rule 26(b)(2)(C) since 1983. Pointing to this historical fact, the court ultimately concluded that "the only change rendered by the amendment was to move the proportional requirement from subsection (b)(2)(C) up to subsection (b)(1)."

Later, in *Schultz v. Sentinel Ins. Co., Ltd*, the court set forth a similar historical summary and noted that "the 2015 amendment simply restores the [proportionality] provision to part (b)(1) of the rule, where it first appeared." *Schultz v. Sentinel Ins. Co., Ltd*, 4:15-CV-04160-LLP, 2016 WL 3149686, at *5, n.1 (D.S.D. June 3, 2016). By describing the changes to Rule 26(b)(1) as little more than reorganization, the court seemingly and indirectly minimized Chief Justice Roberts' noted "significant change" that was generated by the amended rules, and the intended "increased reliance on the common-sense concept of proportionality." In *Schultz*, the court rejected the position that that the proportionality requirement worked a dramatic change in existing law, concluding instead that the proportionality provision was simply being moved. As a result, Rule 26(b)(1) had not been drastically altered in the court's view. Although the court considered the proportionality factors, and addressed a number of issues on the merits that are beyond the scope of this commentary, this particular view of the amended Rule 26(b)(1) is worth noting and evaluating.

On the one hand, decisions like *Design Basics* and *Sprint* have reviewed the amended Rule 26(b)(1), invoked Chief Justice Roberts' Report, looked to the Committee Notes, and concluded that a significant change was intended by the civil rules amendments. On the other hand, decisions like *Gowan* and *Schultz* have suggested that the amendments are a simple reorganization, or reshuffling of words. While the distinction may seem minor, the difference in perspective may greatly impact whether we have treated these changes as a "big deal," as the Chief Justice has advised, and whether we should do so moving forward.

As suggested by other courts confronting the impact of the amended Rule 26(b)(1)—as well as the initial drafters and commentators—the restoration of proportionality as a centerpiece of the scope of discovery did, in fact, suggest a change in the discovery standard. That indicates why, for example, the court in *Design Basics* stated that the amendments "made clear" that "discovery must be proportional to the needs of the case" before narrowing the scope of discovery in that particular instance. It also indicates why the civil rules amendments were highlighted by Chief Justice Roberts in his Year-End Report, and described as a "big deal" that marked "significant change" in civil litigation. In the specific context of Rule 26(b)(1), the Chief Justice even noted that the amendment should generate "increased reliance on the common-sense concept of proportionality," suggesting a shift—even if not a seismic one—in the outcome of discovery disputes under the amended scope of discovery.

Therefore, at the very least, it seems that the civil rules amendments were intended to cause a different result in at least some discovery disputes implicating the scope of discovery under Rule 26(b)(1). However, the position that Rule 26(b)(1) has not been drastically altered, and represents nothing more than a reorganization, seemingly suggests that discovery disputes now should be resolved just the same as they have been since 1983 when the proportionality factors were first codified in Rule 26(b)(2)(C). But in order to put into action the "crystalize[d] … concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality," the new Rule 26(b)(1) must be seen as representing a new discovery standard that impacts—and alters—the outcome of certain discovery disputes. This is true even if proportionality is not, technically, a new requirement.

An Opportunity for the Eighth Circuit to Weigh in?

As a potential opportunity to clarify the impact of the amended Rule 26(b)(1), *Labrier v. State Farm Fire and Casualty Company* is a case worth tracking. It has the potential to generate the first decision from the U.S. Court of Appeals for the Eighth Circuit directly addressing, interpreting, and applying the restored proportionality principle. *See Labrier v. State Farm Fire & Cas. Co.*, 314 F.R.D. 637 (W.D. Mo. 2016).

In *Labrier*, a State Farm insured filed a putative class action concerning allegedly improper calculation methods that were used when State Farm rendered payment decisions on property damage claims. A Special Master was appointed to oversee discovery in the case, and State Farm objected to, and moved to vacate or modify, a discovery order that was issued prior to the putative class being certified.

