

NEWSLETTER

Winter 2022



The United States District Court for the District of South Dakota recently celebrated the 125th anniversary of the federal courthouse in Sioux Falls. The building was built entirely out of Sioux quartzite quarried in Jasper, Minnesota.

Photo by the Hon. John Simko (Ret.). Used with permission.

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Celebrating service

Recipients of Richard S. Arnold Awards honored at Judicial Conference



Recipients of the Richard S. Arnold Awards were honored at the Eighth Circuit Judicial Conference. Pictured from left to right are Michael Williams; Dan Gustafson; Stu Dornan; Spencer Cady, son of Chief Justice Mark S. Cady, who was honored posthumously; Dean Cynthia E. Nance; Gordon S. Rather, Jr.; Lee T. Lawless; Stephanie Johnson Pochop; and Dana Tippin Cutler. Award recipient James Whalen was unable to attend the conference.

By Katherine S. Barrett Wiik

The Eighth Circuit Bar Association was honored to celebrate ten recipients of the 2021 Richard S. Arnold Award for Distinguished Service at the Eighth Circuit Judicial Conference, which was held at the Broadmoor Hotel in Colorado Springs in late October 2021. The award is named for former Chief Judge Richard S. Arnold, who had a distinguished career that included graduating first in his class at Yale University and Harvard Law School. Judge Arnold clerked for Justice William Brennan on the United States Supreme Court before entering private practice and serving on the Eighth Circuit Court of Appeals for decades.

Since 2012, the Eighth Circuit Bar Association has presented Richard S. Arnold Awards for Distinguished Service to ten

deserving individuals at Eighth Circuit Judicial Conference, during the years when the Conference includes practitioners. The awards are made by the Association based on nominations provided by the chief judges of each district in the Circuit.

The contribution of the 2021 Award recipients were highlighted by members of the Bar Association Board and nearly all were able to travel to Colorado to be honored.

The 2021 Richard Arnold Distinguished Servants include:

- **Mr. Lee T. Lawless (Missouri)**, former Federal Defender for the Eastern District of Missouri. Mr. Lawless has also taught several courses on trial and sentencing

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advocacy. He has worked with Missouri's district court and CJA panel members to provide training and resources to the panel, including the establishment of a mentorship program. Mr. Lawless has improved the quality of legal services provided to those financially unable to obtain adequate representation.

- **Ms. Dana Tippin Cutler (Missouri)**, of the James W. Tippin & Associates law firm in Kansas City, Missouri. Ms. Cutler has lived most of her life in Missouri and devoted her practice to civil defense litigation and education law, focusing on charter schools in Missouri. She has dedicated countless hours to bar association work at the local, state and national levels and served as the first woman of color President of The Missouri Bar from September 2016 to September 2017. Ms. Cutler and her husband co-host *Couples Court with the Cutlers*, a nationally-syndicated, Emmy-nominated court television show.

- **Mr. Michael Williams (North Dakota)**, of the Maring Williams Law Office in Bismarck, North Dakota. Mr. Williams has had a private practice in Bismarck, North Dakota since 1979, and his legal career is defined by zealous advocacy for people with disabilities and service to his state bar association and community. He was co-counsel on a landmark disability law case that helped to establish equal rights, creating a state-wide service delivery system that allowed people with disabilities to access quality programs and services in less-restrictive, community-based settings. Mr. Williams has remained a zealous advocate for people with disabilities in the decade or more since it ended. He is a frequent speaker on the rights of people with disabilities at schools, universities, and other groups and agencies.

- **Mr. James Whalen (Iowa)**, the former Federal Public Defender for the Northern and Southern Districts of Iowa. During Mr. Whalen's tenure as FPD (2012-2020), his office made service to the Criminal Justice Act (CJA) panel a high priority. He and his colleagues had

several opportunities to review prior cases and attempted to remedy some of the overly harsh sentences of the past sentences through the clemency process or by arguing for sentencing adjustments. He has also prioritized using of technology to process discovery and to assist in the presentation of persuasive argument to judges and juries.

- **Ms. Stephanie Johnson Pochop (South Dakota)**, of the Johnson Pochop & Bartling Law Office LLP. Ms. Johnson Pochop represents the third generation of her family to graduate from the University of South Dakota School of Law and practice at the firm started by her grandfather and father. She has a practice focusing on in employment discrimination and other civil-rights enforcement cases. Ms. Johnson Pochop commits a minimum of 100 hours of pro bono service per year to indigent clients in the high-need areas of family law and civil rights. Her most fulfilling bar service derives from her leadership of the South Dakota Bar's Lawyers Assistance Committee. She has also been a South Dakota representative for the Infinity Project, a group that works to improve gender equity, diversity, and inclusion within the Eighth Circuit.

