An Interview with *Judge* David Hamilton

*By Laura McNally**

In March 2009, President Obama announced his first circuit court nominee: Judge David Hamilton, then Chief Judge of the U.S. District Court for the Southern District of Indiana. The Senate confirmed his nomination later that year, and while he still remains the Seventh Circuit's most junior member, Judge Hamilton has become a distinctive voice in a court known for its many remarkable voices.

Judge Hamilton grew up in Southern Indiana. His father was a minister, his mother was a singer, and his uncle is former Indiana representative Lee Hamilton. Politics, religion, and public affairs were always "front and center" in Judge Hamilton's family life. He studied religion and philosophy in college at Haverford College and at the University of Tubingen in Germany while a Fulbright Scholar. After graduating from Yale Law School, Judge Hamilton began his legal career as a law clerk to Judge Richard Cudahy of the Seventh Circuit. He spent nine years in private practice at Barnes & Thornburg in Indianapolis, with a break between 1989 and 1991 to serve as legal counsel to Indiana Governor Evan Bayh. Judge Hamilton joined the district court bench in Indianapolis in 1994.

LM: You started your judicial career in the district court. Six of the 12 Seventh Circuit judges have been district court judges, and Judge Sykes was a state court trial court judge. How does trial court experience impact the job of an appellate court judge?

Judge: It brings a lot of familiarity with the kinds of problems that trial judges face. On appeal, it's easy for what happened in the trial court to metamorphose from what it may have looked like to the trial judge into something that looks very different to the Court of Appeals: for example, in how you handle a problem that may arise in voir dire with respect to jurors or how you handle Batson challenges or how you handle issues that may arise during deliberations. Having some experience on the front lines of handling those very human kinds of problems can help inform the appellate review process.

Sentencing is another huge area. It's so important as part of the work of district judges. It is a big part, in terms of volume, of our appeals. Frankly, I think it helps if at least one member

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of the panel has had that experience of being face-to-face with the defendant who is being sentenced: having had the experience of listening to the protestations of remorse and the promises to reform, and of trying to decide whether this is sincere and to be believed, or if the fellow has said this to seven judges before.

Also about sentencing — this is both a legal and personal comment — the federal sentencing statutes, particularly §3553(a) of Title 18, tell judges in essence to do contradictory things: to try to rehabilitate, to deter, to punish, to ensure respect for the law, and so on. In a lot of the sentencing decisions, those different factors will be tugging judges in different directions. The statute doesn't tell you how to resolve that. I hope experience having been tugged in those different directions, by the instructions from Congress and by your own instincts about what is just in the particular case, gives us a better understanding of just how difficult those decisions can be.

LM: Many federal judges come to the bench with a background in government service, often from the U.S. Attorney's office. It seems that there are fewer from the criminal defense bar. Do you believe that has any impact on the direction of the courts?

Judge: I don't know. I do know that my good friend, John Tinder, who has recently retired, was one of the most aggressive enforcers of the Fourth Amendment in criminal cases that I know. That stemmed a lot from his familiarity with the subject area and his comfort levels in saying, from long experiences as both a prosecutor and trial judge, what's allowed and what's not allowed. Somebody like me, coming in from civil law practice, didn't grow up professionally dealing with those issues, and so I haven't lived those issues the way he did.

Where I'm headed with this is a pitch for diversity of professional experience on a multi-member court because we help and teach each other. In terms of government experience, for example, I was counsel to my state's governor for several years. I can say that has shaped my approach to legal issues in that I think it gave me a deeper appreciation than I had before for the genius of American federalism and the role of states in our legal system. From the perspective of a federal bench, where we get to invoke the supremacy clause all the time, I think that it's helpful to have had some on-the-ground experience working with the state government, and occasionally being annoyed by what seemed to be overly aggressive federal courts who weren't sufficiently deferential to our role in the federal system. Whether there should be more appointees with more criminal defense background or plaintiff's personal injury or plaintiff's civil rights and employment law is, I think, a decision for Presidents and Senators.

LM: Do you feel the system does a good job helping new judges learn new areas of the law?

