

NEWSLETTER

Spring 2022



Chief Deputy Clerk Robin Weinberger, pictured above with Clerk of Court Michael Gans, retired on May 31 after 34 years of service to the Court. Read her advice, insights, and reflections in this issue's *Ask the Clerk* column, page 5. The Eighth Circuit Bar Association thanks Ms. Weinberger for her service and wishes her a happy retirement.

Submitted Photo.

Also in this Issue:

CLE focuses on writs, interlocutory appeals, and emergencies.....2

Around the Circuit.....4

CLE focuses on writs, interlocutory appeals, and emergencies



The Eighth Circuit Bar Association presented a panel discussion on interlocutory appeals, extraordinary writs, and emergency matters on May 10. Panelists from left to right are Liz Kramer, Solicitor General of Minnesota; Michelle Kuhl of Lommen Abdo, P.A.; the Hon. Michael Melloy, Senior Circuit Judge; and Lisa Kirkpatrick, United States Department of Justice. *Submitted photo.*

By Eder Castillo

The Eighth Circuit Bar Association presented a CLE panel on interlocutory appeals, extraordinary writs, and emergency matters. The panelists were Senior Circuit Judge Michael J. Melloy, Minnesota Solicitor General Liz Kramer, and Michelle Kuhl of the Lommen Abdo law firm. Assistant United States Attorney Lisa Kirkpatrick of the U.S. Attorney's Office for the District of Minnesota moderated the CLE.

Interlocutory Appeals

An interlocutory appeal is an appeal before a final judgment. There are three types of interlocutory appeals: appeals as of right, appeals by permission, and appeals under the collateral order doctrine.

Under 28 U.S.C. § 1292(a), interlocutory

appeals as of right are limited to any orders regarding injunctions, orders that appoint or refuse to appoint a receiver, and decrees determining the rights and liabilities of the parties to admiralty cases. Failing to file an interlocutory appeal as of right does not waive the right to appeal an issue after a final judgment.

Under 28 U.S.C. § 1292(b), interlocutory appeals by permission require that the district court certify the issue. Before filing a petition for permission to appeal, the district court must certify: (1) the issue is a controlling issue of law, (2) the issue allows a substantial ground for difference of

Continued on next page

opinion, and (3) the resolution of the issue will materially advance the litigation. The petition for permission to appeal must include (1) facts necessary to understand the legal issue, (2) the legal issue, (3) the relief sought, and (4) reasons why the appeal should be allowed under the statute. Petitioners must also attach the order they are appealing and the order granting certification. The petition is limited to 5,200 words or 20 pages. The deadline to file a petition is ten days after the issue is certified.

In 2018, litigants nationwide filed 248 requests to certify an issue for an interlocutory appeal by permission in federal district courts. Only 15.7 percent of the issues were certified. Between 2015 and 2019, the Eighth Circuit received between zero and seven interlocutory appeals by permission per year. In 2021, the Eighth Circuit received three interlocutory appeals by permission, and the court granted all of them.

Under the collateral order doctrine, orders that conclusively determine a disputed question, resolve an important issue separate from the merits of the action, or are effectively unreviewable on appeal from a final judgment may be appealed immediately. Typical examples involve immunity claims, stays, interventions, posting security, and *in forma pauperis* determinations.

To oppose an interlocutory appeal, one must file an opposition to petition within ten days of the petition.

Extraordinary Writs

There are two types of extraordinary writs: writs of mandamus and writs of prohibition. A writ of mandamus is an order compelling the lower court to do something. To obtain such an order, the petitioner must show there are no other adequate means to obtain relief and that the right to the writ is clear and indispensable.

A writ of prohibition is an order prohibiting the lower court from doing something. To obtain a writ of prohibition, the petitioner must show (1) the district court is about to exercise judicial power, (2) the exercise of power is unlawful, (3) the exercise of power will result in an injury, and (4) no adequate remedy exists to redress the impending injury.

The difference between the two extraordinary writs can come down to wording because litigants can

achieve the same result whether the district court is compelled to act lawfully or prohibited from acting unlawfully. In the Eighth Circuit, it is standard practice for extraordinary writs to be captioned as “writs of mandamus,” regardless of the substantive request.

Under Federal Rule of Appellate Procedure 21, the petition must be titled “In re [name of petitioner].” The petition for an extraordinary writ must state: (1) the relief sought, (2) the issues presented, (3) the facts necessary to understand the issues, and (4) the reasons for the writ. The petitioner must also attach copies of applicable orders, opinions, or parts of the record. The petition is limited to 7,800 words and must be served on all parties and the district court judge. Extraordinary writs do not stay proceedings in the district court.

