

Bench Briefs

In Memoriam of the Honorable Donald P. Lay



The Honorable Donald P. Lay, retired United States Circuit Judge for the Eighth Circuit Court of Appeals, died Sunday, April 29, 2007, at his home in North Oaks, Minnesota. He was 80 years old. He is survived by Miriam Lay, his wife of 57 years, five daughters, and several grandchildren.

Judge Lay was born in Princeton, Illinois, on August 23, 1926. He was raised by his mother, a school teacher, and moved with his family to Iowa City, Iowa. During high school, he became known as a “star debater” and “formidable tailback.” After graduation, he attended the United States Naval Academy, but his service in the military ended when

he sustained a back injury while playing for the Academy’s football team. In 1949, he graduated from the University of Iowa. After graduation, Judge Lay considered becoming a radio announcer or working with the Boy Scouts (he had earned the rank of Eagle Scout), but his uncle, a lawyer, informed him that he would not loan him any money unless he entered into a “respective profession.” According to Judge Lay’s daughter, Catherine Lay, Judge Lay decided to “wal[k] across the street and enrol[l] in law school.” In 1951, he received his juris doctor from the University of Iowa. Prior to his appointment to the Eighth Circuit, Judge Lay worked as a trial lawyer in Milwaukee and Omaha for two decades. He also taught law at the University of Minnesota, Creighton University, William Mitchell College of Law, and the University of Uppsala, in Uppsala, Sweden.

In 1966, at the age of 39, Judge Lay was appointed to the Eighth Circuit in 1966 by President Lyndon Johnson. At that time, he was the second-youngest individual ever named to the court (William Howard Taft was 34 when he was appointed in 1892). He maintained his chambers in St. Paul, Minnesota, and served as the chief judge of the Eighth Circuit from January 1, 1980, to January 7, 1992. He assumed senior status on January 7, 1992. On January 3, 2007, Judge Lay took permanent disability retirement. He served over 40 years on the court.

Judge Lay was known as a rigorous defender of the rights of convicts, women, and Native Americans during his years of service on the Eighth Circuit. According to the Honorable Robert W. Pratt, Chief Judge of the United States District Court for the Southern District of Iowa, Judge Lay was “among the last of the unapologetic liberals who believed deeply in the Warren Court revolution and saw the federal courts as the protector of civil and equal rights.” Judge Thomas Boyd, a former law clerk for Judge Lay, commented that Judge Lay fought to protect the rights “of even the most reviled members of society.” According to Judge Boyd, “one of the dissents [that Judge Lay] was most proud of was in *Morrissey v. Brewer* [443 F.2d 942 (8th 1971)].” In *Morrissey*, the Eighth Circuit affirmed a district court’s denial of two prisoners’ petitions for writ of habeas corpus for their release following revocation of their parole. According to the majority of the court, the prisoners’ constitutional

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rights to due process were not violated when the Iowa Board of Parole revoked their paroles without a hearing. Judge Lay dissented, stating: “The Fourteenth Amendment to the Constitution of the United States reads in part ‘Nor shall any State deprive any person of life, liberty, or property, without due process of law.’ This clause is unambiguous on its face. Its plain meaning requires notice of the charges or an opportunity to be heard before a state may deprive the liberty of any person.” The Supreme Court reversed the Eighth Circuit’s *Morrissey* decision, 408 U.S. 471 (1972), agreeing with Judge Lay’s dissent. The Court wrote that the “liberty” of a parolee “is valuable and must be seen as within the protection of the 14th Amendment.”

The United States Supreme Court also reversed the Eighth Circuit and agreed with Judge Lay’s dissent in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). In *United States Jaycees v. McClure*, 709 F.2d 1560 (8th Cir. 1983), the Jaycees brought an action challenging the Minnesota Department of Human Rights’s application of the Minnesota public accommodations law in ordering the Jaycees to admit women to its local chapters in Minnesota. The district court—the Honorable Diana E. Murphy—upheld the application of the Act to the Jaycees. The Eighth Circuit, in an opinion authored by the Honorable Richard S. Arnold, reversed, holding that the state’s interest was not strong enough to be “compelling” so as to override the Jaycees’ First Amendment right of association. Judge Lay dissented, stating that excluding women was based on an outdated rationale that “relegated women to a status inferior to that of men.”

Another notable opinion that Judge Lay authored was *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997)—the first class-action sexual harassment lawsuit in the United States and case behind the 2005 movie *North Country* starring Charlize Theron. In *Jenson*, female employees brought a class action suit against their former employer, Eveleth Mines, alleging sexual harassment and discrimination in violation of Title VII of the Civil Rights Act of 1964 and the Minnesota Human Rights Act (MHRA). The lawsuit was filed in federal district court in August 1988. The district court found Eveleth Mines liable on the plaintiffs’ classwide claims of sexual discrimination and sexual harassment. Thereafter, the district court appointed a Special Master to “consider the compensatory and punitive damages claims under the MHRA raised by sixteen female employees of the Eveleth Mines.” The plaintiffs sought compensatory damages for back pay, front pay, and damages for past and future mental anguish. The MHRA did not define “mental anguish,” and the Special Master concluded that “mental

anguish” includes “mental suffering caused by painful emotions such as indignation, wounded pride, shame, public humiliation, and despair.” The Special Master ultimately awarded damages for mental anguish to various members of the class, ranging from \$2,500 to \$25,000. The plaintiffs then filed objections to the Special Master’s report, but the district court affirmed the Special Master’s report and recommendation. On appeal, the plaintiffs attacked the analysis and rationale that the Special Master used in awarding damages and the Special Master’s failure to award punitive damages. According to the plaintiffs, “the damages awards d[id] not make the women whole and [were] totally inadequate and ‘shocking.’” The court, in an opinion authored by Judge Lay, “share[d] plaintiffs’ concern regarding the inadequacy of damages” and expressed its concern “with the Special Master’s erroneous application of legal principles governing the award, and his restrictive rulings limiting the testimony of plaintiffs’ expert witnesses.” Finding in favor of the plaintiffs, Judge Lay wrote for the unanimous court:

It should be obvious that the callous pattern and practice of sexual harassment engaged in by Eveleth Mines inevitably destroyed the self-esteem of the working women exposed to it. The emotional harm, brought about by this record of human indecency, sought to destroy the human psyche as well as the human spirit of each plaintiff. The humiliation and degradation suffered by these women is irreparable. Although money damage cannot make these women whole or even begin to repair the injury done, it can serve to set a precedent that in the environment of the working place such hostility will not be tolerated.

The Eighth Circuit’s ruling was deemed “precedent-setting” in *Class Action: The Story of Lois Jenson and the Landmark Case That Changed Sexual Harassment Law* by Clara Bingham and Laura Leedy Gansler (Doubleday 2002). According to Bingham and Gansler, while *Jenson* did not “eradicate sexual harassment in the workplace,” the case “made corporate America take real note of it for the first time, and established once and for all that women who are subjected to a hostile work environment never need stand alone again.”

In 1997, Judge Lay authored the majority opinion in *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (8th Cir. 1997), upholding the tribe’s rights to hunt and fish on land in central Minnesota to which it had been granted treaty rights

in 1837. The Supreme Court affirmed the judgment of the Eighth Circuit in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

During his distinguished career, Judge Lay received several awards, including the American Trial Lawyers' Outstanding Federal Appellate Judge of the Year (1982); the American Judicature Society's Herbert Harley Award (1988); the University of Iowa's Hancher-Finkbine Award; and the University of Iowa College of Law's Alumni Achievement Award (1992). In 2000, the University of Iowa Alumni Association honored Judge Lay with its Distinguished Alumni Award. He also received several awards and an honorary doctor of laws degree from William Mitchell College of Law, where he taught from 1982-2000.

Judge Lay's colleagues on the Eighth Circuit also noted his substantial impact on the law and the court. Chief Judge James B. Loken commented:

He spent 40 years of service to our court, 40-plus years, dedicated to equal justice and the independence of the judiciary, the wisdom of the jury trial system, which he defended at every opportunity. He had endless energy for the law. When most of us would feel tired, he'd be there with some new idea or some new organizational or institutional thing that needed to be done, or another course to be taught at one of the local law schools or an article to be written in a legal journal.