Judge: I'll say for new district judges, I don't think anybody is fully prepared for that job. Usually there is a hole in almost everybody's experience. Folks who come in from state courts either have not done a lot of work in substantive federal law, or may not have done it recently enough so that they are rusty in that. Folks who come in from criminal practices, often as you say, they're prosecutors, just don't have the experience of managing civil cases or are not as familiar with the dynamics and the economics of those cases, which are really critical. Somebody like me, I came in from a civil private practice, so I had to learn the criminal stuff from almost a standing start.

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I also had to learn how to become a judge – how to manage the case system, preside over a trial. But almost everybody has some holes in their experience to fill in. I'm a big fan of the Federal Judicial Center, which is the formal educational arm of the federal judiciary, but I also benefitted from so many other colleagues as well, from mentors on the bench who took time to explain to new colleagues, to take phone calls during recess. I think there is a sense of collegiality in the Federal judiciary that smooths that out.

LM: Let's talk about the perception of the federal judiciary as a part of the political process.

Judge: Well, I don't want to comment on particular vacancies or choices, but I am very concerned, about maintaining the long-term institutional legitimacy of the federal judiciary. That is something that took generations to build. It can be destroyed too easily, and it is one of the great treasures of our system of government — a federal judiciary that is respected as independent and as deserving of the respect that we get. Justice Breyer has written about the long progress that was needed to win the public's confidence, and we have to work very very hard to maintain that.

I think we do that by working as hard as we can to find common ground with our colleagues on difficult cases. We do it with the tone of our rhetoric, which I think needs to be appropriately measured and non-personal so that people don't get distracted by the idea that these are personal feuds. They are not. But the wrong kind of rhetoric can be a problem. In the American political system since de Tocqueville's original observation about every major controversy winding up in front of the courts, we do wind up with a lot of very divisive, controversial issues about which people have strong feelings. We need to do our best to assure the people who have to live with those rulings that they are given full consideration, that all sides are heard, and that something that we recognizes as legal reasoning underlies the final result, as opposed to whim or personal values.

In the work that I have seen here on the Seventh Circuit, I have been very impressed. My colleagues and I are talking through these issues at a level that even informally is consistent with the rule of law, and so I am troubled in some of the theoretical discussions and critiques about judicial review and theories of judicial review that try to mock those efforts as just expressions of individual judges' whims and values. They are not. Even in some of the most difficult cases we deal with, we are trying to fit our decision in the particular case into a larger web of law and legal principles.

LM: Do concerns about not appearing political in your decision making influence your willingness to speak or write outside of your judicial rule?

Judge: They do, and I try to make my time available to talk with students or lawyers or public groups about these kinds of problems. But my message I'm afraid, is not very exciting. It is that, in essence, "We're doing our job, we're trying do it as well as we can, and we are not politicians with black robes on." I think that sort of educational effort is an important part of our job.

LM: The Seventh Circuit has a practice of inviting district court judges to sit by designation. Have you found that to be useful process?

Judge: I have now sat on a number of panels with visiting district judges, and we're grateful for the help. It's intended to be an educational experience in two directions, and I think it is working reasonably well at that. A lot of district judges seem to enjoy the experience of being able to look at cases from a different perspective, and it's helpful for district judges to know what their cases look like when they get here. And it is also an opportunity for us to learn from district judges about what is going on in the profession at the trial level today. Even things as basic as what hourly rates are you awarding in civil rights and employment cases these days? Or what difficulties are resulting from our recent supervised release cases on the ground? Can we fine tune that? Those discussions go on.

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LM: You mentioned collegiality. You're the newest member of the Seventh Circuit, and you have been here almost seven years now. You're a member of a group that has worked together for a very long time. How do you maintain collegiality?

Judge: Let me tell you what I mean by collegiality. On the one hand, it's collegiality at the most elementary levels, which you absolutely cannot take for granted. We talk to each other about personal matters, about professional matters. We spend time together. I think we like each other. But I remember Judge Posner's line when Judge Wood was first appointed. He welcomed her to this court by pointing out that since we don't get to pick our colleagues in the way law partners do, she had just joined a family in which everyone's an in-law, and there is no divorce. So, we are with each other for a long time. And when you approach it with that kind of an attitude, it is a great privilege to do the work. These are really smart, hardworking people, and it's a privilege to work with them.