- **Mr. Stu Dornan (Nebraska)**, of the Dornan Law Team. Mr. Dornan has served as an FBI Special Agent, a defender for indigent individuals in Louisiana, and after returning to Omaha, the Douglas County Attorney from 2003-2006. While the Douglas County Attorney, Mr. Dornan was the driving force behind new restorative justice initiatives, including the Young Adult Court, Juvenile Assessment Center, and Mental Health Diversion initiatives. After returning to criminal defense, he co-founded the Dornan Law Team, where he represents individuals charged with crimes and mentors young lawyers. Mr. Dornan and his wife Dari have nine children, including five internationally

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adopted children, and four grandchildren. The Dornans have received several awards from adoption and family organizations.

• **Chief Justice Mark S. Cady (Iowa) (posthumous award)**, was Chief Justice of the Iowa Supreme Court. Chief Justice Cady had a long and distinguished judicial career, serving in every level of Iowa's judicial branch from the time he was a 29-year-old district associate judge until his unexpected sudden death in November 2019. Born in Rapid City, South Dakota, Chief Justice Cady earned both his undergraduate and law degrees from Drake University. Through his kind, caring, and humble personality, Chief Justice Cady passionately sought to improve justice, equality, and fairness for all Iowans. He viewed his role as an advocate of the law, not as an advocate for certain viewpoints or philosophies, understanding that his role is to make the right decision under the law even when it may be against public interest or opinion. At the time of his passing, Justice Cady served as the Chair of the National Center for State Courts Board of Directors and President of the National Conference of Chief Justices. The award was accepted by Chief Justice Cady's son, attorney Spencer Cady.

• **Mr. Dan Gustafson (Minnesota)**, is a founding member of the Minnesota-based litigation firm Gustafson Gluek PLLC. He leads the firm's practice in prosecuting complex and class-action litigation on behalf of individuals and small businesses for various antitrust, product-defect, and consumer-fraud violations. Mr. Gustafson also regularly represents pro bono clients in Minnesota federal and state court. Years ago, he helped to organize the Minnesota Chapter of the Federal Bar Association's Pro Se Project, which coordinates volunteer lawyers for pro se litigants in the District of Minnesota. In 2014, Mr. Gustafson received the American Antitrust Institute Meritorious Service Award and, in 2019, the District of Minnesota awarded him a Lifetime Achievement Award for his work on the Pro Se Project.

• **Mr. Gordon S. Rather, Jr. (Arkansas)**, is a partner with Wright, Lindsey & Jennings LLP in Little Rock, Arkansas, where he had an active trial practice for over 50 years. Gordon graduated from Vanderbilt University and from the Duke

University School of Law. From 1961-1965, Mr. Gordon served as an active duty officer in the United States Navy aboard a destroyer in the Atlantic Ocean and the Mediterranean Sea. As a trial lawyer, Gordon has been involved in the defense of a wide range of tort claims and commercial matters. And as a Proctor in Admiralty in the Maritime Law Association, he has tried a number of admiralty and maritime cases in federal court in Arkansas. Mr. Gordon is a past-President of the American Board of Trial Advocates (ABOTA) and a Fellow in the American College of Trial Lawyers and the International Academy of Trial Lawyers. He enjoys teaching and mentoring, and he served as a faculty member of both the ABOTA National Trial College at Harvard Law School and the ABA-ABOTA Trial Academy conducted at the National Judicial College.

• **Dean Cynthia E. Nance (Arkansas)**, is Dean Emeritus and Nathan G. Gordon Professor of Law at the University of Arkansas at Fayetteville School of Law. Dean Nance has been a member of the faculty at the School of Law since 1994. She became Dean in 2006 and led the school in that role until 2011. After scholar-in-residence appointments at two other law schools, the University of Iowa and Washington University, she returned to Arkansas as Dean Emeritus and Nathan G. Gordon Professor of Law in September 2012. Her scholarship and teaching focus on labor and employment law, workplace legislation, poverty law, and Lawyers as Leaders. Dean Nance she is a leader in the diversity and inclusion space, especially as it relates to the law, legal profession, and education. Dean Nance lectures on legal and educational issues both nationally and internationally, including serving as keynote speaker for the Commonwealth of the Northern Marianas' inaugural Martin Luther King Jr. Day Celebration.

More details about the Richard Arnold Award and past recipients can be found on the Bar Association's webpage.

Katherine S. Barrett-Wiik is a partner at Best & Flanagan in Minneapolis with a focus on civil litigation and appeals.

The Eighth Circuit Judicial Conference

The Eighth Circuit Judicial Conference was held at The Broadmoor in Colorado Springs, Colorado on October 27-29, 2021. The conference featured speakers and panelists on a broad range of civil, criminal, and bankruptcy topics.