According to State Farm, the objectionable discovery, if compelled, would require it to conduct an individualized, file-by-file analysis of approximately 150,000 claims—roughly 20,400,000 pages of information—which State Farm estimated would take nearly 72 "work years" and cost millions of dollars to complete. Nevertheless, the Special Master ordered State Farm to conduct and complete that review. State Farm appealed to the district court, which affirmed the Special Master's order. The court found that the likely benefit of discovery outweighed the burden or expense of compliance and that the burden of discovery was proportional to the needs of the case.

Notably, much of the district court's decision rested upon what it viewed as State Farm's "obstructionist approach" to discovery. State Farm had resisted several options for discovery that were suggested by the Special Master, arguing instead for its own choice of "its sampling of 400 cases without any access to all data from which those 400 cases were selected." The court further minimized State Farm's appeal to the undue burden and expense by recognizing that "State Farm has refused access to its computer system," and concluding that if State Farm wished to keep "its computer system secret," then State Farm "should bear the cost of doing any additional programming to pull out the information required by the interrogatories."

The Special Master's order, as well as the district court's decision, are currently on appeal. This case presents a unique opportunity for the Court of Appeals to discuss the impact of the amended scope-of-discovery standard of Rule 26(b)(1), and that is certainly worth tracking.

PROPORTIONALITY AND RULE 26(B)(1): AN IMPACTFUL CHANGE, OR A MERE SHIFTING OF WORDS?

Michael E. Harriss

Closing Thoughts

As recognized by Chief Justice Roberts, "the 2015 civil rules amendments provide a concrete opportunity for actually getting something done." To the Chief Justice, and the Advisory Committee on Civil Rules, this means focusing discovery on what is truly necessary to resolve each case. In the context of Rule 26(b)(1) specifically, this means eyeing discovery requests, responses, and objections through the lens of "the common-sense concept of proportionality."

In taking stock of the decisions that have interpreted and applied the amended Rule 26(b)(1), there are indications that the restoration of the proportionality principle to the scope-of-discovery standard has impacted the resolution of discovery disputes. Indeed, the majority of decisions that the author has reviewed since the amendments took effect in December 2015 suggest that the basic purpose of restoring "proportionality" to the vernacular used by both parties and the courts to resolve discovery disputes has been achieved. It is also apparent, however, that work still needs to be done. With an open mind to the substantive impact caused by the renewal of the proportionality principles, it may be possible to take full advantage of the "concrete opportunity for actually getting something done." An increased reliance on the common-sense concept of proportionality would ensure that the practical effect of amending Rule 26(b)(1) is not a mere shifting of words, but an impactful change.

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PIERCE V. PEMISCOT MEMORIAL HEALTH SYSTEMS

John M. Baker

If a dead plaintiff appeals a dead suit, is the appeal dead because the district-court judge could have dismissed it (again) under Fed. R. Civ. P. 25(a), even if the judge did not?

The Eighth Circuit answered "yes" in *Pierce v. Pemiscot Memorial Health Systems*, No. 15-1964, 2016 WL 3974142 (8th Cir. July 25, 2016) (per curiam). Beyond the metaphysical dimension to the question, the decision provides a helpful reminder to trial and appellate practitioners of the duty of counsel for a recently deceased client to take an affirmative step to protect against dismissal. The decision also sheds light on the transition between the application of the Federal Rules of Civil Procedure and the application of the Federal Rules of Appellate Procedure.

Through her guardian and conservator, Ruth Pierce brought a Section 1983 suit against a doctor and nurse who had treated her while she was involuntarily detained, as well as their respective employers. A jury returned a verdict in favor of the defendants, which prompted Ms. Pierce's counsel to file a motion for a new trial.

While the motion for a new trial was pending, Ms. Pierce died. Twelve days later, counsel for one of the defendants filed a Notice of Fact of Death in the district court. Such a filing is traditionally known as a "suggestion of death." Federal Rule of Civil Procedure 25(a)(1) provides that a court may order substitution of the proper party if a party dies and the claim is not extinguished, but states that "if the motion [for substitution] is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed." This is subject to the district court's authority under Rule 6(b) to permit an untimely motion for substitution if the failure to file the motion resulted from excusable neglect.