Senior Judge C. Arlen Beam noted that the years that Judge Lay served as chief judge were years of great change for the federal courts, especially because of the increased caseload. According to Judge Beam, "[Judge Lay] was instrumental...in putting together new procedures to handle the onslaught of cases and also the increase in employees that we had working for the courts because of this." Judge Beam stated that Judge Lay was "a very, very hardworking judge, innovative in creating or analyzing and putting into effect causes of action in federal courts." Judge Beam acknowledged that he "didn't always agree with [Judge Lay] in opinions," but jokingly stated that this was because of "the nature of the business that we're in."

Judge Lay's "dedicated service to the federal courts over the past 40 years have made him one of the brightest stars in the federal judiciary," said Senior Judge Myron Bright. Retired Judge Gerald Heaney agreed, stating that Judge Lay "wrote well and did more than his share of the work."

Judge Lay will be remembered as a champion for civil rights. According to Catherine Lay, Judge Lay's daughter, "He was really liberal, and one of the last."

Eighth Circuit's Memorial Session in Honor of Donald P. Lay

On September 26, 2007, the Eighth Circuit convened a special Memorial Session in honor of the late Honorable Donald P. Lay who passed away on April 29, 2007. The memorial session took place in the en banc courtroom of the Thomas F. Eagleton Courthouse in St. Louis, Missouri.

The Memorial Session was convened by Chief Judge James B. Loken, who welcomed those in attendance and, after some further remarks, turned the program over to Judge William J. Riley, who served as master of ceremonies. Judge Riley had served as a law clerk for Judge Lay after graduating law school and credited Judge Lay with directing him toward a career as a trial lawyer and then a judge.

A letter was read on behalf of Judge Lay's oldest colleague on the Eighth Circuit, the Honorable Gerald W. Heaney, who recalled their years together on the Court and praised Judge Lay's service as chief judge while still carrying a heavy load, "writing more than his share of opinions, concurrences, and dissents."

Another one of Judge Lay's long-time colleagues on the Eighth Circuit, the Honorable Myron H. Bright, was unable to attend the Memorial Session but submitted a letter that was read on his behalf. Judge Bright wrote of Judge Lay's "immense contributions to the law and his good works as a person." He wrote that "[a]mong the judiciary's many bright lights, [Judge Lay] was a shining star."

Judge Riley called upon David S. Houghton, of Omaha, Nebraska, and Thomas H. Boyd, of St. Paul, Minnesota, to provide remarks on behalf of Judge Lay's law clerks. Mr. Houghton represented the law clerks who had served when Judge Lay had his chambers in Omaha, and Mr. Boyd spoke on behalf of those law clerks that served after Judge Lay had become chief judge and moved his chambers to St. Paul in 1983.

Dean Robert A. Stein, former Dean of the University of Minnesota Law School and former Executive Director of the American Bar Association, spoke of Judge Lay's prolific work product as a legal scholar, as well as his great contributions as a gifted teacher who taught and inspired hundreds of law students over the years.

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The Honorable William H. Webster was the final speaker of the program. Prior to serving as director of both the Federal Bureau of Investigation and the Central Intelligence Agency, Judge Webster served five years as a circuit judge with Judge Lay on the Eighth Circuit. Judge Webster spoke warmly of their close friendship and his deep respect for Judge Lay. He recalled that Judge Lay was always soft spoken and gracious, but that his beliefs were steadfast and compelling, and his opinions were persuasive and, at times, contained some "thunder."

Chief Judge Loken concluded the program with warm and respectful remarks of Judge Lay.

Following adjournment of the Memorial Session, a reception was held in the foyer outside of the en banc courtroom where friends gathered with Judge Lay's wife, Miriam, and their five daughters, Catherine, Cynthia, Betsy, Debbie, and Susan, to further honor and celebrate Judge Lay's wonderful life.

U.S. Courthouse in Duluth Renamed in Honor of Judge Heaney

In a well-deserved recognition for his great service to the nation as a soldier, lawyer, and judge, the United States Courthouse and Custom House in Duluth, Minnesota was formally renamed for the Honorable Gerald W. Heaney.

While the legislation to rename the federal building in Duluth was enacted into law some time ago, the formal renaming ceremony took place on October 6, 2007. In recognition of this auspicious event, the Eighth Circuit convened a special session of court to hear oral arguments in the building the day before the ceremony. This special session was made

up of two panels, consisting of Chief Judge James Loken, Judge William J. Riley and Judge Lavenski R. Smith, and Judge Roger L. Wollman, Judge Kermit E. Bye, and Judge Bobby E. Shepherd.

The ceremonies surrounding the renaming of the courthouse served as a wonderful platform through which to review Judge Heaney's many remarkable contributions. After growing up in Minnesota, he enlisted in the U.S. Army, serving with the Rangers who landed on Omaha Beach on D-Day. He was decorated for his valorous and distinguished service, seeing action and heavy combat from Normandy through the end of the War. When he returned, Judge Heaney set up a labor law practice in Duluth and immersed himself in Democratic politics as a close advisor and confidant to Hubert Humphrey, Orville Freeman, and Walter Mondale. He was also an instrumental supporter of higher education in Minnesota, serving on the board of regents and providing tirelessly for the University of Minnesota's Twin Cities and Duluth campuses. He was appointed to the Eighth Circuit in 1966, and served 40 years until his retirement last summer.

Due to inclement weather, the formal ceremony took place indoors at the Duluth City Hall. Attendance in the foyer of the City Hall exceeded capacity with Judge Heaney's friends, colleagues, and many of the 77 law clerks he had over his 40 year career as a federal judge on the Eighth Circuit. Congressman James Oberstar, who sponsored the renaming legislation in the House of Representatives, presided over the event as the master of ceremonies.

The colors were posted by the University of Minnesota-Duluth Air Force ROTC, and the proceedings were graced by a stirring rendition of America the Beautiful by the Duluth Denfeld High School Solid Gold singing group. The program also featured a display of the flag that Judge Heaney had made for a VE Day parade in Czechoslovakia at the end of World War II.

The formal program included remarks from the Honorable Herb W. Bergson, Mayor of the City of Duluth; Senator Amy Klobuchar, who sponsored the renaming legislation in the United States Senate; Dr. Kathryn A. Martin, Chancellor of the University of Minnesota-Duluth; Joseph Dixon, Jr., former law clerk to Judge Heaney; the Honorable James B. Loken, Chief Judge of the Eighth Circuit; the Honorable Myron H. Bright, Senior Circuit Judge of the Eighth Circuit; and the Honorable Walter F. Mondale, former United States Senator, Ambassador, and Vice President.

Judge Heaney was then introduced by his son, Bill Heaney. In responding to the tributes, Judge Heaney said that his goal had been to change and improve the lives of ordinary people. "I hope that I have been able to achieve that goal," he told those in attendance.

Following the completion of the formal ceremony, Judge Heaney, his wife Eleanor, other family members, and the many dignitaries who were on hand, adjourned to the federal building for the formal unveiling of the plaque, which reads, "Gerald W. Heaney Federal Building & U.S. Courthouse & Custom House."

These events were followed by a luncheon on the fourth floor of the newly named Heaney Courthouse. Robert J. Hennessey, Judge Heaney's former law clerk, served as master of ceremonies for the luncheon program. There was an invocation by Father Michael Lyons, followed by brief remarks from Thomas H. Boyd, on behalf of several organizations, including the Eighth Circuit Bar Association; Larry Goodwin, President of the College of St. Scholastica; Mark B. Rotenberg, also one of Judge Heaney's former law clerks, who is General Counsel of the University of Minnesota; George A. Sundstrom, a friend and former union representative for the Steel-metal Workers, Local 10; and Jane Freeman, a close friend of the Heaney's and wife of late Governor Orville Freeman. The luncheon program was concluded with a farewell prayer song by Sister Marie Brendan, who is a close friend of Judge and Mrs. Heaney.

It was a very memorable occasion that was a fitting tribute to a great judge.

U.S. Courthouse in Little Rock Named in Honor of Judge Richard S. Arnold.

A dedication ceremony to name the new Little Rock Courthouse in honor of Judge Richard Sheppard Arnold took place at 10:00 a.m. on Friday, September 28, 2007, in Little Rock, Arkansas.

Judge Richard Sheppard Arnold was born in Texarkana, Texas, on March 26, 1936. He received his bachelor's degree summa cum laude from Yale College in 1957. In 1960, he graduated magna cum laude from Harvard Law School. He was admitted to the Arkansas Bar in 1960 and the District of Columbia Bar in 1961.

