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In this issue.....

Bench Briefs

*O'Connor Visit
Shepherd Oath
Judges' Tips
Murphy Honor
Visiting Judge*

Time/Place/Manner

*CM/ECF News
Gans Speaks
New Rules 12-1*

Association News

*K.C. CLE
Mentoring*

Higher Authority

Cert Granted

Issues on Appeal

*Class Removal
State Judgments*

Appealing Site

Ninth Circuit Split?

Footnotes

McMillian Display

Bench Briefs

Retired U.S. Supreme Court Justice Sandra Day O'Connor has accepted an invitation to sit as a **visiting judge** with the Eighth Circuit in St. Louis in **February 2007**, according to Eighth Circuit Clerk of Court Michael Gans.

Justice O'Connor is scheduled to sit Monday and Tuesday February 12 and 13, sharing the bench one day with Chief Judge James Loken and Judge Raymond Gruender and the other day with Judges Roger Wollman and Lavenski Smith.

A non-comprehensive search of electronic legal databases suggests that Justice O'Connor has recently served as a visiting judge also in the Second and Ninth circuits.

Precedent exists for Justice O'Connor's visit to the Eighth Circuit. Retired Justice Bryon White sat with the Eighth Circuit in Saint Paul in October 1995, sharing the bench two days with his former law clerk, Chief Judge Loken, and issuing three signed opinions (*Pulla v. Amoco Oil Co.*, 72 F.3d 648 (1995); *Habiger v. City of Fargo*, 80 F.3d 289 (1996); *Toney v. WCCO TV*, 85 F.3d 383 (1996)).

A non-comprehensive search of electronic legal databases shows that retired U.S. Supreme Court Justice Tom Clark sat with the Eighth Circuit in February 1977 (four signed opinions), and before that in October 1975 (one signed opinion).

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A public **investiture** ceremony for the Eighth Circuit's newest judge, **Bobby E. Shepherd**, will be held the afternoon of December 7, 2006, in the U.S. Courthouse in El Dorado, Arkansas.

In honor of the occasions **two panels** of the Court will **hear cases** in **El Dorado** that morning, according to Eighth Circuit Clerk of Courts Michael Gans. One panel will sit at the El Dorado Chamber of Commerce while the other will sit at South Arkansas Community College.

Judge Shepherd immediately before assuming the Eighth Circuit bench served as a U.S. magistrate judge for the Western District of Arkansas, working out of chambers in El Dorado. He will continue to maintain chambers in that city.

Judge Shepherd took the oath of office privately in October and sat with the Eighth Circuit three days that month. He issued his **first signed opinion** on November 9, 2006, affirming the reasonableness of a sentence in a juvenile delinquency matter. *See U.S. v. D.A.L.D.*, No. 06-1960.

Judge Shepherd holds the seat on the Eighth Circuit previously occupied by Judge Morris Arnold, who took senior status in early October.

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Oral argument is **not as important** as **attorneys** might **think** – but appellants still **should not waive** oral argument, Eighth Circuit Judges Roger Wollman, William Riley and Raymond Gruender told a continuing legal education audience in Kansas City in October.

The Judges, during a joint appearance at a free, Association-sponsored seminar, gave attorneys **tips** on **making** both their **briefs** and their **arguments more effective** and also shared insights on a judge's workload, amicus curiae briefs, and the coming of electronic filing.

Jude Gruender stated that in approximately 150 cases to date, he has left oral argument questioning a strongly held pre-argument view only five to ten times and has completely changed his pre-argument position only possibly twice, generally based on a clarification during argument of the facts or a governing legal principle.

Judge Wollman noted that according to a study conducted in the early 1980s by Eighth Circuit Senior Judge Myron Bright and the late Eighth Circuit Judge Richard Arnold, oral argument changed their views in as many as 15 to 20 percent of cases.

Whatever the effect of argument on the outcome of cases, said Judge Wollman, service as an appellate judge would be a "terribly boring job" without the interaction with attorneys afforded by oral argument.

Judge Wollman stated that he is surprised by how many appellants' attorneys fumble the straightforward question, "Where did the district court go wrong?" The appellant's counsel, he said, should **be prepared** with a **succinct**, clear **explanation** for **why a judgment should be reversed**.

