

Lawyer Representatives Coordinating Committee [LRCC] Meeting

October 13, 2017, Room 266
James R. Browning U.S. Courthouse
San Francisco, California

Minutes

Participants: Darrel J. Gardner, Esq., AK, Chair, John (Jay) B. McEntire, Esq., WAE, Chair Elect, Doreen Spears Hartwell, NV, Vice Chair, Mary B. Pinkel, Esq., AK, Jody Corrales, Esq., and, Christina Covault, Esq., AZ, Misty Perry Isaacson, Esq., CAC, Thomas R. Phinney, Esq., CAE, Linda Lopez, Esq., CAS, Rodney J. Jacob, Esq., GU, James Blaine Rogers, Esq., HI, Nicole C. Hancock, Esq., ID, Kathleen DeSoto, Esq., MT, Russell E. Marsh, Esq., NV, Samantha D. Malloy, Esq., OR, Shea C. Meehan, Esq., WAE, Thomas S. Linde, Esq. and Roger Townsend, Esq., WAW

Appellate Lawyer Rep Liaison to the LRCC: James Stephen Azadian, Esq., CAC, Chair Autumn Spaeth, Esq., Program Chair, Conference Executive Committee

Appellate Lawyer Representatives: Alexandra RobertGordon, Esq., CAN, Phone participants were: Ashley Aull, Ryan Bounds, Matt Campbell, Davina Chen, Daniel Donovan, Steven Hubachek, Robert Markle, Eric Miller, Christine Salmi, Laura St. John

Special Guests: Hon. Sidney R. Thomas, Chief Judge, United States Court of Appeals for the Ninth Circuit, Elizabeth “Libby” Smith, Circuit Executive, and Molly Dwyer (*by phone*), Clerk of Court, United States Court of Appeals

I. Welcome & Introductory Remarks Darrel J. Gardner, LRCC Chair

Darrel Gardner welcomed everyone to the first in person meeting of the newly constituted LRCC. He said that it was an honor to have Hon. Sidney R. Thomas, Chief Judge of the United States Court of Appeals for the Ninth Circuit, participate in the meeting. After participants introduced themselves, Mr. Gardner also announced that there also were a number of Appellate Lawyer Representatives participating by phone to listen Chief Judge Thomas’ remarks.

II. Remarks by Hon. Sidney R. Thomas, Chief Judge

After Mr. Gardner introduced Chief Judge Sidney R. Thomas, Chief Judge Thomas thanked the LRCC for the opportunity to address them because he will be unable to attend the circuit conference brainstorming session because he will be hearing oral arguments at 9:00 a.m. and will be unable to attend the meeting. Judge Thomas stated that this joint meeting is an important event for all of us because planning the annual circuit conference is a tremendous undertaking. He explained that the purpose of the brainstorming tradition is to get the bench and bar together to develop Conference topics that are of interest to all attendees. He emphasized the importance of structuring the Conference so that participants can take away ideas and information about improving the administration of justice and doing their jobs better.

Chief Judge Thomas explained that the Ninth Circuit Judicial Conference is under the microscope and reviewed by the Judicial Council of the United States’ Executive Committee because the costs exceed the \$500,000 threshold. In addition to the perks of participating in such an important Conference, the

goal is to have every session lead to something that examines current practices or leads to change. He described the genesis of the Ninth Circuit's Fairness Committee that was born out of a program on sentencing disparities at the 2012 Ninth Circuit Judicial Conference. Judge Thomas encouraged the LRCC to brainstorm freely and to think about how time and money can be saved as topics are formulated today. Judge Thomas wants everyone to select topics that will result in the improvement of the administration of justice throughout the Circuit.

The Chief explained that he welcomed the opportunity to address the LRCC because when he was in private practice, he truly enjoyed being a lawyer. After he went on the bench, he explained that he encountered a court administration that far exceeded his expectations in depth and quality. Chief Judge Thomas explained that the Ninth Circuit's administration clearly has demonstrated the advantages of operating with critical mass. There have been years with caseloads as high as 16,000 cases and during these times, a normal year involves 11,000 cases. The Ninth Circuit has 10 times the volume of other circuits and the cases are handled well because of the way the Circuit is structured.

