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## Central Staff in Appellate Courts: The Experience of the Ninth Circuit

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### INTRODUCTION

More than a decade before he was appointed to the Supreme Court, Felix Frankfurter summarized the conditions that he believed "indispensable to a seasoned, collective judgment" by that tribunal. Four of these are of particular importance:

1. Encouragement of oral argument; discouragement of oratory. The Socratic method is applied; questioning, in which the whole Court freely engage, clarifies the minds of the Justices as to the issues and guides the course of argument through real difficulties.
2. Consideration of every matter, be it an important case or merely a minor motion, by every Justice before conference, and action at fixed, frequent, and long conferences of the Court. This assures responsible deliberation and decision by the whole Court.
3. Assignment by the Chief Justice of cases for opinion writing to the different Justices after discussion and vote at conference. Flexible use is thus made of the talents and energies of the Justices, and the writer of the opinion enters upon the task not only with the knowledge of the conclusions of his associates, but with the benefit of their suggestions made at the conference.
4. Distribution of draft opinions in print, for consideration of them by

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the individual Justices in advance of the conference and then their discussion at subsequent conferences. Ample time is thus furnished for care in formulation of result, for recirculation of revised opinions, if necessary, and for writing dissents. This practice makes for team play, and encourages individual inquiry instead of subservient unanimity.<sup>1</sup>

Although Frankfurter was speaking about the United States Supreme Court, the process he depicted represents an ideal to which any appellate court may appropriately aspire. In this view, each judge would, in every case decided on the merits, read the briefs and record, hear oral argument, confer with his brethren, research the doubtful issues, and either write an opinion or study a draft prepared by one of his colleagues. The judges would take full advantage of the guidance available through the adversary process; their decisions in turn would be accompanied by opinions explaining the governing principles for the benefit of the litigants, the bar, and the lower courts. The appellate decisionmaking process is thus seen as a happy combination of individual inquiry and collective deliberation.

Whether this ideal was ever the norm in American appellate courts,<sup>2</sup> and whether it exists today in the Supreme Court,<sup>3</sup> are questions I shall leave to others to pursue. What is clear is that the United States Courts of Appeals have departed from this model, often radically, in large numbers of cases.<sup>4</sup> In many state appellate courts the gap between the ideal and reality is even wider.<sup>5</sup> As a result, scholars, practitioners, and even some judges have perceived a threat to what they regard as the essential qualities of appellate review.<sup>6</sup>

The abandonment of traditional appellate procedures has come about largely because of an unprecedented increase in the volume of

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1. F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* vii-viii (1928). Much of this passage is adopted from a letter written to Frankfurter by Justice Brandeis shortly before the publication of the book. See 5 LETTERS OF LOUIS D. BRANDEIS 292-93 (M. Urofsky & D. Levy eds. 1978) (letter of June 5, 1927).

2. See, e.g., K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 32 (1960).

3. See, e.g., Powell, *What the Justices Are Saying*, 62 A.B.A.J. 1454 (1976).

4. See, e.g., COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, *STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 41* (1975) [hereinafter cited as HRUSKA COMMISSION REPORT]; STAFF OF SENATE COMM. ON THE JUDICIARY, 94TH CONG., 1ST SESS., *REORGANIZATION OF FIFTH AND NINTH JUDICIAL CIRCUITS* 13 (Comm. Print 1975).

5. See, e.g., Lilly & Scalia, *Appellate Justice: A Crisis in Virginia?*, 57 VA. L. REV. 3, 15-16 (1971); AMERICAN JUDICATURE SOCIETY, *PENNSYLVANIA'S APPELLATE COURTS* 17, 21-23 (1978).

6. See, e.g., Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969); *Hearings Before the Commission on Revision of the Federal Court Appellate System (First Phase)* 315-17 (1973) (remarks of Samuel C. Gainsburgh, Esq.) [hereinafter cited as *First Phase Hearings*]; *id.* (*Second Phase*) 1047-48 (1974-1975) (remarks of Judge Alvin B. Rubin) [hereinafter cited as *Second Phase Hearings*].

appeals, much greater than the upsurge in litigation generally.<sup>7</sup> In an ideal world, a burgeoning caseload in the appellate courts would probably lead to an increase in the number of judges designated to serve on those courts. In reality, legislatures are slow to respond to the needs of the judicial system;<sup>8</sup> and in any event, an increase in the number of appellate judges in a given jurisdiction may itself have untoward consequences.<sup>9</sup> Nor have the legislatures been inclined to adopt measures that would reduce the volume of appeals or of litigation generally.<sup>10</sup> On the contrary, their inclination has been to create new causes of action that add to the burdens on the judiciary.<sup>11</sup> The result is that the appellate courts have no choice but to increase their productivity—to add to the number of cases that can be heard and determined by a fixed number of judges with a minimal sacrifice of quality in the process or the product.

Several approaches have been adopted. In many courts the first casualty has been oral argument; thus, from 1972 through 1977 the Fifth Circuit heard oral argument in less than half of the cases decided on the merits.<sup>12</sup> Another obvious target is the written opinion. The

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7. HRUSKA COMMISSION REPORT, *supra* note 4, at 1.

8. For instance, the Judicial Conference of the United States recommended the creation of new appellate judgeships in 1971. 1971 REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 81. Congress did not act until 1978. Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629 (1978). Eight months after the passage of the legislation, none of the ten new judges authorized for the Ninth Circuit had been confirmed by the Senate. In the spring of 1980, 18 months after the positions had been created, the last of the new judges was still awaiting confirmation. By that time, three more vacancies had developed. As of June 1980, one nominee remained unconfirmed.

9. Efficiency is likely to be impaired, and the values of collegiality will be diluted or lost. The prestige of an appellate judgeship may diminish, and first-rate lawyers may be reluctant to accept appointments to the bench. Most important, the greater the number of appellate judges in a jurisdiction (whether they sit on a single court, on coordinate courts, or in a hierarchical system), the more difficult it is to maintain uniformity of decision. See generally H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 44-46 (1972); Thompson, *One Judge and No Judge Appellate Decisions*, 50 CAL. ST. BAR. J. 476, 477 (1975); *State of the Judiciary and Access to Justice: Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Judiciary Comm.*, 95th Cong., 1st Sess. 150-51, 162-63 (1977) (remarks of Judge Hufstедler) [hereinafter cited as *Access Hearings*].

10. For instance, no-fault legislation for automobile accidents inevitably encounters rough sledding in the state legislatures. See, e.g., *Standards for No-Fault Motor Vehicle Accident Benefit Insurance: Hearings Before the Senate Comm. on Commerce, Science & Transportation on S. 1381*, 95th Cong., 1st Sess. 2 (1977) (statement of Sen. Magnuson); *id.* at 165 (statement of Douglas A. Fraser). On the national level, Congress has been reluctant to eliminate diversity of citizenship jurisdiction or even to limit its availability to noncitizens of the forum state. See Burger, *1977 Report to the American Bar Association*, 63 A.B.A.J. 504, 506 (1977). But see 124 CONG. REC. H1569 (daily ed. Feb. 28, 1978) (House approves abolition of diversity jurisdiction under suspension of the rules).

11. See, e.g., H. FRIENDLY, *supra* note 9, at 34 & n.108; *First Phase Hearings*, *supra* note 6, at 83-89 (testimony of Judge J. Skelly Wright); *Access Hearings*, *supra* note 9, at 7 (letter of Chief Justice Burger) (47 statutes enacted within eight-year period enlarging federal jurisdiction).

12. JUDICIAL BUSINESS OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIR-

Third Circuit, for example, now disposes of a large proportion of its cases by judgment orders that contain no explanation whatever for the court's result.<sup>13</sup> A less visible target, but one with vast potential for saving time, is the conference of the judges. Again, the Fifth Circuit has been the pioneer: in cases heard without oral argument, the briefs and other materials are considered by the judges independently, with telephone conferences held only if one judge thinks it necessary.<sup>14</sup>

Each of these approaches entails the loss of important safeguards against injustice or the appearance of injustice. Oral argument "contributes to judicial accountability, . . . guards against undue reliance upon staff work, and . . . promotes understanding in ways that cannot be matched by written communication. It assures the litigant that his case has been given consideration by those charged with deciding it."<sup>15</sup> A written opinion serves similar purposes, and others as well.

Conclusions easily reached without setting down the reasons sometimes undergo revision when the decider sets out to justify the decision. Furthermore, litigants and the public are reassured when they can see that the determination emerged at the end of a reasoning process that is explicitly stated, rather than as an imperious ukase without a nod to law or a need to justify.<sup>16</sup>

The conference of the judges minimizes the likelihood of one-judge decisions; it also provides the most congenial atmosphere for raising tentative or not fully articulated doubts that may cause the other members of the panel to reexamine what initially appeared to be a simple case.<sup>17</sup>

Another innovation is the use of central staff—a corps of legal assistants who work for the court as a whole rather than for individual judges in the manner of the traditional "elbow clerk."<sup>18</sup> At first blush, the idea that a central staff of law clerks can help an appellate court to achieve greater efficiency appears to meet an insuperable obstacle—indeed, a paradox. It would appear that unless the law clerks are doing work that would otherwise be done by the judges, they are not helping to increase productivity. But if they *are* doing work that would otherwise be done by the judges, they are usurping the judicial function.

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CUIT: CLERK'S REPORT FOR THE PERIOD JULY 1977-JUNE 1978, at 11. In 1978 the court heard oral argument in 50.6 percent of its cases. *Id.*

13. *The Circuit Court Judgeship Bill: Hearings on S. 2991 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Judiciary Comm.*, 93d Cong., 2d Sess. 278-79 (1974) (testimony of Chief Judge Seitz).

14. *First Phase Hearings*, *supra* note 6, at 415-17 (testimony of Judges Brown, Gewin, Morgan, and Clark); telephone conversation with Gilbert H. Ganecheau, Clerk, U.S. Court of Appeals for the Fifth Circuit, Oct. 8, 1979.

15. HRUSKA COMMISSION REPORT, *supra* note 4, at 48.

16. P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 31 (1976).

17. *See id.* at 29-31.

18. Professor Meador attributes this term to the Federal Judicial Center. *See* D. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME 17 & n.45 (1974).

The paradox disappears, however, if we can identify some tasks that can be performed by judges, but need not be; or if the alternative to performance by staff attorneys is that the tasks will not be performed at all. The experience of the Ninth Circuit Court of Appeals supports this alternative hypothesis, and thus suggests that a central staff *can* help an appellate court to dispose of more cases with a minimum of compromise to the "imperatives of appellate justice."<sup>19</sup> The purpose of this Article is to explain why this is so and how that goal can be achieved. In the course of analyzing the functions of a central staff, I shall also address a number of other problems in appellate court administration, including the use of judgment orders,<sup>20</sup> the operation of non-publication plans,<sup>21</sup> and the development of a "fast track" for the disposition of insubstantial cases.<sup>22</sup> I write from the perspective of nineteen months' service as supervising staff attorney for the court.<sup>23</sup>

## I

### EARLY HISTORY OF THE NINTH CIRCUIT'S CENTRAL STAFF

The United States Court of Appeals for the Ninth Circuit has jurisdiction over a larger geographical area than any other regional court in the country. The circuit extends from Guam and the Northern Mariana Islands to the Missouri River, and from Point Barrow in Alaska to Tiajuana, Mexico. Included within its boundaries are nine states, including California, and three territories. The circuit's caseload is second only to that of the Fifth, which embraces six states of the Deep South.<sup>24</sup> In statistical year 1979, 3,010 cases were filed, an increase of

19. See P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 16, at 8-12.

20. See text accompanying notes 99-102 *infra*.

21. See pp. 950 & 997-98 *infra*.

22. See Part IX *infra*.

23. Most of the procedures referred to in the article are described in greater detail in the Handbook for Court Law Clerks prepared by the staff under my direction. The Ninth Circuit has been generous in making this document available to other courts.

24. On June 18, 1980, the Senate voted to divide the Fifth Circuit into two autonomous circuits, each consisting of three states. S. 2830, 96th Cong., 2d Sess. (1980); 126 CONG. REC. S7320-23 (daily ed. June 18, 1980). See also 126 CONG. REC. S6912-15 (daily ed. June 13, 1980); Washington Post, June 19, 1980, at A5, col. 1. The bill, introduced at the unanimous request of the Fifth Circuit's 24 active judges, was passed by voice vote and without opposition, and in all likelihood the House will agree. Legislation to divide the Ninth Circuit has also been proposed, see, e.g., S. 2988, 93d Cong., 2d Sess. (1974), but effective reorganization would require allocating the judicial districts of California between two circuits. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE, 62 F.R.D. 223, 236-37 (1973). The organized bar in California has been implacably opposed to any such division. See, e.g., *Circuit Realignment: Hearings on S. 729 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Judiciary Comm.*, 94th Cong., 1st Sess., Part 2, at 162-68 (1975) (statement of Brent Abel). Although careful analysis shows that the perceived problems are largely chimerical, Hellman, *Legal Problems of Dividing a State Between Federal Judicial Circuits*, 122 U. PA. L. REV. 1188 (1974), the

100 percent in a decade and 650 percent in two decades.<sup>25</sup> Even with the recent addition of ten new judgeships,<sup>26</sup> the number of filings per judgeship will be more than double what it was in 1961.<sup>27</sup> Because no new judgeships were created between 1969 and 1978, while the caseload was rising rapidly, a large backlog of cases developed.<sup>28</sup> As of August 1, 1980, more than 1,000 cases had been fully briefed but had not yet been set for argument.<sup>29</sup> Until the new judges are fully acclimated to their new responsibilities, the court's decisional capacity is not likely to increase significantly;<sup>30</sup> thus, it will be at least one year, and probably two, before we can expect any substantial reduction in the backlog. By that time, further increases in caseload may well have begun to offset the additional judge power.<sup>31</sup>

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California bar's position is likely to preclude any realignment of the Ninth Circuit in the immediate future.

25. ADMINISTRATIVE OFFICE OF UNITED STATES COURTS, 1979 ANNUAL REPORT OF THE DIRECTOR A-174 (Table X-6) [hereinafter cited as ANNUAL REPORT, preceded by year or years]; 1963 ANNUAL REPORT, *supra*, at 191.

26. Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629 (1978); *see* note 8 *supra*.

27. On the basis of 1978 filings, the per-judge figure for a 23-judge court would have been just under 135. The figure for 1961 was 49. *See* 1978 ANNUAL REPORT, *supra* note 25, at 45 (Table 3).

28. The term "backlog" can be defined in a variety of ways. From the standpoint of measuring the pressures on the judges, it is preferable to include only cases that are ready for argument or submission but have not yet been calendared.

29. Data provided by Office of Staff Attorneys, Ninth Circuit Court of Appeals.

30. In order to increase its decisional capacity by any significant amount, the court will have to continue to make extensive use of "borrowed" judges—*i.e.*, circuit judges from other circuits and district judges from throughout the country. This practice has a number of drawbacks. First, with 60 to 80 judges, sitting in panels of three, taking part in the court's decisions, it is far more difficult to maintain consistency of decision and collegiality within the court than it would be if only active and senior judges of the circuit were sitting. *See* S. REP. NO. 304, 96th Cong., 1st Sess. 2-3 (1979); *First Phase Hearings*, *supra* note 6, at 908 (remarks of Judge Browning). Second, many lawyers are uneasy about having major precedential opinions of the Ninth Circuit written by judges who are not members of that court. Finally, and of particular relevance here, presiding judges of panels are often reluctant to give the visiting judges their full share of opinion assignments. There are several reasons for this reluctance: Many of the visiting judges are available only because they have taken senior status, *see* 28 U.S.C. § 371(b) (1976), some of them have their chambers on the other side of the country or in different time zones, and most of them have caseloads on their own courts that have first call on their time. Certainly there is reason to doubt that a panel consisting of one experienced circuit judge, one circuit judge who has been on the bench only a few months, and a district judge whose first obligations are to his own court will be able to dispose of cases as efficiently as a panel that includes three, or even two, experienced circuit judges.

Today, and for the next year or two, heavy use of borrowed judges is necessary if the Ninth Circuit is to keep up with the volume of incoming cases, let alone make inroads on the backlog. It is to be hoped that the court will eventually have adequate judge power to keep the use of borrowed judges to a minimum.

31. *See* J. BROWN, THE STATE OF THE FEDERAL JUDICIARY IN THE FIFTH CIRCUIT 17 (report delivered to 1979 Fifth Circuit Judicial Conference, Atlanta, Ga., May 7, 1979) (predicting 35 percent increase in filings in three years).

In comparison with the Fifth Circuit,<sup>32</sup> the Ninth moved slowly to "stem the tide" of its rising caseload.<sup>33</sup> One step was to develop a central staff for the "screening" of insubstantial cases. Starting in 1970, the staff reviewed fully briefed cases to identify those that appeared appropriate for disposition without oral argument. In such cases, the staff law clerks prepared memoranda that were sent to three-judge panels, sometimes accompanied by proposed dispositions. If all of the judges agreed that oral argument was unnecessary, the cases could be disposed of quickly and with a minimum of judicial effort.<sup>34</sup>

Initially the staff had only one full-time attorney, who was assisted by elbow clerks assigned to the screening function for periods of six to eight weeks. By 1974 there were seven attorneys on the central staff, and in 1976 the number was increased to twenty. In addition to the summary disposition program, the staff was responsible for assisting the court in the processing of motions and in the monitoring of criminal appeals.

Throughout its early history the staff struggled to discover its true role within the court. This was not easy, for the thirteen active judges had almost as many differing views as to what the staff should be doing. The summary disposition procedure was revised several times; the staff underwent changes of leadership. By the time I arrived in December 1977, the program was ready for a thorough reexamination. My task, as I saw it, was to define the functions of the staff in a way that would best serve the needs of the court and to devise structures and procedures that would enable the staff to carry out these functions effectively. In the remainder of this Article, I shall describe the systems that emerged, the considerations that underlay the various decisions, and the lessons that can be drawn for the operation of appellate courts elsewhere.

## II

### STAFF FUNCTIONS: AN OVERVIEW

To provide a perspective on the work of the central staff today, it will be useful to trace the history of a case as it passes through the

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32. See generally Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U.L.Q. 257.

33. *First Phase Hearings*, *supra* note 6, at 888-89 (statement of Judge Duniway).

34. *Id.* at 724, 733 (testimony of Judge Wright), 914-15 (testimony of Judge Browning). The court also "made massive use of visiting and senior judges," assigned more cases to each active judge, and made extensive use of per curiam opinions and brief orders. *Id.* at 888-89 (statement of Judge Duniway). See also *id.* at 724 (testimony of Judge Wright). However, the court never used one-line affirmances or dispensed with oral argument on the same scale as did the Fifth Circuit.

various steps of processing in the Ninth Circuit Court of Appeals. Three distinct stages can be identified.

