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Bench Briefs

Bobby E. Shepherd, who currently is a U.S. magistrate judge for the Western District of Arkansas, has been **nominated** to fill the **Eighth Circuit** seat now occupied by Judge Morris Arnold.

Judge Arnold announced last fall that he will take senior status in October.

Shepherd, a lifelong Arkansan, graduated from the University of Arkansas (Fayetteville) School of Law with high honors and spent approximately 14 years in private practice in Arkansas.

In 1991, Shepherd became an Arkansas state circuit-chancery judge, and he served in that capacity for approximately two years before becoming a U.S. magistrate judge in 1993.

Shepherd served approximately 8 years in the Army Reserve.

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Eighth Circuit **Senior Judge Gerald Heaney** has announced plans to **retire** completely from the Court.

According to Eighth Circuit Clerk of Court Michael Gans, Judge Heaney sat with the Court for the last time in June and will retire upon finishing those cases, probably **around August 1, 2006**.

Judge Heaney will be the second Eighth Circuit Senior Judge to retire this summer. Senior Judge George Fagg announced retirement plans last fall, sat with the Court for the final time in April 2006, and expects to leave the Court around July 21, 2006.

Judge Heaney, who maintains his chambers in Duluth, Minnesota, joined the Eighth Circuit in November 1966 following distinguished military service in World War II and approximately 20 years in private practice in Duluth. He took senior status in 1989.

Judge Heaney reportedly was the first Eighth Circuit judge to hire a female law clerk.

As a result of the retirements of Judges Heaney and Fagg and the death in January 2006 of Senior Judge Theodore McMillian, the Eighth Circuit will have only seven senior judges as of the start of the new Court term in September 2006.

Eighth Circuit Judge Morris Arnold, however, is scheduled to take senior status in October 2006.

The Court had 10 senior judges as of the start of the 2005 court term.

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The women's suffrage movement in the first quarter of the 20th century and the later civil rights movement both helped **advance** the **appointment of women judges**, said Eighth Circuit **Judge Diana Murphy** in remarks at an April reception in her honor sponsored by the Saint Louis University's Women Law Student Association.

In a speech billed as her “Personal Reflections: As a Woman, Lawyer and Judge,” Judge Murphy spoke about the changes that have occurred with regard to women in the judiciary and the struggle throughout the 20th century of women seeking “access and opportunity” in the legal profession in general, and in the judiciary in particular.

Judge Murphy discussed women pioneers in the judiciary and the efforts and sacrifices those women made to become judges and set an example for other women in the profession.

Judge Florence Allen, who was a leader in the suffrage movement, was elected to the Ohio Supreme Court in **1922**, said Judge Murphy, becoming the **first woman on any court of last resort** in the United States.

Judge Allen in **1934** was appointed to the U.S. Court of Appeals for the Sixth Circuit, becoming the **first woman** to be appointed to an Article III **federal circuit court**. Judge Allen ultimately became chief judge, again a first for a woman on a federal circuit court.

Judge Murphy in discussing the impact of the suffrage movement also pointed to Burnita Shelton, who in **1950** became the **first woman** to be appointed to the **federal district court** when she was appointed to the U.S. District Court for the District of Columbia. Judge Shelton previously had been active for years in the women’s suffrage movement and had served as counsel for the National Women’s Party.

In discussing the impact of the civil rights movement, Judge Murphy highlighted the accomplishments of Constance Baker Motley, who in **1966** became the **first African-American woman** appointed to the **federal bench**.

Judge Motley worked almost two decades for the NAACP Legal Defense Fund, arguing 10 cases in the United States Supreme Court, before her appointment by President Lyndon Johnson to the U.S. District Court for the Southern District of New York.

In order to give historical perspective to the ascension of women lawyers to the federal bench, Judge Murphy recited statistics reflecting the number of women appointed beginning with

President Franklin Roosevelt, whom appointed Judge Allen (but no other women).

President Truman, said Judge Murphy, appointed 1 woman out of 131 appointments; President Eisenhower, 0 out of 165; President Kennedy, 1 out of 125; President Johnson, 3 out of 167; President Nixon, 1 out of 220; President Ford, 1 out of 62; President Carter, 40 out of 258; President Reagan, 29 out of 358; President George H. W. Bush, 36 out of 187; President Clinton, 104 out of 367; and President George W. Bush to date, 49 out of 228.

Judge Murphy talked at some length about the professional career of Justice Sandra Day O’Connor, who in 1981 became the first woman on the U.S. Supreme Court. Judge Murphy in particular described Justice O’Connor’s political experience, noting how it helped Justice O’Connor develop the skills needed to maneuver through and over the political obstacles to the Supreme Court appointment.

Judge Murphy praised Justice O’Connor for maintaining contact with and reaching out to other women in the judiciary.

Judge Murphy also spoke about the contributions of U.S. Supreme Court Justice Ruth Bader Ginsburg, whom Judge Murphy described as the “Thurgood Marshall” of the women’s rights movement.

Judge Murphy concluded her remarks with a discussion of her **personal history**. She was the first woman in her law firm, the first woman on the U.S. District Court for the District of Minnesota, and the first woman on the Eighth Circuit (where, she noted, she continues to be the only woman).

Judge Murphy described being hired as the **first woman at her law firm**, and how her arrival involved some controversy over the removal of the “Lawyers’ Lounge” signs that identified the men’s restrooms.

Judge Murphy told a story about meeting with the head of the litigation department, who predicted that women could never try cases, questioned whether Judge Murphy could deal with certain issues without crying, and questioned her toughness. Judge Murphy recalled her sense that this senior litigator “did not know what tough was.”

Judge Murphy said that she is often asked what prepared her most for being a judge. She responds that it has been both her professional and personal life, noting that as a district court judge she found being a mother to be useful in settling cases.

After praising the strength, commitment, and contribution of those women judges who preceded her and those who, like her, currently serve as judges in the state and federal courts, she told the audience that “you all will write the next chapter. We fought for access and opportunity. You will be fighting for balance.”

With that, Judge Murphy wished those in attendance “a lot of luck as you write the future.”

[Thanks to Association Director Tom Weaver of Armstrong Teasdale, St. Louis, for this report.]

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“Don’t waive oral argument” was the message from a **panel of judges** in a **question-and-answer session** at the University of North Dakota School of Law.

