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

NEWSLETTER

Fall 2022

The United States Supreme Court decided two cases from the Eighth Circuit last term. Caitlinrose Fisher and Ryan Marth analyze the decisions in *Morgan v. Sundance* and *Boechler, P.C. v. Commissioner of Internal Revenue*. See Page 2.

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SCOTUS Term In Review

Court decides two cases from the Eighth Circuit last term

By Caitlinrose Fisher and Ryan Marth

The 2021 Supreme Court term—the Court's first full term with a 6-3 conservative majority—was a year of blockbuster rulings. The Court held that the Second Amendment right to bear arms extends outside the home. *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2002). It relied on the "major questions doctrine" to place limits on the Environmental Protection Agency's ability to regulate greenhouse gas emissions, in a decision that paves the path for significant limits on the regulatory state. *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587 (2022). And the Court overruled its precedent that had secured a woman's right to abortion. *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). The *Dobbs* decision was noteworthy for the separate reason that, for the first time in modern history, a full draft opinion leaked to the media before the Court announced its decision.

It was not just in these landmark decisions that the Supreme Court's ideological realignment was on display. The Court had the lowest rate of unanimous opinions in the last two decades, with only 29% of the Court's merit cases decided unanimously. SCOTUSblog, Stat Pack for the Supreme Court's 2021-22 term at 3 (July 2, 2021) (hereinafter "2021 Term Stat Pack"). By comparison, the Court decided over 40% of merits cases unanimously in the previous term. SCOTUSblog, Stat Pack for the Supreme Court's 2020-21 term at 9 (July 2, 2021).

Coupled with the decrease in unanimous opinions was an increase in 6-3 decisions. Around 30% of the Court's rulings were decided in a 6-3 vote. 2021 Term Stat Pack at 3. Of those 6-3 cases, the Court divided along ideological lines nearly 75% of the time. *Id.*

Whether as a result of the Court's landmark decisions, the *Dobbs* leak, these broader trends, or some other factor, one thing appears clear—the Supreme Court's public perception is falling. According to a recent Gallup poll, 58% percent of Americans disapprove of the Supreme Court's performance, the highest disapproval rating since 2000 when Gallup first posed the question. Adam Liptak, *As New Term Starts, Supreme Court is Poised to Resume Rightward Push*, New York Times (Oct. 2, 2022), *available at* https://www.nytimes.com/2022/10/02/us/conservative-supreme-court-legitimacy.html.

The Supreme Court decided two cases from the Eighth Circuit last term. each case is discussed below, along with a statistical glance at how the Eighth Circuit performed at the Supreme Court compared to past terms.

Eighth Circuit Statistics

Despite the broad trends described above, the Supreme Court's two cases from last term out of the Eighth Circuit are both in the minority of unanimous decisions. The first concerned the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, and was authored by Justice Kagan (*Morgan v. Sundance*, 142 S.Ct. 1708 (2022)). The second, authored by Justice Barrett, concerned equitable tolling of statutory appeal deadlines (*Boechler, P.C. v. Comm'r of Internal Revenue*, 142 S. Ct. 1493 (2022)).

The overall number of Supreme Court cases from the Eighth Circuit, along with the affirmance rate, were similar to the averages from the past decade. The Court's two issued opinions from the Eighth Circuit last term reflected approximately 3% of the Court's overall docket—slightly lower than the averages of 3 cases and 4% of the Court's docket since 2010. The Court's affirmance rate of 0%, however, was obviously below the average affirmance rate of 25.5% from the Eighth Circuit since 2010:

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Term	Number of Cases	Docket Percent	Aff'd – Rev'd – Split	Affirmed Percent
2021	2	3%		0%
2020	4	6%	1-3	25%
2019	1	1%	1-0	100%
2018	4	5%	1-3	25%
2017	3	4%	1-2	33%
2016	2	3%	0-2	0%
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%
Average	3.2	4.6%	0-2	25.5%

This 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.

The table above 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. SCOTUSblog, Stat Pack Archive, *available at* http://www.scotusblog.com/reference/stat-pack/ (Circuit Scorecard for 2010-2020 Terms). The 4-4 split in 2015, although resulting in a nonprecedential affirmance, is not included in the Affirmed Percent and the Average for the Affirmed Percent does not include the 2011 Term, in which no cases from the Eighth Circuit were decided by the Court.

