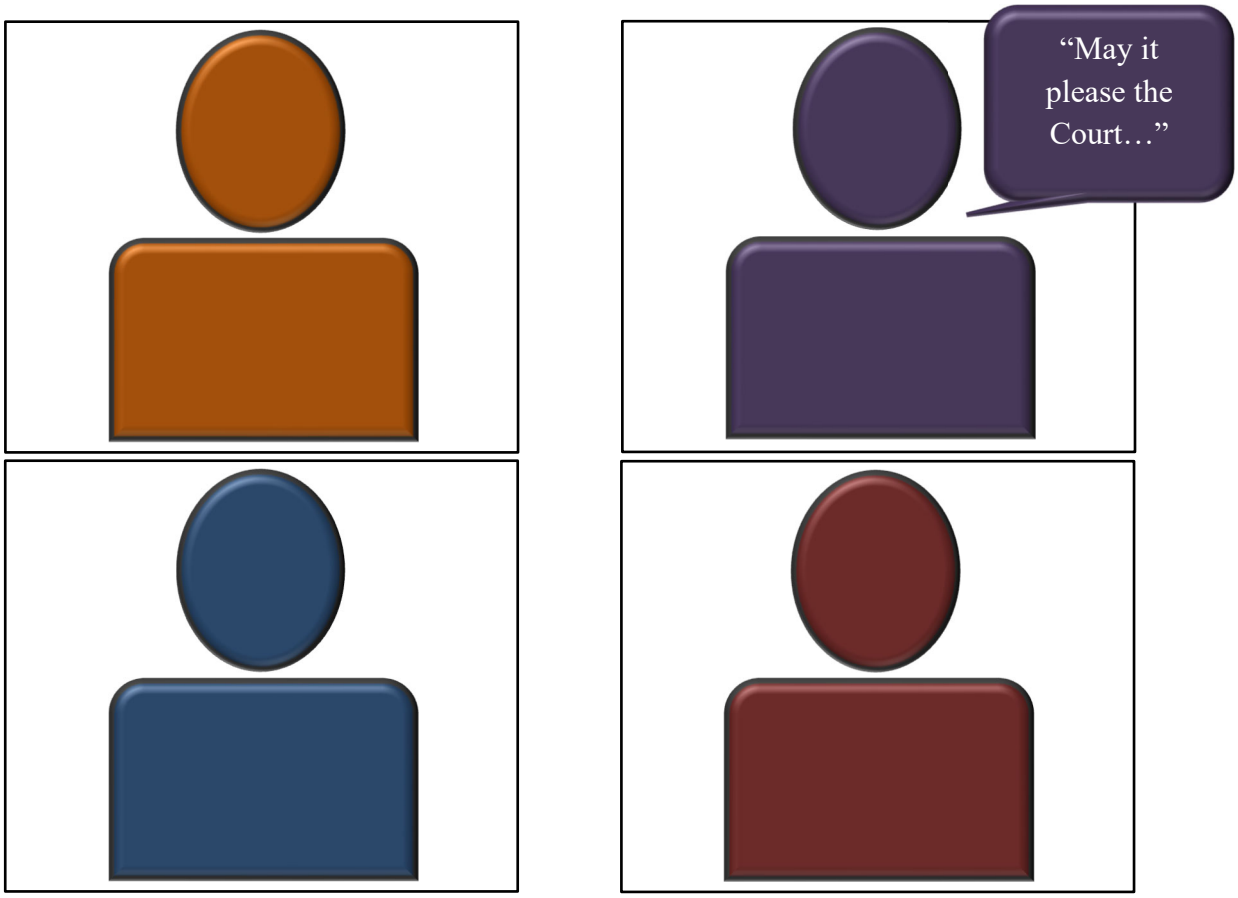
Bar Association for the United States Court of Appeals for the Eighth Circuit

NEWSLETTER

Winter 2021



Home Court

The COVID-19 crisis has all but eliminated in-person court appearances throughout the country, including in the Eighth Circuit. In this issue, seasoned advocates share their experiences with remote advocacy and offer tips for lawyers, judges, and court staff.

Also in this Issue:

Home Court:

As remote oral arguments become the new normal, five experienced advocates offer insights for lawyers, judges, and court staff

"Watch those facial expressions"

Keep in mind that the camera catches more than might otherwise be available from the bench. Watch those facial expressions. And don't do anything that you wouldn't do in the courtroom (including letting a participant eat potato chips—true story, albeit not from an Eighth Circuit argument).