Also, Judges Wollman and Riley stressed, attorneys can **affirmatively hurt** their clients' cases if they are **belligerent** or if they **demean** or **disparage** opposing counsel or the trial court. Such behavior, the Judges said, calls an attorney's credibility – and thus the attorney's entire argument – into question.

Judge Gruender emphasized that attorneys should pay attention to the flow of an oral argument: For example, if counsel for the appellant receives numerous skeptical questions and counsel for the appellee receives few or no challenging questions, counsel for the appellee should consider concluding argument early to avoid opening a "Pandora's box" that leads the argument in unexpected and unfavorable directions.

Heavy questioning, however, does not necessarily mean defeat, noted Judges Wollman and Riley. Judges may ask questions for effect or to test their own positions, or their questions may be intended as comments to other members of the panel. A question should not be treated by counsel as an annoyance: As Judge Riley asked rhetorically, "Would you rather have *no* opportunity to respond to the judges' concerns?"

The oral advocate, the judges agreed, should treat argument like a conversation, should not read a prepared text, and should not make an overly emotional "jury argument." Judge Riley added that counsel should **not be afraid to pause** in response to a judge's question, so as to formulate the best possible response.

The Judges noted that the uniform practice in the Eighth Circuit, in contrast to some other circuits (most notably the Ninth Circuit), is for judges to refrain from discussing cases prior to oral argument. Judge Gruender endorsed this practice of **independent pre-argument review** as an important element in the Court's decision-making process.

Panel members cast tentative votes on individual cases at the end of each day's arguments, with the presiding judge making writing assignments at the end of court week or early the next week.

The Judges' preparation for oral argument includes reading the briefs (estimated by Judge Riley at approximately 3,000 pages per court week) and reviewing memoranda from their law clerks on significant issues. Judge Gruender, while not having his clerks prepare memoranda on criminal issues due to his background in that area, prepares outlines of his tentative dispositions. The major portion of the Judges' review of the law and record, however, occurs after argument, Judge Riley said.

According to Judge Riley's estimate, Eighth Circuit Judges spend only about a **quarter** of their **time on argued cases**. He said that a judge in an average day also handles one to five administrative panel matters (e.g., requests for stays or for certificates of appealability), one to three "no argument" cases, and one to five petitions for rehearing.

This competition for the judges' time makes it important for attorneys to **write clear, succinct briefs** that catch the judges' attention, the Judges agreed. Judge Wollman suggested that attorneys should not be afraid to oversimplify, while Judge Gruender pointed to the need for a logical, well-structured argument that provides a "road map" to the result counsel wants the Court to reach.

Judges Wollman and Riley both emphasized the importance of a well-written summary of the argument, with Judge Riley expressing the opinion that a good summary generally can be done in two to three pages. An attorney who cannot summarize why the client should prevail in a way that emphasizes key themes has not fully thought through the appeal, Judge Riley said.

Judge Riley further suggested that more cases are won on the facts than on the law, making it important for counsel to "**tell a story**" in the fact statement of a brief. By the end of the fact statement, he said, the judges should *want* to rule in that party's favor. In addition, he suggested that counsel identify the issues early to guide the reader's review of the remainder of the brief.

Attorneys should state, but not belabor, the standard of review, said Judge Riley, because absent a special issue, the judges are familiar with the standards of review. Attorneys also should **avoid lengthy footnotes** and **string citations** and should not be writing "law review articles," said Judges Gruender and Wollman.

The Judges agreed that even with the implementation of electronic filing, they expect to continue to prefer the paper format when engaging in detailed reading of briefs. Judge Gruender emphasized that he frequently reads briefs at home, on airplanes and in other locations, which he could not do if "chained to a computer."

On another issue of technological advancement, the Judges agreed that the availability on the Court's web site of recordings of Eighth Circuit oral arguments was an important public resource. Judge Gruender said he or his clerks occasionally listen to arguments and pick up things they missed the first time, while Judge Riley said that when an argument is particularly good, he may have his clerks listen to the attorney's oral presentation to develop the outline for the opinion.

Judge Wollman said the availability of the recordings serves as a good reminder that oral argument is a public process and that judges should be circumspect in using humorous or flippant comments that may come across differently after the fact.

