Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project

Federal Judicial Center

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ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS PROJECT

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Federal Judicial Center
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FOREWORD

The publication of this report is in itself a tribute to the initiative and dedication of Chief Judge Browning and his colleagues on the Ninth Circuit. Faced with what appeared to be intractable problems of court congestion and delay, the judges resolved to review the court's processes and procedures with the aim of increasing productivity without impairing the quality of justice. After seeking recommendations from a variety of sources, including the Federal Judicial Center, the court adopted a number of innovations designed to expedite the handling of appeals. The program also included a commitment by each of the judges of the circuit to accept a substantially increased workload. The dramatic results of this commitment and of these efforts are documented in the pages of this report.

The judges of the Ninth Circuit, recognizing the desirability of assessment and review of any important changes in judicial administration, asked the Center to conduct an evaluation of the program that had been implemented. The results of this evaluation will be of interest not only to the judges of the Ninth Circuit but also to other courts of appeals facing similar problems. It is hoped that this account of the Ninth Circuit's experience will make the task of choosing among available innovations, and fashioning new alternatives, that much easier for others.

There is certainly progress, but panaceas are hard to come

by. If we turn to the 1984 management statistics, the most recent available, the median time from the filing of the record to disposition for the Ninth Circuit is down to 9.5 months--an enviable record compared with the 1980 high of 17.4 months. However, this is longer than the median time for the twelve regional circuits and more than twice as long as the time for the leading circuit. The court had absolutely no backlog of cases ready for argument at the end of the statistical year--a tribute to the judges--but there were still more than 4,300 cases pending in the Ninth Circuit on that date. Translated to appeals pending per panel, the number drops precipitously to 573, but that is still a poorer showing than the median. Some of the difficulty appears to be in the time it took from filing until availability for argument or submission, and this may well result in an improved statistical profile in the future. Yet, in 1984 the Ninth Circuit was below the median in total appeals terminated per panel, in signed opinions per judgeship, and in unsigned opinions per judgeship.

The significance of all this, however, is not self-evident. All of us prize the quality of adjudication above all, but we have made no attempt to measure it, nor could we do so. Neither, let it be clear, have we attempted to address the question of whether the nation's largest circuit should be divided into two or more circuits.

What is evident is that, to borrow Professor Dan Meador's apt phrase, the crisis of volume continues and promises to con-

tinue in the years ahead. Only a limited number of basic options are available. The judiciary can attempt to meet the challenge--as have the judges of the Ninth Circuit--by increasing the number of terminations per judgeship. "Increased productivity" has an affirmative ring; but judicial dispositions are not widgets, and at some point the optimal number of decisions per judge may be exceeded. Productivity cannot be increased indefinitely without loss in the quality of justice. An obvious alternative is the creation of more judgeships. But, while it is clear that additional judges are already necessary, beyond those recently authorized by Congress, continued expansion in the size of the federal judiciary is not without cost.

Finally, we can consider basic systemic approaches--averting the flood by lessening the flow, as Judge Henry Friendly urged long ago. Reducing filings seems nigh to impossible, yet this could be done by creating new patterns of appellate review of administrative law determinations or eliminating or reducing diversity jurisdiction, to mention just two possibilities.

It may well be that no one of these approaches alone will or should suffice, but that each should contribute in some measure. This report details the experience of the Ninth Circuit as the judges of that court undertook to make their significant contribution to the amelioration of the crisis of volume for the benefit of the litigants whose causes they adjudicate.

A. Leo Levin

ACKNOWLEDGMENTS

I alone am responsible for the judgments expressed in this report, but I owe a great debt to those who helped me. I have had the fullest cooperation of the staff of the Ninth Circuit Court of Appeals. I am grateful to Phillip Winberry and Cathy Catterson, the clerk and deputy clerk, who were always available to explain court procedures and suggest improvements in the study. William Davis, the circuit executive, was very helpful in explaining the administrative structure of the circuit. Robert Lohn, Peter Shaw, and Norm Vance were patient and thorough in explaining the duties of the staff attorneys. Elizabeth Ware, formerly of the clerk's office and now at the Federal Judicial Center, answered numerous questions concerning data collection practices of the circuit. David Gentry and Marge Waskewich of the Statistical Analysis and Reports Division of the Administrative Office instructed me in the statistical reporting practices. Michael Leavitt, a former colleague at the Center who aided the circuit in development of some of the programs, offered invaluable assistance and encouragement. I am happy to acknowledge their contributions and relieve them of any liability for error. Of course, they retain the right to disagree with the analyses and conclusions of this report.

I am especially grateful to Chief Judge James R. Browning and the other judges of the Ninth Circuit Court of Appeals for

the opportunity to prepare this report. The willingness of the court, under the leadership of Chief Judge Browning, to alter its procedures and request an evaluation of those changes demonstrates the court's commitment to innovation in appellate court practices. Chief Judge Browning and the other judges were generous with their time during a period when the judicial workload was particularly burdensome, and I appreciate their thoughtful observations.

I. INTRODUCTION

As an appellate court grows in size, steps must be taken to maintain proper judge collegiality and productivity, and to deal with the increased burdens of court administration. The Ninth Circuit Court of Appeals--the largest appellate court in the federal system--recently adopted a number of practices that resulted in notable improvements in the court's performance. Some of these practices differ greatly from the traditional procedures used by federal circuit courts. This report describes these innovations and their effect on the Ninth Circuit.

For many years nine judges was deemed the maximum size for a federal appellate court. Courts of more than nine judges were considered incapable of efficient administration, cooperative collegiality, and effective participation in the development of a consistent body of circuit law. When the Commission on Revision of the Federal Court Appellate System, commonly known as the Hruska Commission, considered this issue in 1975, it recommended nine judges as the optimal size of a federal appellate court, but acknowledged the need for larger circuits in certain circumstances. The commission also recommended the adoption of a limited-membership en banc panel.

Congress recognized the concern over the growing size of federal appellate courts when it considered the need for additional circuit court judges. The Omnibus Judgeship Act of 1978

§6, 28 U.S.C. § 41 (1982), invited circuits with more than fifteen active circuit court judges to experiment with solutions to the problems inherent in managing large appellate courts.

At the time of this legislation only the Ninth Circuit Court of Appeals and the old Fifth Circuit Court of Appeals had more than fifteen active circuit court judges. After considering the limited-membership en banc panel, the Fifth Circuit chose to continue the traditional en banc procedure in which all active judges participate. However, the first en banc session following the appointment of new judges revealed a problem: In a court of this size, the time and effort required in assembling the twenty-four participating judges, obtaining a consensus in the conference, and circulating a draft of the concurring and dissenting opinions made the traditional en banc procedure impractical. The Fifth Circuit Court of Appeals petitioned Congress to divide the circuit.

On October 14, 1980, Congress passed the Fifth Circuit Court of Appeals Reorganization Act of 1980, which, on October 1, 1981, divided the Fifth Circuit into a new Fifth Circuit, composed of Texas, Louisiana, and Mississippi, and the new Eleventh Circuit, composed of Alabama, Georgia, and Florida. Recent congressional testimony indicates that the reorganization eliminated the difficulties encountered by the old Fifth Circuit.

After the division, the Ninth Circuit Court of Appeals became the largest circuit court in the federal system. Almost twice as many appeals are filed in the Ninth Circuit as in the average federal circuit. The Ninth Circuit has twenty-three

active circuit court judges and soon will have twenty-eight active judges, more than three times the number of judges previously considered the ideal number for a federal circuit court.[1] The judges of the court reside in thirteen cities spread across nine states. Appeals are heard from fifteen federal districts, extending from Alaska to Arizona and from Montana to Guam.

In addition to being the largest, in 1980 the Ninth Circuit Court of Appeals was also among the poorest circuits in common measures of court performance. The median elapsed time from filing of the complete record in an appeal to disposition was 17.4 months, the longest of all the federal circuits and almost twice the national average. The Ninth Circuit had the second highest number of pending appeals per judgeship and was among the lowest in terms of the number of case participations per active circuit court judge. Visiting judges participated in approximately one-fourth of the cases.

The judges of the Ninth Circuit Court of Appeals, under the leadership of Chief Judge James R. Browning, accepted Congress's invitation to develop procedures and practices for the administration of large circuit courts. In 1980 the court adopted a local rule and operating procedures permitting limited-membership en banc panels, and undertook an extensive effort to modify existing practices to permit more effective administration and

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1. With the recently approved increase in federal appellate judgeships, eleven of the twelve federal circuit courts of appeals, as well as the Court of Appeals for the Federal Circuit, now exceed the nine-judge standard.

greater productivity. The court adopted many of the recommendations of the Hruska Commission for internal procedures and management of a large circuit. The internal structure of the court was modified to include three administrative divisions, and an expanded role for the central legal staff was developed. In 1982 the Ninth Circuit implemented a number of recommendations made by the staff of the Federal Judicial Center, as well as procedures developed by the court to help reduce the backlog of cases awaiting argument. These changes, collectively described as the "Innovations Project," are the subject of this report.[2]

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2. The development of the Innovations Project represents a collaborative effort of the Ninth Circuit Court of Appeals and the Federal Judicial Center. In response to a request from the court, Michael Leavitt of the Federal Judicial Center prepared a report with suggestions for modifying existing court practices. Mr. Leavitt's report recommended (1) a program for screening cases from the oral argument calendaring track, (2) argument panels that would retain their membership for a full five days of argument, (3) modifications of publication practices to reduce the time spent drafting unpublished dispositions and the length of published opinions, (4) a shifting of responsibility for drafting opinions to judges who have the fewest cases awaiting disposition, and (5) limits on the length of briefs. This last recommendation was to be accomplished through a Prebriefing Conference Program, which the staff of the circuit had developed in a related effort after consulting Mr. Leavitt and others at the Center. The Prebriefing Conference Program was later incorporated as part of the Innovations Project.

Several of Mr. Leavitt's recommendations were rejected by the court. A recommendation that the court consider the development of "team panels," in which judges sit together on a panel for the purpose of processing everything concerning a group of cases, was rejected, though the court did later adopt and then abandon a policy that referred "comeback cases" to the same panel that had heard the argument. A recommendation to increase the proportion of "at-home" arguments, in which the judges hear more cases in the city in which their chambers are located, was rejected because this would interfere with the opportunity for each judge to sit with every other judge. The court also rejected a suggestion that there be standards for determining the point at which it should consider division of the circuit. A recommenda-

Written in response to a request by the Ninth Circuit Court of Appeals, this report serves two purposes. First, it describes the innovations in detail in order to help other courts determine whether they would benefit from similar programs. Particular attention is paid to the details of three major innovations: the Submission-Without-Argument Program, the Prebriefing Conference Program, and the modifications in calendaring of oral arguments. The overall structure of the court also is outlined.

Second, the report describes, where possible, the effect of the various innovations on case processing. Because many of the new procedures were adopted simultaneously, it is difficult to determine their independent effects. Almost all of the analyses compare the functioning of the Ninth Circuit Court of Appeals before and after the adoption of the innovations; there are few comparisons of the performance of the Ninth Circuit with that of other federal appellate courts.

This report does not address whether the Ninth Circuit should be divided. Division of the circuit involves the consideration of issues beyond the scope of this study.

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tion that the court develop "subject-specific" panels, in which six to eight judges are organized into groups that would focus on particular subject areas, was deferred and is currently under consideration. The court undertook some of the most notable innovations on its own initiative. It agreed to increase the number of days of oral argument from forty to forty-five days per year. The staff of the circuit developed calendaring practices that permit similar cases to be placed before the same panel. Development of the limited en banc procedure, as well as implementation of the adopted innovations described above, was the responsibility of the judges and staff of the Ninth Circuit Court of Appeals.

Information for this report was gathered through personal interviews with the judges and staff of the Ninth Circuit Court of Appeals, examination of documents and records compiled by the court, and analysis of data contained in the court's automated case record system, which provides a detailed record of the characteristics of each case and the actions taken by the court in resolving the appeal. Several days in November 1983 were spent interviewing the staff of the court and collecting information and reports that describe the various programs. From January to February 1984, all of the Ninth Circuit judges were interviewed, either in person or by telephone. The average interview lasted forty-five minutes, though several were cut short by the press of judicial duties.

Information was also obtained from the June 1982 report to Congress, submitted by the Ninth Circuit and the Judicial Council, describing the circuit's efforts to implement the administrative innovations in the Omnibus Judgeship Act of 1978; the 1982 evaluation of the Prebriefing Conference Program conducted by the office of the circuit executive; and various sections of the Ninth Circuit's Handbook for Court Law Clerks. Comparisons of the effects of the programs were developed independently using the Automated Record Management System (ARMS) and the Staff Attorneys Data Base (SADB), unless otherwise noted.

II. FINDINGS AND CONCLUSIONS

After the implementation of the Innovations Project, and despite a period of increasing case filings and reduced reliance on visiting judges, the Ninth Circuit Court of Appeals was successful in eliminating its large backlog of cases awaiting submission. The median time from filing of the complete case record to disposition was reduced from 17.4 months in 1980 to 10.5 months in 1983, with the greatest reductions occurring in the period from filing of the last brief to submission of the case for argument.

The most important factor leading to this improvement was the increase in the number of active judges in the circuit from 1979 through 1980, aided by increases in the productivity of individual judges. The average number of case participations by active circuit court judges increased by 27 percent, from 229 cases in 1981 to 291 cases in 1982, while the number of case participations by visiting judges was cut in half. Comparisons of average participations in single and lead cases (excluding associated cases) in other circuits for court year 1983 (July 1, 1982, through June 30, 1983) indicate that the Ninth Circuit Court of Appeals ranked sixth among the twelve federal circuit courts, with an average of 259 participations.

Three procedures--the modification of oral argument calendaring practices, the Submission-Without-Argument Program, and

the Prebriefing Conference Program--constitute the core of the Innovations Project. The oral argument calendar was increased to permit the judges to sit for more days of argument and hear a more demanding argument calendar each day. The judges also remained together as a panel for a full five days of oral argument rather than changing panels at the end of each day. These practices permitted the active circuit court judges to hear oral argument in an average of twenty-one more cases per year, an increase of approximately 11 percent over the previous year. This increase underestimates the actual rise in judge productivity because the revised oral argument calendars were composed of more difficult cases. Furthermore, it was achieved without increasing the median time from submission to disposition. However, the consensus of the court is that the upper limit in oral argument participations has been reached.

The Ninth Circuit also adopted a number of innovations to guard against conflicting decisions by circuit panels. As much as possible, similar cases are placed before the same panel, which also receives notice if a case involving a similar issue already is under consideration by another panel. When conflicts must be resolved, the court convenes a "limited en banc" panel composed of the chief judge and ten active circuit court judges selected by lot. In the four years following the adoption of this program, the court voted to hear thirty-seven cases en banc and has disposed of cases in approximately half the time required under the previous procedure. The limited en banc procedure is far less burdensome than convening the entire court, and all but

one of the judges agreed that it has proven to be a satisfactory substitute for the full en banc panel. Despite several close votes, no judge has requested a full en banc to reconsider a decision by the limited en banc panel.

The Submission-Without-Argument or Screening Program requires separate standing panels of three circuit court judges for considering cases submitted without oral argument. Eligible cases are identified by staff attorneys and referred directly to the panels, whose members consider these cases either sequentially or simultaneously. Any panel member who determines that a case is not suitable for submission on the briefs may reject the case from the program and have it placed on the argument calendar. Following the implementation of the Screening Program, the average number of cases considered on the briefs by active judges more than doubled, from thirty-five cases per judge in the year prior to the program to seventy-three cases in the program's first year. Fifty-three of these cases were decided through the Screening Program. Disposition of almost all the cases submitted to the screening panels is by unpublished memorandum.

Although there initially was opposition to the Screening Program, after two years all the judges agree that it should be used for some cases. However, several judges indicated that their support is contingent on the right an individual judge has to reject any case he or she determines inappropriate for the program. Approximately 18 percent of the cases referred by the staff attorneys to the Screening Program were returned by the judges to be placed on the oral argument calendar. Although this

rejection rate indicates the judges are carefully reviewing the submitted cases, it diminishes the efficacy of the program and results in additional delays for cases then placed on the argument calendar. Improving the referral process will be difficult because the rejection rate appears to result from different standards being exercised by the judges rather than a failure by the staff attorneys to implement the criteria established by the court. The rates of rejection of cases from the screening programs varied from 3 percent on one panel to 34 percent on another, with most of the panels rejecting 15 to 20 percent of the cases they received. Because support for the program is contingent upon the right of judges to reject cases viewed as inappropriate, and because the judges demonstrate considerable variation in their individual standards for rejecting cases, a variation in rejection rates across panels appears to be unavoidable.

The Prebriefing Conference Program, the third major innovation adopted by the court, is the largest such program in the federal circuit courts. Shortly after the appeal is docketed, a conference is scheduled between counsel representing parties in the appeal and a court-designated staff attorney to discuss, among other topics, the issues and the length and structure of the briefs. The conference is intended to assist counsel in improving the presentation of issues, thereby easing the judges' burden in considering the appeal. The conference attorneys also may inquire about the possibility of settlement, but this is not a primary purpose of the program. Interviews with judges and

previous interviews with attorneys conducted by the court staff indicate that the program has considerable support within the circuit. The conference attorneys are given high ratings by the attorneys who participated in the process. A secondary benefit, but one stressed by the attorneys, is the opportunity for instructing members of the bar concerning appellate practice within the circuit. The program has recently expanded to provide services throughout the circuit, concentrating on those cases in which it will most likely improve the briefing process.

In addition to these three major programs, the Ninth Circuit Court of Appeals adopted several modifications of existing practices intended to improve the functioning of the circuit. The court's administrative structure was changed, permitting greater delegation of responsibilities to the circuit executive and clerk, and an executive committee was established to act on behalf of the court. The circuit was divided into three administrative units, with separate duties delegated to an administrative chief judge in each unit. These changes have resulted in reduced administrative roles for the other judges of the court and more time for attending to adjudication. In the opinion of the judges, these administrative structures are sufficiently flexible to accommodate the additional five judges authorized for the circuit. During this period the court also expanded its use of automated systems and word processing.

Although it is difficult to know the extent to which the lessons of different courts can be shared, other growing federal circuit courts might benefit from the experiences of the Ninth

Circuit. The increasing management burdens of a large circuit can be accommodated by the division of the circuit into administrative units, the delegation of greater authority to the circuit executive and the clerk, and the establishment of an executive committee to act on issues that arise between court meetings. Automated processes permit closer monitoring of cases and preparation of performance reports, ensuring that cases are not overlooked or left unattended. If the judges of the circuit must travel frequently to sit as a panel, advantages are to be found in sitting for an extended period. If the judges agree that there are cases that will not benefit from oral argument, separate standing panels can be established to consider these cases without convening, with various procedures implemented to permit the appropriate degree of conferencing among panel members. Finally, a Prebriefing Conference Program may aid in structuring the presentation of issues on appeal, resolving procedural matters, and instructing members of the bar in the standards and expectations of appellate practice, all of which should ease judges' burdens in deciding cases. The central legal staff can play an important role in conducting a preappeal conference, monitoring the caseload, preparing the argument calendar, and identifying those cases that may be appropriate for submission without oral argument.

III. ADMINISTRATIVE STRUCTURE OF THE NINTH CIRCUIT

The Ninth Circuit Court of Appeals made several modifications in the administrative structure of the court from January 1982 to January 1984. Although this study does not examine them directly, these changes were adopted as part of the Innovations Project and offer an alternative management plan for large appellate courts. They are intended to permit flexibility and decentralization while maintaining a unified court for adjudicative functions.

Administrative Units

Section 6 of the Omnibus Judgeship Act of 1978 permitted large courts of appeals with more than fifteen judges to experiment with internal administrative units. The Ninth Circuit adopted a plan that divides the circuit into three units.[3] The Northern Unit consists of the districts of Alaska, Idaho, Montana, Oregon, and Eastern and Western Washington. The Middle Unit consists of the districts of Arizona, Nevada, Hawaii, Guam, the Northern Mariana Islands, and Northern and Eastern California. The Southern Unit consists of the districts of Central and

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3. A copy of the local rule establishing the administrative units can be found in appendix A. A copy of the plan for implementing this rule can be obtained from the Federal Judicial Center, Information Services, 1520 H Street, N.W., Washington, D.C. 20005.

Southern California. Seattle, San Francisco, and Los Angeles/ Pasadena are the centers for the Northern, Middle, and Southern administrative units, respectively. Cases arising in the units are normally calendared in these cities as well. Judges are assigned to sit in each of these administrative units an equal number of times.

The most senior active circuit judge in each unit is designated the administrative chief judge and is asked by the chief judge to coordinate court of appeals staff operations within the unit and deal with a number of other administrative matters that the chief judge would ordinarily handle. For example, administrative chief judges review the backlog of unwritten opinions of judges having chambers within the unit and decide all procedural single-judge motions, such as motions to file amicus briefs.

Modification of Judicial Committee Structure

In addition to administrative units, the circuit established a number of committees to assist in the management of the court. The most prominent of these, the Executive Committee, consists of the chief judge, the administrative chief judges of the three units, and three other active judges selected by lot from among those willing to serve. The last three members serve one-year terms, after which all other judges are polled again for interest, and new lots are drawn. The Executive Committee meets once each month and, according to a May 1982 court resolution, is authorized to act on the following:

1. Emergency matters requiring action before the next scheduled meeting of the court

2. Routine matters not requiring decision as to court policy

3. Matters that, in the unanimous opinion of the executive committee, are of insufficient importance to require action by the full court

4. Review and make recommendations on other proposals regarding the operation of the court prior to their submission to the court

5. Advise the chief judge as he may request, and perform such tasks as he may delegate to the committee.

Executive Committee meeting agendas are distributed in advance to the full court. In addition, binding action taken by the committee is listed on the agenda of the next court administrative meeting, at which time any judge may request reconsideration by the full court. One of the most important duties of the Executive Committee is to act as an advisory body to the chief judge; for example, the committee conducted an extensive review of the proposals contained in the Innovations Project prior to the submission of the project to the full court for approval. The committee has taken on many of the administrative burdens of the court, leaving for court meetings only those matters requiring consideration by the entire court. As a result, the number of administrative court meetings each year has been reduced from twelve to six, leaving more time for judges to attend to their adjudicative duties.

The Executive Committee is assisted by two standing committees. The Advisory Committee on Rules of Practice and Operating Procedures conducts an ongoing review of the court's rules and procedures and includes in its membership representatives of the bar in each of the administrative units. The Senior Advisory

Board is composed of nine senior members of the bar of the circuit, three from each administrative unit, and provides the court with insights on court administration from the practitioners' perspective.

Structure of Circuit Staff

The administrative units plan proposed the expansion and gradual dispersion of court staff operations as well as decentralization of administrative authority. Decentralization will proceed in two phases. First, the court will be required to divide its staff into three groups, one for each administrative unit. Second, the circuit staff will be physically dispersed to the administrative units to provide more direct service to the members of the court and the bar in those areas.

Although divisional offices providing limited services were established in Los Angeles and Seattle, the primary staff of the clerk's office has remained in San Francisco. Until recently, and throughout the period of this study, the case-management functions of the court were handled by five docketing teams. Three teams were responsible for most of the case-processing functions for civil appeals arising from the three administrative units.[4] Criminal and agency appeals, which require expedited handling or special record preparation, were dealt with by separate case management teams not organized by region. In January 1983, the criminal-case team was disbanded, and its duties were

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4. A sample processing schedule can be obtained from Information Services, Federal Judicial Center.

assumed by the three teams serving the geographical units. Specialized functions, such as management of motions and preparation of statistical reports by the Administrative Office of the United States Courts, are handled by deputy clerks.

Consideration of further decentralization of the clerk's office has been postponed while the court improves the services provided by the divisional offices: Divisional office staffs have been increased, local filing of documents may be permitted, and the court is developing a system that will permit electronic docketing of appeals in the divisional offices. Separate arrangements are being made to permit attorneys and the public to have access to court files within one day of the request. After these changes are implemented, the court will then determine whether further decentralization is required. The clerk's office also is extensively involved in the automation of case-management activity.