On the flip side, learn to pin the judges' video feeds to your screen. Then you can closely watch all three judges and their non-verbal cues, which might otherwise be tough to catch from the podium. The ability to see the panel up close is one of the silver linings of remote arguments!

Caitlinrose Fisher
Forsgren Fisher McCalmont DeMarea Tysver LLP
Minneapolis

"The background makes an impression"

Larry Boschee
Pearce Durick
Bismarck

On May 12, 2020, I had the privilege of arguing before the Eighth Circuit Court of Appeals in what I believe was the second case to be heard by that court by video conference because of the pandemic. The process worked smoothly, and I was left with the impression that video-conferencing will remain a viable format in select circumstances. I missed, however, the inspiring presence of the court, the formality of the courtroom, and the directness of personally appearing before the judges. The impact of in-person oral argument should not be minimized.

One of the interesting observations I made while watching the argument before mine, and the technical check ins of the attorneys arguing that day, was the varying backgrounds being used. A few of the backgrounds observed included bookshelves, a podium and dark wood backdrop, and a mix of household décor. Because the background makes an impression, one arguing before the Court should give thought to it.

Katherine Walsh
Office of the
Missouri Attorney General

"Judges and attorneys took great care to not speak over each other"

After the pandemic became a real thing and my office required that we work from home, I became a bit more tech-savvy than I had been before. In March, 2020, right before my office decided it would be safer to work from home, I had case pending before the Missouri Court of Appeals, Western District. The Court scheduled oral argument for May and required that the parties participate through WebEx.

I had never done this before and was, understandably, a little nervous. I chose to attend in my office so that it would be quiet. I was the only person in the office that morning so it was very quiet and I had ample time to prepare.

I connected to the WebEx a little early so that the clerk could make sure that the sound was on and we could all hear each other. We waited for the judges, who each appeared from their individual offices. They told us that we should begin and when they had a question they would try to remember to give us a signal (like a hand wave or just holding their hand up).

The argument went remarkably well. The judges allowed me to make a few initial points and then started asking questions. The Western District usually only allows ten minutes per side for argument but the back and forth was lively and both sides went past their ten minutes. I had no problems with the technology, I could see the judges when they were asking their questions, and I was comfortable in the setting I had chosen. We all, judges and attorneys, were aware of the lag time when talking and took great care to not speak over each other.

"It is worth making sure your call has not dropped every minute or so."

Chad Pennington
Assistant Federal Public Defender
Districts of South Dakota and North Dakota

Like most districts within the Eighth Circuit, COVID-19 substantially affected criminal litigation here in the District of North Dakota. Critical early litigation tasks, such as client meetings, initial appearances and arraignments, and detention and preliminary hearings required the use of alternatives to the traditional in-person meeting and hearing to contain viral spread. The District's Chief Judge, Peter Welte, allowed counsel to appear telephonically. Telephonic appearances and hearings were an excellent idea to combat COVID-19, but as a practical matter from what I learned, I would suggest not using the speaker phone option on your smart phone and, if possible, using a pair of quality headphones. Also, I would suggest slowing your cadence a notch to give the presiding judge an opportunity to ask questions and to make sure an accurate record is captured. Finally, what I wish I would have known most, is that in this type of setting, it is worth making sure your call has not dropped every minute or so. My greatest four minutes of oral advocacy was during a hearing in which I accidentally hung-up on the Court. What might have been!

"I welcome public participation in these important arguments."

Liz Kramer
Solicitor General
Office of the Minnesota Attorney General

My Zoom experience has been unique because my arguments—about the constitutionality of executive orders—have attracted significant public participation. In one, I had over 500 public participants. That volume of participation, by people who may have little experience with the judicial system, has led to some unusual experiences for me as an advocate. In the argument with the 500+ attendees, one of those participants put in the chat "Are we allowed to heckle the attorneys in here?" Thankfully, by the time the argument started, the court disabled the chat. In another high-profile argument, the public participants showed up to the Zoom with slogans on their t-shirts related to the lawsuit and crosses carefully positioned behind them. Although I chose "speaker view," so that the largest picture on my screen was the judge, I had a smaller photo reel across the top of the screen showing angry constituents, making faces and gestures at me during the entire argument. They also chatted incessantly up until the moment the Judge asked them to be quiet (innocuous things like "Are we supposed to be here? Can I invite my friend?), and then one or two were not muted during the argument, so that we heard the phone ringing and then portions of a private phone conversation.

