



Report:

***Court Size as it Affects
Collegiality and Court Performance***

June 2004

Preface

The Commission on District Court of Appeal Performance and Accountability was appointed and assigned its charge by Administrative Order AOSC02-25, dated August 30, 2002. On December 23, 2002, the Chief Justice supplemented its charge and requested the Commission study the effect of court size on collegiality and court performance.

The Commission met by video conference several times over the past year and a half. It examined current court performance data of the Florida District Courts; conducted a survey of Florida district court judges; researched literature on court size and performance in the federal courts; and interviewed the presiding judges of large state intermediate courts. After gathering all of the data, the Commission met to discuss and determine its conclusions. The following report is a result of its efforts. The Commission hopes that its efforts will assist the Supreme Court in its deliberations on the certification of new appellate judges as well as any future discussions of the structure of district courts of appeal in Florida.

The Commission was aided in its efforts by the staff of the Office of the State Courts Administrator, including Peggy Horvath, Steve Henley, and Jo Suhr of the Strategic Planning Unit, W. Clyde Conrad of Information Systems Services, and Patty Harris of Court Services.

Respectfully submitted,

Judge Martha C. Warner, Chair, Fourth District Court of Appeal
Judge William A. Van Nortwick, First District Court of Appeal
Chief Judge Chris W. Altenbernd, Second District Court of Appeal
Judge David Gersten, Third District Court of Appeal
Ms. Mary Cay Blanks, Clerk, Third District Court of Appeal
Judge Jacqueline R. Griffin, Fifth District Court of Appeal
Mr. Ty W. Berdeaux, Marshall, Fifth District Court of Appeal
Mr. Thomas D. Hall, Clerk, Supreme Court of Florida

Table of Contents

| | Page |
|--|------|
| Preface | i |
| Table of Contents | ii |
| Introduction | 1 |
| I. Conclusions of the Commission on the Impact of Court Size on Collegiality and Court Performance | 4 |
| II. Review of Literature on Court Size – Federal Studies | 7 |
| III. Experience of Large State Intermediate Appellate Courts..... | 16 |
| IV. Analysis of Florida Court Data | 25 |
| V. Judicial Survey | 32 |

Introduction

Charge to the Commission

In December of 2002 the Chief Justice of Florida charged the Commission on District Court of Appeal Performance and Accountability to consider the “impact of increasing the total number of judgeships on a district court of appeal.” The Chief Justice noted that concerns had been expressed about having more than fifteen judges on a district court. He therefore requested a study of the affects of court size as regards to the ability of a court to function effectively.

Previous Studies

Two recent studies of the appellate courts in Florida touched on the issue of court size. Both reports implicitly took the position that smaller courts operate more effectively than larger courts; neither explicitly examined this assumption. The first study, the Report of the Committee on Appellate Court Workload & Jurisdiction, was submitted to the Supreme Court of Florida in May, 1997. In its report the Committee made recommendations regarding workload thresholds and configuration of the district courts. The Committee developed a consensus view which provided context for its recommendations regarding a realignment of both jurisdiction and boundaries of the present districts. That consensus included the view that:

The number of appellate judges should be kept to a minimum on each respective appellate court. Some committee members suggested twelve judges should be the maximum, but no consensus was formed as to the number.¹

The second study was the Report of the Committee to Study the Need for Additional District Courts of Appeal. This body was a committee of the Judicial Management Council, and submitted its report to the Council in December, 1998. The committee report noted with respect to size and collegiality on appellate courts:

¹ REPORT OF THE JUDICIAL MGMT. COUNCIL COMM. ON APPELLATE COURT WORKLOAD & JURISDICTION, at 13 (May 1997).

A general assumption is that appellate courts with less judges on the bench have a likelihood of greater collegiality. Conversely, it is assumed that increasing the number of judges in any appellate court will decrease collegiality.²

The Committee then determined that one criterion for determining the need for district courts of appeal was to limit their size to twelve judges.³ Importantly, the report was not adopted by the Judicial Management Council and thus not advanced to the Supreme Court.

Commission Study Methodology

To examine the effect of court size on collegiality and court performance, the Commission surveyed the judges of the Florida District Courts of Appeal and examined the objective performance data of the five district courts. Because the experience of the Florida courts was limited to courts of a size no greater than fifteen judges, the Commission also examined the Federal Circuit Courts of Appeal, particularly a study of the large Federal Ninth Circuit and commentary on that study.