Chief Judge Thomas explained that his predecessor, Hon. James R. Browning, another Chief Judge from Montana, had a vision that the Circuit could be managed with an electronic mail system to improve communication throughout the Circuit. The Circuit has 10 times the volume of cases of other circuits and Chief Judge Browning hired top notch court professionals to create and implement effective case management systems. He was also instrumental in the development of the Bankruptcy Appellate Panel, again a Ninth Circuit innovation. Judge Browning capitalized on the size of the Circuit by implementing case management systems that took advantage of the cost advantages that can be exploited by expanding the scale of production. The effect of economies of scale is to reduce the average cost of case management and other administrative functions throughout the Circuit.

Judge Thomas described previous efforts to restructure or split circuits, the most recent being the Fifth Circuit. He explained that dividing California is the only way to divide the Ninth Circuit that might achieve proportionality in caseloads and geography, which would present a host of issues. When Judge Browning assumed the chief judgeship, he had to figure out how to divide the Circuit. Instead of doing that, Judge Browning set about inventing the modern federal judiciary. Besides inventing the BAP, the Judicial Conference of the United States, implementing judicial misconduct procedures and disability counseling, along with a very active Wellness Program, the Ninth Circuit was the first of the circuits to invite district judges to the judicial council and the first to invite lawyers to the circuit conference. One of Chief Judge Thomas' favorite Judge Browning stories is that he brought email to the circuit. When Chief Judge Browning became a judge, everyone was required to move to San Francisco and Chief Judge Browning did so. That changed with the development of an electronic mail system throughout the circuit.

Why does the Ninth Circuit work? Chief Judge Thomas explained that the Circuit's mediators alone settle 1500 cases annually. This number of cases exceeds the total number of cases in the smaller circuits. The Ninth Circuit is also the only circuit to have an appellate commissioner, Peter Shaw. Having an appellate commissioner enables the judges to concentrate on what they should be doing instead of dealing with matters that take them away from cases.

The big challenge now is in the increase in prisoner pro se and pro se litigation. The Circuit's Pro Se unit separates the wheat from the chaff. If they see a case that deserves greater attention, they submit the case for a pro bono program referral. If counsel does take on a pro bono matter, they are guaranteed oral argument.

The Ninth is the only circuit that inventories and tracks cases from the onset and batches cases for consistency. The Ninth Circuit encompasses all the district courts including the magistrate judges. Chief Judge Thomas explained that the Ninth Circuit has learned how to maximize resources and he cited a

couple of examples. While there are some who might say that the case load is unpredictable, Chief Judge Thomas states that is not the case. Sometimes, there are specific events that cause a spike in cases such as an oil spill in Alaska, border issues and varying judicial vacancies. In those situations, judicial resources are deployed. Judge Thomas explained that Arizona had a judicial emergency after Judge Roll was killed. Chief Judge Thomas was able to secure the services of 200 visiting judges to help with designations that resulted in cost advantages that could address the growing backlog. He explained that the Chief Justice of the United States approves the designations. Judge Thomas went on to explain that the Eastern District of California is another good example. They have a lot of prisoner cases and faced another judicial emergency. Eighty judges took on 15 cases each, often hearing the cases by video. This resulted in an effective sharing of resources and efficiency in managing the caseload.

Chief Judge Thomas went on to describe a unique initiative that the Ninth Circuit initiated with the 2015 Prison Litigation Summit that happened in Sacramento. This summit involved both federal and state corrections officials. Every district and state sent representatives to the summit. The goal was to achieve commonality and develop effective procedures to resolve some of the issues and problems in the prisons. Some of the solutions were as simple as installing scanners in the prisons to copy the petitions that need to be reproduced after a prisoner files a complaint. The summit brought to light the inadequate medical care in the prisons. Judge Thomas described a positive change in Arizona where the prisons partnered with a hospital and developed procedures to effectively treat prison inmates as inpatients and for routine procedures. Bringing together federal and state correctional officials resulted in the formation of some working groups that have been meeting regularly to make internal changes that have resulted in cutting expenses. There also has been a move to strengthen mediation in prisons. In addition, broader initiatives with civil pro se cases are underway and there is research being done nationally on pro se issues.

