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Introduction

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Ninth Circuit Court of Appeals

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INTRODUCTION

*THE HONORABLE MORGAN CHRISTEN**

As a graduate of Golden Gate University Law School, I am especially proud to join the many judges of the Ninth Circuit Court of Appeals who have written introductions over the years thanking Golden Gate for its annual survey of our court's work. The Ninth Circuit is the largest of the federal circuit courts of appeals, both geographically and in terms of caseload, and its docket is varied and demanding. This makes the job of Ninth Circuit judges very interesting—and very busy. Golden Gate's retrospective survey is much appreciated because it provides a rare opportunity to reflect upon the work of our court and to consider larger trends in the law.

Of course, the cases selected for consideration in this volume are a tiny fraction of those handled by the court this year. During the year ending September 30, 2011, a total of 12,141 new appeals were filed in the Ninth Circuit. And while five new judges were nominated by the President and confirmed by the United States Senate in the period between December 2010 and July 2012, we were saddened by the deaths of seven senior and active judges during the same period, including Judge James Browning.¹

The Ninth Circuit is now fortunate to have twenty-eight of its twenty-nine authorized judgeships filled. But with over 12,000 filings per year, it is easy for any observer to recognize that our task would be insurmountable if it were not for the help we receive from senior and visiting judges, and from our superb group of paralegals and staff attorneys.

As a newly appointed member of the Ninth Circuit, I have received many inquiries from lawyers and members of the public who are curious about how so few judges can resolve so many cases. Because

* United States Circuit Judge, United States Court of Appeals for the Ninth Circuit. The views expressed in this introduction are my own and do not necessarily reflect the views of my colleagues or of the United States Court of Appeals for the Ninth Circuit.

¹ Appointed in 1961, Judge Browning served on the court for over fifty years, including twelve years as chief judge. The Browning Courthouse in San Francisco was named in his honor, a mark of gratitude and respect for his many years of service.

the inner-workings of the court's case processing system are not well known, I take this opportunity to provide additional information that hopefully will help illuminate it. It is a system born of necessity and revised many times to accommodate the demands of the circuit's expanding and evolving caseload. In my view, the evolution of this system—which started on handwritten inventory cards but gradually developed into an efficient computerized case-management system—is a testament to the ingenuity of many judges and professional staff who have given years of dedicated service to our court.

First, a word about our senior judges—a remarkable group of volunteers! An Article III judge who reaches the age of sixty-five and has ten years of judicial service in the federal judiciary may retire when the sum of his or her age plus years of service equals eighty or more. This is known as the “Rule of 80.” Article III judges who have satisfied the Rule of 80 may retire and relinquish judicial office,² or take senior status.³ A senior circuit judge may continue to sit on the court and its panels, including motions panels, in such order and at such times as the court directs.⁴

Fortunately for our court, as of September 2012, sixteen senior judges continue to serve after having taken senior status, and they are handling significant caseloads. Fourteen senior judges sat on oral argument panels in 2012, and eleven sat on oral screening, motions, and/or certificate of appealability (COA) panels.⁵ To give a broader perspective on the important contribution made by our senior judges, consider: collectively, the work of senior judges in the twelve-month period ending June 30, 2012 was the equivalent of 24% of the Ninth Circuit's merits-panel caseload. Additionally, senior judges work in the

² See 28 U.S.C.A. § 371(a) (Westlaw 2012).

³ See 28 U.S.C.A. § 294(b) (Westlaw 2012).

⁴ See 28 U.S.C.A. § 46(a) (Westlaw 2012). To continue to perform judicial duties, a senior circuit judge must be designated and assigned by the chief judge or judicial council of the circuit to perform such judicial duties within the circuit as he or she is willing and able to undertake. See 28 U.S.C.A. § 294(c) (Westlaw 2012). Only a majority vote of the active circuit judges may grant a hearing or rehearing before the court en banc. FED. R. APP. P. 35(a). But a senior judge is eligible to participate as a member of an en banc court if: (1) the senior judge was a member of the three-judge panel that issued the decision being reviewed; or (2) the review involves a case that was first decided when the senior circuit judge was in regular active service.

⁵ Oral screening panels are described *infra*. All active judges must serve on at least one oral screening panel each year. Motions panels consist of two or three judges who serve for one month, ruling on motions filed before cases are assigned to three-judge panels. These panels typically meet for three days in San Francisco and via conference call or video conference during the remainder of the month to resolve routine motions. Motions panels also handle all emergency motions requiring action during their duty month. COA panels consist of two judges; a single judge is authorized to grant a COA in a habeas appeal if the appellant makes a substantial showing of the denial of a constitutional right. If a COA is granted on any issue, a briefing schedule is set.

trial courts. Two senior judges were particularly active assisting district courts in the past year; Judge Arthur Alarcón presided over hundreds of criminal cases in the Eastern District of California, and Judge A. Wallace Tashima assumed Judge John Roll's caseload after Judge Roll was killed in January of 2011.

Other senior judges are skilled mediators; their efforts reduce the caseload for active judges and help litigants achieve earlier resolutions. I would be remiss if I did not mention Judge Edward Leavy's mediation efforts in particular; he has been instrumental in resolving scores of FERC cases in the past five years, effectuating billions of dollars of refunds.