Judge Arnold served as a judicial law clerk to Justice William Brennan of the United States Supreme Court in 1960 and 1961. From 1961 to 1964,

he was an associate in the Washington, D.C., office of Covington & Burling. In 1964, he accepted a partnership at Arnold & Arnold in Texarkana. While at Arnold & Arnold, he began working as a legislative secretary to Arkansas Governor Dale Bumpers. When Bumpers was elected to the United States Senate in 1974, Judge Arnold again moved to Washington, D.C., to serve as Senator Bumpers's legislative assistant. In 1978, President Jimmy Carter nominated Judge Arnold to serve as a U.S. District Judge for the Eastern and Western Districts of Arkansas. In 1980, President Carter again nominated Judge Arnold to a new seat on the U.S. Court of Appeals for the Eighth Circuit, where he served as chief judge from 1992 to 1998. Judge Arnold served on the court from 1980 through his death on September 23, 2004.

Chief Judge James B. Loken of the United States Eighth Circuit Court of Appeals served as the master of ceremonies at the dedication ceremony. The Arkansas State Police Color Guard performed the presentation of colors, and Ms. Alana Honold sang the National Anthem. The Reverend Dr. Peggy Bosmyer of Canon St. Margaret's Episcopal Church in Little Rock gave the invocation.

The Honorable Morris Sheppard Arnold of the United States Court of Appeals, brother of the late Richard Arnold, gave a warm welcome to the large crowd of judges, court personnel, family, and friends gathered to honor the late Judge Arnold. After Judge Morris Sheppard Arnold's welcome, a surprise guest appearance was made via video by former President William Jefferson Clinton. President Clinton honored the memory and legacy of the late Judge Arnold with his remarks.

Scott Arme from the U.S. General Services Administration then made remarks about the courthouse annex. Thereafter, the Honorable Susan Webber Wright of the United States District Court for the Eastern District of Arkansas performed the dedication of the courthouse. After the dedication, former Senator Dale Bumpers made a tribute to the late Judge Arnold.

Closing remarks were made by Chief Judge Loken, and the Reverend Dr. Gary D. McConnell, Rector Retired, of Trinity Parish Church Episcopal in Searcy, Arkansas, gave the benediction. The Arkansas State Police Color Guard concluded the ceremony by performing the retiring of the colors.

Music at the ceremony was provided by the Quapaw Quartet of the Arkansas Symphony Orchestra.

After the dedication ceremony, all guests were invited to participate in a self-guided tour of the first floor courtrooms and to celebrate with light refreshments in the atrium.

Members of the late Judge Arnold's family that attended the ceremony included: Kay Kelley Arnold; Judge Morris S. and Mrs. Gail Arnold; Richard and Janet Hart (Janet Sheppard Arnold) and their children Evan A. Hart and Saxon McG. Hart; Terry and Lydia Turnipseed (Lydia Palmer Arnold) and their children Lucile Mae Turnipseed (Lucy) and Grace Arnold Turnipseed.

Visiting Judges

The Honorable John F. Nangle, United States District Judge for the Southern District of Georgia (formerly United States District Judge for the Eastern District of Missouri) sat with the Eighth Circuit on May 14 and 15, 2007, in St. Louis, Missouri. Judge Nangle, along with Judge Kermit E. Bye and Judge Lavenski R. Smith, heard seven cases over the two-day period. Judge Nangle has sat with the Eighth Circuit over 20 times as a visiting judge, including as recently as January 2007.

TIME/PLACE/MANNER

Statistical Summary for the Year

The court's 2007 statistical year ended June 30, 2007, and some key figures are worth noting. New filings fell 11.5% in 2007, with the court docketing 2,984 new cases, as compared to the 3,372 cases docketed in 2006. The court disposed of 3,045 cases, issuing 723 published opinions, and 625 unpublished opinions; the remainder of the dispositions were made through administrative orders by the court and the clerk. At the end of the statistical year, the court had 2,128 pending cases, a slight decrease from the 2,154 cases it had pending at the end of the previous statistical year.

The number of new appeals from the district courts fell 8.1% in 2007, with large decreases seen in several districts—Western Missouri down 16.5%; Southern Iowa down 14.1%; Eastern Arkansas down 10.9%; South Dakota down 9.9%; Northern Iowa down 5.7%; Eastern Missouri down 5.1%; Minnesota down 2.1%; and Nebraska down 1.2%. Only North Dakota experienced an increase in filings, with its appeals up 7.1% in 2007.

Private civil cases still make up the bulk of the court's new filings, accounting for 41% of all cases. Criminal cases now constitute almost 31% of the

court's caseload, while U.S. civil cases account for about 15%. Original proceedings and agency cases make up the remaining 13% of the workload.

Case processing time as measured from the Notice of Appeal to the filing of the judgment decreased in 2007, with civil case processing times falling almost one month. The average case processing time for criminal cases stood at 10.4 months in 2007, while civil case processing time averaged 12.2 months. According to the latest national statistics provided by the Administrative Office of the U.S. Courts, the Eighth Circuit tied for the third best processing time for all case types and was second fastest for criminal cases.

An Update on CM/ECF

Building on its experience and success in implementing the new appellate case management system, on June 1, 2007, the Eighth Circuit became the first federal court of appeals to implement electronic filing (ECF).

ECF requires that anyone wishing to file a document must first become an authorized user, and the court began its implementation of ECF in May by notifying almost 10,000 attorneys about the registration process. Since that time, more than 4,500 attorneys have registered and become authorized Eighth Circuit filers.

As part of the implementation process, the court worked with the Administrative Office of the U.S. Courts to create five on-line learning modules for users. These modules teach users about the CM/ECF system and walk them through filing an appearance, a motion and a response. The modules can be viewed from the court's web site, and they take 10 to 15 minutes to view. The court strongly encourages all new users to view the modules as they provide valuable information and are based on the actual Eighth Circuit filing process.

After the registration process began, the court identified the 100 attorneys who are the court's most frequent filers and asked them to register and take part in some testing activities, including viewing the on-line training aids and making filings in test cases. The court received valuable assistance and advice from these attorneys and made some changes in procedures based on their comments. The information the attorneys provided also helped the court create a series of "Frequently Asked Questions" and "Have a Problem?" tips, which can also be found under the "Document Filing" menu on the court's web site.

The court began the "live" phase ECF on June 1, 2007. As of the time of the writing of these notes, more than 1,000 different people have filed more than 2,750 documents through ECF. The court typically receives 50 to 60 documents a day through the system. Filers have used the system at all times of the day and night and on holidays and weekends, as well.

Full information about ECF, including the court's Administrative Order setting out the rules and procedures for electronic filing, can be found at the court's web site. The site also has information about PACER and CM/ECF registration and contains a list of the types of documents which can be filed using the system. Counsel should note that use of ECF is mandatory for all attorney filers, and they should register and become familiar with the system as soon as possible.

Several other appellate courts plan on going live on the case management system later this year. But, none of these courts plan on implementing electronic case filing until sometime in 2008. Counsel who practice in other circuits should follow those courts' web sites for information about their implementation plans.

Fall Hearing Schedule

The court has established the following dates and places of holding court for the Fall portion of the 2007-2008 terms of court.

September 24-28	Four Divisions in St. Louis, Missouri
October 15-19	Two Divisions in St. Louis and One Division in Kansas City
November 12-16	Three Divisions in St. Louis and One Division at St. Thomas School of Law in Minneapolis
December 1-14	Two Divisions in St. Louis and One Division in Omaha
January 14-18	Four Divisions in St. Louis.

ASSOCIATION NEWS

Seminar Provided Unique Opportunity for Attorneys to Question Judges for a Change

Eighth Circuit judges took their turn in the hot seat at a CLE event sponsored by the Eighth Circuit Bar Association on September 24, 2007, at the Thomas F. Eagleton United States Courthouse in St. Louis. The 130 attendees split into small groups, with each group being "hosted" by one of nine Eighth Circuit judges who agreed to answer questions from the attorneys. The questions and discussions ranged from such topics as "what's the biggest mistake an attorney can make during oral argument?" to "how much time do judges spend reviewing the record?" Attorneys appreciated the opportunity to ask candid questions of the judges about particular areas of practice as well as to learn how the judges interact with each other in the give and take of deciding cases and writing opinions. The attorneys in Judge Gruender's group were surprised to learn that the judge reads upwards of 3,000 pages of briefs to prepare for one court week sitting. Attorneys also saw the lighter side of the judges, not always evident on the bench. "Judge Smith has a great sense of humor," commented one attorney from his group.