The first stage begins when the notice of appeal is filed in the district court. The appeal will be docketed and the record filed; in due course the parties will file their briefs.<sup>35</sup> If all goes well during this first stage, only the litigants and the Clerk's Office will even be aware that the case is in the appellate court. Judicial or staff involvement comes about in only two circumstances: one or more parties may want to diverge from the schedule or procedures otherwise required by the statutes and rules, or a party may seek interim relief—a change in the status quo pending resolution of the appeal. In either event, the need for judicial consideration is ordinarily signaled by the filing of a *motion*. Here we encounter the first of the important functions of the central staff. Before a motion is considered by the judges, it is reviewed by a staff attorney, who drafts a proposed order (sometimes alternative orders) and prepares a memorandum explaining the nature of the application and recommending a disposition. The first stage ends with the completion of briefing, or more accurately the filing of the appellee's brief.

The second stage begins when the case is sent to the central staff for *inventory*. Inventory bears a superficial similarity to the "screening" processes used in some other appellate courts.<sup>36</sup> The court law clerks examine the records and briefs, refer cases with obvious jurisdictional defects to the motions attorneys, and prepare inventory cards. These cards contain information that will assist the court in the further processing of the cases. Inventory data are also stored in a computer for sorting and retrieval, notably in the preparation of the court's argument calendars. Of particular importance is the case's *weight*—a numerical estimate of the relative difficulty of the case from the judges' standpoint. The weights are used to equalize the workloads assigned to the various panels sitting in any given month.

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35. The timing of these events, and the procedures to be followed, are established by the nationally binding Federal Rules of Appellate Procedure and by local rules.

36. For instance, in the Sixth Circuit, the central legal staff screens every case on the court's docket in order to identify those that are appropriate for summary disposition. When a case appears to fit the criteria (*e.g.*, the questions presented are found to be "insubstantial"), the briefs and records are forwarded to a "summary disposition panel," along with a staff memorandum. These panels meet at the seat of the court between oral argument sessions to discuss the staff recommendations and prepare any dispositions. In cases that do not appear appropriate for summary disposition, the staff does no more than to prepare a subject-matter description and make a recommendation as to the amount of time needed for oral argument. The cases are then set for argument before a regular panel. Hehman, *Judicial Administration in the United States Court of Appeals for the Sixth Circuit: Organization and Procedures to Address the Volume Crisis*, 10 U. TOL. L. REV. 645, 655-56 (1979). For a description of the Fifth Circuit's practice, see note 112 *infra*. See generally Haworth, *supra* note 32.



Once a case has been inventoried, it is ready for calendaring. Criminal cases are ordinarily placed on the first calendar to be made up after inventory. However, because of the court's heavy backlog, civil cases may wait as long as eighteen months before they are calendared. Calendaring in the Ninth Circuit is a complex three-stage process, handled by three offices within the court. First, the circuit executive determines the number of panels that will sit in each of the cities where hearings have been scheduled for the particular month.<sup>37</sup> Following detailed guidelines from the court, he assigns judges to three-judge panels and designates the panels for particular days on the calendars. Next, the staff attorneys' office, drawing upon the computerized file of fully briefed cases, compiles as many "clusters" of cases as there are panels designated for sittings. Finally, the Clerk's Office matches clusters to panels and sends the proposed calendar to the members of the court so that they can check for conflicts of interest.

Completion of the calendaring process inaugurates the final stage in the history of a case. Upon being calendared, the case ceases to be a part of the court's undifferentiated backlog and becomes the responsibility of the three judges to whom it has been assigned. The familiar events of the appellate process follow in due course. Oral argument is heard (except in the minority of cases that are submitted on the briefs), the judges confer, and one judge is assigned to prepare an opinion. The opinion is circulated among the other judges on the panel; upon their approval, the disposition is filed and the case closed, subject only to the granting of a petition for rehearing.

The role of the central staff in the processing of calendared cases is a varied one. Even before the case clusters have been assigned to panels, the court law clerks will have begun the preparation of bench memoranda in a selection of the cases to be heard on the particular calendar. Usually the law clerks work on the cases at the lower end of the spectrum of complexity. After argument, the judge to whom the case has been assigned may ask the court law clerk who prepared the bench memorandum to draft a disposition in accordance with the panel's vote. Judges with heavy backlogs of opinion assignments may also request staff assistance in the preparation of opinions in cases that the court law clerks have not previously handled. Finally, the judges may request the assignment of a court law clerk to their chambers for a period of one to two months. This "lend-lease" program is particularly helpful when a judge has a large backlog of submitted cases, but is not limited to such situations.

In short, the principal functions of the court law clerks involve the

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37. The court holds sittings every month in San Francisco and Los Angeles, at least four times a year in Portland and Seattle, and once a year in Anchorage and Honolulu.

processing of motions, the inventory and calendaring processes, the preparation of bench memoranda in cases scheduled for argument, and assistance in the drafting of proposed dispositions. I shall discuss each of these functions in turn, but it will be useful first to examine the structure of the staff and its policies on hiring and tenure.

### III

#### STRUCTURE: MULTIPLE-SPECIALTY DIVISIONS

Less than a year after I came to the court, the central staff expanded from twenty attorneys to thirty. It was clear to me that an organization of this size required a well-defined structure, both to facilitate effective supervision and to permit a certain amount of specialization. The solution was to divide the staff (except for the supervising staff attorney and a counsel for special projects) into five groups—two motions units and three multiple-specialty divisions. The criminal and civil motions units each consisted of two attorneys who did motions work exclusively.<sup>38</sup> The other twenty-four attorneys were each assigned to one of the three multiple-specialty divisions.

The divisional structure was designed to take advantage of the efficiencies that result from a modest degree of specialization, while still providing a varied workload for the law clerks. Specialization can foster efficiency in a number of ways. An attorney who, by reason of his prior work, has become familiar with developments in an area of the law will not have to spend time acquiring the general background knowledge that is necessary to write intelligently about a particular question. Moreover, by taking advantage of his experience, the law clerk can place the particular issues in the full context of the jurisprudence developed by the Supreme Court and his own court under the relevant statutory and decisional law. Without this "feel" for the subject matter, a law clerk will not sense which issues are difficult and which are routine, will not be able to make the most effective use of specialized research tools, and will not be able to find the analogies or shortcuts that may simplify or illumine the particular question.

Familiarity with the underlying law is particularly valuable in the inventory process. The time spent on any one case must be severely limited, yet the law clerk is expected to prepare a useful summary of the case and to estimate its difficulty for the judges. Clearly, the more cases the law clerk has handled in the particular area of law, the more

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38. I now regard the existence of separate units for motions work as an historical survival rather than the product of a genuine need for compartmentalization. If I were starting afresh, I would have two or three motions specialists, but their work would be integrated into that of the divisions. See pp. 956-57 *infra*.

effectively and efficiently he will be able to perform the inventory function.

Experience is also helpful in the preparation of bench memoranda, especially in the high-volume areas of law that have constituted a large proportion of the staff's work. A good example is immigration law. To the novice, the varied statutory procedures and the overlapping criteria for eligibility are nearly incomprehensible; but after a law clerk has worked on ten or twelve immigration cases, each of the different statutes and lines of decisions takes on an identity of its own.

At the same time, specialization has its dangers. When a staff attorney has mastered the intricacies of immigration law or the procedural prerequisites to a Title VII suit, it is all too easy for a judge to rely on the attorney's conclusions rather than working his way to an independent judgment. Even if the judges are conscientious, the question of appearance remains; if there is reason to think that the staff knows more than the judges about particular areas of law, the bar and lower-court judges may fear that the appellate court will give undue deference to staff recommendations.<sup>39</sup>

The greatest dangers of specialization, however, are internal. Specialization can easily dull a law clerk's response to new cases within his area of expertise. If a case appears, on an initial reading, to fit into a familiar pattern, the law clerk may look no further and thus fail to discover that the case involves a significant variation on the familiar theme, or that a chain of precedents contains gaps that he never had occasion to notice. Finally, the court's ability to recruit highly qualified individuals from the best law schools would be severely hampered if the job did not include work in a wide variety of subject-matter areas. Indeed, it is generally recognized that one of the values of a clerkship is the breadth of the experience gained.

To obtain at least some of the benefits of specialization, while minimizing its costs, I established the three multiple-specialty divisions within the office. The system—derived from a proposal by Professors Carrington, Meador, and Rosenberg<sup>40</sup>—worked as follows. The broad areas of federal law were allocated among the three divisions so as to give each division approximately the same number of cases for inventory and for the preparation of memoranda. Each division was as-

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39. The risk—actual or perceived—is particularly great when a high proportion of the appellate judges have only recently taken their seats on the court, a situation that will obtain in the Ninth Circuit for at least the next few years.

40. P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 16, at 174-84. *See also* Carrington, *supra* note 6, at 587-96. The proposal envisaged multiple-specialty divisions within the court itself. Such an arrangement would raise a number of serious problems, *see* HRUSKA COMMISSION REPORT, *supra* note 4, at 60; H. FRIENDLY, *supra* note 9, at 46 n.155, but these are irrelevant in the staff context.

signed a variety of issues, including some generally regarded as particularly interesting and some that would be particularly attractive from a career standpoint. Thus, Division I had the tax cases; Division II, business regulation; and Division III, labor. Some issues were not allocated, to provide greater flexibility. (These were issues that did not arise very often; thus the benefits from specialization would have been minimal anyway.)

An important feature of the system was the decision to allocate issues of criminal law and procedure among the three divisions rather than to concentrate them in one. There were several reasons for this approach. First, I was convinced that we would have great difficulty in hiring qualified people who would be interested in working full time on criminal cases. Second, a large proportion of the criminal appeals are repetitive and unchallenging—an unsatisfactory diet for anyone.<sup>41</sup> Finally, criminal law embraces a wide variety of issues; familiarity with search and seizure law will be of little help in interpreting the statutes prohibiting the possession of firearms by a felon. Thus, we could get almost all of the benefits of specialization, while avoiding most of its hazards, through concentration of the various sub-issues within the broad realm of criminal law.<sup>42</sup>

Each division was headed by an experienced attorney whose principal function was to supervise the work of the law clerks in his division. Through consultation and review the division chiefs helped to assure that no issues or relevant authorities were overlooked or misconceived, and that the issues were approached in the most straightforward and economical fashion. They also kept careful track of what the law clerks in their divisions were doing. For example, if the "day sheet" revealed that one law clerk had not turned anything in for several days, the division chief would attempt to discover why. Most of the time, however, informal conversations were sufficient to keep the division chiefs abreast of current projects and their status.<sup>43</sup>

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41. See generally *First Phase Hearings*, *supra* note 6, at 134-36 (remarks of Judge Hufstедler, Judge Robb, Judge Leventhal, and Professor Rosenberg).

42. Specifically, Division I took cases involving the fourth amendment, self-incrimination, and the right to counsel. Issues involving crimes and defenses, along with constitutional issues not handled by Division I, went to Division II. Division III was given the non-constitutional issues of criminal procedure.

Cases with issues crossing divisional lines were usually assigned in accordance with what seemed to be the principal issue. Sometimes the assignment was made in such a way as to equalize workloads. In any event, divisional lines were not absolute; no one lost any sleep if a case was handled by an attorney in a different division from the one in whose bailiwick it lay.

43. The experience of the Ninth Circuit suggests that division leaders need not be career employees, and in my view they should not be. When the court is hiring well-qualified recent graduates, a year's apprenticeship in a division provides more than adequate grounding for superior performance of the tasks of coordination and review. In each year's crop of law clerks, we were rapidly able to identify several who had obvious potential for leadership, and indeed it was

After a few months, I had no doubt that the divisional system was a success. This was particularly evident in the inventory process. Each division had a brief weekly meeting to discuss the proper weighting of new cases and to note recent developments in the principal areas of law handled by the division. It was remarkable how quickly the law clerks developed a familiarity with the precedents and statutory patterns involved in high-volume areas of the law. The divisions were small enough that all of the law clerks usually knew what the others were working on; thus everyone was able to draw on the experience of all. Finally, the division chiefs soon became one-person clearinghouses: when one attorney had an unfamiliar or potentially time-consuming legal problem, the division chief could often direct him to a colleague who had worked on a similar question and could advise him on research shortcuts.

The full potential of the divisional system had yet to be exploited by the time I left the court. For instance, one judge suggested that the law clerks in each division could monitor the panel opinions issued in their areas of special responsibility and call the court's attention to any actual or apparent inconsistencies. Indeed, as the judge pointed out, the staff might even be asked to review the opinions before they were filed. This would give the judges a chance to iron out differences or clarify language while the cases remained within the bosom of the court, thus avoiding embarrassment or confusion. I doubt, however, that the court should adopt this approach. Dispositions would be delayed, and in the vast majority of cases there would be no need to make any changes. Moreover, if the staff can alert the judges to the pendency of cases with similar issues at the time of calendaring, the different panels will be able to communicate with one another prior to the completion of their opinions. The differences may be resolved before either panel has taken a public stand; at worst, the court can go en banc to decide the issue.<sup>44</sup>

Shortly after my departure, the court adopted a more promising proposal—that the divisions be directed to scrutinize the unpublished dispositions in their areas of special responsibility and suggest the publication of opinions that appear to break new ground or otherwise pro-

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sometimes difficult to select from among two or three promising candidates. Beyond this, all of the dangers of careerism in court legal staffs are multiplied when the career employees are working in supervisory positions. It is far preferable for the new court law clerks to be guided and assisted by colleagues who have some experience, but who still retain the independence and freshness of outlook of short-term employees only a year or two out of law school. See generally Oakley & Thompson, *Law Clerks in Judges' Eyes: Tradition and Innovation in the Use of Legal Staff by American Judges*, 67 CALIF. L. REV. 1286 (1979); note 48 *infra*.

44. For further discussion, see Wasby, *Inconsistency in the United States Courts of Appeals: Dimensions and Mechanisms for Resolution*, 32 VAND. L. REV. 1343, 1368-69 (1979).

vide useful precedents for the decision of other cases. While this matter is fraught with sensitivity, I think the idea is a good one. Much of the concern aroused by non-publication rules would be allayed if the bar and the public had greater confidence that dispositions without a published opinion were limited to cases truly lacking in precedential value.<sup>45</sup> The installation of a watchdog within the court will not satisfy everyone, but the staff can, at the least, alert the judges to cases that appear not to meet the criteria for non-publication. Indeed, the court law clerks are in an ideal position to assist the court in this way. Because most of the cases disposed of without published opinions will be the "insubstantial" appeals in which the staff has prepared bench memoranda, the court law clerks will be able to evaluate the significance of cryptic dispositions that will have no meaning for anyone not familiar with the case. Even if no one on the staff has worked on a case, the court law clerks, unlike an outside observer, can easily obtain the briefs and records from the Clerk's Office. At the same time, because the court law clerks do not have a career commitment to the court, they can address the judges with an independence and a degree of candor that might otherwise be difficult to find within the institution.

#### IV

#### HIRING AND TENURE POLICIES

A perennial question in organizing a central staff is whether to hire recent law school graduates for one or two years, or to develop a staff of career attorneys who would usually come to the court after several years in practice.<sup>46</sup> When I took over as director of the Ninth Circuit's staff there was a mix of career attorneys and recent law graduates. A few months' experience reinforced my *a priori* view that the court was better off hiring recent graduates, except possibly for motions work. The policy that emerged was that all court law clerks, except those doing administrative or supervisory work, would be hired for one year, with the option of a second year for individuals who had done excellent work and wanted to stay.

In practice, we ended up encouraging most of the law clerks to stay for two years rather than one, and were quite successful in doing so. The result was a system under which the court replaced only about half of the law clerks each year (excluding those permanently assigned to

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45. See Reynolds & Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978); HRUSKA COMMISSION REPORT, *supra* note 4, at 52.

46. See, e.g., D. MEADOR, *supra* note 18, at 81-84; Lesinski & Stockmeyer, *Prehearing Research and Screening in the Michigan Court of Appeals: One Court's Method for Increasing Judicial Productivity*, 26 VAND. L. REV. 1211, 1221 (1973).

the motions unit and those doing administrative work, whose tenure usually was longer).

The reasons for the recent-graduate policy were the same ones that underlie the practice of almost all federal judges of hiring law clerks fresh out of law school and keeping them for one year or at most two. To begin with, by making the position a short-term one we were able to hire people who were far better qualified than those who would be willing to come on a career basis. Less than a year after I took over, we were hiring individuals whose credentials were as impressive as those of many federal "elbow clerks." Such people would hardly be interested in clerking as a career, but it is a very attractive job for one or two years shortly after graduation.

Second, by bringing in new people we were able to maintain a level of enthusiasm and diligence that would be difficult if not impossible to sustain in a career office, particularly with the relatively limited opportunities for personal contact with the judges. Although the position of court law clerk provides an excellent beginning to a legal career for a recent law school graduate, it has obvious limitations in the longer term. As a result, a permanent law clerk will tend to lose interest, causing a slip in the quality or quantity of his work. Or, he will take routine cases and, by focusing on latent or implied issues, attempt to turn them into major controversies. For a one- or two-year period, however, the cases will remain relatively novel (especially if the law clerk is rotated among divisions), and the level of interest and productivity will remain high.

Third, having a staff of recent graduates who stay for a year or two leaves little room for concern about the development of a "hidden judiciary." The acceptability of the program among lawyers is strengthened when they know that the court law clerks, like the judges' elbow clerks, are young people fresh out of law school, rather than career attorneys whose views may be given undue weight by the judges.

The arguments for the career approach, it seems to me, rest largely on fantasies, at least where the federal system is concerned. Perhaps there are bright, able attorneys who would be content to be law clerks for a period of years, but generally not at the salaries now available in the federal courts.<sup>47</sup> Of course, there are certain inefficiencies in training new people each year, but these are minimized by the divisional structure and an effective review process, which permit each new law clerk to take advantage of the experience acquired by the other clerks working on the same kinds of cases. Moreover, the advantages of expe-

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47. With a few exceptions, court law clerks are limited to the JSP-12 salary level, now about \$25,000.

rience can easily be overstated. Observation of the first group of law clerks I hired left no doubt in my mind that well-qualified recent graduates of the best law schools can do excellent work quite efficiently with a minimum of start-up time. The reason is simple: here, as elsewhere in the legal profession, there is no substitute for intelligence and first-rate basic legal training.<sup>48</sup>

## V MOTIONS

Motions practice is probably the least-known aspect of the work of appellate courts. To a certain extent this obscurity is understandable; it is hard to work up much excitement about requests for additional time in which to file briefs, or for the consolidation of two cases arising out of related district court proceedings. Motions practice, however, extends over a much broader terrain than these examples might suggest. For example, the losing litigant may seek a stay of the trial court's judgment; if the stay is not granted, the controversy may be moot by the time the court of appeals hears the case. Or, a party may request interlocutory review of an order that is otherwise unappealable; again, if relief is not forthcoming, there may be no way of redressing the injury on appeal from the final judgment.

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48. Views similar to the author's are expressed in Oakley & Thompson, *supra* note 43.