Chief Judge Thomas wants to communicate directly with members of the bar about all the projects that are being administered throughout the Circuit. He explained that bankruptcy courts are dealing with the reorganizations and want to figure out intelligent methods of sharing resources. Circuit Judge N. Randy Smith is leading this effort and guiding the bankruptcy courts to develop new ways of operating with shared resources. Judge Thomas explained that right now, there is a major cyber security emphasis happening throughout the judiciary. Threats to judicial independence and threats to judicial safety have increased. He described several district judges who are under 24 hour protection.

Attempts to divide the Circuit would have a devastating effect on the administration of justice in the west. Budgets are based on caseload. All of the pro se cases would come back and there would be significant layoffs that would affect 1/3 of our staff. The Ninth is unique in terms of geography. As of today, Judge Thomas explained that there is uncertainty regarding the current status of split initiatives of which there are several. There have been two hearings on the split –one in D.C. and one in Phoenix before Sen. Jeffrey Flake. There are five different proposals with no movement on the bills so far, but a bill could be attached to an appropriation or some other matter. Individual circuit judges have signed the letter opposing the split. It is not a partisan issue and not like the split that occurred with the Fifth Circuit. It was painful when the Fifth Circuit was divided to create a newly configured Fifth and new 11th Circuit. It is so difficult to configure the Ninth Circuit. It looks too big and the case for splitting the circuit is political and amounts to judicial gerrymandering.

Under Attorney General Ashcroft, a decision was made to streamline immigration decisions. For 6000 immigration appeals per year, only 1000 immigration appeals were heard. The Fifth and the Eleventh Circuit had the numbers. Aggregate delay figures went up. At this time, we are now down to an average caseload of 11,000 cases.

It would be helpful to get letters of opposition to the split. Sen. Feinstein is a tremendous champion of the Circuit. As the LRCC may know, judges are limited in what they can say. Judges are able to discuss such issues as judicial administration. Congress cares about what judges think. Judge Thomas explained that the Ninth is the only circuit that livestreams their oral arguments. These types of tools benefit the public and it has been shown the public gets involved. For example, the travel ban cases were viewed 280,000 times on the Circuit's website.

Circuit Executive Elizabeth "Libby" Smith stated that the Ninth Circuit leads the country in technology. She explained that the Circuit's proximity to the preeminent technology region in the world encourages the Circuit to push the national technology folks very hard and persuade them to be more futuristic and cutting edge. Cybersecurity is the primary concern and issues related to going abroad are now being tackled for those judges and court employees who need to work while in foreign countries. Ms. Smith explained that progress is being made. She expressed the Circuit's appreciation for the LRCC's service and dedication to developing an outstanding circuit conference.

Chief Judge Thomas welcomed comments and questions. LRCC co-chair Russ Marsh, NV, asked why paper copies are still necessary when filing documents. Chief Judge Thomas explained that independent of constructing the appeal, there is a logical progression to structuring a case. He prefers reading the transcript of the trial. He explained that judges receive only what the lawyers send. The iPad brought a major change to how the judges worked and there was no resistance to the iPad. It will take more time before systems go paperless. Currently, they are meeting with consultants and nationally, improvements to CM/ECF have been slow. Judge Thomas thinks that they will make better use of artificial intelligence and that they can do better to leverage technology and also to ensure that cases are not lost in the system. Stays are the reasons that cases have stayed in the system.

James Azadian, Chair of the Appellate Lawyer Representatives, expressed support against splitting the Circuit. He discussed threats to judicial independence at the state level. Since California has a State Supreme Court, more voices from state court officials also could make an impact on stopping efforts to split the Circuit. The proposal to divide California is broader and splitting one jurisdiction would be remarkable. LRCC Co-Chair Shea Meehan, WAE, asked if there are some administrative ideas can be implemented to create some efficiencies in terms of law. Given that fewer judges support the split, what innovations can be developed to become more efficient? Chief Judge Thomas explained that arguments used for split involve the high reversal rate. Actually, it is the Sixth Circuit that has been the most reversed of all the circuits. Taking 20 cases out of a total range of 11 out of 16,000 cases is not a good measure to determine if a split is needed. Some people do not like the Circuit's en banc system. The Chief sits on all the en bancs and he explained that the Ninth Circuit has a robust en banc process. A random draw deters people from making an outlying decision. The process is representative and promotes deliberation that is authoritative. Chief Judge Thomas explained that at one point, game theorists were called in to assess the efficacy of en banc deliberations and the number of judges that should be involved. They increased the number from 11 to 15 judges but that was abandoned after one year. Eleven judges is a good number and it is also authoritative. There is a mechanism for a full court en banc that has never been utilized. Chief Judge Thomas explained that the Circuit has binding authority with three judge panels. The En Banc process settles a lot of things. Judge Thomas acknowledged that challenges continue in improving case delays, en banc and reversal rates. He explained that with a large circuit, there needs to be constant communication and responsive to the community. Chief Judge Thomas thinks that is the Circuit's challenge—to take the criticisms seriously, to own them, and continue to improve the process.

