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Association News

The Association on April 10, 2006, will **co-sponsor** a **reception** in **Little Rock** for Eighth Circuit judges and court staff and for attorneys attending the Seventh Annual Eighth Circuit Appellate Practice Institute.

The Institute, a six-hour continuing legal education program also scheduled for April 10, is sponsored by Journal of Appellate Practice and Process. Both events will be held at the William H. Bowen School of Law at the University of Arkansas at Little Rock.

Judge Morris Arnold of Little Rock, who will take senior status later this year, will be honored at the reception. Eighth Circuit Judges **William Riley** and **Lavenski Smith** and Eighth Circuit Senior Judge **Arlen Beam** also are expected to be present.

The reception will start at 5:30 p.m. and is expected to run until about 7 p.m.

Judges Riley, Smith and Beam the next morning – i.e., April 11, 2006 – will hear three cases in the Friday Courtroom at the School of Law.

Association director Julie Cullen is scheduled to serve as moderator, at the continuing legal education program, for a panel discussion featuring Judges Arnold, Riley, Smith and Beam. Eighth Circuit Clerk of Court Michael Gans is scheduled to provide an update and refresher on Circuit rules and practice, while former Association president James Layton, who is Missouri State Solicitor, is scheduled to discuss ethical issues in representing the government.

For additional information about the continuing legal education program, visit the Journal of Appellate Practice and Process web site at www.law.ualr.edu/japp.

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The Association Board of Directors at its March meeting voted to **contribute** \$2,000 to the publication of a full-length **history** of the **Eighth Circuit**.

The book, written by legal historian Jeffrey Morris, is a project of the Court of Appeals branch of the Eighth Circuit Historical Society. Morris is a professor at the Touro Law School and is the author of fifteen books, including a history of the Second Circuit.

The book will be published and distributed through the University of Minnesota Press and is expected to be available before the end of 2006.

Association Director Tom Boyd, who also is president of the Court of Appeals branch of the Historical Society, said the project has the support of the Eighth Circuit and particularly of Senior Judges Gerald Heaney and Pasco Bowman. The Eighth Circuit has contributed to publication costs from the attorney admissions fund.

The Historical Society has also received contributions for the project from various district courts within the Circuit and from other bar organizations and private law firms. Inquiries about the project may be directed to Tom Boyd at tboyd@winthrop.com.

Time, Place & Manner

The **cost of filing an appeal** in the Eighth Circuit will **increase to \$455** on April 10, 2006.

Pursuant to the Deficit Reduction Act of 2005, Pub. L. No. 109-171, §10001(b), the appellate docketing fee will increase from \$250 to \$450.

The additional \$5 filing fee, separately provided for in 28 U.S.C. §1917 and retained by the district court, remains unchanged.

The appellate docketing fee last was increased, from \$100 to \$250, effective November 1, 2003. Historically, this fee has been set by the U.S. Judicial Conference and included as part of the Court of Appeals Miscellaneous Fee Schedule, as provided in 28 U.S.C. §1913.

The Deficit Reduction Act, in addition to imposing the increased appellate docket fee, also increases district court and bankruptcy court filing fees.

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A **panel** of Eighth Circuit judges in March sat for a **full week** at the University of **St. Thomas School of Law** in Minneapolis.

The Court has not been able to use its regular facilities in Saint Paul since the temporary closing of the courthouse there, in early October 2005, for remodeling.

A panel of the Court previously sat for a full week at St. Thomas in November 2005; and while the Court will not return to St. Thomas this term, Eighth Circuit Clerk of Court Michael Gans said that the Court anticipates sitting at St. Thomas again a couple of times during the 2006-07 court term.

Gans said the Court also likely will sit twice in each of Kansas City and Omaha during the 2006-07 court term. A panel of the Court sat for a week in Kansas City last fall, but the Court has not yet sat in Omaha this term.

The Eighth Circuit clerk's office in Saint Paul remains open at an alternative location near the courthouse, and the phone number remains unchanged. For further information, see the announcement on the home page of the Eighth Circuit web site, www.ca8.uscourts.gov.

Gans said that the remodeling of the Saint Paul courthouse is expected to take three years, making the projected completion date sometime in late 2008.

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Attorneys seeking to take advantage of the new option for **bankruptcy appeals direct** to the **Eighth Circuit** can now find guidance in the **local rules** of the Eighth Circuit Bankruptcy Appellate Panel.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, effective October 17, 2005, establishes the new right to seek direct review in the Court of Appeals under certain circumstances but gives the Courts of Appeals discretion to decline immediate review and require that the appeal proceed through the normal steps.