The Supreme Court's resolution of Eighth Circuit cases last term was not reflective of the broader trends on display. Each case was decided unanimously, on narrow and non-politically charged grounds. Each case is discussed more fully below.

Morgan v. Sundance, Inc. – Arbitration

Arbitration and arbitrability have been frequent visitors to the Supreme Court in recent years. In Chief Justice Roberts's tenure, the Court has decided a number of landmark cases on the subject, including on the enforceability of class-arbitration waivers (*AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)), arbitrability of complex claims (*Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013)), and interpretation of various carve-outs to the Federal Arbitration Act (*see, e.g., Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022)); *New Prime Inc. v. Oliveira*, 139 S.Ct. 532 (2019)). A bedrock principle of federal arbitration law is the federal "policy in favor of arbitration," embodied in the Federal Arbitration Act. *Morgan v. Sundance* tested the limits of this policy.

Robyn Morgan worked for a Taco Bell

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franchise ("Sundance") in Iowa. Maintaining she was not receiving proper credit for overtime hours, Morgan brought a class-action lawsuit in federal court under the Fair Labor Standards Act, 29 U.S.C. § 201 ("FLSA"). *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1711 (2022). Sundance began defending against Morgan's suit, moving to dismiss the suit as duplicative of an earlier suit filed by employees at other Taco Bell restaurants. *Id*. After the district court denied this motion, Sundance answered the complaint, participated in an unsuccessful mediation, and engaged in scheduling and case-management conversations with Morgan. *Id*.

Nearly eight months after Morgan filed her suit, Sundance attempted to stay the litigation and compel arbitration under sections 3 and 4 of the FAA, based on an arbitration clause in Morgan's employment contract. Morgan opposed the motion, arguing that Sundance had waived its arbitration right by waiting so long after the suit was filed to compel arbitration. *Id*. The district court sided with Morgan—reasoning that Morgan had been prejudiced by Sundance's delay—but the Eighth Circuit disagreed, concluding that prejudice had not been shown. *Morgan v. Sundance, Inc.*, 992 711, 715 (8th Cir. 2021). Judge Colloton dissented, reasoning that Morgan *had* suffered prejudice and, more fundamentally, disagreeing with the rule in the Eighth Circuit (and the majority of other circuits) that a showing of prejudice should be required for a waiver of arbitration rights under the FAA. *Morgan v. Sundance, Inc.*, 992 F.3d 711, 716-17 (8th Cir. 2021) (Colloton, J., dissenting).

The Supreme Court granted *certiorari* to decide whether the FAA and its policy in favor of arbitration imposes an arbitration-specific requirement of prejudice to the doctrine of waiver. *Morgan*, 142 S.Ct. 1712.

Writing for a unanimous Court, Justice Kagan answered this question in the negative. Noting—as Judge Colloton had done—that waivers are typically effective without any showing of prejudice or detrimental reliance, the Court proceeded to examine the Eighth Circuit's and other circuits' premise that the "liberal national policy favoring arbitration" justifies creating arbitration-specific procedural rules. *Id*. at 1713. The Court concluded that the Eighth Circuit and other courts had stretched this policy in favor of arbitration too far. That policy acts only to place arbitration contracts—which had been disfavored prior to the FAA—on equal enforceability footing with other contracts. It does not empower courts to tip the scales more heavily toward the enforcement of arbitration contracts than other contracts. *Id*. The Court also looked to the text of the FAA itself, reasoning that the FAA's instruction to courts to treat "arbitration applications 'in a manner provided by law' for all other motions" instructs courts to place motions to stay for arbitration on equal footing with other motions. *Id*. at 1714.

The Court remanded, requesting that the lower courts reevaluate Morgan's waiver argument, focusing only on wither Sundance knew of the right and acted inconsistently with it. *Id*. On remand, the parties settled. *Morgan v. Sundance, Inc.*. No. 4:18-cv-00316 (SHL/HCA), ECF 47 (S.D. Iowa Nov. 18, 2022).

Boechler v. Comm'r of Internal Revenue – Jurisdictional Effect of Statutory Deadlines

Several Supreme Court decisions of the 2021 term grabbed national and international headlines and may shape the nation's political discourse for years to come. This case was not one of them.