The CLE event also included a one-hour session presented by Michael Gans, Eighth Circuit Clerk of Court, on the ins and outs of the circuit's newly-implemented case management/electronic case filing (CM/ECF) program. Gans walked the group through the steps of getting registered and filing documents using the CM/ECF system. The Eighth Circuit is the first circuit court to require electronic filing, which is now mandatory for attorney filings. The only documents not currently accepted electronically are documents initiating a proceeding, petitions for review filed in the first instance in the court of appeals, CJA vouchers, briefs, and appendices. Gans explained that once district court records are housed at a permanent internet home so that briefs can be hyperlinked to the record, he hopes that electronically-filed briefs and appendices will soon follow. Gans noted that paper briefs will still be required for the foreseeable future, as judges often read briefs at home or on airplanes. Documents can be filed through CM/ECF at all hours of the day, with many filings coming into the court around 3:00 or 4:00 a.m. Documents are dated when received by the system, so attorneys can file up to midnight of the due date for a filing, although Gans warned against waiting to the very last minute. The session provided valuable insight and practical tips for attorneys new to the CM/ECF system.

The event, sponsored by local law firms Armstrong Teasdale, Bryan Cave, and Thompson Coburn, concluded with a drink and hor d'oeuvre reception in the en banc courtroom foyer on the 28th floor, where attorneys had additional opportunities to mingle with the judges.

The seminar has been approved for 2.4 hours of CLE credit in Missouri, 2 hours of CLE in Iowa (IA activity #45773), and 2 hours of standard CLE credit in Minnesota. Attendees from other states may contact an Eighth Circuit Bar Association board member for further information about qualifying for CLE in other states.

HIGHER AUTHORITY

Supreme Court Upholds Eighth Circuit Judgment Setting Aside a Capital Sentence in *Roper v. Weaver*, 127 S. Ct. 2022 (2007)

On May 21, 2007, in a 6–3 decision, the Supreme Court dismissed as improvidently granted the writ of certiorari in *Roper v. Weaver*, 127 S. Ct. 2022 (2007). The Court originally granted certiorari to decide “whether the Court of Appeals had exceeded its authority under 28 U.S.C. § 2254(d)(1) by setting aside a capital sentence on the ground that the prosecutor’s closing statement was ‘unfairly inflammatory.’” The Court’s concern in granting cert had been whether the Eighth Circuit applied the more stringent standard of review mandated by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) consistent with the Court’s interpretation of AEDPA. According to the Court, circumstances persuaded it that “dismissal of the writ is the appropriate manner in which to dispose of this case.”

The Court’s decision affirmed the Eighth Circuit’s ruling. The defendant, William Weaver, was sentenced to death in the murder of Charles Taylor—a witness in a federal drug trial. In the sentencing phase of the murder trial, then-St. Louis County Prosecuting Attorney George R. “Buzz” Westfall “compared the juror’s role in sentencing to that of a soldier who knows he has a duty to kill when he sees his friend killed on the battlefield.” In addition, Westfall repeatedly urged the jury to consider their decision as a part of the larger war on drugs. The Eighth Circuit overturned Weaver’s death sentence, holding that Westfall’s comments were improper. The State of Missouri appealed, arguing that Weaver’s appeal should be governed by AEDPA—a 1996 law that limits appeals in capital cases.

The Court upheld the Eighth Circuit’s ruling based on procedural grounds. The Court concluded that it had to dismiss the appeal so that Weaver’s sentence conformed to similar cases. According to the Court, “[t]he argument made by the prosecutor in this case was essentially the same as the argument that he made in two other cases—one which involved respondent’s codefendant.” In both of those cases, the defendant received the death penalty and filed a petition seeking federal habeas relief before AEDPA became effective. The State of Missouri never questioned “the propriety of relief in the other two cases because it was clear at the time, as it is now, that AEDPA did not apply to either of them.” The Court declined to decide whether the “unusual procedural history” of the case led to the conclusion that AEDPA did not apply. Instead, the Court found “it appropriate to exercise [its] discretion to prevent these three virtually situated litigants from being treated in a needlessly disparate manner, simply because the District Court erroneously dismissed respondent’s pre-AEDPA petition.”

Supreme Court Upholds Federal Abortion Ban; Reverses Eighth Circuit

A divided Court, in a 5–4 decision, upheld the Partial-Birth Abortion Ban Act of 2003 in *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007). The ruling came in the consolidated cases of *Gonzales v. Carhart* (05-380) and *Gonzales v. Planned Parenthood* (05-1382). In No. 05-380, four physicians brought an action against the United States Attorney General, challenging the constitutionality of the Act on its face. The United States District Court for the District of Nebraska held the Act unconstitutional and enjoined enforcement of the Act. On appeal, the Eighth Circuit affirmed. In No. 05-1382, Planned Parenthood Federation of America, Inc. also facially attacked the Act. The United States District Court for the Northern District of California invalidated the statute and granted a permanent injunction against its enforcement. The Ninth Circuit affirmed. The Court granted certiorari.

Justice Anthony M. Kennedy authored the majority opinion “in the first-ever decision by the Court to uphold a total ban on a specific abortion procedure....” The majority upheld the law as written, stating that the lawsuits challenging the Act on its face should not have been allowed in court “in the first instance.” According to the majority, the appropriate way to challenge the Act, if an abortion ban is claimed to harm a woman’s right to abortion, is through an as-applied challenge. Justice Kennedy explained that an as-applied challenge:

is the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used. In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack.

Justice Kennedy assumed that the prohibition in the Act would be unconstitutional “if it ‘subject[ed] [women] to significant health risks.’” But, he also noted that “[w]hen standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations.”

The majority refused to “uphold the Act on the basis of the congressional findings alone.” Instead, the majority explained that, while it “review[s] congressional factfinding under a deferential standard, [it] d[id] not in the circumstances here place dispositive weight on Congress’[s] findings.” According to the majority, “[t]he Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.”

In response, the dissenters argued that the majority was “walking away from the defense of abortion rights that it had made since the original *Roe v. Wade*” decision. The majority, however, did not overrule *Roe v. Wade*, as some of the filings before the Court had urged. Speaking for the dissenters, Justice Ruth Bader Ginsburg announced in the courtroom that the ruling was “an alarming decision” that refuses “to take seriously” the Court’s 1992 decision reaffirming most of *Roe v. Wade* and its 2000 decision in *Stenberg v. Carhart* striking down a state partial-birth abortion law. Justice Ginsburg commented that “the Court’s opinion tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists. For the first time since *Roe*, the Court blesses a prohibition with no exception protecting a woman’s health.” She also stated that the Act “and the Court’s defense of it cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women’s lives. A decision of the character the Court makes today should not have staying power.” According to Justice Ginsburg, the majority offered “flimsy and transparent justifications” for upholding the Act. She also criticized the majority “for its use of ‘abortion

doctor’ to describe specialists who perform gynecological services, ‘unborn child’ and ‘baby’ to describe a fetus, and ‘preferences’ based on ‘mere convenience’ to describe the medical judgments of trained doctors.” She finally commented, “Ultimately, the Court admits that ‘moral concerns’ are at work, concerns that could yield prohibitions on any abortion.”

Chief Justice John Roberts, Justice Samuel A. Alito, Justice Antonin Scalia, and Justice Clarence Thomas joined Justice Kennedy in the majority, while Justice Stephen G. Breyer, Justice David H. Souter, and John Paul Stevens dissented with Justice Ginsburg. In a separate opinion written by Justice Thomas and joined by Justice Scalia, Justice Thomas reiterated his view “that the Court’s abortion jurisprudence...has no basis in the Constitution.”

Defendant in Claiborne Sentencing Case Dies; Supreme Court Replaces *United States v. Claiborne* with *United States v. Gall*

On June 4, 2007, in *Claiborne v. United States*, 127 S. Ct. 2245 (2007), the Supreme Court vacated the Eighth Circuit’s judgment in *Claiborne* as moot after learning that the petitioner died in a robbery incident in St. Louis, Missouri, on May 30, 2007. The Court had granted certiorari in *Claiborne* to determine (1) whether the district court’s below-Guidelines sentence was reasonable and (2) whether it is consistent with *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005), to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances.