But collegiality to me means a lot more than getting along, and this is one of the things that has impressed me and was a pleasant surprise when I got here. I have been very impressed by the quality of the communication: the preparation of cases, especially for oral argument, the communications in conference, and the quality of communications about one another's draft opinions. When there are points of disagreement, there are efforts to try to find common ground, and when those are not successful, the disagreements are laid out. Nobody is holding back on the reasoning, but I think we all understand these are not personal disagreements, and they don't take on that character. I write quite a few separate opinions, and I try to make sure, as best I can, that those are not understood in personal ways but simply as disagreements about how a particular case should be decided or how particular principle should evolve.

LM: Let me ask you about the Seventh Circuit's approach to overruling past precedents or creating circuit splits. Can you talk a little bit about how that works.

Judge: Yes. What you are referring to is Circuit Rule 40(e) which requires a panel that plans either to overrule circuit precedent or to create a circuit split to circulate the opinion within the court before the panel opinion is released. It helps us maintain a reasonable degree of uniformity in circuit law and makes sure that we don't lightly but deliberately create a circuit split. I think that's useful.

Most 40(e) circulations are approved because usually the panel has thought through things pretty carefully and has good reasons for doing what it plans to do. But on occasion there will be disagreements, and we'll either take the case en banc or ask the panel to reconsider the issue. I've done some 40(e) circulations myself. It's not something that we do lightly. It's also not something I do with a hair trigger, in the sense that the fact that we might disagree with language in another circuits' opinions is not enough. We're trying to apply a stringent standard for when we really think the Supreme Court needs to decide this as an issue.

For overruling precedents, 40(e) gives us kind of low-budget way to do that. We've done it, for example, to eliminate circuit splits where we were the last one standing and somebody said maybe we ought to just fold on this issue.

LM: Many of your oral arguments involve appointed counsel. How much do you think such counsel assist the court?

Judge: Oh, their contributions are huge. We're so grateful for the attorneys who are willing to do this. I should also add that those were my first opportunities to argue before this Court as a young lawyer. For me they were great learning experiences, both because of the issues and also as a young lawyer in a big firm learning the responsibility of being first chair for somebody's liberty being at stake. That's an invaluable step in professional growth.

In terms of how they help the court, I believe we recently passed the 50% threshold in terms of *pro se* cases, which is very sobering: criminal defendants, *habeas corpus* petitioners, prisoners who are challenging

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their treatment in custody, and just average folks who just don't have access to a lawyer and feel that they have been wronged in some ways. The court benefits enormously from the contribution of professional skill to address the fact situation and basically give it a legal framework so that we can all engage.

If you're a person who feels you've been mistreated in the criminal justice system, or by an employer, you don't know what the applicable law is but you feel victimized. And maybe you file an appeal that lays out the facts and somebody in the court says there may be something here that wasn't recognized before or this actually is an example of a problem that is recurring. Let's get counsel and let's confront this issue and decide it. That's our job. And we do it so much better when we have good, adversarial presentation by able counsel.

LM: In this circuit, almost 40% of the cases have oral argument, second only to the D.C. Circuit, which hears argument in 51%.

Judge: Well, I'm proud of the record that we have. The general rule is that if you have lawyers on both sides, and if at least one side wants oral argument, you get it. And I think that's a good thing. I think it's good for the judges and lawyers to come face to face and actually have to talk over the issues. It's good for judges to have to confront, even if on a second-hand basis, the human side of what we're deciding. And it's good for lawyers to confront whether they want to put a particular issue in the brief if they are going to have to defend this face to face.

LM: What is the value of oral argument to you?

Judge: Well, it depends. I met with a group of students recently in appellate practice who asked me in essence whether I approached oral argument fairly and objectively, and I said well, not really, no, because it's rare for me to come in neutral. The expectation here among the members of the court is that you are sufficiently prepared to be ready to cast a vote after the arguments – a tentative vote but one that you are very likely to stick with – so that we want to do the hard thinking now while we're all together for argument and for conference face-to-face. And so, what I get out of oral argument, regardless of the quality of the oral argument, is the opportunity to listen to and talk to my colleagues about the case for the first time. That's really critical. As often as not, we're talking to each other as much as we're talking to the counsel in the case.

I try to go into an oral argument with both a preliminary view and some thoughts about what it might take to change my mind. Questions are usually aimed in that direction, as well as signaling to colleagues what I'm worried about, what I'm thinking about, particularly if you're looking at a case that has multiple paths to different results or multiple paths to the same result. What's most important? Should we do this on procedural grounds? Should we reach the substance of the dispute? The dialogue is pretty transparent, I think. You can watch our discussions and questions and probably make some pretty good guesses about likely votes.