An issue must meet certain standards, set out in new bankruptcy 28 U.S.C. §158(d)(2), to be eligible for consideration for immediate review.

New Local Rules 8001B and 8003A address the mechanics of filing a certification of eligibility for direct review, and a new local form is available for those cases in which all appellants and appellees join the certification.

The Eighth Circuit announced the new Local Rules and amendments under an order dated February 8, 2006, and posted on the home page of the Eighth Circuit web site at www.ca8.uscourts.gov.

This new right to seek direct review applies only to cases commenced after the effective date of the 2005 Act.

Bench Briefs

The Eighth Circuit on Monday April 17, 2006, will hold a **memorial** ceremony in honor of the **late Judge Theodore McMillian**.

The ceremony will begin at 3 p.m. in the en banc courtroom of the Thomas F. Eagleton Courthouse in St. Louis, with invited guests having first priority for seating.

Eighth Circuit Clerk of Court Michael Gans said additional courtrooms will be set up for remote

viewing of the ceremony, with an overflow crowd expected. The ceremony is open to the public.

Judge McMillian, who maintained his chambers in St. Louis, passed away in January after more than 27 years as a Judge and Senior Judge with the Eighth Circuit.

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Eighth Circuit **Senior Judge David Hansen** focused on a theme of “**change**” in remarks made March 2, 2006, in Des Moines at the annual seminar of the Iowa Academy of Trial Lawyers.

Among the changes he addressed were amendments to the Federal Rules of Appellate Procedure, a new U.S. Supreme Court ruling regarding preservation of error, the effect of computers on appellate practice, and the effect of new laws on appellate workloads.

With regard to **computers**, Senior Judge Hansen noted that Eighth Circuit judges now have the ability to vote from their homes in emergency situations such as “11th hour” death penalty appeals.

Senior Judge Hansen also said that his law clerks now do most of their legal research electronically; and he noted that the Eighth Circuit is moving toward electronic filing, although the electronic filing system will not be ready for use until January 2007 at the earliest.

On the subject of court **workload**, Senior Judge Hansen noted that, due to the increase in constitutional claims and federal statutory causes of action, federal law is now applied in a number of contexts which were traditionally the province of state law. As a result, he said, the federal district courts – and, consequently, the federal Courts of Appeals – have experienced significant increases in caseloads.

In particular, Senior Judge Hansen noted that appellate filings in the federal system have increased by 67% since 1990, which was the last year in which Congress authorized any new Court of Appeals judgeships. Consequently, said Senior Judge Hansen, times for processing appeals have increased substantially.

Senior Judge Hansen began his presentation by mentioning the December 2005 amendments to the Federal Rules of Appellate Procedure, noting in

particular the adoption of new FRAP Rule 28.1, which collects and expands upon the prior rules governing cross-appeals.

He also discussed the December 2005 amendment to FRAP 35(a) concerning en banc review. Under the prior Eighth Circuit practice, the number of votes required for en banc review turned on the total number of active judges, even if one or more of those judges was disqualified from sitting on the particular case. Under FRAP 35(a) as amended, the number of votes required for en banc review turns on the number of active judges not disqualified from sitting on the particular case.

Senior Judge Hansen made special note of the recent U.S. Supreme Court decision in *Unitherm Food Systems v. Swift-Eckrich*, 126 S.Ct. 980 (2006). The Court in *Unitherm* held that a party’s failure to file a post-verdict motion challenging the sufficiency of the evidence precluded the Court of Appeals from using insufficiency of the evidence as a basis for granting that party a new trial.

[Thanks to David May of Des Moines for submission of this report]

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Briefs should be written “in English and not in Latin,” Eighth Circuit Senior Judge Pasco Bowman told an audience of Saint Louis University law students in a **question-and-answer** session when the Circuit, during February court week, heard three cases in that school’s William H. Kniep Courtroom.

Eighth Circuit Chief Judge James Loken and Judge Lavenski Smith, who with Senior Judge Bowman made up the panel, joined in offering **tips on briefing and oral argument**.

Chief Judge Loken emphasized the importance of preparation for oral argument. Senior Judge Bowman discussed the need for clarity and concision in oral advocacy as well as in brief writing. Attorneys at oral argument should avoid rhetoric and legalese and focus on why the parties they represent should win.

