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## Introduction to Upcoming Ninth Circuit Survey

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## Introduction to Upcoming Ninth Circuit Survey, by Judge Clifton

NOVEMBER 18, 2013 BY EXECUTIVE ONLINE EDITOR 0 COMMENTS

By: The Honorable Richard R. Clifton

For nearly four decades, the [Golden Gate University Law Review](#) has produced an annual volume reviewing decisions of the Ninth Circuit. As our court covers over one-fifth of the country, and deals with a comparable share of the federal appeals, it is appropriate to pay attention to its jurisprudence.

The bar should be grateful to the law review for that effort. The Ninth Circuit is the last stop for the overwhelming majority of cases. Review by the Supreme Court is sought for only a fraction of the Ninth Circuit's decisions, and the Supreme Court takes for consideration on the merits only about one per cent of those cases in which a petition for certiorari is filed. To be sure, the Court takes many high-profile cases, but even most cases that could be described that way do not get selected by the Court for plenary consideration. As a practical matter, lawyers considering an appeal to the Ninth Circuit know that it will be the final appeal for all but a handful of cases.

Understanding more about the court's decisions may help a lawyer craft more persuasive arguments.

These volumes should also be of interest to lawyers practicing before the court because they provide useful insight into how the court operates. Most lawyers working on Ninth Circuit appeals do not have much experience with the court. There are exceptions, of course. There are lawyers with the Department of Justice, Federal Defender Offices, or other government agencies who appear before the court on a regular basis, as do some private practitioners who specialize in fields like criminal appeals, immigration law, or Social Security benefit appeals. But most attorneys who appear before the Ninth Circuit do not do so very often. As a result, they may not be familiar with the court's internal procedures.

In recent years many of the introductions written by my colleagues to these annual volumes have made an effort to discuss the court's operations. [Judge Morgan Christen](#) wrote about the contributions made to the court by senior judges and by the court's staff attorneys. [Judge Susan Graber](#) discussed the use of technology, decisions to submit a case on the briefs and without oral argument, and the screening process, used by our court for about one-third of all cases resolved on the merits. [Judge Marsha Berzon](#) provided insight into how our court considers whether to rehear a case en banc. The [court's procedures](#) have been discussed in articles by other authors as well.

The court does not intend for its processes to be secret. Indeed, it is affirmatively helpful to the court for lawyers and other interested people to have a better idea of how the court works. Someone who is knowledgeable is less likely to make a mistake that has to be untangled or, in some cases, may be fatal to an appeal. That person is also better able to explain to clients and other interested people what to expect on appeal and the significance of some of the court's orders and instructions.

Unfortunately, it is hard for someone who is not behind the curtain to know what goes on backstage. Although the [Federal Rules of Appellate Procedure](#), the [Ninth Circuit Rules](#), and the court's [General Orders](#) are readily available, including on the court's website, they do not define all of the court's procedures. Besides, it may be difficult to glean how the court actually works just from the rules – someone trying to understand baseball would find it challenging to do so by only reading the official rulebook. The Golden Gate University Law Review has performed a useful service in helping to explain how the court works.

There are other sources available, and lawyers with cases before the Ninth Circuit would do well to consult them. In recent years the court itself has tried to make more information available,

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primarily via its website. Anyone interested in the court – including lawyers who are filing appeals, drafting briefs, and preparing for oral arguments – should make a point of checking the resource information made readily available by the court at that website:

<http://www.ca9.uscourts.gov>.

Worthy of special note are substantive outlines on certain areas of law, currently found on the website in a section described as [Guides and Legal Outlines](#). Most of the outlines are prepared by staff attorneys employed by the Ninth Circuit who help present cases to judges and who deal repeatedly with certain areas of the law, developing substantial expertise in the process.

Currently there are outlines available on appellate jurisdiction, standards of review, perfecting an appeal, immigration law, and section 1983 litigation. Reviewed and updated on a periodic basis, they were initially prepared for use by staff attorneys themselves, but some years ago it was decided to make them public. They are not recognized by the court as a persuasive authority, so they should not be cited for that purpose, but they provide an outstanding summary of important legal propositions with supporting citations to Supreme Court and Ninth Circuit decisions.

Another recent addition to the collection is the [Appellate Lawyer Representatives' Guide to Practice in the United States Court of Appeals for the Ninth Circuit](#). It can also be found on the Ninth Circuit's website. The first version of the guide was made available on October 22, 2013, and periodic reviews and updates are planned. It was prepared by lawyers who serve as representatives of appellate practitioners to the periodic [Ninth Circuit Judicial Conference](#). It describes the court's procedures and provides helpful checklists for the preparation and filing of motions, briefs, and records. Even experienced lawyers are likely to learn something new from the guide. I wish I had been able to refer to it when I was a practicing lawyer.

The Golden Gate University Law Review has been a leader in the effort to better explain the Ninth Circuit. The judges of the court and the lawyers practicing before it owe the law review our thanks.

**About Judge Richard R. Clifton:**

President George W. Bush nominated Judge Clifton to the Ninth Circuit on September 4, 2001, and the Senate confirmed him on July 18, 2002. Judge Clifton received his A.B. from Princeton University in 1972, and his J.D. from Yale Law School in 1975.

After law school, Judge Clifton *clerked* for Judge Herbert Y.C. Choy of the United States Court of Appeals for the Ninth Circuit from 1975 to 1976. Judge Clifton went on to maintain a private practice in Honolulu, Hawaii, from 1977 to 2002, where he also served as an Adjunct Professor at the University of Hawaii, Richardson School of Law, from 1978 to 1980 and again from 1983 to 1989. Judge Clifton maintains his chambers in Honolulu, Hawaii.

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