The suggestion of death did not prompt Ms. Pierce's counsel to file a motion for substitution of her estate. Before the end of that 90-day period, the district court denied the motion for a new trial. As a result, on the 90th day after the suggestion of death was filed, a judgment in favor of the defendants was already in place and appealable. The district court did not take further action, and shortly after the 90th day, counsel for Ms. Pierce appealed from the judgment, in her name.

The counterpart to Rule 25 on appeal—Federal Rule of Appellate Procedure 34(a)—does not impose a filing deadline for a motion for substitution because of death. The question therefore became which set of rules would govern in this situation.

The Eighth Circuit ruled that the Rules of Civil Procedure, not Appellate Procedure, still governed on the 90th day, notwithstanding the entry of a final appealable judgment, because the notice of appeal had not yet been filed. At oral argument, Ms. Pierce's counsel conceded that the failure to file the motion for substitution was not the result of excusable neglect. The Eighth Circuit held that "[t]his action thus should have been dismissed" after the 90-day period elapsed. It therefore remanded the matter to the district court "with instructions to dismiss the suit" under Rule 25(a)(1).

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REVIEW OF THE EIGHTH CIRCUIT DURING THE SUPREME COURT'S 2015 TERM

Timothy J. Droske

The Eighth Circuit posted an impressive record at the Supreme Court this past 2015 term. The number of Eighth Circuit cases that the Court heard was high compared to most recent terms, and the affirmance rate vastly greater than any of the past five years. The Eighth Circuit also had a prominent role before the Supreme Court, with cases from this Circuit being impacted by the biggest event from last term, Justice Antonin Scalia's death, and playing an part in one of the biggest decisions from last term, concerning religious objections to the birth-control mandate.

This article reviews these highlights and provides a brief summary of the six cases from this Circuit that were before the Court for argument last term.

Eighth Circuit Statistics

The Eighth Circuit's track record in the 2015 term of six cases heard and an affirmance rate of 60%, was impressive compared to other recent terms.[2] From 2010-2013, the Supreme Court generally only heard a few cases from the Eighth Circuit—four in 2010; zero in 2011; two in 2012; and two in 2013. The affirmance rate was also low—25% in 2010; 0% in 2012; 0% in 2013. And while the 2014 term marked a significant increase in Eighth Circuit cases before the Court, with eight, only one was affirmed, yielding an affirmance rate of just 13%. The 2015 term, in contrast, continued to feature a higher number of cases from the Eighth Circuit, with six, but also had a high affirmance rate of 60%, putting it near the top of the circuits.[3] These six cases are discussed below, as well as the Eighth Circuit's pivotal role in the birth-control mandate cases.

The Eighth Circuit and the Affordable Care Act's Birth-Control Mandate

The Eighth Circuit had a critical role in what was among the most closely watched decisions last term, regarding religious objections to the Affordable Care Act's birth-control mandate. When the Eighth Circuit weighed in on the issue in two September 17, 2015 opinions,[4] it was not the first circuit to do so, but it was the first to side with the mandate's challengers, finding that the contraceptive mandate substantially burdened the challengers' exercise of religion, and that the contraceptive mandate and accommodation was not the least-restrictive means of furthering the government's interests. Significantly, these decisions were issued around the same time that a number of pending certiorari petitions from other circuits were being distributed to the Justices for conference, and created the circuit split that then necessitated Supreme Court review.[5] Certiorari was granted on November 6, 2015,[6] and in an unusual move likely precipitated by a split vote in the wake of Justice Scalia's death, the Court called for supplemental briefing apparently aimed at whether the parties could agree to a compromise position. The Court ultimately issued a per curiam order (with Justices Sotomayor and Ginsburg concurring) that vacated and remanded the judgments to allow the parties to collectively "arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'"[7]

