



# ASSOCIATION OF THE BAR OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## Bench Briefs

The U.S. Senate on July 20, 2006, **confirmed** the **nomination** of **Bobby E. Shepherd** to the Eighth Circuit bench.

Shepherd, who currently is a U.S. magistrate judge for the Western District of Arkansas, is expected to **sit** with the Court for the **first time in October**.

Shepherd will fill the seat currently occupied by Judge Morris Arnold, who will take senior status in early October.

Shepherd is an Arkansas native who spent about 15 years in private practice in that state and then served approximately two years on the state bench before becoming a U.S. Magistrate Judge in 1993.

Upon joining the Eighth Circuit, Judge Shepherd will continue to maintain chambers in El Dorado, Arkansas, but will relocate to space yet to be identified.

No date has been announced for Judge Shepherd's public investiture ceremony.

Judge Arnold, who maintains his chambers in Little Rock, assumed the Eighth Circuit bench in 1992.

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Comments from the bench in **honor** of former Eighth Circuit **Judge Gerald Heaney**, made on the occasion of the Judge's last sitting with the Court, can be heard on an **audio clip** accessible from the Eighth Circuit Internet home page at [www.ca8.uscourts.gov](http://www.ca8.uscourts.gov).

The five-minute clip includes audio of Senior Judge Heaney telling the story of an **historic U.S. flag**, from World War II, which was displayed in the courtroom in Judge Heaney's honor on his last day.

Senior Judge Heaney's colleagues on the panel for his last sitting, on June 16, 2006, in St. Louis, were Judges Lavenski Smith and Raymond Gruender.

Senior Judge Heaney joined Senior Judge George Fagg in retiring over the summer. The two Judges served with the Court for nearly 40 and nearly 24 years, respectively.

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Senior U.S. District Judge Richard Kyle of the District of Minnesota will sit with the Eighth Circuit as a **visiting judge** in September in St. Louis.

Senior Judge Kyle has sat with the Circuit on at least 15 occasions over the years, although apparently not since 2001.

Senior Judge Kyle assumed the district court bench in 1992 after a career that included nearly 30 years in private practice, plus two years as state solicitor general in Minnesota.

Senior Judge Kyle, who maintains his chambers in Saint Paul, took senior status in 2005.

## Association News

The Association will sponsor a **continuing legal education** program in **Kansas City** in conjunction with the Court's sitting in that city October 16-20, 2006.

Judges Roger Wollman, William Riley and Raymond Gruender, in a panel discussion, will offer their perspectives on adoption and implementation of electronic case management and electronic filing.

Eighth Circuit Clerk of Court Michael Gans also will appear on the program.

The exact day and time for the program have not yet been determined. Tentative location is the training room in the Charles Evans Whittaker U.S. Courthouse, with a reception to follow in the Bell Room.

Additional details will be announced soon.

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The Association's **membership renewal** campaign for the member year beginning July 1, 2006, is proceeding ahead of last year's pace, with nearly 250 members already having renewed.

Members have until December 31, 2006, to pay their dues before being dropped from the Association's membership list. All members except those who joined after January 1, 2006, need to renew.

Dues remain at \$35, with an exemption for judicial and law clerk members of the Association.

More than 90 percent of Association members renewed their memberships for the past year, with total Association membership remaining, as a result of new members, at around 320.

For a copy of the membership renewal form, visit the Association web site at [www.law.ualr.edu/eighthcircuitbar](http://www.law.ualr.edu/eighthcircuitbar) (if the 2006 renewal form has not yet been posted, modify the 2005 form to show the proper date).

## Appealing Site

The **redesigned Eighth Circuit Library web site**, which went on-line in June of this year,

offers attorneys access to a variety of new information, including research guides and tips prepared by library staff.

For example, one research guide, accessible from the Library home page, collects links to a variety of legal writing sites, including sites dealing with grammar and citation style.

By clicking on the heading "research directory" near the top of the Library home page, attorneys can access collections of web links on topics ranging from federal government to national and international news to legal humor.