As suggested in the description of the Innovations Project programs, the staff attorneys' office is critical to their success.[5] The central legal staff consists of thirty attorneys and

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5. The role of the central legal staff in appellate courts has been the subject of a wide variety of publications. An early review of these issues is found in D.J. Meador, Appellate Courts: Staff and Process in the Crisis of Volume (National Center for State Courts 1975). An examination of the roles of staff attorneys in the federal circuit courts is found in D.P. Ubell, Report on Central Staff Attorneys' Offices in the United States Courts of Appeals, 87 F.R.D. 253 (1980). The development of the role of staff attorneys in the United States Court of Appeals for the Ninth Circuit is discussed in Hellman, Central Staff in Appellate Courts: The Experience of the Ninth Circuit, 68 Calif. L. Rev. 937 (1980).

and fifteen externs and supporting personnel. All of the staff attorneys, including the staff director, serve a limited tenure with the court. The director of staff attorneys serves a term of two years, with a possible extension of one year; staff attorneys serve one to two years. The central legal staff is divided into six groups: a prebriefing conference/civil motions division, a criminal motions division, three multiple specialty divisions that handle the preparation of cases through the inventory and screening functions, and an administrative division. The office is unique in the degree of responsibility it exercises in the management and coordination of cases filed in the circuit.

Prebriefing conference attorneys become involved in the management of civil cases soon after the cases are docketed by examining the filing information and convening conferences in certain cases. The conference attorneys are available to guide the prebriefing process and to answer questions concerning court practices and expectations. With the assistance of staff law clerks, they also handle all contested civil motions filed in the circuit. Criminal motions attorneys process motions arising from criminal appeals, federal or state habeas corpus proceedings, civil rights actions brought by prisoners, and attorney fee requests. Both civil and criminal motions attorneys prepare weekly calendars for the judges assigned to the motions panels. Finally, the staff attorneys' office is responsible for calendaring cases for submission and clustering similar cases before the same panel.

All other attorneys on the central legal staff, except the staff director and the deputy directors, are assigned to one of

the three multiple-specialty divisions, which are directed by experienced attorneys who review the work of the law clerks. The various areas of federal law have been divided among the three groups to allow each to develop a degree of specialization while maintaining an interesting mix of cases. Table 1 shows the allocation of areas of federal law among the divisions.

The three divisions are responsible for the inventory and assignment of weights to cases, identification of and preparation of bench memoranda for cases to be submitted without oral argument and occasionally for cases to be argued, and assistance in the drafting of proposed dispositions. The inventory process, which takes between thirty and sixty minutes, involves several steps.

Approximately forty-five cases are forwarded each week. Staff law clerks, who work for the entire court rather than for individual judges, first review the cases for jurisdictional defects. If defects are found, the case is immediately referred to the judges sitting on the motions panel for consideration of dismissal. If no defects are found, the issues raised by the appeal are classified using an elaborate system of codes to indicate the areas of law addressed in the appeal. (Copies of the jurisdictional check list, inventory card, and a summary of the issue codes used by the staff attorneys are available from Information Services, Federal Judicial Center.) As many as ten issues may be coded. The staff law clerk then assigns a weight to each case. The court uses five categories--1, 3, 5, 7, and 10--to indicate the relative amount of judicial time and attention required to

TABLE 1

ALLOCATION OF ISSUES ACROSS DIVISIONS IN THE STAFF ATTORNEYS' OFFICE

Division I	Division II	Division III
	Criminal	
Double jeopardy	Confrontation clause	Criminal discovery
Evidence*	Crimes and defenses*	Guilty pleas*
Search and seizure*	Cruel and unusual punishment	Judicial and prosecutorial misconduct
Self-incrimination*	Grand jury and indictments	Jury instructions
	Right to counsel*	Jury selection and deliberations
		Probation and parole
		Sentencing and punishment*
	Civil	
Admiralty	Antitrust	Article III
Banking and consumer law	Communication	Employment discrimination*
Bankruptcy	Copyright	(Title VII & ADEA)
Condemnation law	Energy	Environmental law
Constitutional law (except procedural due process)	Government licenses and employment	Failure to prosecute*
	Immigration	Habeas corpus procedure
Freedom of Information Act	Patents	Indian law
Government contracts	Procedural due process	Labor law*
Military law	Public lands	Section 1983 procedures*
Tax*	Securities	
Tort claims and immunities*	Social Security*	
	Trademarks	
	Transportation	

*The issues with asterisks are high-volume issues. A division member would spend a large proportion of time working in these areas.

resolve the case. There is a presumption that civil and agency cases are 5-weight cases, and criminal and habeas corpus cases are 3-weight cases, with individual cases adjusted up or down to account for factors resulting in greater difficulty or simplicity. Cases likely to serve as precedents are assigned greater weights. Finally, the staff law clerk prepares a brief narrative description of the issues presented by the parties to facilitate easy recognition of the unusual characteristics of a case. The issue codes, weights, and other administrative information about the case are entered into a computer data base maintained by the staff attorneys' office to permit quick and accurate access.[6] Staff attorneys make the critical decision concerning placement of the case on the oral argument calendar or the screening calendar, where the case will be considered on the briefs.

The divisions have little further involvement with the preparation of cases destined for oral argument. Occasionally these cases are returned to the staff for further development after oral argument, but for the most part they become the responsibility of the assigned judges and their individual law clerks. Staff attorneys deal more with approximately one-fourth of the cases, which are placed in the Screening Program for consideration without oral argument. After inventory and assignment of a case to the Screening Program, the staff attorneys prepare a bench memorandum, which helps the judges make a faster ruling by

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6. Responsibility for maintaining the staff attorneys' data base was recently transferred to the clerk's office.

providing guidance to the case materials required to resolve the appeal. The memorandum takes about three days to prepare; it informs the panel of the procedural posture of the case, contains a full discussion of the relevant facts, issues and arguments, cites relevant legal authorities, and provides an analysis leading to the recommended result. Although the bench memorandum is not a draft disposition, it often provides the basis for the eventual determination. The bench memorandum, issue classifications, and case weights are reviewed by the attorney who directs the division and may be discussed in weekly division meetings. Judges occasionally request that the staff attorney who prepared the memorandum also prepare a draft opinion.

The work of the staff law clerks varies, based on the needs of the court. In general they complete four to six bench memoranda or seven to eight substantive motions memoranda each month, depending on the difficulty of the cases assigned. They are also expected to inventory approximately ten cases each month and write any draft dispositions on cases for which they prepared the bench memorandum. When their assignments are completed, the law clerks are given the opportunity to work on more complicated cases. Upon request of a judge, the clerks are permitted to work with individual judges in need of temporary assistance. Law clerks also review unpublished decisions of the circuit and recommend publication of those with precedential value, and work with the staff attorneys on special projects, such as reviews of various areas of the law.

The circuit recently considered whether the personnel of the

staff attorneys' office should be dispersed as part of the decentralization process under the administrative units plan. The Prebriefing Conference Program has been expanded throughout the circuit, with the conference attorneys visiting the larger cities of the circuit on a regular basis and holding telephone conferences in cases filed from the less populated districts. The court decided that the duties of the staff attorneys' office are better performed by a single office located in San Francisco, as the specialized knowledge of a large, centrally located staff outweighs the benefits of dispersion.

Automation

Automation of various administrative activities is not covered in this study, but it has had a great effect on circuit productivity. The Ninth Circuit has made extensive use of automated operations, making it a leader among the federal circuit courts in developing appellate case-management systems.[7] When asked about recent improvements in the circuit, more than one judge mentioned the introduction of word processing and other automated systems first.

The use of automation begins when an appeal is filed. Once a case is docketed, every significant activity is entered into the automated record system and is available for inspection. Automated programs are used to monitor lapses in case activity,

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7. A review of the use of automated systems by the Ninth Circuit Court of Appeals is found in N. Lateef, Keeping Up with Justice: Automation and the New Activism, 67 Judicature 213 (1983).

including failure to pay filing fees, nonreceipt of the case record, and lateness of briefs. The clerk's office closely monitors case events, resulting in the dismissal of twenty to thirty appeals each month for failure to prosecute.

Automated systems also calendar cases for oral argument. The Ninth Circuit sets up to forty-five argument panels each month in three or more locations. The computer program arranges the panels so that each judge is scheduled to sit with each other judge and in each city an equal number of times. Then, based on the case weights and issue codes, the program assigns cases to "clusters," ensuring that the difficulty of the clusters are approximately equal and that all available cases presenting the same issue are included in the same cluster and are presented to the same panel. The program also lists all cases calendared in the preceding year that raised the same issue. Cases with high statutory priority receive preferential calendaring; the age of the cases awaiting calendaring in the three administrative units should remain approximately equal. The case clusters are matched with panels at random.

The court has also developed an automated system to monitor the progress of a case under submission. Once it is calendared, the case becomes the responsibility of the three judges to whom it has been assigned. The presiding judge assigns bench memoranda to the panel members, and the memoranda are circulated to the other panel members during the week prior to the argument. Unless the case is submitted on the briefs, oral argument is heard, and the judges confer and reach a decision. The presiding

judge informs the clerk's office which of the three judges on the panel will prepare the opinion, and each judge informs the clerk's office as the opinion is circulated. This information is used to prepare a monthly report of each judge's backlog of uncirculated opinions, permitting the chief judge to take action to relieve overburdened judges without waiting for the problem to be brought to his attention. Upon the judges' approval or the development of dissenting or concurring opinions, the disposition is filed and the case is closed, subject only to the granting of a petition for rehearing.

The introduction of word-processing systems has greatly eased the work of the the individual judges and their staffs, resulting in a noticeable increase in efficiency in drafting and editing judicial dispositions. The court may have hundreds of draft dispositions in circulation at one time, and mail delivery may take a week. The word-processing systems of the circuit, connected following this study, permit electronic mail between chambers. Orders, draft opinions, revisions, concurrences, and dissents circulate easily throughout the circuit. The court plans to install optical copy readers, which scan typewritten text, to permit rapid transmission of emergency motions and other high priority documents among Seattle, San Francisco, and Los Angeles.

Recently the Ninth Circuit Court of Appeals became one of three pilot courts used in the development of a decentralized, automated case-management system that will permit greater monitoring and control of cases. This system will replace paper

dockets with an automated data base containing uniform entries; paper copies of the docket sheets will be produced only as needed. The judges of the court will have access to the system in chambers through their word-processing terminals, and staff attorneys and other court personnel will have access for case-management purposes. This system should also permit an expansion of services to the divisional offices of the clerk's office.

IV. INCREASED ORAL ARGUMENT CALENDAR

The most notable changes in the administration of the Ninth Circuit reflected the commitment of the judges to review and decide more cases. Simple cases that were to be decided without oral argument were placed on a separate decision track and referred to one of eight permanent panels whose three members would consider the case without convening. This process, known as the Screening Program, is discussed in the next chapter. The more difficult cases were placed on the oral argument calendar, as in the past, but the court agreed to sit for more days of oral argument and to hear a calendar of greater weight.

Before the adoption of the Innovations Project, each judge usually sat for forty days of oral argument per year--four days per month for ten months. Each day of oral argument was composed of approximately five cases totalling sixteen points in difficulty, based on a weighting system that estimated the amount of judicial effort and attention required to review the materials and draft the disposition. As part of the Innovations Project, the members of the court agreed to increase the number of cases they considered by sitting for oral argument for forty-five days--five days per month for nine months each year. The daily argument calendar was increased in difficulty from sixteen to eighteen points. To accommodate these increases and to reduce the burdens and expense of travel, the members of the court

agreed to sit together as a panel for the full week of oral argument rather than change panel membership at the end of each day.[8] The willingness of the Ninth Circuit judges to sit for more days of oral argument and to hear more cases each day is the most compelling evidence of their commitment to reduce the backlog of cases awaiting argument.

This chapter describes in detail these changes in the argument procedure, related changes in publication practice, and the means used to ensure consistency of decisions within the circuit, with particular emphasis on the limited en banc panel.

Calendaring

Implementation of the increased oral argument calendar was relatively easy. Within the inventory and calendaring systems described in chapter 3, in order to reflect the authorized increases in the oral argument calendar, the court restructured the computer programs that cluster the cases and assign judges to panels. The judges modified their schedules to permit spending a full five days at the designated site of the oral argument and made changes in the administration of their chambers to accommo-

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8. The increase in the number of oral argument days--12.5 percent, from 40 to 45 days--along with the increased difficulty of the daily oral argument calendar--12.5 percent, from 16 to 18 points--was expected to increase the number of cases disposed of after calendaring by 25 percent. However, these projections assumed that the increase in the weight of the daily calendar would be reflected in additional cases. As described later in this chapter, the introduction of the Screening Program and a reinterpretation of the case-weighting system resulted in oral argument calendars comprising fewer cases than expected, though the argument calendars were much more difficult than before.

date the increased number of cases they would be hearing.

There was considerable variation in the way individual judges handled the increased argument calendar. Although most judges sat five days a month for nine months, some judges sat for fewer months, while several judges continued to sit for ten months but heard cases under the more demanding five-day calendar. One judge continued to sit for four-day calendars, but for eleven months. There continued to be a considerable amount of panel switching by judges to accommodate scheduling difficulties that arose after the panel assignments were made.

The additional five days of oral argument each year underrepresents the increase in the judges' workload. Because the court increased the difficulty of the daily oral argument calendar from 16 to 18 points, there was a 90-point calendar for the five days of oral argument. Measured on an annual basis, the weight of the oral argument calendar was increased by 27 percent, from 640 to 810 points. Many of the judges commented that the 18-point daily calendar is much more demanding than the 16-point one because the simpler lower-weight cases are being diverted to the Screening Program. The change in the point system appears to have influenced the mix of calendared cases by making the overall burden more difficult, rather than simply increasing the number of cases argued each day.[9]

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9. Although it is clear that the increased calendars are more burdensome, the increase in their weight must be interpreted with caution. The weights assigned do not reflect the cases' absolute difference in difficulty; that is, one 7-weight case may be more difficult than two 5-weight cases. In general, the

The growing number of case dispositions increased the potential for conflicts within the circuit and in the development of circuit law. Several steps were taken to avoid such problems. First, calendaring practices were modified to place cases with the same or similar issues on an argument calendar to be decided by a single panel. Approximately eleven weeks before a scheduled argument calendar, a computer-generated list of cases that are likely to go on the calendar is prepared. Cases are selected on the bases of age and statutory priority. The computer also generates a list of cases ready for argument that were identified in the inventory process as involving issues similar to those raised in the cases tentatively placed on the oral argument calendar. Staff attorneys compare the characteristics of tentatively calendared cases with similar uncalendared cases, with all cases calendared during the previous twelve months, and with all cases still under submission that have the same primary issue code. Cases are then calendared so that (1) cases raising similar issues, that would be on the same calendar anyway, are placed before the same panel and (2) cases that would not be on the same calendar are placed before the same panel if they raise the same or a very similar issue; notice is sent to counsel informing them of the joint calendaring to allow them to improve their preparation for argument. (A copy of the notice sent to counsel in re-

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weights are intended to reflect only the relative difficulty of the cases. Furthermore, the case-weighting system appears to have altered slightly after the adoption of the changes in the oral argument calendar and Screening Program, making comparison during this period especially difficult.

lated cases is available from Information Services, Federal Judicial Center.) Criminal cases, expedited cases, and cases with a statutory priority that raise similar issues often cannot be calendared together because each case is placed on the first available calendar, before a subsequent related case has been inventoried. In such instances the relationship is noted on the inventory card so that subsequent panels are aware that a case raising a similar issue is pending.

A second step taken to avoid conflicts in the development of circuit law was to rely less on dispositions by visiting judges. Before the Innovations Project, the Ninth Circuit made extensive use of visiting judges to assist in the disposition of the backlog of cases, and this reliance increased following delays in filling the additional judgeships authorized in 1978. However, heavy use of visiting judges makes it more difficult to maintain consistency of opinion than if only active and senior judges are sitting. Furthermore, because many visiting judges face heavy workloads in their home courts, presiding judges often are reluctant to give them their full share of writing assignments. The decision to rely less on visiting judges, thereby forgoing one of the traditional resources used to overcome a case backlog, indicates the priority the court placed on maintaining consistency in the development of law within the circuit during a period of increased calendaring.

Effect of the Increases in Oral Argument Participations

Following the Innovations Project, the number of cases submitted to oral argument panels dropped slightly, from 2,246 in 1981 to 2,109 in 1982 (see table 2). This is partially due to the number of cases diverted to the Screening Program. However, the decrease disguises an increase in participations by active circuit court judges and a dramatic decrease in participations by visiting judges. The figures for 1980 and 1983 are somewhat misleading; for most of 1980 there were several vacancies on the court, while in the latter half of 1983 the backlog of cases awaiting calendaring had been eliminated, and the number of oral argument calendars was reduced accordingly.

The comparison between 1981 and 1982, before and after the increased oral argument calendar was implemented, is the most informative. During this period, the number of oral argument participations by active circuit court judges increased 10 percent while the number of participations by visiting judges was reduced by more than half. Oral argument participations by senior judges increased 7 percent. A similar pattern emerges when only lead cases are examined: Oral argument participations by active and senior judges increased 13 and 10 percent, respectively, while participations by visiting judges were reduced by more than half.[10] Among the judges themselves, participations varied

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10. The difficulties of accurately determining the number of lead and single cases are discussed in chapter 7. Although there was some discrepancy between the definition used by the Administrative Office and the implementation of this standard by the staff of the Ninth Circuit, the standard used by the staff did not vary throughout the period examined in this report.

TABLE 2

ORAL ARGUMENT PARTICIPATIONS

	1980	1981	1982	1983
Total cases	1,883	2,246	2,109	1,839
Total participations[1]	5,645	6,731	6,310	5,502
Participations by:				
Senior judges	568	401	428	377
Visiting judges	1,498	1,690	761	847
Active judges	3,579	4,640	5,121	4,278
Average participations by active judges[2]	180	202	223	186
Lead/single cases[3]	1,428	1,659	1,594	1,441
Lead/single participations	4,283	4,972	4,772	4,312
Participations by:				
Senior judges	377	313	344	303
Visiting judges	1,123	1,230	573	659
Active judges	2,783	3,429	3,855	3,350
Average participations by active judges[2]	140	149	168	146

[1]These figures do not include participations in en banc proceedings. There were eight en banc cases terminated in 1981, twelve in 1982, and thirteen in 1983, with each case decided by a panel of eleven active judges. The number of oral argument participations add to less than three times the number of cases due to missing data for participating judges.

[2]During 1980 six of the judgeships in the circuit remained unfilled for portions of the year. The number of active-judge participations includes judges who did not serve the full year, while the number of average participations only includes judges who were in active service at the beginning of the year.

[3]During the period reported in these tables, the Ninth Circuit Court of Appeals followed practices in defining cases as "consolidated cases" or "cross-appeals" that were inconsistent with the standards specified by the Administrative Office and presumably used by the other circuits. This issue is discussed in greater detail in chapter 7. Although the figures reported here are accurate for comparisons of relative changes in the performance of the circuit across years, they underestimate the actual number of oral argument participations in lead and single cases and are not valid for comparison with similar measures of other circuits.

widely. In 1982, for example, five active judges participated in fewer than 208 cases involving oral argument while five others participated in more than 248.

As already stated, the higher number of case participations is not a complete measure of the increased difficulty of the oral argument calendar. From 1981 to 1982, the average weight of argued cases increased from 3.8 to 4.1, suggesting that the typical case required more judicial effort than in the year before the increased argument calendar. Some of the change may be due to a shift in the measurement scale during this period, but since the simpler cases submitted to the oral argument panels prior to 1982 were being diverted to the screening panels after 1982, it appears that not only were the active circuit court judges hearing more oral arguments, but the calendars themselves were composed of more difficult cases.

The judges of the Ninth Circuit were able to increase their participations in oral arguments without greatly increasing the median disposition time. Initially, there was some concern that the backlog would simply shift from cases awaiting argument to cases awaiting disposition. However, as more members of the court were able to catch up on their writing assignments during the extra time off permitted by the shift from a ten-month to a nine-month calendar, the backlog of cases awaiting disposition diminished. Median disposition increased from 76 to 79 days in 1982 and dropped to 72 days in 1983.[11]

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11. At the time of these computations several of the cases argued in 1982 and 1983 were without disposition dates. The re-

Several criteria govern the processing of dispositions. First, criminal cases are given priority over all other cases. Second, judges are to give priority to the review of draft dispositions by other panel members and are to act on those draft dispositions within seven days of receipt. The presiding judge of the panel is directed to contact the assigned judge when the disposition in a criminal case is not circulated within sixty days, and to contact any visiting judge who has not circulated a disposition within ninety days of assignment or not acted on another judge's proposed disposition within thirty days. If two judges have agreed on a disposition, and the third judge has not indicated a position or circulated a proposed concurring or dissenting opinion within sixty days, the majority may, after providing ten days' notice to the third judge, file the disposition with a notation that the third judge may file a separate statement at a later date.[12]

In addition to the increased argument calendar, the court adopted a series of reporting practices for monitoring the progress of cases argued and awaiting disposition. Every month the clerk's office prepares reports for the individual judges indicating the status of each assigned case. Another report,

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ported median dates include an adjustment for these missing data by assuming that the elapsed time for all of the cases awaiting disposition will exceed the reported medians, a reasonable assumption since these data were collected in April 1984, which fell after the median.

12. Copies of the general orders regarding the monitoring of dispositions and the filing of majority opinions can be obtained from Information Services, Federal Judicial Center.

which helps presiding judges monitor the progress of their panels' cases, lists those cases awaiting disposition, the assigned judge, and the circulation date, if any. A special report on criminal cases also is prepared. Finally, a report for the chief judge summarizes the total number of cases assigned to each judge, the number that have been circulated, and the length of time they have been in circulation. A copy of this report is sent to each judge, and the administrative chief judges review the status of the cases in their districts that have been pending more than six months.

The court also adopted a policy that permits the chief judge to relieve of further calendar duties a member of the court who falls behind in preparing dispositions. (The general order expressing this policy can be obtained from Information Services, Federal Judicial Center.) At the discretion of the chief judge, a judge may be relieved of all calendar duties or assigned to fewer panels when one or more of the following criteria are met:

1. Two or more cases not presently in circulation were assigned to the judge for preparation of a disposition over nine months earlier.

2. Five or more cases not presently in circulation were assigned to the judge for preparation of a disposition over six months earlier.

3. Twenty or more case[s] not presently in circulation have been assigned to the judge for preparation of a disposition.

In the two years following the Innovations Project, only one judge was taken off the calendar, and only for a brief period of time.

Almost all of the judges mentioned during the interviews

that the new oral argument calendars were a heavy burden, and that sitting together as a panel for the full five days of argument made the task manageable. A five-day panel facilitates discussion and the allocation of writing assignments among the judges. However, it also limits the opportunity to sit with every other judge; under the best circumstances, it takes more than one year for each judge to sit with every other member of the court. Most of the judges believed that their greater familiarity with other panel members' decision-making processes, gained from the five-day panel, offset the diminished opportunity to sit together frequently. The extended time period results in more efficient panel deliberations, a better working rhythm, and a collegiality based on a more thorough understanding of the other panel members. Although no judge was opposed to the fixed panel system, several of the judges did not endorse the change, indicating that consistently sitting with the same panel members made very little difference and was of doubtful benefit. One judge mentioned that the slower rotation of panel membership would make it difficult for new judges to become acquainted with other members of the court.

The increased burdens of the oral argument calendar changed the way some judges allocate their time. A number of the judges said they now have less time to read slip opinions, edit and supervise law clerk assignments, polish their own opinions, edit the draft opinions of other judges, prepare for oral argument, and pursue independent writing and other outside professional activities. Other judges mentioned that they had less time to

perform all of their duties, and they attempted to compensate by working longer hours.

Nevertheless, almost all of the judges indicated that the increased oral argument calendar could be continued as an ongoing program. Sixteen of the judges believed that the court is at the upper limit of oral argument participations, two indicated they could hear argument in more cases, and four believed that the proper limit had been exceeded and the quality of judicial consideration was suffering.[13]

Publication of Opinions

As part of the package of innovations, the members of the court agreed to publish fewer and shorter opinions, a policy that had its greatest effect on cases submitted for argument. The court reaffirmed its practice that a full opinion, as opposed to a memorandum, should be written only if the panel specifically determines that an opinion is necessary and should be published under the standards of local rule 21. Local rule 21 contains a presumption against publication, which is overcome when a case:

1. Establishes, alters, modifies, or clarifies a rule of law, or

2. Calls attention to a rule of law which has been generally overlooked, or

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13. At the time of the interviews, the judges of the Ninth Circuit Court of Appeals believed that the combined effect of the Innovations Project and their increased workload had resulted in a total of case participations that ranked the court among the most productive federal appellate courts in the country. The Ninth Circuit actually ranks in the middle. It is possible that this misunderstanding affected the judges' responses to questions concerning higher rates of case participations.

3. Criticizes existing law, or

4. Involves a legal or factual issue of unique interest or substantial public importance, or

5. Relies in whole or in part upon a reported opinion in the case by a district court or an administrative agency, or

6. Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desire[s] that it be reported or distributed to regular subscribers.