The considerations discussed in the text also bear upon the selection and tenure of the staff director. As far as I know, the Ninth Circuit was breaking new ground when, rather than turning to a career-minded administrator, it hired a law professor who would serve for a limited period of time. Whatever the accomplishments of my own regime, I think that the judges' instincts were sound. To begin with, the task of supervising and reviewing the work of recent law school graduates involves what is essentially a tutorial process. A good law professor, experienced in reviewing legal work from a neutral rather than a partisan perspective, will be adept at guiding the law clerks without imposing his own view of the cases or the law. Second, by reason of his contacts in the academic world, his experience in evaluating law school records, and (it is to be hoped) his easy rapport with students, a law professor will have a head start in recruiting and hiring new law clerks—perhaps the most important single function of the staff director. Third, a scholar interested in the workings of appellate courts can help the judges to develop and evaluate innovative procedures for managing their caseload. As staff director he will have a unique perspective: he is a member of the court "family," deeply involved in the details of everyday operation, yet he can also view the court's procedures through the eyes of a knowledgeable outsider. Fourth, with an independent stature in the legal profession and an academic position to which he can return, the director can advise the court with greater independence than can be expected of an attorney whose career is tied to the judicial system. Finally, when the staff director is a law professor serving for a relatively short period of time, the court minimizes the danger that the staff will develop into an independent empire within the court. Because his career interests lie elsewhere, the director will have little inclination to aggrandize his powers; because his tenure will be short, he could not impose his own substantive views even if he wanted to. By the same token, the bar and the lower courts are likely to have less concern about the growth of a "hidden judiciary" if the staff is led by a visitor from the academic world rather than a career bureaucrat. There are, of course, some inefficiencies in having a staff director who serves for a relatively short period of time, but these are easily overstated, and in any event are outweighed by the advantages of this approach.



Because the court does not assign cases to particular judges until they are placed on the argument calendar, a procedure had to be developed for handling requests for procedural or interim relief in cases not yet calendared. The Ninth Circuit's approach—similar to that followed in other circuits—is to designate rotating motions panels and to assign to the central staff virtually all of the delegable work involved in the processing of motions.<sup>49</sup> Because civil and criminal cases differ greatly in the motions they engender, separate units were established within the central staff to handle each. During my tenure at the court, each unit had two full-time attorneys who were assisted on an ad hoc basis by other staff members to the extent necessary to avoid backlogs.

### *A. Motions Procedures*

When a motion is filed with the court, it is placed on one of three tracks, depending on the nature of the relief sought. Some motions are disposed of by the motions attorneys without judicial action; some are heard by a single judge; and some are heard by two judges.

Under Local Rule 22, certain unopposed procedural motions may be decided by the Clerk of the Court or by a designated motions attorney. During the second half of 1979 the motions attorneys disposed of about fifty matters per month without judicial action. Orders entered by the motions attorneys are subject to reconsideration by a judge if any objections are filed, but objections are rare. Indeed, most of the motions disposed of by the motions units without judicial consideration are so routine that they could be handled in the Clerk's Office without the need for attorney involvement.

The second group of motions encompasses those in which the relief sought is procedural, but which appear too sensitive to be delegated to the staff. For instance, a motion to expedite oral argument requires a careful balancing of the exigencies of the particular case against the delay to older cases if the motion is granted. Similarly, permitting a party to file an oversized brief imposes an added burden on three judges. Procedural motions of this kind are heard by a single judge. A single judge also considers objections to orders entered by the Clerk or a designated motions attorney.

Once a week, each of the motions units compiles a single-judge calendar. The motions attorneys prepare explanatory memoranda and proposed orders for each of the motions on the calendar. Civil motions are heard and determined by the lead judge of the motions panel sitting in the particular week. Criminal motions are forwarded to a specially

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49. Once a case is calendared, all further motions are the responsibility of the panel designated to hear the case, and the Clerk's Office forwards all motions papers directly to those judges.

appointed criminal motions judge who provides continuity in the monitoring and expediting of criminal appeals. There is a real question, however, whether monitoring should be a judicial function at all, and in mid-1979 the court was moving toward a policy of delegating much of the responsibility to the staff.

Motions that may be dispositive, or that otherwise involve more than procedure, are heard and determined by at least two judges.<sup>50</sup> Once a week, each motions unit prepares a two-judge calendar. For each case on the calendar, the lead judge and the second judge receive copies of the motion, any opposing documents, the relevant parts of the record, a memorandum prepared by the staff, and a proposed order. In a close case, the motions attorneys will prepare alternative orders, *e.g.*, one granting and one denying the relief sought.

As already suggested, the two-judge motions often involve questions that, as a practical matter, may resolve the controversy between the parties. For instance, if the motions panel denies a request to enjoin the construction of a highway segment, the road probably will be completed by the time the case is heard in its regular course. Or, if the motions panel refuses to issue a writ of mandamus, *e.g.*, to halt the disclosure of income tax returns sought through discovery, the harm will be done and there will be nothing left to litigate on an appeal from the final judgment.

Quite a few two-judge motions have as their declared purpose the final disposition of the case on the merits. These include motions for summary affirmance, summary reversal, dismissal, or enforcement of an administrative agency order. Summary disposition by a motions panel makes sense where the issues presented have been authoritatively resolved by an intervening decision of the Supreme Court or the Ninth Circuit, or where the court lacks appellate jurisdiction over the case. When the prevailing party in the court below believes that circumstances such as these exist, a motion for summary disposition is in order. In practice, however, motions are not limited to clear-cut situations; litigants also file motions to terminate appeals that they argue are without merit on their facts.<sup>51</sup>

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50. Motions to reconsider single-judge orders are also treated as two-judge motions. *See* FED. R. APP. P. 27(c). If a single-judge motion and a two-judge motion are both pending in a single case, the matter will be treated as a two-judge matter, and the panel considering the substantive motion will also dispose of the procedural requests. This approach avoids duplication of effort and the possibility of inconsistent orders.

51. For example, the Immigration and Naturalization Service frequently invokes motions procedures in cases where aliens are seeking to reverse orders of deportation. The rate of frivolous appeals in deportation cases is very high, but the effect of this practice is that the cases are decided on the merits by a two-judge motions panel rather than a three-judge calendar panel. This result is not necessarily to be condemned, but it might be desirable to regularize the practice by court rule, as the Seventh and Tenth Circuits have done. 7TH CIR. R. 15; 10TH CIR. R. 8. Legislation

In rare instances a case will be placed on the motions calendar even though no party has requested any kind of ruling. This occurs when a court law clerk, in the course of inventorying a case or writing a bench memorandum, discovers a jurisdictional problem that appears to require the dismissal of the appeal. If the division chief and a motions attorney agree that jurisdiction is probably lacking, the law clerk will prepare a "suggestion for dismissal" that is treated as a two-judge motion and forwarded to a motions panel.

Most of what I have said thus far relates primarily to civil motions. The grist of the criminal motions unit is quite different. A large proportion of its work involves applications by indigent defendants seeking financial assistance for the prosecution of their appeals, or by habeas corpus plaintiffs requesting the "certificate of probable cause" that is required if their appeal is to be heard at all. Although some of the cases are easily disposed of on procedural grounds, others require extensive research into the record and the relevant authorities to determine whether the appeal reaches a threshold level of probable merit. Thus, a motion can require as much work as a bench memorandum.<sup>52</sup>

### *B. Personnel*

Motions work is often thought of as a staff function that is particularly suitable for career attorneys. While there is some substance to this view, the argument can be easily overstated. To begin with, I am not convinced that the law applicable to substantive motions is so arcane or specialized that only attorneys with experience can handle these matters efficiently. Admittedly, the published authorities on such questions as the availability of mandamus or the propriety of a stay pending appeal fall far short of providing a complete education for the law clerk attempting to write intelligently about a particular case. But the same may be said about the law on the "substantial evidence" rule as applied in judicial review of administrative action. In both instances the law clerk's job is to set out the relevant facts and authorities, leaving it to the judges to determine which side of the line the case falls on. With some guidance, a recent graduate skilled in legal research can perform one task almost as well as the other.

Yet even if one concedes that experience is of particular value in the handling of many substantive motions, the use of career attorneys is

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passed by the Senate in September 1979 would eliminate much of the distinction by requiring three-judge panels for all cases, including motions matters. S. 1477, 96th Cong., 1st Sess., § 112 (1979); 125 CONG. REC. S12132 (daily ed. Sept. 7, 1979); see S. REP. NO. 304, 96th Cong., 2d Sess. 2 (1979).

52. See generally Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157, 219-51 (1972).

not without its costs—in particular, the danger of undue reliance on staff work. This danger is far greater in motions matters than in calendared cases. In the Ninth Circuit, decisions in calendared cases are usually accompanied by an opinion or memorandum; the parties will have had a chance to make their arguments orally; and the judges will have had an in-person conference. In contrast, motions are usually granted or denied with no explanation whatever; oral argument is extremely rare; and if the judges confer at all it will be by telephone. In short, the safeguards against staff overreaching that are at work in almost all calendared cases, however insubstantial, are almost nonexistent when motions are involved. To be sure, many of the judges assign their own law clerks to take a second look at motions matters that raise doubts in their minds. In the general run of cases, however, the staff memorandum is the principal resource available to the judges on the motions panel, and a plausible recommendation by the motions attorney is likely to be given very heavy weight.

I would not suggest that motions should receive the same treatment as calendared cases; the time that would be needed is simply not available. But there are ways of minimizing the likelihood that the motions staff will start making law on its own. For instance, at least some of the substantive motions can be handled by court law clerks rather than by career attorneys. Not only would the judges give more careful scrutiny to the recommendations in the particular cases, but the practice would be likely to have a spillover effect on all motions work, because the career attorneys would have to explain unwritten practices and unquestioned assumptions to their junior colleagues. Consistent with this view, a large number of the motions to affirm and petitions for mandamus that came before the court during the last few months of my tenure were assigned to court law clerks. The quality of the work was high, and both the career motions attorneys and the court law clerks benefited from the opportunity to work together.

If I were starting afresh in organizing a staff, however, I would not establish separate units for motions work. I would have two or three career attorneys who would specialize in motions matters, but each would be assigned to one of the multiple-specialty divisions. The career attorneys would handle some substantive matters as well as procedural applications that for some reason were deemed too sensitive to be processed wholly by Clerk's Office personnel. They would also provide guidance to the court law clerks and perhaps review some of the substantive matters handled by them. But by integrating the motions attorneys into a structure dominated by non-career personnel, the court would avoid the danger that the motions units would become independent bureaucracies, promoting values and goals not necessarily

shared—or in any event articulated—by the judges. At the same time, the court would retain the undoubted benefits of expertise and consistency that can result from the use of career attorneys.

## VI

### INVENTORY, CALENDARING, AND RELATED FUNCTIONS

#### *A. The Inventory Process Generally*

When I first came to the court, I was disconcerted by references to the “inventory” process. The word conjured up the image of a retailer monitoring the accumulation and flow of goods in a warehouse—an image that seemed at odds with traditional notions of justice. Yet a court, like a merchant, cannot function effectively without knowing in some detail the magnitude and character of the business to be done. In short, the court must manage its caseload, and in the Ninth Circuit, the inventory system is an important part of the caseload management program.

As noted earlier, inventory is similar to the “screening” processes used in some other appellate courts.<sup>53</sup> The differences, however, are more important than the similarities. In contrast to most screening procedures, inventory does not result (immediately, at least) in differential tracking of different kinds of cases. At the same time, the system yields considerably more information useful to the court at all stages of the appellate process.

Each Wednesday the staff receives the briefs, relevant portions of the record, and the docket sheet for the cases that have become fully briefed in the preceding week. The number of cases per week varies between twenty and fifty; the average is about thirty. The cases are initially screened by the inventory coordinator, who rejects those that have incomplete files and allocates the others among the three divisions. The division chiefs then assign two or three cases to each law clerk for work-ups.

The law clerk’s first task is to scrutinize the record to uncover any problems of appellate jurisdiction. Unless jurisdiction is clearly absent, the law clerk will review the briefs in sufficient depth to prepare an inventory card containing essential information about the nature of the appeal. Taking thirty to forty-five minutes per case, the law clerk will classify the issues in accordance with the staff’s numerical outline of federal law issues, make a variety of coded entries identifying other important aspects of the case, write a very brief summary (50-200 words) of the facts and issues, and suggest a *weight*—a numerical estimate of the relative amount of judicial time and attention the case will

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53. See note 36 *supra*.

require. The weights are used to equalize the workloads assigned to the various panels sitting in any given month.

When the law clerks have finished their work, each division holds a short meeting at which each case is briefly discussed. Questionable weighting decisions are debated and, where appropriate, changed. The inventory cards are then typed in final form, and the coded data entered into the computer.

To fully describe the inventory system and related procedures would require a lengthy article. In the following sections I shall do no more than touch on some of the high points.

### *B. The Issue Classification System*

The principal purpose of the issue classification system is to provide a means for identifying cases presenting similar or related issues. The ability to identify such cases helps the court to manage its caseload in a number of ways.

First, and most important, when two (or more) cases raising similar issues are ready for calendaring at the same time, the cases can be assigned to a single panel in order to avoid duplication of research efforts and to minimize the danger of inconsistent results. If the cases are not ready for calendaring at the same time, the court can advance the later-filed case so that both can be heard and disposed of together. Even if the court prefers not to advance the later case, or if the appeals must be heard in different cities, the judges on each panel will be made aware of the other case so that they can coordinate their deliberations. Of course, the panels may not be able to reach agreement, but if they differ, they will do so on the basis of full information rather than ignorance of the alternative approach.

Second, awareness of related cases can aid the judges by providing a broader factual perspective for the decision of legal issues, especially those raised by new legislation. For instance, when cases involving the procedural prerequisites to a suit under the Age Discrimination in Employment Act first began to make their way through the appellate courts, judges would have benefited from being able to consider the various possible approaches as they might be applied to a spectrum of concrete factual situations. In a circuit as large as the Ninth, this kind of inquiry might have been possible if there had been a staff with the capacity to identify the various pending cases and bring them to the attention of the different panels.

Third, the court may find it desirable, on occasion, to address clusters of related legal issues in a comprehensive series of decisions, thus providing greater guidance to the bar and the district courts. The Supreme Court has followed this procedure from time to time, as it did

in the 1976 Term with Title VII issues<sup>54</sup> and in 1977 with double jeopardy.<sup>55</sup> But given the vast scope of federal law today, the Supreme Court must pick and choose very carefully among areas of possible concentration. The result is that, as a practical matter, the court of appeals is the court of last resort on all but a handful of issues. Comprehensive rather than ad hoc adjudication may well be appropriate, at least where the cases are in the backlog awaiting decision.

Finally, because the system is designed to identify secondary as well as principal issues, the court will be able to isolate recurring but low-visibility procedural problems that may call for a full-dress opinion or other action. For instance, a trial judge might persistently misunderstand the criteria for granting summary judgment or for dismissing a prisoner civil rights suit. The number of such cases that make their way to the court of appeals will be small, and in the ordinary course it is highly unlikely that any single judge or panel would ever see more than one or two. With a computerized file of procedural issues the court could identify such sore spots and clarify the law to the extent necessary.

Given these purposes, the goal of the classification system is not to identify cases that arise out of a particular field of activity (*e.g.*, education or railroading), or even those that fall within the same area of legal specialization (*e.g.*, media or environmental law). Rather, the goal is to identify cases that are similar in ways that are relevant to the issues being adjudicated. From this standpoint, two cases are similar if both involve an issue that is governed by a distinct line of authority. The line of authority may be a particular statutory or constitutional provision, a group of precedents, or some combination of the two. Thus, if there is a possibility of conflict between the decisions in two cases, the reason must be that the cases raise one or more issues that are governed by a line of authority common to both cases. Much the same can be said of the situation where the legal research for two cases would involve a great deal of overlap. In other words, the inquiry focuses, in the first instance, on the legal issues rather than the factual context of the case. Factual contexts are relevant only when the particular factual setting is one that has engendered its own line of statutory or decisional law.

To implement the system, the legal issues that arise in Ninth Circuit cases were sorted into eleven broad areas. Some of the areas, such as "federal regulation of trade and commerce," had a conceptual basis.

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54. See Hellman, *The Supreme Court and Statutory Law: The Plenary Docket in the 1970's*, 40 U. PITT. L. REV. 1, 18-19 (1978).

55. See Hellman, *The Supreme Court and Civil Rights: The Plenary Docket in the 1970's*, 58 ORE. L. REV. 3, 10-11 (1979).

Others, such as "high-volume areas of federal law," were merely convenient rubrics that enabled us to take advantage of the simplicity of a decimal classification system. Each of the broad areas was then subdivided according to more particularized legal issues and narrower lines of authority, ultimately to the fourth level of specificity.<sup>56</sup> Fourth-level codes were very specific indeed; they covered such discrete areas as the military-service exception to the Federal Tort Claims Act, economic hardship as a ground for suspension of deportation, and the scope of the coconspirator exception to the hearsay rule.<sup>57</sup>

Designing and implementing the system turned out to be far more difficult than I had anticipated. Cases at the court of appeals level do not come in neat packages like most of the cases that receive plenary consideration in the Supreme Court;<sup>58</sup> the issues are more numerous and less well-defined. In particular, criminal defendants and employers challenging unfair labor practice findings by the NLRB often attack a particular ruling on several grounds. If the inventory card were to reflect every possible characterization of every issue, the system would soon become so unwieldy as to make retrieval of similar cases impossible; yet to omit one or more of the possibilities creates the risk that the case will not be found when it would be helpful. The staff is continuing to refine the codes and to reexamine the cases, so as to strike a sound balance.<sup>59</sup>

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56. *E.g.*, within the area of constitutional law (1000-1999), freedom of speech was a second-level category (1100-1199). It was further broken down according to the various lines of precedent: Obscenity (1110-1119), commercial speech (1120-1129), libel (1130-1139), etc. Within these third-level categories the issues were further broken down to reflect narrower recurring issues. For example, within the "obscenity" category, there were fourth-level issues of "application of *Miller* standards" (1111) and "seizure of obscene materials" (1118). In addition, some specific, narrow lines of precedent were given fourth-level categories and subsumed under third-level rubrics that were designed more for convenience than for analytical precision. For instance, the third-level category "freedom of expression in special environments" did not, itself, reflect a single line of authority; rather, it was a catch-all for the lines of authority dealing with the first amendment rights of teachers, students, military personnel, etc.

57. Admittedly, the proper classification of a case is not always obvious. Suppose, for example, that plaintiffs in a private antitrust action have brought suit under the Freedom of Information Act to obtain documents prepared by the Federal Trade Commission in the course of an inquiry into alleged anticompetitive practices of the defendants. If the appeal turns on whether the materials are protected from disclosure by the FOIA exemption for investigatory files, the case would be classified as one involving the FOIA, not as an antitrust case, since the relevant precedents are those construing the FOIA exemption. Nevertheless, to provide maximum assistance to the court, the staff might also note a secondary antitrust issue, even though the decision in the case will not turn on any points of antitrust law.