Boechler answered the question of whether the 30-day deadline for filing administrative appeals under 26 U.S.C. § 6330(a) is jurisdictional, or whether it is a non-jurisdictional deadline, which may be equitably tolled. In a unanimous decision, the Court ruled that the deadline was not jurisdictional. *Boechler, P.C. v. Comm'r Internal Revenue*, 142 S.Ct. 1493 (2022).

In *Boechler*, the IRS levied the property of a North Dakota law firm, after the firm did not respond to the IRS's notice of discrepancies in prior years' tax returns and resulting delinquent taxes and penalties. *Id*. at 1496-97. The firm then requested a hearing to prevent the levy, in the agency's Independent Office of Appeals ("IOA"), under 26

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U.S.C. §§ 6330(a), 6721(a)(2), and (e)(2)(A). *Boechler*, 142 S.Ct. 1496-97. The IOA sustained the levy, which triggered the firm's right to petition the Tax Court to review the decision within 30 days. The firm missed the deadline by one day. Reasoning that the deadline in § 6330(a) was jurisdictional, the Tax Court dismissed the petition for lack of jurisdiction, and the Eighth Circuit affirmed. *Id*. at 1497.

The Supreme Court began its analysis with the text of § 6330(a), noting that its precedent in *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515 (2006), established that the Court would not read deadlines as jurisdictional, absent a clear Congressional mandate to do so. *Boechler*, 142 S. Ct. at 1497.

Section 6330(a) reads as follows:

> The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).

The parties' textual debate largely revolved around the meaning of the words "such matter" in the statute's parenthetical. *Boechler*, 142 S.Ct. at 1497. According to the Commissioner, the words referred to the entire paragraph such that the Tax Court's jurisdiction was restricted to hear only those petitions filed within the 30-day deadline. The law firm, on the other hand, contended that it referred only to the phrase immediately preceding the parenthetical—"petition the Tax Court for review of such determination." *Id*. at 1498.

While conceding that both sides' interpretations had strengths and weaknesses, the Court ultimately came down unanimously on the side of the law firm. The Court utilized the last-antecedent rule—*i.e.*, that a descriptive phrase is most likely to modify the immediately preceding antecedent—to reason that "such matter" was slightly more likely to relate to *any* petition (rather than just to timely filed ones). *Id*. And at the end of the day, while the Court found some plausible statutory interpretations that could support the Commissioner's position, none of those were sufficiently clearly articulated to condition the Tax Court's authority on the timeliness of the petition for review. *Id*. The Court further supported its reading of the statute by reference to the broader statutory framework, in which other provisions enacted around the same time contained clear links between timeliness of filings and jurisdiction, the absence of which undercut the Commissioner's argument that Congress intended a jurisdictional effect for § 6630(a). *Boechler*, 142 S. Ct. at 1499.

Having decided that the statute was non-jurisdictional, the Court determined the 30-day deadline could be equitably tolled. Beginning with the proposition that non-jurisdictional deadlines may presumptively be equitably tolled, the Court found nothing to the contrary in the statute's text or legislative history to suggest otherwise. *Id*. at 1500-01. The Court then remanded for proceedings consistent with its opinion. *Id*. at 1501.

If, as members of the Eighth Circuit Bar, readers of this article were hoping for a legally significant—if not exciting—decision in *Boechler*, they will be disappointed. The decision simply represents an application of accepted statutory-interpretation canons to a well-established presumption against jurisdictional deadlines.

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Jurisdiction Junction

Eighth Circuit clarifies appealability in decisions on recusal, nominal damages

By Geoffrey D. Kearney

Though the U.S. Court of Appeals for the Eighth Circuit hands down hundreds of merits decisions each term, many cases are either decided on procedural grounds or, at the least, require a meaningful procedural analysis before the court may reach the merits. Below are a few decisions that the court has handed down in the last few months that touch on appellate jurisdiction.

Recusal Motion Order Need Not be Appealed until Related Attorney Fee Motion Decided

Skender v. Eden Isle, 33 F.4th 515 (8th Cir. 2022)

Stetson Skender brought claims under the Fair Labor Standards Act and Arkansas Minimum Wage Act against Eden Isle Corporation ("Eden"), his former employer, seeking damages for unpaid overtime wages. Minutes after the district court entered an order granting the defendant's motion for summary judgment, Skender filed a notice of acceptance of an offer of judgment that had been made six days previous. Despite this notice, the clerk nonetheless entered judgment in favor of the defendant. However, the district court, relying on *Perkins v. U.S. W. Commc'ns*, 138 F.3d 336, 339 (8th Cir. 1998), which holds that an offer of judgment remains open despite an intervening grant of summary judgment, amended the judgment to reflect that it had been accepted.

