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Bench Briefs

Just two days after our nation celebrated the life of a "drum major for peace" - i.e., the Rev. Dr. Martin Luther King, Jr., a "drum major for justice" passed away. Eighth Circuit **Senior Judge Theodore McMillian died on January 18** after becoming ill during a dialysis treatment, according to his office and his sister, as reported by the St. Louis Post Dispatch.

Judge McMillian, who served as a judge at various levels for 50 years, grew up surrounded by racism and **broke the color barrier numerous times** as the first African American assistant circuit attorney in the City of St. Louis, appellate judge on the Missouri Court of Appeals for the Eastern District, and Judge for the Eighth Circuit Court of Appeals.

Judge McMillian was born in St. Louis, Missouri, on January 28, 1919. He grew up in an impoverished area but was able to overcome **many adversities** while excelling academically and graduating first in his high school class at Vashon High School.

In keeping with his grandmother's mantra, so to speak, to work hard and get an education, Judge McMillian attended Stowe Teachers College and Lincoln University in Jefferson City, the only accredited public four-year institution open to African Americans in Missouri at that time. He graduated **Phi Beta Kappa** with degrees in mathematics and physics.

After serving in the U.S. Army for four years, Judge McMillian began **law school** at St. Louis University. Judge McMillian's dream had been to become a doctor; but with the quotas for African Americans at medical schools, he would have had to wait five years to begin. Thus, he decided to go to law school instead.

What the medical profession lost, the legal profession gained. Even with working as a janitor to pay his bills, Judge McMillian again excelled academically, serving as associate editor of the school's first law review, graduating **first in his class** in 1949, and becoming the first African American to be inducted into Alpha Sigma Nu, a Jesuit national honor society.

Despite his stellar academic achievements, Judge McMillian found it a Sisyphean task to find a position at any of the law firms in St. Louis. With racial discrimination still pervasive, Judge McMillian continued his life's work of being an advocate for civil rights, establishing the **law firm of Lynch & McMillian** with his classmate Alphonse Lynch.

Four years later, the Honorable Edward L. Dowd hired Judge McMillian as the first African American assistant circuit attorney for the City of St. Louis. Through diligent work as a prosecutor, Judge McMillian in 1956 gained appointment to the St. Louis City Circuit Court, 22nd Judicial District.

As a jurist, Judge McMillian continued his belief in civil rights not only by his words, but by his deeds. As recounted in materials from Judge McMillian's 2003 portrait ceremony, the Judge during this time, with a group of fellow judges, corrections officers, police and civilians, "infiltrated the penal system to see what it was really like to be on the inside." This experience, along with the juvenile cases he

heard, "left an indelible impression" on Judge McMillian; and he "initiated a series of reforms and civic programs designed to help address" the problems he found.

Judge McMillian's reputation as a civil rights advocate was pervasive throughout his tenure as a judge on the Missouri Court of Appeals for the Eastern District, where he served from 1972 to 1978. Then in 1978, Judge McMillian was appointed as the first African American Judge for the Eighth Circuit Court of Appeals. As stated in materials from Judge McMillian's 2003 portrait ceremony, his opinions from his nearly 28 years on the Eighth Circuit bench exemplify his commitment to the law, which was "equaled by his commitment to the people it affects."

Missouri Supreme Court Chief Justice Michael Wolff, during his 2006 State of the Judiciary Address, remarked that Judge McMillian was "a historic figure, an inspiration to those of us who were privileged to know him, and a generous mentor. Through his talents, persistence, civility and sense of humor, Judge McMillian opened doors that had previously had been closed to men and women of his race."

Judge McMillian lived by the creed, "It is more important to be human than it is to be important." Another of his mottos, as set out in a 2003 tribute in the St. Louis School of Law alumni magazine, was "Why waste time on being bitter?"

Indeed, Judge McMillian did not waste time but instead generously gave his time, compassion and heart to the community. He founded the Herbert Hoover Boys and Girls Club, was one of the founders of the anti-poverty agency Human Development Corporation, and was the founder of what is now Legal Services of Eastern Missouri. In addition, he was a frequent speaker/professor at St. Louis University School of Law, actively contributed to and participated with local and national bar associations, and served on several boards.