I can tell you I always appreciated arguing in front of Judge Ripple because he would be quite explicit: "Counsel, here's my biggest problem with your side of the case." In essence, "Give me your best shot. What's the best response you have to this potential weakness?" If I'm counsel in the case, those are the questions I want, and those are the questions that I try to ask as a judge.

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But also, even if I'm not troubled about a case, I will frankly try to ask a question or two just so there's some give-and-take discussion. We do ask counsel to come here to have a conversation about the cases, and I think we ought to go ahead and do that and not be a totally cold bench. Obviously there are times when we are way hotter than counsel may want or like.

This has come up in some particularly controversial cases where oral arguments may have been especially contentious. I would ask counsel to be a little patient with our impatience. I think I said this in an oral argument a year or two ago, in essence said, "Counsel, we've read everything you wrote for us. This is our turn." I know it's frustrating for counsel not to be able to give a prepared speech about the strongest points in their case. That's what I wanted to do in oral argument too. But for our purposes, our job is to probe the softest spots in the argument. This is our chance to talk back and wrestle with the arguments in the briefs, so please don't take the interruptions amiss. Time is limited, and if we are asking questions, it's usually because it's something we think is important.

LM: Every now and then there are arguments with no questions. Are there any rules of thumb for what one should take from an argument if there are no questions?

Judge: I wouldn't say there are any rules of thumb, simply because different judges have such different approaches. There are some panels where I would think that's impossible to happen and other panels where it could happen quite easily.

If I'm on the panel, it's unlikely to happen. I guess I may be echoing some of my time as a district judge where I would be at least cognizant of an audience of parties, clients, witnesses and so on. I would sometimes ask a question or two just to signal to everybody: I am paying attention, I do understand what this is about even if I'm quiet right now. That would often happen, for example, in sentencing hearings where a plea in mitigation might have been very difficult for victims to listen to. I would listen but would also ask a question or two just to remind both the defendant and his counsel and also observers that I do remember what happened. I do remember why we're here. Those kinds of questions can also be useful just in terms of acknowledging implications in this case, both for the parties and for other people who are similarly situated. So it's just part of a public dialogue as part of our job.

LM: Prior to oral argument, do you ever discuss a case with fellow panelists?

Judge: I won't say absolutely never, but it's very rare. I may touch base with colleagues if I'm going to be raising an issue that's not really developed in the briefs, such as a jurisdictional issue. Rather than catch everybody flat-footed, I'll just let them know ahead of time that I'm going to be raising this particular issue.

LM: Do oral arguments ever change your determination of which side should prevail on the appeal, in addition to shaping the opinion?

Judge: Yes, it changes outcomes. It certainly shapes opinions, and somewhere between 2 and 10% of the time it will change outcomes. Now, is that change the result of the brilliance of oral advocacy, a mistake in my preparation, or questions from a colleague that get me to see the case in a different light? All of the above. It can be any of those things. I try to be well prepared for oral argument, but there's a reason there are three of us. And there are also situations in which somebody who has a good case may just not have written a very good brief, and we just don't quite get it until we hear the oral argument.

Oral argument also helps shape the opinions. It is the opportunity for a group dialogue. I realize it's highly stylized and formalistic, but you're bringing together several minds, the judges and the counsel, to focus on the questions: What are the implications if we agree with you about this? Or this is a very confusing area of state practice; help explain this to us so we don't mess it up. All kinds of ways that we're helped by that.

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We are generalists, and one of the difficult challenges of this job is that we're doing very public work in areas where counsel are far more expert than we are. Oral argument is really a chance for us to kind of ask some dumb questions and make sure we understand the larger context in which this dispute arises.

LM: I'd like to talk about outside factual research by appellate judges. Do you have a view on that practice?

Judge: I don't claim to be a purist about this. I think that it is often helpful for judges to do a little bit of directed research to understand better the context of a particular case. I think the maps that Judge Posner often puts into an opinion are very helpful to understand the subject matter. And it can be helpful to know a little more about the background of the case. I'm not claiming moral high ground or principled purity here. But I do think that appellate courts are not in the business of finding adjudicative facts that are going to be decisive for the outcome of the appeal. We have district courts that are far better suited institutionally to do that work. District judges who think that a case is not being developed sufficiently for one side or another have plenty of tools to be able to encourage or push that side to develop additional facts.