Skender then filed a motion for attorney fees and costs and a motion seeking the district judge's recusal and reassignment of the matter of fees and costs. While the court denied the recusal motion the day it was filed, the fees and costs order was not entered for 36 more days. Despite a request for substantially more, the latter order granted Skender $1 in attorney fees. He filed a notice of appeal the day of its entry.

Eden filed a motion to dismiss the appeal as to the recusal order on the basis that the notice was untimely. The dispositive question for the court was whether the appellant's deadline was triggered by the recusal order or the order deciding the related fees and costs motion.

The court began its analysis with a brief discussion of the requirements for commencing an appeal—that the notice be filed within 30 days of the order being appealed, and that the predicate order be final to be appealable. Though the panel recognized that recusal orders typically are *not* considered final and appealable, it also observed that, as an order entered post-judgment, this particular recusal order was "more amenable to immediate appeal," as appeals of such orders do not raise the same concerns about efficiency, confusion, *etc.*, that they would if appealed during the litigation. *Skender*, 33 F.4th at 520. Indeed, the court noted that at least one sister circuit had held such an order final and appealable. *See id.* (citing *United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 183 (2nd Cir. 1991)). Looking to the particulars of the case, however, the court ultimately determined that holding the recusal order final and appealable only upon entry of the latter order was the proper course:

> First, unlike an appeal from most post-judgment orders, an immediate appeal here might have interfered with proceedings before the district court. At the time of the court's order denying recusal, the court had pending before it a motion for an award of costs and attorneys' fees—a motion to

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> which Skender's recusal motion was expressly tethered. So a notice of appeal filed while the court was considering that related motion could arguably have divested the district court of jurisdiction to decide it and thus prevented the court from resolving it until our court resolved the appeal of the recusal order. Second, further proceedings would likely produce an order that was more final than the order denying recusal. The resolution of the motion for attorneys' fees provided a natural terminus after which we could review the fee order and the related, prefatory recusal order.

Id. (citation omitted). However, emphasizing that whether such an order is final and appealable is a product of the posture and circumstances of the case, the court also made clear that this holding should not be construed as a broad statement about post-judgment recusal orders. The court arguably signaled that the disposition in the instant case should be treated as more the exception than the rule:

> We do not intend to intimate that no post-judgment recusal orders are final and appealable. Some post-judgment recusal orders, like the one at issue in *Yonkers*, may respond to recusal motions that do not identify some other motion or proceedings for which recusal is sought and that would soon be resolved. In that circumstance there may be no other court order that would provide a worthwhile or sensible opportunity to review the court's recusal decision. A party should not be able to revive a lost opportunity to appeal after each and every subsequent post-trial order. *See* 15B Edward H. Cooper, Federal Practice & Procedure § 3916 (2d ed. April 2022 update). But here the recusal motion was expressly connected to a specific motion filed the same day whose resolution could be expected in short order. In these circumstances, we think it more practical to review the orders resolving these motions in one fell swoop after the court has decided both of them.

Id. Denying the motion to dismiss the appeal, the court reached the merits of the case.

Order Stating Nominal Damages will be Awarded but Does Not Set Amount is Not a Final Order

Perficient v. Munley, 43 F.4th 887 (8th Cir. 2022)

Thomas Munley's former employer, Perficient Inc. ("Perficient"), sued him and Spaulding Ridge, LLC ("Spaulding"), his subsequent employer, for relief relating to non-competition and confidentiality agreements Munley executed during his time with Perficient. The district court granted summary judgment in favor of Perficient through two orders entered on April 15, 2021. However, the court held that no actual damages had resulted from the breach and that only nominal damages were appropriate. It further held that the attorney fees incurred in the litigation were consequential damages under a breach of contract theory. The court ordered briefing on damages and attorney fees and advised the parties that a final judgment would be entered thereafter. Before judgment was entered, Munley filed his notice of appeal. Perficient filed a motion to dismiss the appeal for lack of jurisdiction.

Perficient's position was that the April 15 orders were not final, and therefore did not provide a basis for appellate jurisdiction. Munley argued that, to the contrary, the orders were final and appealable. The panel held that the orders were not final and, therefore, were not appealable.

