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Introduction

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INTRODUCTION

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"The Ninth Circuit, like other federal courts, has been subject to the pressure of a caseload which threatens perpetually to out-distance the ability of its judges to dispose of it."[1] So began the introduction to this law review's very first Ninth Circuit Survey in 1976. The author, Anthony M. Kennedy, then a Ninth Circuit judge, and now a Supreme Court justice, rightfully boasted that the Ninth Circuit had issued final decisions on the merits in more than 1,300 cases in the preceding year. I am proud to report that, this past year, the court issued final decisions on the merits in almost five times as many cases.[2] Judge Kennedy's introduction thirty-five years ago not only identified the "perpetual[]" challenge that our court faces in addressing an ever-expanding caseload, it also presciently foretold the ways in which we would meet that challenge. One straightforward way to handle an increasing caseload is to nearly triple the number of judges hearing cases. As Judge Kennedy predicted, "the number of federal judgeships" has grown.[3] In 1976,

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[1] Judge Anthony M. Kennedy, *Introduction*, 6 GOLDEN GATE U. L. REV. 273, 273 (1975-76).

[2] Unless otherwise noted, all contemporary statistics refer to the period with the most recent data: the twelve-month period ending September 30, 2010. In that period, the Ninth Circuit issued 1,870 precedential opinions and 4,454 unpublished dispositions, for a total of 6,324 dispositions on the merits. U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, 2010 STATISTICAL OVERVIEW, tbl.B-4 (on file with author). There were 11,982 new filings during that same period. *Id.* at tbl.B.

[3] *See* Kennedy, *Introduction*, 6 GOLDEN GATE U. L. REV. at 273 ("This is not the proper forum for a discussion of proposals for increasing the number of federal judgeships or of decreasing federal jurisdiction, although it appears both are indicated."). Although not a subject of this introduction, I note that Judge Kennedy's other prediction also has been borne out, at least in part. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 306(a)(2), 110 Stat. 3009-607 (codified as amended at 8 U.S.C. § 1252(a)(2)) (stripping jurisdiction over certain types of immigration cases); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(a), 110 Stat. 1214 (eliminating direct judicial review in the federal courts of appeals of final removal orders for aliens convicted of certain enumerated crimes).

thirteen active judges and four senior judges sat on the Ninth Circuit. Today, we have twenty-six active judges and twenty sitting senior judges. Even with a greater number of judges, we still cannot do all the work ourselves. Fortunately, we are grateful to a large number of judges from district courts and other circuit courts, commonly called "visiting judges," who sit by designation as one member of a three-judge panel.[4] This past year, visiting judges participated in more than 1,100 cases that were decided on the merits.

But the increased number of judges tells only part of the story. In 1976, the focus of Judge Kennedy's introduction was "an experimental program by which the bar of the Ninth Circuit can assist the court in reducing its backlog."[5] That particular program—an optional "Accelerated Disposition Calendar" at which the three-judge panel ordinarily would rule from the bench—has not survived the test of time. But Judge Kennedy correctly expressed confidence that "innovations in calendaring and argument techniques" "will have a beneficial effect on the court's caseload disposition rate."[6] Three innovations currently used by the Ninth Circuit have helped us keep up with our growing caseload.

First, the role of technology cannot be understated.[7] Because the judges of the court are geographically separated, with judges (and lawyers and parties to cases) in places as far apart as Montana, Arizona, Alaska, Hawaii, and Guam, correspondence that once took days or even weeks to arrive now travels at the speed of light via the internet and electronic filing. When circumstances require it, technology also allows us to hear cases remotely, via video or telephone conferencing by a judge or a lawyer, thus permitting us to hear cases as scheduled rather than postponing argument for a later date. Electronic word-processing and online research capabilities also facilitate our decision-making.[8]

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[4] Three-judge panels must have at least two judges from the Ninth Circuit, one of whom must be active. 28 U.S.C. § 46(b). So there may be a maximum of one visiting judge per panel. *But see id*. (permitting an exception in an "emergency"). Additionally, visiting judges may not sit on our en banc panels or screening panels.

[5] Kennedy, *Introduction*, 6 GOLDEN GATE U. L. REV. at 273.

[6] *Id*. at 273-74.

[7] *See* Judge Kim McLane Wardlaw, *Introduction*, 40 GOLDEN GATE U. L. REV. 293, 296 (2009-10) (discussing our use of new technologies to improve the transparency and efficiency of judicial proceedings).

[8] Technology likely is responsible for the relatively recent trend of judges retaining only one judicial assistant rather than two, in favor of hiring an additional law clerk. *See* Richard H. Deane & Valerie Tehan, *Judicial Administration in the United States Court of Appeals for the Ninth Circuit*, 11 GOLDEN GATE U. L. REV. 1, 3 (1981) (noting that, in 1981, judges ordinarily employed two judicial assistants and three law clerks).

Second, many cases do not require that we hear oral argument. If we decide that the merits of a case are explained adequately in the briefs, so that oral argument would not aid our decision-making, we may submit the case on the briefs, without oral argument. By custom, if any judge prefers oral argument, we honor that request; that is, majority rule does not apply to the decision whether to hold argument. This past year, of the cases decided on the merits, we submitted the case on the briefs approximately 70% of the time, compared to fewer than 50% of cases submitted on the briefs in 1976.

Third, the Ninth Circuit has instituted a "screening" process for cases whose merits are clearly controlled by precedent or whose resolution is otherwise plain.[9] Our indispensable staff attorneys (and, occasionally, judges' _elbow_ law clerks)[10] thoroughly review the record and the law, after which they prepare oral presentations on cases initially deemed suitable for the screening process. The staff attorneys then present the cases to an oral screening panel, composed of three judges of the court who typically sit together in person in a conference room in San Francisco.[11] Each active judge must sit on one oral screening panel per year. An oral screening panel typically decides more than 200 cases in an intense three days or so of oral presentations. If any member of the screening panel believes that a case warrants further study or is too complicated or difficult for the screening process, that judge may "kick" the case from the screening process to one of our regular argument panels. The case is then processed like any other. This innovative technique leverages the skill of our staff attorneys and permits us to concentrate our efforts on the cases that are not easily decided.

The increase in the number of judges and the innovative techniques employed by the court have helped us to render effective and timely justice to the parties in an ever-increasing caseload. The size of our docket, however, means that we often do not have the opportunity to reflect on the larger trends within the law or to examine our past precedents with a scholar's eye. We are therefore grateful to the Golden Gate University Law Review for this annual survey of Ninth Circuit cases.

In closing, I find it appropriate to end as I began, with a quote from Judge Kennedy's original introduction: "[D]espite innovations in

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[9] 9TH CIR. GEN. ORDER 6.5.

[10] The term "elbow clerk" generally refers to a judge's personal law clerk, as distinct from a clerk who works for the court as a whole or for a panel of judges.

[11] Much less common are written screening panels, in which the staff attorney prepares a written memorandum instead of an oral presentation.

calendaring and argument techniques, justice must be rendered case by case, after judges have weighed the claims of all litigants. Every party is entitled to have his [or her] controversy carefully considered by a panel of this court and deserves as much of each judge's time and thought as is required to satisfy the judge that a reasoned and principled decision controls the outcome."[12] Despite (or perhaps because of) the faster pace and greater volume of the flow of information, those words are as true today as they were thirty-five years ago and, I suspect, as they will be thirty-five years from now.

[12] Judge Anthony M. Kennedy, *Introduction*, 6 GOLDEN GATE U. L. REV. 273, 274 (1975-76).