In 2003 the American Bar Association Commission on Racial and Ethnic Diversity recognized Judge McMillian with its Spirit of Excellence Award.

Judge McMillian was truly a "drum major for justice" for all.

The Eighth Circuit is planning a memorial ceremony for Judge McMillian to be held in St. Louis in April during court week.

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The **importance** of **oral argument** should not be measured simply in terms of whether or not a judge votes differently after argument, a panel of Eighth Circuit judges told a continuing legal education audience in Des Moines in December.

Eighth Circuit **Judges Michael Melloy, Steven Colloton and Duane Benton** heard oral argument in an actual Eighth Circuit case as part of a December 2, 2005, federal practice seminar sponsored by the Iowa State Bar Association. The Judges then took questions – mostly about oral argument – from seminar attendees.

Oral argument, in addition to actually changing a judge's mind, can clarify a judge's thinking when the judge is tentative or "on the fence," Judges Melloy, Colloton and Benton agreed. In addition, they said, oral argument can cause a panel to take a different approach in writing the opinion.

Judge Benton said that the late Eighth Circuit Judge Richard Arnold, based on a survey of his colleagues, concluded that oral argument changes a judge's mind in approximately 12 to 15 percent of argued cases. Judge Benton noted that a change of result is more likely in a case involving a single issue.

Judges Melloy, Colloton and Benton strongly **discouraged** the use of **visual aids** by counsel at oral argument, saying that in their experiences, visual aids are rarely helpful and may even detract from oral argument by distracting counsel from the substance of the argument.

A visual aid may be helpful on the rare occasion when the case involves an exhibit that cannot be depicted in words, the Judges said; however, they find that most attorneys use visual aids instead for important statutory or contractual language. The Judges noted that they can and do turn to relevant appendix and brief pages while on

the bench and can follow important language more easily in that fashion than by trying to read a chart or "blow up" at a distance.

The Judges also spoke a little about their decision-making procedures, noting that unlike the practice in some state courts, the Eighth Circuit **does not assign or draft opinions in advance of oral argument**. The Judges said that as a matter of custom they rarely even discuss the merits of cases with one another in advance of argument, although they may discuss administrative issues such as the need for or proper length of oral argument.

Judge Melloy explained that the clerk's office schedules oral arguments and grants argument, if requested, in almost all cases where both parties are represented by attorneys. The panel of judges to whom the case is assigned, however, may subsequently decide to remove the case from the argument schedule.

The Judges receive a particular month's argument calendar and case materials (briefs and appendix) approximately six weeks in advance. Judges Benton and Colloton said that they split the cases among their law clerks, have "back and forth" with their clerks about those cases, and request additional research by their clerks as needed. Judge Melloy, in contrast, said that he involves his law clerks in advance of argument only about 25 percent of the time, asking for a memo when, for example, there is an unusual subject matter or special question.

Each of the Judges has his law clerks draft opinions some or all of the time, with the approach the clerk is to follow in the draft determined by the Judge in light of the concerns and consensus of the panel at the post-argument conference. The law clerks' drafts, of course, then may be and are extensively rewritten by the Judges.

Judge Melloy emphasized the Court's use of a random method of selecting panels and assigning Judges to those panels. He noted that even the case heard in Des Moines was randomly assigned to the particular panel, in that the case originally was assigned to be argued before the same three Judges during December court week in St. Louis.

Judge Benton, in addition to taking part in the argument and question-and-answer session, served as luncheon speaker at the seminar. He focused in his remarks on his **personal campaign for civility** in the practice of law and reminded attorneys of the definition of a "profession" as: (1) a group (2) pursuing a learned art (3) as a common calling (4) in the spirit of public service.

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Senior District Judge Andrew Bogue of South Dakota sat with the Eighth Circuit as a **visiting judge** for three days in January.

Judge Bogue, who maintains his chambers in Rapid City, assumed the district court bench in April 1970 after a varied career including private practice, service in the U.S. Army JAG Corps, a stint as a state's attorney in Turner County, South Dakota, and experience as a state district court judge.