The Judges were somewhat mixed in their thoughts on **amicus briefs**. While Judge Wollman said that such briefs can be useful in public interest cases and that he gives particular attention to amicus briefs from the U.S. Department of Justice, Judge Gruender said that amicus briefs are not necessarily helpful because the authors of those briefs are less familiar than the parties with the facts and record.

Judge Riley said he reviews amicus briefs very quickly to see if they contain anything new and different from what the parties have said. The policy arguments typically contained in such briefs, he said, can sometimes offer helpful context; however he emphasized that he does not consider himself a policymaker.

[Thanks to Association programs committee co-chair Alok Ahuja of Lathrop & Gage, Kansas City, for this report.]

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Eighth Circuit **Judge Diana Murphy** has been honored with the hanging of her **portrait** in the U.S. Courthouse in Minneapolis, where she served for more than 14 years as a federal district judge.

A brief account of the ceremony appears in the Eighth Circuit Library newsletter, available at www.lb8.uscourts.gov. A few additional details at one time appeared on the web site of the Minneapolis Star Tribune at www.startribune.com.

According to the latter source, Judge Murphy is the tenth judge to have her portrait hung at the Minneapolis courthouse.

Judge Murphy served on the U.S. District Court for the District of Minnesota from 1980 until her appointment to the Eighth Circuit in 1994. She was Chief Judge for the district from 1992 to 1994.

Judge Murphy was the first female appointed to the federal district bench in Minnesota,

and she is the first – and so far only – female Eighth Circuit judge.

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New U.S. District Court Judge Patrick J. Schiltz from the District of Minnesota sat with the Eighth Circuit as a **visiting judge** for the first time in November, joining the Court for two days during its week-long session at the University of St. Thomas School of Law in Minneapolis.

The sitting was something of a “homecoming” for Judge Schiltz, who was involved in the founding of St. Thomas and served the school as an associate dean, acting dean and professor before assuming the district court bench in late May 2006.

Judge Schiltz is a former law clerk of U.S. Supreme Court Justice Antonin Scalia. He practiced law for eight years with Faegre & Benson in Minneapolis before leaving in 1995 to teach law at the University of Notre Dame, where he remained until moving to St. Thomas in 2000.

Judge Schiltz maintains his district court chambers in Saint Paul.

Time, Place & Manner

The Eighth Circuit in early November announced plans to begin implementing the appellate version of **Case Management/Electronic Case Filing (CM/ECF)** starting Monday December 18, 2006.

Initially, the only effect on attorneys will be **changes** on the Eighth Circuit **web site** (www.ca8.uscourts.gov) and the **discontinuation** of the “VIA” electronic noticing system.

However, the Court **expects** to request that attorneys in **January 2007** start **submitting** all **documents** other than appendices by **e-mail attachment**, said Eighth Circuit Clerk of Court Michael Gans. Attorneys should **watch** the Court’s web site **for an announcement** and additional details.

An announcement regarding the December 18 changes remains posted on the Eighth Circuit web page. In addition, Gans has addressed the

coming of CM/ECF at two recent continuing legal education programs.

The “CM” component of the new system, Gans explained, is the case management software the Court uses for internal administrative purposes, while the “ECF” component is what allows attorneys to file documents electronically. Only the “CM” component will go into effect December 18.

The clerk’s office, Gans said, currently is processing docket entries both under existing docketing software and under CM, resulting in a double administrative burden on clerk’s office personnel.

After CM becomes the exclusive docketing software on December 18, attorneys will be able to access all electronically available documents in Eighth Circuit cases. Access, however, will be through PACER, with a charge of 8 cents a page to a maximum of \$2.40 per document. Certain materials currently available free on the Eighth Circuit web site, such as briefs and orders, will no longer be available directly and will have to be accessed through PACER.

Also beginning December 18, the VIA system for electronic and fax noticing will no longer be in use. Attorneys with e-mail addresses on file with the Court will still receive notices by e-mail; however, all other attorneys will receive notices by regular mail. The CM/ECF announcement on the Eighth Circuit home page includes links to forms for submitting new or additional e-mail addresses to the Court.