Judge Smith analogized the role of appellate courts to the performance of an “autopsy,” with appellate judges examining the proceedings in the

trial court to determine whether the case died of “natural causes” or whether it was killed by “unjust means.”

Chief Judge Loken and Judge Smith told students that while in most instances a judge will have an initial view, based on the briefs, of how a case should come out, oral argument in a small number of cases will change the judge’s mind. Chief Judge Loken estimated that oral argument has changed his initial view between three and five percent of the time.

Judge Loken explained how the panel of judges that hears a case confers after argument, with the presiding judge making the decision as to which judge will write the opinion. He said that assignments are not based on a judge’s background or area of expertise and emphasized the importance of judges avoiding specialization because the Court of Appeals is a court of general jurisdiction.

Senior Judge Bowman agreed that Eighth Circuit judges do not perceive themselves as specialists.

[Thanks to St. Louis University second-year law student Babak Torgoley and Association director Lawrence Friedman of St. Louis for this report]

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A non-comprehensive survey of a commercial legal database suggests Eighth Circuit Senior Judge John R. Gibson was the “**frequent flier**” among Eighth Circuit **senior judges** for the **2004-05 court term**.

Senior Judge Gibson during that time assisted his brethren in six circuits – the First, Second, Third, Sixth, Ninth and Eleventh – while still sitting with the Eighth Circuit for portions of seven of the Circuit’s ten court weeks.

Senior Judges Donald Lay, Myron Bright, Frank Magill and David Hansen each also served one or more times during the 2004-05 court term as a visiting judge in the Ninth Circuit, and Judges Lay, Bright and Magill in addition each also sat with either the Third Circuit or the Sixth Circuit.

Senior Judges Hansen and Gerald Heaney each sat with the Eighth Circuit for some portion of

eight court weeks during the term – one more than Senior Judge Gibson – while Senior Judge Magill was the least likely of the Eighth Circuit senior judges to “stay home,” sitting with the Eighth Circuit for portions of only two court weeks during 2004-05. The remaining Eighth Circuit senior judges sat with the Court for portions of either five or six of the ten court weeks during the term.

The results of the non-comprehensive survey suggest that fewer Eighth Circuit senior judges sat outside the Circuit during the 2004-05 term, as compared to the 2003-04 term, with Senior Judges Pasco Bowman and Arlen Beam apparently dropping from the list of Eighth Circuit senior judges who went “visiting.”

Senior Judges Bowman and Beam, however – among others – have already served as visiting judges during the 2005-06 term and have assisted their brethren in two circuits – the Fourth and the Fifth – not among those on the itineraries of Eighth Circuit senior judges during 2004-05.

The Seventh and Tenth circuits continue as apparently the only two circuits who have not recently taken advantage of the services of an Eighth Circuit senior judge.

According to an article in the February 2006 issue of *The Third Branch* (available on the web site of the Administrative Office of the U.S. Courts, www.uscourts.gov), U.S. Courts of Appeals during the 2005 fiscal year utilized visiting judges, either from other circuits or from district courts, on 324 occasions, with those judges participating in 4,893 appeals.

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Two Minnesota district judges – Chief Judge James Rosenbaum and Senior Judge Paul Magnuson – sat with the Eighth Circuit as **visiting judges** in St. Louis in March.

In addition, Senior District Judge Andrew Bogue of South Dakota, who sat with the Court as a visiting judge in January, is scheduled to sit with the Court again in April in St. Louis.

All three judges have been frequent “visitors” at the Eighth Circuit. Chief Judge Rosenbaum has sat with the Circuit around eight times, making his first visit just months after his

appointment in 1985 to the district court bench. Judge Rosenbaum, however, apparently has not sat with the Circuit since 2001.

Senior Judge Magnuson first sat with the Eighth Circuit as a visiting judge in 1983, following his appointment to the district court bench in 1981. He served as a visiting judge on nearly an annual basis from 1990 through 2001 and most recently sat with the Circuit in April 2004.

Senior Judge Bogue first sat with the Eighth Circuit as a visiting judge in 1972, following his appointment to the district court bench in 1970. He sat frequently with the Court during the 1990s.

Chief Judge Rosenbaum immediately before assuming the federal bench was U.S. attorney for the district of Minnesota. He began his career as an attorney with various public service organizations in Chicago before spending about eight years in private practice in Minneapolis. He has been Chief Judge for the District of Minnesota since 2001.