Senior judges also perform a wide variety of non-case-related tasks, including serving on local court governance committees, assisting with budget and human resource issues, providing guidance on courthouse construction projects, and serving on the court's historical society.

Our circuit also receives considerable help from district judges and judges visiting from other parts of the country. In the year ending June 30, 2012, these judges participated in 4.9% of the appeals our circuit resolved on the merits. We are very grateful to these judges for their assistance.⁶

The important role played by the circuit's staff attorneys is sometimes overlooked, but it is critical to the circuit's ability to monitor and process its caseload.

After the parties file opening and answering briefs, case management attorneys work from the parties' briefs, the docket, and the excerpt of record to prepare case inventories. The inventory process, which has been used by the circuit in one form or another since 1976, provides statistical information regarding the makeup of the court's caseload, allows cases with common characteristics to be grouped together for more efficient processing, and permits calendaring staff to allocate the caseload more equally among the Ninth Circuit's judges.

Cases are assigned by subject matter; some staff attorneys specialize in petitions for writs of habeas corpus, others in social security appeals, immigration appeals, and so on.

Case management attorneys draft brief descriptions of each case and identify the issues raised on appeal. This allows judges and chambers staff to recognize the type of case and its likely complexity at a glance. It also allows circuit staff to search the court's database to

⁶ Absent an emergency, no three-judge panel can have more than one visiting judge. See 28 U.S.C.A. § 46(b) (Westlaw 2012). Visiting judges do not participate in en banc votes or sit on en banc panels.

determine whether other pending cases raise related issues. If related cases are discovered, they are noted in the case inventory so the three-judge panel assigned to hear the case is made aware that other panels may be considering the same or similar issues.

Case management attorneys also assign weights to each case based on the number of issues raised, the complexity of the issues, the complexity of the facts, the size of the record, and the extent to which the case is likely to establish precedent. Cases are weighted one, three, five, seven, ten, or twenty-four.

Cases designated a weight of “one” are presumptively routed to three-judge screening panels for consideration without oral argument. Screening panels can resolve large numbers of cases (sometimes 200 or more over the course of three days) because one-weight cases typically involve only one or two issues for which the circuit has directly controlling authority. But before a case is presented to a three-judge screening panel, it is subject to a peer review process within the staff attorneys’ office, insuring that a peer with the same specialty, and a supervisory-level attorney, agree the case is fairly categorized as a one-weight case, that the legal issues have been correctly analyzed, and that the proposed disposition is appropriate.

When staff attorneys orally present one-weight cases to three-judge screening panels, they give a detailed factual and legal summary of the issues, review relevant portions of the record with the panel, answer any questions asked by the judges, and provide a proposed memorandum disposition. Judges on the panel frequently edit the proposed memorandum disposition during the screening conference. If any judge on a screening panel believes the case would benefit from oral argument or that the issues or factual record require more in-depth analysis than the staff attorneys anticipated at the time of screening, the judge may direct that the case be reassigned to a regular three-judge merits panel. If a case is referred to a merits panel, it is prepared for oral argument like any other; the three judges on the merits panel direct their respective law clerks regarding the preparation of a bench memo and other factual or legal research necessary to resolve the case. Cases referred from a screening panel to a three-judge merits panel may or may not be scheduled for oral argument by the merits panel. Often, pro bono counsel is appointed.

Cases receiving weights of three or higher are assigned to three-judge merits panels as a matter of course. Generally, the difference between three-, five-, and seven-weight cases is a function of the number of issues raised, the complexity of the issues, and the size of the record that must be reviewed. Ten-weight cases are “blockbuster” cases. These may include multi-defendant criminal appeals, large class action cases,

cases presenting complicated Indian law questions, Title VII, environmental or antitrust cases with complex technical issues or particularly voluminous records. Death penalty cases are designated as twenty-four weight cases.

The weighting system allows our calendaring staff to more evenly allocate the court's workload. Because some cases inevitably require more time and attention than others, our calendaring staff schedules a maximum of twenty-four "points" for a single day of oral argument. Eight three-weight cases might be calendared for oral argument on a single day; two seven-point and two five-point cases might be heard on another.

All in all, the Ninth Circuit's system for processing its caseload allows a large number of one-weight and three-weight cases to be resolved expeditiously so additional time and resources can be devoted to complex cases that demand extra attention. The screening process works well because the specialized knowledge of very competent circuit staff and a peer review system allow the identification of cases that should be readily resolvable via established precedent. The system's second safety net recognizes that some cases that appear to be straightforward at the outset wind up taking unanticipated twists and turns. When that happens, the judicial screening panel—or an individual member of the screening panel—reassigns the case to a three-judge merits panel, where the legal and factual issues are analyzed "from the top down," just as in any other merits appeal.

In conclusion, as readers peruse this issue of the *Ninth Circuit Survey*, I hope they will keep in mind the vast amount of work performed by senior judges, visiting judges, and the Ninth Circuit's incredible paralegals and staff attorneys. The active judges of the Ninth Circuit are grateful to these public servants who devote so much time, skill, and effort to the work of our court, and we are conscious of the debt we owe them.