58. See Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 HARV. L. REV. 1709, 1738-39 & *passim* (1978).

59. In many areas the number of cases was small enough that we found no need to go beyond the third, or even the second, level of specificity. For instance, in more than a year under the system we inventoried only 12 cases involving questions of copyright law. Scanning all of the cards was easy enough that the delineation of subcategories would have been a waste of time.



### C. Other Code Applications

The coding system as a whole was designed to serve three purposes. First, I hoped that it would enable a judge or law clerk, with a minimum of indoctrination, to ascertain essential information about the nature of a case by reading a single line of a computer printout. Second, through computer sorting and retrieval, the court would be able to identify cases appropriate for particular procedures. Finally, the court would be able to isolate recurring problems in judicial administration at both the trial and the appellate level.

The use of printouts to gain a quick "fix" on a case never became common practice during my tenure at the court, in part because the printouts were not generally available. Even if they had been, however, it was probably unrealistic to expect that judges or law clerks would readily turn to them. Happily, advancing technology will probably eliminate the need for anyone to use the printouts alone. By linking the word processing system to the computer, the staff can make available the full inventory cards, including the verbal summaries. In effect, the court will have a subject-matter index of pending cases. An index of this kind has proved very useful in the Michigan Court of Appeals, and I have no doubt that it would be welcomed by any appellate court with a large caseload, especially if the judges do not live and work in a single city.

We had greater success in using the inventory system to identify cases appropriate for particular procedures. Late in 1978, one judge decided to experiment with preargument settlement conferences. The experience of other courts suggested that settlement efforts are most likely to succeed when the parties are arguing over money alone.<sup>60</sup> We therefore looked to the computer field specifying the "nature of relief sought or granted" in the trial court. This enabled us to isolate cases involving only money damages or requests for attorneys' fees, and those cases were the first chosen for the settlement conference project. At this writing it is not clear whether the experiment disposed of enough cases to justify the expenditure of judicial time; however, without the inventory system, such potentially effective techniques would not even have been tried.

In the long run, the system can be used in much more sophisticated ways, especially if post-disposition data are added to the inventory file. For instance, the case-weighting process could be refined by isolating those kinds of cases in which staff weighting judgments differ substantially from those of the court. In a more ambitious vein, the

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60. See, e.g., Birnbaum & Ellman, *Pre-Argument Settlement Process in an Intermediate Appellate Court: The Second Department Experience*, 43 BROOKLYN L. REV. 31, 36 (1976).

staff could look for patterns in the kinds of cases in which the judges determine that oral argument is unnecessary; the resulting data would then enable the staff to select appeals for an accelerated track with little likelihood that many such cases would have to be reclassified for regular processing.

The prospect of using the inventory system to identify recurring problems of judicial administration in the lower courts raises some delicate questions. For instance, once post-disposition data are added to the file, it would be possible to discover whether particular trial judges are being reversed with great frequency for granting summary judgments or otherwise terminating lawsuits. Patterns such as these, however, may result from any number of circumstances, and it is doubtful that the appellate court would wish to take action on the basis of quantitative data alone.

#### *D. The Case Weighting System*

Appellate cases differ greatly in their degree of difficulty and in the amount of time and effort they will require of the judges. If cases were placed on calendars at random, some panels would be overburdened, while others would need only a few days to write opinions disposing of a month's worth of cases. Over a period of time the individual judges' caseloads would probably attain a rough equivalence, but the short-term imbalance would have unfortunate consequences. Because calendars must be made up many weeks in advance, a succession of light calendars would create a loss in decisional capacity that could not be easily recaptured. A succession of overweighted calendars would be harmful in a different way. When a judge must put some cases on the "back burner" for a while, the total amount of time consumed by the cases is likely to be greater, since the judge must review his previous work each time he returns to a case. Moreover, delay tends to breed more delay, as new high-priority matters come along and displace the earlier assignments. Finally, the more time that elapses between oral argument and the preparation of the disposition, the less value the argument is likely to have.

A second consequence of overweighted calendars is perhaps more dangerous, although less visible. Out of an understandable concern to avoid delay, the judges may give some of the cases substantially less attention than they deserve, and less attention than they would get if they were included on a more balanced calendar. Cases meriting extended consideration and a published opinion may be disposed of in a brief unpublished memorandum, and cases deserving at least a statement of reasons may receive little more than a judgment order. In contrast, a relatively even flow of work, without the aggravated pressures

that result from overloaded monthly calendars, will enable the judges to give each case an appropriate degree of attention consistent with the court's overall workload.

To avoid these problems, the court adopted the weighting system referred to earlier. The premise of the system is that for each day's sitting, a panel of three judges can reasonably be assigned three "solid" cases—cases calling for extensive consideration and research and resulting in a full-dress published opinion. Each judge would then have one such opinion to write. The weight of 5 was arbitrarily chosen for the "solid" case, and cases of greater or lesser difficulty were given correspondingly higher and lower weights. Thus, a case is weighted 1 when it involves a straightforward application of settled principles to a simple set of facts, and the result seems obvious. At the other extreme, the weight of 10 is reserved for the "blockbusters"—cases involving complex facts and multiple issues, such as some environmental or anti-trust appeals.<sup>61</sup> When calendars are made up, each panel is assigned a group, or "cluster," of cases having, in total, the numerical weight established by the court as appropriate for a single panel. At this writing, each panel hears 16 points' worth of cases—the equivalent of three solid appeals and one "throwaway."

On the whole, the judges found the weighting system to be a substantial improvement over random calendaring. However, it sometimes seemed to the staff that the judges expected scientific precision in the process, and were disappointed when cases were misweighted, particularly when the result was to produce unduly heavy calendars. During my tenure at the court we were constantly working to refine the system and improve the accuracy of our judgments. Probably the most useful change was the review of weighting decisions at division meetings. This procedure helped to foster uniformity, especially since the inventory coordinator took part in all of the meetings. Perhaps most important, weighting decisions became collective judgments that took advantage of the fund of knowledge and experience acquired by all of the law clerks in the division.

This process worked exactly as I hoped it would. Again and again a case would involve a legal issue or factual situation familiar to one of the law clerks by reason of a case that he had recently worked on. The law clerk was then able to point to specific circumstances that made the case more or less difficult than might otherwise have been supposed.

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61. We found no need to use all of the numbers between 1 and 10. Instead, to keep the system simple, we limited the weights to 1, 3, 5, 7, and 10. For instance, a straightforward one-issue case that appeared to require a short published opinion would be weighted 3. A 7-point case would have one or more features making it more difficult or time-consuming than the "solid" 5-point case, *e.g.*, a large record as well as two or three substantial legal issues.

The composite of the individual contributions thus permitted weighting decisions to be much more solidly grounded than would have been possible if any one person or small group of persons were doing the work.<sup>62</sup>

## VII

### PREPARATION OF BENCH MEMORANDA

When we turn from motions in matters and inventory to the realm of calendared cases, we move from an area where staff participation is generally accepted into one where it is far more controversial. Two kinds of staff participation can be identified: the preparation of bench memoranda and the drafting of opinions. Predictably, the latter arouses greatest opposition, but even the former does not go unquestioned.

As the name suggests, a bench memorandum is a document prepared—initially, at least—for study by the judges before they go on the bench to hear oral argument. Although practice varies from one court to another, most bench memoranda follow pretty much the same outline: a statement of the relevant facts and procedural history, an analysis of the issues, and a recommended result.<sup>63</sup>

#### *A. Purposes of Bench Memoranda*

The first question about bench memoranda is why the judges need them in the first place. After all, are not the parties, in the briefs, supposed to draw the court's attention to the relevant facts and authorities? And can't the judges do the rest of the work themselves?

Bench memoranda can help the judges in several ways. To begin with, unless the court is current with its docket, the briefs will often be old and out of date. In an era of rapidly developing law, the judges

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62. From time to time, judges would suggest that all cases should be weighted by one individual, or at most by two or three experienced attorneys. The difficulty with this suggestion is that weighting is only one part of the inventory process. Having one person do all of the inventory work would be a poor use of the skills of an experienced and able attorney. Nor would a competent person want such a job for very long. Inventorying two or three cases a week is a pleasant break from memorandum writing; with a larger number, the work rapidly grows tedious. In any event, the system described in the text assures that weighting decisions benefit from the experience of senior personnel without requiring them to do all of the spadework.

Judges also asked about the amount of attorney time consumed by divisional meetings. If the only purpose of the meetings was to reach a consensus about case weights, the time spent might be excessive. However, the meetings also provided a valuable opportunity for the law clerks to become familiar with recent developments in their areas of specialization and to discuss questions raised by newly filed appeals, cases pending in the Supreme Court, recent decisions of the Ninth Circuit, and unpublished opinions. The exchange of information during these meetings easily justified the time spent.

63. The inclusion of a recommended result is somewhat controversial. See text accompanying notes 68-69 *infra*.

should not have to take Shepard's in hand in order to ascertain the bearing of recent cases or legislation on the authorities cited by the parties. Nor would a simple list of intervening decisions serve the purpose; the judges will want to know the precise relationships between the new authorities and those cited in the briefs, so that they can proceed in an efficient manner in doing their own research. A bench memorandum can update the briefs, and can do so most usefully by providing the new material in its full context—an integrated treatment rather than a pocket part, so to speak.

The bench memorandum can also save the judges time by providing a complete, comprehensive account of the relevant facts and giving citations to the record for each point. A statement of facts prepared by one of the parties will usually concentrate on those portions of the record most supportive of the position asserted. The judges may be able to obtain a complete picture by collating the two accounts, but it is more efficient if a law clerk does the spadework of examining the record, setting the facts in order, and providing citations so that the judge can look at the documents or testimony himself.

Finally, the bench memorandum can assist the judges by providing an analysis of the facts and authorities from a neutral perspective. If the analysis survives the judges' scrutiny, it will save time, but even if it falls victim to the judges' greater experience or their different reading of the facts or the law, it can still provide a useful starting point.

Those who are generally skeptical about staff assistance fear that bench memoranda will tend to usurp the functions of counsel. The sad fact is that the briefs of the parties too often provide little help to the court. The attorneys may cite cases from other circuits, or even from state courts, when there is authority within the circuit that is directly on point. The "Argument" section of the brief may consist of a string of quotations with little or no attempt to apply the cited authorities to the case at bar. Cases or statements of law may be cited out of context or with no appreciation of the broader principles underlying the particular holdings. Surely the premises of the adversary system do not require a court to limit the scope of its inquiry simply because one or both lawyers did not probe deeply enough into the facts or the precedents.<sup>64</sup> And if this is so, little significance attaches to whether the spadework is done by staff or by the judges themselves, as long as the judges engage in an independent study of the relevant materials.

The last point is, of course, the crucial one. In the Ninth Circuit, at least, I saw no evidence that the judges took staff memoranda on

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64. See T. MARVELL, *APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM* 131-32 (1978).

faith; on the contrary, even in the cases in which the court relied most heavily upon the staff, the judges routinely read the precedents or the portions of the record that were crucial to the decision. For instance, in one appeal the panel asked the court law clerk who had prepared the bench memorandum to draft the disposition. The law clerk did so, and the panel adopted most of what he had written—but only after the authoring judge had added an extended section treating the facts in more detail.

Finally, the bench memorandum will seldom furnish the last word for the panel. The court hears oral argument in most cases, and does so *after* the completion of the bench memorandum, so that any suggestions made by the court law clerk can be tested in the crucible of the adversary process.

### *B. Advantages of Staff Memoranda*

Bench memoranda can be prepared by the judges' own law clerks, and often are. Why then should the court law clerks be called upon to perform this function? One reason is that the elbow clerks do not have time to write memoranda in all of the cases to be heard by their judges. In a single month on calendar, a judge will hear twenty cases or more. If his law clerks were to prepare bench memoranda in all of them, they would have little time for anything else. Even if the time were available, however, assigning at least part of the responsibility to the staff can add significantly to the overall efficiency of the court, especially if the staff works on the cases at the lower end of the spectrum of complexity. There are four reasons for this conclusion.

First, having bench memoranda prepared by court law clerks avoids the duplication of effort involved when memoranda are prepared separately by the law clerks of each of the judges on the panel. At the same time, there is not the danger of loss of neutrality that results when all of the participating judges use a single memorandum prepared by one judge's elbow clerk. A law clerk who has been working for a particular judge is likely, even unconsciously, to direct a memorandum toward the interests of that judge. The effect may be to decrease the utility of the memorandum for the other members of the panel.<sup>65</sup> A court law clerk, on the other hand, does not have such loyalties, and will be better able to write from a neutral perspective.

Second, the court law clerks can usually complete their memoranda and have them in the judges' hands much sooner than the elbow

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65. Cf. R. Aldisert, Outline of Remarks at Seminar for Senior Staff Attorneys 17 (Dec. 12, 1977): "The elbow law clerk . . . is attuned to the philosophy of his judge. . . . [A]lthough he is intellectually independent, he is in fact working for a judge who has articulated and evidences a certain point of view."

clerks—several weeks before oral argument, rather than a few days. In part, this is because the court law clerks can and do begin work even before the cases have been assigned to particular panels; indeed, in our office it was not uncommon to have bench memoranda *finished* before the panel had been named. Yet more is involved. Experience suggests that the preparation of bench memoranda tends to rank rather low on the list of priorities within the judges' chambers. Opinions must be drafted; other judges' opinions must be reviewed; petitions for rehearing must be examined. Work on bench memoranda for upcoming cases is likely to be squeezed in between other activities, and the finished documents will often be available to the judges only a few days before the oral argument. For the court law clerks, on the other hand, preparation of bench memoranda is a high-priority activity, and the division chiefs oversee the work to assure that most memoranda are put in the judges' hands at least four weeks before the oral argument.

Early preparation of bench memoranda has two advantages. Because the law clerks begin their work before the case clusters are sent to the Clerk's Office, the staff can identify misweighted cases and correct the weights before the calendars are prepared. More important, the staff can suggest specific questions to be asked of counsel in time for the lawyers to give the matters full attention before facing the judges on the bench. This approach is especially desirable when cases present the possibility of mootness, or where intervening legislation, court decisions, or other events may have changed the posture of the legal issues. Such a procedure is not only useful to the court; it also enables the lawyers to know what particular points are troubling the judges and thus permits them to improve the quality of their presentations.<sup>66</sup>

Third, court law clerks of equal ability can often produce better bench memoranda than elbow clerks. In part, this is because the preparation of bench memoranda occupies a lower position in the elbow clerks' list of priorities than it does with court clerks: when there are opinions to be written for the Federal Reporter, it is hardly surprising that bench memoranda are often hastily composed and sometimes turn out to be rambling or incomplete. For the court law clerk, on the other hand, work on bench memoranda provides the principal opportunity to display his legal skills; thus, he will strive to do the best job he can. The more important reason, however, is that staff memoranda are reviewed by senior staff members before they are sent to the judges. Through this process the law clerk writing the memorandum has an opportunity to test his work against questioning from persons who are not familiar with the particular case, but who have a good background

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66. See *First Phase Hearings*, *supra* note 6, at 723 (remarks of Stanley E. Long, Esq., of the Washington bar); *cf. id.* at 726 (remarks of Judge Wright).

in the general area of law involved. Review helps to assure that the arguments of the parties are fully dealt with; that all relevant lines of authority are considered; and that the facts, issues, and authorities are presented in a compact, well-organized format that will be of maximum value to the judges on the panel. All this can be done, moreover, with a relatively small expenditure of resources. We found that with 60 to 100 cases being reviewed each month, the total time devoted to the process was equivalent to the services of one full-time attorney. This is a remarkably small price to pay for the improvement in quality resulting from review.<sup>67</sup>

Finally, the modest degree of specialization made possible by the divisional system permits the court to gain efficiencies of scale. As already noted, a court law clerk who, by reason of his prior work, is familiar with developments in a general area of law has no need to engage in research simply to acquire the basic grounding in the subject that is necessary to write intelligently about a particular question. Even if the individual attorney does not have the necessary background, it is likely that one of his colleagues in the division will be able to help him. By taking advantage of the collective experience of his colleagues, the court law clerk can prepare a better memorandum, in less time, than an elbow clerk working in a judge's chambers. Perhaps more important, he can place the particular issues in the full context of the jurisprudence developed under the relevant statutory and decisional law.

During my tenure at the court I saw numerous examples of this phenomenon. For instance, a panel once requested a bench memorandum in a case arising under the Occupational Safety and Health Act. I assigned the case to a law clerk who had previously worked on an appeal involving a different clause of the same section of the Act. The law clerk was able to plunge immediately into the particular issues because she was familiar with the structure of the legislation and the leading circuit precedents interpreting it. Such efficiency would not have been possible outside the staff operation; the number of OSHA cases filed in a year is so small that no elbow clerk is likely to encounter more than one during his tenure with the court, but it is large enough that the central staff will probably handle several.

One final point deserves attention. Judge Ruggero Aldisert, among others, has expressed concern that staff attorneys will become "super advocate[s], conveying [their] influence not to one judge in the privacy of chambers—but to the entire judicial body that will ultimately make the decision." In his view, "maximum objectivity" in bench memoranda "is hard to come by," and there is serious question

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67. For further discussion, see pp. 973-76 *infra*.



whether staff memoranda should include a recommendation as to the case's disposition.<sup>68</sup> These concerns are legitimate, but the experience of the Ninth Circuit suggests that they can be overcome with relative ease. To begin with, I think that little is accomplished by telling the court law clerk not to conclude with a recommended disposition. Anyone who analyzes a legal problem in any depth is likely to reach at least a tentative conclusion as to how it should be resolved. The judges reading the bench memorandum should know the law clerk's view so that they can take it into account in evaluating his analysis and the route by which he reaches his conclusion.<sup>69</sup> Moreover, the need to reach a conclusion forces a clerk to organize and channel his thinking in a way that will be helpful to the judge for whom the document is prepared.

With respect to the analysis contained in the memoranda, we used several procedures to "maximize] objectivity." A staff handbook provided detailed instructions as to the contents of a memorandum. The reviewers took particular care to assure that memoranda gave adequate treatment to the arguments of the litigant to whom the recommended disposition would be adverse. And regular hiring of new law clerks—and new reviewers—helped to guard against the development of any "party line."

### C. *Selection of Cases for Staff Memoranda*

In 1974, when the court sought the creation of additional staff positions, the judges expressed the hope that the staff would be able to prepare bench memoranda for all calendared cases. By 1979, however, it was apparent that even a staff of thirty could not provide 120 bench memoranda a month and still perform all of its other responsibilities.<sup>70</sup> The court, therefore, had to decide which kinds of cases would receive staff memoranda.

Some judges thought that the staff should work on the most difficult and complex cases, and certainly there is something to be said for this view. If, as I have suggested, court law clerks can produce better

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68. R. Aldisert, *supra* note 65, at 16-17.

69. Curiously enough, the more common problem in our office was not the zealous advocate, but law clerks who could not bring themselves to make a recommendation one way or the other. We would not have pressed them but for the fact that most of the judges preferred that the memorandum take a stand.