The Court heard several cases at the law school on March 24, 2006, with Judges Kermit Bye, William Riley and Lavenski Smith and Senior Judge Myron Bright participating in one or more of the arguments and then joining in the subsequent question-and-answer session.

Responding to a question regarding the weight of the brief versus the weight of oral argument in the Court’s decision-making process, Judge Bye explained that the briefs are very important.

Judge Bye further stated, however, that if the Court thinks reversal might be appropriate in a particular case, the Court almost always grants oral argument. “So, the point is, if you are out there in the real world as an appellate advocate, don’t waive oral argument. Even if the clerk says you aren’t going to get oral argument, ask for it, and ask again. **Because you are not going to win if you are trying to upset a decision without oral argument.**”

Judge Bright seconded Judge Bye’s advice: “If the case is worth appealing, it’s worth arguing.

If you got a case that you think has merit, don’t ever, ever waive oral argument.”

Oral argument, Judge Bright explained, can “change the judge’s mind. Not that it does or will in every case, but in a close case it can make a difference.”

Judge Riley agreed that oral argument is rarely the decisive factor in the decision process. The briefs, he said, are the most important because they lay out the arguments and give the details to the court.

“What oral argument does,” said Judge Riley, “is it tends to focus an argument, help the court think along the lines hopefully that you are advocating.” He noted there are cases where a judge changes his mind based on the oral argument, or where a judge is unsure which way to go and the oral argument convinces the judge how to rule.

“I don’t think there will ever be a TV show about reading briefs,” joked Judge Smith, “but I guarantee you that **a high quality brief is the very first best step you can take to winning an appeal.** If you write a shoddy brief that is poorly written and poorly cites to authority, you’re starting way behind when you come to the people who have read it. In fact, you might stand a good chance, if you write a very poor brief, of having one of the panel members recommend that your case be taken off the argument calendar.”

Referencing Judge Bye’s earlier comment, Judge Smith reminded the audience that they had already heard “what [lack of argument] means for an appeal seeking a reversal.”

Due to case load, Judge Bye explained, the Court cannot hear oral argument in every case. Counsel thus should **consider oral argument a privilege** and think twice about ever waiving it, he said.

When the Court’s questions focus on other areas at the expense of a point counsel wishes to make, Judge Smith advised that the “best response is to answer promptly and directly the judge’s questions if possible, because typically **a question has reason, the judge is interested in something.** There is a reason the question is being asked. The best thing you can do is give them a very succinct response to it.”

Judge Smith said that counsel can attempt to move to the preferred issue but should first answer the Court's questions.

Judge Bright explained that oral arguments today "are more of a dialogue than a prepared argument." He said if you have a wonderfully prepared argument, you will probably never get to give it. Rather, the judges ask questions on what they think is important and will go directly to the issue.

Judge Bright advised counsel in preparing for argument to think about the questions that will be asked, because if you can't answer them, you are in tough shape.

Judge Riley explained that "questions from the court should always be perceived as an opportunity, an opportunity to respond to something that is bothering the judge. Even if the judge is making more of an argument himself or herself, you have an opportunity to address it and explain why the judge is wrong."

Through their questions, Judge Riley explained, "you get a window into the judges' minds about what they are thinking, what they think is important."

Counsel, however, should not abandon an argument simply because of a judge's questions, said Judge Riley. It is only one judge asking the question, and the other two judges may think the question is foolish or they may not be bothered at all by the issue, he explained. "So, you answer the question directly and get to the point, but try to get back to your argument because the other two judges may be persuaded by that argument."

"The goal in an argument," Judge Riley said, "is to have what Judge Bright calls a 'dialogue.' I call it 'conversation.'" The appellate lawyer should want a "conversational atmosphere," like the attorney is having a conversation with the court over some legal issue, said Judge Riley.

Judge Bye advised, "When you are asked a question by a judge, answer it. And you answer that question whether it helps or hurts your case; don't try to sidestep it. People lose credibility in a real hurry when they start sidestepping questions."

Judge Bye, however, also reminded counsel that nothing says an appellate attorney has to use all the time allotted. "If you do five minutes of oral

argument, and you've gotten everything across, and it looks like you're ahead, that is the perfect time to sit down," he counseled.

Agreeing with Judge Bye, Judge Riley explained that some of the best arguments are when the lawyer gets up and says, "It appears that the court understands the issues. If you have any questions I will answer them. Otherwise I am going to sit down." And that was the argument.

[Thanks to Association director Doug Bahr, who is the North Dakota Solicitor General, for this report.]

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Eighth Circuit Judges Morris Arnold, William Riley and Lavenski Smith, joined by Eighth Circuit Senior Judge Arlen Beam, provided both insight and entertainment when they shared their **perspectives on Eighth Circuit practice** for a continuing legal education audience in Little Rock on April 10, 2006.

The Judges appeared jointly at the Seventh Annual Eighth Circuit Appellate Practice Institute sponsored by the Journal of Appellate Practice and Process, which is based at the William H. Bowen School of Law at the University of Arkansas at Little Rock.

UALR adjunct law professor (and Association director) Julie Cullen served as panel moderator.

The Judges' comments were personal as well as practical. For example, the Judges suggested that oral argument via teleconference may be the wave of the future, and they advised advocates to "speak to the judges," not your notes.

Judge Arnold observed that a physical presence is not important, but it is more important to allow the public to feel that someone is listening.

Each of the Judges noted a preference for advocates who **winnow the issues on appeal**, selecting a limited number of the most important points rather than using a "shot gun" approach. However, the Judges also noted the propriety of the "shot gun" approach in death penalty cases.

Judge Arnold introduced some levity into the discussion when he quoted his brother, the late

Eighth Circuit Judge Richard S. Arnold, as having observed that "sometimes you can win with a stupid argument."

The Judges were critical of the sharp increase, to \$455, in the appellate filing fee. Judges Riley and Arnold both observed that the fee increase impacts access to justice. The Judges were also quick to point out that the fee increase did not originate with the courts but came from another branch of government.

All of the Judges enjoy oral argument. Judge Beam observed that oral argument changes his mind about a case more than one might think. Judge Smith reminded the audience that any one member of the panel may call for oral argument.

Judge Riley suggested that appellants need oral argument as the Court is unlikely to reverse a decision without it. Judge Riley also observed that the panel is a "jury of three" and that argument more often than not convinces a judge that he or she was leaning the right way.