Attorneys can also use the research directory to link to sites for state government and local news media within the Circuit and to access general informational sources such as dictionaries and encyclopedias.

The Library web site continues to contain information about Library locations, hours and policies as well as excerpts from the Library newsletter.

In addition, the Library web site continues to include a link to the Eighth Circuit Historical Society, plus it contains history about the Eighth Circuit Library itself and information about the Library's archive of historical Court materials.

The library web site can be found at [www.lb8.uscourts.gov](http://www.lb8.uscourts.gov), or it can be reached by link from the Eighth Circuit home page at [www.ca8.uscourts.gov](http://www.ca8.uscourts.gov).

## Time, Place & Manner

The Eighth Circuit during the **coming court term** will continue to **sit** in a **variety of locations** to compensate for its lack of access to its Saint Paul courtrooms following the temporary closure of the courthouse there for remodeling.

A panel of the Court will sit in Kansas City during October court week, at the University of St. Thomas School of Law in Minneapolis during November court week, and in Omaha during December court week.

The Court during its 2005-06 term sat twice at St. Thomas, twice in Kansas City and once in Omaha. The Court may schedule additional sittings for those locations later in this court term.

The Court will open its 2006-07 term with four panels sitting in St. Louis in September.

The Saint Paul courthouse closed for the remodeling on September 30, 2005, and the project is expected to take around three years.

The Saint Paul clerk's office remains open for business as usual at a location only a few blocks from the courthouse, and its telephone number remains the same.

For further information on contacting the Saint Paul clerk's office, see the special notice on the Eighth Circuit home page at [www.ca8.uscourts.gov](http://www.ca8.uscourts.gov).

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### **“Get Ready, Get Set, Go! The Eighth Circuit Moves Toward Electronic Filing.”**

*To recap the progress toward and status of electronic filing, this Newsletter has received permission to reprint a condensed version of the following article, originally published in the September 2006 issue of e-Filing Report, copyright Thomson/West.*

*Author of the article is Association member and former Association president Eric J. Magnuson, who practices with Rider Bennett, LLP, in Minneapolis.*

In November 2005, the federal “Case Management/Electronic Case Files” (CM/ECF) system turned 10 years old. *See generally* “Electronic Case Filing in Federal Courts Reaches Milestone,” *The Third Branch* (Dec. 2005), available at ([www.uscourts.gov/ttb/dec05ttb/ecf/index.html](http://www.uscourts.gov/ttb/dec05ttb/ecf/index.html)).

Starting with a test project in the U.S. District Court for the Northern District of Ohio, the U.S. Courts Administrative Office took 5,000 document-intensive asbestos cases and put together a system that allowed attorneys and the court to file and retrieve documents and notices electronically.

Since that first effort, the CM/ECF system has expanded across the nation. As of July 2006, CM/ECF systems were in use in 89% of the federal courts: 89 district courts, 93 bankruptcy courts, the court of

international trade, and the court of federal claims. *See* “About CM/ECF: Case Management/Electronic Case Files” (July 2006)(educational material available at [www.uscourts.gov/cmecf/cmecf\\_about.html](http://www.uscourts.gov/cmecf/cmecf_about.html)). Under current Administrative Office plans, most of the trial courts that are not using CM/ECF will begin using it by the end of 2006.

The same cannot be said, however, for the U.S. Courts of Appeals. A review of PACER web sites shows that not a single U.S. Court of Appeals is, as of this date, participating in the CM/ECF program. However, that is about to change.

The Eighth Circuit is poised to become the first circuit court to implement a CM/ECF system. The journey has been long, but the final destination is now in sight.

Anyone familiar with the appellate process recognizes that appeals are dramatically different from trial court proceedings.

In some ways, the mechanics and processes of an appeal seem uniquely suited for the electronic environment – appeals involve great volumes of information that must be presented in a strictly regimented form (briefs), and in a very specific way. The raw material of the record would appear, at first blush, to be ideally suited to being gathered up, organized and presented in an electronic format.

However, at an Eighth Circuit planning conference held in November 2004, the participants recognized a number of significant potential obstacles.