70. During the first half of 1979, the number of cases heard each month averaged about 120. With the addition of ten new judges, the number of panels sitting each month was expected to increase from 25 to 45. This means that the court would be hearing as many as 225 cases each month. However, these figures are predicated on the assumption that the court would continue to make very extensive use of "borrowed" judges—*i.e.*, district judges and retired judges from other circuits. This practice is far from ideal. See note 30 *supra*.

memoranda than the elbow clerks, it would seem to make sense to have them work on the cases requiring the greatest amount of judicial effort. By the same token, the big cases will benefit most from preargument work that permits the court to address questions to counsel well before argument. Moreover, in a court where opinion assignments are made by the presiding judge, preparation of bench memoranda by the staff gives that judge the greatest leeway in making the assignments. In contrast, when one judge's clerk prepares a memorandum for all members of the panel, there will be a strong temptation to assign the case to that judge. Finally, if the court law clerks devote most of their time to the preparation of bench memoranda, their work will be more interesting, and morale correspondingly higher, if the cases they work on are the toughest on the calendar.

Initially I found these arguments persuasive, but in the end I was convinced, as was a majority of the court, that the staff could best serve the court by concentrating on the cases at the lower end of the spectrum of difficulty. This conclusion rested both on the drawbacks of staff involvement in the higher-weighted cases and on the unique advantages of staff concentration on the relatively simple cases.

Staff preparation of bench memoranda in complex cases can be inefficient in two ways. First, the judges are not likely to ask the court law clerk to draft the opinion; thus, an elbow clerk will have to learn the case from the ground up, duplicating work that has already been done by someone else. Second, the higher-weighted cases tend, by definition, to be cases with many decision points—multiple contingent issues, multiple ways of characterizing issues, or alternate approaches to decision. A court law clerk, working without guidance from any of the members of the panel, either will spend a great deal of time on matters that the panel will not pursue, or will write a memorandum covering the issues in such a superficial way as to be of minimal value even as a “roadmap” to the case. An elbow clerk, in contrast, will be able to consult at least one member of the panel directly, and may be able to get a “feel” for which issues or lines of reasoning the panel is likely to pursue.<sup>71</sup>

These objections, standing alone, might not justify denying to the court law clerks the opportunity to work on the higher-weighted cases. Far more persuasive are the considerations supporting central staff preparation of bench memoranda in the lower-weighted cases.

To begin with, large numbers of the lower-weighted cases arise in

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71. See Aldisert, *Duties of Law Clerks*, 26 VAND. L. REV. 1251 (1973). However, some judges prefer that their law clerks not consult them at the bench memorandum stage. In that situation, there is no advantage to having the memorandum prepared in one of the judges' chambers rather than by the staff.

high-volume areas of the law—in the Ninth Circuit, cases involving searches and seizures, sentencing and parole procedures, review of decisions of the National Labor Relations Board, and immigration appeals. As already noted, the court law clerks rapidly acquire a familiarity with the principal authorities in these areas. Alone or with the help of others in their divisions, they can prepare bench memoranda much more efficiently than an elbow clerk for whom each case may present a new issue or a new area of the law.

Second, in a lower-weighted case, the nature and extent of the delegable work will be defined with relative precision from the outset. Certain portions of the record will have to be scrutinized; certain authorities will have to be examined, and their bearing on the case at bar analyzed. These are tasks that must be performed in the course of writing a bench memorandum prior to judicial consideration; they are tasks that will provide the underpinning for the ultimate disposition. It is efficient to have the work done once, and done well, at the outset, so that when the judges turn to the case they will have everything they need in front of them. The court law clerks can perform this function very efficiently: they can work on the cases with a minimum of distraction from other tasks; the memorandum will be prepared in accordance with established, uniform guidelines; and the scope and accuracy of the discussion will be reviewed by a more experienced attorney. In short, the cases at the lower end of the spectrum of complexity, with their predictable contours, are well suited to the structured processes of a central staff.

Finally, and most important, staff work on the simpler cases provides an offsetting safeguard for the very limited amount of time that the judges can spend on these appeals if they are to fully discharge their responsibilities in the more difficult cases. The judges must be able to deal with the simple cases rather summarily, yet with some confidence that there is no more to the case than meets the eye. Very often the briefs provide only minimal help in analyzing the issues presented by an appeal.<sup>72</sup> A relatively thorough staff memorandum can bridge the gap. The court law clerk will scrutinize the record to the extent necessary, will pursue the lines of authority suggested by the parties, and will analyze arguments that have been presented in an inadequate or confused manner in the briefs. With this assistance the judge and his elbow clerks can make efficient use of the limited time that they will spend on most of these cases, and can have a high level of confidence that an appeal is as straightforward as it appears to be.

From time to time, some judges took the position that they had no

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72. This problem is most acute in pro se cases, but also exists in many appeals handled by attorneys.

need for staff memoranda in the simple cases because they could look at the briefs and in twenty or thirty minutes determine what the cases were about and how they ought to be decided.<sup>73</sup> In my view, however, the very fact that the judges think that twenty or thirty minutes will suffice to take the measure of a case provides the strongest justification for the staff memorandum. Admittedly, in a large proportion of the cases the law clerk will not discover anything in the record or the authorities that suggests a different conclusion from the one the judge has reached on the basis of his experience and intuitions. Occasionally, however, a case that looks simple and unremarkable on the surface will turn out to have a twist that requires more extensive judicial attention. The proofs as to a crucial fact may be missing or ambiguous. Language in an earlier case that at first appeared controlling may turn out to have been dictum. Precedents that initially seemed to point in a single direction may, upon closer examination, reveal gaps or incipient conflicts. Even when discoveries such as these do not change the result, they may prompt the judges to write an extended opinion or to issue a cautionary dictum for the district courts.

Although federal appellate judges are now authorized to hire three elbow clerks, I would still argue that the lower-weighted cases are best handled by the staff. This conclusion rests not only on the advantages of staff memoranda discussed above, but also on the belief that the additional elbow-clerk time is best devoted to more thorough work on the "big" cases. In particular, it is important that the elbow clerks give careful scrutiny to the opinions of other panel members and draw their judges' attention to dicta or other statements that may cause trouble in the future. The non-writing judges cannot be expected to edit opinions as though they were on a law review, but the imperative of collegiality does require, at the least, that all participating judges approve all aspects of an opinion that may be legitimately relied on by the bar and lower courts as declaring the law.<sup>74</sup> In this endeavor the elbow clerk can play an important role.

In an ideal world, the offsetting safeguard furnished by a high-quality staff memorandum might be superfluous, but in the real world of heavy caseloads and limited judge power, such memoranda provide the best assurance that all appeals, whether pathbreaking or routine, will receive the consideration they deserve.

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73. Cf. R. Aldisert, *supra* note 65, at 14: "[O]n the average easy case, I can read the briefs and dictate a bench memorandum in about a half hour."

74. See generally Johnson, *The Supreme Court of California, 1975-1976 Term—Foreword: The Accidental Decision and How it Happens*, 65 CALIF. L. REV. 231, 238-39 & *passim* (1977).

*D. The Review Process*

When I took over as supervising staff attorney, I had no preconceptions about review, although I did assume that one of the reasons the court turned to the academic world for a staff director was to have someone who would work with and assist the young attorneys just out of law school in improving the quality of their legal work. Today, on the basis of my experience, I am convinced that review for substance, form, and clarity by an experienced attorney is an essential ingredient of a first-rate central staff program.

The Ninth Circuit's procedure for review evolved gradually and without planning. Most memoranda were reviewed by two attorneys, one of whom was usually the chief of the division to which the writer was assigned. The two reviewers would study the memorandum independently, then confer with one another, after which the principal reviewer would discuss the case with the writer. Sometimes, when the suggestions were only verbal, the conference was omitted. At the other extreme, when a case presented major problems, both reviewers might discuss them with the writer in the hope of finding an approach that would present the judges with the full panoply of options without making the treatment unbearably long and convoluted. Once the initial review was completed, the reviewers often did not see the memorandum again except to proofread it. Of course, if extensive changes were called for in the initial review, at least one reviewer would go over the revised version to make sure that it conformed to the understanding reached during the discussion.

The two reviewers had somewhat different functions. The principal reviewer was expected to study the briefs, though not necessarily in depth; he might also check one or two of the principal authorities relied upon by the writer or by the parties. The secondary reviewer did not ordinarily go beyond the "four corners" of the memorandum. The system thus provided a twofold check on the writer's analysis: the principal reviewer would make sure that the writer had adequately covered the points raised by the briefs, while the secondary reviewer would be able to detect omissions or inarticulate major premises that rendered the analysis incomplete or otherwise faulty. Dual review had the additional advantage of furnishing a safeguard against the development of a "party line": whatever preconceptions one reviewer might have would be counterbalanced by the other. In addition, because the secondary reviewer was ordinarily the chief of another division, he could provide information about pending or recently decided cases on issues that lay within his bailiwick. The marginal cost of dual review was very small; the secondary reviewer seldom spent more than half an hour, or an hour at most, on a case.

With respect to the substance of review, it is easier to explain what we avoided than to describe what we did. Review was not directed toward achieving stylistic perfection or linguistic refinement; we were concerned about style only to the extent that it impeded understanding. Nor, at the other extreme, did the reviewers attempt to impose their own views of the substantive issues on the authors of the memoranda. From the very beginning, and without discussion, it was understood that the memorandum was the writer's: The reviewer was not to approach the case *de novo*, but rather was to scrutinize the writer's analysis and to suggest alternatives only if there were defects in the document's treatment of the case. In short, the reviewers did not attempt to change the author's views, but rather to make sure that he had considered them fully and articulated them well.

One other aspect of the system deserves mention. As time went on, the court law clerks tended, more and more, to consult their division chiefs in advance of writing rather than waiting for review of the finished draft. This kind of consultation was particularly valuable when the law clerk discovered a threshold question that might make it unnecessary to reach other, more difficult issues. The division chief, who was more familiar with the court's different ways of dealing with such situations, was often able to suggest an approach that would avoid unnecessary work while still providing the panel with all the information that it needed at the preargument stage. Even in the ordinary case, early consultation often helped the law clerk to find staff memoranda or published authorities that permitted shortcuts in the research or analysis. And where a case presented unexpected difficulties, consultation usually made the post-drafting review less time-consuming and more efficient.

With this general background, I turn to the specific purposes served by the review process as it developed in the Ninth Circuit. The principal purpose, of course, was to improve the quality of the individual memoranda. Review helped to assure that no issues or relevant authorities were overlooked, and that the memoranda fully stated the operative facts, the questions presented, and the applicable law. One might think that the briefs would provide adequate guidance as to the scope of the inquiry, but, as I have already noted, the parties' submissions were often inadequate or out of date. An experienced attorney could help the law clerk to steer a middle course between, on the one hand, slavish adherence to the parties' characterizations and, on the other, overly imaginative recreations of the issues presented. Moreover, because the reviewers were quite familiar with many recurring legal problems, they were often able to draw the writer's attention to authorities that would not be uncovered through conventional research

tools. Finally, by insisting that the writer articulate the major premises underlying his analysis, the reviewers helped to assure that no important aspects of the case were inadvertently concealed from the judges, and that the parties' contentions were analyzed with the appropriate degree of thoroughness.<sup>75</sup>

Review also helped to assure that the substance of the cases was presented to the judges in a compact and useful form. The law clerks enjoyed writing, and often wrote at greater length than they should have. A short deadline did not necessarily mean that a memorandum would be short; rather, the writing attorney might simply be denied the time in which to obtain a perspective that would permit tightening a memorandum. The review process provided this perspective, and thus helped to cut down on the amount of material that the judges had to read.<sup>76</sup>

Another ingredient of a high-quality staff memorandum is neutrality. A judge soon gets to know his elbow clerk, and can read the memoranda he writes in light of that knowledge. In contrast, the judge will usually have no way of taking into account the idiosyncrasies or predilections of a court law clerk. Of course, law clerks would not deliberately "slant" a memorandum; what is involved here is the law clerk's general approach to recurring legal issues or, more commonly, the narrowing of perspective that results when an attorney reaches a conclusion too early in his work on a case. Review enabled the law clerks to become aware of any such distortions and to correct them.

Review played a major role in the development of the law clerks' legal skills during the year or two that they worked for the court. Although the reviewers concentrated on substance, form, and clarity within individual memoranda, they would also draw the authors' attention to recurring problems in their writing that would make it more difficult for the judges to follow their arguments. Moreover, analytical or organizational suggestions made by a reviewer for one memorandum often proved valuable in later months when the writing attorney confronted a similar problem in another case. Time spent on review thus constituted a capital investment that enabled the staff to increase

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75. In a lower-weighted case the analysis would be quite thorough; in a higher-weighted case, the issues would be discussed in more summary fashion.

76. *E.g.*, a law clerk might devote lengthy analysis to a point that, while not irrelevant, could be disposed of in a much simpler fashion. Having taken the arduous route, the law clerk might want the judges to travel it with him, even though, on the basis of their familiarity with the area of law, they would much prefer the shortcut. The reviewer could help the writer to recast the material in a way that would call the judges' attention to the more roundabout route without requiring them to travel its full length. Or, the most appropriate sequence of ideas or organization of issues might be difficult to find if the writer has only a few days in which to work. A second, experienced attorney could often suggest a reorganization that would bring the issues into sharper perspective—usually in a more compact form.

its productivity as the year progressed.<sup>77</sup>

The review process also proved to be a useful tool from the standpoint of personnel management, in that it made the best use of the best people on the staff. A bright and experienced law clerk who did nothing but write memoranda and work on inventory might be able to prepare four to six memoranda a month. Much of his time would be spent in routine research that could be done equally well by any competent law clerk. As a result, only a few judges would be able to take advantage of the special qualities that he could bring to bear on a legal problem. In contrast, when the experienced law clerk spent his time reviewing memoranda prepared by his junior colleagues, his work benefited a much larger number of judges. The collaborative effort involved in review thus made the most efficient use of all of the staff's intellectual resources.<sup>78</sup>

Finally, review helped the court to preserve judicial control over the staff attorney program. It is a familiar phenomenon that when everyone is responsible, no one is responsible. In the ordinary course, no single judge would see a sufficient number of memoranda by a particular court law clerk to form a valid judgment about the law clerk's ability, dedication, or integrity. The reviewers, however, had the necessary information, and a supervising judge, working with a staff director who himself or through the reviewers read all staff work, could with relatively little effort make any necessary judgments about the quality of the work being produced.

#### *E. Circulation of Bench Memoranda to the Parties*

To some observers, the development of central staffs poses a threat not only to the integrity of the judicial function, but also to the role of counsel and ultimately to the adversary system itself. In particular, there is concern that the staff bench memorandum will tend to displace the briefs and arguments submitted on behalf of the parties and thus "reduce or eliminate the participation of counsel in the appellate proc-

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77. Review contributed to the efficiency of the office even in the early weeks of the court year. A recent law school graduate who, alone, would struggle at length over a tough case could work with the reviewer to cut through procedural or conceptual thickets and thus arrive at a finished product in much less time than would otherwise be required. As a result, the five or six memoranda that the reviewer might have produced in a month would often be offset by increased production from the attorneys being reviewed.

78. By the same token, the review system helped us to retain our best law clerks for longer than they would otherwise have stayed. After a year of writing bench memoranda (even with occasional stints at lend-lease or opinion writing), a bright attorney with a good law school background will probably have benefited all he can from the staff program; alternative job opportunities will be too attractive to pass up. Putting our best people to work on review gave them a new challenge and a new level of intellectual experience that made it far more likely that they would stay with us for a second year or even a third.



ess.”<sup>79</sup> I saw no evidence, however, that this was happening in the Ninth Circuit. On the contrary, most judges made a point of not reading bench memoranda until after they had read the briefs; and within the staff, as I have said, the reviewers would check carefully to make sure that a memorandum did not stray too far from the case as the parties had presented it.<sup>80</sup> Nevertheless, it may be worth some effort to attempt to allay the concern. One way might be to supply the staff bench memorandum (and draft opinion, if there is one) to counsel before argument or decision. This approach has been proposed, and cogently supported, by Justice Robert S. Thompson of the California Court of Appeal.<sup>81</sup> I agree that the procedure would increase the visibility of the decisionmaking process, would provide a very effective check on staff overreaching, and might assist the judges in zeroing in on the points that are really crucial to the case. Yet the procedure would also pose some problems—problems not discussed by Justice Thompson.<sup>82</sup>

To begin with, I think that Justice Thompson miscalculates the probable nature of counsel's responses. While some lawyers would help the court to focus on the areas of real dispute, others would devote their attention to attacking each point made by the staff memorandum. I can foresee disputes over the scope of particular precedents, the correctness of particular findings by the lower court, or the aptness of particular language, even when these matters are not crucial to the decision. As a result, the court would become mired in trivia rather than concentrating on the heart of the case.

If this last objection were the only one, the procedure would certainly be worth trying on an experimental basis, but a more fundamental problem remains: that of identifying the appropriate role for the judges at the time the staff memoranda are supplied to counsel. If the staff product is circulated without any review by the judges, the power of the staff will be greatly increased. The staff attorney will become the equivalent of the district court magistrate;<sup>83</sup> losing counsel will be placed in the position of having to demonstrate to the judges that the

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79. *First Phase Hearings*, *supra* note 6, at 1198 (statement of Phyllis Skloot Bamberger, Esq.).

80. The point was also emphasized in the *HANDBOOK FOR COURT LAW CLERKS*: “Although you are expected to do independent research, you should keep in mind that under the adversary system it is the parties who are responsible for deciding which issues are to be pursued and how the case is to be approached. . . . You should make a point of going back to the briefs at intervals during your work on a case to make sure that you have not departed too far from the case as shaped by the parties.”

81. Thompson, *supra* note 9, at 516-19.

82. Justice Thompson does address “four principal areas of resistance” to the plan, *id.* at 518-19, and refutes them persuasively.

83. See 28 U.S.C. § 636(b)(1)(A) (1976) (certain pretrial matters may be heard and deter-

staff has erred. Lawyers would hardly welcome this arrangement. Moreover, the staff might rely on arguments or interpretations of precedent that, while plausible, are not the ones the judges would have found controlling. Counsel must then address those points, even though the judges are quite indifferent to them. On the other hand, if the judges review the staff product before it is submitted to counsel, they would end up deciding many of the cases twice. On the first round they would have to determine whether the staff memorandum or per curiam was *prima facie* correct; then, if counsel responded, they would have to decide whether anything in the response gave grounds for a different result or reasoning. Unless the proportion of cases with responses is very low, or unless the judges routinely scrutinize petitions for rehearing, the court is not likely to save much time.