Ms. Autumn Spaeth, CAC, commented that while doing research for a position statement for the Orange County Bar Association, she read transcripts of hearings about the split and perceived a lack of collegiality. How much communication actually happens among the judges? Chief Judge Thomas responded that there is more collegiality in a larger court and that there have been many instances where some state supreme courts and smaller circuits can become dysfunctional because of personality conflicts. He thinks that the key is communication and that Ninth Circuit judges really work at developing and maintaining personal collegiality. Even though they may have differences, they all really know each other. Even if there is geographical diversity, they communicate on panels all the time. There are frequent email exchanges on all sorts of cases. Chief Judge Thomas explained that he had to prepare for hearings starting at 9:00 a.m. He thanked the LRCC for the opportunity to speak with them.

III. LRCC Programs and Activities

Darrel J. Gardner, LRCC Chair

Mr. Gardner explained that the LRCC will participate in developing programs for the Chief District Judges meeting happening in Tucson at the Westward Look. He encouraged participants to arrive in time for the group dinner on Wednesday, January 24 and explained that the LRCC's program will take place on Thursday, January 25, from 8:30 a.m. to 12:00 p.m. The Chief Bankruptcy Judges meeting will take place May 1-4, with the members of the Circuit's Bankruptcy Bar in attendance. The bankruptcy lawyers will present their program on May 2. The LRCC is also responsible for several programs including a new lawyers' orientation and lawyer representatives business meeting at the annual circuit conference.

A. Conference of Chief District Judges, Dinner on January 24 and program on January 25, 8:30 a.m. to 12:30 p.m. at the Westward Look in Tucson.

1. Chief Judge Barry Ted Moskowitz, CAS, is the chief of the chiefs this year.
2. To date, Linda Lopez, CAS, Jody Corrales, AZ, Mary Pinkel, AK, and Nicole Hancock, ID, have volunteered to assist with topic development. They have confirmed a topic about immigration and confirmed the participation of Immigration Judge Irene Feldman. They have not yet decided if there will be three one hour programs or two 1.5 hours programs. There will be a group luncheon at noon. Mr. Gardner encouraged participants to think of programs that would be of interest to district judges such as the program Jay McEntire, LRCC Chair Elect, developed earlier this year: What Lawyers Wish that Judges Knew.

B. Conference of Chief Bankruptcy Judges, May 1-4, Reno, NV. The Bankruptcy Lawyer Representatives will be responsible for program development.

1. Chief Bankruptcy Judge Sherri Bluebond, CAC, will be the conference chief.
2. Tom Phinney, CAE, has volunteered to take the lead on program development and will be in touch with all the Circuit's bankruptcy lawyer representatives to ask for volunteers.

C. Circuit Split Issues

Mr. Gardner and others believe that circuit split issues need to be communicated in a discrete way. If the chief is uncomfortable, then there may be pushback. The Western District of Washington has been working with the Federal Bar Association. They have established an ad hoc committee and want to create and follow an orderly process. They are gathering all testimony including Circuit Judge Tallman's who is not unpersuasive. They are organizing all recent testimony and opinions that the en banc is not truly en banc. Various districts feel they are the "tail" of the California dog. Autumn Spaeth thinks that it is important to check the temperature of what is happening and to pursue multiple avenues in terms of advocating against the circuit split.

Shea Meehan, WAE, suggested having a session on the circuit split. He thinks this is a way to resolve some of the problems and management issues that Circuit Judge Richard Tallman has identified. It may be more effective to have a program at the Chief District Judges meeting in January.

Before adjourning the meeting, Mr. Gardner urged the LRCC to advocate for program ideas. The next LRCC meeting will be a conference call on November 14.

IV. Adjournment

The meeting was adjourned at 9:30 a.m.