Obviously, a lot of people noticed the different opinions in a case called *Rowe v. Gibson.* [798 F.3d 622 (7th Cir. 2015)]. That came out in the summer of 2015 where Judge Posner and I debated the appropriateness of independent factual research by an appellate court. I said I think most of what I had to say in that dissenting opinion.

LM: Do you have more concern relating to internet-based fact-finding than fact-finding from other sources?

Judge: No. It's just that the internet is so convenient. You sit at your desk and Google topics and find reliable and unreliable sources on the internet without having to do what we used to do, which is trundle down to a public library or study the secondary literature or find the major text. It's so easy and convenient that it's a big problem.

There's another interesting dimension to this that I think is more of an issue with the Supreme Court than it is with us. That has to do with facts coming in the form of amicus briefs. There has been some scholarly discussion of this practice in the Supreme Court. This line between background and context that I'm comfortable with and important and decisive facts is not necessarily a bright one, especially if you're dealing with an opinion that has fairly sweeping implications.

LM: Do you see many amicus briefs in your cases?

Judge: It's certainly nothing like the Supreme Court's practice. Maybe one amicus brief in 10 to 15 cases. We try to discourage me-too amicus briefs, but it is sometimes helpful, particularly in cases where the individual stakes are low. This can come up for example, in bankruptcy or in consumer cases, or various kinds or immigration cases, where you've got limited resources for the parties but the opinion this court issues is going to have pretty sweeping effects on a lot of other people. Then, believe me, I'm happy to have amicus briefs from people who are really expert in the subject area to tell us, don't do this, or even if you affirm, don't do it this way, or if you're going to reverse, make sure you do it this way, and so on.

LM: I'd like to talk now about supervised release and the changes within the Seventh Circuit that's predominantly with *Thompson* and *Kappes*. I don't think it would be an understatement to say there has been a seismic change in the approach to appellate review of supervised release.

Judge: What I can say about this is that virtually every sentence I imposed as a district judge would not have met the standard of *Thompson* and *Kappes* because I (and virtually every other district judge I know of in the circuit) simply imposed standard conditions of supervised release by reference to other documents, and typically without any detailed explanation.

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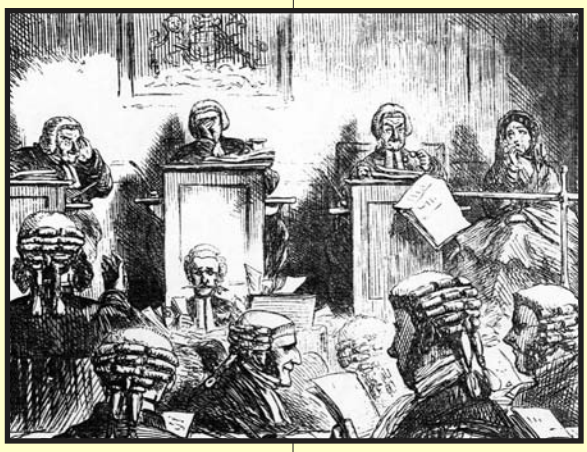
If anybody had an objection, I would have been happy to deal with it, either to modify the condition, or to remove it or explain why I thought it would be appropriate. But those kinds of objections were very rare.



I think the problem stems from the fact that relatively few defendants I ever had any experience with cared about the terms of supervised release. Certainly at the time that a prison sentence is being imposed, the defendant is focused almost exclusively on what the prison sentence is going to be because that is by far the most onerous part of the sentence. And supervised release conditions also are very malleable. As we said in a decision about a month ago, *U.S. v. Neal,* 810 F.3d 512 (7th Cir. 2016), the conditions of supervised release can be modified at any time. That's what the statute says. So if the conditions are a problem after the defendant has finished his or her sentence in custody, that's a far more sensible time, in my view, to try to do the custom tailoring of those conditions. That said, I will say that I think *Thompson* and *Kappes* do an important job of getting everybody focused on the substantive content of those terms, so that they are no longer taken for granted and no longer done as routinely as they were when I was a district judge, by me and others.