### VIII

#### DRAFTING OF PROPOSED DISPOSITIONS

In its report on the internal procedures of appellate courts, the Commission on Revision of the Federal Court Appellate System (Hruska Commission) stated unequivocally that "central staff attorneys should not draft opinions."<sup>84</sup> I was a member of the Commission's staff, helped to draft its report, and agreed with the conclusion just quoted. Like the members of the Commission itself, I was strongly influenced by an authoritative description of the internal operating procedures in the California Court of Appeal, First Appellate District.<sup>85</sup> In that court, the staff screens cases for summary disposition. When a case is selected for the "fast track," a staff attorney will draft a proposed opinion for circulation to the three judges of the panel on a round-robin basis.<sup>86</sup> With rare exceptions the drafts are adopted. The result, as one member of the court told the Commission, was that it was quite possible that a case would be decided on the merits with none of the judges reading the briefs, hearing argument, or taking part in a conference.

Today, having seen a very different approach to the use of central

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mined by a magistrate, subject to reconsideration by a judge if the resulting order is clearly erroneous or contrary to law).

84. HRUSKA COMMISSION REPORT, *supra* note 4, at 54.

85. The procedures are described in D. MEADOR, *supra* note 18, at 212.

86. That is, the papers are sent first to the presiding judge alone. If he approves the draft opinion and agrees that oral argument is unnecessary, he will send the case to the second member of the panel. If the second judge is also satisfied, he will pass the case on to the third. Thus, not only will the judges not discuss the case in person, but they will not even have the briefs and records in their possession at the same time, and the second and third members of the panel will not see the staff-drafted opinion until it has already received the imprimatur of at least one judge. See also *Second Phase Hearings*, *supra* note 6, at 876 (remarks of Chief Judge Brown) (description of round-robin practice in Fifth Circuit); text accompanying notes 127-28 *infra*.

staff, I see no reason for an absolute ban on staff drafting of opinions. On the contrary, the judges of the Ninth Circuit developed at least three procedures under which opinion drafting is both helpful and proper: The lend-lease program, the use of court law clerks to draft opinions in sprawling or otherwise time-consuming appeals, and the assignment of opinions to court law clerks in cases where they have prepared the bench memoranda.

#### *A. The Lend-Lease Program*

Under the lend-lease program, court law clerks were assigned to work in individual judges' chambers for periods of one month to six weeks (and sometimes longer). The program proved particularly helpful when judges had accumulated large backlogs of opinion assignments, as well as in situations in which an elbow clerk was ill or otherwise underproductive. At other times, the sheer weight of seven new opinion assignments each month would call for extra help. In any of these circumstances, a judge—sometimes prodded by the chief judge, who reviewed the backlog reports submitted monthly by each member of the court—might request a lend-lease clerk. Occasionally the judge named a particular law clerk whose work had pleased him, but ordinarily I circulated a memorandum describing the assignment and asking who was interested and available. From among those who signed up I submitted two or three names; the judge made the final selection.

For the court law clerks, lend-lease assignments were highly prized and much sought after, for they provided an opportunity to work closely with individual judges in the manner of an elbow clerk. The program also provided important benefits to the office as a whole. The court law clerks became familiar with the judges' methods of operation and learned how staff work fit into the decisional process in the particular chambers. The experience gave them an insight into the judges' needs and the methods of presentation that best satisfied them. This knowledge was then reflected not only in the individual law clerks' own work, but also in the work of their colleagues, especially those in the same division with whom they worked closely. For instance, some of the court law clerks tended to write overlong bench memoranda. Seeing the sketchier products prepared by the elbow clerks gave new emphasis to the staff supervisors' exhortations to brevity.

The lend-lease program also helped the court to maintain supervision over the staff as a whole. The judges came to know particular law clerks, and were able to make judgments about them and to communicate their views to the staff director and to the chief judge. Perhaps more important, the information the judges obtained in the course of

working with the court law clerks gave them a sense of what was going on in the central staff office. The judges' perceptions were sometimes skewed by the views of the particular law clerks assigned to them, but the questioning prompted by these misconceptions provided an opportunity for clarification. The process thus helped to assure that the staff director did not stray too far from the policies that the court wanted him to follow.

The Hruska Commission did not have the lend-lease program in mind when it expressed its opposition to staff drafting of opinions, and indeed it would be difficult to argue against the practice, at least if one accepts the legitimacy of the role played by elbow clerks. The court law clerk on a lend-lease assignment works in the judge's chambers, under the direct supervision of the judge. The judge will ordinarily provide guidance during the drafting stage; he will then review the finished product, not only for substance, but also for the manner of expression. Often the process is a collaborative effort, with the judge requesting additional drafts after his review of the initial submission. The process is thus identical to the one seen in the work of the elbow clerk, and the danger of improper delegation is no greater.

A good argument can be made that for some appellate courts, a central staff lend-lease program would serve the judges' needs better than the hiring of additional elbow clerks. Having more than one or two full-time law clerks can be a mixed blessing. The judge will probably spend more time recruiting, supervising, and conferring with the law clerks, and less time doing research and writing on his own or conferring with his brethren on the court.<sup>87</sup> Sometimes the press of work will call for the assistance of additional clerks, but sometimes it will not. Under the lend-lease approach, the judge gets the extra help when he needs it, but is freed of the burdens of additional supervision when the needs are not there.

### *B. Ad Hoc Assignments*

Apart from the lend-lease program, the judges sometimes asked for assistance in the drafting of particular opinions. Sometimes these requests involved ordinary appeals; sometimes they involved cases with long records, technical backgrounds, or other unusual difficulties. Cases of the latter kind can monopolize an elbow clerk's time for weeks

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87. To be sure, some of the additional interchange will help the judge to sharpen his perceptions of the cases, but it is at least as likely that the judge's work will become "less the product of his own mind and more the product of a team." P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 16, at 45. Collegiality, too, is threatened: when the judge has the privilege of conducting tutorial sessions with very bright students who will be generally receptive to his ideas, it would hardly be surprising if he preferred that environment to the rough-and-tumble of conferences with his peers.

or even months; thus it is helpful to the judge to be able to assign the work to someone else. Moreover, with a large staff it is possible to hire individuals with technical backgrounds who would have a head start in making sense of the record in a patent or environmental case. Using the court law clerk can thus be more efficient than assigning the work to an elbow clerk who must educate himself in the basics of the general area before he moves on to the issues of the particular case.

The danger of improper delegation is somewhat greater with these ad hoc assignments than it is with the lend-lease program, but even here the risk should not be exaggerated. For one thing, the judge can be easily reached by telephone, and consultation can take place with little more effort than if the law clerk were in the judge's chambers. Moreover, these large-record or technical cases may require long stretches of spadework during which consultation is really unnecessary, such as where the law clerk attempts to summarize voluminous testimony at a conspiracy trial or to translate scientific terms into layman's language. In such situations the fact that the law clerk is not working at the judge's side is largely irrelevant. Once the work turns to the legal issues or the actual drafting, the law clerk can consult by phone or even spend a few days in the judge's chambers.

A special word is in order about technical cases. In the preliminary version of its report, the Hruska Commission recommended "the creation of a pool of scientific advisors, who [would] function in a manner similar to that of the judge's law clerk."<sup>88</sup> In support of its proposal, the Commission noted that the federal courts of appeals "are increasingly being asked to adjudicate cases in which scientific and technical knowledge is a prerequisite to informed decision-making."<sup>89</sup> Citing patent and environmental cases, among others, the Commission concluded that "where complex scientific issues are involved, the traditional means of [providing the court with needed information] are not always adequate."<sup>90</sup> A "pool" of technical advisors, "headquartered" in Washington but with its members available on request to any federal appellate judge, would help to fill the gap, or so the Commission thought.<sup>91</sup>

The Commission's recommendation was severely criticized by both judges and lawyers, largely because of the fear (recognized in the Preliminary Report) "that *in camera* communications from technical

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88. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, A PRELIMINARY REPORT 83 (1975).

89. *Id.* at 82.

90. *Id.* at 83.

91. *Id.*

advisors may unfairly or improperly affect the decision of the case, with no opportunity for counsel to challenge or rebut the advisor's presentation."<sup>92</sup> The Commission voted to withdraw the recommendation, and no mention of it appears in the Final Report.<sup>93</sup>

Some of the criticism of the Preliminary Report was, I believe, the product of misunderstanding, which in turn resulted from a lack of clarity in the Report itself. Although the Report uses the term "advisor," a reading of the full discussion leaves little doubt that the Commission envisaged the advisors primarily as *translators* of scientific and technical terms in the briefs and records. While there is some danger that translation will spill over into legal advice that would be given undue deference by the judges, the danger would be minimized if the advice came from a recent law school graduate whose primary function was that of a law clerk. Thus the presence in the central staff of one or two individuals with scientific or technical backgrounds would provide the court with the help that the Commission had in mind, without the risks associated with a centralized corps of career experts whose views might receive greater deference than is desirable.

### C. *Drafting of Opinions in Cases With Staff Memoranda*

Far more controversial than lend-lease or the occasional ad hoc assignment was my suggestion that the judges routinely ask staff law clerks to draft proposed dispositions in cases in which they had written bench memoranda. During my tenure at the court, this approach remained the exception rather than the rule. Nevertheless, I am convinced that, with proper controls, the practice can provide valuable assistance to the court without any usurpation of the judicial function. It should be emphasized, however, that what follows is more an outline of my own views than a description of how the Ninth Circuit operates.

I begin with the proposition that when an opinion is to be written in a case in which a court law clerk has prepared a bench memorandum, it will usually be most efficient to have the court law clerk draft the opinion. He will be familiar with the facts, will have done much of the necessary research, and will have explored blind alleys that he may not have mentioned in his memorandum. This will enable him to prepare the draft in much less time than an elbow clerk, who would have to learn the case from the ground up and perhaps follow the same false leads. The question, then, is whether the efficiency inhering in this procedure is outweighed by the dangers of improper delegation.

To answer this question, it is necessary to discuss a fact of appel-

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92. *Id.* at 84.

93. See T. MARVELL, *supra* note 64, at 353 n.17.

late life that until recently has gone largely unmentioned in legal writing.<sup>94</sup> In the traditional portrayal of the appellate process, opinions are written by the judges. Law clerks may provide the raw material, critique the judge's drafts, and perhaps compose a footnote or two, but the actual writing is done by the judge whose name appears on the opinion. For some judges, the reality conforms to this picture, but in other chambers, much of the work of opinion drafting is done by law clerks—elbow clerks, to be sure, but law clerks nonetheless. Many judges, perhaps most of them, revise their law clerks' drafts so extensively that they can truthfully claim credit for the final product. There is evidence, however, that some judges confine their efforts to little more than micro-editing.<sup>95</sup>

One need not cherish tradition for its own sake to recognize the values inhering in the drafting of opinions by the judges themselves. Anyone who works with ideas has had the experience of the argument that "won't write." A sequence of propositions that seemed persuasive and indeed irrefutable in one's head or in an oral presentation often proves vulnerable when the proponent attempts to set them down on paper. Even the act of reading a justification prepared by someone else is not the equivalent of working through the raw material and shaping it into a written document. As Judge George Edwards of the Sixth Circuit has put it, "[i]f the judge does not write the opinion, but adopts a draft from [a law clerk], he may well have bought a gap in law or logic that has been glossed over by very attractive language. . . ."<sup>96</sup>

If this analysis were carried to its logical conclusion, we would insist that every appellate decision be accompanied by separate opinions explaining how each of the participating judges reached his conclusion. No one takes this position today, partly because the bar's need for a predictable law is better served by opinions expressing the views of all of the participating judges, but also because the demands of time and caseload do not permit the preparation of individual opinions in each case. Thus the putative ideal is immediately compromised by the fact that two of the three judges on a court of appeals panel will "adopt a draft from" someone else.

But the compromise does not end there. In the Ninth Circuit—which in this respect is probably typical of the federal courts of appeals—each active judge will sit on twenty or more cases each month that he is on calendar. On the average, he will be asked to prepare

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94. See *id.* at 314 n.7 ("A cloud . . . always hangs over published reports of the amount of delegation to clerks. Judges seem to be leery about admitting that much of their opinions are ghostwritten.").

95. *Id.* at 89-90.

96. *Second Phase Hearings*, *supra* note 6, at 1226.

seven opinions or other dispositions. After eliminating the time spent in hearing argument, preparing for argument, reviewing other judges' opinions, passing upon motions, and carrying out necessary administrative work, the judge will be lucky if he has as many as ten working days in which to prepare those seven opinions. While some of the cases will be insubstantial, others will require extended research, reflection, and ordering of ideas. There is simply no way that the judge could complete his work without relying heavily on drafts prepared by someone else—in the ordinary course, his elbow clerks.

It is no answer to say that caseloads of this magnitude require more judges. Legislatures will not authorize additional judgeships, and in any event, as suggested earlier, the proliferation of appellate judges would probably create as many problems as it would solve.<sup>97</sup> Thus, if the judges are going to explain their decisions, they must have help in writing the explanations. And if two out of the three judges will not be doing the writing themselves, how much importance should we attach to the fact that the "authoring" judge edits or builds upon a draft prepared by a law clerk rather than drafting the opinion himself from scratch? Unquestionably something is lost, but at least some of the benefits of the writing process are retained through the judge's careful review and revision of the law clerk's drafts. This does not comport with the ideal, but it is probably the best we can hope for.

We are thus brought back to the question posed at the outset: Given that judges must turn to law clerks for assistance in opinion-writing, is there any reason not to have some opinions drafted by court law clerks rather than by elbow clerks? One distinction, of course, is that the elbow clerk works in the judge's chambers and can be supervised easily. He can consult the judge readily during the initial drafting; once the initial draft is prepared, the judge and the clerk can go over it together. Afterwards, successive drafts can be easily exchanged, reviewed, and perfected. In contrast, the court law clerk must use the telephone to consult the judge, and once the judge receives the draft, he will probably not find it convenient to check back with the law clerk except on major points of substance.

These differences cannot be gainsaid, but their significance is far from clear. Many opinions—especially those that are not designated for publication—do not warrant an extended drafting process. There will be little need for the law clerk to consult the judge, because the issues will be clearcut and their resolution straightforward. And once the judge receives the law clerk's draft, he will need to do no more than add or subtract passages here and there, edit the rest, and send it to his

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97. See note 9 *supra*.



colleagues on the panel. In cases of this kind, propinquity is largely irrelevant.

Yet the minimal need for consultation and collaboration may not respond fully to the concerns of those who oppose the drafting of opinions by members of a central staff. It can be argued that the difference between having an elbow clerk do the work and having it done by a court law clerk is not so much that the latter will receive less supervision, but rather that he will not have the same sense of the judge's general attitudes and ways of approaching legal issues.<sup>98</sup> This point has some substance, but I do not think that the distinction is universally valid. Some judges inject less of their personality or their *Weltanschauung* into their opinions than others. Some judges keep their elbow clerks at arm's length in any event, so that the clerks will not acquire more than a general sense of a judicial approach that goes beyond the particular appeal. Finally, in the simpler cases the form or shape of the opinion will be affected very little by the characteristics of the judge who writes it. Even less of a difference can be anticipated in the *ratio decidendi*.

In an unknown number of cases, nuances of reasoning or limitation will be lost when a court law clerk rather than an elbow clerk drafts the opinion. How much is lost will depend on the nature of the cases and the extent to which the individual judges pay attention to the nuances. Against these losses must be balanced the gain in efficiency made possible by the use of central staff to perform the delegable work in the cases at the lower end of the spectrum of difficulty. As long as the judges are conscientious, I think that the efficiencies will be worth the price.

Even if this conclusion is not accepted, one other factor must be considered. Thus far I have proceeded on the premise that the alternative to having opinions drafted by court law clerks is having them drafted by elbow clerks. In the lower-weighted cases, however, the court may determine that the choice lies between having opinions drafted by court law clerks and having no opinions at all. As mentioned at the beginning of this Article, the federal courts of appeals today dispose of many of their cases with judgment orders that provide no explanation for the results reached.<sup>99</sup> This practice is usually justified by the argument that preparing a statement of reasons in every case is an unwise allocation of judicial resources.<sup>100</sup> In this view, the effort required to explain the results in simple cases with no preceden-

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98. See generally R. Aldisert, *supra* note 65, at 16-17.

99. Judgment orders are used even more extensively in many state intermediate appellate courts, e.g., the Superior Court of Pennsylvania.

100. The argument was forcefully made by Judge Ruggero Aldisert of the Third Circuit, testi-

tial value would take too much time from the writing of thorough opinions in the cases that "will count for the future [in] the development of the law."<sup>101</sup>

This need not be so. The cases in which a judgment-order disposition would be tempting are, for the most part, the cases in which staff memoranda will be prepared. But once a court law clerk has prepared a bench memorandum, it is an easy task for him to draft a proposed disposition in accordance with whatever instructions the authoring judge may give. To provide that guidance and then to review and revise the draft will usually take, at most, one or two hours. To my mind, one or two hours of judge time is a very reasonable price to pay for the many benefits inhering in a statement of reasons for a judicial decision. Admittedly, the full measure of these benefits can be obtained only if the judge himself does all of the writing, but the judge's careful review of a draft prepared by another hand is better than nothing. Thus, through the use of staff-drafted dispositions, the court can preserve most of the values inhering in opinion writing, with a minimum expenditure of time beyond that which the judges would spend in any event in reading the briefs, checking salient portions of the record, and reading authorities to make sure that they stand for the propositions for which they are cited.

It may be argued that, contrary to the premise of the preceding discussion, no opinion at all is better than an opinion prepared by a court law clerk and given no more than an hour or two of a judge's time. The staff product may contain the seeds of bad law that will cause mischief in years to come—in Judge Edwards' words, "a gap in law or logic that has been glossed over by very attractive language, and

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fying in opposition to the Hruska Commission's recommendation that every decision be accompanied by an articulation of the reasoning that impelled it:

The most difficult task in legal exposition is to articulate reasons in a short terse statement. . . .

. . . [W]here an appellant's brief raises twelve points or five points, it is rather difficult to write an opinion [answering those points] in a single, terse paragraph, or [to explain the decision by citing] one precedent.

. . . .

Each judge of our court . . . hears 240 fully briefed appeals per year. . . . [W]e have 240 work days a year. I suggest that each judge cannot write or examine one opinion each day of the year, read a set of briefs each day of the year, research the law each day of the year, examine motions, travel to sit on three-judge courts, and still have time to prepare meaningful opinions on the issues which properly should command his attention.

. . . .

We believe that the maximum time should be allocated to proper decision making, to performing the function of doing justice, of having time to think about these briefs you are reading and about the oral arguments you are sitting on; and having made the proper decision, to write meaningful opinions on those cases which deserve time.

*Second Phase Hearings*, *supra* note 6, at 708.

101. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 165 (1921).

won't appear for some time in the future."<sup>102</sup> The answer, I suggest, lies in a wise selection of cases for staff processing and in careful and conscientious review of the staff draft by all three judges on the panel.