First, a large number of appellate filings are *pro se*, and *pro se* filers are generally unable to use the electronic filing procedures already in place.

Second, records come to an appellate court from many different district courts within the circuit. Although CM/ECF is generally similar across the federal courts, it is not always identical. Docketing and filing practices in the lower courts also vary widely.

Third, many federal appellate cases involve review of state court proceedings, such as *habeas* review in criminal cases, and state courts are not generally part of a uniform e-filing system. See the National E-Filing Survey sponsored by the National Judicial College and available on its web site at [http://www.judges.org/downloads/miscellaneous/efiling\\_survey.pdf/file\\_view](http://www.judges.org/downloads/miscellaneous/efiling_survey.pdf/file_view).

Finally, an even more fundamental issue, and one that has presented obstacles nationally, is the natural hesitance of lawyers and judges to accept change and embrace electronic filing – especially when paper filing has, for the most part, adequately served their needs.

Following the planning conference in 2004, the Eighth Circuit judges authorized the clerk's office to proceed with implementing the CM/ECF system.

It is worth noting CM/ECF consists of two very separate components. The "CM" portion of the system consists of case management software that permits the clerk's office to open cases, docket events and filings, create reports and forms, monitor schedules, and report case data for national statistical purposes.

The "ECF" portion of the system is the interface which permits filers to log into the system, access cases, file their documents and create the docket entries associated with the filing. When a pleading, order or opinion is filed, ECF also notifies parties of the filing.

Over the last twenty months, the Eighth Circuit's clerk's office has laid the groundwork for implementing CM by testing and customizing the software provided by the Administrative Office, creating the reports and forms necessary to docket and manage cases, and verifying that the case data in the current system can be transferred to the new case management system.

Existing programs, such as the Court's software for the creation of hearing panels and the random assignment of oral argument cases, have been integrated with CM. The Eighth Circuit has also taken the lead in

developing the software needed to mesh the CM/ECF with the software currently used by central legal staff and the settlement program.

As a result of the progress made by the Court in these areas, the Administrative Office asked the Eighth Circuit to be the first to implement the CM portion of CM/ECF. The Court is already entering case data in the new system, and it expects the system to be fully operational by the end of December, 2006.

Other circuits will follow, and all of the circuits hope to be using CM software in 2007 or early 2008.

Significant issues still exist, however. For example, privacy remains a significant concern in a system that allows instant access by the public over the Internet.

The U.S. Judicial Conference has adopted a set of recommendations relating to privacy and public access to electronic case files (posted at [www.privacy.uscourts.gov](http://www.privacy.uscourts.gov)). Nonetheless, serious privacy issues remain for clients, practitioners and the courts. These problems include inconsistencies between the privacy requirements in the various circuits. See Howard J. Bashman, *Redact This: Preserving Secrets on Appeal in the Digital Age*, Law.com (Jan. 30, 2006) ([www.law.com/jsp/article.jsp?idequal1138269915256](http://www.law.com/jsp/article.jsp?idequal1138269915256)).

Progress in getting the judges to accept electronic appeals has been slow, but steady. The Eighth Circuit was actually one of the first courts to require electronic copies of briefs.

Beginning in 2000, the Court asked lawyers to submit, along with the hard copies of their briefs, electronic copies of their briefs on disk. The Court uses these electronic copies to extract information concerning the issues being presented in particular appeals, and it posts the electronic briefs on the Court's web site.

It may be some time before the Court and counsel are able to work from an electronic record, but that is one of the goals of the CM/ECF project.

The ability to create briefs with hyperlinks, thereby potentially eliminating the need for a paper record, was identified at the 2004 planning conference as a key requirement for the appellate version of CM/ECF. As a result, the Administrative Office and key U.S. Judicial Conference committees made a commitment to modify the district court and bankruptcy court CM/ECF systems to allow appellate filers to create hyperlinks in their briefs to take the reader directly to the district and bankruptcy court documents. This programming work has been completed, and the Eighth Circuit's staff is now testing the software; based on its current experience, the Court believes it will be very simple for counsel to create "pinpoint" cites to the trial court record.