The judges also shared their experiences with the **confirmation process**. Judge Smith characterized the process as "fair," noting that his confirmation took 13 months with the tragedy of the September 11, 2001, attack on the World Trade Center intervening during the process.

Judge Riley agreed that the process was fair; however, he also observed that such might not be the case for a high-profile appointee. Judge Beam recalled that his confirmation did not involve any "litmus test."

Judge Arnold disagreed with his fellow panel members, noting that while the American Bar Association rating system was exceedingly fair, his confirmation process was not. He noted in particular an inquiry into the private clubs to which he belonged and said such an inquiry did not seem appropriate to him.

[Thanks to Association Director Mark Marshall of Davenport, Evans, Hurwitz & Smith, Sioux Falls, for this report.]

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A **jurist** of "**wise judicial leadership**" was the underlying sentiment of all who spoke in

remembrance of the **late** Eighth Circuit Judge **Theodore McMillian** during a special **memorial session** in his honor April 17, 2006, in the en banc courtroom at the Thomas F. Eagleton Courthouse in St. Louis.

Judge McMillian served on the Eighth Circuit from September 23, 1978, until his passing on January 18, 2006. He was the first African-American appointed to the Court, and he was third among court of appeals judges nationally in length of active service when he took senior status on July 1, 2003.

Eighth Circuit Chief Judge James Loken, who presided over the memorial session, described Judge McMillian as a "**tireless public servant**" who brought a "wealth of experience and great compassion to our court."

Judge Loken further commented that Judge McMillian was a man with a "great legal mind" who had "common sense and uncommon good judgment." Most importantly, Judge McMillian was "a nice man who truly cared about people" and who served as an "**effective role model**" and taught younger judges about "judging and justice."

Judge Loken acknowledged the numerous judges from various benches who were in attendance at the memorial session: 16 Eighth Circuit judges; 12 U.S. district court judges; 4 bankruptcy judges; 8 magistrate judges; 3 Missouri Supreme Court judges; 14 Missouri Court of Appeals judges; and 14 municipal court judges. Sixty members of Judge McMillian's family also were in attendance, along with a number of Judge McMillian's former law clerks and countless friends and acquaintances.

Julie Tang, who was a law clerk to Judge McMillian for 13 years, served as the mistress of ceremonies. She warmly remembered Judge McMillian for his "brilliance, his incredible memory, his witty sense of humor, his amazing courage and grace in the face of adversity" as well as for his "never-ending patience and kindness, and gentle manner." Judge McMillian, she said, genuinely cared for his law clerks, their families and their children.

Missouri Congressman William Lacy Clay commented that Judge McMillian "**made the justice system accountable to every citizen.**" In

1978, Clay's father, Congressman Bill Clay, suggested to then-Missouri Senator Thomas Eagleton that Judge McMillian would be an excellent addition to the Eighth Circuit Court of Appeals. A testament to Judge McMillian's unquestionable qualifications is reflected in the fact that his Senate **confirmation hearing** only took **20 minutes**.

Clay said that Judge McMillian's connection with and genuine concern for people is reflected in the community's use of simply "the Judge" in referring to Judge McMillian.

Clay applauded Judge McMillian for providing guidance and commitment in the voluntary St. Louis school desegregation plan and for standing up and authoring an opinion which held that the KKK had the right to underwrite programming on a local radio station.

Judge McMillian, Clay said, was a great jurist who was a "fierce defender of the rights of those who are too often invisible to our society." He stood for "civility, justice, courage and compassion."

The Honorable Joseph J. Simeone, who was first Judge McMillian's teacher, and then his colleague, at the St. Louis University School of Law, and who also served with Judge McMillian on the Missouri Court of Appeals, fondly reminisced about his close relationship with Judge McMillian. He shared a cleverly-written, humorous poem, "Ode to Judge McMillian," that he wrote for Judge McMillian's birthday in the 1970s.

Judge Simeone encouraged all to remember, honor and celebrate the **incredible contributions Judge McMillian made to society**. He recalled that Judge McMillian was a law student who was "eager for legal knowledge." He suggested that we should all strive to be Judge McMillian's equal in service to the law and to the community.

The Honorable Lisa Van Amburg, a former Judge McMillian law clerk now sitting on St. Louis Circuit Court, spoke of her admiration for Judge McMillian and commended him for his commitment and support for women lawyers. She echoed the comments of fellow law clerk Julie Tang regarding Judge McMillian's sincere interest in his law clerks' legal careers and families, noting that

Judge McMillian even remembered his clerks' children's names over the decades.

Judge McMillian, she said, asked of his law clerks, "Was justice done?" with each of the 1,286 opinions he wrote. He influenced Judge Van Amburg to "infuse the law with conscience and courage," she said. Also, he taught his law clerks the "value of humility" and that we should all "swim together in this great ocean of life."

The Judicial Council of the National Bar Association, in a resolution acknowledged at the memorial session by Tang as mistress of ceremonies, recognized Judge McMillian for doing what was "just and righteous" and for devoting his career to "promoting social, political and economic justice for all people." Judge McMillian, declares the resolution, was a "**trail-blazing icon among us**."

The National Bar Association, the nation's oldest and largest national association of lawyers and judges, previously honored Judge McMillian in 1992 by inducting him into the Association's Hall of Fame.

The resolution, along with a resolution from the Missouri House of Representatives, will be presented to Judge McMillian's family.

Doug Copeland, president of the Missouri Bar, spoke of the distinguished service Judge McMillian bestowed upon the legal profession. He noted that Judge McMillian was a shining example of the "dignity, honor, and respect that is the hallmark of our profession."

He said that although it is certain that with Judge McMillian's passing another giant is gone, Judge McMillian himself would, undoubtedly, respond that "**in this very room there are giants to be made; get to it**."

The Honorable Marvin Teer, Jr., St. Louis City Circuit Judge and president of the Mound City Bar Association, spoke of his pleasure and privilege in having known Judge McMillian – whom he referred to as "Judge Ted" – since childhood. There was something uniquely special, he said, about "Judge Ted," who overcame adversity and made his mark by being the first on many fronts.

Judge Teer said that "Judge Ted" "tirelessly fought for justice, truth and fairness" and that this

world is a better place because “Judge Ted” blessed us with his presence.