Judge Bogue first sat with the Eighth Circuit as a visiting judge in 1972; and he sat frequently with the Court during the 1990s. Judge Bogue, however, before January of this year had not sat with the Eighth Circuit since June 2003.

Judge Bogue was chief judge for the District of South Dakota from 1980 until taking senior status in July 1985.

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Digital images of the **portraits** of **Senior Judges** Pasco Bowman and David Hansen and the late Senior Judge Theodore McMillian appear in the 2005 newsletter of the Eighth Circuit Historical Society and can be viewed by accessing the newsletter on the Internet at http://www.ca8.uscourts.gov/library/newsletter2005.html.

For more information about the Society and its newsletter, see the article later in this issue under the "Footnotes" heading.

Association News

Craig Eichstadt of South Dakota took over as **Association president** effective January 1, 2006. Eichstadt replaces Krista Kester of Lincoln, Nebraska, who remains on the Board as past president.

Eichstadt joined the Association, upon its founding in 2003, as the initial director from South Dakota and at the same time served as the Association's initial treasurer. Eichstadt then served as Association secretary in 2004 and as president-elect in 2005. Eichstadt is a deputy attorney general for South Dakota.

Thomas Weaver of St. Louis succeeds Eichstadt as **president-elect** of the Association. Weaver likewise has been a member of the board since the founding of the Association, serving first as director for the Eastern District of Missouri, where he is in private practice, and then moving to an at-large director position.

New board members are Jeffrey Ellis of Little Rock, representing the Eastern District of Arkansas; Diane Bratvold of Minneapolis, representing the District of Minnesota; and Jeremiah Morgan of Kansas City and Julie Cullen of Little Rock as at-large directors. All are in private practice except Cullen, who is with the Arkansas Court of Appeals.

Retiring directors include David Herr of Minneapolis and Tom Sullivan of the University of Arkansas at Little Rock, both of whom also were among the initial directors of the Association.

Herr during his tenure further served as chair of the programs committee. He will be replaced in that position by at-large director Tom Boyd of Minneapolis and Alok Ahuja of Kansas City as co-chairs.

Barry Pickens of Kansas City continues as Association treasurer, while Margaret Callahan of Des Moines continues as secretary.

Directors continuing to serve are Thomas Kieklak for the Western District of Arkansas; Larry Friedman for the Eastern District of Missouri; Diane Kutzko and Angela Campbell for the Northern and Southern Districts of Iowa, respectively; Bob Rossiter for the District of Nebraska; Doug Bahr and Mark Marshall for the Districts of North and South Dakota, respectively; and Lajuana Counts of Kansas City as an at-large director.

Lists of the Association officers and directors, with contact information, are posted on the Association web site at www.law.ualr.edu/eighthcircuitbar.

Time, Place & Manner

The Eighth Circuit in December **abrogated** its **Local Rule 28A(e)(2)** regarding the length of briefs in cases involving **cross-appeals**. The provisions of the former subpart were inconsistent with new FRAP 28.1, which went into effect December 1, 2005.

New FRAP 28.1 collects in one place various briefing and other requirements relating to cross-appeals and files in gaps in the prior FRAP by, for example, establishing the length and timing of cross-appeal briefs. The appellee/cross-appellant's initial brief and the appellant's cross-appeal/reply brief can be longer under FRAP 28.1 than was permissible under former Local Rule 28A(e)(2).

Eighth Circuit Local Rule 28A(e)(1), regarding timing of briefs in cases involving cross-appeals, is consistent with new FRAP 28.1 and remains in effect.

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Eighth Circuit **panels** will **sit** at a number of **law schools** during the early months of 2006, beginning February court week with the two law schools in St. Louis.

Judges William Riley, Michael Melloy and Duane Benton will hear three cases at Washington University School of Law on the morning of February 14 while Judges James Loken and Lavenski Smith and Senior Judge Pasco Bowman will hear three cases at St. Louis University School of Law the next morning.

According to Eighth Circuit Clerk of Court Michael Gans, the Court has sat once a year at Washington University since the opening of that school's new law building about five years ago and has sat once a year at St. Louis University for probably about three years. Gans noted that the Court can readily sit at the St. Louis law schools without significant extra cost.