In addition, the Commission interviewed the chief or presiding judges of all ten intermediate state appellate courts that are larger than fifteen judges. All interviews were conducted by the Chair. After evaluation of the underlying data, the Commission developed the conclusions presented in this report. The conclusions are set forth first, and the underlying data and analysis is provided in the following four sections.

Limitations of the Commission Study

The Commission's task was to determine what effect court size would have on collegiality and court performance. The Commission limited its consideration to how size affected judicial collegiality and decision-making. It did not consider additional factors which may impact court size, such as the impact on clerk's offices, the physical space needed for additional judges, and other similar factors. It was not asked to determine the maximum size of a court, nor did it consider other factors that should be considered in determining the future of the District Courts of Appeal in Florida. In short, it did not determine the criteria for establishing new district courts of appeal.

² REPORT OF THE JUDICIAL MGMT. COUNCIL COMM. TO STUDY THE NEED FOR ADDITIONAL DISTRICT COURTS OF APPEAL, at 9 (December 1998).

³ *Id.* at 10.

The Commission also determined that it was not possible to define, let alone measure, what constituted “quality” opinions or work. Instead, it relied on objective measures to evaluate court performance, as those could be compared to other state appellate courts. Without funding, it was not possible to conduct surveys of lawyers and trial courts, as was done by the commission reviewing the Federal Ninth Circuit, although surveys in general only provide attitudinal information rather than empirical evidence concerning court performance.

Given these limitations, the Commission submits its conclusions.

I. Conclusions of the Commission

Collegiality is a necessary condition for the effective functioning of an appellate court. It is an important element of the conditions that permit appellate judges to engage in principled deliberation, allowing differing points of view to be discussed and constructively considered in an atmosphere of civility and respect. Collegiality permits diverse judges with different perspectives to communicate and influence one another in finding common ground and reaching better decisions, whether the task at hand requires the panel to apply precedent or to interpret a rule, statute, or constitutional provision.

Most judges believe that the more they work with a colleague, the better the judge understands the colleague's manner of reasoning and temperament, the more easily and effectively the colleagues can discuss, disagree, and assimilate ideas and concepts. In addition to these positive effects on the judicial decision making process, collegiality also permits a court to manage itself more effectively, supporting collective decision making about the administration and operations of the court.

The relationship between court size and collegiality is commonly thought to be inverse. That is to say, most judges believe that a larger court is less collegial and less efficient than a smaller court. This view is widely accepted and rarely challenged or reexamined. While this subjective view may be strong, the experience in Florida and elsewhere suggests that larger appellate courts with strong leadership, adequate staff support, well considered case management strategies and appropriate technology can operate with a collegial environment and efficiency similar to or even greater than that of a smaller court.

The Commission makes the following conclusions:

- Florida's district courts of appeal are presently performing effectively in accepted measures of performance, and existing differences in performance do not appear to correlate to differences in court size.
- Judicial surveys in Florida and nationally generally reveal that judges prefer smaller sized courts. However, most judges presently serve on smaller sized courts, and it appears that their preferences are directly related to their personal experience.
- An increase in court size does not necessarily reduce the collegiality to engage in the type of discussion and consensus building necessary to perform the work of the court.

- The national experience of courts larger than those in Florida is that collegiality has not been reduced as courts grow in size.
- Courts that report poor collegiality often evidence personality conflicts among judges, which is as likely on a smaller court as on a larger court.
- Where unitary courts⁴ develop a culture of collegiality, that culture remains strong even when the court increases in size.
- Efficient court performance is a function of strong leadership, good case management practices, a manageable caseload per judge, and the availability of adequate support resources. Large courts can and do function as well as small courts when these conditions are present.
- Consistency of the law is a prime value to be fostered in appellate courts, where those appellate courts have a duty to maintain consistency in the opinions of the court.
- The larger the court the greater the chance of inconsistency in opinions. However, where a formal en banc procedure is in place to resolve intra-court conflicts, consistency can be maintained.
- The Florida courts all successfully use the full en banc process to resolve inconsistencies, and it does not appear that the current size of the courts is an impediment to resolving inconsistency in the law of the districts.
- The national experience, and particularly that of the federal circuits, suggests that when an en banc process requires the participation of all judges of the court, the process may become unwieldy. Where a court is so large as to discourage the use of the en banc process there is a potential for developing inconsistency and incoherence in the law of the court. No authoritative study has determined with any specificity the maximum workable size of an appellate court which relies on a full en banc process. The United States Court of Appeal for the Fifth Circuit found that when the court comprised twenty-six judges the en banc process became difficult to administer.