Eighth Circuit Senior Judge Donald Lay, who was not able to attend the memorial session, sent a tribute on audiotape in which he remembered that Judge McMillian’s “**most impassioned arguments were in dissent.**”

He recounted a number of passages from some of Judge McMillian’s opinions and said of them, “With his characteristic eloquence, Judge McMillian continually reminded his colleagues of this Court’s obligation to protect the freedoms and rights guaranteed under our Constitution.” Judge McMillian’s “enduring legacy will live on in the hearts of all who were touched by his strength, intellect and compassion.”

Eighth Circuit Senior Judge Myron Bright also was not able to attend in person but said, in a statement read by Tang, that he counted Judge McMillian as a friend and colleague who had similar views and that he and Judge McMillian “supported each other in the pursuit of justice under the law.” Judge Bright concluded that Judge McMillian was a “friend and great judge who will be sorely missed.”

Ms. Beverly Ann Moss, one of Judge McMillian’s nieces, spoke on behalf of the family, noting that although Judge McMillian accomplished many firsts in his lifetime, he had another side as an uncle, older brother and friend. He loved his family with a “stern voice, but gentle smile” – a humble man.

Ms. Moss remembered from her visits to Judge McMillian’s office that he always kept on his wall a plaque which he received when he had served as a judge for 40 years. The plaque was inscribed as follows: “**It is much more important to be human than to be important.**” The family shared their gift, Judge McMillian, with the world.

Eighth Circuit Judge Diana Murphy concluded the memorial session with remarks on behalf of the Court in which she described her friend and colleague Judge McMillian as a “great American and historic figure.”

Judge McMillian, she said, did not dwell on his experiences with segregation and prejudice; instead, he simply remembered and committed his “life to the service of justice and to the

disadvantaged.” None of Judge McMillian’s accomplishments came easy, but he “never became bitter, he persevered.”

Judge McMillian, said Judge Murphy, had an interest in all the people at the Court, and he mentored many. He also had a **special interest in helping minorities and women break down barriers.** Judge Murphy included herself in the number of people to whom Judge McMillian extended a supportive hand.

Judge McMillian was known as a student and teacher of the law and for his “clearly written and scholarly opinions.” Judge Murphy likened Judge McMillian to his peers, U.S. Supreme Court Justice Thurgood Marshall and U.S. Circuit Judges Wade McCree and Leon Higginbotham, as having had “significant impact on the evolving federal judiciary and its decisions.”

Judge Murphy concluded by saying she would miss her colleague, great man and “most wonderful friend.”

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A **permanent display** honoring the life and contributions of the **late Eighth Circuit Judge Theodore McMillian** opened in Thomas F. Eagleton Courthouse in **St. Louis** on April 17, 2006, the same day as several hundred friends, family members and colleagues gathered to pay tribute to Judge McMillian through a memorial ceremony.

The new display occupies both sides of the west hall of the 27th floor, which is home to three of the Eighth Circuit’s courtrooms.

The north side of the display features Judge McMillian’s portrait and federal commission and a biographical summary, plus a glass case enclosing Judge McMillian’s robe with the gold stripes on the sleeves, a stole from an African-American judges’ conference, Judge McMillian’s ABA Spirit of Excellence Award, and a buffalo soldier bust Judge McMillian kept on his desk in memory of his World War II service in that famous Army unit.

The south side of the display includes photos spanning the years from Judge McMillian’s childhood to his service on the federal bench, various awards received by Judge McMillian, and a

list of Judge McMillian’s achievements as the first African-American in various capacities.

The robe in the display is modeled after the robe worn by the late Chief Justice Rehnquist and was presented to Judge McMillian by his past and present law clerks in 1999.

In addition to the permanent display, persons in attendance at the memorial session were able to watch a video of Judge McMillian made by Saint Louis University and peruse a table-top exhibit and biographical booklet prepared by the U.S. Courts Library.

The Circuit Executive’s Office and U.S. Courts Library staff worked with John Martin of Creative Art Gallery & Framing to create the permanent display.

A link to an audio recording of the memorial session appears on the Eighth Circuit home page at www.ca8.uscourts.gov.

[Thanks to Joan Voelker of the Eighth Circuit Library for this report.]

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Senior District Court Judge David Doty is scheduled to sit with the Eighth Circuit as a **visiting judge** in June in St. Louis.

Judge Doty, who serves in the District of Minnesota and maintains his chambers in Minneapolis, assumed the district court bench in 1987 and took senior status approximately 11 years later, in 1998.

Before becoming a judge, Judge Doty spent some 25 years in private practice in the Minneapolis-Saint Paul area, with a term of service also as a special assistant state attorney general.

Judge Doty has sat with the Eighth Circuit as a visiting judge five or six times previously, most recently in 2001.

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A **transcript** of the **memorial** ceremony in honor of the **late** Eighth Circuit Judge **Richard Arnold** appears in the front of 432 F.3d while a **transcript** of the ceremony upon the presentation of the **portrait** of Eighth Circuit **Senior Judge David**

Hansen appears one volume later, in the front of 433 F.3d.

The former ceremony was held in January 2005 at the Thomas F. Eagleton Courthouse in St. Louis. The latter ceremony was held in March 2005 at the U.S. Courthouse in Cedar Rapids, where Judge Hansen maintains his chambers.

Time, Place & Manner

A **revised home page** for the Eighth Circuit web site went up in early April, according to Eighth Circuit Clerk of Court Michael Gans.

At the request of users, all links to web site information now appear directly on the home page, said Gans.

For example, a user wishing to search for an opinion or review the court’s calendar can find the appropriate link on the home page rather than having to click on a general heading, such as “case information” or “COA Information,” before finding the desired link on a sub-menu.

The substantive content available on the Eighth Circuit web site has not changed, said Gans.

He indicated he has already received feedback from users who find the new home page to be an improvement.

Gans in a recent presentation at a continuing legal education program (see separate article *infra*) encouraged attorneys to take advantage of the extensive information on the web site.

Features include daily summaries of new opinions (written by Gans himself), full-text search capability for opinions, audio of oral arguments back to January 1, 2000, and links from the argument calendar to case briefs. In addition, the site contains court rules and forms and general court information.

The Eighth Circuit web site, Gans said, as of April was the only federal government web site with no broken links or outdated material.

