

By
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According to practitioners before the U.S. Court of Appeals for the Eighth Circuit, Judge James B. Loken is one of the most "active" judges on the bench. "Active" is an adjective that describes more than Judge Loken's judicial demeanor, however, as energy and enthusiasm for the law have marked Judge Loken's career both before and since his nomination by President Bush in 1990.

Off the bench, the judge runs 6 to 8 miles, three times a week during his lunch break (followed by a meal of popcorn) along the Mississippi River in Minneapolis, where his chambers are located. There is usually at least one running law clerk in his chambers each year. The judge is also renowned in Twin Cities bowling circles for his two consecutive bowling championships at the Minneapolis Athletic Club in the late 1970s. These bowling championships were an outgrowth of his early bowling career at the University of Wisconsin, where he was on the Big Ten Conference Championship bowling team in 1961. Nowadays, however, the judge focuses more on golf, including travel to far-flung locales to try out new courses. Closer to home, Judge Loken can often be found at his Wisconsin cabin, where he spends time fishing and occasionally pursuing one of his other favorite pastimes — drafting opinions.

Judge Loken's educational and work histories have also been "active." Born in Madison, Wis., Judge Loken's family lived in a variety of towns while he was young, eventually settling in Chicago. After graduating from high school, the judge attended college at the University of Wisconsin where he received a Bachelor of Science degree in Economics. During college, Judge Loken had his first federal job as a part-time postal carrier in the Chicago-area town of Park Ridge, Ill. After graduation from Wisconsin, Judge Loken entered Harvard Law School, where he was eventually made an editor of the Harvard Law Review.

After law school, Judge Loken had two federal clerkships. His first clerkship was with Hon. Judge J. Edward Lumbard of the U.S. Court of Appeals for the Second Circuit. Through his work with Judge Lumbard, Judge Loken learned never to assume anything, and to look behind the appellate briefs to see how the case at issue proceeded. Judge Loken has come to believe that seeing the case from the district judge's perspective, and understanding which errors were preserved and which were allowed to go by the wayside by the lawyers litigating the case, is crucial to a sound appellate decision.

After his Second Circuit clerkship, Judge Loken moved

to Washington, D.C., to clerk for Justice Byron R. White of the Supreme Court. Judge Loken cites Justice White's "inquiring mind" for honing Judge Loken's penchant for reasoning by hypothetical. The animated discussions in Justice White's chambers that regularly took place during the drafting of an opinion demonstrated to Judge Loken the value of bouncing theories and ideas off other lawyers and testing the practical reasoning of a proposed resolution.

After his clerkship with Justice White, Judge Loken and his wife Caroline moved to Minneapolis where the judge joined the law firm of Faegre & Benson. He became a member of the business litigation group, focusing his practice primarily in the area of commercial litigation with an emphasis on antitrust matters. Judge Loken remained an associate at Faegre & Benson until 1970, when he was tapped to return to D.C. as the general counsel to the President's Committee on Consumer Interests.

After four months with the President's Committee on Consumer Interests, Judge Loken was asked to join the White House staff as a staff assistant to President Nixon. One of Judge Loken's responsibilities as staff assistant was to sit on the Oil Policy Committee, which was responsible for the Administration's Mandatory Oil Import Program. The staff assistant position allowed Judge Loken to get his feet wet in other areas of foreign trade policy, as well. The judge also worked on the administration's task forces for energy and trade. These task forces were comprised of representatives from federal agencies and were charged with studying issues and making recommendations to the President. Among other things, the energy task force recommended an initiative for deregulation of natural gas at the wellhead, providing the judge with insights on the interplay between business, policy and politics.

Judge Loken was also one of a few administration liaisons to the business community. This gave the judge a first-hand opportunity to work with federal agencies on a wide variety of issues involving the business community, including the motion picture industry and the medical device industry. This work, as well as his foreign trade work and task force participation, was a good fit with the judge's interest in commercial law. It also expanded his legal knowledge and experience.

By the end of 1972, Judge Loken was ready to return to private practice. Judge Loken explains that he wanted to get back to the "core job" of practicing law. Judge Loken chose to return to Faegre & Benson, where he soon became a partner. As he had before his stint at the White House, the judge focussed on business litigation, with a new emphasis on administrative law — a practice area he developed from his experiences in Washington. By the 1980s, the judge was practicing in a variety of business law disciplines, including environmental and insurance

regulation, Truth-In-Lending law, and consumer and banking law.

Judge Loken's skill as a lawyer led to his nomination to the Eighth Circuit bench by President Bush in 1990. He was confirmed by the Senate in the fall of that year and joined the bench on Jan. 1, 1991. While he had some familiarity with the job of an appellate judge from his days as a clerk, Judge Loken needed to learn, as he put it, "conferencing, oral arguments, and judging." This new phase of his legal career also gave the judge the opportunity to delve into as-yet-unexplored areas of the law, including criminal, social security, and habeas corpus law. Judge Loken's never-ending enthusiasm for the law served him well in the initial months of his judgeship as he geared up to meet the demands of interpreting the full scope of federal law.

On the difference between being an appellate judge and a private practitioner, Judge Loken says that "being a judge is as intense as being a lawyer, but less tense." Judge Loken has penned numerous noteworthy decisions, including his first dissent, written in a habeas case, *Fretwell v. Lockhart*, 946 F.2d 571, 579 (8th Cir. 1991) (Loken J. dissenting), *rev'd*, 506 U.S. 364 (1993), which the Supreme Court adopted. The judge also authored the opinion in a complex Lanham Act case, *Gilbert/Robinson Inc. v. Carrie Beverage-Missouri Inc.*, 989 F.2d 985 (8th Cir.), *cert. denied*, 510 U.S. 928 (1993), which involved questions relating to service mark registration. Judge Loken found this case especially interesting because it presented intricate statutory issues that had not been dealt with in detail by any previous court. The judge has also had an opportunity to write on some controversial issues, such as the Independent Counsel Act. In *Starr v. Mandanici*, 1998 WL 327849 (8th Cir. June 23, 1998), in which the court affirmed the dismissal of an "ethics grievance" filed against Independent Counsel Kenneth Starr, Judge Loken's concurrence cites historical precedent for the argument that the best prosecutors are those that are politically active.

Although a judicial conservative by nature, the judge characterizes the common law as an "activist" tradition. By this, the judge means that the court's role is to put the law



into action: applying existing precedent to new factual situations is, by necessity, active or creative. Judge Loken recognizes that while the circuit judge's role is to decide the specific case before the court in a way that addresses only those issues before the court, a circuit judge also has a duty to promote consistency — consistency in the rule of law and also with the mandates of the Supreme Court and Congress. In rendering his decisions, Judge Loken searches for the solution that will best resolve the dispute before the parties and also make sense for future application.

Any lawyer that has appeared before an Eighth Circuit panel that includes Judge Loken recognizes that the give-and-take of oral argument is something the judge truly relishes.

The judge is also enthusiastic about working with practitioners outside of the courtroom, in cooperative efforts to ensure that the standards of practice and adjudication in the federal courts remain high. To that end, Judge Loken has actively participated in the FBA as a panelist, and, currently, as secretary of the Minnesota Chapter. Judge Loken's contribution of energy, enthusiasm and intellectual challenge to the legal community in Minnesota and throughout the Eighth Circuit is greatly appreciated.

The judge has commented that one of the best features of being a circuit judge is that he won't have to quit until he's ready. Federal practitioners in the Eighth Circuit will be able to benefit from Judge Loken's active style both on and off the bench for many years to come. ■

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