Typically, in the conference immediately after an oral argument, the panel determines whether the disposition of the case they have just heard should be published. In addition, the staff attorneys review unpublished opinions and recommend publication in appropriate cases, including those cases that involve apparent intercircuit conflicts. From August 1979 to April 1982, the staff reviewed approximately 100 unpublished dispositions each month; it recommended publication of forty-two opinions, an average of slightly more than one opinion per month, and the court published twenty-two of them. The most common reason for suggesting publication was that the unpublished memorandum relied on out-of-circuit opinions as the authority for a controlling question.

Table 3 illustrates the shift in publication practice that occurred during this period. From 1981 to 1982, the proportion of cases with published opinions dropped from 40 percent to 36 percent, due to the lower proportion of signed opinions. It is not clear, however, that the decrease is due to the court's commitment to publish fewer opinions undertaken as part of the Innovations Project or simply to the continuation of a trend toward

nonpublication that had already begun. Between 1980 and 1981--before the Innovations Project--the proportion of published opinions had dropped by an even greater amount.

TABLE 3

PUBLICATION OF DISPOSITIONS IN ARGUED CASES

	1980		1981		1982		1983[a]	
Published	47%		40%		36%		37%	
Signed	41%	(769)	36%	(726)	32%	(707)	32%	(589)
Per curiam	6%	(118)	4%	(91)	4%	(96)	5%	(84)
Unpublished	53%		60%		64%		63%	
Memoranda	45%	(845)	55%	(1,128)	58%	(1,284)	59%	(1,091)
Order	8%	(152)	5%	(94)	6%	(121)	4%	(82)

[a]These figures do not include the 140 cases submitted in 1983 for which disposition information was missing at the time of the study. Since unpublished dispositions are reported more quickly, it is reasonable to assume that a greater proportion of the missing cases will be disposed of by published opinion. Even if it is assumed that all of the cases with missing information will have published opinions, the proportion of published opinions in 1983 will not exceed 40 percent.

Although there is no convenient way to determine if the lengths of the published opinions have decreased as well, most of the judges interviewed believed that they had. One judge suggested that the increased argument calendar resulted in a growing reliance on the work of law clerks, which in turn has caused an increase in the opinions' lengths. A few judges also commented on apparent inconsistencies in publication policies across panels, though all of these practices appear to be within the broad standards set by local rule 21. Publication policy and practices is a sensitive topic, and some of the judges questioned

whether opinion length is an appropriate topic for the establishment of court policy. The effect of the court's commitment to reducing the length of published opinions remains an object of speculation.

The Limited En Banc Procedure

The most novel innovation adopted by the Ninth Circuit Court of Appeals was the limited en banc procedure. Under section 6 of public law 95-486, the Omnibus Judgeship Act of 1978, any circuit court with fifteen or more active members is permitted to "perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals." The Ninth Circuit adopted local rule 25 (see appendix B), which provides for hearings and rehearings en banc by special panels of eleven judges, consisting of the chief judge, or next most senior active judge, and ten judges drawn by lot from the active judges of the court. Any active judge whose name has not been drawn for any of three successive en banc cases is automatically placed on the next en banc panel. Active judges who served on the three-judge panel that heard a case subsequently taken en banc receive no priority for placement on the en banc panel.[14]

The chief judge has served on all but one of the first thirty-seven limited en banc panels. The remaining twenty-one

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14. Visiting judges are not eligible to sit on the limited en banc panel. Initially, senior judges also were not eligible to sit, but this policy was recently changed to permit senior judges who were on the original three-judge panel to elect to have their names placed in the en banc pool.

active judges who have been in service since the adoption of the procedure have served on an average of seventeen panels. The two judges with the most frequent service have appeared on twenty-one panels each, while the judge with the least frequent service has appeared on eleven. The rule that automatically places a judge on the panel if he or she has not served on the three previous panels has been invoked fifty-five times.

Apart from the selection of the members for the en banc panel, the process functions much as in the past. Any party may suggest and any active judge may request that a case be heard or reheard en banc. All active judges may vote on taking a case en banc and all members of the court, including visiting judges who participated in the three-judge panel that heard the case, are kept informed of the voting.[15]

After a case is accepted for hearing or rehearing en banc, only those members selected for the en banc panel are included in the distribution of material and in deliberations. When the members of the panel have reached their decisions, the most senior judge in the majority assigns the drafting of the opinion. The court closely monitors the preparation and circulation of the majority and separate opinions. Judges assigned to draft opinions may request to be taken off the regular argument calendar. Once the opinion is filed, any party may suggest and any active

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15. At first, an affirmative vote of a majority of all active judges was required to take a case en banc. This policy was recently changed to require a majority of all active judges who are not recused.

judge may request that the case by reheard by the full court. If a majority of all active judges not recused agree, the case may be reargued and submitted to the full court. The general orders implementing the limited en banc court under local rule 25 are in appendix C.

From August 1980--the date the court adopted the limited en banc procedure--to July 1984, the court voted to hear thirty-seven cases en banc. Administrative Office reports reveal that in the three years following the adoption of the rule, twice as many en banc appeals were disposed of as in the three years prior to its adoption, though the increase in the size of the court during this period makes it difficult to attribute this change to the procedure alone. In the twenty-six en banc cases decided at the time of this study, an average of 175 days elapsed from the date of submission to the en banc panel to the date of its decision, compared with an average of 349 days in the ten cases decided en banc in the two years preceding the adoption of the limited en banc rule. There has been no request by a judge and only one suggestion by a party for a rehearing before the full court.

All but one of the active members of the court agreed that the limited en banc panel is a satisfactory substitute for the full en banc procedure. Several of the judges mentioned the practical difficulties that the court would face in convening all of its active members and indicated that there is a greater willingness by the judges to call for an en banc hearing under the new rule. There was, however, considerable variation in the wil-

lingness of individual judges to call for a rehearing en banc. Several of the judges admitted that they had been skeptical of abandoning the traditional en banc procedure, with participation by the full membership of the court; however, the opportunity for any member of the court to call for an en banc involving all active judges was viewed as the proper safeguard to ensure that a decision represents the majority opinion of the judges of the circuit. There have been several close votes under the limited en banc procedure, but, as evidence of the court's acceptance of the procedure, the judges repeatedly stated that there has not been a single recommendation for a full en banc panel following a decision by a limited one.

Several members of the court suggested that the limited membership of the en banc panels has affected the nature of the deliberations. Those selected to serve on the limited panels appear to feel an obligation to ensure that the views of all members of the court are represented in the deliberations. In fact, two judges, including the judge who did not endorse the limited en banc procedure, mentioned that in some cases it has been difficult to restrict the deliberations to the members selected for the panels. Viewpoints held by members not selected for the en banc panel are often addressed in the majority or accompanying opinions and can therefore be considered by the Supreme Court if the case is pursued on appeal. The likelihood that such cases will be appealed to the Supreme Court also was cited by several judges as a reason for the acceptance of limited en banc decisions by members in the minority.

Most of the judges stated that the limited en banc procedure would be appropriate for a court smaller than the Ninth Circuit Court of Appeals if it has difficulty convening its full membership. There was no agreement on the proper size of the limited en banc; the eleven-member panel was adopted as a compromise during the development of the rule, and a difference of opinion persists. When the Hruska Commission recommended the limited en banc, it suggested that the panels be composed of at least a majority of the members of the court. This restriction was not adopted by Congress when it authorized the procedure, and the size of the limited en banc panels are not expected to change as the court increases in size.

V. SUBMISSION-WITHOUT-ARGUMENT PROGRAM

The most notable and controversial departure from past practice in the Ninth Circuit was the development of separate panels to consider cases submitted without oral argument. Although formally called Submission-Without-Argument Program, it is commonly referred to in the circuit and elsewhere as the Screening Program. Development of the screening panels was intended to increase the number of cases disposed of without oral argument, and thereby increase the overall productivity of the court.

The benefits of this program may not be immediately apparent. Oral argument is rarely heard and in any event would only require about thirty minutes. The judges must still read the briefs, confer to the extent necessary, and draft and review the disposition. The main advantage of the Screening Program is the ease and convenience with which a case can be considered. Judges can examine the cases and dispose of them in one sitting, without having to reexamine them when the argument panel convenes. Judges are also free to consider the cases at any time that is convenient, rather than only when the argument panel convenes. This advantage became especially important to Ninth Circuit judges when increases in the argument calendar left little time for the regular panels to consider cases not scheduled for oral argument. However, cases appropriate for the program must be identified early in the appeal process and placed on the separate

screening track. If inappropriate cases are placed on the track, they must then be removed and returned to the clerk to be placed on the oral argument calendar.

The greatest concern about the Screening Program is whether the cases receive adequate judicial attention; the selection of cases by staff law clerks makes the concern even more acute. It is difficult under any circumstances to determine objectively if the degree of judicial attention is "adequate," especially in any case that receives less than the full range of appellate procedures. When this issue was raised, all members of the court agreed that cases exist in which oral argument does not aid the deliberation of the panel, and which require little consultation among the panel members. Although providing oral argument in such cases may serve several purposes, including ensuring the visibility of the appellate process, offering it in every case limits the time and attention the court can devote to cases that are more demanding. The Screening Program is intended to ensure that both the simple and complex cases receive proper judicial attention and are decided in a way that is appropriate to the issues raised in the appeal.

The Screening Program was the most controversial of the major innovations. In 1975 a more limited screening program was abandoned when the court modified its calendaring practices to permit oral arguments of less than thirty minutes.[16] However,

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16. The Ninth Circuit Court of Appeals also adopted, then abandoned, another procedure prior to developing the new Screening Program. The Appeals-Without-Briefs Program was intended to

argument panels continued to decide approximately 20 percent of the submitted cases without argument. By 1981 the increasing caseload and greater numbers of staff attorneys caused the court to consider the reestablishment of a screening program. Some members of the court were initially opposed, citing the diminished opportunity for consultation among members of the screening panel. A screening program modeled after the Fifth Circuit serial-panel procedure was adopted on a trial basis for six months;[17] an alternative parallel-panel procedure was added to permit the individual members of a screening panel to consult with each other by telephone. Sixty cases each month were to be referred to the panels (seven to eight cases each), which would permit the Screening Program to dispose of approximately 25 percent of the cases decided after submission.

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expedite the disposition of civil appeals presenting familiar and straightforward issues. Instead of briefs, counsel filed "pre-argument statements," which were not to exceed five pages and which contained a list of citations to principal cases and pages of the record on which the party intended to rely during oral argument. These appeals were also given a priority in calendaring and a longer amount of time for argument. The program was not successful and was abandoned in February 1982, shortly after the adoption of the Screening Program. For an evaluation of this program, see J.E. Shapard, Appeals Without Briefs: Evaluation of an Appeals Expediting Program in the Ninth Circuit (Federal Judicial Center 1984). The state appellate court program that served as a model for the federal court program is described in J.A. Chapper and R.A. Hanson, Expedited Procedures for Appellate Court: Evidence from California's Third District Court of Appeal, 42 Maryland Law Review 696 (1983).

17. The Screening Program in the Fifth Circuit is described in C.R. Hayworth, Screening and Summary Procedures in the United States Court of Appeals, 1973 Washington University Law Quarterly 257 (1973), and in A.B. Rubin and G. Ganucheau, Appellate Delay and Cost--An Ancient and Common Disease: Is it Intractable? 42 Maryland Law Review 752 (1983).

The program fell short of this goal. An average of forty cases per month were referred, approximately five cases for each panel. The Screening Program accounted for approximately 15 percent of the cases disposed of after submission in 1982 and 1983, though cases decided on the briefs by the argument panels raised the total proportion of cases decided without oral argument to 25 percent. The shortfall of cases referred to the program was due to difficulty in having sufficient numbers of eligible cases and staff law clerks available at the same time. Toward the end of 1983, when the court had overcome its backlog and there were no cases waiting to be calendared, some of the cases that customarily would have been sent to the screening panels were used to fill up available space on the oral argument calendar. This decision represents a deliberate choice by the court to provide oral argument to as many litigants as possible.

Procedures

The Screening Program of the Ninth Circuit relies heavily on the participation of staff law clerks to identify cases suitable for screening and to prepare bench memoranda. When the briefs and other necessary records have been filed, the case materials are sent to the staff attorneys' office for review. Staff law clerks examine the briefs and relevant portions of the record, refer cases with jurisdictional defects to the staff attorneys designated to assist with motions, and prepare the inventory cards described in chapter 3.

Then the staff law clerks, using criteria discussed below,

determine if the case should be placed on the traditional oral argument track or on the screening track. The law clerks are closely supervised and are encouraged to consult with their division supervisors when questions arise. Cases assigned to the screening track are also reviewed in the divisional meetings after the law clerks have completed the initial processing.

When a case is placed on the screening track, counsel for both parties are notified that the court is considering submission without argument; they are given ten days from the receipt of the notice to present a statement setting forth the reasons why oral argument should be heard in the case. During the first two years of the Screening Program, at least one attorney objected to the submission of the case without argument in 22 percent of the cases. Any objection raised by counsel is forwarded with the case materials to the judges on the screening panel. All three judges must agree that a case can be properly decided on the screening track or the case is returned to the clerk's office for placement on the next oral argument calendar. A dissent by a panel member in a case submitted on the screening track is permitted only in cases in which counsel has not objected to the submission without oral argument. If there has been an objection by counsel in a case in which a panel member wishes to dissent, the case must be returned to the clerk's office and placed on the next oral argument calendar.

Work on the bench memorandum receives the highest priority among the duties of the staff law clerks. As in cases designated for oral argument, the purpose of the memorandum is to inform the

screening panel members of the procedural circumstances, basic facts, relevant testimony and authorities, and issues and arguments raised in the case, thereby giving them the opportunity to review the materials and decide the case in a brief period of time. The bench memorandum prepared for a screening case frequently contains more information on the facts and authorities than an oral argument bench memorandum. The staff law clerks do not prepare draft dispositions in screening cases, though in a number of instances the panel has returned cases to the law clerk who prepared the bench memorandum and has requested a draft disposition consistent with the determination of the panel. Portions of the bench memorandum are frequently incorporated into the panel's decision.

A staff law clerk usually takes three or four days to review the materials, complete the inventory forms, prepare the bench memorandum, and provide whatever further support the panel requires in each screening case. Because each law clerk is responsible for developing bench memoranda for four screening cases per month, the monthly limit on the number of cases submitted on the screening track is determined by multiplying the number of available law clerks by four; there usually are fourteen law clerks available, so fifty-six cases can be accommodated in the Screening Program each month. This upper limit is rarely achieved, however, due to the difficulty in finding a sufficient number of cases that meet the screening panel criteria. Cases placed on the screening track must be the same age as those cases placed on the oral argument calendar. The court decided that the Screening

Program should not become a system for expediting appeals.

In addition to the four bench memoranda, the staff law clerks usually prepare a memorandum for at least one additional case that has not been designated for the screening panels, assisting a senior judge, visiting judge, or active judge who has a particularly demanding argument schedule. These more complex cases are assigned to those clerks who have completed work on the screening cases. The lack of an opportunity to work on the more challenging cases has been identified as a source of discontent among the staff law clerks.

Selection Criteria

The criteria for diverting cases to the screening panels are well developed. Cases must meet the standard for submission without oral argument set forth in rule 34(a) of the Federal Rules of Appellate Procedure and repeated in local rule 3 of the circuit (see appendix D). These standards permit submission of a case without oral argument when either:

1. the appeal is frivolous, or
2. the dispositive issue or set of issues has been recently authoritatively decided, or
3. the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Cases referred to the screening panels also must be simple and straightforward enough for a judge to be able to read the briefs and bench memoranda in a relatively short time and reach a disposition with confidence. According to the handbook that instructs the staff attorneys concerning their duties, cases are

placed on the screening track if they satisfy one or more of the following standards:

1. The result is clear. Some cases present issues that have been recently authoritatively decided by this court or the Supreme Court. Otherwise, your brief review of the materials may suggest that the issues raised are wholly frivolous or that reasonable people would not disagree on the result.

2. The legal standard is established and undisputed. Even where the result is not clear, the case may be suitable for submission to a screening panel if the legal standard to be applied is clear and undisputed and the result is not likely to be precedential. For example, an appeal may raise the issue whether police officers had probable cause to search a closet. Even if the outcome is close, the probable cause issue is straightforward, unlikely to be precedential, and might suitably be decided without oral argument. On the other hand, an appeal raising the novel question whether police have probable cause to search a particular computerized memory file would be unsuitable for the Screening Program, not because the legal standard is complex, but because the disposition might well be precedential.

3. The appellant or petitioner is proceeding pro se (and may be incarcerated). Most appeals filed by incarcerated pro se litigants satisfy one of the first two standards for submission to a screening panel. You may encounter some appeals filed pro se, however, that raise issues of greater complexity, perhaps novel, where the result is not clear. Several factors should influence your tracking decision.

   First, you may select a case for the argument tract even if it cannot be argued. A case is properly assigned to an argument calendar even if it will not in fact be argued where the case: (1) would benefit from closer scrutiny in chambers; (2) would benefit from a face-to-face conference of the three judges who will decide the case; or (3) is likely to be disposed of by a published opinion.

   Second, incarcerated pro se litigants would rarely be released from custody for the purpose of appearing for oral argument. If the appeal presents important issues, you should consider whether the court should appoint counsel to argue (and perhaps rebrief) the appeal. In appropriate cases, consult your Division Chief concerning whether you should draft a suggestion for the sua sponte appoint-

ment of counsel. Our office retains a list of counsel who have volunteered to serve pro bono.

4. The bus trip test. If the judges agree on one thing, it is that screening cases should be simple. Stated practically, a judge should be able to carry all the relevant materials (briefs, excerpt, and your bench memorandum) on a bus ride commute and decide both that the case is suitable for submission without oral argument and what the result should be. If your case does not satisfy the "bus trip test," it should probably be placed on the argument track.

Through discussion at weekly division meetings, the law clerks have achieved a consistent interpretation of these standards, and their work is closely monitored. During the first year of the Screening Program, the staff surveyed the judges as they participated on argument calendars and asked whether any cases submitted on the argument calendars would have been appropriate for the Screening Program. Only 18 of 557 cases on the argument calendars were identified as suitable for the Screening Program, and no case was identified by more than one judge. Furthermore, when the judges were asked if the staff and its criteria are effective in selecting cases appropriate for the Screening Program, all but one judge indicated satisfaction. Although approximately 18 percent of the cases are rejected from the program, most of the rejections result from judges' objections to the propriety of placing individual cases on the screening track, and perhaps even from differences among the panels in standards for rejection, rather than from a failure of the staff law clerks to implement the criteria of the court.

Screening Panels

Eight three-judge panels consider cases submitted on the screening track. Membership, which is determined by random allocation, changes once every twelve months, unlike that of the argument panels, which change every month.[18] Each of the twenty-three active circuit judges sits on one of the screening panels and two senior judges share the third position on the eighth panel. Visiting judges do not participate.

Each panel selects either the serial or the parallel procedure for considering the cases. In the serial procedure, the clerk's office sends the case materials and the bench memorandum prepared by the staff law clerk to one of the three judges on the screening panel. Each panel member serves as the initial judge on approximately one-third of the cases. The initial judge then either (1) decides the case is suitable for the Screening Program, drafts a proposed disposition, and sends the draft disposition and case materials to the next judge, or (2) rejects the case from the Screening Program and returns the case to the clerk's office for placement on the next available oral argument calendar.[19] Unless the first judge rejects the case, the second judge on the panel receives the materials next and either concurs

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18. The screening panels in the first year continued until February 1983, for a term of thirteen months. The panels for 1983 then served an eleven-month term.

19. This practice was recently modified to permit the clerk's office to send a replacement case to the screening panels upon receipt of a rejected case. Implementation of this modification is limited, however, by the availability of appropriate cases.

with the proposed disposition and forwards the case to the third judge, or rejects the case from the Screening Program and returns it to the clerk's office. The third judge follows the same procedure and forwards the case to the clerk's office. The advantage of the serial procedure is that it saves time that would be spent coordinating discussion of those cases on which the panel members already agree. When the judges differ, however, the initial judge may waste time drafting a disposition for a case that the second or third judge will then return to the clerk's office for placement on the oral argument calendar.

In the parallel procedure, the judges receive the case materials from the clerk's office simultaneously. The members of the parallel panels generally confer once by telephone concerning the appropriateness of the case for the Screening Program and discuss any difficulties or special issues that may need to be addressed in the case. Although such issues arise infrequently, due to the simple nature of the cases, it is this opportunity for a conference that attracts panel members to the parallel system. The panel then assigns the case to one of its members, who prepares a written disposition to be circulated for approval. This process offers the added advantage of eliminating cases unsuitable for the Screening Program prior to the drafting of an initial disposition, though greater coordination of the panel members' activities is necessary.

Until recently the serial process was the more popular procedure. In 1982, six of the eight panels chose the serial method; in 1983, it was selected by five of the eight. In 1984,

four of the screening panels chose each procedure, but the practices under each had been modified. Two-thirds of the judges expressed a preference for the serial method; more than half of these judges had had experience with both processes. Supporters of the serial procedure praised its efficient disposition of a case with one viewing and its flexibility in permitting consideration of the screening cases at any convenient time, rather than structuring consideration around a conference call. Several supporters acknowledged some wasted effort occurs when a case is rejected after an initial disposition is drafted, but believed that this loss is offset by the procedure's advantages.

One-third of the judges preferred the parallel procedure, with four of these judges having had experience with both systems. All of these judges placed great value on the opportunity for conferencing. Another advantage cited was the ability to reject inappropriate cases before drafting a disposition. Procedure preference also seems to depend on the circumstances of the panel members. Two judges mentioned that the parallel system works well when all of the judges are in the same building, but that conferencing becomes awkward when the panel members are in different locations and time zones.

Some of the initial distinctions between the serial and parallel procedures became blurred as judges participated in different systems and adopted the best of each in structuring the practices of subsequent panels. For example, the serial procedure did not originally include conferences among panel members. If the second or third judge was dissatisfied with the disposi-

tion drafted by the initial judge, the case was to be rejected and sent to the oral argument calendar. However, at least half of the judges who prefer the serial procedure mentioned that panel members occasionally have conferred, usually by memoranda, on modifying an initial disposition rather than simply rejecting the case. Similarly, several judges who prefer the parallel procedure indicated that they have changed the process so that conference time is devoted only to those cases that appear to pose some difficulty. Much of the communication now takes place by memoranda, rather than by telephone. Other variations have been tried and abandoned.

In general, there appears to be a great deal of innovation under both the parallel and serial procedures, making them more similar than originally envisioned. However, a number of the judges insisted that the individual panel members be permitted to choose either the parallel or the serial procedure, or from among those variations that have developed, rather than have the court adopt a single uniform practice.

Operation of the Program

During the first two years of the program, 1,020 cases were referred to the screening panels. Of these, 969 cases were either single or lead cases (associated cases are submitted with lead cases). All but 13 cases had either been disposed of or rejected at the time of the study. The following analyses rely on data from these 956 cases, with separate studies of the 786 cases

decided by the screening panels and the 170 cases rejected from the screening track.

Five hundred and fifteen cases were submitted in the first year of the program compared with 441 in the second year. The drop is due in part to the Ninth Circuit's success in reducing its backlog. By the fall of 1983, the court had eliminated the pool of fully briefed cases awaiting calendaring; as briefing was completed, some of the cases that would have been sent to the screening panels were shifted to the oral argument calendars to ensure that oral argument would be available to as many cases as could be accommodated. Before the end of year, however, the increase in case filings had resulted in a growing backlog of cases awaiting calendaring for oral argument, and the Screening Program returned to its previous level of activity.

Tables 4 through 6 summarize the characteristics of the cases disposed of through the Screening Program during the first two years of its operation. As seen in table 4, the common types of cases were appeals in general civil suits (24 percent), criminal cases (21 percent), civil rights actions not involving prisoners (15 percent), petitions or applications from the Immigration and Naturalization Service (12 percent), civil suits in which the United States or an agency of the United States was a defendant (11 percent), and state and federal habeas corpus cases (6 percent). The remaining 11 percent of the cases were disbursed across the remaining case types.

TABLE 4

TYPES OF CASES DECIDED BY THE SCREENING PANELS (1982-83)

Case Type	Percent	Pro Se[1]	Objection[2]
Private civil	24% (191)	53% (102)	22% (42)
Criminal appeal	21% (163)	7% (12)	21% (35)
Civil rights	15% (115)	86% (99)	22% (25)
Immigration	12% (95)	3% (3)	14% (13)
Civil vs. U.S.	11% (88)	45% (40)	28% (25)
Habeas corpus (Federal and state)	6% (44)	82% (36)	18% (8)
Other	11% (90)		

[1]Pro se = percentage of cases for each case type that were pro se appeals.