The Court is also testing software that will allow attorneys to create a "virtual appendix" or record on appeal which would reside on the Court's server.

Eighth Circuit Clerk of Court Michael Gans anticipates that at some point the Eighth Circuit will not use appendices or paper appellate records at all and instead will do everything by "E-record."

Briefs with pinpoint citations to transcripts, trial court documents and exhibits will be powerful tools for appellate lawyers – and may eventually convince appellate judges and law clerks that electronic briefs are preferable to paper ones. Even now, some judges are reading electronic versions of the briefs at home.

Over the next six months, the Eighth Circuit intends to create CM/ECF working groups that will include appellate practitioners and the Court's own judges and staff. The working groups will help the Court identify issues and develop changes in the local rules and operating procedures required for the transition to electronic filing.

Gans believes the Court's commitment to including the bar in this process is a direct result of the success of the 2004 planning conference, which helped the Court understand the benefits of a

collaborative approach to the implementation of CM/ECF. Simply put, involving all of the stakeholders in the planning process insures buy-in, and a broader, shared perspective from which to identify issues and solutions.

The Court also expects to involve the bar in testing the ECF software and in evaluating the training plans and training software the Administrative Office is developing. Gans indicated that details about opportunities to participate in these working groups and in the testing process will appear on the court's web site.

The Eighth Circuit expects to implement the ECF portion of the system in the second quarter of 2007.

While the final version of the software is not yet available, Gans believes the Eighth Circuit is committed to certain broad principles for its version of ECF:

(a) The system will cover all case types and will be mandatory for attorney filers and permissive for pro se filers.

(b) The Court will accept electronic versions of all documents, although it may require a limited number of paper briefs in each case.

(c) Pro se documents will be scanned so that the electronic version of the appellate file is complete.

(d) Hyperlinks to trial court documents will be required, where applicable, in appellate motions and briefs.

(e) The Court may dispense with paper versions of the record, including joint and separate appendices.

The Court has not yet decided whether the implementation should be in phases (perhaps starting with motions and petitions for rehearing).

Sometime in the not-too-distant future, electronic filing will become a reality for the Eighth Circuit. The Eighth Circuit will be the first federal circuit court of appeals to take this momentous step. When it happens, it will be the result of a great deal of careful thought, lots of hard work, and tremendous dedication

on the part of the judges and court staff as well as lawyers practicing before the Court.

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The U.S. Judicial Conference Standing Committee on Rules in June approved **proposed new FRAP 25(a)(5)** regarding **privacy protection**.

Under the proposed new rule, an appeal in a case originating in district or bankruptcy court would continue to be governed by the privacy provision of whichever of the civil, criminal or bankruptcy rules previously applied.

The privacy provision of the civil rules would apply in all other cases, except that the privacy provision of the criminal rules would apply to applications for extraordinary writs in criminal cases.

The proposed new rule was circulated for public comment in August 2005 and approved by the Advisory Committee on Appellate Rules, with only stylistic revisions, in April 2006.

The proposed rule next must be considered by the full U.S. Judicial Conference.

### Higher Authority

The U.S. Supreme Court in its recent decision in *U.S. v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006), **affirmed** the **Eighth Circuit’s** reversal of a criminal conviction based on a denial of the defendant’s choice of counsel. See 399 F.3d 924 (2005).

The Court, in a 5-4 decision, held that the admitted error in the disqualification of the defendant’s chosen counsel resulted in a Sixth Amendment violation regardless of the effectiveness of alternative counsel and that the violation was not subject to “harmless error” analysis.

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The **Eighth Circuit case** of *Lopez v. Gonzales* (417 F.3d 934 (2005)) will be the first case heard by the U.S. Supreme Court in its 2006-07 term, with argument set for October 3, 2006.

Another Eighth Circuit case **held over** from last term, *Carhart v. Gonzales* (413 F.3d 791 (2005)), will be heard November 8, 2006.