Senior Judge Magnuson before assuming the federal bench spent nearly 20 years in private practice in Saint Paul. He was Chief Judge for the District of Minnesota from 1994 until succeeded by current Chief Judge Rosenbaum. He took senior status in 1992.

Senior Judge Bogue before assuming the federal bench had a varied career that included 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. He was chief judge for the District of South Dakota from 1980 until taking senior status in July 1985.

Chief Judge Rosenbaum maintains his chambers in Minneapolis while Senior Judges Magnuson and Bogue maintain their chambers in Saint Paul and Rapid City, respectively.

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A **transcript** of the **ceremony** upon the presentation of the **portrait** of Eighth Circuit **Senior Judge Pasco Bowman** appears in the front of 430 F.3d. The ceremony was held October 2004 in Kansas City, where Judge Bowman maintains his chambers.

Issues on Appeal

The Eighth Circuit in its recent decision in *Dieser v. Continental Casualty Co.* (No. 05-2172, decided 3-2-06) made two points regarding **premature appeals**.

First, the Court reaffirmed that when a district court ruling expressly reserves an issue – in this case, prejudgment interest – for further proceedings, the district court’s ruling is not a final decision and any appeal from that decision is premature.

Second, the Court held that **FRAP 4(a)(2)**, which renders timely an appeal taken in advance of formal entry of judgment, does not apply when the appeal is from a ruling that, regardless of whether or not it was formally entered, would not be a final decision.

The Court observed in a footnote that to the degree some prior Circuit decisions could be read as construing FRAP 4(a)(2) more broadly, Circuit decisions were in conflict, and the Court would follow the narrower decisions as being more consistent with 1991 U.S. Supreme Court precedent regarding FRAP 4(a)(2).

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The Eighth Circuit recently in *Porter v. Williams*, 436 F.3d 917 (2006), made clear that a **final appealable order** exists when the district court, after dismissing all federal claims on summary judgment, exercises its discretion to decline supplemental jurisdiction and remands all remaining claims to state court pursuant to 28 U.S.C. §1367.

When the district court remanded all the remaining state law claims, the Eighth Circuit said, the court had nothing left to resolve and the partial summary judgment dismissing the federal claims became final.

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The Eighth Circuit’s recent decision in *Canny v. Dr. Pepper/Seven-Up Bottling Group* (No. 05-1491, decided 3-9-06) provides an example of

how a **trial tactic** can result in the **waiver** of an **issue on appeal**.

The defendant on motion in limine sought to exclude a particular letter as involving settlement negotiations; and when the district court ruled that the plaintiff would be allowed to cross-examine the defendant’s witnesses about the contents of the letter, the defendant chose to preemptively introduce the contents of the letter itself in hopes of limiting the letter’s impact.

The Eighth Circuit rejected the defendant’s argument that it was forced to preemptively introduce the evidence and applied the general rule that a party who introduces evidence cannot complain on appeal that the evidence was erroneously admitted.

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The Eighth Circuit in its recent **en banc** per curiam opinion in *U.S. v. Richardson*, 439 F.3d 421 (2006) **overruled** its controlling precedent on the issue of whether an individual can be convicted both as a felon in **possession of a firearm** and as a drug user in possession of a firearm based on a single incident.

The Court en banc held that such multiple convictions are not permissible, a position shared, according to the Court, by every other circuit that has considered the issue.

While the panel necessarily had held the multiple convictions permissible, two judges had joined in a concurring opinion to express their disagreement with the now-overruled holding of *U.S. v. Peterson*, 867 F.2d 1110 (1989).

The panel decision, 427 F.3d 1128, remains in effect except as to the single issue addressed by the Court en banc.

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The Eighth Circuit in its recent **en banc** decision in *U.S. v. McCall* (No. 04-1143, decided 3-15-06) held that a felony conviction for **driving while intoxicated** generally is a “**violent felony**” for purposes of sentencing enhancement under the Armed Career Criminal Act, 18 U.S.C. §924,

because of the potential for injury to another created by felony-level drunk driving.

The Court, however, held that when the state in question interprets its law to allow a felony drunk driving conviction for conduct short of actual driving, the sentencing enhancement is not available unless the government establishes that the particular defendant’s prior drunk driving convictions did involve actual driving. The Court en banc thus remanded the case for further proceedings.

The panel had held, based on Eighth Circuit precedent interpreting the “crime of violence” language in the sentencing guidelines, that driving while intoxicated was not a “violent felony” under §924. *See* 297 F.3d 1028 (2005).