In late March an Eighth Circuit panel will sit at the University of North Dakota, while in early April a panel will sit at the University of Arkansas at Little Rock. In both instances the visits will

coincide with local appellate or federal practice seminars.

Gans said it has probably been 10 years since the Court last sat at the University of North Dakota.

The Court also will hear cases again at St. Thomas School of Law in Minneapolis, this time in March. The Court has been using alternative facilities in the Minneapolis/Saint Paul area, where possible, due to the temporary closing of the Saint Paul Courthouse for remodeling. The Court held a full court week at St. Thomas in November.

Higher Authority

The U.S. Supreme Court recently in *Unitherm Food Systems v. Swift-Eckrich, Inc*. 126 S. Ct. ___ (2006), held that a Court of Appeals **cannot review the sufficiency of the evidence** to uphold a jury verdict when the appellant **failed to make a timely post-trial motion** under either Rule 50(b), for judgment as a matter of law, or under Rule 59, for new trial.

The Supreme Court rejected the practice in some circuits of reviewing the sufficiency of the evidence and granting a new trial – but not judgment as a matter of law – to a party who fails to renew a Rule 50(a) motion after verdict.

While the case before the Supreme Court involved the application of Tenth Circuit law (*see* 375 F.3d 1341, 1365 n.7 (Fed. Cir. 2004)), the Eighth Circuit appears on occasion to have stated a rule similar to that rejected by the Supreme Court. *E.g.*, *Total Petroleum v. Davis*, 788 F.2d 476, 479 (1986).

Newer Eighth Circuit cases have stated both that the filing of a Rule 50(b) motion is "mandatory," *Conseco Fin. Servicing Corp. v. North Am. Mort. Co.*, 381 F.3d 811, 821 (2004), and that review of the sufficiency of the evidence in the absence of a Rule 50(b) motion is for "plain error" resulting in "manifest miscarriage of justice." *Broadus v. O.K. Indus.*, 238 F.3d 990, 991 (2001)(per curiam).

Justices Stevens and Kennedy, in a dissent to the Supreme Court's recent ruling, interpreted the majority opinion as precluding even "plain error" review of the sufficiency of the evidence in the absence of a Rule 50(b) motion.

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The U.S. Supreme Court recently in *Will v. Hallock*, 126 S. Ct. 952 (2006), emphasized the **"modest scope"** of the **collateral order doctrine** in holding that the Second Circuit had lacked jurisdiction to review the district court's denial of a motion to dismiss filed by the defendant federal agents.

The plaintiffs had previously filed a lawsuit, arising out of the same incident, under the Federal Tort Claims Act; and the defendant agents relied on an express statutory provision (28 U.S.C. §2676) as requiring the dismissal of the new lawsuit. The Supreme Court, on the issue of appellate jurisdiction, rejected the agent's analogy between the district court's order and an order refusing to dismiss on grounds of qualified immunity, which is an immediately appealable collateral order.

The proper analogy, the Supreme Court unanimously concluded, instead was to a district court order refusing to find claim preclusion, as to which immediate appeal is not available.

The Second Circuit had upheld the refusal to dismiss on the merits. *See* 387 F.3d 147 (2004).

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The U.S. Supreme Court recently in *Volvo Trucks North America v. Reeder-Simco GMC*, 126 S. Ct. 860 (2006), **reversed** the **Eighth Circuit** in a case involving application of the Robinson-Patman Price Discrimination Act.

The Supreme Court held that the plaintiff dealer's case failed because the dealer, with two exceptions, failed to show that it was competing with the allegedly favored dealer(s) for the same customers and because the evidence regarding the two instances of competition failed show price discrimination of such scope and magnitude as to substantially affect competition between the plaintiff and the allegedly favored dealer(s).

The Eighth Circuit, in a panel decision with Senior Judge David Hansen dissenting on the Robinson-Patman issue, had upheld a substantial

jury verdict in favor of the plaintiff dealer. *See* 374 F.3d 701 (2004).