The court began its analysis by explaining the basics of appellate jurisdiction; namely, a civil appeal must be commenced by a timely notice of

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appeal and 28 U.S.C. § 1291 only grants courts of appeal jurisdiction over "final decisions." The court then defined a final order and discussed the consequences of a purportedly final order that does not fix a damages amount:

> "A final decision within the meaning of § 1291 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Dieser v. Cont'l Cas. Co.*, 440 F.3d 920, 923 (8th Cir. 2006) (quoting *Borntrager v. Cent. States, Se. & Sw. Areas Pension Fund*, 425 F.3d 1087, 1091 (8th Cir. 2005)). "A judgment awarding damages but not deciding the amount of the damages or finding liability but not fixing the extent of the liability is not a final decision within the meaning of § 1291." *Id.*; *see also St. Mary's Health Ctr. Of Jefferson City v. Bowen*, 821 F.2d 493, 498 (8th Cir. 1987) (citing *Parks v. Pavkovic*, 753 F.2d 1397, 1404 (7th Cir.), *cert. denied*, 473 U.S. 906, 105 S. Ct. 3529, 87 L.Ed.2d 653 (1985) ("Normally an order that merely decides liability and leaves the determination of damages to future proceedings does not finally dispose of any claim; it is just a preliminary ruling on the plaintiff's damage claim.")); *Albright v. UNUM Life Ins. Co. of Am.*, 59 F.3d 1089, 1092 (10th Cir. 1995) ((brackets omitted) (quoting 16 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 4009 (3d ed.)) ("[A]n order that determines liability but leaves damages to be calculated is not final.").

Perficient, 43 F.4th at 889–90. Because the April 15 orders determined that damages would be awarded but left the *amount* of damages open, it did not fit the standard definition of a final order.

The court noted authority providing that such an order may be nonetheless final if calculating the damages is merely a "ministerial task." *Id.* at 890 (collecting cases). However, the instant case did not present such circumstances. While the determination that a task is merely ministerial is appropriate where the court will not need to exercise "independent legal judgment" or will undertake only "mechanical or computational" work, it is not so when the question is open and rests upon the district court's evaluation of competing briefs on the matter. Though the court seemed to leave open the possibility that an order with an unspecified nominal damages award could be held to be final where "nominal damages" has a fixed definition, this is not the case under Missouri law (which governs the relevant contract).

The court concluded with a brief analysis of Fed. R. App. P. (4)(a)(2). This rule allows an appellate court to accept a prematurely filed notice of appeal if it is filed after a decision that is final from a practical standpoint but precedes the filing of a true final order or judgment. However, under even this somewhat more generous approach, the April 15 orders did not qualify as final and appealable. "[T]he rule applies 'only when a district court announces a decision that would be appealable if immediately followed by the entry of judgment' and does not save a premature appeal 'from a clearly interlocutory decision.'" *Perficient*, 42 F.4th at 891-92 (quoting *FirsTier Mortg. Co. v. Invs. Mortg. Ins.*, 498 U.S. 269, 276 (1991)). As discussed above, the relevant orders left at least one crucial issue unresolved. Accordingly, the orders did not qualify under Rule 4(a)(2).

The court therefore granted the motion to dismiss the appeal.

Geoffrey D. Kearney is a solo practitioner based in Pine Bluff and Little Rock, Arkansas. His practice focuses on civil litigation, appeals, criminal defense, and family law.

Ask the Clerk

Updates on in-person arguments, BriefQC, and overlength briefs

By Michael Gans

First, a few news notes and then we will dive into reader questions.

September marked the beginning of the Court's 2022-2023 term of court. Arguments in September and October were in-person and, absent a significant change in the spread of COVID-19, I expect all the upcoming sessions will be conducted in-person. COVID-related court room procedures vary from panel to panel, and you should review the procedures for your panel. We will send you the procedures as part of the notice process for your argument date, but they can also be found on the website at Court Calendar > Procedures Governing Oral Argument > Search by your Division Number.