The address for the Eighth Circuit web site is www.ca8.uscourts.gov.

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Eighth Circuit Clerk of Court Michael Gans offered a combination of **news items and**

practice tips to attorneys at the Seventh Annual Eighth Circuit Appellate Practice Institute, sponsored by the Journal of Appellate Practice and Process and held April 10, 2006, at the Friday Courtroom of the William H. Bowen School of Law, University of Arkansas at Little Rock.

Gans identified as “exciting,” and as “the biggest change in our (or the judges’) lifetimes,” the introduction in the U.S. Courts of Appeals of **electronic case management and electronic filing**. “The job of the clerk,” said Gans, “has not changed much in the last 100 years, but it will now, and the clerk will be more of a quality control manager.”

Gans said that the Eighth Circuit has in place the software for electronic case management, customized for the Eighth Circuit’s use, and that the internal case management system should be finished by the end of 2006.

Gans said that he hopes electronic filing will be available by spring 2007, but that it could be longer. He anticipates that attorneys will be permitted to file all documents electronically, with only briefs needing to be sent also in hard copy.

Gans said the electronic filing system will be similar to that used in federal district courts, with attorneys needing to convert their documents to Adobe Acrobat pdf format.

Gans said the Court also should eventually have the capacity to create an electronic record, with all documents from the lower court gathered in a “giant pdf file.” Attorneys, judges and court staff then will be able to link to the record and, for example, view a passage from a brief and the relevant record side by side on the same computer screen.

Gans said that hopefully at some point the Eighth Circuit will not use appendices or paper appellate records at all and instead will do everything by “e-record.” He noted that some Judges already are reading electronic versions of briefs at home.

Gans emphasized that he wants input on electronic filing from everyone involved. He said in particular that he has already sought and will continue to seek input from the bar and that plans call for the establishment of “user groups” of attorneys and others who will test the electronic

filing system and provide feedback and suggestions to the Court.

After the system is finalized, Gans said, training will be available.

Gans noted that his office actually first began working on electronic filing back in 2000.

In response to a question, Gans indicated that he did not know if or when the system would allow for the use in briefs and other documents of links to cases, for example, on Westlaw or Lexis. Gans said the Court’s ability to adopt such technology might be limited by the Administrative Office of United States Courts.

In other news items, Gans reminded attorneys of the **amendments to the Federal Rules of Appellate Procedure effective December 1, 2005**; major changes involved the clarification of Rule 27 (typeface requirements for motions), the addition of Rule 28.1 (cross-appeals, including new requirements regarding length and color of cover), and the standardization of Rule 35 (disqualified judges not counted in determining the number of votes necessary for grant of hearing or rehearing en banc).

Gans also reminded attorneys of the increase to \$455 of the **cost of filing** an appeal.

The Court’s caseload, said Gans, was up about 15% for the 2005 calendar year. He said there were about 3,800 cases filed in the Eighth Circuit during that time, with about 1,800 of those filed by pro se appellants.

The Court, Gans said, issues about 2,800 written opinions a year. While the Court does not keep records, Gans estimated that the Court reverses the district court in about 15 percent of civil cases and about 2 to 3 percent of criminal cases.

The Eighth Circuit’s median decision time from filing to disposition of a case, said Gans, is eight-and-one-half months, which ranks third among the regional Courts of Appeals.

The Court annually receives about 600 requests each for rehearing and rehearing en banc and grants around six, estimated Gans. He noted that the U.S. Supreme Court grants certiorari in three to five Eighth Circuit cases each term.

For his initial practice pointer, Gans informed attorneys that he takes telephone calls without having them screened, such that attorneys

can call the St. Louis clerk's office (314-244-2400) and direct their questions to Gans personally.

Gans noted, however, that he cannot give opinions on the existence of appellate jurisdiction (although he does recommend to attorneys the *Eighth Circuit Practice Manual*, a book published by Minnesota CLE with assistance from Gans).

The Clerk's Office handles cases in an "assembly line" manner, said Gans. First, when a notice of appeal is filed, a deputy clerk retrieves materials and opens the case. The case then passes to a case manager, assigned according to case number. A single deputy clerk supervises the oral argument calendar, and a final group of deputy clerks processes opinions and deals with the Supreme Court when necessary.

Gans recommended that counsel **order** any necessary **transcripts as soon as possible**, because the deadline for the appellant's brief generally will be set for approximately 10-14 days after receipt of the transcript or 40 days after docketing of the appeal, whichever occurs first. The appellant does not receive 40 days after receipt of the transcript to prepare the initial brief, Gans emphasized.

Counsel in designating the **appendix contents** – another early step in the appeal process – should look at the matter from the reader's point of view and should avoid including too much, Gans advised.

He noted that the Local Rules allow the appellant and appellee to either file a joint appendix based on an advance designation or file separate appendices with their briefs, and he said the Court has no preference. He did, however, express the opinion that use of separate appendices might allow the parties to be more selective, because then decisions on appendix content come later in the briefing process.

Gans made five major points regarding **briefing**. First, he emphasized the importance of the opening "Summary and Request for Oral Argument" – a section which the clerk's office and many judges read first. This section, said Gans, should summarize the case and create a favorable impression. He advised attorneys to write this section only after completing their briefs.

Second, Gans noted that pursuant to local rule, counsel in the "Statement of the Issues" should

list only the most apposite cases or authorities, up to four.

Third, Gans reminded attorneys that an addendum is required in the appellant's brief and can be included in the appellee's brief. He noted that although the Judges will not always have the appeal appendix with them when reading a brief, they necessarily always will have the addendum.

Fourth, Gans reminded attorneys of the requirement that briefs include certificates of compliance stating the word processing program used and the word count for the brief, among other information.

Finally, Gans advised counsel to check FRAP 32 for technical requirements regarding, for example, printing, binding, margin size and typeface. He noted specifically that a proportional font, if used, must be 14-point in size and must have serifs (although serifs are not required in headings).

Approximately one-third of briefs received by the Eighth Circuit are defective under FRAP 28 or 32 or Local Rule 28A, said Gans. The Court may reject these briefs and return them to counsel for inclusion of omitted elements.

Gans noted that when electronic filing is available, the clerk's office will be able to check electronic copies of briefs first so that counsel can fix errors before sending in the required print copies.