[2]Objection = percentage of cases for each case type in which there was an attorney objection.

In 41 percent of the cases decided by the screening panels, the appellant was proceeding without the assistance of counsel. Pro se appeals were especially common in civil rights cases not involving prisoners (86 percent) and especially rare in immigration appeals (3 percent) and appeals of criminal convictions (7 percent). Although relatively few appeals involved habeas corpus petitions, assistance of counsel occurred in only 18 percent (8 of 44) of these cases. As indicated in table 5, the court affirmed the action on appeal in 82 percent of the cases decided by the screening panels, and reversed or reversed and remanded only 8 percent of the cases.

TABLE 5

OUTCOME OF CASES DECIDED BY THE SCREENING PANELS

Nature of Disposition	Percent
Affirmed	82% (645)
Reversed	2% (17)
Reversed & remanded	6% (47)
Remanded	3% (23)
Other[1]	7% (54)

[1]The "other" category includes cases dismissed for lack of jurisdiction or noncompliance with court rules, and actions on petitions for review or enforcement of agency actions.

Disposition by unpublished memorandum opinion is the almost exclusive practice, occurring in 94 percent of the cases. The opinion of the court was published in 6 percent and only 4 percent were signed. There was some initial confusion over the court's policy concerning submission to the screening panels of cases in which publication is anticipated. Such cases are submitted with a recommendation to publish the disposition: for example, on those rare occasions when no authority exists in the circuit for a particular proposition, but every other circuit has considered the issue and decided the case in an identical fashion. At first, the screening panels reacted unevenly, with some panels uniformly rejecting all screening cases in which the staff recommended publication. Although cases that anticipate publication are not excluded from submission to screening panels, publication of a decision by a screening panel remains a rare event.

Table 6 shows the median number of days from the submission of the case materials to the filing of the disposition. A median of forty-eight days elapsed from the time the case was submitted until the disposition was filed, with slightly less time required by the parallel panels. In the first year of the program (actually the first thirteen months during which the initial screening panels remained intact), the screening cases remained under submission for almost the same period of time under the parallel and serial panels (47 and 45 days, respectively). In the second year, however, the serial panels were notably slower in disposing of submitted cases (55 days as opposed to 40). The reason for the slowdown remains unclear.

TABLE 6

TIME FROM SUBMISSION TO DISPOSITION
OF CASES REFERRED TO THE SCREENING PANELS

	Median Days
All screening cases ('82-'83)	48 days (393 cases)
Cases referred to serial panels	48 days (261 cases)
First judge to second judge	18 days (247 cases)
Second judge to third judge	9 days
Third judge to clerk	13 days
Cases referred to parallel panels	44 days (131 cases)

NOTE: Data were missing for one of the cases referred to the screening panels.

Effect of the Program

Because the Screening Program offers an alternative means of deciding cases without oral argument, the most appropriate com-

parison for determining the effects of the program is to examine the characteristics of cases decided without oral argument before and after the adoption of the Screening Program. This is not an exact comparison, however, of screened cases and earlier cases that would have been screened if such a program had existed. Oral argument occurred in 79 percent of the cases before the Screening Program and only 72 percent of the cases afterwards, suggesting that oral argument was originally extended to some kinds of cases that were later decided on the briefs alone. Furthermore, after the adoption of the Screening Program, approximately 10 percent of the cases submitted to the oral argument panels were still decided on the briefs. However, such a comparison is likely to include most of the earlier cases that would have been referred to the Screening Program, had such a program existed, and should indicate how such a program affects the resolution of simpler cases.

Following the Innovations Project, the number of cases submitted on briefs increased sharply, from 380 cases in 1981 to 624 cases in 1982 (see table 7).[20] The increase in participations in such cases by the active and senior judges, combined with the decrease in such participations by visiting judges, is especially noteworthy. The size of the difference between 1981 and 1982 may

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20. The average number of participations per active judge in cases submitted on briefs differs somewhat from the figures reported in table 14. The figures in this table identify the average number of participations in cases submitted to the screening panels during the year while the figures in table 14 identify the number of participations in cases terminated during the year.

TABLE 7

PARTICIPATION IN LEAD AND SINGLE CASES SUBMITTED ON BRIEFS[1]

	1980	1981	1982	1983
Submissions on briefs				
Total cases	462	380	624	542
Total participations[2]	1,386	1,139	1,872	1,626
Participations by:				
Senior judges	111	72	123	103
Visiting judges	264	266	71	73
Active judges	1,021	801	1,678	1,450
Average participations by active judges	51[3]	35	73	63
Subset of above cases decided through the Screening Program				
Total cases	0	0	434	365
Total participations[2]	0	0	1,302	1,095
Participations by:				
Senior judges	0	0	74	67
Visiting judges	0	0	0	0
Active judges	0	0	1,228	1,028
Average participations by active judges	0	0	53	45

[1]During the period reported in these tables, the Ninth Circuit Court of Appeals followed practices in defining cases as "consolidated cases" or "cross-appeals" that were inconsistent with the standards specified by the Administrative Office and presumably used by the other circuits. This issue is discussed in greater detail in chapter 7. Although the figures reported here are accurate for comparison of relative changes in the performance of the circuit across the years, they underestimate the actual number of participations in lead and singles cases submitted on briefs and are not valid for comparison with similar measures of other circuits.

[2]The number of oral argument participations may be less than three times the number of cases due to missing data for participating judges.

[3]During 1980 six of the judgeships in the circuit remained unfilled for portions of the year. The number of active-judge participations includes judges who did not serve the full year, while the number of average participations only includes judges who were in active service at the beginning of the year.

be somewhat misleading, however, because the number of participations in cases submitted on the briefs in 1981 was a good deal lower than in 1980. The data for 1983 should also be interpreted with caution since the backlog of cases awaiting submission was eliminated in 1983, and some cases that would have been directed to the screening panels were used to fill out the oral argument calendars. Still, it is clear that the Innovations Project resulted in a marked increase in the number of cases submitted on the briefs.

The contribution of the Screening Program is revealed in the lower half of the table. In 1982, more than two-thirds of the participations in cases submitted on briefs involved cases submitted through the Screening Program.

Some case types in particular are now more likely to be decided on the briefs. In the two years before the Innovations Project, 36 percent of cases involving petitions and applications from the Immigration and Naturalization Service were decided on briefs (see table 8). Following the introduction of the program, this figure rose to 61 percent. Civil suits brought against the United States or a federal agency and civil rights actions not brought by prisoners also were substantially more likely to be decided on the briefs. The number of habeas corpus petitions submitted without oral argument differed by only 1 percent.

The development of the Screening Program also affected the form of disposition in cases submitted on their briefs. In the two years prior to the Screening Program, 78 percent of these dispositions were unpublished; after the Screening Program, 89

TABLE 8

TYPES OF CASES DECIDED ON BRIEFS[1]

	1980-1981 % (Briefs/Total)	1982-1983 % (Briefs/Total)	Change
Immigration	36% (53/147)	61% (113/186)	+25%
U.S. civil def.	19% (64/342)	33% (122/374)	+14%
Civil rights	29% (98/338)	41% (155/376)	+12%
Criminal	22% (208/935)	28% (267/942)	+6%
Private civil	14% (176/1,233)	19% (310/1,599)	+5%
Habeas corpus (Federal and state)	46% (134/289)	45% (58/128)	-1%

[1]Associated cases are excluded from this analysis.

percent were unpublished, with a sharp increase in dispositions by unpublished memorandum opinions. It is difficult to isolate the effect of the Screening Program on publication practices, however, since they were also influenced by the increase in the oral argument calendar and the commitment of the court to publish fewer cases.

During this same period, the percentage of cases submitted on briefs that were affirmed increased from 74 percent to 79 percent (see table 9), while the proportions of cases reversed, reversed and remanded, and remanded remained approximately the same. The increase in affirmances reflects a shift from other dispositions. For example, the proportion of cases affirmed in part and reversed in part dropped from 4 percent to 2 percent; the proportion of cases voluntarily dismissed after submission

under rule 42 of the Federal Rules of Appellate Procedure dropped from 2 percent to 1 percent.

TABLE 9

DISPOSITION OF CASES SUBMITTED ON BRIEFS

Nature of Disposition	1980-1981	1982-1983[a]
Affirmed	74% (623)	79% (911)
Reversed	2% (19)	2% (25)
Reversed & remanded	7% (55)	7% (76)
Remanded	4% (35)	3% (38)
Other	13% (110)	9% (99)

[a]These figures do not include 17 cases submitted during this period for which there is no information on the nature of the disposition.

At first glance, the Screening Program appeared to cause a slight increase in the amount of time a case decided on the briefs remained under submission. Cases submitted on briefs typically required thirty-seven days from submission to disposition in the two years prior to the Screening Program and required forty-five days in the two years following the program's inception. However, "time under submission" has a slightly different meaning in the context of cases submitted to screening panels. When a case is submitted to an argument panel, even if it is to be decided on the briefs, the time the case is under submission is marked from the time the panel convenes to consider the case. When a case is submitted to a screening panel, the time the case

is under submission is marked from the time the case materials are sent to the panel, or to the initial judge, using the serial process. Case materials are sent to the argument panel four to six weeks before the week the panel convenes. If this time is added to the time under submission for cases referred to argument panels, the development of the Screening Program appears to result in a decrease in the time a case decided on the briefs awaited disposition.

All of the judges agreed that the Screening Program is an appropriate means of increasing court productivity without reducing the quality of judicial consideration. A number of the judges who had opposed the the program's adoption said that they had been won over as a result of their participation. Many of them expressed a preference for oral argument, as much for the opportunity to confer about the case as for the benefits of the oral argument itself. But these judges indicated that the need for the court to dispose promptly of cases, especially in periods of increasing appellate case filings, outweighed the value of offering oral argument in every case. Several of the judges mentioned that their support for the program was contingent on the right of each individual judge to reject cases thought to be unsuitable, a right that is recognized under rule 34(a) of the Federal Rules of Appellate Procedure.

All of the judges agreed that cases decided on the screening track receive judicial attention that is "appropriate" to the issues raised in the case. The judges were also asked if the "quality of judicial consideration in disposing of such cases has

changed since the Screening Program was introduced." Unfortunately, this question was asked in such a way that the standard for comparing cases in the Screening Program was not clear. Several of the judges acknowledged that cases referred to screening panels receive less attention, but it is not clear if these judges were comparing screening cases to cases in which argument was permitted or to cases placed on the argument calendars but decided on the briefs. Several judges mentioned that under the previous practice--when cases were placed on the oral argument calendar and decided on the briefs--the cases received relatively little judicial attention because the panel members focused their efforts on the more difficult cases. Another ambiguous interview question concerned the amount of attention such cases receive overall. Several judges mentioned that they and their law clerks now spend less time on such cases, but that the extensive review of the cases by the law clerks results in a net increase in the amount of attention devoted them by the court as a whole. Furthermore, the preparation of a more thorough bench memorandum permits the judge to decide the case in a more efficient manner, diminishing the value of a comparison of time spent.

Rejection of Cases

The opportunity for a single judge to reject a case from the screening panel is the greatest safeguard against insufficient judicial attention. All members of the screening panel must agree that the case is appropriate for the screening panel or the case is removed and placed on the next available oral argument

calendar. Several of the judges noted that their support for the program was based on this individual right.

The rejection rate appears to be sensitive to the criteria used to select cases for screening. In the first year of the program, 15 percent of the cases placed on the screening track by staff attorneys were rejected; in the second year, 20 percent of the cases were rejected, for an average of about 18 percent. For a brief period during the first year, interpretation of the criteria was liberalized in an effort to reach the goal of sixty screening cases per month. During this period, the rejection rate increased from 16 percent to 22 percent, then dropped when the liberal interpretation was abandoned. The higher rejection rate in the second year of the program might indicate greater difficulty in finding cases appropriate for screening as the backlog of cases awaiting calendaring diminished. The sensitivity of the rejection rate suggests that the cases are closely examined by the judges to ensure that they are appropriate for the Screening Program.

As might be expected, complex cases are much more likely to be rejected from the Screening Program. In the first two years, 44 percent of the cases given a "3" case weight, and all cases with higher case weights, were rejected from screening, while less than 1 percent of the cases with a "1" case weight were rejected from screening (only four cases out of six hundred).

Rejection of almost one of every five cases from the program suggests that the judges are closely monitoring the selection of cases for submission without oral argument. However, the cases

that are rejected suffer considerable delay in being heard, even though they are placed on the next available oral argument calendar. (The cases are calendared approximately eleven weeks prior to oral argument.) Such delays raise substantial concerns, especially in criminal cases rejected from screening. The court considered, but did not approve, argument by telephone in cases that would otherwise be rejected. For the time being, the added delay that results from calendaring rejected cases for oral argument must be accepted in return for the Screening Program's benefits.

Another concern is the variation in rejection rates across panels. Most judges indicated that they reject a case from the Screening Program "unless the result is clear," but this standard is not consistently interpreted. In each of the first two years, the range in rejection rates varied from 3 percent on one screening panel to 34 percent on another, with most of the panels rejecting between 15 percent and 25 percent of the cases they received. Because the cases are randomly assigned, this variation suggests that different criteria are being employed by some panels.

The judges were also asked if there are certain types of cases that cause exceptional problems in the Screening Program. Fifteen judges indicated that there are no specific types of cases that cause difficulties--cases are rejected when there is some unique or special difficulty that was unforeseen by the staff law clerks. However, eight judges said that some cases involving "personal rights" cause difficulties and should be rejected. The most frequently cited example of such cases was im-

migration appeals; criminal appeals, civil rights cases, habeas corpus cases, and Social Security disability appeals were also mentioned. The judges said that, in these cases, it is especially important that the appellate process is visible and the litigants aware that the case received full consideration. Several judges noted that commercial cases are seldom placed on the screening track, and questioned whether the resources of the court should be structured so that cases involving "personal rights" receive less than the full range of appellate services while oral argument is reserved for commercial cases. Table 8 shows that the likelihood of a private civil appeal (the case type most likely to include commercial cases) being decided on the briefs increased 5 percent after the adoption of the Screening Program, from 14 percent to 19 percent. However, this rise is much less than the increased likelihood of immigration and civil rights cases being decided on the briefs alone.

An analysis of rejection rates reveals that diverting immigration and habeas corpus cases growing out of state court convictions to the eight screening panels is particularly controversial. Such cases are submitted on the theory that they involve the application of an undisputed standard and that the result is clear. The rejection rates for these cases were the highest in the group: 28 percent (13/46) of the state habeas corpus cases and 26 percent (33/128) of the immigration cases were rejected, compared with a rate of 16 percent for all other cases. However, the high immigration-case rate can be attributed to the actions of only a few panels. In the first year, a single panel ac-

counted for seven of the twenty immigration cases rejected by the screening panels. In the second year a single panel was responsible for four of the thirteen cases rejected.

The choice of the serial rather than the parallel procedure also appears to result in a higher rejection rate. The average rejection rate for the eleven panels employing the serial procedure during the first two years of the program was 20 percent, while the average rejection rate across the five panels employing a parallel processing system has remained steady at 13 percent each year. This higher rejection rate is a surprise--an early concern was that the serial procedure would result in more cursory attention to the screening cases and in a lower rejection rate. It appears that the members of the serial panels are at least as vigilant in monitoring the referral of individual cases to the Screening Program as the members of the parallel panels.

Not surprisingly, the initial judge on the screening panels employing the serial procedure rejects the greatest proportion of cases. In the nine serial panels that rejected more than 7 percent of the cases, the initial judge rejected 81 percent while the second and third judges each rejected about 9 percent.[21]

There are several possible interpretations of these data, all of which are hindered by the absence of an objective estimate of the proper rate of rejection for a panel and how these rejections should be allocated among the serial panel members. For

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21. Two of the serial panels had very low rates of rejection, making it difficult to distinguish the practices of the initial judges, and were excluded from the analysis.

example, the low rates of rejection by the second or third judges relative to the rejection rate of the initial judge raise the question of whether the cases passed on by the initial judges are receiving close scrutiny by the second and third judges, who perhaps decline to reject a case in which the initial judge has already drafted a disposition. This interpretation assumes, however, that the initial judge has passed on cases that would be rejected by the other panel members if they were serving as the initial judge. If the panel members agree on the kinds of cases that are appropriate for screening, and the initial judge effectively implements this policy, the much higher rejection rate by the initial judge indicates the program is a success. If the second and third judges rejected as many cases as the initial judge, it would suggest that there is no consensus on the panel concerning which cases are appropriate for the Screening Program.

The concern that the second and third judges are passing on inappropriate cases for which the initial judge has drafted a disposition is also mitigated by evidence that the rejection rates of the serial panels are higher than the rejection rates of parallel panels, on which there is consultation among the panel members. The initial judges on the serial panels are rejecting a greater proportion of cases than the parallel panels as a whole, which implies that the initial judges are following a stringent policy of review and acceptance. It is unlikely that cases that would have been rejected by the parallel panels are being decided by the serial panels.

There is also no evidence that the second and third judges

on serial panels are not offering an adequate review of the disposition drafted by the initial judge. However, because the serial panels have evolved to permit subsequent judges to modify the disposition rather than reject the case, the low rejection rates by second and third judges may not offer an appropriate indication of the scrutiny these cases receive. There was no evidence from the interviews that the second and third judges are simply passing on dispositions drafted by the initial judges without reviewing them.

Without a standard for determining the proper rate of rejection, the question can be turned around: Are the initial judges in serial panels being too conservative in determining which cases are appropriate for the screening panels? The statistics might suggest that the initial-judge rejection rate is too high; perhaps initial judges tend to reject borderline cases rather than draft a disposition for a case that might be rejected by a subsequent panel member. Panels employing the parallel procedures avoid this problem by agreeing at the outset that, through a telephone conference, a case can be properly decided by the screening panel before the disposition is drafted. Recently, to ensure that the effort devoted to the draft disposition is not wasted, the court adopted a policy of forwarding to the argument panels the draft dispositions for all cases, with separate notes indicating why certain cases were rejected. Nevertheless, court personnel have suggested that judges serving on the parallel panels may be more willing to accept difficult cases because of

the opportunity for consultation prior to the drafting of a disposition.

Members of the court disagree over the proper interpretation of the rejection of cases from the Screening Program. Some of the judges on panels that reject relatively few cases noted the disruptions and delay in disposing of a case that result when a case is rejected and interpreted the high rejection rates as an indication that the Screening Program is falling short of its potential. These judges urged the adoption of common standards for all the panels. Other judges, many from panels with relatively high rejection rates, said the rejection rates prove that the program is successful in ensuring that only the cases suited for disposition by the screening panels are considered, and expressed concern that the rejection rates were so low for some of the panels.

Resolution of this conflict might be difficult. Many members of the court made clear that their support for the Screening Program was predicated on the right to reject from the screening panel any cases that seemed unsuitable, and the judges appear to employ different standards for making this determination. The right of an individual judge to determine that a case is unsuited for disposition without argument is acknowledged in rule 34(a) of the Federal Rules of Appellate Procedure. As long as the judges follow different standards for rejection of cases from screening, the court will continue to decide similar cases using dissimilar practices.

Furthermore, it appears that the standard for referral to

screening employed by the court as a whole differs from the standard recommended by the attorneys representing the parties to the appeal. The attorneys are notified when the case is designated for the screening track and are given an opportunity to register an objection. Although there is agreement between the recommendations of the attorney and the actions of the court in two-thirds of the cases, this is a result of the relatively low rates of objection by the attorneys and rejection by the panels. When attorneys do object, it appears to have little impact on the actions of the court. As indicated in table 10, there is no relationship between the objection to the screening referral by one of the attorneys, almost always the attorney representing the appellant, and the decision of the panel to reject a case from the Screening Program. Attorneys raised objections in approximately 22 percent (214/956) of the cases referred to the screening panels. Of these, the panels rejected 20 percent (42/214), a rejection rate only slightly higher than the rejection rate of cases to which attorneys did not object (17 percent, 128/742). Similarly, of the cases rejected by the screening panels, the attorneys objected to referral in only 25 percent (42/170). The lack of correspondence between attorney objections and panel rejections suggests that there may be a disagreement concerning the proper standards for submission to the Screening Program. The court is considering requesting more information from the attorneys to better understand the nature of this difference.

Despite early concerns, the Screening Program has become an accepted procedure in the Ninth Circuit. All but one member of

TABLE 10

RELATIONSHIP BETWEEN ATTORNEY OBJECTION TO REFERRAL OF CASES AND REJECTION OF CASES FROM SCREENING

	Action of Attorney		
	Objection	No Objection	Total
Action of panel			
Reject	42	128	170
Not reject	172	614	786
Total	214	742	956

NOTE: chi square = .4889; p not less than .05.

the court believes that the program should be continued, and the sole opponent suggests restructuring the selection criteria, rather than abandoning the program entirely. However, the judges did indicate that the Screening Program may have reached its limit as a means of increasing their case participations. Although some other federal circuit courts accept greater proportions of their caseloads for disposition through similar programs, most of the judges of the Ninth Circuit are opposed to expansion of the program beyond its current limits. Only five of the judges thought the program should be expanded, one suggested the program be restricted, and the rest believed the program should remain at its current level.

VI. PREBRIEFING CONFERENCE PROGRAM

The Prebriefing Conference Program was the first of the major innovations adopted by the Ninth Circuit Court of Appeals. As in preappeal conference programs in other circuits,[22] under the authority of rule 33 of the Federal Rules of Appellate Procedure, a conference is held between counsel and a court-designated conference attorney soon after the appeal is docketed to discuss the issues on appeal, the structure of the briefs, and other issues involving appellate practice. The Prebriefing Conference Program is unique, however, in that it is primarily intended to assist counsel in improving the presentation of issues, thereby easing the burden on the judges considering the appeal.

The Prebriefing Conference Program was established in November 1981 to deal with civil appeals originating in the

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22. The Ninth Circuit's Prebriefing Conference Program was patterned after similar programs in the Second and Seventh Circuits. Descriptions of the preappeal conference program in the Second Circuit can be found in J. Goldman, An Evaluation of the Civil Appeals Management Plan: An Experiment in Judicial Administration (Federal Judicial Center 1978), and A. Partridge & A. Lind, A Reevaluation of the Civil Appeals Management Plan (Federal Judicial Center 1983). The conference program in the Seventh Circuit is described in J. Goldman, The Seventh Circuit Preappeal Program: An Evaluation (Federal Judicial Center 1982). The Eight Circuit recently began a limited conference program, which is described in D.P. Lay, A Blueprint for Judicial Management, 17 Creighton L. Rev. 1047 (1984). A description of the preappeal conference program in the Sixth Circuit is found in R. Rack, Preargument Conference in the Sixth Circuit Court of Appeals, 15 U. Tol. L. Rev. 921 (1984).

Northern District of California. Within two years the program was expanded to include civil appeals from the districts of Oregon, Western Washington, and Central California, and conferences were held in more than 3,000 cases. In February 1984, the court agreed that the program would include all civil appeals arising in the Ninth Circuit, making it the largest preappeal conference program in the federal appellate system. Although objective assessment of the effectiveness of the program is difficult, the broad support of the bar and the faith of the judges of the circuit suggest that the Prebriefing Conference Program is a valuable complement to the other innovations that have increased judicial productivity.

The opportunity for consultation between counsel and the conference attorney afforded by the Prebriefing Conference Program is intended to accomplish a wide range of purposes. It (1) permits informal resolution of procedural matters, such as briefing schedules, joinder of briefs in multiparty appeals, and requests for time extensions, (2) encourages the clarification and narrowing of issues on appeal, or, when appropriate, settlement without submission to the court, and (3) encourages the parties to file shorter briefs and records. The degree to which this program focuses on the length of the briefs and other submitted material is unique among the preappeal conference programs. The conference attorneys also review the appeal for jurisdictional defects, a task that is performed by staff law clerks in cases that are not diverted to the Prebriefing Conference Program.

Unlike programs in other circuits, the Prebriefing Confer-

ence Program is not intended to accelerate the pace of litigation by setting shorter briefing schedules for appropriate classes of cases. When the circuit had a large backlog of cases waiting to be calendared, extensions in briefing schedules were common. As the backlog dwindled, however, the conference attorneys who establish the briefing schedules began to deny repetitive requests for short extensions and single requests for long extensions. For a brief period in 1983, when the court had essentially eliminated the backlog of cases waiting to be calendared, there was an effort to expedite the briefing process to fill the argument calendar, though briefing schedules were never set for a time period less than the periods specified in rule 31 of the Federal Rules of Appellate Procedure. But acceleration of the briefing schedule cannot be considered an ongoing goal of the Prebriefing Conference Program. As the number of case filings and the pool of cases awaiting calendaring began to increase, the efforts to expedite ended. In civil cases not referred to the Prebriefing Conference Program, the briefing schedule is set by the clerk's office. Appellants must file briefs forty days after the notice of filing of the record by the court; appellees file their briefs thirty days from the date of service of the appellants' briefs. Extensions of approximately four weeks are frequently allowed.