The court of appeals may (1) deny the petition without an answer, (2) direct respondents to file an answer, (3) invite the district court judge or *amicus curiae* to address the petition, or (4) advise parties that briefing or oral argument is necessary. Judge Melloy said he had never seen oral argument on an extraordinary writ.

As the name suggests, courts of appeals rarely grant extraordinary writs. The petitioner must show an “unquestioned” legal right to obtain an extraordinary writ. Establishing a “mere error” is insufficient, and any other adequate remedies, including interlocutory appeals, must be exhausted. In 2021, 51 petitions for writs of mandamus and 1 petition for a writ of prohibition were filed in the Eighth Circuit. None were granted.

Emergency Matters

Emergency matters are considered and decided by administrative panels consisting of three judges. The most common emergency matters are stays of removal in immigration cases, stays of execution in capital cases, and election cases. Under the Eighth Circuit Internal Operating Procedure I(D)(3), emergencies are best handled by telephoning the clerk for instructions. Judge Melloy recommends calling the clerk as soon as possible to give the court the most time to consider your emergency.

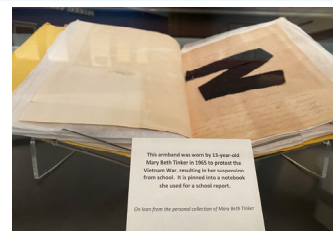
Eder Castillo prosecutes white-collar crimes at the Hennepin County Attorney’s Office in Minneapolis.

Eighth Circuit Bar Association Newsletter – Spring 2022

News and events from around the Eighth Circuit



After spending years on display in Washington, D.C., the famous black armband once worn by Mary Beth Tinker is now on loan to the U.S. Courts and the Judicial Learning Center at the Thomas F. Eagleton Courthouse in St. Louis. The armband is on display along with an educational exhibit about the historic U.S. Supreme Court case decided in 1969. The exhibit officially opened following a small ceremony on December 15, 2021. To celebrate Law Day, an online version of the exhibit launched in May. The online version is available here: <https://judiciallearningcenter.org/tinker/>



The United States District Court for the District of Minnesota hosted a Minority Judges Reception on June 16. Pictured from left to right are Minnesota Attorney General's Office Law Clerks Bobby Isbell, Alex Barkley, and Emanuel Williams with the Hon. Jesse L. Seabrooks II of Minnesota's 10th Judicial District. *Submitted photo.*



Approximately 300 guests attended the Federal Judges' Dinner Dance, which returned after a two-year pandemic break, on Saturday, May 7, 2022, in Minneapolis. The evening included a social hour, dinner, remarks from Chapter President Dan Hedlund, and live music from the Sevvies. *Photo credit: Vincent Weglarz Photography.*

Ask the Clerk

Retiring chief deputy clerk shares advice and insights

By Robin Weinberger

In the days when the “shadow docket” is a hot topic of discussion, this edition of “Ask the Clerk” takes an inside look at the mechanics and organization of the Clerk’s office, so as to better understand how the Clerk’s office manages the caseload and how technological innovations have advanced the process. To be clear, there are no secret dockets or procedures in the Eighth Circuit. Many appeals may be resolved without briefing or in summary fashion. Knowledge of the various procedural routes cases take may prove to be of assistance to the bar.

Initially, when appeals are filed, the Clerk’s office staff in the case opening unit will review the case. Is the notice of appeal timely? Has the fee been paid or can the appellant proceed in forma pauperis without a new determination on appeal? Are there pending motions in the district court? Is there a final appealable order? The answer may require a remand to the district court or a dismissal for lack of jurisdiction, a determination made by an administrative panel of the court. That administrative panel is chosen on a rotating basis from a schedule of monthly panel combinations set by the Chief Judge. A case may also be referred to a panel for possible summary disposition after review by attorneys in the Clerk’s office or staff attorneys office. Other types of cases resolved without a briefing schedule may include a habeas case or motion to vacate under 28 U.S.C. § 2254 or § 2255, when the district court has denied a certificate of appealability. The case may be referred to a panel for such a determination after review by staff attorneys. If the panel denies a certificate of appealability, the case is dismissed. Counsel is not automatically appointed unless a certificate of appealability is granted by either the district court or this court. Applications for successive habeas petitions/motions to vacate are reviewed and ruled on after a response from the respective government’s counsel is received. Appeals from

denial of detention or bail are reviewed by a panel after each side submits a statement of the case.