Three judges in dissent from the en banc ruling argued that the “violent felony” language of §924 is ambiguous and that Congress intended the enhanced penalty for those with a history of actively violent offenses.

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The Eighth Circuit during April court week will hear argument **en banc** on the issue of when a municipal policy regarding **police dogs** gives rise to a constitutional “**excessive force**” violation under the Court’s 2003 decision (*Kuha v. City of Minnetonka*, 365 F.3d 590) requiring a warning before use of a police dog to “bite and hold” a suspect.

The panel in the en banc case, *Szabla v. City of Brooklyn Park*, 429 F.3d 1168 (2005), reversed a grant of summary judgment in favor of the city responsible for the police dog, holding that the city, based on the language of its written policy, potentially was liable unless it could show its officers nevertheless understood use of a warning was required.

Judge Steven Colloton in dissent argued that a policy that merely leaves to the officer the decision whether or not to give a warning does not reflect the type of deliberate choice necessary to support municipal liability.

The Court has expressly limited en banc consideration to the municipal liability issue and has reinstated those portions of the panel decision that affirm the dismissal on summary judgment of

other claims and defendants. *See* 437 F.3d 1289 (2006).

Higher Authority

The U.S. Supreme Court recently **granted certiorari** in the **Eighth Circuit** case of *Carhart v. Gonzales*, 413 F.3d 791 (2005), which involves the constitutionality of the federal Partial-Birth Abortion Ban Act of 2003 (see 18 U.S.C.A. §1531).

A panel of the Eighth Circuit unanimously held the Act unconstitutional based on the absence of a statutory exception for protection of the health of the mother. The panel held that such an exception was required under the Supreme Court's 2000 ruling in *Stenberg v. Carhart* (see 520 U.S. 914) due to the absence adequate evidence of a change in medical consensus regarding the value of the prohibited procedure.

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The U.S. Supreme Court's recent decision in *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235 (2006), has potential **appellate practice implications**, as it involves the distinction between a requirement that affects the existence of federal subject matter jurisdiction and a requirement that merely is an element of the plaintiff's claim.

While an issue not raised before the district court generally cannot be raised on appeal, a challenge to federal subject matter jurisdiction can be raised at any time.

Arbaugh involved the statutory limitation of Title VII employment discrimination prohibitions to employers with 15 or more employees. (See 42 U.S.C. §2000e(b)). The defendant failed to raise any issue in this regard until post-trial motions; but the district court dismissed the Title VII claim on that basis and the Fifth Circuit affirmed the dismissal, holding that the defendant had not waived error because the issue was one of subject matter jurisdiction. *See* 380 F.3d 219.

The U.S. Supreme Court unanimously reversed, holding that statutory requirements such as the one at issue generally should not be deemed "jurisdictional" absent a clear Congressional intent.

The Supreme Court noted the existence of a circuit split on the issue but did not identify the Eighth Circuit as having taken a position.

The Supreme Court further noted that, like some other courts, it has not always been careful in its decisions in labeling issues as involving "jurisdiction."

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The newest member of the U.S. Supreme Court, **Justice Samuel Alito**, is now the **Circuit Justice** for the **Eighth Circuit**.

He replaces Justice Clarence Thomas, who elected to become Circuit Justice for the Eleventh Circuit when Justice Anthony Kennedy shifted from the Eleventh Circuit to the Ninth Circuit to replace the retired Justice Sandra Day O'Connor.

Justice Thomas had been the Eighth Circuit's Circuit Justice since the start of the Supreme Court's October 1994 term.

He replaced the late Justice Harry Blackmun upon Justice Blackmun's retirement from the Supreme Court. Blackmun, a former Eighth Circuit judge, had been the Eighth Circuit's Circuit Justice since his elevation to the Supreme Court in 1970.

Applications properly addressed to a single Justice generally are directed first to the Circuit Justice for the Circuit from which the matter arises. *See* S. Ct. R. 22.

In addition, the Circuit Justice for the Eighth Circuit generally has been a featured speaker at the Eighth Circuit Judicial Conference.

Appealing Site

Congress once again has before it a **bill** that would open the way for **expanded media coverage** of proceedings in the U.S. **Courts of Appeals**.

Pursuant to the S.829 – given by its sponsors the title "Sunshine in the Courtroom Act of 2005" – the presiding appellate judge would have discretion to allow the photographing, electronic recording, broadcasting or televising of any particular argument before the Court of Appeals. The bill would grant similar discretion to district court judges.