Although no goal priorities were specified when the program began, settlement of appeals appears to receive less attention by the conference attorneys than in similar programs in other circuits. When a preliminary evaluation of the program by the circuit executive's office raised questions concerning the relation-

ship among the goals, the court indicated that efforts toward case management rather than settlement should be emphasized. More than two-thirds of the judges interviewed identified reduction of brief and record length and narrowing of issues to be the most important aims of the program. A number of judges also mentioned the value of using the conferences to educate members of the bar concerning court procedures and expectations. Although the staff attorneys are instructed to offer encouragement when settlement is likely, most of the judges expressed considerable doubt concerning the ability of the current program to bring about settlement in cases that would otherwise continue to oral argument. A pilot program recently undertaken in the Western District of Washington permits members of the federal bar associations to serve as mediators on cases identified by the conference attorneys as candidates for settlement.

Procedures

During the period addressed by this evaluation, the Prebriefing Conference Program was extended to all civil and agency appeals in the four districts listed above, with the exception of interlocutory appeals under 28 U.S.C. § 1292(b) (1982) and petitions for writs. After the notice of appeal is filed, the clerk of the district court, or the clerk of the court of appeals in cases involving review or enforcement of an agency action, sends a letter to the attorneys representing the parties, explaining the Prebriefing Conference Program and the procedures that will be followed in the appeal. A "docketing statement" is sent to

the appellant. (For copies of these materials, see appendix E.) The docketing statement, which must be returned to the clerk of the court of appeals within fourteen days, sets forth the jurisdictional facts, nature of the proceedings, related cases, issues on appeal, and applicable standards of appellate review. The appellant must attach a copy of the judgment or order appealed from and findings of fact or conclusions of law supporting the decision. The appellee may file a single-page response if he or she disagrees with the appellant's statement of the case or the issues on appeal, but this rarely occurs.

After the clerk's office receives the docketing statement and proof of service, the case is docketed and the statement is forwarded to the conference attorneys. The docketing statement and related materials are used by the conference attorney to prepare for the prebriefing conference. There are four senior staff attorneys who are designated as conference attorneys and have experience as civil motions attorneys. The conference attorneys have worked closely together and appear to follow similar practices in the conference process. Docketing statements are reviewed to identify jurisdictional defects. If there appears to be a problem, the conference attorney may ask for clarification of jurisdictional issues or inform the parties of a jurisdictional defect that can be cured. After a review of jurisdictional issues, pro se cases are also screened out of the conference program and referred to the clerk's office. As indicated in table 11, of the 4,024 cases referred to the program between

TABLE 11

DISPOSITION OF CASES REFERRED TO THE PREBRIEFING CONFERENCE PROGRAM

	Conference Cases	Pro Se Appeals	Total
Total dispositions	1,640	344	1,984
Cases submitted and decided	628	94	722
Cases disposed of:			
Before submission	1,012	250	1,262
Before filing docket statement	325	86	411
Before conference	171	--	171
Before briefing	440	150	590
Before calendaring	76	14	90

NOTE: Information in this table is taken from the reports on the program compiled by the staff attorney's office and represents the period from November 1981 through December 1983. During this period there were 4,024 total cases eligible for the program. After the 756 pro se appeals were examined for jurisdictional defects and returned to the clerk's office, 3,268 cases remained and were eligible for the prebriefing conferences. Disposition information was not available for 2,040 of these cases at the time of the study. These data include disposition information for recently filed cases that settled early, but excludes disposition information on cases from the same filing cohort that continued to submission and may, therefore, slightly overestimate the rate of nonsubmission over time.

November 1981 and January 1984, 756 pro se appeals were reviewed for jurisdictional issues and referred to the clerk's office.

For certain cases, such as Social Security review and immigration, the conference attorneys may conclude that a conference will not be beneficial. A standard scheduling order used by the clerk's office is then issued, and counsel is required to send a written request if the briefing schedule requires modification. For most cases, however, a conference is

held within a month of filing of the docketing statement. The initial conference date is set by written notice or by telephone with written confirmation.

In-person conferences are preferred, and at least one is usually scheduled if both attorneys work within a fifty-mile radius of one of the conference sites. In other cases, or when the conference attorneys determine that an in-person conference is not necessary, an initial conference by telephone is arranged. As shown in table 12, there was an average of 113 conferences per month in 1983, 93 of which were first conferences. Subsequent conferences are usually by telephone unless their purpose is to pursue settlement negotiations. The conference attorneys estimate that approximately two-thirds of the cases involve some telephone conferencing, a figure that will increase as the program is expanded to outlying districts.

The in-person conferences take place in the federal courthouses of San Francisco, Seattle, Portland, and Los Angeles. Counsel attending the conferences must have the authority to make decisions about settlement or narrowing of issues, consolidation of appeals, and other issues that are to be discussed. If attendance is not possible, lead counsel must arrange to be available by telephone and must appoint a substitute attorney with broad authority to settle or narrow the appeal and agree on case-processing matters. If any of the party attorneys are unfamiliar with the process, the conference begins with a brief explanation of its purpose. The prebriefing conference is described as the appellate equivalent of the pretrial conference, intended to or-

TABLE 12

LEVEL OF PREBRIEFING CONFERENCE ACTIVITY

	1983	Monthly Average
Total conferences	1,355	113
First conference	1,117	93
Second conference	182	15
Subsequent conference	56	5
Total orders issued	2,337	195
Briefing orders	877	73
Stays of proceedings	461	38
Extensions of time	322	27
Releases from program	248	21
Settlement/show cause order	134	11
Miscellaneous	295	25

NOTE: Information is this table is taken from the reports on the program compiled by the staff attorneys' office. The monthly average is based on activity of the program during 1983, when the program was in effect in all four districts. During this period, there were approximately 202 appeals each month, 40 of which were pro se appeals, and 162 of which were eligible for conferencing. Approximately 35 percent of the appeals are from the Central District of California, 25 percent are from the Northern District of California, 20 percent are from Oregon or the Western District of Washington, and 20 percent are agency appeals in which the evidentiary hearing was held in one of these four districts.

ganize and structure the appeal and determine simple matters with a minimum of judge involvement. The topics to be addressed and the confidentiality of the process are discussed. Counsel for the appellant is then asked what issues he or she expects to raise on appeal. Any jurisdictional problems are addressed, with the conference attorney suggesting ways to eliminate minor jurisdictional defects that would not lead to dismissal. The possibility of settlement or narrowing of the issues on appeal, and

the structure and length of the brief, are also discussed. During this process the conference attorneys are likely to field a number of questions concerning appellate procedures and standards from members of the bar who have not practiced before the court of appeals. Most of the in-person conferences are thirty-five to forty minutes; simple cases may require no more than fifteen minutes, and complex cases may require as much as an hour.

Although the conference attorneys raise the possibility of settlement, the preferred practice is to rely on counsel to indicate an interest. When such a possibility exists, the conference attorneys explore settlement issues in depth and indicate that they are willing to hold subsequent conferences or to refer cases to magistrates or senior judges for additional settlement efforts. The pilot program in the Western District of Washington permits referral to a member of the Federal Bar Association who will direct the settlement discussions. More than one conference is conducted in approximately one-sixth of the cases. Although settlement is the primary reason for such conferences, they also may address some problem with the record that developed after the initial conference.

The usual result of the prebriefing conference is an order setting forth a briefing schedule and maximum page limits for each brief. (A copy of this order is included in appendix F.) Table 12 shows that an average of seventy-three briefing orders were issued in each month of 1983. If the court reporter's transcript has not yet been ordered, a deadline is set for this as well. The matters discussed in the conference are not dis-

closed by the conference attorneys unless they are embodied in such an order, or unless there is a motion for reconsideration of the order resulting from the conference. A party may move for reconsideration by a judge of any order issued by a conference attorney. Within ten calendar days of the date the order is filed, the motion for reconsideration is heard by the coordinating judge of the administrative division in which the appeal is filed. After ten days any motion for reconsideration is referred to the judge serving on the single-judge motion panel.

Formal motions for reconsideration are rare. The conference attorneys are frequently able to work out disagreements with counsel through negotiation, in keeping with the program's primary purpose of avoiding formal motions for procedural relief. In fact, from the filing of the docketing statement to the completion of the briefs, the conference attorneys are authorized to grant informal requests for time extensions usually on the basis of a telephone call, especially if extra time might result in a reduction in brief length or in settlement of the case.

Early in the program, a lack of coordination between the conference attorneys and the clerk's office resulted in a measure of confusion. The granting of a request for an extension of time in the initial conference is considered equivalent to the first extension that is typically granted by the clerk's office in cases not diverted to the Prebriefing Conference Program. However, monitoring of compliance with briefing schedules is a duty of the clerk's office. The preliminary evaluation of the program found that the clerk's office was reluctant to dismiss confer-

enced cases that exceeded the briefing periods set out in rule 31 of the Federal Rules of Appellate Procedure since the parties may have in fact been in compliance with a schedule that had been negotiated with a conference attorney. Closer cooperation between the clerk's office and conference attorneys has diminished this problem.

Another early difficulty of the program concerned delays in ordering the court reporter's transcript. Initially, attorneys were encouraged to delay ordering the transcript until after conference discussion concerning possible limitations on record size. Soon it became apparent that the conference program was not particularly effective in reducing the record size, that transcript length was not a primary concern of the judges of the circuit, and that postponement in ordering the reporter's transcript was causing needless delay in the appellate process. Currently transcripts are ordered before the conference, pursuant to the same schedule that governs nonconferenced cases.

Effectiveness

The costs of the Prebriefing Conference Program are clear: It requires the time of the senior staff attorneys as well as additional expenses incurred by the parties when counsel are required to participate in the conference. Although these costs may be offset by improvement in the quality of appellate practice and diminished burdens on the judges, such benefits are hard to assess in an objective manner.

The fact that the prebriefing conference occurs early in the

appellate process--usually about one month after the docketing statement is filed--makes it difficult to determine what would have happened without one. Furthermore, some of the factors likely to be influenced by the program cannot be defined in measurable terms. For example, it is difficult to determine the breadth of issues on appeal in order to ascertain whether the program has been successful in narrowing these issues. Brief length is much easier to measure, but many cases must be examined in order to detect meaningful differences.

Since the primary purpose of the Prebriefing Conference Program is to ease judge burden, the judges of the Ninth Circuit are the most appropriate sources of information concerning the effectiveness of the program. The judges were surveyed twice, six months and two years after the program was initiated. Most of them were unwilling to pass judgment on the program, noting the difficulty of assessing its effects when the appellate materials do not indicate which cases were referred to the program. However, all eight judges who offered an assessment indicated that the program seems to have a beneficial effect. Several of these judges also expressed concern about the number of staff attorneys required to maintain such a program.

A more relevant assessment can be found in the reactions of attorneys who participated in the prebriefing conferences. A preliminary evaluation, conducted by the circuit executive's office approximately one year after the program began, involved sending questionnaires to every attorney participating in a prebriefing conference. Only half were returned so the results must

be interpreted with caution. The program was modified in response to some of the survey findings so the results may not accurately reflect the functioning of the current program. Nevertheless, the survey offers some insight into the perception of the attorneys who have participated in the initial program.

As a preliminary question, the attorneys were asked to assess the overall performance of the conference attorneys. Because they were rated as "knowledgeable" (84 percent), "reasonable" (87 percent), and "effective" (82 percent), it appears that any reservations expressed about the program cannot be attributed to shortcomings in the performance of the conference attorneys.

The survey results suggest that the program has been helpful in improving the quality of the appellate practice. In approximately 85 percent of the cases, the conference attorneys discussed narrowing the issues on appeal, and two-thirds of the attorneys in these cases believed the program to be successful in this regard.

Sixty percent of the attorneys expect that the program will be effective in reducing the number of motions. Responses to the survey suggest that this may be due to the ease with which scheduling modifications can be obtained without resorting to formal motions.

The effectiveness of the program in reducing the length of the briefs and records is more difficult to determine. Although the Federal Rules of Appellate Procedure permit briefs of up to fifty pages, the median length of briefs prior to the program was thirty pages, including great variation. Measures collected by

the conference attorneys indicate that the median length of briefs submitted after the conferences are between twenty-eight and thirty pages long. Although it may appear that the program has had little or no effect on brief length, this conclusion might be unwarranted. For example, if the program is successful in encouraging settlement of simpler cases with briefs of less than average length and is effective in reducing the length of briefs in more complex cases, the median of thirty pages before and after implementation of the program may disguise the effectiveness of the program in achieving both of these goals. Of course, any measure of brief length ignores the quality of the presentation of issues in the briefs. If the conference results in narrower issues on appeal and better development of those issues that are submitted, the absence of a reduction in brief length should not be used to demonstrate that the program is a failure. Seventy percent of the attorneys expected some success in this area, while several judges had already noticed a reduction. Until a more accurate measure is developed, these impressions offer the best evidence of the effect of the program on brief length.

The attorneys found the program to be less successful in reducing record length. This issue was discussed in approximately 60 percent of the cases selected for the study, and only 19 percent of the attorneys in those cases said record lengths had been reduced. Only 23 percent of the attorneys considered it reasonable to expect the program to serve this function; less emphasis has recently been placed on reducing record length.

Settlement efforts by conference attorneys also received mixed reviews. If there is a prospect of settlement, the conference is a convenient opportunity to discuss it. Settlement was discussed by the conference attorneys in 65 percent of the cases, and the survey indicates that the attorneys found these discussions helpful about half the time. Only 27 percent of the attorneys interviewed, however, expect the program to be effective in encouraging settlement.

Some of the judges did not feel that it is the role of the Prebriefing Conference Program to bring about increased rates of settlement. Those who did suggested that the program refer cases with settlement potential to someone with judicial authority and litigation experience. Because the judges of the circuit have little time to conduct such negotiations, reliance on senior judges, retired state court judges, or magistrates has been suggested as an option. A pilot program recently developed in the Western District of Washington will permit conference attorneys to refer cases with prospects of settling to mediators who are members of the federal district bar association. In other districts, the conference attorneys continue to encourage settlement--in subsequent conferences, if necessary--in those cases where it seems possible.[23]

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23. An effort to determine changes in settlement rates and elapsed-times-to-filing of the last brief was unsuccessful. Settlement rates and elapsed times in the months before and after implementation of the program in the individual districts were too unstable. Measurement of these effects is complicated by seasonal variation and differing trends within districts. Of course, the primary purposes of the Prebriefing Conference Program are not to settle cases or accelerate the briefing process.

The Prebriefing Conference Program is perceived as particularly helpful in instructing members of the bar in appellate practice in the circuit. Discussions with the conference attorneys suggested that this is especially important for counsel who have not practiced before the federal appellate courts, and counsel view the conference attorneys as points of contact with the court. Several of the judges mentioned that strong support for the program had been voiced by several leading members of the various federal bar associations.

The survey also revealed that the benefits of the conference program for some classes of cases has been limited. Almost one-third of the attorneys indicated that their cases did not belong in the program because they were "too simple" or "involved only a single, clearly defined issue." Conference attorneys also raised the possibility of removing the simpler single-issue cases from the program. When the program was recently expanded throughout the circuit, the conference attorneys were instructed to focus their efforts on those cases that would benefit most from conferencing. As a result, cases such as Social Security and immigration appeals are now issued standard scheduling orders, and no conference is held unless the attorneys specifically indicate that such a conference will be of assistance.

The Prebriefing Conference Program is a good example of an innovative program that was implemented in a limited manner and gradually evolved into an accepted part of the circuit's appellate process. As the program expanded, it sharpened its objectives and eliminated those activities that did not appear produc-

tive. Although it is difficult to demonstrate its effectiveness in objective measures, the program has earned the support of the court and the bar. The experiences of the Ninth Circuit Court of Appeals and of other federal circuit courts indicate that this preappeal conference program can be helpful in improving the appellate process.

Two additional issues deserve to be addressed as the program expands. Because cases with settlement potential in the Western District of Washington are identified and referred to local mediators by the conference attorneys, there is an opportunity to better understand their characteristics. This pilot project also should indicate the relative effectiveness of settlement efforts conducted by the conference attorneys and by local attorneys serving as settlement mediators.

The role of in-person conferences also deserves closer examination. Although an in-person conference facilitates communication, it is difficult to determine whether this advantage outweighs the delay and expense involved in gathering the participants in a single location. Telephone conferences are becoming more common as the services of the conference attorneys are extended to outlying districts where in-person conferences are impractical. Presumably, they also will become more common than in the past in the Western District of Washington as settlement efforts are delegated to the local mediators. As they gain more experience with these procedures, the staff of the Ninth Circuit may be able to develop standards for determining the proper role of in-person conferences that can guide the actions of other federal circuit courts.

VII. CHANGES IN CASE ACTIVITY IN THE NINTH CIRCUIT

Statistics offer incomplete measures of court performance and can be misleading; objects and events are counted while quality of judicial consideration and fairness of the disposition remain unexamined. Nevertheless, concern over statistical measures of court performance was one of the factors that led the Ninth Circuit Court of Appeals to adopt the Innovations Project.

Common statistical measures of court and judicial activity reveal that the performance of the Ninth Circuit Court of Appeals has notably improved in recent years. More cases are being terminated, and the average time from filing to disposition has dropped sharply from earlier levels. These improvements are particularly impressive because they were accomplished during a period of rising case filings and diminished reliance on visiting judges. Much of the improvement certainly is due to the increase in judgeships for the court. However, the analyses suggest an additional 27 percent increase in case participations by active judges results from the innovations described in this report.

Data collected by the Administrative Office are helpful in demonstrating changes in case processing over time and in comparing the Ninth Circuit with other federal appellate courts. The published figures by the Administrative Office for all federal circuit courts are based on annual cycles that run from July to July, making awkward the assessment of changes adopted in

January 1982. These data are supplemented by information from the Ninth Circuit that offer more precise measures of court performance from January to January. However, the best yearly records from the Administrative Office for examining the impact of the innovations are designated as 1983 data, containing measures of case activity from July 1, 1982, to June 30, 1983, while the most appropriate records from the clerk's office are designated as 1982 data, following the annual cycle from January 1, 1982, to December 31, 1982. To avoid confusion here, measures of annual cycles that run from July to July will have the prefix "CY," indicating the Administrative Office measure of a "court year."[24] The result is a patchwork of various measures that, when viewed cumulatively, demonstrate the improvements in the court's performance.

Measures of Case Processing

The most common measures of appellate court activity are the number of cases filed, the number of cases terminated, and the number of cases pending at the end of the year. Figure 1 indicates the number of cases filed in the Ninth Circuit Court of Appeals in each court year since 1970.[25] The number of cases

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24. The Administrative Office actually refers to this measure as a "statistical year," but because the staff of the Ninth Circuit Court of Appeals refers to this as a "court year," this convention will be followed in this report.

25. Data for this figure and the three following ones are taken from Federal Court Management Statistics, an annual publication by the Administrative Office, for the years 1973 through 1983. The 1970-72 data were included in the 1973 edition.

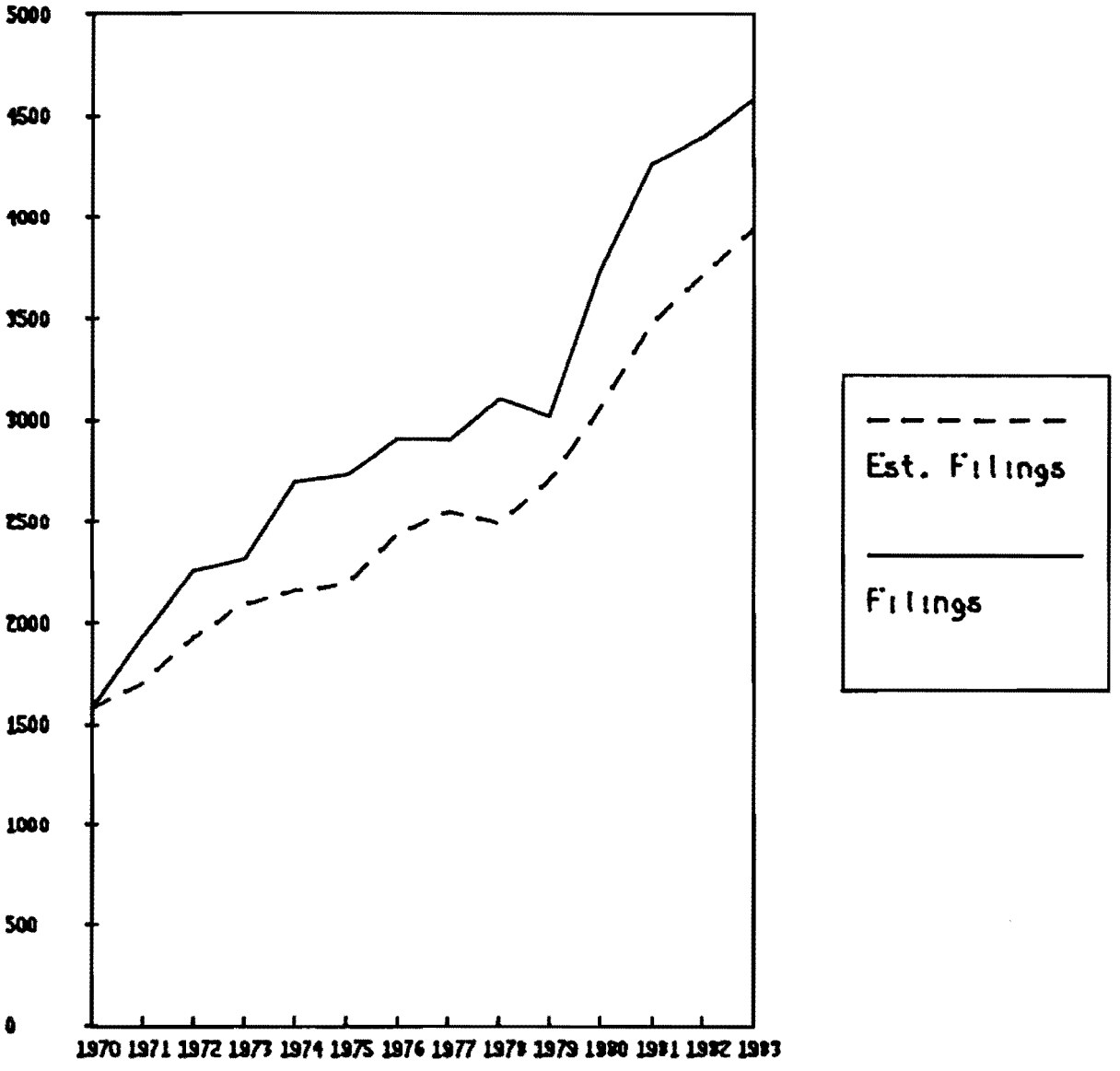
filed tripled from CY-1970 to CY-1983; increases were especially sharp after CY-1979. The broken line in figure 1 shows the rate at which the case filings would have risen had the increases in the Ninth Circuit followed the average annual rates of increase for all other federal circuit courts. It is clear that the Ninth Circuit experienced increases in case filings that exceed the overall rate for the rest of the circuits.

During this period the Ninth Circuit Court of Appeals also sharply increased the rate at which cases were terminated. Figure 2 demonstrates this increase, again sharper since CY-1979. The increase in the number of cases terminated from CY-1970 to CY-1979 occurred when the court had thirteen active appellate court judges. From October 1979 to July 1980, a period that roughly corresponds to CY-1980 on the graph, ten new judges joined the appellate court. These additional judges and a relatively heavy reliance on contributions by visiting judges contributed to the sharp increase in terminations from CY-1979 to CY-1981. The number of cases terminated in CY-1982 includes cases terminated six months before and six months after the start of the Innovations Project in January 1982. The increase in cases terminated in CY-1983 occurred after implementation of the project.

Despite increases in the number of cases terminated, the number of cases awaiting judicial action at the end of each year increased steadily until the additional judges entered service (see figure 3). After CY-1980, the number of pending cases began declining, but this statistic must be interpreted with caution.