Once a briefing schedule is entered, the case is managed by the case management team. Case managers are assigned the case based on the terminal digits in the case number. Case managers will ensure that the case proceeds in a timely manner, that the briefs and records are filed in accordance with the federal and local rules, and that any interim motions requiring court action are referred to an administrative panel. After the briefs have been filed, the case is initially screened for oral argument or for consideration of the case on the briefs and record. Parties are advised of the screening decision and given an opportunity to object or advise the court of calendar conflicts. After screening for oral argument, the management of the case is moved to the calendar unit for placement on an upcoming calendar. A computer program is used to create the argument panels and to place the individual case before that panel in order to ensure a random assignment. The calendar unit in the Clerk’s office will create the calendar, notify counsel, transfer the records to the hearing panel, act as courtroom deputy, run the timing lights, record the session, and monitor the case until the hearing panel issues its decision.

Once the court issues its written opinion, the Clerk of Court prepares a summary of the opinion for the court’s website, and the case managers ensure the opinion is released and the parties, publishers, and district court judge are notified. The case managers will manage the filing of petitions for panel and en banc rehearing, issuance of the court’s mandate and any coordination with the Supreme Court. Court staff processes requests for payment to court-appointed counsel using the eVoucher system.

The case management process has many

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Ask the Clerk – Continued from previous page

twists and turns depending on the individual circumstances of the divergent cases brought before the court and we are ready to offer assistance and answer questions along the way.

Final Reflections: The Clerk has graciously granted me some space to share some personal thoughts as I retire as Chief Deputy Clerk after 23-plus years in the Clerk’s office and as a staff attorney for 11 years. The court has seen dramatic changes these past 34 years. Paper dockets and files are now gone. Communication, filings, and service are electronic. The composition of the court, with one exception, has completely changed during my tenure. Case filings and dispositions for the most part have remained relatively constant, not counting periodic changes in the law that created bumps in the statistics. Electronic filing and noticing have dramatically changed the way cases are managed. The pandemic taught us that case management can proceed in a remote work environment. What hasn’t changed is the dedication of the staff, their commitment to the efficient and effective administration of justice, and their concern for and attention to superb

customer service. At the helm is Michael Gans, whose leadership inspires all of us and to whom I am eternally grateful for being my mentor and friend. I am confident that my successor, Stephanie O’Banion, will be a brilliant Chief Deputy and you can expect a smooth transition. It has been an honor and a privilege to be Chief Deputy in the Clerk’s office and to work for such a distinguished group of judges and staff. Finally, to the members of the Eighth Circuit Bar, including appointed counsel, your exceptional service to the court and on behalf of your clients, must be applauded. Without your dedication, we would not be able to achieve justice. Following my faith tradition, we are commanded, “Tzadek, Tzadek, Tirdof” (“Justice, Justice, shall you pursue”). I am thankful for the opportunity I have had to serve the court, the bar, the litigants, and the Clerk’s office to pursue justice.

Submit any questions for *Ask the Clerk* through Ask_TheClerk@ca8.uscourts.gov.

Don’t forget!

Renew your Eighth Circuit Bar Association membership today

**Visit the Eighth Circuit Bar Association website at
<https://8thcircuitbar.wildapricot.org/>**

Committee on Model Jury Instructions launches Jury Instruction Builder

The Committee on Model Jury Instructions for the Eighth Circuit is pleased to announce a new tool with increased functionality for both Civil and Criminal Model Jury Instructions. Trial lawyers and judges will benefit from the Jury Instructions Builder (JIB) which enables users to format an entire packet of jury instructions by clicking a few computer keys.

The Jury Instructions Builder (JIB) is intended to serve as an aid to practitioners and the District Courts throughout the Eighth Circuit in preparing instruction packets for trial. Use of the JIB will ensure that the most current version of the instructions is being used. Though it should be understood that the posting of these instructions is not an adjudicative approval of the content which must await case-by-case review by the Eighth Circuit.

Current Civil and Criminal Model Jury Instructions are available via the JIB to bench and bar at the following web address:

<https://juryinstructions.ca8.uscourts.gov>.

Benefits and features include:

- Instant access, with no log-in, username, or password required.
- Generates customized packets of jury instructions for civil or criminal cases (with or without Committee Comments and Notes on Use).
- Maintained and updated by court staff.
- Allows users to send feedback that goes directly to the Jury Instruction Reporter.

The Committee on Model Jury Instructions reviews the instructions on an ongoing basis and annually makes any recommendations for amendment. The Committee welcomes user input on the content of the Model Jury Instructions.



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*Views expressed in this newsletter
are those of the authors, not
necessarily those of the Eighth
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