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The U.S. Supreme Court recently **granted certiorari** in the **Eighth Circuit case** of *U.S. v. Gonzalez-Lopez*, 399 F.3d 924 (2005). The Eighth Circuit panel found a denial of a criminal defendant's Sixth Amendment right to choice of counsel and further found that the denial constituted fundamental error requiring reversal regardless of the presence or absence of prejudice.

Issues on Appeal

The Eighth Circuit in January in St. Louis heard its third **en banc** case of the present court term.

Review in *U.S. v. Lopez* was limited to the section of the panel opinion addressing the adequacy of the evidence to connect one of the defendants with the drug possession and conspiracy. (See order of 10-10-25, in No. 04-2254). The panel, although noting that the **conspiracy evidence** was "razor thin," affirmed the defendant's conviction. 414 F.3d 954 (2005).

Two en banc arguments in September both involved **sentencing** issues. The case of *U.S. v. McCall* presented the issue of whether a felony conviction for driving while intoxicated constitutes a "violent felony" for purposes of sentencing under the Armed Career Criminal Act, 18 U.S.C. §924.

The panel held that such a conviction did not qualify as a "violent felony," with Judge William Riley in concurrence noting that he would interpret the Armed Career Criminal Act differently but for his belief that he was bound by Circuit decisions regarding the treatment of OWI convictions under the sentencing guidelines. 397 F.3d 1028 (2005).

The Court in the other September en banc case has already affirmed the panel by vote of an equally divided court. *U.S. v. Christenson* 424 F.3d 852 (affirming 403 F.3d 1006).

The case involved a "substantial assistance" downward departure under the sentencing guidelines, with the panel upholding the district court's grant of a departure substantially in excess of that recommended by the government (or even sought by the defendant). Senior Judge Arlen Beam, as a member of the panel, sat with the Court en banc, leaving the en banc Court with an even number of judges.

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The opinion in *Doe v. Miller*, 418 F.3d 950 (2005), reflects the rare publication by the Eighth Circuit of a decision on a **motion to stay mandate** pending the filing of a petition for writ of certiorari.

The Court indicated that in ruling on such motions it looks at four factors: whether there is a "reasonable probability" the Supreme Court will grant certiorari; whether there is a "fair prospect" the moving party will prevail on the merits; whether the moving party is likely to suffer irreparable harm; and whether the balance of the equities, including the public interest, supports a stay.

The panel denied the motion for stay in this case, with one judge dissenting.

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The Eighth Circuit recently held in *Borntrager v. Central States Pension Fund*, 425 F.3d 1087 (2005), that a district court order **remanding** a multi-employer pension fund "expulsion" case to the **ERISA administrator** for discovery was **not** a **final** appealable order, even though the district court did not retain jurisdiction, and also was **not** subject to review under the **collateral order** doctrine because the defendant's desire to avoid expense and inconvenience did not make the order one "effectively unreviewable on appeal from a final judgment."

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Recent Eighth Circuit cases include the following **appellate practice holdings** and **reminders**:

A party who fails to object to the proposed jury instructions circulated by the district court cannot urge error on appeal based on the mere prior submission of a proposed instruction not used by

the district court. *U.S. v. Tobacco*, 428 F.3d 1148, 1150 (2005).

The Eighth Circuit retains jurisdiction to review an appealable interlocutory order, despite the district court's transfer of the case to a venue outside the Circuit, when the notice of appeal is filed before the transferee district court dockets notice of receipt of the case file. *Integrated Health Servs. v. THCI Co.*, 417 F.3d 953, 957 (2005).

In the absence of a formal objection or motion for mistrial, review of a claim of prosecutorial misconduct is for plain error. *U.S. v. Ehrmann*, 421 F.3d 774, 783 (2005).

Appealing Site

The **Eighth Circuit Library** research staff in a communication to the Judges and other Court personnel recently recommended the following web sites for background and information on the U.S. Supreme Court nomination process:

Nomination History: Georgetown University's law library has a nice guide to the nomination process along with some history of the process. Another good site for current and historical nomination material is the Library of Congress' nominations page. GPO links to historic and recent nomination hearings. The Senate's web site also has a nominations page with links to judicial biographies, statistics, and more. Wikipedia has a nice entry about the position of Chief Justice.