FIGURE 1

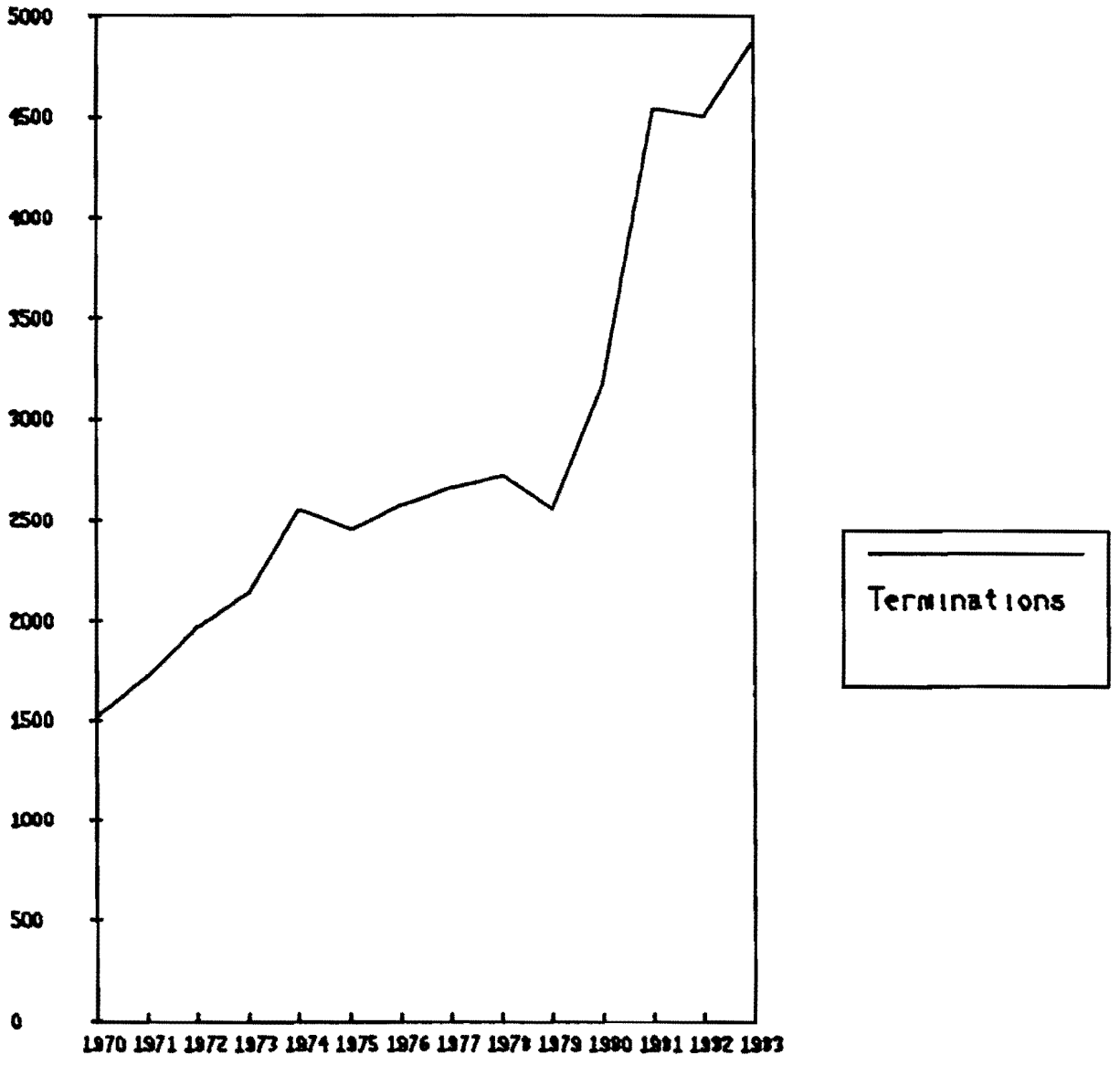
NUMBER OF CASES FILED



NOTE: Based on Administrative Office measures of court years from July 1 to June 30.

FIGURE 2

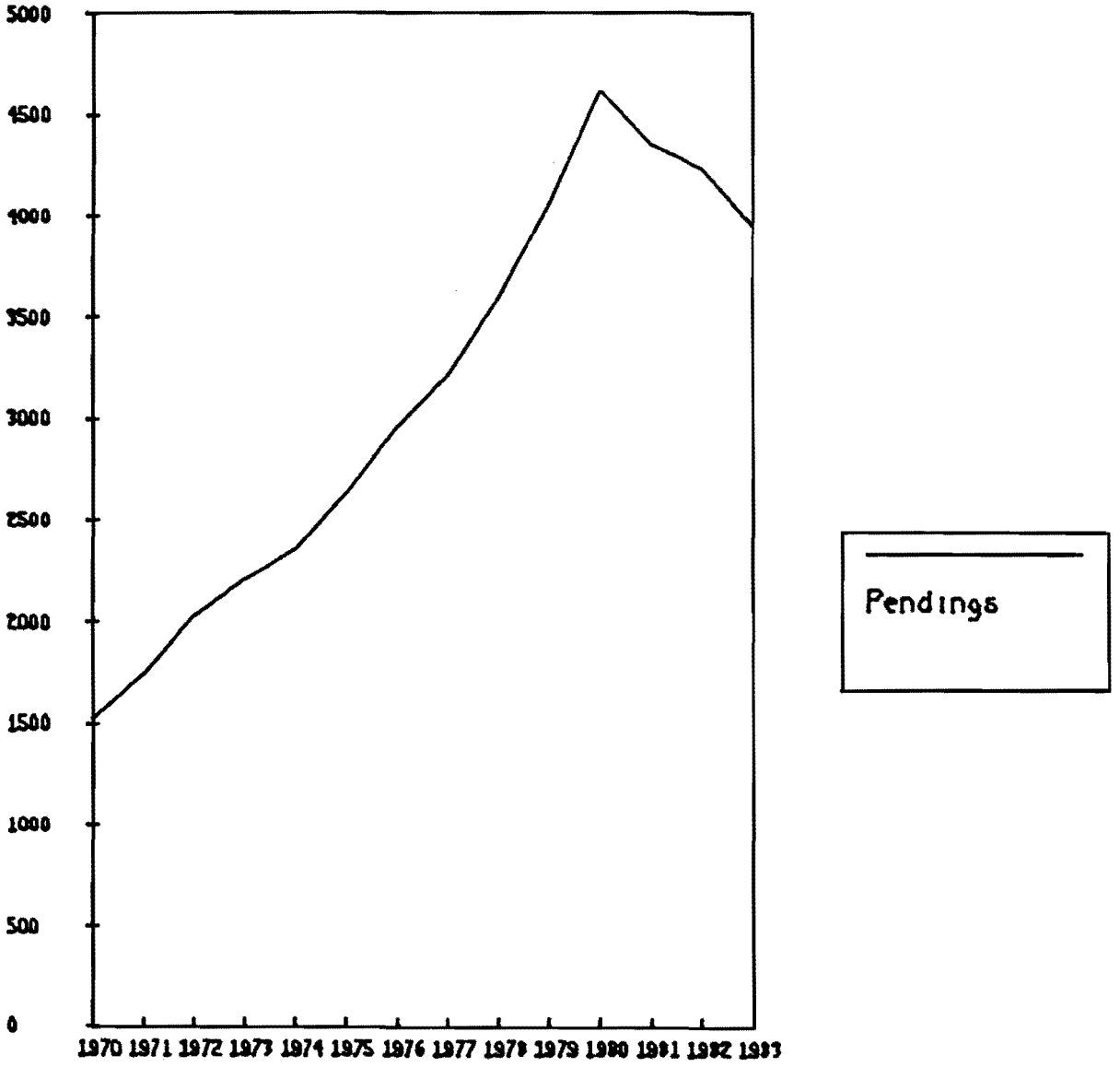
NUMBER OF CASES TERMINATED



NOTE: Based on Administrative Office measures of court years from July 1 to June 30.

FIGURE 3

NUMBER OF CASES PENDING
AT THE END OF THE COURT YEAR



The pending caseload includes cases undergoing some preliminary procedure, such as preparation of the briefs by the parties, as well as cases fully prepared and awaiting argument. Increases in the number of cases pending at the end of the year reflects, in part, the increases in earlier case filings and the unavoidable passage of time that is required for briefing, submission, and drafting of a disposition. For example, during the summer of 1983 the Ninth had succeeded in calendaring all of the cases that were fully briefed and awaiting submission, and there were still almost 4,000 pending cases. Presumably, these cases were undergoing court procedures in preparation for calendaring. These 4,000 cases represent a "floor" in the number of pending cases, and the number of pending cases cannot be expected to go below this level without a modification of court procedures or a drop in the filing rates.

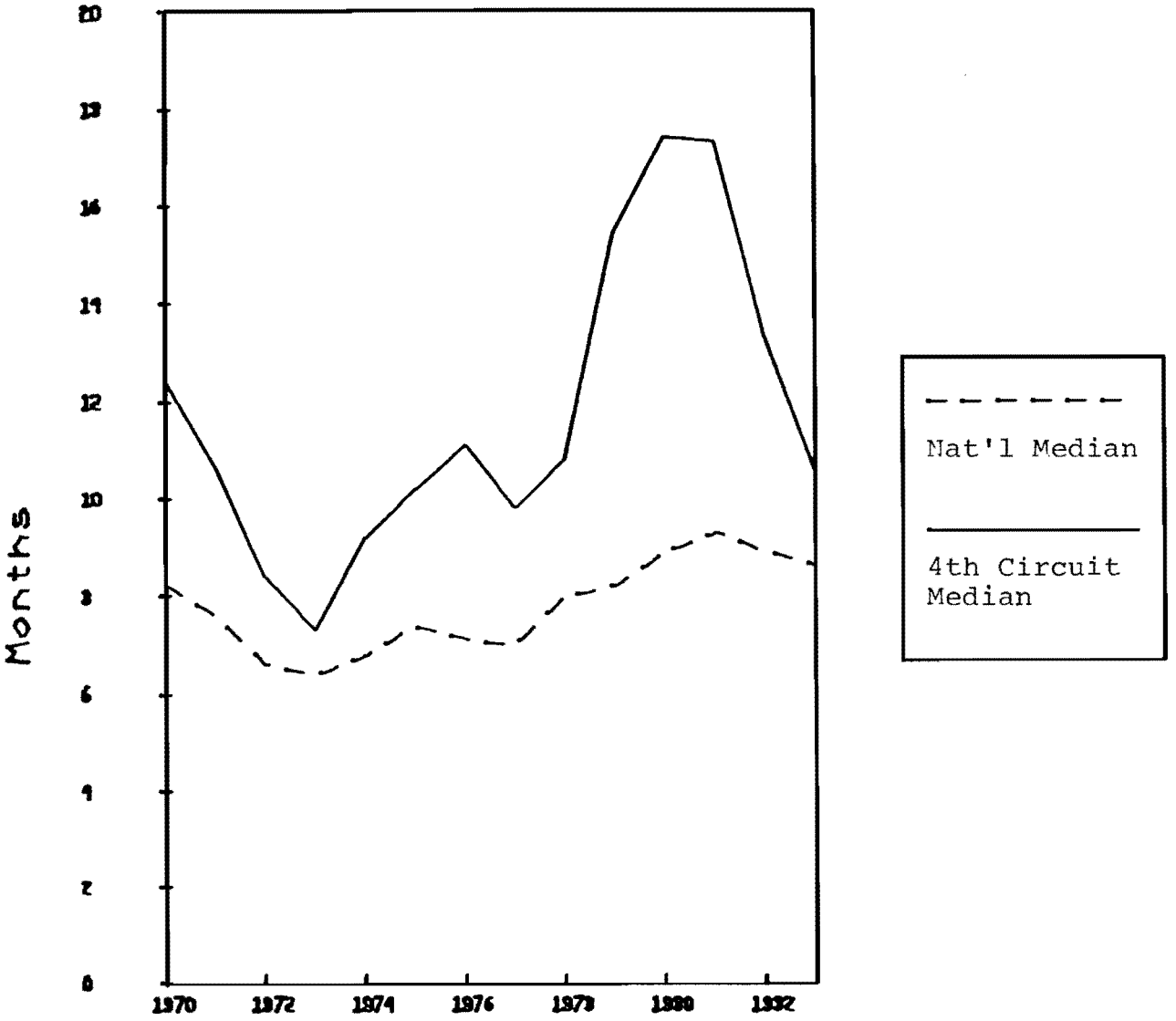
Measures of Case Disposition Time

While the numbers of cases filed, terminated, and pending are of concern to persons involved in the administration of the federal courts, the time from filing to disposition is of greater interest to the litigants. The Ninth Circuit Court of Appeals has made considerable gains in moving cases to a speedy disposition.

Figure 4 indicates the median number of months that passes from filing of the complete record to disposition for cases terminated after hearing or submission on briefs. This median increased by ten months, from 7.3 months in CY-1973 to 17.4 months

FIGURE 4

MEDIAN ELAPSED TIME FROM FILING
OF COMPLETE RECORD TO DISPOSITION



NOTE: Based on Administrative Office measures of court years from July 1 to June 30.

in CY-1980, then declined to 10.5 months in CY-1983. Although these improvements have been dramatic, the median disposition time for terminated cases has remained above the national average. Again, the improvement follows the arrival of additional judges, as well as increases in the productivity of the court. Furthermore, the rate of increase in the number of cases filed has been more moderate in recent years, permitting the court to overcome the backlog of cases and concentrate on the more recently filed cases.

Closer inspection of the improvements in disposition time reveals that the period from the filing of the last brief in a case to submission to a three-judge panel for disposition has been reduced by more than half. In each bar graph in figure 5, individual steps identify the median number of days from notice of appeal to filing of the last brief, to submission of the case to the panel of judges, and to disposition.[26] The disposition time for all submitted cases dropped from 684 days in 1980 to 378 days in 1983. The greatest reductions were in the number of days from filing of the last brief to submission to a three-judge panel. A separate analysis, not portrayed in the graph, revealed that the median number of days that elapsed between these two events dropped from 302 days in 1980, to 224 days in 1981, to 127 days in 1982, to 87 days in 1983. The number of days from notice

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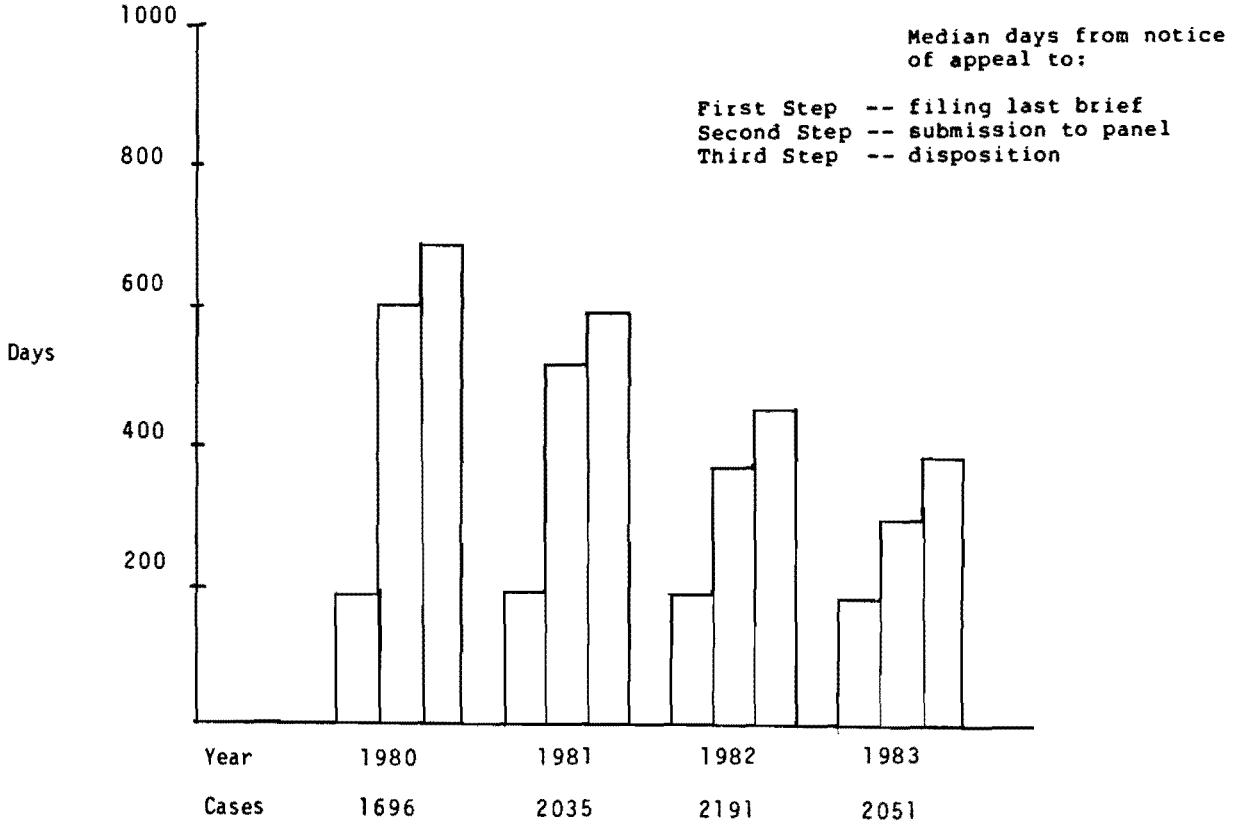
26. Unlike the preceding figures, this graph is based on records of the Ninth Circuit clerk's office and measures the median disposition times of submitted cases that were terminated from January 1 through December 31 of each year.

FIGURE 5

DISPOSITION TIMES FOR SUBMITTED CASES



of appeal to filing of the last brief and from submission to a panel to disposition remained fairly stable.

The greatest improvements in disposition time occurred in nonpriority civil cases. As shown in figure 6, from 1980 through 1983 the median number of days from filing to disposition in such cases dropped by more than half, from 846 days to 393 days. Again, the greatest reductions occurred in the period from filing of the last brief to submission for disposition. Figures 7 and 8 reveal that during this same period disposition times for criminal cases remained stable, and disposition times for agency cases remained stable after an initial reduction in 1981. These improvements reflect the effects of increases in the number of cases terminated, due to additional judgeships, increases in productivity, and changes in the rate at which cases are filed.

FIGURE 6

DISPOSITION TIMES FOR
NONPRIORITY CIVIL CASES

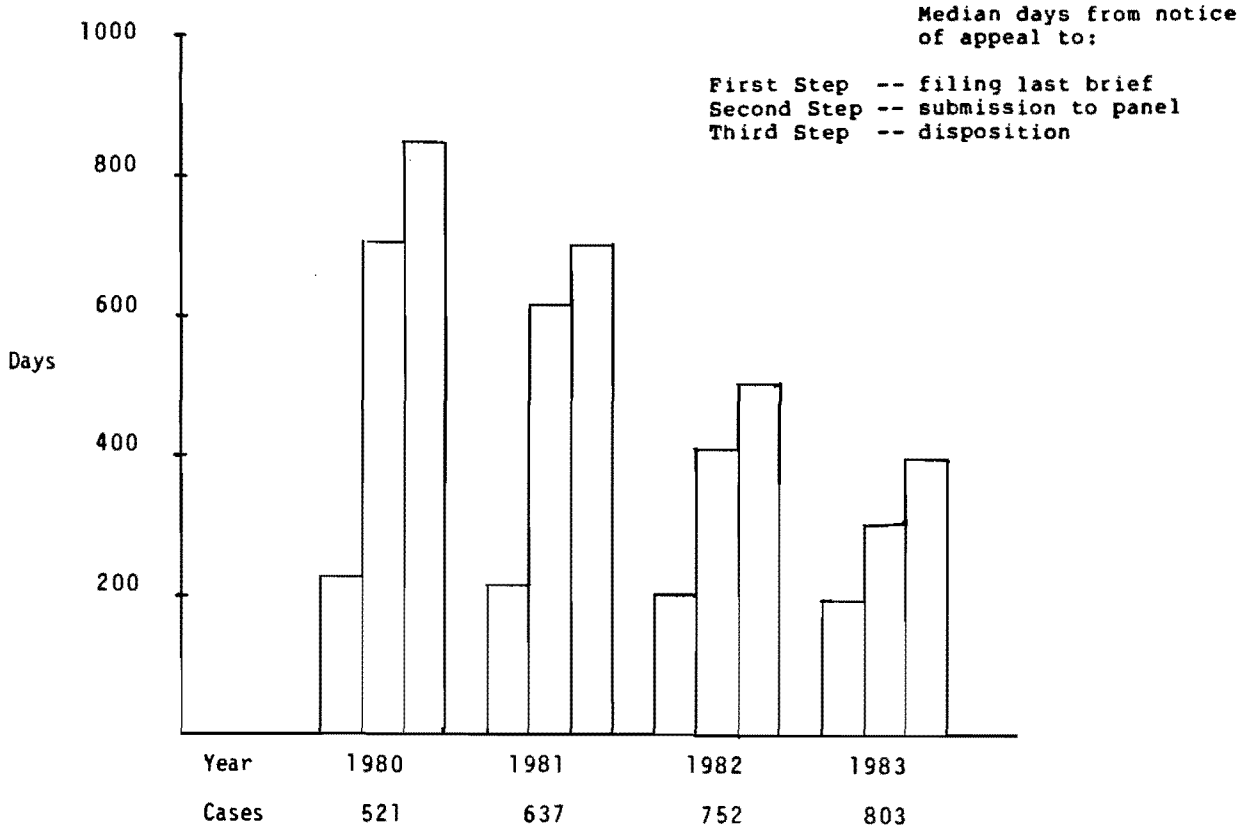


FIGURE 7

DISPOSITION TIMES FOR CRIMINAL CASES

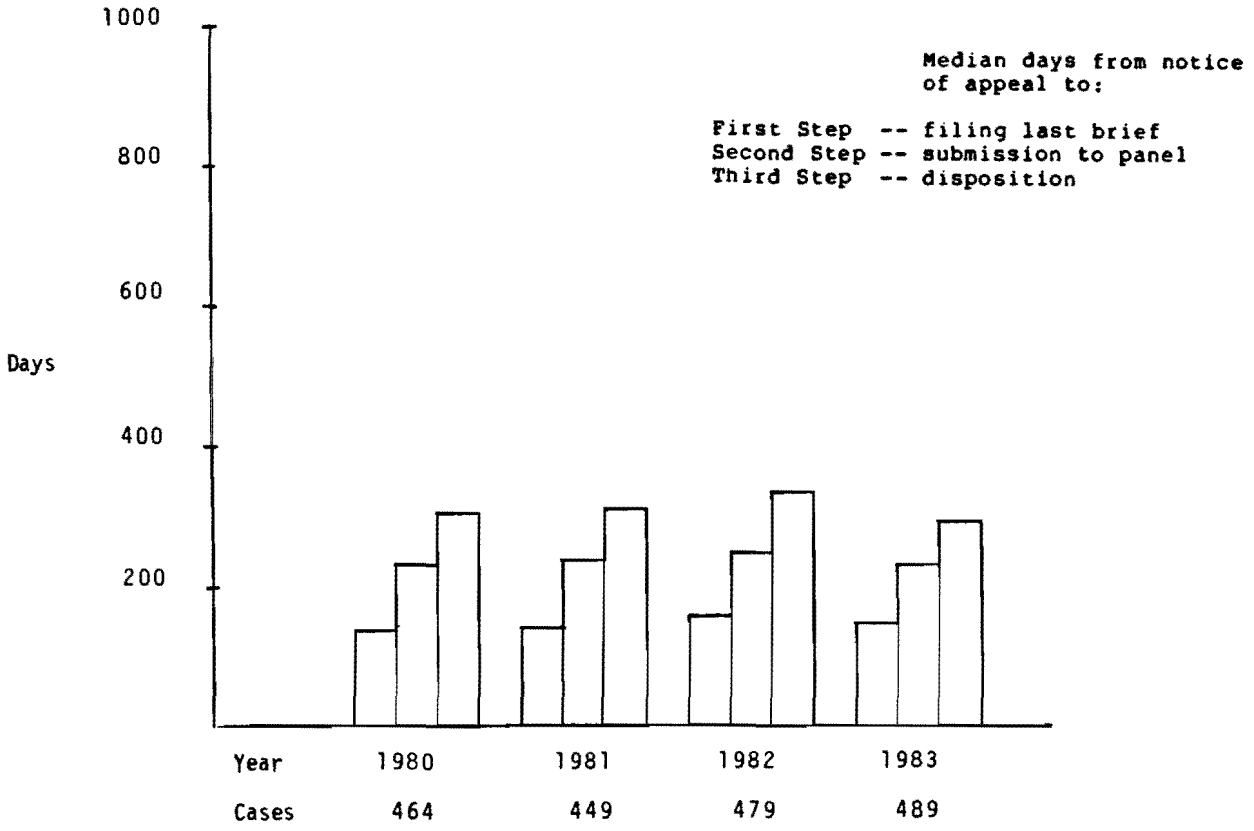
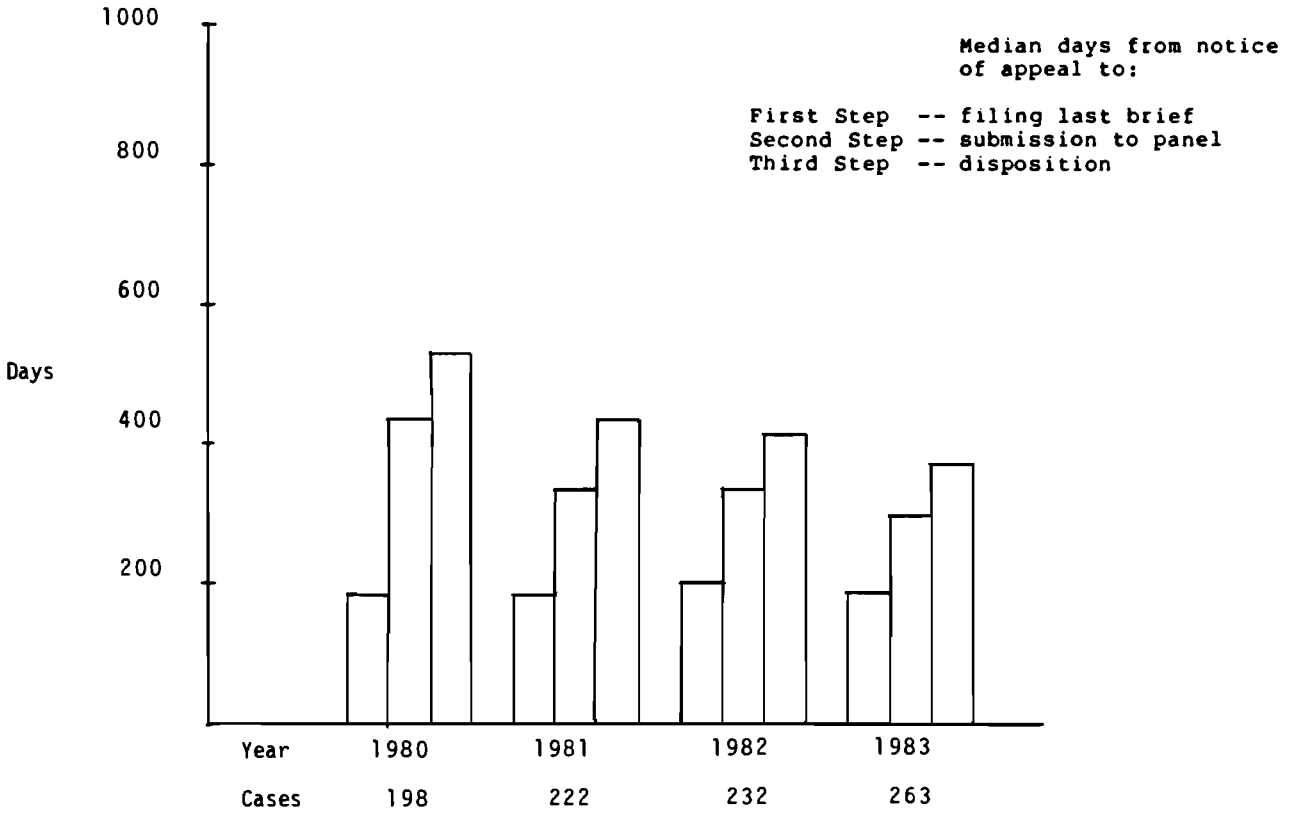


