The Ninth Circuit Court of Appeals Evaluation Committee

Judge David R. Thompson

The Ninth Circuit Court of Appeals Evaluation Committee (the "Evaluation Committee") was created in March, 1999. I have had the honor of chairing that committee.

The Evaluation Committee was not created to quibble with or attack the White Commission Report. It was created to be a self-examination committee charged with the task of challenging the policies, practices and procedures of the Ninth Circuit Court of Appeals, and making recommendations to the court as to how the court might improve upon the delivery of justice to those it serves.

The members of the Evaluation Committee are:

Senior Circuit Judge David R. Thompson, Chair
Circuit Judge Mary Schroeder
Senior Circuit Judge Edward Leavy
Circuit Judge Thomas G. Nelson
Circuit Judge Michael Daly Hawkins
Circuit Judge M. Margaret McKeown
Circuit Judge Kim McLane Wardlaw
Chief District Judge David Ezra
Professor Arthur Hellman
Miriam Krinsky, Chair, (Advisory Rules Committee)

The Evaluation Committee has met regularly to investigate and study concerns and issues pertaining to the court, the court's constituency, and the geographical area it serves. The Evaluation Committee has enlisted assistance from academic experts and has reviewed research work by the court's staff attorneys. In conjunction with the Circuit's Advisory Rules Committee, the Evaluation Committee has conducted bench-bar focus group meetings at a variety of locations in the circuit to obtain the views and suggestions of the Ninth Circuit bench and bar. The Evaluation Committee has also widely circulated a detailed call for comments from

judges, lawyers, and other interested parties from across the circuit and across the nation.

The mission of the Evaluation Committee is "[t]o examine the existing policies, practices and administrative structure of the Ninth Circuit Court of Appeals, in order to make recommendation to its judges to improve the delivery of justice in the region it serves."[1]

Pursuant to its mission, the Evaluation Committee initially identified approximately thirty-five matters for consideration. Thereafter, new topics were added and some were deleted. Eventually, the work of the Evaluation Committee became focused in five categories: The En Banc Process, Improved Processes and Efficiencies, Consistency of Decisions, Collegiality, and Regional Sensitivity and Outreach.[2]

THE EN BANC PROCESS

In reviewing the court's en banc process, the Evaluation Committee considered whether more judges should be included on the en banc court; whether the number of votes required to take a case en banc should be decreased in order to increase the number of cases taken en banc; whether the composition and method of selection of the en banc court should be altered; and whether other modifications should be made to the court's en banc procedures.[3]

In the course of its work, members of the Evaluation Committee consulted with a number of outside academic experts. One of the experts consulted was Professor D.H. Kaye of the College of Law, Arizona State University. Professor Kaye conducted a statistical analysis of the size of the limited en banc court in relation to a full court of twenty-eight judges. His analysis demonstrated that an en banc court of eleven judges is sufficient to achieve a representative factor of 94%, even when the vote to take a case en banc is nineteen to nine.[4] Professor Kaye's analysis also illustrated that increasing the number of judges on the en banc court from eleven to thirteen or fifteen would add very little to that degree of reliability.[5]

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[1] NINTH CIRCUIT EVALUATION COMMITTEE INTERIM REPORT 2 (Mar. 2000), *available at* http://www.Ca9.uscourts.gov/Ca9/Documents.nsf/news?openview & expandview [hereinafter INTERIM REPORT].

[2] *Id.*

[3] *Id.*

[4] *Id.* at 3.

[5] *Id.*

Members of the Evaluation Committee also spent a day with a panel of distinguished scholars drawn from a variety of disciplines that bear on the operation of appellate courts. These scholars included: Professor Linda Cohen, Department of Economics, University of California, Irvine; Professor John Ferejohn, Hoover Institute, Stanford University; Professor Louis Kornhauser, New York University School of Law; Professor Matt McCubbins, Department of Political Science, University of California, San Diego; and Professor Roger Noll, Department of Economics, Stanford University. Prior to the meeting, the Evaluation Committee provided these academics with materials, including the White Commission Report and the rules, procedures and statistics relating to the Ninth Circuit en banc court. Among other things, this group confirmed the import of the calculations done by Professor Kaye in concluding that the current random draw is effective in providing a representative en banc court. The group strongly recommended, however, that to increase the level of representation of judges in the *overall* en banc process, the court should consider ways to increase the number of cases taken en banc.[6]