Upon receiving an e-mail notice after implementation of the CM system, an attorney will need to click on the link in the e-mail to view the notice, order or other document. The attorney will also need to either download or print the document, if desired for future reference, because the attorney will be charged through PACER for viewing the document after “one free look.”

The purpose of the planned interim switch to filing by e-mail attachment, according to Gans, is to make all documents electronically available for the entire 2007 calendar year and for the Court to better test and adjust to the CM system. Documents not received by e-mail attachment will have to be scanned into the system, creating extra work for court staff already scanning in pro se filings. Gans

said, however, that there will be no penalty for failing to file by e-mail attachment.

The **full switch** to **ECF** should be completed by **September 1, 2007**, estimates Gans. He said the Court actually hopes to have the transition completed sooner but that he is “98 percent certain” the Court can meet the September 1 date even allowing for unexpected delays.

The Court likely will institute ECF in phases, Gans said, perhaps first allowing or requiring the use of ECF only in certain types of appeals or only for appeals from certain judicial districts.

Appellate ECF, according to Gans, will function in a manner similar to district court ECF: Attorneys will convert documents to pdf for electronic submission and will receive electronic notice of new filings. He expects that participation in appellate ECF will be **mandatory**, subject to the same exceptions currently recognized in the district courts.

Even under ECF, said Gans, the Court anticipates a continued requirement for the submission of **briefs in paper**. The current expectation, he said, is that counsel will first file the brief electronically and will then submit a paper version upon receiving certification from the clerk’s office that the brief complies with the requirements of the Federal Rules of Appellate Procedure and Eighth Circuit Local Rules.

Attorneys filing briefs under CM/ECF will be able to link directly in their briefs to items, such as pleadings, in the district court record, said Gans. District court materials from a given case can be collected and assigned a “permanent web address” to allow such linking, he explained.

The Court, however, said Gans, has **not reached a decision** on the possible continued role of **appendices** under CM/ECF. One possibility would be the creation of a “virtual appendix,” with certain materials being assembled electronically based on the designations of the parties, he said. The Judges currently are split, he noted, with some believing an appendix will be unnecessary and some wanting attorneys still to take at least a “first pass” at culling unnecessary materials from the record.

Gans said that attorneys may have the option of including in their briefs links to cases and materials on Westlaw and Lexis.

The coming of ECF will require extensive revision of the Eighth Circuit Local Rules, said Gans, adding that a re-write is already in progress. He said that he hopes all the circuits work together and achieve a high degree of uniformity in their ECF rules.

The Eighth Circuit will issue temporary rules as necessary with the various steps in the CM/ECF implementation process.

Initial plans call for training on CM/ECF to be handled through district court personnel with on-line help, a telephone “support desk,” and peer-to-peer information-sharing also available.

The Eighth Circuit, Gans said, will be the **first circuit to implement** either component of CM/ECF.

Gans spoke on CM/ECF on October 13, 2006, as part of a telephone seminar sponsored by Minnesota CLE and on October 19, 2006, in Kansas City as part of a free seminar sponsored by this Association.

For more information on accessing documents through PACER, see the CM/ECF announcement on the home page of the Eighth Circuit web site and/or additional PACER-related materials on the site.

[Thanks to Association programs committee co-chair Alok Ahuja of Lathrop & Gage, Kansas City, and Association treasurer Barry Pickens of Spencer Fane Britt & Browne, Kansas City, for reporting on Gans’ Kansas City presentation.]

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Attorneys should consider **taking advantage** of the **option** to include an **addendum** of up to 15 pages in their appellants’ and appellees’ briefs, Eighth Circuit Clerk of Courts Michael Gans recently advised a continuing legal education audience.

Eighth Circuit Local Rule 28A(b) allows for the inclusion of short excerpts from the record, other than from the transcript, that would be helpful to a judge in **reading** the **brief without** reference to

the **appendix**; and Gans said he is surprised more attorneys do not take advantage of this option.

Appellants, however, said Gans, need to remember to also include the required addendum, which generally consists of the district court and/or magistrate judge's ruling.

Gans said approximately **30 percent of briefs** filed with the Eighth Circuit **wholly omit** some **required element** of content, ranging from the name of the trial judge on the cover to the jurisdictional statement to the identification of standards of review. He stressed that attorneys should read FRAP 28 and 32 and Local Rules 28A and 32A before filing their briefs.