FIGURE 8

DISPOSITION TIMES FOR AGENCY CASES



Measures of Case Participation

The above figures demonstrate improvements in the overall performance of the court, but offer misleading indications of the productivity of the judges. General assessments of case activity fail to take into account changes in the number of judgeships and the contributions of visiting and senior judges. Furthermore, because a case is decided by a panel of judges, "case" is an awkward measure of the work of individuals. Participation by a judge on a panel that considers a case is a more appropriate measure. For example, when a single case is submitted to a panel of three judges, each of the judges would receive credit for one "case participation."

The number of case participations by judges increased through 1982, then dropped in 1983 (see table 13). The decline in 1983 resulted in part from the success of the court in clearing its backlog of cases awaiting calendaring. In the latter half of 1983, the court had succeeded in calendaring all cases that were ready for submission and was forced to reduce and cancel a number of argument panels. Because there was not a sufficient number of cases to fill the argument calendars of judges scheduled and willing to serve, the totals for 1983 are not an accurate measure of the productive capacity of the court.

The total number of case participations in each year is divided into the number of participations by active judges, senior judges, and visiting judges who are either district court judges from within the Ninth Circuit or appellate court judges from other circuits. As the table shows, the number of case

TABLE 13

CASES DISPOSED OF BY ACTIVE, SENIOR, AND VISITING JUDGES[1]

	1980	1981	1982	1983
Total case participations	6,552	7,774	8,319	7,556
Active judges	4,216	5,280	6,694	6,108
Senior judges	720	505	548	526
Visiting judges	1,616	1,989	1,077	922

[1]A "case participation" by an individual judge is an appeal in which the judge hears oral argument or where the appeal is submitted on the briefs. When a single case is heard before a panel of three judges, each judge serving on the panel gets credit for one case participation. These figures do not include participations in en banc proceedings. There were eight en banc cases terminated in 1981, twelve in 1982, and thirteen in 1983, with each case decided by a panel of eleven active judges of the circuit.

participations by active judges increased sharply during this period. The increase in 1981 reflects the contributions of the ten additional active judges who entered service during this period. The increase from 1981 to 1982--a period when the number of active judges remained constant--indicates the success of the court's commitment to increasing the number of case participations by active judges. During this period, case participations by active judges increased 27 percent while case participations by visiting judges dropped by almost half.

Table 14 presents average participations in terminated cases from 1980 through 1983. The figures for average case participations for 1980 include data only from those judges who were in service for the entire year. The table reveals that in 1982 the active judges of the Ninth Circuit Court of Appeals disposed of an average of 291 cases, 62 more cases than in the year before.

The additional cases are almost evenly divided between participations in oral arguments and participations in cases submitted for disposition on briefs, though this results in a notable increase in the proportion of cases submitted on briefs. These figures do not include service by the judges on en banc panels, which can be quite demanding. There were eight en banc cases terminated in 1981, twelve in 1982, and thirteen in 1983, with each case decided by a panel of eleven active circuit judges. All but one of these cases were decided after oral argument. However, the figures in table 14 do not indicate the extent of the variation among the judges in the number of case participations. Although the twenty-three active judges participated in an average of 291

TABLE 14

AVERAGE PARTICIPATIONS IN TERMINATED CASES

	1980[a]	1981	1982	1983
Average for active judges	226	229	291	265
Oral argument	172	188	221	197
Submission on briefs	54	41	70	68

NOTE: A "case participation" by an individual judge is an appeal in which the judge hears oral argument or where the appeal is submitted on the briefs. When a single case is heard before a panel of three judges, each judge serving on the panel gets credit for one case participation. These figures include participations in all cases, not just lead and single cases, and do not include participations in en banc proceedings. There were eight en banc cases terminated in 1981, twelve cases in 1982, and thirteen cases in 1983, with each case decided by a panel of eleven active judges.

[a]During 1980, six of the judgeships in the circuit remained unfilled for portions of the year. The measure of "average" participations for active judges in 1980 includes only participations by judges who were in active service at the beginning of the year.

cases, five of the judges participated in fewer than 261 cases and five in more than 321 cases. Some of this variation is due to participation on argument panels that were assigned a greater or a fewer number of cases consolidated or related to lead cases. However, there was also considerable variation in dispositions of lead cases among the judges.[27] An increase in overall performance can be achieved by encouraging able judges who participate in fewer than the agreed number of cases to meet a minimum standard.

Another measure of judicial activity the Administrative Office uses to compare judges in the Ninth Circuit with those in other circuit courts is the number of participations in lead and single cases, excluding participations in consolidated cases, cross-appeals, and other related cases that are likely to be resolved in the same proceeding.[28] For several years the Ninth Circuit disputed the published figures. It was recently discovered that standards used by the staff of the Ninth Circuit in defining cases as "consolidated cases" or "cross-appeals" were

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27. The average number of oral argument participations per active judge differs somewhat from the figures reported in table 2. The figures in this table identify the average number of participations in cases submitted to the argument panels during the year while the figures in table 2 identify the number of participations in cases terminated during the year.

28. Measures of case activity without regard to consolidation, such as those presented in table 14, offer better estimates of the changes that result from the Innovations Project. One likely effect of the case inventory process combined with the Prebriefing Conference Program is more frequent consolidation of cases. If this is so, measures that count only lead or single cases will underestimate the changes that result from these programs.

inconsistent with the standards specified by the Administrative Office and presumably used by the other circuits.[29] As a result, some Administrative Office published reports in recent years underestimate the actual number of case participations by Ninth Circuit judges.

Table 15 presents the average number of participations per judge in lead and single cases for the twelve federal circuit courts in CY-1983, including corrected numbers of participations for the Ninth Circuit Court of Appeals. The table reveals that the Ninth Circuit ranks sixth among the federal circuit courts, with an average of 259 participations per judge in lead and single cases.

Interpretation of the figures for appellate courts other than the Ninth Circuit requires caution. First, courts with relatively low rates of case participations may be quite efficient

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29. Under the standards set by the Administrative Office, cases are defined as "consolidated" if they are joined for all aspects of case processing. This definition was recently modified to make explicit that cases are to be defined as "consolidated" only if they are consolidated for briefing by appellants as well as for subsequent proceedings in the process. Frequently, cases in the Ninth Circuit Court of Appeals have separate briefs by several appellants, then are consolidated upon motion by the appellee, who submits a single brief, followed by several separate reply briefs. The Ninth Circuit erroneously counted such cases as "consolidated," even though they were briefed separately by the appellants, resulting in an underestimate of participations in lead cases when compared with other circuits. Cross-appeals posed a separate problem. The Ninth Circuit had been coding both appeals as cross-appeals and therefore was not receiving credit for even one lead or single case. The staff of the Ninth Circuit and the Administrative Office have worked together to develop corrected figures for recent years, but the corrections have not been made for the years prior to CY-1982.

TABLE 15

COMPARISON OF PARTICIPATIONS BY ACTIVE JUDGES
IN LEAD AND SINGLE CASES IN CY-1983

Rank	Circuit	Judge-ships	Total Part.	Average Part.	% of Cases Receiving Oral Argument
1	Fifth	14	4,302	307	46%
2	Eleventh	12	3,453	288	50%
3	Tenth	8	2,290	286	53%
4	Sixth	11	3,082	280	66%
5	Third	10	2,786	279	40%
6	Ninth	23	5,963	259	70%
7	Seventh	9	2,172	241	80%
8	Second	11	2,498	227	80%
9	First	4	895	224	77%
10	Eighth	9	1,661	185	63%
11	Fourth	10	1,481	148	89%
12	D.C.	11	1,135	103	90%
Total		132	31,718	240	64%

NOTE: This table presents the average number of case participations by active judges, based on data found on page 14 of the 1983 Federal Court Management Statistics. The number of case participations reported for the Ninth Circuit Court of Appeals has been corrected for an erroneous classification practice that resulted in an underreporting of actual participations in lead and single cases. An additional 819 misclassified participations, identified by the staff of the Ninth Circuit, were added to the 6,410 reported participations for a total of 7,229 case participations. This figure was then multiplied by 82.5 percent to yield 5,963 case participations by the twenty-three active circuit judges, or an average of 259 case participations per active judge. The figures presented in this table do not adjust for periods during which an authorized judgeship remained vacant. There were no vacancies on the Ninth Circuit Court of Appeals during this period. However, extended vacancies in the Fifth Circuit, Seventh Circuit, and Eighth Circuit are likely to have resulted in more average participations by the active judges in these circuits than these figures indicate. The estimates of the proportion of submitted cases involving oral argument are taken from table 9 on page 109 of the 1983 Annual Report of the Director of the Administrative Office of the United States Courts. These estimates are based on cases rather than participations and do not control for case participations by senior and visiting judges.

in dealing with their caseloads; most of the circuits listed in the lower half of this table would rank in a table displaying median times to disposition. Second, differences across circuits in the composition of the caseload are ignored in these computations. The Ninth Circuit Court of Appeals has a relatively high number of cases involving review of administrative agency actions and relatively few prisoner petitions. Other circuits, especially the District of Columbia, have caseloads with characteristics that make direct comparisons misleading. Third, data from other circuits may include classification errors similar to those found in the Ninth Circuit data. Circuit courts with judgeship vacancies during this period are especially likely to be shortchanged by the figures in the table since the average is based on the number of judgeships and not the number of judges actually in service.

Furthermore, the average number of case participations does not take into account the nature of each judge's participation, such as the extent of participations in oral arguments. The last column in the table indicates the percentage of lead and single cases that were disposed of after oral argument as opposed to after submission on the briefs. As the table shows, circuits with high numbers of case participations per judge generally dispose of a lower proportion of cases after oral argument. (The Third Circuit and the Eighth Circuit appear to be exceptions to this rule.) A table that ranks the circuits in order of partici-

pations in oral arguments would find the Ninth Circuit ranked somewhat higher than sixth.[30]

When appellate courts consider means of increasing the number of case participations, procedures for increasing the numbers of cases disposed of after submission on briefs are frequently proposed. Although table 15 would seem to support such a conclusion, the experience of the Ninth Circuit suggests that there are limits to which such procedures can be implemented. When the Ninth Circuit developed its program for increasing case participations, great emphasis was placed on the Screening Program as a means to expeditious disposition of cases submitted on briefs. After some initial skepticism, the Screening Program is now well accepted as an essential procedure in the Ninth Circuit. However, as discussed in chapter 5, the Screening Program's success was limited by a lack of cases that fit the criteria established for the program and an unexpectedly high number of cases rejected by the judges from the Screening Program and placed on the oral argument calendar. The fact that the judges of the Ninth Circuit found it inappropriate to decide as many cases through submission

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30. The active judges of the Ninth Circuit heard oral argument in an average of 185 lead and single cases in CY-1983, based on data from the clerk's office and including a correction factor for the undercounting of lead and single cases. Comparable data for other circuits are not readily available, though a rough estimate may be obtained by multiplying the proportion of cases receiving oral argument by the average number of case participations in each circuit. Such a method does not eliminate case participations by senior and visiting judges and may result in a biased estimate for those circuits, other than the Ninth Circuit, in which screening programs permit active judges to decide a disproportionate number of cases after submission on briefs.

on briefs as originally intended, despite their commitment to increased productivity, suggests that courts seeking to implement such programs must carefully consider the characteristics of the cases referred.

APPENDIX A

Local Rule 23

RULE 23

Administrative Units

(a) Creation of Administrative Units

Pursuant to 28 U.S.C. §41 (Pub. L. 95-486, 92 Stat. 1629), three administrative units are established:

The Northern Unit, composed of the districts of Alaska, Idaho, Montana, Oregon, Eastern and Western Washington;

The Middle Unit, composed of the districts of Arizona, Nevada, Hawaii, Guam, and Northern and Eastern California; and,

The Southern Unit, composed of the districts of Central and Southern California.

(b) Administrative Centers

Seattle, San Francisco, and Los Angeles/Pasadena are designated administrative centers for the Northern, Middle, and Southern Units, respectively.

(c) Place of Hearings

Cases arising from the Northern Unit will normally be calendared in Seattle or Portland, from the Middle Unit in San Francisco, and from the Southern Unit in Los Angeles/Pasadena, and provided, that cases shall be heard in such other places, including, but not limited to, Alaska and Honolulu, as the court

Rule 23 continued

may designate.

(d) Assignment of Judges to Calendars

Judges shall be assigned to calendars according to such policies as the court may provide by general order; however, insofar as reasonably practicable, each active judge shall be assigned to approximately the same number of calendars each year in the Northern, Middle, and Southern Units as each of the other active judges.

(e) Assignment of Panels to Calendars

Panels shall be allocated to the Northern, Middle, and Southern calendars in proportion to the caseload arising out of each Unit.

(f) Administrative Staff

(1) To the extent practicable, administrative personnel in the circuit executive's office, the clerk's office, and the staff attorneys' office initially will be organized internally into groups with each group responsible for providing staff support to a particular administrative unit;

(2) To the extent the court deems appropriate, administrative personnel will be permanently assigned to one of the three administrative centers;

(a) Branch clerk's offices shall be established in Los Angeles/Pasadena and Seattle; the principal office of the clerk shall remain in San Francisco;

(b) Regional libraries shall be maintained in Seattle, Los Angeles/Pasadena, Phoenix, San Diego, Portland, Anchorage,

Honolulu, Sacramento and Tuscon; the central library shall remain in San Francisco.

(g) Abrogated September 18, 1981

APPENDIX B

Local Rule 25

RULE 25

Limited En Banc Court

The en banc court, for each case or related group of cases taken en banc, shall consist of the chief judge of the circuit or the next senior active judge in the absence of the chief judge and ten additional judges to be drawn by lot from the active judges of the Court.

The drawing of the en banc court will be performed by the Clerk or a deputy clerk of the Court in the presence of at least one active judge and shall take place on the first working day following the date of the order taking the case or group of related cases en banc.

If a judge whose name is drawn for a particular en banc court is disqualified, recused, or knows that he or she will be unable to sit at the time and place designated for the en banc case or cases, the judge will immediately notify the chief judge who will direct the Clerk to draw a replacement judge by lot.

Notwithstanding the provision herein for random drawing of names by lot, if a judge is not drawn on any of three successive en banc courts, that judge's name shall be placed automatically on the next en banc court.

In appropriate cases, the Court may order a rehearing by the full court following a hearing or rehearing en banc.

APPENDIX C

General Orders Implementing the Limited En Banc Court

CHAPTER 5*

En Banc Procedures

5.1 Definitions and General Provisions

(a) Definitions

For purposes of this chapter:

(1) "Full court" means that number of authorized and appointed active judges actually present when all available judges are convened for the purpose of conducting judicial business.

(2) "En banc court" means that number of judges, greater than three, established by rule of the court, which shall hear and decide cases taken en banc as provided by statute, rule, or in these General Orders.

(3) "Eligible judge" means any judge who is not recused or disqualified and who entered upon active service before the date of a call for an en banc vote pursuant to subsection 5.5(b). A senior judge may elect to be eligible, in the same manner as an active judge, to be selected as a member of the en

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* The entire chapter was redrafted in 1980 to reflect the court's initiation of a limited en banc procedure. Further modifications in the procedure were approved at the 1981 Symposium. Minor amendments were approved at the August 1981 and September 1982 court meetings to clarify ambiguities as to the duties of the panel members, actions deemed as calls for a vote, and time limits in the en banc process. The chapter was amended further at the April 1984 court meeting to clarify the role of senior judges in en banc matters, and to further define procedures for "stopping the clock."

banc court reviewing a decision of a panel of which the judge was a member. However, a senior judge is not eligible to call for an en banc vote or to vote on whether to take a case en banc. Except as set forth in this subsection, a judge who takes senior status shall not participate in any decision with respect to en banc procedure after the effective date of his taking senior status. Notwithstanding the foregoing, a senior judge who takes senior status while serving as a member of the en banc court may continue to serve until all matters then pending before that en banc court are disposed of finally.

(4) "En banc coordinator" means an active judge apppointed by the chief judge to perform the duties set forth in this chapter.

(5) "Suggestion" means a suggestion by a party for en banc consideration and includes a petition for rehearing with suggestion for rehearing en banc.

(6) "Proposal" means a proposal by a member of the court that a panel amend its disposition.

(7) "Recommendation" means a recommendation by the majority of the members of a panel that a case be heard or reheard en banc, or that a suggestion be rejected.

(8) "Request" means a request by an active judge that a case be heard or reheard by an en banc court.

(b) General Provisions

(1) Judicial Participation

Each judge selected for the en banc court shall make every reasonable effort to sit on the en banc court, but if unable to sit the judge should notify the Chief Judge of the court as promptly as possible so that the clerk may be directed to draw a replacement. If for any reason a judge is unable to participate in the oral argument and the first conference on the en banc case, that judge shall neither vote nor participate further in the case.

Judges drawn for the en banc court shall set aside the entire day designated for the en banc case or cases. If more than one day is required for en banc business, the judges will be notified and should plan accordingly.

Only active judges may vote on taking a case en banc. All members of the court, senior and active, shall be kept informed of en banc proceedings, including all requests, responsive memoranda, and votes, until a case is taken en banc or returned to the panel. After a case has been taken en banc only those judges participating in the en banc court (a) shall be included in the distribution of memoranda, proposed opinions, and other communications regarding en banc proceedings, or (b) shall vote or write opinions on cases taken en banc. Before a case is taken en banc, all judges, including visiting judges who participated in a case before a panel, shall receive copies of all suggestions, requests, recommendations and communications.

(2) Duties of the En Banc Coordinator

(a) In General

The en banc coordinator shall supervise the time schedules provided in this chapter; circulate periodic reports on the status of each case under en banc consideration; may designate another judge to perform all or part of the en banc coordinator's duties during the coordinator's absence; and may suggest, for any particular case, the modification or suspension of the provisions of this chapter.

(b) Clearance of Order Rejecting En Banc Hearing

Whenever an order rejecting a suggestion is presented for filing, the clerk shall immediately notify the en banc coordinator. Before directing the clerk to file the order, the en banc coordinator shall insure that the time for making a request has expired and that no directive to hold en banc activity in abeyance remains in effect. If the en banc coordinator delays the filing more than 24 hours, he or she shall telephone the judge who presented the order.

(3) Vote Tallies

Orders rejecting or accepting cases for en banc consideration shall not specify the vote tally. Any judge may direct that his or her dissent to a failure to accept a case for en banc consideration be incorporated in the order.

(4) Use of Blue Transmittal Memoranda

In order to expedite the circulation of, and action upon, proposed majority and dissenting opinions, and to call

attention to memoranda relating to en banc business, all such papers shall be circulated to the participating judges with a blue memorandum of transmittal. Judges will instruct their office staff to process all such papers as quickly as possible and judges will, themselves, respond to all such communications as promptly as possible.

(5) Duties of Panel Members

The following persons shall be responsible for the entry of panel orders on en banc matters and for the distribution of the panel recommendation:

(a) The author of a majority disposition, when an active judge, or

(b) The presiding judge of the panel, when the author is either not a member of the court, or when the case has not yet been submitted.

After a panel recommendation, or following a suggestion by a party, in which either no request is made, or the recommendation or request fails to receive a majority vote, as the case may be, the author or presiding judge, as above indicated, shall be responsible for the entry of an order rejecting the suggestion.

5.2 Hearing En Banc

(a) Suggestion by a Party Prior to Calendaring before a Panel

The clerk shall (1) enter the receipt or filing of a suggestion for hearing en banc, (2) send copies to the en banc

coordinator and the appropriate motions attorney, (3) notify the parties that the case will be heard in due course by a panel unless the court votes to hear it en banc, and (4) send copies of the briefs to the motions attorney upon the completion of briefing.

As soon as possible after the completion of briefing, the motions attorney shall prepare for the en banc coordinator a memorandum setting forth the facts and issues of the case. The en banc coordinator shall promptly notify each active judge that en banc consideration has been suggested, but that the case will be calendared before a three-judge panel unless a judge calls for a vote. The en banc coordinator may also distribute an independent evaluation of the matter. Any active judge who favors an en banc hearing may so request within fourteen days after receipt of notice from the en banc coordinator.

The en banc coordinator shall notify the clerk and motions attorney of the rejection of the suggestion when either (1) no active judge requests a vote on the suggestion, or (2) upon a vote, there is no majority in favor of en banc consideration. Upon notification the clerk shall enter on the docket sheet a notation that the suggestion has been rejected.

(b) Recommendation by Panel or Request by Active Judge

The panel before which a case is calendared may recommend or any active judge may request, that the case be heard en banc. Such recommendation or request shall be made by prompt

notice to the en banc coordinator, who forthwith shall instruct the clerk to remove the case from the calendar. The panel or judge, as the case may be, shall circulate the recommendation or request to all members of the court with a memorandum setting forth the reasons therefor. The en banc coordinator shall after the circulation call for a vote, providing an active judge has either made the request or concurred in the panel's recommendation. If the case is not taken en banc it shall be restored to a panel calendar as soon as possible.