In addition to considering the views of academic experts, the Evaluation Committee collected data on the following issues: how close the votes had been to take cases en banc since the limited en banc court was instituted in 1980; how frequently cases that were taken en banc involved panel decisions with dissents or concurrences, how often a visiting judge was on the three-judge panel, and whether cases taken en banc had received Supreme Court review.[7] In the course of its research, the Evaluation Committee determined that since 1980, when Congress authorized the limited en banc process, more than 170 limited en banc decisions had been rendered.[8] One-third of those decisions were by a unanimous en banc court and three-quarters were rendered by a majority of eight to three or greater.[9]

Considering the foregoing, the Evaluation Committee presented recommendations to the court for increasing the number of judges on the en banc court and decreasing the number of affirmative votes required to take a case en banc. These recommendations were presented to the court at a meeting on July 27, 1999.[10] By the time of that meeting, Senator

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[6] *Id.*

[7] *Id.*

[8] *Id.* at 4.

[9] *Id.*

[10] *Id.*

Feinstein had introduced Senate Bill 1043, entitled "The Ninth Circuit En Banc Procedures Act." That bill provided for a reduction in the number of votes required to take a case en banc from a majority to 40%, and an increase in the size of the en banc court to a majority of the active judges.[11] The bill also contained a provision requiring judges from specified geographic areas of the circuit to be on three-judge panels hearing cases in those areas. The court endorsed the Feinstein bill.

Although the court has not yet decreased the number of votes required to take a case en banc, the number of cases taken en banc has increased significantly over the past three and-a-half years, as shown in the following table[12]:

Calendar Year	No. of Cases Taken En Banc
1994	8
1995	8
1996	14
1997	19
1998	17
1999	20
2000 (to July 26)	11

As can be seen, the high figure for 1999 is no "spike." The figure reflects an apparent change in the court's en banc culture. This suggests that the concern about not taking enough cases en banc is being met within the framework of the court's existing rules and procedures.

To conduct en banc hearings in what may prove to be a more efficient use of judge time, and to reduce travel requirements, the court has adopted, on an experimental basis, the suggestion of the Evaluation Committee to hold en banc hearings quarterly throughout the year.[13] The experiment is still in its early stages. In March 2000, the court held its first set of quarterly hearings. The Committee believes that after further experience with quarterly hearings the court will be in a good position to determine whether this form of scheduling should be continued, modified, or abandoned.[14]

Finally, as suggested by the Committee, the court's Web site now contains a status report on all cases in which en banc review has been

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[11] *Id.*

[12] *Id.* at 5.

[13] *Id.*

[14] *Id.* at 6.

granted.[15] The report presents key information about the cases, including a summary of the issues before the en banc court. Through this Web site, trial judges and lawyers can now ascertain whether a pending en banc decision may affect their own cases and the status of the pending en banc rehearing.

IMPROVING PROCESSES AND EFFICIENCIES

As part of its work, and particularly as a result of the many bench-bar meetings held around the circuit, the Evaluation Committee received a number of suggestions for improving court processes. The Evaluation Committee recommended some of these to the court. The court rejected some proposals, adopted some, and sent the Evaluation Committee back to the drawing board with regard to others. The following seven proposals represent some of the proposals that remain under consideration or have been acted upon by the court.

The first proposal that remains under consideration concerns the batching of cases on argument calendars.[16] In preparing the court's calendars, staff has been directed to batch a number of cases raising the same issue and to inform the panel assigned to adjudicate a collection of batched cases that other cases may be awaiting resolution of a lead case or cases. These procedures will permit the panel to designate which case or cases should serve as "lead," and to make sure the key issue gets resolved as expeditiously as possible.

The second proposal recommended by the Evaluation Committee, and authorized by the court, is the release of the names of judges serving on the monthly motions panel on the first day of each month.[17] Under previous practice, institutional parties became aware of the panel identity early in the month by virtue of their voluminous caseload. Yet, most other lawyers and pro se litigants had no knowledge of the motions panel composition.

The third proposal recommended by the Evaluation Committee concerns the resolution of pending and dispositive motions.[18] The bar expressed concern that frequently pending procedural motions referred to merits panels were not dealt with prior to argument, thus causing confusion or uncertainty for counsel as to how to proceed on certain

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[15] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, PENDING EN BANC CASES, *available at* http://www.Ca9.uscourts.gov.html.

[16] INTERIM REPORT, *supra* note 1, at 7.

[17] *Id.*

[18] *Id.*

matters. The Committee recommended, and the court directed, that presiding judges take steps to try and resolve these motions prior to argument. The bar also expressed concern that a number of dispositive motions were being referred by motions panels to merits panels, only to have the merits panel decide the case on the issue previously raised in the dispositive motion. Recently, there appears to have been some improvement in motions panels ruling on dispositive motions. Nevertheless, the Committee plans to continue to monitor the situation.