REVIEW OF THE EIGHTH CIRCUIT DURING THE SUPREME COURT'S 2015 TERM

Timothy J. Droske

***Hawkins v. Community Bank of Raymore* – The Impact of Justice Scalia's Death**

One of the six cases from the Eighth Circuit heard last term was also arguably the first to be directly impacted by Justice Scalia's death. On the first day of oral argument in the 2015 term, a case from the Eighth Circuit, *Hawkins v. Community Bank of Raymore*, Sup. Ct. No. 14-520, was before the Court. The case presented the question of whether spousal guarantors are unambiguously excluded from being Equal Credit Opportunity Act "applicants," as the Eighth Circuit had held,[8] and the corresponding question of whether federal regulations that included spousal guarantors as applicants remained valid. At oral argument, Justice Scalia was in fine form—he evoked the first round of laughter when, after petitioners' counsel cited Duke Energy in response to his question, he quipped, "I never liked that case"; and he got into such a back and forth with Justice Breyer that petitioners' counsel was forced to ask the Chief Justice for permission to interject with a response.[9] Four months later, this giant of the Court had passed away. *Hawkins* was not yet decided. When the decision was issued on March 22, 2016, it was the first case bearing the single-line ruling that became familiar as the term went on—"The judgment is affirmed by an equally divided Court."[10] Based on Justice Scalia's comments at oral argument, he also would have likely voted to affirm. But with his seat vacant and a 4-4 split, the judgment lacks any precedential value, and there are no insights into the Court's reasoning.

***Tyson Foods, Inc. v. Bouaphakeo* – Class Actions/Collective Actions Affirmed**

The Eighth Circuit's decision in *Tyson Foods, Inc. v. Bouaphakeo*[11] set the stage for the Supreme Court's next large class-action decision following *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) and *Comcast v. Behrend*, 133 S. Ct. 1426 (2013). The district court certified a class action and Fair Labor Standards Act ("FLSA") collective action consisting of employees at a Tyson Foods pork-processing plant, alleging that they were denied overtime compensation for time spent "donning and doffing" protective gear for work. The case went to a jury trial, where plaintiffs were awarded $2.9 million. The arguments to the Eighth Circuit were focused on the certification of the classes, and the Eighth Circuit affirmed, with one judge dissenting.

Tyson Foods first urged the Supreme Court for a rule categorically excluding "representative evidence," arguing that the class was improperly certified because plaintiffs' method of proving injury assumed, using expert analysis, that each employee spent the same time donning and doffing the gear, even though differences in the gear used may have meant that different employees, in fact, took different amounts of time. The Supreme Court affirmed by a 6-2 vote (Justice Kennedy authoring), issuing a narrow ruling that concluded that the appropriateness of representative and statistical evidence will depend upon the nature of the class action, and finding that such evidence had been previously permitted by the Court in FLSA actions. The second question posed—whether uninjured class members may recover damages—was one that the Court also recognized as "important," but did not reach, observing that a damages award had not yet been disbursed to the class members, and without the record indicating how disbursement would occur, the question was premature. Although the case's holdings were narrow, it marked a shift compared to recent pro-defendant class-action decisions from the Court. As Justice Thomas (joined by Justice Alito) maintained in dissent, the Court's precedents dictate a "rigorous analysis" that the district court did not undertake here, and that the majority avoided by creating a special rule for FLSA cases.

REVIEW OF THE EIGHTH CIRCUIT DURING THE SUPREME COURT'S 2015 TERM

Timothy J. Droske

***Mathis v. United States* – "Violent Felony" Under the Armed Career Criminal Act**

In *Mathis v. United States*,[12] the Supreme Court resolved a circuit split regarding the applicability of the Armed Career Criminal Act ("ACCA"). Under the Act, federal defendants with three prior convictions for a "violent felony" are subject to a 15-year mandatory minimum sentence. The general rule as previously set forth by the Supreme Court was that a prior crime qualifies as a violent felony if and only if its elements were the same as, or narrower than, those of the "generic" (i.e., common or usual) version of the offense. The issue here was whether Mathis's prior burglary convictions under Iowa law qualified as a violent felony. It was agreed by all parties that Iowa's statute covered more conduct than generic burglary, which is unlawful entry into a "building or other structure," because it also extended to "land, water, or air vehicle." Moreover, the way the statute was structured was such that the list of locations did not amount to alternative elements creating separate crimes. Instead, the statute had one crime of burglary, with one location element that was broader than the generic version, but with multiple ways of meeting that element, some of which were within the generic definition. Here, the district court reviewed the records of Mathis's prior burglary convictions and determined Mathis had been convicted for burgling structures, not vehicles, and on that basis imposed the ACCA enhancement. The Eighth Circuit affirmed, but the Supreme Court reversed, finding that "[o]ur precedents make this a straightforward case," and holding that application of the ACCA involves only comparing the elements of crimes, and does not permit courts to examine the defendant's particular means of committing the crime. The Court, however, was divided, with Justice Breyer (joined by Justice Ginsburg) and Justice Alito writing separate dissents arguing that the rule announced in *Mathis* is an overly convoluted and abstract rule. Neither Justice Kagan's majority opinion, nor Justice Kennedy's concurrence, completely disagree with the dissents, with both adhering to precedent, but noting that Congress could take a role in creating a different standard.