I do not want to overemphasize the importance to a central staff program of having dispositions in staff cases drafted by court law clerks. While I believe that the practice constitutes the most efficient way of furnishing the parties with a particularized explanation of the court's decision, it is not the only way. Yet the matter has implications that go beyond short-term efficiency. Staff morale is significantly bolstered when the talents and energies of court law clerks are called upon for drafting and other post-argument work. The result is to make the court law clerks feel that their contributions are important, and in the long run to spur them to higher productivity. Moreover, by working with the court law clerks on the cases in which they have prepared bench memoranda, the judges can maintain greater control over the staff operation as a whole. They can come to know the law clerks as individuals, and through casual interchanges can get a sense of whether the staff is operating in accordance with the court's perception of its needs.

During my tenure at the Ninth Circuit, only a minority of the judges made regular use of the staff for opinion drafting. The other judges, however, often drew upon staff bench memoranda when they or their elbow clerks prepared the dispositions in staff cases. Frequently—although not often enough—the judges sent their drafts to the court law clerks for comment. The clerks often had valuable suggestions; of equal importance, by comparing their own work with what the judge had prepared, they learned a great deal about the judicial approach to the questions presented and the manner of addressing them. In any event, a thorough bench memorandum provides a safeguard in the decisional process whether or not the judge uses the memorandum or consults with the court law clerk in writing the disposition.

#### *D. Timing of Opinion Drafting*

In those courts that rely most heavily on central staff, staff attorneys draft proposed dispositions before any judge has considered the cases.<sup>103</sup> The Ninth Circuit was following this procedure—albeit only in very light cases—when I came to the court, but abandoned it shortly thereafter. I fully supported the court's decision. As a judge of the Tenth Circuit told the Hruska Commission, being presented with a case neatly tied up in a proposed per curiam makes it too easy for the judge

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102. *Second Phase Hearings*, *supra* note 6, at 1226.

103. See notes 85-86 and accompanying text *supra*. See also D. MEADOR, *supra* note 18, at 201 (Michigan Court of Appeals).

to "lean too hard" on the staff product.<sup>104</sup> On the other hand, if the judges ignore the proposed disposition—as the Ninth Circuit's judges often did—the procedure loses much of its efficiency. In any event, the preparation of draft opinions before any judges have considered the cases is a practice not likely to strengthen public confidence in the courts, and should perhaps be rejected for that reason alone.

One member of the court, however, developed a procedure that appeared to mitigate the drawbacks of the California approach while preserving most of its efficiencies. As the presiding judge of the panel, he was often able, after studying the briefs and the bench memorandum in a case, to determine that all members of the panel were likely to reach quick agreement as to both result and reasoning. When this occurred, the judge asked the court law clerk who had written the bench memorandum to prepare a draft disposition before oral argument. The presiding judge edited the draft and cast it into a form acceptable to him, but did not ordinarily share it with the other members of the panel until the postargument conference. Then, if all members of the panel agreed that the case was ready for final judicial action along the lines that the presiding judge had predicted, he would present the draft to them. The panel would review it, make any necessary changes, and move on to the next case.

This procedure had several advantages. First, it provided an opportunity for the judge to work directly with the court law clerks on individual cases. Second, the clerks received immediate "feedback" on the good and bad points of their analyses. Third, and most important, the procedure enabled the panel to complete its work on the day of oral argument. The judges did not have to take the case back with them to their chambers; did not have to turn their minds to it another time, with all the inefficiencies that that entails; and did not have to put their own law clerks to work on the case.<sup>105</sup>

Notwithstanding these advantages, when the procedure was first adopted I had some doubts about its wisdom. The risk is not one of improper delegation. Indeed, the presiding judge, in requesting a preargument draft, often specified a disposition or *ratio decidendi* different from the one recommended by the court law clerk. The danger, rather, is that the two junior judges on the panel will feel—however unjustifiably—a certain amount of pressure to go along with the ap-

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104. *Second Phase Hearings*, *supra* note 6, at 977-78 (testimony of Judge Lewis).

105. In the conference after oral argument, the two junior judges often had suggestions for minor changes. These could usually be incorporated into a new draft typed and filed at the site of the argument. On a few occasions, one of the junior judges volunteered to take the senior judge's preargument draft, work it over on the way home, and circulate a final draft in a few days. Here the advance draft gave a head start to the new authoring judge.

proach suggested by the presiding judge, even if they are not fully convinced that the case is ready for final disposition. There is also the problem of appearances. Preparation of dispositions prior to oral argument may give litigants and their lawyers the impression that the argument is a futile gesture that will have no effect on the result in the case.<sup>106</sup>

Upon further reflection, however, I began to think that my concerns were not justified. Article III judges, however recent their appointment to the bench, will not ordinarily adopt a position simply because another judge has suggested it. And the availability of a preargument draft, far from crystallizing their views, may make it easier for them to discern flaws in a superficially plausible approach. Moreover, if the draft is circulated before oral argument, it may help the judges to formulate specific questions to ask counsel.<sup>107</sup> In short, the preargument draft may serve exactly the functions that a written opinion should serve in the decisional process.<sup>108</sup>

## IX

### ASSISTING IN THE OPERATION OF A "FAST TRACK"

Throughout my tenure at the court I was involved in efforts to devise a "fast track" for the disposition of cases that do not require the full panoply of traditional appellate processes. The challenge was to develop a procedure that would save time for the judges without unduly compromising the values served by the traditional approach. Shortly before I left, I put forth a proposal that was accepted in substantial part by the court. It is too soon to say whether the idea has proved successful, but I shall describe it here in the hope that it will assist other courts in devising their own fast tracks.

The premise of the idea was that little could be done to reduce the amount of time the judges must spend on a case before oral argument, so that the most promising approach was to minimize the amount of post-argument work. This premise rested, in turn, on two assumptions about the way the court works. First, the court is strongly committed to preserving oral argument. Thus, in recent months oral argument has been omitted in only about a quarter of the cases. This commitment can only be strengthened by the recent revision of Rule 34 of the Fed-

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106. See note 109 *infra*.

107. Justice Thompson's proposal for circulating a proposed draft opinion to counsel carries this idea one step further. See text accompanying notes 81-83 *supra*.

108. As the judge who initiated the procedure commented, "The preargument draft gives the three judges something to look at, underline and mark up, while they are discussing the disposition. This is far better, I suggest, than to talk off the tops of their heads as they discuss the end result and not how the opinion might be developed." Letter on file with the author.

eral Rules of Appellate Procedure (FRAP), under which there is to be a strong presumption in favor of argument.<sup>109</sup> Second, once the cases are calendared, all members of the panel will study the briefs carefully during the week or month preceding the argument. Indeed, under the revised rule, if the judges think that they might want to omit oral argument, all three *must* examine the briefs at least to the extent necessary to determine whether the argument is likely to be of assistance.

The net effect of all this is to establish a minimum investment of judicial time that the cases will require prior to argument or submission, whatever the procedures that are followed afterwards. For the simple, straightforward case, this preargument study will be all that is necessary. Yet, under traditional procedures, even if the oral argument has not changed the judges' initial view of the case, the panel members will return to their home chambers, where, days or weeks later, one judge will prepare and the others will review a proposed disposition. Because of the lapse of time, each of the judges will end up redoing some of the work that he did before argument.

To avoid this duplication of effort, I proposed, in essence, to institutionalize the procedure for preargument drafting of dispositions that was described in the preceding section. In brief, the staff would identify, well in advance of argument, calendared cases likely to have no precedential value.<sup>110</sup> Upon the request of one of the judges on the panel, the court law clerks who prepared the bench memoranda in these cases would draft proposed dispositions. The goal was to enable the panel to dispose of the cases during the week of oral argument.

The details were as follows. In sending bench memoranda to the court's calendar panels, the staff director would identify those staff cases that seemed to be appropriate for fast-track treatment. As suggested above, these would be cases in which the disposition appeared likely to have little or no precedential value.<sup>111</sup> Any low-weighted case meeting this requirement would be eligible, regardless of subject matter

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109. FED. R. APP. P. 34(a). The presumption is not, however, as strong as it would have been under the revised rule as initially promulgated in 1977. Compare *id.* with COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONF. OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE 20 (1977).

110. Theoretically, in a common law system *every* case has at least some precedential value unless it is identical in all relevant respects to a decision already on the books. However, if the differences between the earlier decision and the later one are trivial, the precedential value of an opinion in the later case would be minimal. In speaking of cases with "no" precedential value, I include cases of this latter kind.

111. The category would include, *e.g.*, cases in which the only issue is the sufficiency of the evidence and the record is not large; cases in which the only issues involve evidentiary or procedural rulings tested by an abuse-of-discretion standard and the record is not large; cases involving nothing more than the application of well-established rules to a simple set of facts; and cases in which all issues appear to be clearly frivolous or foreclosed.

or procedural posture. No attempt would be made to designate cases for fast-track treatment until the bench memoranda were substantially complete.

The memoranda would be sent to the panels well in advance of the calendar week. The notation as to probable lack of precedential value would be a signal to the judges to take an early look at the case. If any member of the panel determined that the case was unlikely to have precedential value, and that the panel was likely to reach quick agreement as to both result and reasoning, he would request that the court law clerk prepare a proposed disposition in advance of argument. The court law clerk would prepare the draft in accordance with the initiating judge's instructions. The draft would then be sent to the initiating judge for revision (or, if the judge preferred, to all members of the panel). Oral argument would be held unless the judges unanimously determined that it could be omitted consistent with the criteria set forth in FRAP 34(a).

After the argument, the judges would hold their usual conference. If they determined that the draft disposition fully and correctly addressed the issues in the case, they would make any necessary revisions, file the disposition with the Clerk's Office, and be done with the matter. If the case needed further work but remained appropriate for the fast track, the judges would request additional research or a new draft from the court law clerk who had prepared the original disposition. Ordinarily the law clerk could complete the assignment within twenty-four or forty-eight hours, so that the case could still be disposed of during argument week. On the other hand, if the case turned out to be inappropriate for the fast track, the judges would take it back to their chambers and handle it in the traditional manner.

As is evident, this proposal envisions a substantial role for the staff, and in particular the regular use of court law clerks for the drafting of dispositions. This is not a necessary part of the program, however. The key is to have a draft disposition prepared in advance of argument week. Whether the disposition is prepared by a court law clerk, by an elbow clerk, or by the judge himself is a secondary consideration.

With or without staff drafting, the procedure offers several important advantages. First, because cases are not designated for fast-track treatment until the bench memoranda are substantially complete, the plan avoids the dangers inherent in segregating cases on the basis of a review of the briefs alone. If an apparently straightforward case turns out to have hidden difficulties or procedural complications, they will generally be flushed out during the preparation of the bench memorandum, and the case will never be placed on the fast track. The plan thus

minimizes the likelihood that placing cases on the fast track will create a self-fulfilling prophecy leading the judges to give the cases less scrutiny than is their due.

Second, and in a related vein, the plan has great flexibility. The judges receive the bench memoranda and other materials well in advance of the scheduled argument. If a member of the panel determines that the result and reasoning are clear, the panel can dispose of the case during calendar week. But if the oral argument reveals or confirms difficulties inherent in the case, the appeal will return to the regular track with no wasted effort. In contrast, when appeals that have been preliminarily identified as appropriate for summary disposition are routed to a special panel, as in the Fifth Circuit,<sup>112</sup> there is no satisfactory way of handling a case in which the judges determine that oral argument would be desirable after all. Either the special panel must schedule a separate set of arguments, thus adding considerably to the judges' travel time, or the cases must be returned to the regular track, thus requiring another group of judges to hear them.

In years to come, devices such as the Picturephone may make it possible for judges to hear an oral argument while sitting in their separate chambers.<sup>113</sup> Until the technology becomes more widely available, however, there is a significant benefit in having a fast-track procedure under which seemingly insubstantial cases are assigned to panels that will convene in any event, so that oral argument and a conference of the judges can be held with no need to schedule them separately.<sup>114</sup>

Third, the plan makes it easy to assure that in every case the parties will receive an expeditious, written explanation for the result. This conforms to the recommendation of the Hruska Commission that there be, in every case, "some record, however brief and whatever the form, of the reasoning which underlies the decision."<sup>115</sup> It also accords with the expectations of the bar and the litigants.<sup>116</sup>

In short, the suggested plan embodies a minimum of compromise

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112. In the Fifth Circuit, cases are screened first by the staff, then by panels of three judges. If the screening panel agrees with the staff that the case does not require oral argument, the panel will decide the case on the merits. But if any one judge thinks that the case is not appropriate for summary disposition, the case will be returned to the Clerk's Office and in due course will be set for oral argument before a different panel of three judges. *First Phase Hearings*, *supra* note 6, at 145 (testimony of Chief Judge John R. Brown).

113. See National Law Journal, April 7, 1980, at 4 (judges in Philadelphia hear arguments presented via Picturephone by lawyers in Pittsburgh).

114. The scheduling problems referred to in the text would largely disappear if all of the judges lived and worked at the seat of the court, but in a majority of the federal courts of appeals and in some state appellate courts (e.g., Pennsylvania's), they do not. *Cf.* note 36 *supra*. See generally Swygert, *Why Not Live-In Circuit Judges?*, 64 A.B.A.J. 853 (1978).

115. HRUSKA COMMISSION REPORT, *supra* note 4, at 50.

116. *Id.* at 49.



with traditional appellate processes. In contrast to the round-robin system used in the Fifth Circuit,<sup>117</sup> every case will receive independent scrutiny by all three members of the panel. The plan thus avoids the risk that two judges will examine the case with a lesser degree of care because of their confidence that the initiating judge has done his work well.<sup>118</sup> Also in contrast to the Fifth Circuit's procedure, every case is considered, even if briefly, at a private face-to-face conference of the participating judges. The parties, if not the bench and bar at large, receive an explanation for the court's decision, but no opinions are drafted by the staff until at least one judge has considered the case. At the same time, the plan avoids the risks inherent in the Second Circuit's practice of affirming from the bench at the close of the oral argument. These risks have been well described by the late Judge Harold Leventhal of the District of Columbia Circuit:

[T]he tape-recorded oral appellate opinion . . . seems to be the practice of the Second Circuit. My concern is that it may inhibit collegial discussion. Often in our robing room after leaving the bench, the three judges on a panel all comment that a case should "obviously" be affirmed. But we have made no announcement from the bench—and in the conference room a few minutes later we more than once find that we hold quite divergent views on exactly why we propose to affirm. And our interchange enhances analysis and understanding.<sup>119</sup>

Because the plan embodies so few compromises with the traditional appellate process, there may be a tendency to think that it cannot possibly save much judicial time. The answer, I suggest, is that if the judges are not giving each case the kind of attention envisaged by the plan, they are short-changing the litigants and the law. Surely it is not too much to expect that for each case on which he sits, an appellate judge will study the briefs and relevant portions of the record, read a bench memorandum, confer for a few minutes with the other participating judges, and review or edit a short disposition prepared by a judge or law clerk. The plan requires no more; but it preserves the essentials of the appellate process.

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117. See notes 14, 86 *supra*.

118. See *Federal Diversity of Citizenship Jurisdiction, Hearings on S. 2094, S. 2389 & H.R. 9622 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Judiciary Comm.*, 95th Cong., 2d Sess. 55 (1978) "[T]he summary method usually results in considerable time saving to the second and third judges on the screening panel, who need only check the work of their initiating colleague rather than formulate their ideas from the ground up, as is the custom in cases on oral calendar." (emphasis added) (letter from law clerk to Prof. Wright).

119. Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility*, 23 U.C.L.A. L. REV. 432, 440-41 (1976). See also *First Phase Hearings*, *supra* note 6, at 641 (comments of Chief Judge Brown).

## SUMMARY AND CONCLUSIONS

*A. Using the Staff to Save Judicial Time*

At the outset of this article I posed the question: How can a central legal staff help a court to maintain a high level of productivity without undertaking functions that are properly those of the judges? The discussion in the preceding pages suggests several answers.<sup>120</sup>

*1. Processing Motions*

By its very nature, motions practice involves law that is largely unwritten, matters that must be resolved with dispatch, and procedural difficulties that require both legal knowledge and administrative skill for their resolution. Staff attorneys can undertake the administrative

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120. In September 1979, the Senate approved legislation that, for the first time, would provide explicit statutory authorization for the hiring of central legal staffs for the courts of appeals. S. 1977, 96th Cong., 1st Sess. § 316 (c), 125 CONG. REC. S12132 (daily ed. Sept. 7, 1979); see S. REP. NO. 304, 96th Cong., 1st Sess. 33 (1979). At present, such authorization as there is comes through appropriations acts. See, e.g., *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies, Appropriations for 1980: Hearings Before a Subcomm. of the House Appropriations Committee*, 96th Cong., 1st Sess. 146-47 (1979) [hereinafter cited as *Appropriations Hearings*].

Now that central staffs have proved their worth, statutory recognition is quite appropriate. However, the bill passed by the Senate provides further that "in no event may the number of staff attorneys in any circuit exceed the number of circuit judges authorized" for that circuit. Such a limitation would be highly undesirable as a general matter, and for the Ninth Circuit it would be almost disastrous. This is not the place to discuss the question in detail; the principal objection is that the more judges a court has, the greater the need for a centralized body to coordinate the activities of the various panels. Thus, simply to perform the inventory, calendaring, and conflict-monitoring functions in a circuit with 23 active judges will require as many central staff attorneys as a smaller circuit would need for all staff functions. See H.R. REP. NO. 96-1091, 96th Cong., 2d Sess. 38 (1980). The Senate Report on S. 1477 offered no justification for the proposed numerical limitation, and it is to be hoped that the size of central staffs will be left to the individual circuits, subject, as always, to regulations imposed by the Judicial Conference of the United States. See *Appropriations Hearings*, *supra*, at 290 (remarks of William E. Foley, Director of the Administrative Office of the United States Courts).

The committee reports accompanying the appropriations bill for the judiciary for fiscal 1980 suggested that because Congress has now approved a third law clerk for each circuit judge, central staffs might no longer be necessary. H.R. REP. NO. 247, 96th Cong., 1st Sess. 53 (1979); S. REP. NO. 251, 96th Cong., 1st Sess. 53 (1979). I hope that this article has amply demonstrated the error in the premises underlying the Committees' suggestion. (This proposal, too, was put forth without any supporting arguments. Nor is there any support in the hearings that preceded the reports. See *Appropriations Hearings*, *supra*, at 228-90 (discussion of supporting personnel in courts of appeals).) The two committee reports went on to request that the Judicial Conference of the United States conduct a study "to determine the need for . . . central staffs [and] the scope of their activities, and [to] present a proposal for phasing out such staffs." However, a painstaking study commissioned by the Judicial Conference in response to this provision concluded unequivocally:

The need [for central staffs] is there. It is real. It is demonstrable. The issue is not too many, but too few. The present staffing level is the minimum that should be considered adequate to allow the courts of appeals to get on with the task of attacking the backlog that the newly appointed judgeships allow.