The fourth proposal recommended by the Evaluation Committee concerns "focus" orders.[19] Pursuant to the committee's recommendation and to the extent panels and en banc courts are able to do so, the court encourages issuance of orders prior to oral argument. This procedure focuses counsel on particular issues or cases.

The fifth proposal recommended by the Evaluation Committee concerns issues not addressed in briefing or argument.[20] A concern arose during bench-bar gatherings regarding the resolution of appeals based on either an issue or recent authority not briefed or addressed by the parties. This problem is dealt with by the court's General Order 4.2, which states that "[I]f a panel determines to decide a case upon the basis of a significant point not raised by the parties in their briefs, it shall give serious consideration to requesting additional briefing and oral argument before issuing a disposition predicated upon the particular point."[21] The Advisory Rules Committee is also considering an Advisory Committee note to give counsel guidance as to what to do when their case appears to have been either lost or stalled.[22]

Lastly, on recommendation of the Evaluation Committee, the court referred to the court's Advisory Rules Committee consideration of a rule which would allow citation of unpublished dispositions for persuasive value.[23] After careful study, the Advisory Rules Committee recommended that citation of unpublished dispositions or orders be permitted in requests for publication and in petitions for panel rehearing and rehearing en banc. Acting on that recommendation, the court amended Circuit Rule 36-3.[24]

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[19] *Id.* at 8.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* at 6.

[24] 9TH CIR. R. 36-3. The court amended Circuit Rule 36-3 as follows:

CONSISTENCY OF DECISIONS

While there is no objective evidence that Ninth Circuit decisions are subject to greater inconsistency than those in other circuits, there is a perception that a circuit as large as the Ninth cannot avoid inconsistencies with so many panels issuing so many opinions.[25] Responding to this perception, the Evaluation Committee focused its efforts on strengthening the court's ability to recognize potential or perceived conflicts early and address them directly and immediately.[26]

Amended Circuit Rule 36-3

Citation of unpublished Dispositions or Orders:

(a) Not Precedent. Unpublished dispositions and order of this Court are not binding precedent, except when relevant under the doctrines of law of the case, res judicata, and collateral estoppel.

(b) Citation. Unpublished dispositions and orders of this court may not be cited to or by the courts of this circuit except in the following circumstances:
(i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case, res judicata, or collateral estoppel..
(ii) They may be cited to this Court or by any other courts in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case.
(iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.

(c) Attach Copy. A copy of any cited unpublished disposition or order must be attached to the document in which it is cited, as an appendix.

Circuit Advisory Committee Note to Circuit Rule 36-3:

Circuit Rule 36-3 has been adopted for a limited 30-month period, beginning July 1, 2000 and ending December 31, 2002. Litigants are invited to submit comments regarding the rule to the Clerk during the first 24 months of the trial period. After the rule has been in effect for 24 months, the Advisory Committee on Rules will study and report to the Court on the frequency with which unpublished dispositions are cited to the Court and on any problems or concerns associated with the rule. The Advisory committee will also issue a recommendation on whether the rule should be made permanent. Unless, by December 31, 2002, the Court votes affirmatively to extend the rule, it will automatically expire on December 31, 2002, and the former version of Circuit Rule 36-3, prohibiting citation of dispositions under all circumstances will be reinstated.

[25] INTERIM REPORT, *supra* note 1, at 8.

[26] *Id.* at 9.

Before the court assigns cases to three-judge panels, the Case Management Attorneys in the Office of Staff Attorneys prepare inventory cards for all cases sent to oral argument panels.[27] This information includes a notation of all pending cases that raise a related issue, as well as recent panel decisions that may have been issued since the briefs were filed.[28] The inventory cards also include a notation of recent Supreme Court decisions and specify the issues upon which the Supreme Court has granted certiorari.[29] A new computer data base has been created to capture all of this information.[30]

The Case Management Attorneys also issue daily pre-publication reports. These reports briefly summarize the decisions of three-judge panels in every opinion that is about to be filed.[31] In addition, the reports identify pending cases before the court that may be affected by the opinions.[32] The report is circulated two days before an opinion is published. This enables the entire court to review upcoming opinions for consistency without delaying the disposition of appeals.[33] Moreover, the circulation informs panels which may have heard argument, or are about to hear argument, that a case raising related issues has just been decided.[34]

The Evaluation Committee is also addressing the perception expressed in the White Commission Report, and by some district judges and practitioners within the Ninth Circuit, that conflicts exist among unpublished memorandum dispositions and published opinions.[35] The Commission acknowledged it had no hard data to support this perception, and expressed the view that "neither we nor, we believe, anyone else, can reduce consistency and predictability to statistical analysis."[36] The Commission frankly stated that "[I]n the time allotted, we could not possibly have undertaken a statistically meaningful analysis of opinions as well as unpublished dispositions, dissents, and

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[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 29 [hereinafter Final Report]. Citations to Final Report can be found at http://app.comm.uscourts.gov. (last visited Oct. 25, 2000). Hard copies of all cited Final Report documents are on file with the UC Davis Law Review.