⁴ The Commission defines “unitary courts” as courts which do not divide themselves into divisions.

- Although many of the large state intermediate courts of appeal do not have any mechanism to resolve intra-court conflicts, of those that do, none use a full en banc process.
- The national experience also suggests that where an en banc procedure is in place that permits less than the full court to sit en banc to resolve an intra-court conflict, the court can be large and still maintain consistency.
- Where consistency is addressed informally, such as through the circulation of opinions to all of the judges for comment prior to release, at some point the process becomes burdensome because of the number of opinions each judge is expected to review.
- Florida's Second District Court of Appeal has had dispersed chambers in Tampa and Lakeland, a distance of approximately fifty miles, for twenty-five years. The judges of that court report that this dispersion has had little effect on collegiality on the court. Whether more locations or more distant locations would affect collegiality cannot be assessed from the Second District's experience.
- Nationally, chambers dispersion has become less of an impediment to collegiality and court performance due to the advances of communication and document management technology, particularly the use of e-mail and the internet.

Based on the foregoing, the Commission concludes that additional judges could be added to the current district courts of appeal without negatively impacting collegiality and court performance. This assumes the presence of good case management practices, strong leadership and adequate personnel and technological resources. If any court were to grow substantially, the Commission recommends further study of the en banc process and consideration of structural alterations of the courts, such as the creation of divisions, to accommodate increased size.

II. Review of Literature on Court Size – Federal Studies

There is scant literature examining issues regarding the size of state intermediate appellate courts. However, the federal courts have recently examined the issue of size of the federal circuit courts of appeal, primarily of the United States Court of Appeal for the Ninth Circuit, which consists of twenty-eight judges and covers most of the far western states, including Alaska and Hawaii, as well as the U.S. territories in the Pacific. In addition, several judges have written on the question of collegiality in the federal circuit courts and have commented on the effects of court size on collegiality and the overall performance of the courts. Review of the existing literature yields no empirical evidence supporting the proposition that large courts perform less efficiently or effectively than small courts, although some judges believe that large courts tend to be less collegial and in danger of producing inconsistent opinions.

A. Report of the Commission on Structural Alternatives for the Federal Circuit Courts of Appeal

Whether the Ninth Circuit should be divided because of its size has been debated for at least thirty years.⁵ In 1997, Congress authorized a commission to study the structure and alignment of the federal appellate courts, particularly with respect to the Ninth Circuit.⁶ The results of this study were submitted in 1998. The Commission recommended the establishment of three regional divisions of the Ninth Circuit, each hearing appeals from the district courts in their geographical region. A procedure to resolve conflict between the divisions was also proposed. “The commission asserted that this approach would enhance the consistency and coherence of circuit law, promote genuine judicial collegiality and link the appellate forum more closely to the region served.”⁷

The Commission reviewed the history of the federal appellate courts since their inception. It noted that since the 1960’s there was recommendations to split both the Fifth Circuit and the Ninth Circuit because of their size. In 1978, Congress authorized federal courts of appeal with more than fifteen active judges to use divisions for administrative tasks and to permit en banc hearings of the court with fewer than all of its

⁵ See, e.g., Carl Tobias, *A Divisional Arrangement for the Federal Appeals Court*, 43 ARIZ. L. REV. 633 (2001); Thomas E. Baker, *On Redrawing Circuit Boundaries--Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit is Not Such a Good Idea*, 22 ARIZ. ST. L.J. 917 (1990).

⁶ Tobias, *supra* note 5, at 638. Congress provided a budget of \$900,000 for the study, which was to be completed and submitted within one year.