***CRST Van Expedited, Inc. v. EEOC* – Attorney's Fees under Title VII**

CRST Van Expedited, Inc. v. EEOC presented a square circuit split regarding the availability of attorney's fees.[13] Title VII of the 1964 Civil Rights Act authorizes attorney's fees to "the prevailing party," subject to certain qualifications. Here, the EEOC filed a suit in its own name against CRST, alleging sexual-harassment charges. Except for one person's claim, which was settled, all the others were ultimately dismissed, many because the EEOC failed to satisfy certain presuit obligations. The district court awarded CRST over $4 million in attorney's fees as the prevailing party. But the Eighth Circuit struck the fees award, finding in part that dismissal because of a failure to meet presuit requirements was not a ruling "on the merits," as it held was required to be a "prevailing party." The Supreme Court granted certiorari, and in an 8-0 decision authored by Justice Kennedy, reversed. The Court held "that a favorable ruling on the merits is not a necessary predicate to find that a defendant has prevailed."[14]

REVIEW OF THE EIGHTH CIRCUIT DURING THE SUPREME COURT'S 2015 TERM

Timothy J. Droske

***U.S. Army Corps of Engineers v. Hawkes Co., Inc.* – Judicial Review of Clean Water Act Approved Jurisdictional Determinations**

Hawkes[15] involved the Clean Water Act's applicability to property owned by three mining companies in Minnesota that wanted to expand their mining to a tract of land that includes wetlands. Whether property includes "waters of the United States" can be difficult to ascertain, but the consequences are substantial. "Waters of the United States" are subject to the Clean Water Act, which imposes significant civil and criminal penalties if any pollutants are discharged without a permit. Because of this, the U.S. Army Corps of Engineers will issue "approved jurisdictional determinations" ("JD") providing the agency's definitive view on whether certain land is subject to the Act. The Corps issued such a JD here, finding that the wetlands constituted "water of the United States." The mining companies then sought judicial review under the Administration Procedure Act ("APA"), but the District Court dismissed, finding that the JD was not "final agency action for which there is no other adequate remedy in a court." On appeal, the Eighth Circuit disagreed, instead concluding that such a JD is a final agency action ripe for review under the APA. This created a circuit split. The Supreme Court granted certiorari and affirmed the Eighth Circuit. Chief Justice Roberts's majority opinion rejected the Corps' arguments that the JD is not "final agency action" and its contention that there are adequate alternatives for challenging it in court. The outcome was unanimous, although five Justices (Kennedy, Thomas, Alito, Kagan, and Ginsburg) wrote or joined separate concurrences.

***Nebraska v. Parker* – Tribal Lands**

Nebraska v. Parker[16] posed a fairly discrete question regarding an 1882 act of Congress and the boundaries of the Omaha Indian Reservation. In 2006, the Omaha Tribe amended its Beverage Control Ordinance and sought to subject retailers in Pender, Nebraska, to its tax. While the land the village of Pender is on used to be part of the Omaha Indian Reservation, Pender retailers challenged the Ordinance's applicability, contending that the sale of the land pursuant to the Act of Aug. 7, 1882 ("1882 Act"), "diminished" the reservation's boundaries. The district court, Eighth Circuit, and Supreme Court all examined the 1882 Act, which unlike earlier treaties with the Omaha Tribe, did not "cede, sell, and convey" the Omaha Tribe's land for a fixed amount of money, but instead authorized the Secretary of Interior to survey, appraise, and sell land, with proceeds being held in trust for the Tribe's benefit. The Eighth Circuit panel and Supreme Court both unanimously agreed, relying primarily upon the text of the 1882 Act, that the sale did not diminish the reservation's boundaries.