[36] *Id.* at 39

petitions for rehearing en banc to make our own, objective determination of how the Ninth Circuit Court of Appeals measures up to others."[37]

In contrast to the White Commission, the Evaluation Committee believes that it is possible to obtain evidence that will shed additional light on the Ninth Circuit's performance in maintaining intra-circuit consistency.[38] To that end, the Committee has sought information from those who are in the best position to know if conflicts exist: the members of the Ninth Circuit legal community. The Committee has circulated a memorandum to Ninth Circuit Lawyer Representatives, Senior Advisory Board Members, all law school deans within the Ninth Circuit and other members of the academic community asking for their help in identifying what may appear to be conflicting decisions.[39] In addition, the Evaluation Committee has circulated to all Ninth Circuit district judges, magistrate judges and bankruptcy judges a request to bring to the court's attention examples of possible conflicts involving unpublished memorandum dispositions.[40] The Evaluation Committee created a response form which permits responses to be returned to the court via the court's Web site. The form may also be faxed or mailed to the court. The Evaluation Committee initially made the form available to the public in late January 2000. As of July 2000 only a handful of responses have been received.[41] These responses have been dealt with by the Committee or the court.

Since August 1999, the Evaluation Committee has also been monitoring published opinions for consistency. Pursuant to this Opinion Monitoring Experiment, Case Management Attorneys monitor published opinions falling within six categories: (1) the opinion expressly distinguishes one or more Ninth Circuit precedents; (2) the opinion expressly rejects out-of-circuit precedents; (3) the opinion includes a dissent; (4) the opinion holds a federal statute unconstitutional; (5) the opinion holds a state statute or initiative unconstitutional; (6) the opinion invalidates a published federal regulation.[42]

If a party files a petition for rehearing in any of these "flagged" cases, the Case Management Attorneys notify one of the circuit judges on the Evaluation Committee.[43] That judge then reviews the opinion and the

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[37] *Id.*

[38] INTERIM REPORT, *supra* note 1, at 10.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 11.

[42] *Id.*

[43] *Id.*

petition for rehearing to determine whether there is an asserted conflict and, if so, whether that assertion appears to have merit.[44] The staff and the reviewing circuit judge also monitor comments by judges pertaining to the opinion, as well as requests for General Order 5.4(b) notices, stop clocks, and calls for en banc.[45]

To this point, the data suggests that the court is properly monitoring its opinions for consistency and resolving potential conflicts. The court has taken action in a relatively high percentage of the "flagged" cases in which petitions for rehearing have been filed, and has focused on those cases in which the assertion of a conflict might have some merit.[46]

The Evaluation Committee is not yet in a position to draw conclusions, even tentatively, about monitoring vis-à-vis the Supreme Court.[47] That element, although not directly related to intra-circuit consistency, is a matter worthy of further study and analysis. Certiorari petitions from some of the cases decided by panels since the experiment began have now started to reach the Supreme Court.[48] After the Court announces its first certiorari order lists for the October 2000 Court term, the Evaluation Committee should have a better sense of whether this aspect of the monitoring process requires further attention.[49] If it does, the Committee will examine possible refinements of the Court's monitoring process.[50]

REGIONAL SENSITIVITY AND OUTREACH

At the court meeting on December 15, 1999, the court authorized the continuation of the Regional Calendaring experiment for the Northern administrative unit of the circuit in calendar year 2000.[51] The Northern administrative unit consists of the states of Oregon, Washington, Idaho, Montana and Alaska. Pursuant to this experiment, at least one judge who resides within the Northern administrative unit is assigned to the three-judge panels hearing cases within that region.[52] The Evaluation Committee anticipates the effectiveness of this project may be measured, at least in part, by how it is received in the Northern region of the

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[44] *Id.*
[45] *Id.*
[46] *Id.* at 12.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*

circuit.[53] Although we may all agree that the result in a given case does not depend upon whether a particular judge on the panel is from a particular region, we cannot deny that there is a perception that judges from particular regions bring to a panel a certain sensitivity to the concerns of people within that region.[54] Indeed, this perception has been expressed by Senators from the Northwest and has been formalized by inclusion in Senator Feinstein's bill.[55]