In addition to discussing technical briefing requirements, Gans **warned** counsel **against** letting cases go into **default** by missing briefing deadlines. Allowing an appeal to go into default is grounds for a disciplinary referral to state court, said Gans, noting that he makes about three dozen such referrals each year.

A request for **additional time** should be made before the time for briefing runs, said Gans, and a letter (rather than a formal motion) is adequate and may be sent by fax. The letter should include the current due date, a short statement of the reason for the extension, and the amount of time needed. Counsel should not submit a proposed order.

The clerk's office rules on initial requests for extension, and Gans advises opposing counsel not to oppose such requests absent a significant

pattern of delay. He said first extensions of around two weeks will usually be granted.

Gans, however, asked that counsel avoid seeking second extensions, although such extensions are occasionally granted. Second extension requests require more detailed justifications, are scrutinized much more closely, and are not routinely granted.

Requests for permission for **overlength briefs** likewise are not favored, said Gans, noting that the Judges have complained that he is too lenient in granting these requests.

If counsel nevertheless decides to pursue such permission, the request must be received at least seven days in advance of the due date for the brief in question. Gans reminded counsel that the relevant measure is word count (or line count), rather than pages, since the 14,000-word limit for a main brief generally translates into 75 to 80 pages while the page limit for a brief not meeting FRAP 32(a)(7)(B) type requirements is 30 pages.

Attorney requests for **oral argument** generally are granted, said Gans, who performs the initial screening. However, the panel of judges to whom the case is assigned may subsequently have the case taken off the argument calendar.

When a case instead is initially screened for no argument, counsel may object; and Gans said that oral argument will be heard if one member of the panel so requests.

He noted that the panels of judges are established by use of a computer program and that cases are also assigned to panels by this same method.

On the day of argument, counsel need to both check in with the clerk's office at the hour stated in the argument notice and be present in the courtroom for the call of the docket at the start of the day's arguments, said Gans. The appellant's counsel, in checking in, should inform the clerk how time should be divided between opening and rebuttal.

When separately represented parties appear on the same side of the appeal, counsel should work out a division of time among themselves, or the Court will decide if they cannot.

When arguing, Gans advised, counsel should stay in one place and speak into the

microphone, yield to a judge who starts speaking, and pay attention to and answer questions. Questions, said Gans, are opportunities, and not interruptions; they give counsel the chance to address the concerns of the Judges who will be deciding the case.

When the red light on the podium comes on, Gans said, counsel should either sit down or ask for additional time to sum up. Most judges, he said, will give counsel a couple of minutes to finish up, especially if there has been extensive questioning, but counsel must ask and receive permission.

Gans advised counsel to follow up as soon as possible, upon returning to their offices, if the panel during argument asked for more information or further materials or cases.

Gans pointed to FRAP 28(j) as governing the citation of **supplemental authorities** discovered after briefing but before decision: Counsel should send to the court and opposing party a letter, of 350 words or less, identifying the new authority and the reason for its citation, with reference to the relevant page of the brief or point argued orally.

Gans said that if the supplemental citation potentially will have substantial impact on the case, counsel can ask the Court for the right to submit supplemental briefs.

After the Court files its decision, parties have 14 days to petition for rehearing, or 45 days if the United States or an officer or agency is a party, said Gans. He said the clerk's office can grant a 14-day extension but that any further extension request is referred to the panel that heard the case.

Gans called attorneys' attention to a number of additional procedural features of the Court, such as the "VIA" electronic noticing system – which is unique to the Eighth Circuit – and the availability of a settlement program.

Gans noted that the Forms "A" and "B," which counsel are required to file, are strictly for settlement purposes and never go to the Judges. Rather, the settlement director will contact counsel if it appears from the forms that settlement may be a possibility.

Gans also explained that preliminary motions on matters not within the discretion of the clerk's office are randomly assigned to one of the three three-judge administrative panels that exists at

any given time, separate and apart from the monthly argument panels.

Gans said that counsel should always respond to substantive motions, such as motions to dismiss, and he encouraged counsel to call if they have a question as to whether response is required. He noted that the time for response is eight days, with three additional days if the motion was served by mail.

Gans reminded **appointed criminal counsel** that the district court will lack jurisdiction to rule on a motion to withdraw after the notice of appeal is filed. The Eighth Circuit, he said, traditionally has required trial counsel to continue, although a panel of appellate criminal counsel may be created in the future.

Gans said that an appointed counsel in a criminal case who believes no colorable issues exist for appeal may need to file an “*Anders*” brief and should call Gans to discuss the situation and should consult Local Rule 27C and the Eighth Circuit Plan to Expedite Criminal Cases.

Gans also addressed the Eighth Circuit’s discretion to certify an **unclear question of state law** to the state court for resolution, noting that the Court receives about 15 certification requests annually and grants two or three of them. He said the Court particularly is unlikely to grant certification after the district court has refused a similar request.

Gans noted that other than Missouri, all states within the Eighth Circuit accept certified questions.

[Thanks to Association president Craig Eichstadt, who is deputy attorney general for South Dakota, for this report.]

* * * *

The Eighth Circuit recently **used** its Internet **home page** to **solicit amicus curiae briefs** on an issue before the Court.

By order dated May 19, 2006, the Court invited the filing of amicus briefs in the case of *United States v. Spears*, No. 05-4468/06-1354, on the issue of the reasonableness, post-*Booker*, of

using a crack cocaine/powder cocaine ratio of less than 100 to 1 in imposing sentence.

A direct link to the order appeared on the Eighth Circuit home page.

A search of the web site shows that apparently no amicus briefs were received by the June 2, 2006, deadline. The case was to be argued June 14, 2006.

A similar solicitation of amicus briefs in another case, about a year ago, resulted in the filing of two such briefs, according to Eighth Circuit Clerk of Court Michael Gans.

The Court in that instance was concerned that a jurisdictional issue was not adequately addressed in the briefs in a case scheduled for submission without argument, and the panel directed that the clerk enter an order both requesting additional briefs from the parties and soliciting amicus briefs. As on the more recent occasion, Gans placed a direct link to the order on the Circuit’s home page.

Gans said the Court in that instance received amicus briefs from two advocacy groups and that counsel from one of the amicus groups even argued the taxpayer’s side when the case subsequently was placed on the Court’s argument calendar.