Highly Sensitive Documents and sealed documents are in the news. While the Eighth Circuit has yet to receive a request for permission to file Highly Sensitive Documents, counsel should be aware of Local Rule 25A(i) which was adopted last year to cover these situations. Additionally, with respect to sealing less sensitive but confidential documents, counsel should note a recent Eighth Circuit decision in *United States v. David Garner*, 39 F.4th 1023 (8th Cir. 2022), which was issued on July 11. The opinion found the motion to seal in that case overbroad, and the opinion provides additional guidance on the information which should be provided in motions to seal.

On August 8, the clerk's office introduced new functionality in CM/ECF – BriefQC – which automatically checks your brief for compliance with Federal and Eighth Circuit rules before you submit it for review in CM/ECF. More details are available in the "Announcement" section of the website. So far, about 50% of filers are taking advantage of the opportunity to correct their briefs before filing.

Now to some questions.

Our first question concerns binding briefs and separate addendums and asks, **"Is there a preferred spine/binding for briefs?"** The simple answer is "no." The most popular bindings seem to be spiral and "comb" bindings. Keep in mind that we have a comb binding machine so we can take your brief apart and correct/add pages without having to send it back to you. We do get briefs with the Velo binding, which uses two rigid pieces of plastic (one with little columns and the second a backing plate), but these are very difficult to take apart and copy and often seem to break in use. Staples are fine, but be sure to place them close to the edge so that the brief can be opened without obscuring text. If you use staples, please put tape over them – nobody likes to slide a pile of briefs across their desk and find the staples have left scratches on the wood.

An offshoot of this is binding appendices. First, if you have more than 300 pages in your appendix, you need to divide your appendix into volumes; 400- or 500-page appendix volumes are unwieldy to use and seldom stay in one piece. Please do not use 3-ring binders for your appendices. Instead, use spiral or comb bindings. Staples just do not seem to work for these documents, which get a lot of handling and copying.

Our second reader poses several questions, some of which I will save for the next column. The first question is: **"How does the Court view the circumstance where a party does not consent to the filing of an amicus brief?"** I would say that it is much more common to oppose rather than to consent to an amicus brief. As a result, the court is well versed in the reasons for opposing amicus briefs, and counsel should not fear raising their concerns with the court if they oppose such motions. Typically, opposed motions will be referred to administrative panels for a ruling, as the filing of the amicus brief

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impacts subsequent briefing. In some instances, the motion may be taken with the case for a final decision by the panel which draws the case for disposition on the merits. If the ruling on the motion in your case is deferred, I suggest you address the proposed amicus brief in your responsive brief, perhaps dropping a footnote indicating that the motion is opposed, and you are responding to the brief from an abundance of caution.

The writer's second question concerns **overlength briefs**. I cannot emphasize strongly enough the judges' belief that briefs are simply too long in most cases and that a request for an overlength brief – outside of death penalty litigation and a limited number of other special circumstances – is rarely warranted. If you do have to ask, keep two things in mind. First, Eighth Circuit Rule 28A(l) requires that your motion for an overlength brief must be filed at least 7 days prior to the brief's due date. This rule is rigorously enforced. Second, keep your request reasonable. We often see motions for double or even triple the 13,000 word limit provided for principal briefs. Those motions are almost never granted. A motion for an additional 10 or 15% has a more likely (but never guaranteed) chance of success.

Michael Gans is Clerk of Court for the Eighth Circuit Court of Appeals.

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

Eighth Circuit Bar Association seeks candidates for Board of Directors

The Eighth Circuit Bar Association is seeking applicants for upcoming openings on its Board of Directors, including from the District of Nebraska, Eastern District of Missouri, Western District of Arkansas, the District of North Dakota, the Southern District of Iowa, and an at-large position. Directors will be elected for three-year terms starting in January 2023.

The Board is also seeking applications to serve open officer positions, which include President-Elect and Secretary.

The Board consists of one member from each judicial district in the Eighth Circuit as well as five at-large members. Members of the Board of Directors are expected to attend monthly meetings and also serve on one or more committees.

Any member of the Association is eligible for election to the board of directors. The board is seeking members with diverse backgrounds to serve on the board, including candidates reflecting diversity in gender, race, ethnic background, and professional experience.

To apply, members should fill out an application form, which is available *here*.

To be considered for these openings, applicants are advised to apply on or before December 1, 2022. Directors must be active members of the Association (i.e., be current in their dues) to be considered.

Something on your mind?
Tell us more!

Send article ideas and submissions to Michael Goodwin, Communications Committee Chair, at michael.goodwin@ag.state.mn.us.