"Regional Sensitivity and Outreach" involves more than regional assignment of judges.[56] It also involves having the court sit in cities where the court does not ordinarily sit and making continued efforts to interact informally with practitioners in those cities.[57] To that end, such regional sittings have been combined with bench-bar activities, thereby increasing outreach to and communication with all parts of the circuit.[58] During calendar year 1999, the court conducted oral arguments and bench-bar meetings in Anchorage (Alaska), Coeur d' Alene (Idaho), Missoula (Montana), San Diego (California), Phoenix (Arizona), and Honolulu (Hawaii).[59] The court conducted these regional sittings and bench-bar meetings in conjunction with the court's regular sittings in Pasadena, San Francisco, Portland, and Seattle.[60] The court has continued and expanded the Regional sittings and bench-bar meetings during 2000. The Chief Judge has agreed they will be continued in future years as well.[61]

COLLEGIALITY

There is a perception, reinforced by the White Commission Report, that larger courts have more difficulty than smaller courts in being "collegial."[62] There is no empirical data to support such an assumption. Moreover, it is contrary to the input the Evaluation Committee received from the academic experts it consulted.[63] The perception seems largely based on the assumption that the main way judges get to know one

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[53] *Id.* at 13.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] Final Report, *supra* note 35, at 47.
[63] INTERIM REPORT, *supra* note 1, at 14.

another's way of thinking is through court sittings. The staff director for the Commission, Professor Meador, recently testified: "The present Ninth Circuit limited en banc functions through judges who are unlikely to have worked together before in deciding cases and will never do so again . . . ."[64]

The judges of the Ninth Circuit know from their own experience that this is not correct.[65] The assumption that there is a correlation between court size and collegiality ignores the existence of the interaction among judges by telephone, e-mail, calendar lunch and dinner meetings, constant press of issues that relate to administration of the court and how we do our work, and the steady stream of communication on whether to take cases en banc.[66] Our e-mail traffic covers such diverse topics as chambers space allocation, whether or not bench memoranda should be pooled, the successes of our children and grandchildren, and recommendations for legal reading.[67] The White Commission suggested, however, that as the size of a court increases, "[t]he opportunities the court's judges have to sit together decrease. In a court of twenty-eight judges, given a typical sitting schedule such as that used in the Ninth Circuit Court of Appeals, it would be rare for a judge to sit with every other judge of the court more than once or twice in a three-year period."[68]

Although the Commission's observation overlooks judges sitting with one another on motions and screening panels and the times judges sit together en banc, improvement could be made in the frequency with which judges sit with one another on regular three-judge panels.[69] Improvement in this area might be achieved by reducing the use of visiting judges.[70] This option could become viable once the court's judicial vacancies are filled.[71] Improvement might also be achieved if judges were willing to forego preferences as to their off-calendar months.[72] Another solution might be to mix judges on panels when two or more panels are sitting in the same city in the same week.[73] The

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[64] Final Report, *supra* note 35, at 47.
[65] INTERIM REPORT, *supra* note 1, at 14.
[66] *Id.*
[67] *Id.*
[68] Final Report, *supra* note 35, at 47.
[69] INTERIM REPORT, *supra* note 1, at 15.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*

disadvantage of such mixing, of course, would be that the assignment of cases for opinion writing would become somewhat more complicated.[74]

Another aspect of collegiality is "civility" among judges. Judge Wald of the D.C. Circuit has stated that collegiality in this form comes into play in opinions and dissents, and involves colleagues writing respectfully about the views of one another.[75] Although this may be correct, breaches of this kind of civility are not peculiar to large circuits.[76] An informal committee survey of other circuit court decisions containing dissents failed to reveal any correlation between size and "nastiness."[77]

CONCLUSION

With regard to most of the matters the Committee has considered, its work seems to be drawing to an end. Other matters remain on the table. Various aspects of collegiality are still being considered, and further work on that subject may be indicated.[78] The Feinstein bill, if enacted, would deal with en banc issues.[79] To the extent these issues are not dealt with by that bill, the Evaluation Committee expects to take a fresh look at its previous recommendations in light of the court's experience under the new en banc culture.[80] With regard to Regional Calendaring, the Committee will evaluate the effectiveness of that project after the end of calendar year 2000.[81]

To date, the results of the experiment with Consistency of Decisions suggest that there is no significant problem with inconsistent decisions in the Ninth Circuit. Moreover, to the extent any inconsistent decisions may occur, the court is dealing with them effectively through its internal structures. The experiment is ongoing and a final report will likely be submitted to the court during the year 2001.[82]

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[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.* at 16.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*

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