At the same time, this is an area of law where it seems to me we need as an appellate court, to make sure that we are sticking to general principles of waiver and forfeiture and fair presentation of issues to the district judges where most of these controversies should be resolved. I would say we are still working out a lot of those details, but I hope we will soon come to some kind of stable equilibrium that would allow district judges to avoid wasting time reciting terms or explanations that nobody really wants to hear or needs to hear at that time, while at the same time assuring that where there is a genuine controversy or concern about the content of those Supervised Release conditions, everybody appreciates the importance of it and gives it attention.

LM: Generally, defendants do not have appointed counsel to assist with supervised release challenges after the appeal process is finished.

Judge: And the point you're making about access to counsel is the best argument against waiting. I'm happy to acknowledge that. I'm drawing somewhat on my experience as a district judge, but I didn't see probation officers with time on their hands available to spend harassing supervised releasees for no good reason. In my experience, people had their supervised release revoked only when it was mandatory or they committed a new crime, or when, and only in the very rare cases where they were so resistant to the conditions of supervised release that they were just impossible. I understand that there may be different practices in different districts, and that's part of my education in this process, and that's why this is a group decision.

LM: Let's talk about demeanor evidence. There is a fair amount of disagreement regarding the weight that should be given to demeanor-based credibility findings at the trial court level. What was your experience in the district court?

Judge: My experience on the district court was consistent with the psychological experimental research, which is that pure demeanor evidence is a very difficult tool. It's very difficult to use demeanor evidence reliably to determine credibility. It's not useless. There are situations where the signals may be strong enough that an attentive observer can reliably detect deliberate deception, but it's very difficult to do reliably, especially across ethnic lines and cultural lines.

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Take something as simple as eye contact. The myth that somebody can't look you in the eye and lie is a myth, but at the same time, there are people in some cultures for whom direct eye contact, particularly to an authority figure like a judge or a jury, is in essence a rebellious or disrespectful act. If you don't understand that, you're going to have a hard time reliably interpreting somebody's demeanor. I can think of some specific situations in which I did feel I could make that determination with enough confidence to base a decision on, but only as to specific facts, not the outcome of the whole case. Instead, as a trier of fact, my own experience was I would work just as hard as I could to figure out a basis other than demeanor for determining the overall credibility.

In terms of the role of an appellate court, we review a lot of credibility determinations, and the law I think is quite clear that we do that with great deference to the person in the front line, not because they are perfect but because we are not going to be any better.

That may be an immigration judge trying to evaluate a claim of asylum by somebody who says they're very afraid of what may happen to them if they're sent back to some corner of the world in which terrible things are happening to people of a particular ethnic group or gender or sexual orientation or social group. Or it may be a sentencing judge trying to decide how sincere the professions of reform are. It may be a district judge or magistrate judge who's made findings of fact about an encounter between police and civilians having to do with Fourth Amendment issues or uses of force. They just have to decide whose account is most credible. And it's very, very tough for somebody just looking at the proverbially cold record to substitute our judgment for theirs.

LM: And then last, I'd like to talk a little bit about civility and professionalism.

Judge: I can say we certainly see a spectrum of behaviors within the profession from judges and from lawyers. It's something that we always have to pay attention to. To circle back to something that I said much earlier, society has entrusted legal institutions, the legal profession, lawyers and judges with enormous responsibilities for peaceful resolution of countless disputes in our societies. For that to work and for the rule of law to work, we have to always nurture and deserve respect. So we have to work at deserving respect, I guess is the better way to put that. And uncivil conduct by judges, by lawyers, whether it's oral statements, the writing that we do, or the conduct we undertake can either contribute to or erode that public confidence in what we do. I think it's very important that we try to behave towards each other in ways that convey the impression as well as the substance of the rule of law.

Upcoming Board *of* Governors' Meetings

Meetings of the Board of Governors of the Seventh Circuit Bar Association are held at the East Bank Club in Chicago, with the exception of the meeting held during the Annual Conference, which will be in the location of that particular year's conference. Upcoming meetings will be held on:

Tuesday, May 3, 2016*

**at the annual conference, Radisson Blu Aqua Hotel, Chicago*

Saturday, September 10, 2016

Saturday, December 3, 2016

All meetings will be held at the East Bank Club, 500 North Kingsbury Street, Chicago at 10:00 AM