Subsequently, on June 11, 2007, the Court agreed to take a case on the same Guidelines issue that the Court had been considering in *Claiborne*. The Court granted certiorari in *Gall v. United States*, 127 S. Ct. 2933 (2007), to determine whether, when determining the “reasonableness” of a district court sentence under *United States v. Booker*, 543 U.S. 220 (2005), it is appropriate to require district courts to justify a deviation from the United States Sentencing Guidelines with a finding of extraordinary circumstances.

The Court heard oral arguments in *Gall* on Tuesday, October 2, 2007.

Supreme Court Reverses Eighth Circuit in Federal Officer Removal Case

The Supreme Court, in a unanimous decision, ruled that a company that conducts federally man-

dated tests on its products is not “acting under” a federal “official.” In *Watson v. Philip Morris*, 127 S. Ct. 2301 (2007), consumers brought a putative class action in state court against a cigarette manufacturer, alleging that the manufacturer designed its cigarettes to deliver more tar and nicotine to smokers than its use of the labels “light” and “lowered tar and nicotine” suggested, in violation of the Arkansas Deceptive Trade Practices Act. The action was then removed to federal court based on a “federal officer removal” law dating back to the early 19th Century. Philip Morris relied on the law, claiming that it was “acting under” the Federal Trade Commission’s advertising regulation when it shifted the lawsuit to federal court. The district court denied the consumers’ motion to remand to state court, and the Eighth Circuit affirmed the district court.

The Court reversed the Eighth Circuit, stating that no evidence existed “of any delegation of legal authority from the FTC to the tobacco industry to undertake testing on the Government agency’s behalf, or evidence of any contract, payment, employer/employee relationship....The usual regulator/regulated relationship cannot be construed as bringing Philip Morris within the statute’s terms.”

Supreme Court Affirms Eighth Circuit Judgment Allowing Companies To Seek Recovery of Costs for Cleanups

The Court unanimously affirmed the Eighth Circuit in *United States v. Atlantic Research Corp*, 127 S. Ct. 2331 (2007). The issue presented in Atlantic was whether a party that is potentially responsible for the cost of cleaning up property contaminated by hazardous substances under CERCLA—but cannot sue for contribution under § 113 of the Act—can bring an action against another potentially responsible party under § 107.

The Court explained that the plain language of § 107 clearly grants a right of recovery to Atlantic Research, which retrofitted rocket motors for the United States Department of Defense in the 1980s, resulting in the contamination of soil and groundwater at the government site. Atlantic Research voluntarily investigated and cleaned the contaminate site at its own expense. It subsequently sued the United States in 2002 to recoup some of the cost.

The United States argued that § 107 expressly limits availability of cost recovery to entities other than potentially responsible parties (PRP). The Court rejected this argument, finding that it made “little textual sense.”

Supreme Court Holds That Strict Standard Applies in Habeas Proceeding

In another unanimous decision, the Court held in *Fry v. Piller*, 127 S. Ct. 2321 (2007), that federal courts must apply the “substantial and injurious effect” standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), in a federal habeas proceeding when considering the prejudicial effect of a constitutional error in a state criminal trial.

A jury had convicted John Fry in 1995 of shooting James and Cynthia Bell. At trial, Fry attempted to offer the testimony of Pamela Maples, who was going to testify that she had heard Anthony Hurtz discussing homicides resembling the murder of the Bells. The state trial court excluded the testimony, concluding that insufficient evidence existed to link the incidents to the Bells’ murder. Following Fry’s conviction, he appealed to the California Court of Appeal, arguing, inter alia, that the state trial court’s exclusion of Maples’s testimony deprived him of a fair opportunity to defend himself. Without directly addressing Fry’s argument, the California Court of Appeal held that the state trial court did not abuse its discretion in excluding Maples’s testimony under California’s evidentiary rules. At no time did the state appellate court identify which harmless-error standard it was applying in finding that Fry suffered “no possible prejudice.” The California Supreme Court subsequently denied discretionary review. Thereafter, a federal district court denied habeas relief, concluding that even though the state trial court erred in excluding Maples’s testimony, there was an insufficient showing that the exclusion resulted in a “substantial and injurious effect” on the jury verdict. The Ninth Circuit affirmed.

The question presented to the Court was “whether a federal habeas court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the ‘substantial and injurious effect’ standard...when the state appellate court failed to recognize the error and did not review it for harmlessness under the ‘harmless beyond a reasonable doubt standard’ set forth in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967).” The Court held that, in 28 U.S.C. § 2254 proceedings, federal district courts must review the prejudicial impact of a constitutional error a state-court criminal trial under the “substantial and injurious effect” standard, regardless of whether the state appellate court recognized the error and reviewed it under *Chapman*.

A Divided Supreme Court Holds That Federal Appeals Courts Do Not Have Authority To Consider Appeal Filed After Time for Filing Notice of Appeal Had Expired, Even if District Court Had Allowed Appeal to Be Filed

In *Bowles v. Russell*, 127 S. Ct. 2360 (2007), the Court split 5–4 in holding that federal appeals courts lack the authority to consider an appeal that was filed after the time for filing a notice of appeal had expired, even if a district court has allowed the appeal to be filed outside of such limits.

Keith Bowles was convicted in 1999 for participating in the beating death of Ollie Gipson. After Ohio courts upheld his conviction and 15-years-to-life sentence, Bowles sought review in federal district court on September 5, 2002. Four days later, the district court denied Bowles’s request. Bowles then had 30 days to file with the district court a notice of appeal to the Sixth Circuit—a deadline that Bowles missed. Then, on December 12, 2003, Bowles asked the district court to reopen the period during which he could file a notice of appeal. The district court was permitted, under the rules, to extend the filing period for 14 days from the day that it granted the order to reopen. The district court granted the order on February 10, 2005; however, instead of giving Bowles until February 24, 2005, to file his appeal, the district court gave him until February 27, 2005. Bowles filed his notice on February 26, 2005. The State of Ohio asked the Sixth Circuit to reject Bowles’s appeal, arguing that his failure to meet the 14-day deadline under the federal rules voided his request for federal court review. The Sixth Circuit rejected Bowles’s appeal, concluding that the 14-day limit was “mandatory and jurisdictional” and incapable of being extended by a federal district court.

Justice Thomas, writing for the majority, concurred with the Sixth Circuit, determining that statutory restrictions on the timing of appeals limit federal court jurisdiction. “Jurisdictional treatment of statutory time limits makes good sense. Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them.”

Supreme Court To Decide Dispute Over the Wide Disparity in Punishment Between Crack Cocaine Crimes and Offenses Involving Cocaine Power

On October 2, 2007, the Supreme Court heard oral arguments in *Kimbrough v. United States*, 06-6330. At issue in *Kimbrough* is the long-standing

dispute over the wide disparity in punishment for crack cocaine crimes and offenses involving cocaine powder—a 100 to 1 ratio. The questions presented in *Kimbrough* are as follows:

(1) In carrying out the mandate of § 3553(a) to impose a sentence that is “sufficient but not greater than necessary” on a defendant, may a district court consider either the impact of the so-called “100:1 crack/powder ratio” implemented in the U.S. Sentencing Guidelines or the reports and recommendations of the U.S. Sentencing Commission in 1995, 1997, and 2002 regarding the ratio?

(2) In carrying out the mandate of §3553(a) to impose a sentence that is “sufficient but not greater than necessary” upon a defendant, how is a district court to consider and balance the various factors spelled out in the statute, and in particular, subsection (a)(6), which addresses “the need to avoid unwarranted disparity among defendants with similar records who have been found guilty of similar conduct”?

The Eighth Circuit has already held, in *United States v. Spears*, 469 F.3d 1166, 1178 (8th Cir.2006), that a district court may not depart downward from the Guidelines based solely on the categorical rejection of the Guidelines’ 100 to 1 ratio for offenses involving powder cocaine and “crack” cocaine respectively.