Current Nominations: The White House, the National Archives, and Yale's law library have pages devoted to recent and/or current judicial nominees. You can also read the latest regarding nominations at this DC firm's blog.

Supreme Court History: For information on the history of the Court, Chief Justices, and Associate Justices, see the site for the Supreme Court Historical Society. You can locate opinions organized by Justice at this Cornell LII web page.

Footnotes

The 2005 **newsletter** of the **Historical Society** of the United States Courts in the **Eighth Circuit** is now available on the Society's web site, http://www.ca8.uscourts.gov/library/newsletter2005.html.

This issue of the newsletter includes reports on the portrait ceremonies for Eighth Circuit Senior Judges Pasco Bowman and David Hansen and the late Senior Judge Theodore McMillian, an article about the historical archive maintained by the Eighth Circuit Library, a summary of the Eighth Circuit papers in the Justice Harry Blackmun collection at the Library of Congress, and an update on the writing and publication of a full-length history of the Eighth Circuit.

Frances Mitchell Ross, who is a member of the history department at the University of Arkansas Little Rock, is the current Society president. She provides the following summary of **"The Historical Society of the United States Courts in the Eighth Circuit: How It Started, What It Does."**

> The year 2005 marked the twentieth anniversary of the establishment of the Eighth Circuit Historical Society. Incorporated May 22, 1985, and promoted enthusiastically by former Chief Judge Donald P. Lay, the Society was formed as a not-for-profit entity to preserve and celebrate the rich history of the federal courts of the seven states that make up the Eighth Circuit.
>
> A new history of the Court of Appeals to be published by the University of Minnesota will be a major contribution toward the society mission. Covering the mid nineteenth century to the late twentieth century, each of the seven chapters first discusses the Court's history within the context of the particular time and gives attention to regional and national developments. Following this overview, the author then tells the story of the Court's administration, the judges and significant cases of the period. Past Society president and current Appeals Branch president Thomas H. Boyd has overseen this project for the

Society and has worked closely with the author, Professor Jeffrey B. Morris of the Touro Law School.

To help promote Society goals Eighth Circuit archives librarian Joan Voelker prepared an exhibit, displayed at the 2005 Judicial Conference in Colorado Springs, on the 1929 division of the Eighth Circuit. Voelker also played a major role in producing the Society newsletter, containing articles of current as well as historical interest, which was distributed at the Judicial Conference.

Based on reports that were given at the Society's 2005 board of director's meeting in Colorado Springs and recorded in the minutes by circuit librarian and Society secretary, Ann Fessenden, many district branches are actively preserving their own histories. Nebraska is working on a written history and has recently completed a video of Judge Donald Ross. South Dakota plans videos of senior judges. In Minnesota the court is working with the Landmark Center to develop an exhibit program. The Eastern District of Missouri has formed committees that are at work on oral histories, notable cases, notable persons, architecture and a written history. Authors in the Eastern and Western Districts of Arkansas have written biographical essays on district judges who served between 1836 and 1960. The essays are intended for publication. Oral histories with a number of Arkansas district judges have also been done. In the Southern District of Iowa a portrait of Judge Richard Peterson, a past president of the society, has been hung in Council Bluffs and an oral history of Judge George Fagg has been completed. Judge Peterson has also been asked to update the district's history. The reports show an impressive level of commitment from the districts and illustrate the wide variety of projects they have pursued.

A board of directors, to which each district court and the circuit court names two representatives, governs the Society. The board then selects Society officers. In October Judge Richard Kopf of Nebraska completed a distinguished period of service as Society president and was elected chairman of the board. More information about the Society is available at the Society website: http://www.ca8.uscourts.gov/library/hist_society.html or from secretary Ann Fessenden, PO Box 595, St. Louis, MO 63188, phone 314-244-2660.

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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 Margaret Callahan (mccallahan@belinlaw.com) or vice-chair Annamary Dougherty (adougherty@cgwg.com).

Members contributing to this issue were Lajuana Counts of Kansas City and Andrew Faulkner of Little Rock.

The committee would welcome additional members and/or occasional contributors.