The case in question, *Bartman v. Commissioner*, 466 F.3d 785 (2006), was decided this May, with the Court holding that the tax court had lacked jurisdiction over all of the taxpayer’s claims.

Gans said that a decision to solicit amicus briefs may be made solely by the panel of judges to whom a case is assigned.

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Eighth Circuit filings increased 16.4 percent, to 3,611, for the fiscal year ending September 30, 2005, according to an **annual statistical report** prepared by the U.S. Courts Administrative Office.

During the same period, Eighth Circuit case terminations were up 24 percent (to 3,287) while pending cases increased 16.8 percent (to 2,328).

Overall, the regional Courts of Appeals saw filings increase 9 percent, with terminations

increasing 10 percent and pending cases increasing 13 percent.

Total filings in the regional circuits reached a record 68,473, making the fiscal year ending September 30, 2005 the tenth consecutive record-breaking year.

Total filings in the regional circuits in fact have increased 68 percent, according to the report, since the last new circuit judgeships were created in 1990.

The report noted that the increase for the fiscal year likely would have been greater but for the decline in filings in the Fifth Circuit after Hurricane Katrina: The Court there received only 92 filings in September 2005, compared to normal monthly filings of 700 to 1,000.

Criminal appeals jumped 28 percent for the fiscal year in question, with increases involving virtually all offenses but particular increases in appeals involving drugs, immigration, firearms and explosives, and property offenses.

Original proceedings jumped 23 percent, an increase attributed in the report to the filing by inmates of motions for permission to file habeas corpus petitions to challenge their sentences in light of recent significant U.S. Supreme Court sentencing decisions (i.e., “*Booker*” and “*Blakely*”).

Agency appeals jumped 12 percent, fueled primarily by immigration appeals but with most of those appeals (53 and 21 percent, respectively) filed in the Ninth and Second Circuits.

Civil appeals, in contrast, actually declined slightly for the fiscal year ending September 30, 2005, with 51 percent of all civil appeals involving prisoner petitions.

Civil appeals now constitute only 48 percent of filings in the regional circuits, down from 53 percent the previous fiscal year.

The percentage of the overall docket comprised of criminal appeals is up to 23 percent, from 20 percent, with agency appeals (20 percent), original proceedings (7 percent) and bankruptcy appeals (1 percent) each continuing to occupy approximately the same proportion of the overall regional Courts of Appeals docket as in the past.

As recently as 1996, civil appeals made up nearly 70 percent of the regional Courts of Appeals docket.

In contrast to the continued increase in filings in the Courts of Appeals, overall filings in the U.S. District Courts declined 8 percent for the fiscal year ending September 30, 2005.

Additional statistics, including statistics specific to the Eighth Circuit, can be found in the report, which is entitled “2005 Judicial Business of the United States Courts” and is posted on the U.S. Courts Administrative Office web site at www.uscourts.gov/judbususc/judbus.html.

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A **panel** of the Eighth Circuit is scheduled to sit in **Omaha** throughout **June court week**.

The Court apparently has not sat in Omaha since August 2004, and before that March 2004, and each of those sessions was for only one or two days, rather than a full week.

The Court has sat for a full week in a variety of locations since the temporary closing of the Saint Paul courthouse, in early October 2005, for remodeling.

For example, a panel of the Court sat for a full week in Kansas City in each of October 2005 and May 2006. In addition, a panel of the Court sat for a full week at the University of St. Thomas School of Law, Minneapolis, in each of November 2005 and March 2006.

At the same time, multiple panels have continued to sit monthly in St. Louis, as usual.

Eighth Circuit Clerk of Court Michael Gans previously has indicated that the Court’s 2006-07 calendar likely will include two week-long argument sessions in each of Kansas City and Omaha, as well as at St. Thomas.

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The U.S. Supreme Court in April approved two **pending amendments** to the Federal Rules of Appellate Procedure.

Both amendments will go into effect December 1, 2006, absent action by Congress.

One amendment adds new Rule 32.1 regarding citation of “**unpublished**” opinions.

This Rule has the subject of extensive public comment and was even sent back to the Appellate

Rules Advisory Committee for further consideration, and revised in part, before being approved by the U.S. Judicial Conference in September 2005.

As currently constituted, pending new Rule 32.1 overrides in part current local rules that prohibit, limit or discourage the citation of unpublished opinions. In addition, it requires in certain circumstances the attachment to the brief or motion in question of the unpublished opinion being cited.

Pending Rule 32.1, however, applies only to federal court opinions issued on or after January 1, 2007.

The second amendment approved by the Supreme Court in April modifies Rule 25(a)(2)(D) to authorize the adoption of mandatory **electronic filing** by the various circuits.

Association News

The Association on April 10, 2006, **co-sponsored a reception** in Little Rock, Arkansas, honoring Eighth Circuit Judge Morris Arnold and his service to the Court.

The event was held in conjunction with the Seventh Annual Eighth Circuit Appellate Practice Institute put on by the Journal of Appellate Practice and Process, which also co-sponsored the reception.

Judge Arnold announced last fall that he will be taking senior status in October 2006.

Judges present at the reception included three of Judge Arnold's Eighth Circuit colleagues – Judges William Riley and Lavenski Smith and Senior Judge Arlen Beam – plus Judges Susan Webber Wright and Bill Wilson from the U.S. District Court for the Eastern District of Arkansas.

Judge Arnold was toasted by professor Kenneth S. Gallant of the William H. Bowen School of Law, University of Arkansas-Little Rock, who was a law student of Judge Arnold in the late seventies at the University of Pennsylvania.

Judge Arnold gave Professor Gallant a grade about which Professor Gallant is still complaining; and in true Judge Arnold style, Professor Gallant was told to "stop complaining already; it's been almost thirty years; I'll change the damn grade."

Judges Riley, Smith and Beam the next morning heard several cases at the Bowen School of Law.

[Thanks to Association director Julie Cullen, adjunct law professor and law clerk for the Arkansas Court of Appeals, for this report.]

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Association members should expect to receive **membership renewal** notices within the next couple of weeks.

Dues for the new member year, starting July 1, 2006, will remain at \$35 for regular members, with dues waived for federal judges within the geographic Eighth Circuit, and for their law clerks.

Renewal notices will be sent by e-mail, with members who do not initially respond receiving further notice by mail.

The Association currently has just over 300 members.