Supreme Court Rules That Federal Criminal Sentence Within the Guidelines May Be Presumed To Be Reasonable on Appeal

In *Rita v. United States*, 127 S. Ct. 2456 (2007), the Court held that sentences within the Guidelines range may be presumed “reasonable” by appellate courts. While the vote in *Rita* was 8 to 1, suggesting “broad agreement among the justices, there were actually serious differences, expressed in concurring opinions, over how this decision fits within the court’s recent insistence that juries and not judges make the crucial findings that determine a defendant’s sentence.”

Justice Stephen Breyer, writing for the majority, stated that the presumption of reasonableness was “not binding” and could be overcome. In addition, the Court did not require appellate courts to apply a presumption of reasonableness. Furthermore, the Court reminded federal district courts that they remain free, under *Booker*, to impose sentences that depart from the Guidelines, as long as they explain the sentence and reasoning.

Justice David H. Souter dissented, stating that the presumption of reasonableness undermined the defendant's Sixth Amendment right to a jury trial.

Justices Antonin Scalia and Clarence Thomas concurred in the case's outcome but refused to sign the majority opinion, "which they said 'reintroduced the constitutional defect that Booker purported to eliminate.'" According to Justices Scalia and Thomas, the Court had "broken its promise" to eliminate judicial fact-finding from sentencing.

Supreme Court Strikes Down School Integration Plans

The Supreme Court divided 5-4 in striking down voluntary integration plans in the public schools of Seattle and Louisville in *Parents Involved in Community Schools v. Seattle School District*, 127 S. Ct. 2738 (2007). Writing for the majority, Chief Justice John Roberts stated that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." The majority concluded that the school districts "failed to provide the support necessary" for the proposition that "there is no other way to avoid racial isolation in the school districts."

Justice John Paul Stevens, dissenting, stated that there was a "cruel irony" in the majority's claim that it was remaining faithful to *Brown v. Board of Education*, 394 U.S. 294 (1955), because it involved a rewriting of the history "of one of this Court's most important decisions." According to Stevens, who joined the Court in 1975, "no Member of the Court" at that time "would have agreed with today's decision."

Justice Kennedy concurred, declining to join the majority opinion as it discussed the lack of a compelling interest in achieving racial balance in public school classrooms. Justice Kennedy noted that ending racial isolation may sometimes be a compelling interest in public education and can be pursued with race as "one component" of the plan to achieve racial diversity.

ISSUES ON APPEAL

Eighth Circuit Issues En Banc Decision in Police Dog Case

In *Szabla v. City of Brooklyn Park, Minnesota*, 486 F.3d 385 (8th Cir. 2007) (en banc), the issue presented to the Eighth Circuit was whether the City of Brooklyn Park was liable to a homeless person who was bitten by a police dog and then temporarily arrested.

In the early morning hours of August 17, 2007, police officers from the City of Crystal responded to a report that an automobile had struck a tree near the Becker Park. The officers found car, which was abandoned. The car's windshield was

shattered and had an imprint of where a person's head had struck it. The officers began searching for the driver and requested assistance from the City of Brooklyn Park, which had a canine unit. Officer Steven Baker and his canine, Rafco, were dispatched to the scene.

When Officer Baker and Rafco arrived at the abandoned car, Officer Baker discovered a screwdriver—which he thought could have been used as a burglary weapon—and observed "property" in the car's backseat—which he believed could have been the fruits of a burglary. According to Officer Baker, because the officers did not know whether they were looking for a criminal suspect or an innocent injured person, he gave Rafco the command to "track"—a command for him to apprehend or bite the individual he was tracking. Rafco acquired a scent from the crash automobile. Officer Baker had Rafco on a 15-foot leash but provided Rafco with approximately a six-foot lead. He never shouted a warning that a police dog was in the area. Rafco took Officer Baker through the park to a shelter within the park. Id. Once Rafco entered the shelter, he bit Henry Szabla, who had been asleep in the shelter. Szabla kicked Rafco, and Rafco bit him again. Officer Baker ordered Szabla to show his hands and then instructed Rafco to release Szabla. Szabla was then temporarily arrested. Within two minutes, officers released Szabla after verifying that he was not involved in the accident. Szabla suffered 23 punctures on his legs and hips.

Szabla brought a municipal liability claim under § 1983 against the City of Brooklyn Park. The district court ruled that (1) Szabla failed to identify which of Brooklyn Park's policies was allegedly unconstitutional; (2) the isolated incident of Rafco biting Szabla did not support a claim that the City of Brooklyn Park acted with deliberate indifference by failing to adequately train its officers; and (3) Szabla had not raised an argument as in *Kuha v. City of Minnetonka*, 365 F.3d 590 (8th Cir. 2003), that the City was liable for adopting a policy that authorized police officers to use a canine to bite and hold a suspect but did not mandate that the officer give an advance warning. A panel of the Eighth Circuit reversed the district court, concluding that Szabla had adequately raised a *Kuha* claim.

In a 8-4 decision, the Eighth Circuit, sitting en banc, held that: (1) the City's policies regarding police use of canines were not unconstitutional under the Fourth Amendment; (2) the city did not act with deliberate indifference to the constitutional rights of its citizens by failing to train its officers working with canines to give advance warnings before commanding the canine to bite and hold the suspect; and (3) the city's failure to adopt a policy mandating a canine deployment warning did not cause the plaintiff's injury. The court's ruling abrogated the circuit's previous case of *Kuha*.

Eighth Circuit Holds That Missouri's Legal Injection Protocol Does Not Violate the Eighth Amendment

On July 5, 2007, the Eighth Circuit ruled in *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007), that Missouri's lethal injection protocol is not cruel and unusual punishment in violation of the Eighth Amendment. Last year, a federal district court placed a moratorium on Missouri executions after hearing testimony from "John Doe 1," the State of Missouri's longtime execution doctor. The physician, later identified as Dr. Alan Doerhoff, "testified that he is dyslexic, did not always follow the same procedures, and did not record the actual amount of anesthetic delivered and sometimes used only half the suggested five-gram dose." Dr. Doerhoff stated that he monitored the "anesthetic depth" of the dying inmate by observing the inmate's facial expressions through a window. The district court ruled that an unnecessary risk of pain and suffering existed because the protocol was "subject to change at a moment's notice" and because "Doerhoff appeared to have 'total discretion,' with 'no checks and balances or oversight, either before, during or after the lethal injection occurs.'" The district court "demanded the state to create a written protocol, use a board-certified anesthesiologist, administer at least five grams of anesthetic and create a better way to monitor consciousness." After the district court twice rejected the Missouri Department of Corrections' proposed measures, the State of Missouri appealed.

The Eighth Circuit panel, composed of Judges David R. Hansen, William Jay Riley, and C. Arlen Beam, determined that the Constitution does not require a "medically optimal" setting or a doctor for an execution. Judge Hansen, writing for the unanimous panel, acknowledged concerns about the protocol but stated, "In each of the past six executions, however, death occurred in five minutes or less from the time the first chemical was administered, and there was not a scintilla of evidence that any prisoner ever suffered any pain other than what was necessary to access to the prisoner's circulatory system through the insertion of the needed intravenous lines." "[T]he Constitution protects only against the wanton and unnecessary infliction of pain." According to the court, the State of Missouri's protocol "renders any risk of pain far too remote to be constitutionally significant."

FOOTNOTES

United States Sentencing Commission Details Federal Sentencing Trends in 2006 Sourcebook of Federal Sentencing Statistics

On May 30, 2007, the United States Sentencing Commission released the 2006 Sourcebook of Federal Sentencing Statistics. This publication includes sentencing profiles of judicial districts, plea and trial rates by district and circuit, information about organizational defendants, detailed information on guideline departures, and data on appeals of sentencing decisions.

The statistics demonstrate that, for fiscal year 2006, federal courts sentenced 72,585 cases under the Guidelines—a 0.2% increase over fiscal year 2005. In addition, 86.7% of all federal offenders were men. The average age of offenders was 34.8 years. Of all the defendants sentenced under the Guidelines, 36% were convicted of drug offenses. Cocaine accounted for the largest number of drug violations—43.9%.