⁷*Id.* at 633.

judges. The old Fifth Circuit was enlarged from fifteen to twenty-six judges, but did not adopt a limited en banc process. When it held its first en banc case conferences with all judges, they found the procedure unwieldy and voted to request Congress to split the circuit, resulting in the creation of the Eleventh Circuit.⁸ In contrast, the Ninth Circuit adopted a limited en banc process with less than the full court sitting en banc to decide a case. Justices of the Supreme Court expressed concerns that this limited en banc did not resolve all intra-circuit conflicts.⁹ A survey of Ninth Circuit judges themselves found that about one-third described the process as inadequate.¹⁰ This indication that judges view the process as inadequate was similar or less than that found on other federal circuit courts.¹¹

After reviewing statistical data about court performance, including case filings, time on appeal, and case management techniques to handle ever expanding dockets, the Commission found “no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively.”¹² Concern was expressed, however, as to whether the Ninth Circuit, because of its size, created a danger of intra-circuit inconsistency. Recognizing that consistency and predictability in the law were of a high priority for any appellate court, the Commission found that evaluation of these factors was both subjective and not practical within the limited time frame given to the Commission by Congress.¹³ Although at least one study had been made in the 1980’s concluding that intra-circuit inconsistency was not evident in the circuit’s published opinions,¹⁴ the Commission looked to its own survey of district court judges and lawyers practicing before the court to determine their attitudes regarding the circuit’s consistency. Those surveys produced mixed results, with judges generally finding that the circuit’s opinions were sufficiently consistent to provide proper guidance, while the attorneys found them less consistent.¹⁵ Noting that the survey participants may have answered in accordance with their own self-interest, the Commission concluded, “when all is said and done, neither we, nor we believe anyone else, can reduce consistency and predictability to statistical analysis. These concepts are too subtle, the decline in quality too incremental, and the effects of size too difficult to isolate, to allow evaluation in a freeze-framed moment.”¹⁶

⁸ COMM’N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT, at 21 (1998).

⁹ *Id.* at 38.

¹⁰ *Id.* at 48, at note 107.

¹¹ *Id.*

¹² *Id.* at 29.

¹³ *Id.* at 39.

¹⁴ See Tobias, *supra* note 5, at 641.

¹⁵ See *id.*

¹⁶ *Id.* at 641 (quoting COMM’N REPORT, *supra* note 8, at 40).

The Commission believed, however, that consistency and predictability were best served through collegial deliberations, and appellate courts have placed an emphasis on the necessity to maintain collegiality in deliberations so that the opinions produced maintain their coherence and consistency over time. Courts should be kept relatively small, according to the Commission.¹⁷ The Commission believed that “the maximum number of judges for an effective appellate court functioning as a single decisional unit is somewhere between eleven and seventeen.”¹⁸ This was based upon the collective experience of the Commission members as well as their survey of federal appellate court judges. “In our national survey . . . of the 205 circuit judges who expressed an opinion about how many judges a court of appeals can have and still function well, 74% reported that the maximum number is between ten and eighteen. Still, almost 22% believe that number is higher or that there is no natural limit on the size of an effective court.”¹⁹

Another reason for reducing the size of the court was to insure that judges were able to read all of the opinions written by the court to minimize inconsistency and increase knowledge of the circuit law. Based upon their survey of federal circuit judges, a lower percentage of Ninth Circuit judges reported that they read all or most of their circuit’s published opinions than in other circuits.²⁰

Although lacking in statistical or empirical data showing a malfunctioning of the court, the Commission proceeded to develop a regional divisional concept for the Ninth Circuit, reducing the size of each division to approximately nine or ten judges. It recommended to Congress that this same divisional concept be employed as other circuits increase in size.²¹

B. Commentary on the Commission Report

The report received considerable criticism both before and after its release, particularly for its lack of empirical data relevant to the problems the Commission sought

¹⁷See *id.* (quoting from COMM’N REPORT, *supra* note 8, at 40).

¹⁸COMM’N REPORT, *supra* note 8, at 29.

¹⁹*Id.* at n. 72.

²⁰*Id.* at 47 n. 105.

²¹See *id.* According to the Commission, judges who resided in each geographical division would be assigned primarily to that division, although judges from the other divisions should be assigned to each division for a period of three years. Each division would consist of at least seven resident judges. The divisions would be semi-autonomous and resolve intra-division conflicts. While the Ninth Circuit’s law would be binding throughout the district, a division could recede from old precedent. As to new decisions, each division should give great weight to the decisions of another division. To maintain consistency within the entire circuit, a Circuit Division would be established, consisting of the chief judge of the circuit plus twelve active judges equally spread among the divisions and decided by lot. A party could invoke the discretionary division of the Circuit Division to resolve a square intra-circuit conflict between the divisions.