D. UBELL, REPORT ON CENTRAL STAFF ATTORNEYS' OFFICES IN THE UNITED STATES COURTS OF APPEALS 112 (1980).

tasks that would otherwise fall upon the judges in their scattered chambers. They can work directly with the Clerk's Office and, where necessary, with counsel to streamline and simplify the submissions that will be presented to the court. Of greater importance, by drawing upon the individual and collective experience of its members, the staff can help the court to maintain consistency and continuity in its resolution of individual motions. In short, a central staff can perform, with great efficiency, all of the delegable work necessary to the court's handling of motions, substantive and procedural.

## *2. Avoiding Conflicting Decisions or Duplication of Research*

In a court with a large caseload, appeals presenting identical or related issues will occur with some frequency. Unless the appeals are calendared before the same panel, or flagged for the different panels hearing them, two or more judges will end up doing much of the same research. Sometimes the panels will produce conflicting decisions that might have been avoided if the two groups of judges had known what the others were doing. A central staff using its legal acumen as well as its administrative skills can calendar appeals so as to best coordinate the resolution of similar cases and minimize conflict or duplication. Similarly, the staff can monitor cases after they have been calendared or submitted and draw the judges' attention to apparent or incipient conflicts. This kind of monitoring is particularly valuable when the members of the court are widely dispersed geographically or have limited personal contact with one another. It is almost essential when many cases are disposed of by brief memoranda designated as not for publication, with the result that judges not on the panel may be unable to fully appreciate the significance of the decisions in relation to other pending cases.

## *3. Balancing Panel Calendars*

Intelligent calendaring can help the court to make the most of its judicial resources by providing balanced workloads for the various panels, so that each member of the court always has his fair share of the work. The court thus avoids both light calendars that retard efforts to cut into the backlog and overloads that lead to delays and inefficiencies within individual judges' chambers. Sound calendaring also requires a careful balancing of the competing priorities among cases of different ages and types. The process calls for legal and administrative skills not only when the actual calendars are put together, but also in the compilation of the necessary information as cases move through the earlier stages of the appellate process. These tasks can logically be assigned to a central legal staff.

#### 4. *Safeguarding the "Fast Track"*

Twenty years ago, appellate courts handled all of their cases in much the same way. The judges read the briefs, heard oral argument, conferred among themselves, and issued opinions explaining the reasoning that underlay their decisions. Today, when caseloads have increased on a scale previously unknown, it is generally recognized that the traditional approach is no longer practical, and that different kinds of appeals can appropriately be placed on different procedural "tracks." These "differentiated procedures" vary greatly from one court to another, but their common characteristic is the use of a "fast track" for cases in which the issues are—or appear to be—simple, straightforward, and easy of resolution.

In many courts these procedures have permitted remarkable increases in decisional output, but they also give rise to the danger that cases on the "fast track" will receive less attention than is their due. To some extent, the problem involves a self-fulfilling prophecy: once the cases have been tagged as losers, it is all too easy for the judges to give them minimal scrutiny and perhaps miss difficulties or complexities that did not emerge in the initial screening. But another phenomenon may also be at work: because the "big cases" in appellate courts today are so difficult and so complex, they take an enormous amount of time, and the judges may become impatient with the "pewees"<sup>121</sup> that prevent them from devoting full attention to the landmark appeals. In short, the tendency is to make the big cases even bigger, and the pewees smaller.

A thorough staff memorandum provides an offsetting safeguard for the limited amount of time that the judges will spend on the less substantial cases. The court law clerk will examine the record and flag the testimony or documents that support or cast doubt on the correctness of the rulings below. When the party likely to prevail relies on cases that appear to control, the clerk will study those cases—and their antecedent authorities—to determine if the chain of reasoning is as solid as it seems. If the case involves the application of a familiar, frequently invoked standard, the law clerk will marshal the cases on both sides of the line and will point out the features of the case at bar that push it toward one side or the other. These tasks could be performed by the judges themselves, but need not be. As long as the judges examine the crucial portions of the record, read or recall the dispositive authorities, and make their own determination as to which side of the line the case falls on, they have not improperly delegated the judicial

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121. See *Proceedings in Memory of Mr. Justice Harlan*, 409 U.S. v, xxviii (remarks of Chief Justice Burger).

function. Indeed, given the competing demands on their time, it is probably not a wise use of the judges' energies to undertake the spadework that uncovers the dispositive materials.

It is no answer to say that all the help the judges need can be furnished by counsel for the opposing parties. The briefs may be out of date or carelessly prepared. Even if the briefs are of high quality, they will—quite correctly—reflect the predispositions of the two sides, and the judges will find it useful to have a neutral summary and synthesis.

Nor is it persuasive to argue, as some judges do, that bench memoranda are unnecessary in the straightforward cases because a judge—or in any event an experienced judge—can learn everything he needs to know about the case in half an hour on his own. Even the most experienced judge cannot fully assess a sufficiency-of-the-evidence claim without delving into the record in some depth. Nor can he keep in his mind all of his court's decisions in a well-plowed area such as the fourth amendment. Although the judge's initial response will be accurate in a large proportion of the cases, some appeals will involve facts or precedents whose true significance does not emerge without careful study. Moreover, if the litigants are to get only thirty minutes of a judge's time, they are entitled to some assurance that during those thirty minutes the judge will have all of the relevant material in front of him, not just the allusions or summaries in the parties' briefs. A thorough staff bench memorandum goes far toward providing that assurance.

##### *5. Preserving the Integrity of the Law*

The benefits of the staff bench memorandum in the seemingly insubstantial case are not limited to the particular appeal. In a common-law system, legal principles develop incrementally, as each new decision illuminates the ones that have gone before. If "no case can have a meaning by itself,"<sup>122</sup> it is equally true that no rule can have meaning except as it is applied in a series of cases. In recent years, burgeoning appellate caseloads and the procedures necessarily adopted to cope with them have posed a twofold threat to the orderly development of legal rules. Individual judges on a large court, sitting in panels of three, see only a small portion of the cases in any given area of the law. Many of the cases in which they do not participate will be disposed of with no opinion at all, or by unpublished opinions written principally for the parties and thus unenlightening to anyone not familiar with the case. As a result, the law may become ossified or distorted. At best, the articulated rules will no longer correspond to what the courts are doing

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122. K. LLEWELLYN, *THE BRAMBLE BUSH* 48 (1951).

in fact. At worst, the rules will be applied mechanically to new kinds of factual situations without any judge ever having considered whether their logic or policy required such a conclusion. Or, there will be no consistent pattern at all to the law, with each panel applying its own unchecked perceptions of the rules.

Using the staff on the less substantial cases can help the court to preserve the integrity of the law. With a divisional structure like that of the Ninth Circuit's staff, the law clerks can monitor the flow of cases and alert the judges to trends that may not be apparent in the scattered chambers. In writing their bench memoranda, the court law clerks can tell the judges about similar cases calendared before different panels or disposed of without a published opinion. Even with respect to published opinions, the relatively thorough staff memorandum can draw the panel's attention to issues seemingly settled by prior cases, but that turn out upon examination to have been discussed only in dictum.

## 6. *Drafting Opinions*

When a court law clerk has prepared a bench memorandum in a case, the judge to whom the case has been assigned can save time by having the opinion drafted by the court law clerk. If the issues are simple and the dispositive reasoning straightforward, the judge can give the necessary instructions with a minimum of effort, and the law clerk's draft will probably say all that needs to be said about the case. At the least—assuming the law clerk's competence—the judge will have an outline to which he can add shadings or nuances as he thinks necessary. Admittedly, in some of the very simple cases the judge will spend as much time as he would to dictate an opinion himself, but the opinion is likely to be more thorough and the treatment of the relevant precedents more specific.<sup>123</sup>

### *B. Avoiding Improper Delegation of the Judicial Function*

In a recent article, Chief Justice Bird of the California Supreme Court expressed concern that "the development of large, impersonal central staffs," together with the application of a non-publication rule, creates a potential for improper delegation of the judicial function.<sup>124</sup> Echoing the fears of an intermediate appellate judge, she foresaw the issuance of "no judge" opinions and "the possibility that the decision-making process will become that of an anonymous bureaucracy operating without public accountability while its work masks the quality of

123. See *Second Phase Hearings*, *supra* note 6, at 521-22 (remarks of Judge Sprecher) (explanation due in every nonfrivolous appeal).

124. Bird, *The Hidden Judiciary*, 17 JUDGES J. 4 (Winter 1978).

performance, or lack of it, of judges who are accountable.”<sup>125</sup> These concerns are understandable, but I believe that in the Ninth Circuit the court has succeeded, notwithstanding the large size of its staff, in avoiding “staff usurpation or the bureaucratization of the [federal] judiciary.”<sup>126</sup> Analysis of the court’s procedures reveals four important elements of a program to preserve the integrity of the judicial function.

First, each judge has equal responsibility for every appeal on which he sits, at least until the case is assigned for the preparation of an opinion. Motions matters and appeals that do not receive oral argument are forwarded to the judges simultaneously and considered by them independently, rather than in a round-robin fashion. Argued cases are not assigned to individual judges for the preparation of an opinion until all members of the panel have studied the briefs, heard the argument, and taken part in the conference. The court thus avoids the dangers inherent in any system under which one judge works up a case before the other judges on the panel have considered it.

The most obvious risk in the latter situation is that the second and third judges may relax their scrutiny of the cases because they are confident that the initiating judge has done his work well.<sup>127</sup> Review by three judges thus becomes the equivalent of one-judge review, and the appellate process loses one of its most important safeguards: the fact that if one judge misses a gap in reasoning or a factual omission, another is likely to catch it. Moreover, when the two junior judges are presented with a result that has already received the imprimatur of the senior judge on the panel, they may feel a subtle pressure to go along, even though they are not fully satisfied with the suggested result or rationale.<sup>128</sup>

Equality of responsibility provides a valuable safeguard whether or not the judges have a staff memorandum, but the more the judges rely on staff work, the more important it is that each member of the panel gives independent consideration to the cases. Any errors or omissions in the staff product are more likely to be caught if the judges view the cases without the preconceptions induced by the knowledge that one of their brethren has found nothing amiss. Put another way, “the less-than-dedicated panel which would produce a one-judge opin-

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125. *Id.* at 4-5.

126. P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 16, at 48.

127. *See* note 118 *supra*; Thompson, *supra* note 9, at 478-80.

128. We need not posit any kind of actual pressure by the initiating judge to acknowledge that such pressure may be perceived. For instance, if the initiating judge forwards six cases, the junior judges may well be hesitant about raising questions about each one. This hesitancy will be increased if disagreement will put the case on a different track and perhaps require the attention of a different panel of judges. *See* note 112 *supra*.

ion without staff may produce a no judge opinion with it.”<sup>129</sup>

The second safeguard in the Ninth Circuit’s procedures lies in the fact that every case decided on the merits is discussed at a conference, whether or not the panel hears oral argument. The importance of the conference is well stated by Professors Carrington, Meador, and Rosenberg:

The essence of appellate collegiality is that all the deciding judges give simultaneous consideration in each other’s presence to the particular case. . . . Not taking up the case at a conference, where there has been no oral argument, removes the opportunity for interaction and exchange of views by the judges participating in the decision.<sup>130</sup>

As noted earlier, a conference provides the most congenial atmosphere for raising doubts or questions that have not yet been fully articulated in the judges’ minds and that may not appear to be worth the trouble of putting down on paper. The incompletely formed idea may develop further in the course of discussion; even if it does not, it may trigger other questions—perhaps not directly related—that do require further attention.

Carrington, Meador, and Rosenberg go on to say that the oral argument can serve as an acceptable substitute for the closed conference if the judges participate actively and “agree at the conclusion of the argument that no purpose would be served by further discussion.”<sup>131</sup> There is merit to this view, especially if the judges have had the benefit of a thorough staff memorandum prior to the argument. If the oral argument has answered satisfactorily all of the questions raised either by the memorandum or by the judges’ own study of the briefs and records, it is unlikely that more remains to be said at a conference. On the other hand, if oral argument is omitted, it is vital that the judges talk together and express any doubts they may have about the conclusions suggested by their reading of the case materials.

While the benefits of the conference are great, the costs are not. When the judges hear oral argument, they will have no difficulty in holding a face-to-face conference on the cases afterwards. Moreover, the conference can include some cases that are not argued. Thus, if the court omits oral argument in a large proportion of its cases, I would

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129. Thompson, *supra* note 9, at 515.

Note, however, that the process also works in reverse. If a court does choose to give one judge the principal responsibility for each case, the risk of one-judge opinions will be diminished if the initiating judge circulates not only a document expressing his own views, but also a thorough staff memorandum prepared in advance of judicial consideration. The staff memorandum will alert the other members of the panel to matters that may require further exploration notwithstanding the initiating judge’s view that they are not worth pursuing.

130. P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 16, at 30.

131. *Id.*



suggest that the non-argued cases be included on the panels' daily calendars, so that they can be discussed at conference without the need to arrange a special meeting. In some courts, however, insubstantial cases are placed on a completely different track, and are assigned to panels of judges who would not, in the ordinary course, meet as panels. In this situation, a telephone conference call may suffice to preserve most of the values of the in-person conference.<sup>132</sup>

Like the rule of equal responsibility, the conference serves as a safeguard against staff usurpation. Indeed, it may be that the more plausible the staff law clerk's conclusion, and the more comprehensive the reasoning underlying his recommendation, the more important it is that the judges get together and discuss any small doubts that may turn out to require further consideration. The conference thus complements the independent examination that the judges have given the cases: the judges first scrutinize the staff memorandum and other materials individually, without any preconceptions induced by another judge's view; thereafter, each judge has the opportunity to bring to the attention of his colleagues any doubts, however small or inchoate, that have been triggered by his examination.<sup>133</sup>

The third safeguard in the Ninth Circuit is that the staff does not draft opinions until the judges—usually all three of them—have considered the case. Admittedly, the judges can save some time, and the decisional process can be expedited, if the panel members are presented with a draft opinion when they receive the staff memorandum, the briefs, and the record. Admittedly, also, in a large number of cases the result and reasoning embodied in the draft will not differ in any meaningful way from what the judges would have produced if they had not had the draft. In my view, however, the predrafted disposition makes it too easy for the judges to shirk their responsibilities. Even the most diligent of judges, if very hard pressed (as most appellate judges today are), may succumb to the temptation to adopt a staff draft that disposes of all of the issues in a plausible fashion, even though his own approach, if he had given drafting instructions to the law clerk, would have been somewhat different.<sup>134</sup> The substitution may have no effect on the result in the particular case, and if the opinion is designated as

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132. Raising questions is not quite as easy as it is when judges are sitting around a table, but it is easy enough, especially if the judges have speaker attachments on their telephones that permit them to talk, listen, and refer to documents without having to hold their receivers to their ears.

133. Once again, however, the absence of a staff memorandum does not diminish the desirability of the conference; on the contrary, the need remains, although for different reasons. The risk then is not that the panel will adopt the staff attorney's conclusions without adequate scrutiny or reflection, but that the judges will fail to see gaps in the initiating judge's reasoning or factual presentations that the law clerk might have caught.

134. See *Second Phase Hearings*, *supra* note 6, at 977-79 (testimony of Judge Lewis).

one not to be published or cited, the apparent effect on the development of the law may be small also. Yet it seems to me that over a period of time the effect would be felt in ways difficult to quantify or pinpoint. The process would develop a momentum of its own; the judges would become, to some extent, bureaucrats reviewing and often rubber-stamping (the image is inescapable) the work of their subordinates, rather than individual craftsmen bringing their own unique qualities to bear on the cases. In a sense, the court would have lost control of a substantial proportion of its decisions, and given up the very characteristics that distinguish the judiciary from an executive department or administrative agency.

The fourth safeguard against usurpation of the judicial function is the court's policy of hiring court law clerks directly out of law school for one year or two, rather than developing a staff of career attorneys. However great the temptation may be to rely too heavily on the conclusions of a staff memorandum, it will be even greater if the memorandum has been prepared by an experienced attorney whose work the judges have found, over the years, to be generally sound. Conversely, the risk is reduced if the memorandum, though solidly researched and supported, is the product of a recent graduate who is bright and able but does not have the same kind of track record. Admittedly, there is a certain amount of inefficiency in training a new group of law clerks each year, but in my view the losses are far outweighed by the benefit of minimizing the risk that the judges will give—or be seen as giving—too much weight to the recommendations of an experienced staff.<sup>135</sup>

Hiring recent graduates preserves the integrity of the judicial function in another way. For the very reason that they lack experience, the recent graduates will perceive difficulties or questions that a more seasoned attorney would regard as nonexistent or foreclosed. Most of the time, perhaps, the judges will not share the law clerk's view; they will find that the point has been decided, or that the suggested distinctions are without merit. Every now and then, however, the inexperienced law clerk will draw the judges' attention to something that warrants further examination. Even if the result remains the same in the particular case, the opinion may develop ideas or a rationale that will be useful to the bar and the lower courts in the handling of future cases.

For instance, a career attorney who has handled many cases on

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135. The effect on the bar's perceptions is likely to be much greater than the actual effect. If, as the judges tell us, the vast majority of appeals can be decided only one way, and on only one line of reasoning, *see* Thompson, *supra* note 9, at 514, and authorities cited therein; H. FRIENDLY, *BENCHMARKS* 6 (1967), the judges' decision will coincide with the staff recommendation far more often than not. The bar is more likely to take this as an indicium of undue influence if the alleged influencers are long-time court attorneys rather than individuals just out of law school.

immigration law or the availability of mandamus may assume that particular precedents have established certain propositions. If, over a period of time, the attorney's memoranda proceed on this assumption, his views are likely to become those of the court. On the other hand, if the matter is assigned to a recent graduate who has to study the cases to find out what they stand for, he may discover that the supposed holdings were merely dicta. The court when presented with the issue may adopt the dicta as law, but it will be after consideration of an open question, not because the judges assume that the point has already been determined.

To be sure, the inexperienced law clerk will spend some time researching or analyzing issues that turn out to be foreclosed. This is a small price to pay for bringing to the judges' attention other issues that may have appeared foreclosed, but were not. I note, moreover, that the inefficiency resulting from unnecessary exploration of settled questions is substantially reduced in the Ninth Circuit by reason of the guidance available to the inexperienced law clerks through the divisional system and the review process.

### *C. Conclusion*

Appellate courts today are sailing on uncharted waters. The flow of cases has grown at a rate undreamed of in years past. Many of the appeals involve intractable questions of social and legal policy that will require days and even weeks of work on the part of the judges and their law clerks. But the courts must also do justice—and be seen as doing justice<sup>136</sup>—in the vast numbers of seemingly insubstantial cases, lest “the occasional meritorious [appeal] . . . be buried in a flood of worthless ones.”<sup>137</sup> Nor can the courts remain indifferent to the cumulative effect of assembly-line justice on the development of legal rules.

Any departure from traditional appellate procedures entails some risks. By making wise use of a central staff, the court can keep the risks at a minimum without unduly intruding on the judges' ability to give full consideration to the difficult or precedential appeals.

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136. See *United States v. Del Piano*, 593 F.2d 539, 541 n.2 (3d Cir. 1979) (Adams, J., concurring).

137. See *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in result).