Also on the issue of briefs, Gans cautioned that the Court reviews carefully any motion for **additional pages or word count**. A request for double the length of a normal brief will almost inevitably fail, he said, although a motion seeking an additional 10 to 15 percent in length might be reasonable, if sufficient justification is offered.

Gans reminded attorneys that a motion for overlength brief must be filed a week in advance of the briefing deadline, with the untimeliness of the motion being in and of itself a sufficient basis for denial.

Requests for **extension of time**, in contrast, are view a lot less critically, said Gans. A request can be made by motion or letter and should be brief; but counsel still must state the existing deadline, specify how much additional time is needed, and describe the grounds relied on for the extension. Gans said that previously scheduled vacation and other personal commitments are among appropriate grounds.

A request for an extension of more than 21 days, however, said Gans, will be carefully scrutinized, and the extension granted may be limited to that period.

Gans discourages counsel from opposing an extension request of reasonable duration absent specific prejudice or good reason to believe the moving party has an ulterior motive in seeking the extension. In any event, Gans said, any objection should be raised very quickly, as the Court tends to rule immediately on extension requests.

Gans made his comments October 19, 2006, in Kansas City as part of a free continuing legal education program sponsored by the Association.

[Thanks to Association programs co-chair Alok Ahuja of Lathrop & Gage, Kansas City, and Association treasurer Barry Pickens of Spencer Fane Britt & Browne, Kansas City, for this report.]

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Two key federal **rules changes** of interest to appellate practitioners are set to take effect **December 1**, 2006, absent congressional action.

New FRAP 32.1 addresses opinions designated by federal courts as "unpublished." The rule prohibits local rules that would restrict the citation of "unpublished" federal decisions issued after January 1, 2007.

Another subdivision of new FRAP 32.1 requires that attorneys in certain instances attach copies of "unpublished" federal opinions they cite.

A December 1 amendment to Rule 50 of the Federal Rules of Civil Procedure should also affect appellate practice, specifically with regard to preservation of error; subpart 50(b) as revised will no longer require that a party seek judgment as a matter of law specifically at the close of all evidence.

An amended version of FRAP 25(a)(2)(D) also scheduled to go into effect December 1 officially authorizes the adoption by the circuits of mandatory electronic filing.

According to Eighth Circuit Clerk of Court Michael Gans, the Court will adopt a new local rule in response to FRAP 32.1 but likely will retain the limitations of current Local Rule 28A(i) with regard to citation of unpublished opinions pre-dating January 1, 2007.

Association News

More than 80 attorney gained insights from Eighth Circuit Clerk of Court Michael Gans and three Eighth Circuit Judges during a recent **free two-hour continuing legal education** program sponsored by the **Association**.

The October 19, 2006, event was held at the Charles Evans Whittaker U.S. Courthouse in Kansas City in conjunction with the sitting of a panel of the Court in Kansas City that week.

Following the educational program, participants were able to mingle with Gans and Judges Roger Wollman, William Riley and Raymond Gruender at a reception.

Summaries of the presentations by Gans and the Judges' panel appear elsewhere in this issue of the newsletter. Association director Jeremiah Morgan of Bryan Cave LLP in Kansas City served as moderator for the Judges' panel.



The law firms of Bryan Cave LLP, Lathrop & Gage L.C. and Spencer Fane Britt & Browne LLP sponsored the reception.

Morgan, fellow Association director Lajuana Counts of the U.S. Attorney's Office, Association treasurer Barry Pickens of Spencer Fane Britt & Browne, and Association programs committee co-chair Alok Ahuja of Lathrop & Gage organized the event for the Association.

[Thanks to Association director Lajuana Counts of the U.S. Attorney's office, Kansas City, for the above photo from the Kansas City program.]

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More than 20 Association members have already volunteered to participate in the Association's **planned mentoring program** for attorneys newly admitted to practice before the Eighth Circuit.

More volunteers are welcome, according to Association directors and project coordinators

Jeremiah Morgan of Kansas City and Diane Bratvold of Minneapolis.