Ask the Clerk

Changes to the Eighth Circuit Local Rules

In this edition I would like to talk about two issues. First, I will highlight some significant changes made by the November 1, 2021 amendments to the Eighth Circuit's local rules. I will finish with a discussion of the court's policy on extensions in criminal matters where the defendant has received a sentence of 36 months or less.

In November, the court amended several rules. From counsel's point of view, the most important changes are those affecting parallel record citations and the filing of amicus briefs that may cause a recusal.

8th Cir. Rule 25A(i). This provision on highly sensitive documents implements recent guidance from the Administrative Office of the U.S. Courts, which was developed after the revelation of the Solar Winds hack. Highly sensitive documents are extremely rare at the appellate level, and if you run into this situation, I recommend a call to the clerk's office for guidance.

8th Cir. Rule 27(a). The court has created a finite set of matters that the clerk can decide on behalf of the court. Motions seeking relief not listed in the rule will be referred to a three-judge motions panel.

8th Cir. Rule 28A(j). First a reminder – there is no requirement for an appendix in criminal cases – see Section III, B. 2 “Forms of Record References” in the Eighth Circuit Plan to Expedite Criminal Appeals, (rev. No. 2021). So, the amendment in this rule is primarily, if not exclusively, directed to civil cases (despite the Plan, some counsel do file appendices in criminal cases). The amendment requires counsel to provide parallel citation to the appendix and the district court record for the record references in their briefs. The judges find it very helpful to have both citations. The court recognizes this requirement will cost parties words for counting the word limits, and counsel may ask for

permission to file *slightly* overlength briefs based on the additional words required to provide both citations. Tighter editing is always preferable, however.

In Social Security cases, parties may cite directly to the administrative record without a parallel citation to the district court record.

The court is working on an electronic appendix program that it hopes to implement in the next year. This rule may be amended depending on future decisions the court makes about the creation and format of the electronic appendix.

8th Cir. R. 29A(a). The new rule is similar to rules found in many circuits and provides that the court will not file amicus briefs which would result in “the recusal of a member of a panel to which the case has been assigned or in the recusal of a judge in regular active service from a vote on whether to hear or rehear a case en banc.” The source for the rules is FRAP 29(a)(2), which provides a court “may prohibit the filing or strike an amicus brief that would result in a judge's disqualification. “

One of the rationales for such a rule is to prevent parties from creating recusals by recruiting amicus groups or parties that might lead to a disqualification. Counsel should note that while the judges' financial interests are publicly available, recusals related to law firms, individual attorneys, and other persons, groups, or associations are not public information and will not be disclosed by the clerk's office.

8th Cir. R. 29A(b). This rule clarifies the procedure for the court to rule on motions for leave to file amicus briefs in support of petitions for rehearing en banc.

8th Cir. R. 30(a)(3). The new rule provides that appendices are not required in immigration cases. All record references in briefs should be to

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the relevant page in the electronic administrative record prepared by the agency.

A word about the processing of criminal appeals with sentences of 36 or fewer months. The court has experienced a significant increase in criminal appeals where the defendant has received a sentence of 36 months or less. Many revocation appeals necessarily involve shorter sentences – recently, the court had an appeal of a 30-day sentence of incarceration. The court takes seriously its duty to try and resolve these appeals before the matter becomes moot.

As a result, if you have an appeal with a 36-month or shorter sentence, you should expect to receive both fewer and shorter extensions of time to file the principal briefs. This applies to both defendants’ counsel and the U.S. Attorneys. It will be rare for the court to grant more than two short extensions in such cases. The court, on its end, is identifying these cases at docketing and is expediting the screening, submission and decision-making in these appeals.

If you have an appeal with a twelve-month or less sentence which would be mooted by your client’s release, we recommend that you file the notice of appeal as promptly as possible. We also suggest that you carefully consider the filing of a motion to expedite the appeal as soon as it is docketed in our office. For example, with the 30-day sentence mentioned above, such a motion was filed and granted. A special briefing schedule was set, and the court gave the case priority in submission and disposition. It was decided before the expiration of the defendant’s revocation sentence. Cooperation between the court and counsel is essential to the administration of justice in these cases.

A second word about motions to withdraw in criminal cases. Motions to withdraw as appointed counsel are referred to the court for a ruling. If counsel has found an attorney willing to accept the appointment, counsel should include that information in the motion to withdraw/substitute. Counsel should also include a representation that the new counsel has agreed to represent the defendant **and defendant has consented** to the appearance of that new attorney. 8th Cir R. 27B(b).

If you have questions for me or my staff, you are welcome to submit them through Ask_TheClerk@ca8.uscourts.gov.

- The Clerk’s Office



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