Display Commemorating 50th Anniversary of Little Rock's Desegregation Case

The Eighth Circuit Library has just completed a display to commemorate the 50th anniversary of Little Rock's desegregation case and integration crisis. When Arkansas's legislature and Governor Orval Faubus fought integration following the Supreme Court's ruling in *Brown v. Board of Education*, it took rulings from U.S. District Court Judge Davies of the District of North Dakota, sitting in Arkansas by designation, and the force of Army troops sent by President Eisenhower to allow nine African American students to walk through the doors of Central High School in September 1957. It took rulings by the Eighth Circuit Court of Appeals and the United States Supreme Court (*Cooper v. Aaron*, 358 U.S. 1) to keep them there the following year, sending the message to all states that the federal courts would not tolerate state refusal to comply with desegregation. Duplicate copies of the display will be shown simultaneously in the Little Rock and Fargo federal courthouses in September 2007. In October, the display will be in the Fargo and St. Louis federal courthouses.

Circuit Librarian Becomes President of National Law Library Organization

Ann Fessenden, Eighth Circuit Librarian since 1984, has recently become President of the American Association of Law Libraries (AALL). The American Association of Law Libraries was founded in 1906 to promote and enhance the value of law libraries to the

legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information. Today, with approximately 5,000 members, the Association represents law librarians and related professionals who are affiliated with a wide range of institutions: law firms; law schools; corporate legal departments; courts; and local, state and federal government agencies.

Fessenden will serve as President until July, 2008, and in that role will represent AALL at a number of law and library organizations' meetings, including the upcoming American Bar Association meeting in San Francisco and the Association of American Law Schools meeting in January in New York.

Professor Jeffrey B. Morris Publishes Full-Length History of the Eighth Circuit

After years of hard work and diligent scholarship, Professor Jeffrey B. Morris' fine history of the United States Court of Appeals for the Eighth Circuit has recently been published by the University of Minnesota Press.

In *Establishing Justice in Middle America*, Professor Morris chronicles the history of the Eighth Circuit from its founding in 1866. The history explores the development of the diverse region that makes up the Eighth Circuit, provides fascinating portraits of the judges who have served on this Court, and synthesizes the important cases they have decided over the years.

Extraordinarily qualified to undertake this important project, Professor Morris is a member of the Touro Law School faculty and an accomplished legal historian with more than 15 books and numerous other publications to his credit. Professor Morris has been particularly accomplished in publishing court histories. His works include, *Calmly to Poise the Scales of Justice: A History of the Courts of the District of Columbia Circuit*, and *Federal Justice in the Second Circuit*.

Professor Morris was engaged to write this history by the Court of Appeals Branch of the Historical Society of the United States Court in the Eighth Circuit. This book is the product of years of research, personal interviews of many of the judges, and an insightful and experienced analysis of the development of the law in the Eighth Circuit.

This fine history of the Eighth Circuit is graced by a forward written by the Honorable William H. Webster, well known to the Nation for his distin-

guished service as a director of both the Federal Bureau of Investigation and the Central Intelligence Agency. Judge Webster is a native of Missouri, former district U.S. Attorney for the Eastern District of Missouri, former district judge of the Eastern District of Missouri and, of course, served five years as a circuit judge of the Eighth Circuit before he was called to service in Washington, D.C.

Establishing Justice in Middle America is available for purchase online through the Minnesota of University Press, www.upress.umn.edu.

CM/ECF On Appeal— The Eighth Circuit Affirms

“Because things are the way they are, things will not stay the way they are.” —Bertolt Brecht

Federal appellate courts are built on precedent and tradition. Bowties and fountain pens are commonplace among appellate judges, whose every decision is made with close attention to precedent. Many practitioners at the appellate level still prefer to research in the comfort of a library rather than hunched over a laptop. But tradition does not become wiser by refusing to acknowledge the present.

In the spirit of advancement, the Eighth Circuit Court of Appeals took a big step recently, embracing the significant technological changes that saturate our world. In December 2006, the 8th Circuit became the first federal court of appeals to officially employ the case management portion of the Federal Judiciary's Case Management/Electronic Case Files (CM/ECF) system. On June 1, 2007, the court initiated the electronic filing portion of the system. Since June 1, almost 5,000 attorneys have registered to become authorized CM/ECF filers in the Eighth Circuit, and more than 1,000 attorneys have actually made an electronic filing. As of late August, 2007, more than 4,000 separate documents had been filed through CM/ECF, and the court had sent more than 185,000 electronic notices to court staff, lawyers and other case participants.

Through CM/ECF, information is provided to the courts in a radically different fashion than with traditional paper documents. Today, 8th Circuit practitioners can file a variety of case documents in electronic format via the Internet. CM/ECF-equipped courts provide not only case information access to the public, but allow electronic access to the record itself.

This article analyzes the 8th Circuit's CM/ECF implementation process, celebrates its successes, and identifies several areas for change or improvement.

Electronica: The Exception Or The Rule?

Over the last decade, the efforts of the Administrative Office of the United States Courts and the Federal Judicial Center to expand electronic access to federal courts have produced steady progress. Today, the Public Access to Court Electronic Records (PACER) system provides public Internet access to lists of cases, parties, participants (including judges, attorneys, and trustees), a chronology of case events, and a wide variety of other information. See <http://pacer.psc.uscourts.gov/pacerdesc.html>. The PACER system serves as an electronic window into the federal courts.

In recent years, the federal courts have also implemented the CM/ECF system. CM/ECF replaces the courts' old docketing and case management systems, providing an electronic filing system via the Internet. Currently, 98 percent of all federal courts are participants in the CM/ECF program, including 93 district courts, 93 bankruptcy courts, the Court of International Trade, the Court of Federal Claims, the Court of Appeals for the 8th Circuit, and the Bankruptcy Appellate Panels for the 8th and 10th Circuits. One Hundred percent of the 8th Circuit's district courts use CM/ECF. Over 31 million cases are in the CM/ECF system; more than 300,000 attorneys and others have filed documents over the Internet. See <http://pacer.psc.uscourts.gov/documents/press.pdf>. In most courts, electronic filing is mandatory for attorneys, with limited exceptions, and optional for pro se filers.

Anyone familiar with the appellate process appreciates that appeals are dramatically different than trial court proceedings. In some ways, the mechanics and processes of an appeal would seem uniquely suited for the electronic environment. Appeals involve a large volume of paper, to be sure, but that volume is strictly regimented in form and content. The primary presentations to the court—the brief and well-constructed appendix—are based upon a record narrowly circumscribed by clear rules. The raw material of appeals—the record below—would seem a natural for electronic compilation and presentation.

Moreover, the nature of the appellate decision-making process would seem to be well served by an electronic case file system. The collegial decision-making process of an appellate court often requires three or more judges to simultaneously access the record and file information. These judges are often widely dispersed geographically. In such circumstances, an electronic record would seem nearly ideal.

The fit is not, however, perfect. Circuit courts of appeal encompass several district courts, and take appeals from not only those courts, but from administrative agencies as well. The federal CM/ECF program allows some local tailoring of practices and procedures, along with the choice of a number of options. While all 8th Circuit district courts currently use CM/ECF, each district has the ability to choose slightly different approaches and versions of software to address unique concerns regarding use of the system locally. This flexibility adds to the complexity of a circuit-wide system.

Logistics and rules aside, the 8th Circuit had to address an even more fundamental issue: were the constituents of the court (judges, staff, lawyers who appear before the court) ready and willing to make a commitment to the considerable effort required in implementing the CM/ECF system? While the court's judges and staff believe the answer to this question is "yes," the question remains: are all of the important players convinced that CM/ECF on the appellate level will be worth the time and effort?

The Court's Perspective

For the Eighth Circuit's Clerk's office, the June 1, 2007 inauguration of electronic filing represented the culmination of more than six years of effort by the Administrative Office and the appellate courts. From gathering design requirements to programming and testing, the development of the appellate version of CM/ECF has been a cooperative effort, with the appellate courts assuming a large role in the development process. As a result, the appellate court system is both more flexible and more complex than either the district or bankruptcy court CM/ECF systems.

The collaborative nature of the project is reflected in the clerk's office's attempts to involve the bar and the appellate judges in the design process. The effort began in September, 2004, when the court invited representatives of the bar and the district and bankruptcy courts to meet with its judges and staff to outline an implementation strategy, and the efforts continued through May, 2007, when the court looked to the bar for assistance in testing its registration and filing systems. The survey described in this article reflects the court's willingness to engage in an ongoing dialogue with the bar to develop and improve the system, and these efforts will continue in the future when the court adds its own customer satisfaction survey tools to the system.