Conclusion

The strength of the Eighth Circuit bench, and the influence of Eighth Circuit decisions nationally, was on display last year as the Supreme Court heard and affirmed a number of important cases from the Eighth Circuit. The Supreme Court's 2016 term has already begun, with its first conference on September 26, 2016, and oral argument on October 4, 2016.

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125TH ANNIVERSARY OF THE U.S. COURT OF APPEALS

Joan Voelker

Happy birthday to the U.S. Court of Appeals for the Eighth Circuit, created 125 years ago by the Evarts Act in 1891!

While a three-tier federal court system was created by the Judiciary Act of 1789, that system did not include the U.S. courts of appeals. It included the U.S. district courts, the U.S. circuit courts, and the U.S. Supreme Court (established by Article III of the Constitution).

During the early period of the federal judiciary, the federal district and circuit courts were both trial courts. The circuit courts served as the main trial courts and as the appellate courts for district-court cases. The Supreme Court served as the court of final appeal.

The appellate cases for a particular circuit court were heard by panels of two to three judges, who served on the Supreme Court, district court, and circuit court.

The Supreme Court justices traveled throughout the circuits, often on horseback, to hear the appellate cases in the circuit courts. As federal filings increased dramatically during the 19th century, the burden on the circuit-riding justices grew. To alleviate this burden and better handle the caseloads, in 1891 Congress created the U.S. circuit courts of appeals, one for each of the then-nine circuits. These courts, renamed the U.S. courts of appeals in 1948, were the first federal courts designed exclusively to hear cases on appeal from the federal trial courts.

The creation of the appeals courts ended the appellate jurisdiction of the circuit courts, which continued as trial courts until January 1, 1912, when they were abolished according to the terms of the Judicial Code of 1911.

Timeline of the U.S. Court of Appeals for the Eighth Circuit

Creation: March 3, 1891

The U.S. Circuit Court of Appeals for the Eighth Circuit was created by the Evarts Act (26 Stat. 826), passed by Congress on March 3, 1891.

First Judge: June 16, 1891

The Evarts Act established that the existing circuit judges and a newly authorized judge in each circuit were the judges of the U.S. circuit courts of appeals. Henry Clay Caldwell, the existing circuit judge for the Eighth Circuit, was assigned as the first judge to the U.S. Circuit Court of Appeals for the Eighth Circuit on June 16, 1891. Walter Henry Sanborn would receive his commission as the Court's second judge on March 17, 1892.

First Meeting: June 16, 1891

On June 16, 1891, the Eighth Circuit Court of Appeals met for the first time, in St. Louis. In attendance were U.S. Supreme Court Justice David J. Brewer and U.S. Circuit Court of Appeals Judge Henry Clay Caldwell. Caldwell had succeeded Brewer as circuit judge for the Eighth Circuit in 1890.

First Oral Argument: October 12, 1891

The Eighth Circuit Court of Appeals heard its first case on October 12, 1891. Judge Caldwell presided and was joined by two district judges, Amos Thayer of the Eastern

District of Missouri and Moses Hallett of the District of Colorado. (Colorado was part of the Eighth Circuit from 1876 to 1929. Thayer became the third judge appointed to the Circuit's Court of Appeals, in 1894.)

For more on the early history of the federal judiciary and the Eighth Circuit, check out the U.S. Courts Library's display and brochure, "Empire in the Grasslands: The Eighth Circuit Before 1891."[19]

Joan Voelker is Archives Librarian for the U.S. Courts Library Eighth Circuit and Secretary of the Historical Society of the U.S. Courts in the Eighth Circuit.

First appointees, U.S. Circuit Court of Appeals for the Eighth Circuit: Walter H. Sanborn, 1892; Henry C. Caldwell, 1891; Amos M. Thayer, 1894. (Blackmun Collection, U.S. Courts Library Eighth Circuit.)