I welcome public participation in these important arguments. I hope it builds trust in our judicial system and rule of law. At the same time, my hope is that courts become more savvy in how to allow public participation in remote arguments to feel more like it would in the courtroom. In a courtroom, judges would advise the public to turn their phones off, to be quiet and respectful. That should also happen on Zoom/WebEx (or it should automatically be enforced). Plus, in a physical courtroom, the only faces I see are those of the judge or judges, not the faces (and t-shirt slogans) of the attending public. I have appreciated those instances where staff: instruct that only the attorneys arguing should have their cameras on; disable any chat functions; and administratively mute everyone who is not arguing.

CLE: Pleading State Punitive Damages in Federal Court

By Eder Castillo

Mitchell Hamline School of Law and the Eighth Circuit Bar Association hosted a productive debate on pleading state punitive damages in federal court. Josh Jacobson of the Law Office of Josh Jacobson argued that federal courts should not apply state punitive damages pleading statutes. Joshua Turner of Faegre Drinker argued the opposing side.

Punitive damages are awarded in addition to actual damages to penalize or make an example of a wrongdoer. At least nine states, including Minnesota and North Dakota, have punitive damages pleading statutes. Because both Jacobson and Turner practice in Minnesota, the conversation at the debate centered around Minn. Stat. § 549.191. Section 549.191 states that a complaint must not seek punitive damages at the commencement of a civil action. Instead, a party may "make a motion to amend the pleadings to claim punitive damages." The motion must allege a legal basis for punitive damages under § 549.20 and include affidavits establishing the claim's factual basis. A court may only grant the motion if it finds *prima facie* evidence in support of the motion.

Over the last four years, federal district court judges in Minnesota have held that § 549.191 does not apply in federal court. In a recent order, United States Magistrate Judge Elizabeth Cowan Wright described those federal judges who refuse to apply § 549.191 as "[t]he large majority."

When a federal court sitting in diversity has to resolve a conflict between state and federal law, the court applies the *Erie* doctrine. In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Court held that "federal courts sitting in diversity apply state substantive law and federal procedural law." When state law does not directly conflict with a federal rule, courts can apply them both.

Josh Jacobson first argued his position in a 2001 article for *Bench & Bar*, the Minnesota State Bar Association's monthly magazine. Jacobson cites *Cohen v. Office Depot*, 184 F.3d 1292 (11th Cir. 1999), to support his argument that state punitive pleading damages statutes directly conflict with Federal Rule of Civil Procedure 8. While Minn. Stat. § 549.191 states that a complaint must not seek punitive damages at the commencement of a civil action, Rule 8(a)(3) states that a pleading must contain "a demand for the relief sought," including "alternative or different types of relief." Jacobson also argues that § 549.191 directly conflicts with Rule 15 because Rule 15 already states the requirements for amending pleadings before trial.

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Joshua Turner also argued his position in a *Bench & Bar* article that he co-authored last year with Jeffrey Justman and Tom Pryor. One argument that Turner presented is that § 549.191 does not directly conflict with the Federal Rules of Civil Procedure. Rule 8 and § 549.191 can coexist because Rule 8 does not require the *initial* pleading to claim punitive damages. Therefore, a statute that limits pleading punitive damages to an amended pleading does not violate Rule 8; it only prescribes the manner and timing. Rule 15 and can also coexist with § 549.191 because Rule 15 allows what § 549.191 demands: an amendment

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of the pleadings when "justice so requires." Here, justice would require that punitive damages be established in an amended pleading to prevent a frivolous claim. Another argument that Turner presented is that refusing to apply § 549.191 does not promote *Erie*'s policy goals, that is, to prevent "forum-shopping" and inequitable "administration of the laws." Turner predicted that plaintiffs might sue in federal court to exert a tactical advantage over defendants at the pleading stage. He hoped that the Eighth Circuit would address this issue in an appropriate case.

For more information, please read the presenters' articles on the topic: Josh Jacobson, *Pleading Punitive Damages: An* Erie *Dilemma*, Bench & Bar (Feb. 2001); and Jeffrey P. Justman, Joshua Turner, and Tom Pryor, *A Misstep on § 549.191: Why recent federal courts in Minnesota are wrong in refusing to apply Minn. Stat. § 549.191 to punitive damages claims in federal court*, Bench & Bar (July 2020).

Eder Castillo is a prosecutor at the Hennepin County Attorney's Office in Minneapolis, practicing white-collar prosecution and post-conviction litigation. He graduated from the University of Minnesota and received his law degree from the University of St. Thomas.

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Tune in for the next

Eighth Circuit Bar Association CLE

The Record on Appeal

Coming this Spring. Time and date TBD (watch your email)