An almost identical 1999 Senate bill, S. 721, failed to pass.

The U.S. Judicial Conference since 1996 has allowed each Circuit the option of deciding for itself whether to allow camera coverage of appellate proceedings.

In contrast, under current U.S. Judicial Conference policy, cameras and electronic devices may not be used by the media in covering trials in U.S. district courts.

The Second and Ninth circuits, which participated in a pilot program preceding the Judicial Conference's adoption of the 1996 policy, are currently the only circuits that permit use of cameras at appellate proceedings.

Ninth Circuit Judge Diarmuid O'Scannlain, in testimony before the Senate Judiciary Committee last fall, said that from 1991 until November 2005 the Ninth Circuit received 205 requests to allow electronic media access to oral arguments. Of these requests, the court granted 133, with the panel before whom the case was to be heard having the decision-making authority. The Ninth Circuit heard more than 24,000 oral arguments during this time, meaning that the court received a request for expanded coverage in less than one percent of the total cases argued.

Judge O'Scannlain reported few if any problems with cameras in appellate courtrooms and stated that his experience has been overwhelmingly positive.

The current policies of the Second and Ninth Circuits regarding cameras at oral argument can be found on the Internet at www.ca2.uscourts.gov and www.ce9.uscourts.gov, respectively.

The Eighth Circuit apparently has no current plans to allow the use of cameras during oral arguments. The Court, however, has for several years made available on its web site audio recordings of oral arguments.

U.S. Supreme Court Justice Stephen Breyer in a recent speech in Little Rock offered his opinion that it is "almost inevitable" that U.S. Supreme Court arguments some day will be televised. He talked of letting the nation know more about what goes on behind the closed doors as a way of demystifying the high court and helping the nation

better understand the role of justice in American government.

For more on S.829 and a companion bill, H.2422, and for background on the issue of cameras in the courtroom, including the special problems associated with cameras in trial courtrooms, the **Eighth Circuit library staff recommends** the following materials available on the Internet:

Tony Mauro, *"Bill Allowing Cameras in Supreme Court Gains Momentum."*

www.law.com/jsp/article.jsp?id=1131583507730.

Dan Horn, *"U. S. Judges Camera-Shy in Courtroom."* Cincinnati.com, Jan. 29, 2006.

<http://news.enquirer.com/apps/pbcs.dll/article?AID=/20060129/NEWS01/60129362/-1/back01&template=printpicart>.

Judge O'Scannlain's testimony before the Senate Judiciary Committee, Nov. 2005.

<http://judiciary.senate.gov/hearing.cfm?id=1672>.

Electronic Media Coverage of Federal Civil Proceedings: an Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals, Federal Judicial Center, 1994.

[www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/\\$file/elecmediacov.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/$file/elecmediacov.pdf)

The Eighth Circuit library staff also has prepared a more extensive **bibliography** which lists

law review articles and print materials on the issue of cameras in the courtroom, plus more Internet materials on the topic. Interested attorneys may contact the Eighth Circuit library at library8th@ca8.uscourts.gov for a copy of this bibliography.

[Thanks to Crata Castleberry, Deborah Showalter-Johnson, and Kris Albertus of the U.S. Court of Appeals Eighth Circuit Library for submission of this report]

Footnotes

Several attorneys appearing for **oral argument** in St. Louis in January found themselves standing across the bench from a single judge – and **two speakerphones**.

Eighth Circuit Clerk of Court Michael Gans said that judges participate by speakerphone when they become unavailable due to, for example, travel delay or health issues. Because the absent judge is prepared and another judge generally cannot readily be called in, the participation of the judge by speakerphone benefits both the court and the attorneys and parties by allowing the case to proceed, explained Gans.

Gans said the Eighth Circuit's first "speakerphone" argument took place probably some 12 or 13 years ago, before the Court moved to its new building in St. Louis: He remembers having to run telephone cord down the hall to the courtroom from the St. Louis chambers of the late Eighth Circuit Judge Theodore McMillian.

Gans said that the Court was not looking at the use of speakerphones as becoming a regular alternative to live argument in front of a panel of three judges. The recent situation in St. Louis with two judges absent, he said, was unusual.

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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 Bob Rossiter of Omaha, Andrew Faulkner and Kris Baker of Little Rock, and Colin Witt of Des Moines.

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