5.3 Amendment of Disposition; Proposal by Judge

Any active judge may, within twenty-eight days of the date of filing of a disposition, propose to the panel that it amend its disposition, and contemporaneously may ask the panel to stay the mandate. Any proposal to amend shall be accompanied by the text of the proposed amendment. The panel shall consider the proposed amendment.

The panel shall notify all members of the court if it decides to amend its disposition. Any amendment shall accompany the notification. The panel shall within fourteen days notify the judge who proposed the amendment of its action with respect to the proposed amendment in any event. Any request by the judge proposing the amendment for a vote on rehearing the case en banc shall conform to the procedures set forth in General Order 5.4 and 5.5. Notification of the panel's decision on a proposal or a panel rehearing shall be the responsibility of the author of the majority disposition.

5.4 Rehearing En Banc

(a) Suggestion by a Party

(1) Duties of Clerk

Upon the filing of a suggestion, the clerk shall forward a copy thereof to each active judge. If a suggestion is untimely, the clerk shall forward a copy thereof only to each member of the appropriate panel. A copy shall not be sent to the other judges unless the panel orders the suggestion filed.

(2) Duties of Judges Not on the Panel

Judges not on the panel should not take any action with respect to the suggestion until the panel considers the suggestion and makes a recommendation.

(3) Rehearing by Panel

If as a result of a suggestion the panel decides to allow a panel rehearing, it shall notify all members of the court in which event the suggestion shall be deemed rejected without prejudice to its renewal after the panel completes action on the rehearing.

(4) Duty of Panel when Suggestion Relies on Intercircuit Conflicts

When the suggestion contains, as one of its grounds, the allegation that the panel's opinion initiates a significant conflict with a decision of another court of appeals, the panel shall comment on this allegation in its recommendation to the court.

(b) Panel Recommendation

(1) Time and Content of Recommendation of En Banc Consideration

Subject to G.O. 5.2(b), a panel may recommend en banc consideration at any time after a case is assigned to it. A panel recommendation shall be forwarded to all members of the court and shall include a memorandum setting forth the reasons therefor.

(2) Time Within which Judges must Act on Panel Recommendation of En Banc Consideration

The time for acting on the recommendation shall not commence before all judges have been sent the suggestion.

(3) Time Within Which Judges Must Act on Panel Rejection of Suggestion

A recommendation to reject a suggestion requires no action by any judge, unless he or she favors a rehearing en banc. If no request is made within twenty-one days of the date of distribution of the panel's recommendation for rejection, the panel shall enter an order rejecting the suggestion.

(c) Request by Judge

(1) In General

Any active judge may request a vote on rehearing a case en banc: (1) sua sponte; (2) in response to a panel's rejection of a judge's proposal for amendment (see G.O. 5.3, supra); or (3) in response to a panel's recommendation that a suggestion be rejected (see G.O. 5.4(b)(3), supra). The requesting judge shall notify the panel and all other members of the court of any request, and shall within fourteen days of the date of distribution of the notice, forward a memorandum setting forth the reasons therefor. The date of

the memorandum will be deemed the date of the request for purposes of further en banc procedure.

(2) Staying the Mandate

If the judge does not forward a memorandum pursuant to this section, any hold placed on the issuance of the mandate shall
be released. If the request is made in a case where no suggestion has been filed and the requesting judge wants the mandate held, he or she shall make arrangements therefor with the en banc coordinator who will then notify the clerk to stay the mandate.

(3) Sua Sponte Requests

A judge may sua sponte request a vote on rehearing en banc within twenty-eight days of the date of entry of filing the disposition or the filing of an amended disposition, or within twenty-eight days after the filing of an order directing that a previously unpublished disposition be published.

(4) "Stopping the Clock" by an Active Judge

(A) If an active judge believes that further reflection by one or more judges may be necessary or helpful in aid of early disposition of a possible en banc question, any active judge without calling for a vote under this section, may delay the filing of an order denying rehearing and rejecting a suggestion for en banc consideration, as required by G.O. 5.4(b)(3), for a period of fourteen days by memorandum to the concerned panel with copies to all active

judges. Only one such delay is permitted; all active judges desiring delay must resolve their concerns within this fourteen-day period. If no active judge takes any further action within the fourteen days contemplated herein, the panel may proceed to file its order denying rehearing and rejecting the suggestion for en banc consideration.

(B) If within the fourteen-day period prescribed in (A) above an active judge believes it appropriate to request that the panel consider altering, revising, or modifying its opinion, that judge may delay the filing of an order denying rehearing and rejecting a suggestion for rehearing en banc by addressing such a request to the panel. A copy of this request, together with such supporting memoranda as might be appropriate, shall be sent to all judges. The request should suggest the specific changes thought to be necessary when appropriate and feasible. The panel shall respond to this request in any way as it deems appropriate within twenty-one days after the receipt of such request. The panel may file its order denying rehearing en banc within fourteen days after its response to the request has been dispatched unless a request for a vote on rehearing en banc previously has been made. The panel is not required to respond to any request made after the expiration of the initial fourteen-day period.

5.5 Procedure Upon Recommendation or Request for En Banc Consideration

(a) Responses

The active judges and any judge on the panel assigned to a case have fourteen days after the date of a recommendation by a majority of a panel or request by an active judge to distribute a response thereto. Time for exchanging additional memoranda may be arranged with the en banc coordinator, providing such additional time shall never exceed twenty-one days commencing with the expiration of the fourteen days referred to herein.

(b) Voting*

When the exchange of memoranda has been completed, the en banc coordinator shall call for a vote on the request. The communication shall include a ballot setting forth the questions to be voted upon. The en banc coordinator shall call for a vote on a panel's recommendation only if either the recommendation is concurred in by an active judge on the panel or any other active judge requests that a vote be taken on the recommendation. The en banc coordinator shall notify the judges when a majority of the active judges computed without regard to any recusals, has been reached or when voting is sufficiently complete to indicate that the request or recommendation has failed. Each judge shall cast a vote within fourteen days of the date of distribution of the call. Upon good cause shown by an individual active judge, the en banc coordinator may permit an additional period not to exceed seven days within which such judge may vote.

---

* The modification of section 5.5(b) reflects the judges' decision at the September 1982 court meeting to strengthen the language directing judges to cast votes on en banc matters.

(c) No Majority Favoring En Banc Consideration

If the recommendation or request fails to obtain a majority of the active judges, the en banc coordinator shall notify the judges of such failure. The panel shall resume control of the case and no further en banc action is required.

(d) Majority Favoring En Banc Consideration

If a majority of the active judges votes in favor of en banc consideration, the en banc coordinator shall notify the chief judge who will enter an order withdrawing the case from the panel and taking the case en banc. The number of votes required for a majority shall be the same regardless of recusals. If, in the exchange of memoranda and voting, any issues have been isolated for specific attention, the order shall set forth such issues.

If there is to be oral argument, the chief judge shall establish and insert the date, time, and place of argument. In the event no oral argument is to be heard, the chief judge shall designate a date, time, and place for a conference of the en banc court, which date ordinarily shall also be the date of submission of the case.

5.6 Reserved Time

En banc oral arguments and conferences may be scheduled for any afternoon during the week in which calendar hearings are otherwise scheduled in San Francisco.

5.7 Assignment of Opinion Writing, Circulation, and Filing of Disposition

(a) Assignment of Opinion Writing

After the case has been submitted to the en banc court, the judge senior in service among those voting with the majority shall assign the writing of the majority opinion. In the event more than one judge expresses a minority view, the senior judge among those sharing that view may assign the writing of a dissenting opinion without restricting any judge in the expression of individual views.

The first draft of the majority opinion should be circulated within twenty-eight days from the date of assignment. A judge should not be selected to write a majority or dissenting opinion unless the judge's workload will permit the judge to circulate the opinion within this twenty-eight days.

(b) Circulation of Opinions

(1) Majority Opinion

Any judge unable to circulate the first draft of the majority opinion within the twenty-eight days shall circulate a memorandum to the members of the en banc court stating why the deadline cannot be met. To expedite the distribution of the majority opinion the judge assigned to write that opinion may be relieved from a future calendar by the Chief Judge.

(2) Dissenting or Other Separate Opinion

A judge who plans to circulate a dissenting or other separate opinion shall notify the members of the en banc court as soon as possible, but in any event within fourteen days after the date of distribution of the draft of the majority opinion. Any dissenting or separate opinion shall

be circulated within twenty-eight days after a proposed majority opinion is distributed.

(3) Voting on Opinions

Voting shall commence twenty-eight days after the circulation date of the majority disposition when no timely notice of a dissenting or other separate opinion has been circulated. When such a timely notice has been filed, voting will commence fourteen days after the dissenting or other separate opinion has been circulated. The senior judge among those voting with the majority shall continuously monitor the above time limits.

(c) Filing of Dispositions

The author of the majority opinion shall be responsible for arranging for the withdrawal of any previous opinion, coordinating
the proposed majority, dissenting, and concurring dispositions, and filing the final dispositions at the appropriate time.

5.8 Rehearing by Full Court

Upon a suggestion by a party or a request by any active judge within fourteen days after the filing of an en banc disposition, a vote may be taken of all active judges whether or not to rehear the case by the full court. If a majority of these judges agree, a case once taken en banc by the en banc court may be reargued and submitted once more to the full court of all active judges. Thereafter, in such cases, the provisions of this chapter will apply insofar as may be appropriate, to conclude the matter.

5.9 Stay or Recall of Mandate*

A motion for stay or recall of mandate in a case decided en banc shall be forwarded to the author of the disposition, who shall dispose of the motion and then send all members of the en banc court a copy of the motion and the disposition of the motion.

* This section was added pursuant to the judges' approval at the November 1981 court meeting of a separate paragraph setting forth the procedure for handling motions for stay or recall of mandate in en banc matters.

APPENDIX D

Local Rule 3

RULE 3

Oral Argument

(a) Notification of Parties. As soon as possible after setting a case on the court's calendar for oral argument, the clerk shall notify all parties of the date, time and place of argument.

(b) Change of Time or Place of Argument. No change of the day or place assigned for argument will be made except by order of the court for reasons

Rule 3 continued

shown. Only under exceptional circumstances will the court grant a request to vacate a setting within fourteen (14) days of the date set. [Formerly subsection f].

(c) Priority Cases. Any party who believes his or her case is entitled to priority in hearing date by virtue of any statute or rule shall so inform the clerk, in writing, prior to the filing of the first brief. [Formerly subsection g].

(d) Submission on Briefs by Agreement. Once a case has been set for oral argument, submission on the briefs by agreement of the parties shall not be permitted without consent of the court.

(e) Failure of Counsel to Appear. Failure of counsel to appear for argument without providing reasonable notice may result in the issuance of an order to show cause why sanctions should not be imposed.

(f) Classes of Cases to be Submitted Without Oral Argument. Pursuant to Rule 34(a), Fed. R. App. P., there is hereby established a class of cases to be submitted without oral argument. There may be placed in this class any appeal, petition for original writ, or petition for review or enforcement of an administrative order in which a three judge panel of this court is of the unanimous opinion that:

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and

Rule 3 continued

the decisional process would not be aided significantly by oral argument.

Oral argument will be allowed in each case absent a specific finding pursuant to this rule that oral argument is not needed. When a case has been classified by the court for submission without oral argument, the clerk shall give the parties notice in writing of such action. The parties shall have seven days from the date of the clerk's letter in which to file a statement setting forth the reasons why, in the opinion of the parties, oral argument should be heard.

(g) Designation in General. Appeals, applications for original writs, and petitions to review or enforce orders or decisions of administrative agencies may be heard at any session of the court in the circuit, as designated by the court.

(h) Administrative Proceedings. Petitions to enforce or review orders or decisions of boards, commissions or other administrative bodies shall be heard at the same places as are appeals from the district courts in districts of which the person affected by the order or decision is a resident, if within this circuit, unless another place of hearing is ordered by the court. (Amended July 1984).

APPENDIX E

Notice to Counsel Regarding Prebriefing Conference Program and Docketing Statement

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P.O. Box 547
San Francisco, California 94101

TO: Counsel Filing Notices of Appeal or Petitions for Review or Enforcement in Civil Cases Arising out of the Northern District of California, the Central District of California, the Western District of Washington and the District of Oregon

The attached Civil Appeals Docketing Statement must be completed and returned to the Clerk of the Court of Appeals, P. O. Box 547, San Francisco, California 94101, pursuant to the Procedures Governing Prebriefing Conference Program adopted by the Court of Appeals. For your convenience a copy of the Procedures is attached to this letter. Please note that a failure by appellant to complete and return the docketing statement within fourteen (14) days may subject the appellant and counsel to sanctions including dismissal of the appeal pursuant to Local Rule 19(b). A copy of the district court's opinion or order must be attached to the docketing statement. Section B of the Procedures explains the effect of the Program on the ordering of the transcript.

The docketing statement will be utilized by the Court to prepare for a prebriefing conference and to establish a briefing schedule for the appeal. The prebriefing conference is described in detail in section C of the Procedures. The purposes of the conference are to determine whether: (a) there are any jurisdictional defects in the appeal; (b) there are grounds for settlement of the appeal; (c) it is possible to narrow the issues on appeal and reduce the size of the record; (d) the appeal can be adequately briefed in fewer than the maximum number of pages permissible under Fed. R. App. P. 28(g) or oversized briefs are necessary; (e) joint briefing by multiple parties is practicable; and (f) the processing of the appeal can be simplified in any other way. The conferences will also establish the briefing schedules for the cases and seek to avoid the need for procedural motions.

Where possible, conferences will be held in person before a Conference Attorney. If necessary, a Conference Attorney will conduct the conferences by telephone. The Procedures require that the attorneys participating in the conferences have authority to make decisions concerning the merits of the cases. Where the Court determines that a conference is not necessary, the Court will establish a briefing schedule based on the docketing statement. Any order issued by a Conference Attorney is subject to reconsideration by a judge upon filing of an appropriate motion within ten (10) calendar days of the date the order is filed.

If you have any questions concerning the docketing statement or the Prebriefing Conference Program please contact Richard Schickele, or Norman P. Vance, the Conference Attorneys, or Mrs. Starr Hays, the Administrative Assistant, at (415) 556-1394.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PROCEDURES GOVERNING PREBRIEFING CONFERENCE PROGRAM

A. Docketing Statement

1. Upon receipt in the District Court or the Tax Court of a notice of appeal from a judgment or order of the district court (other than in a criminal case) or the Tax Court or upon receipt in the Court of Appeals of a petition for review or enforcement of an agency decision, the Clerk of the District Court or the Clerk of the Court of Appeals will mail to all parties a copy of these Procedures and a docketing statement form. Within fourteen (14) calendar days of the mailing of the docketing statement form by the District Court or the Court of Appeals, appellant shall file in the Court of Appeals an original and one (1) copy of a docketing statement with proof of service of one (1) copy on each appellee.

2. The statement must fully and accurately set forth the jurisdictional facts, nature of proceedings below, related cases, issues on appeal, and standards of review applicable to those issues. Failure to include any matter in the docketing statement does not constitute a waiver. The court may, however, impose sanctions on counsel or appellant if it appears that available information has been withheld. Appellant must attach to the docketing statement a copy of the judgment or order appealed from and any findings of fact or conclusions of law upon which the judgment or order is based.

3. Failure to file a docketing statement within the time set forth above will be ground for dismissal of the appeal under Rule 19(b) of this court.

4. A motion for extension of time within which to file the docketing statement will be granted only for the most compelling reasons. Trial counsel is responsible for insuring that the docketing statement is timely filed in this court even if new counsel will handle the appeal. Only one docketing statement may be filed for each notice of appeal; if there is more than one appellant, appellants must consult and decide jointly who is responsible for filing the single docketing statement.

5. Appellee, within seven days of receipt of the docketing statement, may file a single page response if appellee strongly disagrees with appellant's statement of the case or the issues on appeal. If appellee believes there is a jurisdictional defect, appellee should raise the issue at the prebriefing conference or file a motion to dismiss. Multiple appellees should consult on the nature of the response to appellant's docketing statement and, if they decide to file a response, file only one response.

6. Appellee must file a separate docketing statement if a cross-appeal is filed. The prior paragraph applies to appellants who are also cross-appellees.

7. If a docketing statement indicates a jurisdictional defect, a judge, conference attorney, or motions attorney may direct the parties by order, letter, or telephone inquiry to address the question of jurisdiction in a specific form and time period.

B. Time Limits for Record and Briefs

1. Excepted Cases

In (a) habeas corpus appeals, (b) appeals in proceedings under 28 U.S.C. § 2255, (c) all appeals in which one of the parties is appearing pro se in this court, and (d) appeals in which permission to appeal has been granted under 28 U.S.C. § 1292(b), the time for designating and ordering transcripts and filing briefs established by the Federal Rules of Appellate Procedure and the Local Rules of the Court of Appeals shall not be affected by the provisions of these Procedures.

2. Covered Cases

In all other cases, however, those time limits are stayed and shall not begin to run again until the date of a scheduling order issued after a conference under section(C) of these Procedures or the date of written notice from the court that no conference will be held. Transcripts need not be ordered in these cases until after the date of such order or notice.

C. Prebriefing Conference

1. In any civil case, the court may, at its option, require counsel to attend a prebriefing conference with a senior staff member of the court designated as a Conference Attorney. The purposes of a conference are to determine whether: (a) there is any jurisdictional defect and whether such a defect is remediable under Fed. R. App. P. 4(a)(5), Fed. R. Civ. P. 54(b), or otherwise; (b) there are grounds for settlement of the appeal; (c) it is possible to narrow the issues on appeal and reduce the size of the record that must be

ordered for appeal; (d) the appeal can be adequately briefed in fewer than the maximum number of pages permissible under Fed. R. App. P. 28(g) or oversized briefs are necessary; (e) joint briefing by multiple parties is practicable; and (f) the processing of the appeal can be simplified in any other way. Fed. R. App. P. 33. An order will be entered by the Conference Attorney after the conference setting the briefing schedule for the appeal and incorporating any other matters resolved at the conference.

2. Conferences must be attended by counsel with responsibility for the appeal and authority to make decisions about any aspects of the appeal covered by the preceding paragraph. If lead counsel cannot attend, that attorney: (1) must appoint a substitute attorney to attend the conference; (2) delegate to the attending attorney the broadest feasible authority to settle or narrow the appeal or agree on case processing matters; and (3) be available by telephone at the time of the conference. The parties to an appeal may be required to attend a conference. When the business office of counsel is not in the vicinity of the conference site or for any other reason, the court, at its option, may hold any conference by telephone conference call. The court may request that the district court file be transferred to this court for use during the conference.

3. The conference date will be set by telephone with written confirmation or in a written notice informing counsel that a conference will be held. Unless counsel already has a directly conflicting court date, a request to alter the date will be disfavored. Requests to change the date of a

conference should be made by telephone to the Conference Attorney's Office after consulting with opposing counsel about alternative dates.

4. All matters discussed at the conference are completely confidential and will not be disclosed by the Conference Attorney, except: (a) those matters embodied in an order concerning further proceedings in the appeal; and (b) to the judge reviewing an order entered by the Conference Attorney as to which a motion for reconsideration has been made. A judge who conducts a conference or reviews an order by a Conference Attorney may recuse himself or herself from any further participation in the case.

5. The costs of preparing and filing a docketing statement are not taxable, but time spent preparing for and attending a prebriefing conference may be recovered as part of attorneys' fees when such fees are awarded by the court and compensation for such work is not prohibited by statute.

6. In a case in which, after review of the docketing statement, the court finds a conference unnecessary or inappropriate, it may sua sponte issue an order limiting the length of briefs, requiring joint briefing, setting the schedule for filing the record and briefs, or regulating any other aspect of the appeal that could be handled at a conference.

7. Any order issued by a Conference Attorney is subject to reconsideration by a judge upon filing of an appropriate motion within ten (10) calendar days of the date the order is filed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

For Court Use Only

CIVIL APPEALS
DOCKETING STATEMENT

Case Name: _____

District Court/Agency Docket No.: _____ District Judge: _____

Party or Parties filing appeal/petition: _____

A. Timeliness of Appeal or Petition for Enforcement or Review

(1) Date of judgment or order appealed from: _____

(2) Date notice of appeal or petition filed: _____

(3) Authority fixing time limit for filing notice of appeal or petition:
_____ Fed. R. App. P. 4(a) _____ Fed. R. App. P. 4(b);
_____ Other (specify)_____

(4) Time limit for filing notice of appeal or petition: _____

B. Appeal From District Court

(1) Is the order appealed from a final order (i.e., does it dispose of the action as to all claims by all parties)?_____

(2) If the order is not a final disposition, did the district court certify the order for an immediate appeal? (Fed.R.Civ.P. 54(b) or 28 U.S.C. § 1292(b))_____

(3) If not final, is the order properly appealable as an injunction (28 U.S.C. § 1292(a)(1))? _____

(4) If none of the above applies, what is the basis for seeking appella review?

_____

C. Review of Agency Decision

If the appeal is from an agency decision, what statute or other authorit grants this court power to review that decision? _____

_____

D. Nature of Disposition Below:

( ) Bench Trial
( ) Jury Verdict
( ) Summary Judgment
( ) Agency Order
( ) Default Judgment
( ) Grant/Denial of Injunction
( ) Dismissal:
  ( ) Lack of jurisdiction
  ( ) Failure to State a Claim
  ( ) Failure to Prosecute
  ( ) Other
( ) Other Disposition (specify)_____

E. Length of Trial or Hearing: Equivalent of _____ full days.

F. Related Cases: List all related cases pending in this Court of Appeals defined in Ninth Circuit Rule 13(b)(4):_____

_____

G. Nature of Relief Sought Below:

( ) Damages: amount sought: $_____ amount granted: $_____
( ) Injunctive Relief: ( ) preliminary or ( ) permanent
( ) granted or ( ) denied
( ) Declaratory Relief: ( ) granted or ( ) denied
( ) Attorney's fees: amount sought: $_____ amount granted: $_____
( ) Other (specify) _____

PLEASE CONFINE YOUR RESPONSES TO H, I, AND J TO THE SPACE PROVIDED

H. Brief Description of Nature of Action and Result Below:

I. Issues to be Raised on Appeal:

J. Standard of Review (Specify the proper standard of review to be applied by the Court of Appeals for each issue to be raised, citing relevant authority.)

K. Do you desire oral argument on this appeal? Yes _____ No _____
If yes, why in your opinion should oral argument be heard _____

_____

_____

_____

L. Attorneys representing appellee(s)/respondent(s)
Appellee(s) _____

Attorney _____ Telephone ( ) _____

Address: _____

_____

Appellee(s) _____

Attorney _____ Telephone ( ) _____

Address: _____

_____

(List additional counsel below or on separate paper if necessary).

M. Attorney or Party (if pro se) filing docketing statement:

NAME _____ (Telephone) ( ) _____

ADDRESS _____

_____

_____

Check one: ( ) Attorney ( ) pro se
Check one: ( ) Appellant ( ) Appellee ( ) Cross-Appellant ( ) Cross-Appelle

_____ _____
Signature Date

(If this is a joint statement, add names and addresses of other counsel belc
or on an additional sheet, together with certification that they all have
concurred in the filing of this statement)

APPENDIX F

Prebriefing Conference Order

EBRIEFING CONFERENCE ORDER Case _____

nference held before NPV in person _____ by telephone _____

pellants petitioners represented by _____

_____

pellees respondents represented by _____

_____

/ These appeals are consolidated for all purposes.

/ The reporter's transcript has been ordered and designated.

/ Appellants shall may order and designate the reporter's transcript on or before _____.

/ The parties have agreed that no reporter's transcript will be ordered for this appeal, and the district court clerk is requested to forward the certificate of record as soon as practicable.

/ Appellants petitioners shall file a brief of not more than _____ pages on or before _____.

Appellees respondents intervenors shall file a brief of not more than _____ pages on or before _____.

Appellees respondents intervenors shall file a brief of not more than _____ pages on or before _____.

Appellants petitioners may file a reply brief of not more than _____ pages within 14 days of the service date of appellees respondents intervenors brief.

This appeal is stayed until _____ or pending _____

_____

_____, whichever occurs first.

Appellants petitioners shall contact the Conference Attorney prior to the expiration of the stay to schedule a further prebriefing conference, if necessary.

A further prebriefing conference will be held by telephone at _____ pacific time on _____.

The Clerk shall serve a copy of this order on the district court clerk.

_____

_____

_____

This order is subject to reconsideration by a judge if any objection is filed within 10 days of entry of the order.

nents: _____

1520 H Street, N.W.
Washington, D.C. 20005
Telephone 202/633-6011

Federal Judicial Center
Dolley Madison House
1520 H Street, N.W.
Washington, D.C. 20005
202/633-6011