Once the mentoring program is in place, the Eighth Circuit will include in materials sent to newly admitted attorneys a copy of a letter of introduction from the Association. The letter will invite newly admitted attorneys to contact volunteer Association mentors with questions about Eighth Circuit practice.

The list of volunteer mentors, with contact information, will appear on the Association web site. The list will include notes as to particular mentor areas of expertise, such as civil or criminal appeals.

The mentoring program presents a **great opportunity to serve the bench and bar** and will promote the Association goals of improving Eighth Circuit advocacy and the administration of justice, said Bratvold.

Any Association member who has not yet volunteered but who is **interested in serving** as a **mentor** should **e-mail** Dori Quam at dquam@dehs.com; **include** your contact information; a brief "resume" of your appellate experience (including appellate clerkships with the Eighth Circuit or otherwise); and any preferences or limitations on the types of questions you are willing to receive (e.g., civil, criminal, briefs only, oral argument, etc.).

Mentoring, Bratvold said, is a common "buzz word" that has meaning only when in action: The Association seeks to make mentoring a regular and reliable means of connecting lawyers who practice before the Eighth Circuit.

Association members with questions or comments about the mentoring program should contact Morgan at jjmorgan@BryanCave.com or Bratvold at dbratvold@riderlaw.com.

Higher Authority

The U.S. Supreme Court has granted **certiorari** in the **Eighth Circuit case** of *Claiborne v. U.S.*, 439 F.3d 479 (2006), to consider issues involving downward departures from the federal sentencing guidelines. In particular, the Court will consider whether, under *U.S. v. Booker*, 125 S. Ct. 738 (2005), a sentence which constitutes a

substantial downward variance from the guidelines must be justified by extraordinary circumstances.

In reversing the district court's sentence, the Eighth Circuit panel relied upon its earlier decision in *U.S. v. Dalton*, 404 F.3d 1029 (2005), to conclude that a 60% downward variance from the guidelines range constituted an "extraordinary reduction" that was required to be supported by "extraordinary circumstances."

Although not formally consolidated, the Supreme Court simultaneously granted certiorari in *Rita v. U.S.*, an unpublished Fourth Circuit case, to consider whether a within-guidelines sentence may be imposed without an explicit analysis of factors that might justify a lesser sentence.

Issues on Appeal

The Eighth Circuit in its recent decision in *Saab v. Home Depot*, No. 06-8014 (Nov. 22, 2006), declined to give an expansive reading to its **new power** to grant **interlocutory review**, under 28 U.S.C. §1453(c)(1), with regard to rulings on motions to **remand** in certain **class action** suits.

The defendant in the case before the Court had invoked only traditional diversity jurisdiction, *see* 28 U.S.C. § 1332(a), in removing a class action from state to federal court.

The Eighth Circuit panel held that the new appeal provision, which was adopted as part of the Class Action Fairness Act of 2005, applies only when removal is under 28 U.S.C. §1332(c), a new subpart adopted as part of the same Act to make federal jurisdiction more readily available in certain circumstances.

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The recent Eighth Circuit panel decision in *Myer v. Americo Life*, No. 06-1687 (Nov. 15, 2006), provides an example of the **interaction** between **state** and **federal** courts when parties attempt to **litigate** the same issue in **both forums**.

The district court dismissed on abstention grounds a suit to set aside an arbitration award; and while an appeal from that ruling was pending, the state trial court entered a final decision enforcing the award.

The Eighth Circuit affirmed the federal dismissal, holding that while the losing party's intent to appeal the state court judgment precluded a finding that the federal appeal was moot, the state trial court judgment was entitled to res judicata effect.

Appealing Site

Is the **Ninth Circuit** too large or unmanageable? Should the Circuit be **split** to add one – or perhaps two – more circuits to the federal court system? These are questions that have been discussed as far back as 1935.

The most **current push** to reorganize the nine states and two territories of the Ninth Circuit is now before Congress in several different forms.

The Ninth Circuit is the largest circuit in the country measured by population, geographic size, caseload or number of judges. The Circuit's population of more than 59 million people is in fact almost 27 million greater than the population of the next most populous circuit.

Several issues nevertheless make the decision whether to split the circuit a difficult one. These issues include cost, administration, politics, and the impact on those who actually work in the circuit. For almost every argument in favor of splitting the Ninth Circuit, there is a counter-argument.