CM/ECF implementation is by no means complete in the Eighth Circuit, as two critical components of the appeal process have yet to be ad-

dressed – records on appeal and briefs. The court made a conscious decision to postpone implementation of an electronic record on appeal for two reasons. First, a significant modification to the district court CM/ECF had to be made in order to create permanent Internet Protocol (IP) addresses for every district court filing. Without a permanent IP address for each document, it is impossible to create hyperlinks to the district court record in briefs and other appellate court filings. This software upgrade has been completed, and district courts will begin to install the software over the next year. Included in the upgrade are new tools which will permit court staff and attorneys to log onto the district court system and create an electronic or “virtual” record on appeal by simply clicking boxes on the docket sheet.

The court also delayed implementation of the electronic record on appeal because the federal judiciary had been unable to resolve the question of how to make transcripts available online without impacting court reporter revenue. A compromise solution will be proposed to the Judicial Conference this fall, and the appellate courts are confident that electronic versions of the transcripts will be available to the parties on appeal in a time frame which will prevent any delay in the timely and efficient briefing of the appeal.

Within the next year, the Eighth Circuit intends to adopt procedures which will permit the creation of an electronic record on appeal and which will require attorneys to include hyperlinks to the record in their briefs. The procedures may also dispense with the need for attorneys and district court clerks to create a paper record for use in the appeal. Any administrative orders or rules governing the procedures for briefs and records will be developed with significant input from the bar.

The Practitioner’s Perspective

With the assistance of the 8th Circuit Bar Association, we conducted an informal survey of members regarding their interaction with CM/ECF. Respondents were asked questions relating to their prior e-filing experience, their satisfaction with the training materials provided for the Eighth Circuit CM/ECF system, and general impressions regarding that system.¹ What follows is a synopsis of the results.

Experience. While CM/ECF is of first impression at the appellate level, the national rollout of the system started in early 2001 in the bankruptcy courts. District courts began using it in May 2002. Nearly nine out of every ten survey respondents had experienced e-filing in various courts throughout the

country. Three-fifths of those surveyed had used the 8th Circuit e-file system,² indicating clearly that it is not foreign to practitioners.

Training. The 8th Circuit Clerk’s office encourages all filers to review CM/ECF online training materials available on the 8th Circuit’s CM/ECF Web site, <https://ecf.ca8.uscourts.gov/cmecfTraining/LessonsMenu.html>. The five electronic learning modules introduce attorneys to the system and walk them through the basic steps for filing three kinds of appellate documents: appearances, motions, and responses. The modules have audible content, but users can also view and print transcripts for future reference. Each module takes 10 to 15 minutes.

It appears from our survey that the training materials are underutilized. Only 38.8 percent of those surveyed made use of the training available. Those who completed the learning modules, however, were satisfied. Respondents gave the training materials an average ease of use rating of 4.12 (out of 5) and the overall value rating averaged out at 4.15. Notably, almost four-fifths of those who received training or e-filed in the past did not require further assistance when filing their own court documents.

Ninety two point three percent of the respondents offered no suggestions for improving the CM/ECF training materials. Ideas for improved training included changing the layout, reducing the amount of PDF screens, and providing a one page “cheat sheet” for reference.

Issues and comments. Respondents’ feedback regarding 8th Circuit e-filing was not uniform praise. Comments and overall suggestions reveal wrinkles in CM/ECF that are yet to be ironed out or show a lack of understanding on the part of some users as to how the system works and the features it offers. (Hopefully increased use of the training materials and experience will reduce any uncertainty about how the system works.) The Clerk’s Office response to the survey comments appears in brackets.

- The drop-down boxes for document categories could be clearer. *[The court continues to work on refining and clarifying the drop down boxes and a modified version of the drop down boxes will appear this Fall.]*
- There are inconsistencies between the 8th Circuit’s system and those of the district court, leading to confusion *[The systems are different, reflecting changes in programming tools used to build the systems and the different procedures in place in the appellate and district courts. As noted above, the training materials are designed to help reduce any confusion or uncertainty.]*

- No current “proof of filing” is sent out to confirm that documents have been filed with the clerk. [A Notice of Docket Activity is sent to all parties who participate in CM/ECF whenever a filing is made or any other docket activity takes place.]
- The document retains the same name it was given on the e-filer’s private system, now shown publicly in the docket. *[This feature - to show path information - was added at the request of many attorney filers. After receiving this comment, the court has decided to delete all path information.]*
- E-filers’ staff members who receive copies of filings get duplicate e-mails because they receive notices for more than one attorney. *[Attorneys determine who receive notices, and firms can designate one or many attorneys to receive notice. Anyone who enters an appearance in a case will receive Notices of Docket Activity.]*
- The system requires the users to have JAVA, a programming language, loaded on their computers. *[The system uses JAVA to create a secure computing environment, and this requirement cannot be changed. JAVA is free and simple to download from java.com.]*
- The initial page takes too long to download. *[We have continued to work with the Administrative Office of the U.S. Courts to tweak and refine the system, and we believe the system response time has dramatically improved. If users are “stuck” on the opening page, they probably do not have the current version of JAVA on their computers.]*

Along with technical problems, a handful of respondents expressed concern about CM/ECF’s impact on pro se and indigent filers. One individual felt that an e-system is “elitist,” and eliminates human interaction, which courts can provide to those individuals looking for help and advice. The respondent continued, saying that, “The courts no longer see foot traffic, they have become modern mausoleums of justice.” However, CM/ECF is not required for pro se filers. And this survey-taker’s frustration may be misplaced at the appellate level. The appeals process already lacks the personal interface inherent at the district court level. Another respondent noted that “[c]ounsel are now required to provide a level of technological service never addressed by the guarantee of effective assistance.” While this point is well taken, a high-tech society may not be able to afford lawyers, even the most experienced and prominent, who practice in a technological vacuum. And in the end, the cost of filing electronically may be significantly less than the cost of traditional methods,

especially if the court is able to follow through on anticipated changes in production and filing of the record on appeal.

Despite suggested improvements, and the few responses voicing resistance, the 8th Circuit’s implementation of the CM/ECF system appears well received by respondents. They rated the ease of e-filing at 3.93, the clarity of e-filing instructions at 3.82, the availability of assistance at 4.07, and the overall satisfaction at 3.93. Individuals were also pleased with the quality of customer service received at either the PACER Service Center, or the 8th Circuit Court of Appeals Help Desk, rating them at 4.14 and 4.54 respectively.

Here To Stay

The name of the game is no longer implementing and accepting the 8th Circuit’s technological plunge into e-filing. A resounding 91.9 percent of survey takers said they would recommend the process to other attorneys. Now the 8th Circuit’s focus will be fine-tuning the system. As with the district courts, e-filing on the federal appellate level will improve and refine with time. Even as the system grapples with growing pains, filers are seeing the benefits of the electronic information structure. E-filing makes transfers of large amounts of information faster and easier. While there’s no need to rid the appellate world of bowties and fountain pens, we best make room in our world for PDFs and e-signatures. E-filing in appellate courts is here to stay.

NOTES:

1. The survey included three types of questions: yes/no questions; questions that asked the survey taker to rate a certain statement from 1-5, 1 being poor, 5 being excellent; and questions that invite 4d comments.
2. Of the 113 people who responded, 65 had used the 8th Circuit e-filing system. If the individual had not used the 8th Circuit’s system, they did not answer the content specific questions. The majority of the survey reflects the opinions of the 65 responders who were familiar with the 8th Circuit’s system.
3. Appellate Courts that are currently in the process of implementing CM/ECF: 1st Circuit, 2nd Circuit, 3rd Circuit, 4th Circuit, 5th Circuit, 6th Circuit, 7th Circuit, 8th Circuit, 9th Circuit, 10th Circuit, 11th Circuit, D.C. Circuit, 1st Bankruptcy Appellate Panel, 6th Circuit Bankruptcy Appellate Panel, 9th Circuit Bankruptcy Appellate Panel.

EIGHTH CIRCUIT NEWSLETTER

This newsletter is compiled by the communications committee of the Association of the Bar of the United States Court of Appeals for the Eighth Circuit. Comments and suggestions should be addressed to committee chair Tiffany Milligan Brown (TMill720@aol.com).

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In addition, a special thanks goes to Margaret C. Callahan for her contribution to the April 2007 newsletter. Ms. Callahan's contribution to the newsletter was regrettably overlooked in the newsletter. Her dedication and contributions to the newsletter are greatly appreciated.