The Supreme Court during its 2005-06 term fully heard and decided three cases from the Eighth Circuit and affirmed the Circuit in two of those cases.

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The U.S. Supreme Court last term in its per curiam opinion in *Eberhart v. U.S.*, 126 S. Ct. (2005), clarified and reconciled its previous decisions on the **distinction between “jurisdictional” and “claims processing” provisions** – and in the process rejected a position taken by most Courts of Appeals.

Specifically, the Court in *Eberhart* held that the deadline in **Rule 33** of the Federal Rules of **Criminal Procedure** for new trial motions is not “jurisdictional” and instead merely establishes a rule for claim processing, such that a timeliness objection cannot be raised for the first time on appeal.

The Court expressly noted that, in part as a result of its own prior imprecise use of language, the circuits generally have characterized the Rule 33 filing deadline as “jurisdictional.” For an example of such a holding in the Eighth Circuit, see *U.S. v. Beran*, 546 F.2d 1316 (1976).

### Issues on Appeal

The Eighth Circuit will hear **two criminal cases en banc** in September as it opens its **new court session** with a sitting in St. Louis.

One case, *U.S. v. Burns*, involves a district court’s decision to grant a downward sentencing departure of 60 percent, for cooperation by the defendant, when the government recommended a downward departure of only 15 percent. The panel, with Judge Roger Wollman in dissent, upheld the sentence. 438 F.3d 826 (2006).

The Court last September also heard en banc a case involving a downward sentencing departure substantially in excess of that recommended by the government. That en banc proceeding, however, resulted in an affirmance of the panel decision, and

thus of the district court, by an equally divided vote. See *U.S. v. Christenson*, 424 F.3d 852 (affirming 403 F.3d 1006).

The second new en banc case, *U.S. v. Norris*, involves a district court's enforcement of a signed plea agreement from which the government sought to withdraw after a new assistant U.S. Attorney took over the case and decided the agreement was too favorable to the defendant. The panel unanimously affirmed the enforcement of the plea agreement. 439 F.3d 916 (2006).

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The Eighth Circuit in its recent decision in *Hope v. Klabal*, No. 05-1972 (Aug. 7, 2006), made clear that a partial summary judgment becomes **appealable** as a **final decision** if the parties **dismiss** the **remaining claims**, regardless of whether the dismissal is with or without prejudice.

The Court acknowledged some inconsistency in its previous opinions but concluded that even a voluntary dismissal leaves the district court with nothing to resolve and thus ends the case as far as the district court is concerned.

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The Eighth Circuit has been drawn into the “**same-sex marriage**” controversy, issuing a decision in July upholding against constitutional challenge a voter-adopted amendment to the Nebraska Constitution prohibiting the recognition in that state of any form of same-sex relationship. See *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (2006).

As evidence of the attention attracted by the case, a direct link to the opinion appears on the Eighth Circuit Internet home page, and the Court in a footnote in the opinion acknowledged the filing of 17 amicus curiae briefs (13 in support of the amendment).

Issues addressed in the opinion include standing, equal protection, bill of attainder and the First Amendment.

The Eighth Circuit panel reversed the decision of district court, which had found the amendment unconstitutional.

The Court by order dated August 30, 2006, denied rehearing and rehearing en banc.

## Footnotes

“The Verdict of History: Examining Missouri’s Judicial Record” is the current traveling **exhibit** at the new **Judicial Learning Center** on the main floor of the Thomas F. Eagleton U.S. Courthouse in **St. Louis**.

The exhibit, developed by the Missouri State Archives, showcases the state's judicial records and includes photos and documents involving Meriwether Lewis, William Clark, Dred Scott, and Jesse and Frank James, among others.

For more on the Center and its recent opening, see the June 2006 issue of this newsletter (available on the Association web site at [www.law.ualr.edu/eighthcircuitbar](http://www.law.ualr.edu/eighthcircuitbar)) or the May 2006 issue of *The Third Branch* (available on U.S. Courts Administrative Office web site at [www.uscourts.gov](http://www.uscourts.gov)).

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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](mailto:mccallahan@belinlaw.com)).

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