One factor complicating options on how to divide the Ninth Circuit is the principle that no circuit should consist of fewer than three contiguous states. This principle is seen as strengthening the federalizing function of the regional appellate courts.

Thus, one proposal now before Congress now would split the Ninth Circuit by grouping California with Hawaii, Guam, and the Pacific Islands and creating a new circuit for the remaining seven states, running from Arizona to Alaska. However, because California, with a population of over 36 million, generates more than half of the Ninth Circuit's appellate business, this proposed split would create a new circuit with a disproportionately low caseload – in addition to its awkward geography.

Another factor in the debate is number of judges. The Ninth Circuit employs more than twice the average number of judges in any other circuit. Proponents of a circuit split feel that such a large number of judges makes speaking with one consistent, authoritative voice problematic, with the large caseload and geographic scope of the circuit further making it difficult to maintain an internal consistency of law.

At the same time, the Ninth Circuit needs at least seven new judges to handle its caseload, which has increased 70 percent from 2000 to 2005. The circuit's current caseload is triple the average caseload of other circuits – more than 16,000 appeals for the calendar year ending December 2005, and nearly 6,700 cases more than the next busiest circuit.

The Ninth Circuit has not had a new judgeship since 1984; however, current legislation authorizing five new permanent and two new temporary judgeships is dependent on a splitting of the circuit.

At least part of the increase in the Ninth Circuit's caseload is due to an upswing in immigration appeals in the wake of the new "streamlining" procedures at the Board of Immigration Appeals. Congress is considering legislation to alleviate this problem.

The U. S. Courts Administrative Office estimates the cost of implementing a circuit split at around \$96 million, with an additional annual cost of \$16 million. The initial cost could possibly be reduced if existing buildings are remodeled.

Opponents of a circuit split argue that the problems created by geographic distance would remain and that any split will result in an imbalance of caseload between the newly-created circuits or among the existing judges. Some opponents also perceive a partisan motivation for a split – i.e., an attack on judicial independence and an attempt to coerce judges or punish them for not bending to the will of the current Congress.

All but three Ninth Circuit judges are opposed to a split. In addition, all of the circuit bar associations are opposed to a split.

For more on the issue of a possible Ninth Circuit split, the Eighth Circuit Library staff recommends the following web sites:

Ninth Circuit court restructuring web site

www.ce9.uscourts.gov/Web/restructure.nsf/

Senate Judiciary Committee Hearings, 9-20-06; Testimony from the Hon. Mary Schroeder, the Hon. Diarmuid F. O'Scannlain, et al.

<http://judiciary.senate.gov/hearing.cfm?id=2071>

The Library staff in preparing this article also relied on (1) Carl Tobias, "Keep it Together: Without a strong case of their own, supporters of a 9th Circuit split should defer to judges who oppose division," *Legal Times*, Aug. 28, 2006, p. 60; and (2) Daniel J. Meador, "Split the Difference: To resolve its 9th Circuit dilemma, Congress must focus on separating case decisions from court management," *Legal Times*, August 28, 2006, p. 61. Statistics are from the U. S. Bureau of the Census (www.census.gov).

[Thanks to branch librarians Crata Castleberry, Little Rock, and Deborah Showalter-Johnson, Kansas City, and reference librarian Kris Albertus, St. Louis, for this report.]

Footnotes

An **exhibit honoring** the late Eighth Circuit Judge Theodore **McMillian** is in the last days of a seven-week stay at the African American Historical Museum and Cultural Center in **Cedar Rapids**, Iowa.

The display, which was prepared by Eighth Circuit **Library staff**, will close December 1, 2007.

Judge McMillian was the first African American to serve on the federal bench in the seven states of the Eighth Circuit. He was appointed to the Court in 1978 and continued to serve, as an active and then a senior judge, until his death in January 2006.



The display consists of five panels of text and related photographs: (1) introduction, which includes a list of Judge McMillian's historical accomplishments as the first African American in

various capacities; (2) early years; (3) early career and state judiciary service; (4) federal judiciary service; and (5) community service and awards.

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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 and Krista Kester of Omaha, and Colin Witt of Des Moines.

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