REFERENCES

[1] *See* John Roberts, 2015 Year-End Report on the Federal Judiciary (Dec. 31, 2015), available at https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

[2] The following table reflects the number of Eighth Circuit cases heard by the Court, the percentage of the docket those cases composed, the Court's voting record on those cases, and the affirmance percentage, as reported by SCOTUSblog:

Term	Number of Cases	Docket Percent	Aff'd – Rev'd – Split	Affirmed Percent
2015	6	7%	3-2-1	60%
2014	8	11%	1-7	13%
2013	2	3%	0-2	0%
2012	2	3%	0-2	0%
2011	0	-	-	-
2010	4	5%	1-3	25%

SCOTUSblog, Stat Pack Archive, available at http://www.scotusblog.com/reference/stat-pack/ (Circuit Scorecard for 2010-2015 Terms). Note that the 4-4 split, although resulting in a non-precedential affirmance, is not included in the Affirmed Percent.

[3] SCOTUSblog Stat Pack, October Term 2015 at 3 (June 29, 2016), available at http://www.scotusblog.com/2016/06/final-october-term-2015-stat-pack/. Only the First and Second Circuits fared better, with a 67% affirmance rate. *Id.*

[4] Sharpe Holdings, Inc. v. United States Department of Health and Human Services, No. 14-1507, 801 F.3d 927 (8th Cir. Sept. 17, 2015); Dordt College v. Burwell, No. 14-2726, 801 F.3d 946 (8th Cir. Sept. 17, 2015).

[5] *See* Supreme Court Rule 10(a) (identifying a circuit split as the first criteria the Supreme Court considers when determining whether to grant a petition for a writ of certiorari)

[6] *See* Supreme Court of the United States, 2015 Term Court Orders, November 6, 2015 Miscellaneous Order, available at http://www.supremecourt.gov/orders/courtorders/110615zr_j4ek.pdf.

[7] Zubik v. Burwell, 136 S. Ct. 1557, 1560 (2016). The petitions in Sharpe Holdings (Sup. Ct. No. 15-775) and Dordt College (Sup. Ct. No. 15-774) were granted, vacated, and remanded on May 16, 2016 in light of the *Zubik* decision. See https://www.supremecourt.gov/orders/courtorders/051616zor1_g31h.pdf.

[8] Hawkins v. Community Bank of Raymore, 761 F.3d 937 (8th Cir. 2014).

[9] Hawkins Transcript, 5:12-20, 10:20 - 12:18, available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/14-520_3e04.pdf

[10] *Hawkins*, 136 S. Ct. 1072 (Mar. 22, 2016).

[11] Bouaphakeo v. Tyson Foods, Inc., 765 F.3d 791 (8th Cir. 2014), aff'd Sup Ct. No. 14-1146, 136 S. Ct. 1036 (Mar. 22, 2016).

[12] United States v. Mathis, 786 F.3d 1068 (8th Cir. 2015), rev'd Sup. Ct. No. 15-6092, 136 S. Ct. 2243 (Jun. 23, 2016).

[13] EEOC v. CRST Van Expedited, Inc., 774 F.3d 1169 (8th Cir. 2014), aff'd Sup. Ct. No. 14-1375, 136 S. Ct. 1642 (May 19, 2016).

[14] In vacating and remanding the decision, though, open issues remained. In particular, the Court remanded for the lower courts to take up in the first instance the EEOC's new argument that a defendant must obtain a preclusive judgment in order to prevail. The Eighth Circuit did not revisit the case following remand, other than

REFERENCES

to vacate its prior opinion and remand the case to the District Court for further proceedings consistent with the Supreme Court's opinion. EEOC v. CRST Van Expedited, Inc., Judgment, 8th Cir. No. 13-3159 (8th Cir. Jun. 28, 2016).

[15] Hawkes Co. v. United States Army Corps of Eng'rs, 782 F.3d 994 (8th Cir. 2015), aff'd Sup. Ct. No. 15-290, 136 S. Ct. 1807 (May 31, 2016).

[16] Smith v. Parker, 774 F.3d 1166 (8th Cir. 2014), aff'd by Nebraska v. Parker, 136 S. Ct. 1072 (Mar. 22, 2016).

[17] John Paul Stevens, *In Memoriam: Judge Donald P. Lay*, 92 Iowa L. Rev. 1551, 1551 (2006-2007).

[18] Donald P. Lay, *How to Putt on Wet Greens*, Int'l Soc'y Barristers Q. (1981).

[19] http://www.lb8.uscourts.gov/pubsandservices/histsociety/coa8-empire-display.html.