Details on membership requirements can be found on the Association web site at www.law.ualr.edu/eighthcircuitbar. The 2006 membership renewal form should be posted shortly.

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The Association Board of Directors has **under discussion two amendments** to the Association **bylaws**.

One amendment would add a new section addressing the **use of membership information**. The Association on occasion has made member contact information available to outside groups to publicize events and services such as the Eighth Circuit Appellate Practice Institute and the Eighth Circuit Appellate Practice Manual.

The bylaws amendment would expressly authorize such use of membership information when the use would be consistent with the purposes of the Association.

The proposed new language, however, also acknowledges the desirability of protecting against excessive and inappropriate use of membership information; requires a written request from the outside group wishing to use the information; and

makes the request subject to approval by either the majority of the Board or the unanimous executive committee.

The text of the proposed new bylaw is posted on the Association web site at www.law.ualr.edu/eighthcircuitbar and interested members are invited to comment.

The second amendment under consideration would modify section 6.2 of the bylaws, regarding election of officers, to allow the **secretary and treasurer** (but not the president or president-elect) to serve **consecutive terms**.

This proposed bylaws amendment is still in the drafting process. The new language likely will retain at least some limit on term of service for the offices of secretary and treasurer.

Higher Authority

The U.S. Supreme Court in its recent decision in *Arkansas Dep't of Human Services v. Ahlborn*, 126 S. Ct. 1752 (2006), **unanimously upheld** a ruling of the **Eighth Circuit** regarding the scope of a state's right to recover Medicaid benefits paid to an injured party who later settles with the tortfeasor.

The Supreme Court agreed with the Eighth Circuit (see 397 F.3d 620 (2005)) that the state violated the "anti-lien" provision of federal Medicaid law insofar as the state sought to recover portions of the settlement intended as compensation for damages other than medical expenses covered by Medicaid.

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The U.S. Supreme Court recently **granted certiorari** in the **Eighth Circuit case** of *Lopez v. Gonzales*, 417 F.3d 934 (2005), which involves the question of when a state felony drug offense constitutes an "aggravated felony" under 8 U.S.C. §1229b(a), so as to make an alien ineligible for the "long-time resident" protection against deportation.

The Eighth Circuit panel held that an alien who has been convicted of a state-law felony controlled substance offense has a prior "aggravated felony" conviction, for purposes of that immigration

provision, even when the offense in question would not have been a felony under federal law.

The Eighth Circuit case will be consolidated, for Supreme Court review, with the unpublished Fifth Circuit decision in *U.S. v. Toledo-Flores* (No. 04-41378, 8-17-05), which involves a prior state-law controlled substance felony and the concept of "aggravated felony" under the Federal Sentencing Guidelines.

The definitions of "aggravated felony" at issue in *Lopez* and in the Fifth Circuit case include similar references to federal drug trafficking and controlled substances statutes.

Issues on Appeal

The Eighth Circuit in its recent **en banc decision** in *U.S. v. Lopez*, 443 F.3d 1026 (2006), clarified the proper standard of review for challenges to the sufficiency of the evidence in **conspiracy** cases.

The Court indicated it took the case en banc to address references in some prior Circuit decisions to the so-called "**slight evidence rule**," and it unanimously reaffirmed the government's burden to prove even a "minor" defendant's connection to a conspiracy "beyond a reasonable doubt."

The Court acknowledged that opinions in the Circuit have not always carefully described the applicable legal principles and that statements of law "have tended to migrate somewhat." The Court, however, concluded that the controversy was one of language, not law.

The Court agreed with the panel (414 F.3d 954 (2005)) that the government met its burden of proof in the case.

* * * *

The Eighth Circuit in its recent decision in *Stallings v. Hussmann Corp.* (No. 05-1882, May 12, 2006) held that a district court's application of the doctrine of **judicial estoppel** is entitled to deference and will be **reviewed for abuse of discretion**.

An appellate court, the panel stated, should only overturn a district court's application of judicial estoppel if "it plainly appears that the court committed a clear error of judgment in the

conclusion it reached upon a weighing of the proper factors."

The Eighth Circuit had not previously addressed the issue of the proper standard of review for an application of judicial estoppel; and despite setting a deferential standard, the panel overturned the district court's application of judicial estoppel in the case at hand.

The Eighth Circuit's decision contains a detailed discussion of judicial estoppel and the factors a court should use in determining whether to apply the doctrine.

Footnotes

Attorneys arguing in **St. Louis** or otherwise visiting the Thomas F. Eagleton Courthouse there may want to check out the new **Judicial Learning Center** on the main floor.

The 2,500-square-foot center, which opened its doors to the public in May, will be devoted to interactive learning.

Features will include a three-judge bench, jury box, counsel tables, screen, and display areas around the perimeter. Topics addressed eventually will include the difference between the state and federal courts, how the courts work, the three levels of the federal courts, and the importance of an independent judiciary and the rule of law in American society.

A special section will highlight news items about current events affecting citizens in federal court, parties pursuing justice, and the public officials who perform the work of the federal courts.

For now, however, the Center features traveling exhibits, as the planned regular exhibits and content are not yet ready.

The current exhibit presents the role of the U.S. district courts in immigration, naturalization, and deportation proceedings. The exhibit, provided by the American Immigration Law Foundation, is

entitled "America's Heritage: A History of U.S. Immigration" and will run until July 15, 2006.

For more information on the Judicial Learning Center, see the May 2006 issue of *The Third Branch* at www.uscourts.gov/ttb/05-06.

[Thanks to Joan Voelker of the Eighth Circuit Library for this report.]

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A direct **link** to the **Eighth Circuit** web site is among the available links featured on a **new web site**, www.bankruptcyprobono.org, aimed at **pro bono attorneys** within the Circuit who encounter **bankruptcy** issues.

Another link on the new site directs attorneys to a collection of Circuit-specific materials regarding student loans issues in bankruptcy. Additional links direct attorneys to materials specific to the individual bankruptcy courts within the Circuit.

The site is a collaborative effort of the Minnesota State Bar Association, the American College of Bankruptcy, and volunteer attorneys from each bankruptcy district within geographic area covered by the Eighth Circuit.

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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).

Committee members contributing to this issue were Lajuana Counts of Kansas City, Bob Rossiter of Omaha, Kris Baker of Little Rock, and Colin Witt of Des Moines.

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