to address: a lack of consistency in decisions and the need for collegiality necessary to achieve that consistency.²² Judges both supported the reduction in size of the circuit²³ and opposed it.²⁴ Even former Ninth Circuit law clerks weighed in on the issue, both for dividing the circuit²⁵ and against it.²⁶

Professor Carl Tobias questioned the Commission's central premise that large courts have difficulty maintaining consistency and coherence in their published decisions. He pointed out that the Commission had no data to support its proposition and had overlooked studies contradicting its premise.²⁷ With respect to the Commission's dismissal of the limited en banc procedure presently used in the Ninth Circuit, the Commission provided no data to suggest that it did not effectively discharge its function, and only a minority of Ninth Circuit judges were dissatisfied with the procedures as a method of reducing intra-circuit conflict.²⁸

Chastising the Commission's lack of data to support its conclusions, Tobias concluded, "When the legislative and judicial branches make critical decisions about the circuits, Congress and the courts should not permit generalized perceptions, the commissioners' unelaborated experiences and the unsupported opinions of self-interested individuals to replace empirical data, which independent, expert evaluators systematically collect, scrutinize and synthesize."²⁹

²²See, Tobias, *supra* note 1, at 675; and Baker, *supra* note 1, at 961. See also Robert Mueller, *Finding A System of Courts that Works*, 45-JUL FED. LAW. 2, 2-4 (July 1998); Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, The Ninth Circuit, and The Congress*, 77 OR. L. REV. 405, 482-491 (Summer 1998); William Richman & William Reynolds, *Elitism, Expediency, and The New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (Jan. 1996); Carl Tobias, *The Federal Appeals Courts at Century's End*, 34 U.C. DAVIS L. REV. 549 (Winter 2000); Arthur Hellman, *The Unkindest Cut: The White Commission Proposal To Restructure The Ninth Circuit*, 73 S. CAL. L. REV. 377 (Jan. 2000).

²³See Chief Judge Edward Becker, Third Circuit Court of Appeals, *Contemplating the Future of the Federal Courts of Appeals*, 34 U.C. DAVIS L. REV. 343, 343 (Winter 2000); Judge Diarmuid O'Scannlain, Ninth Circuit Court of Appeals, *Should the Ninth Circuit Be Saved?* 15 J.L. & POL. 415, 418-19 (Summer 1999); Judge Harry Edwards, D.C. Circuit Court of Appeals, *The Effects of Collegiality of Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1674 (May 2003); Chief Judge Gerald Bard Tjoflat, Eleventh Circuit Court of Appeals, *The Federal Judiciary: A Scarce Resource*, 27 CONN. L. REV. 871, 873-75 (Spring 1995).

²⁴See Judge Stephen Reinhardt, Ninth Circuit Court of Appeals, *Too Few Judges, Too Many Cases: A Plea to Save the Federal Courts*, 79 A.B.A.J. 52 (Jan. 1993); Chief Judge Procter Hug, Jr., Ninth Circuit Court of Appeals, *The Ninth Circuit Should Not Be Split*, 57 MONT. L. REV. 291 (Summer 1996).

²⁵See Jennifer E. Spreng, *The Icebox Cometh: A Former Clerk's View of the Proposed Ninth Circuit Split*, WASH. L. REV. 875 (Oct. 1998).

²⁶See Aaron H. Caplan, *Malthus and the Court of Appeals: Another Former Clerk Looks at The Proposed Ninth Circuit Split*, 73 WASH. L. REV. 957 (Oct. 1998).

²⁷See Tobias, *supra* note 5, at 651; see also Hellman, *supra* note 22, at 397-98.

²⁸Tobias, *supra* note 5, at 652.

²⁹Tobias, *supra* note 5, at 654.

Similarly, Professor William Richman disputed the contention that larger courts lead to inconsistency and incoherency in the law, calling it the “great red herring.”³⁰ Instability of the law within a circuit, he maintained, is not empirically supported, not a great problem, and not a function of court size.³¹ Likewise, Professor Arthur Hellman, who had studied the Ninth Circuit’s consistency during the 1980’s, concluded that, based upon an empirical study, actual intra-circuit inconsistency was not much of a problem. There were, however, several discrete areas of law where he found “disarray” caused by multiple precedents on the same legal issue coming to different conclusions, none of which were “squarely” inconsistent but which resulted in unpredictability for lawyers and litigants.³² Nevertheless, these areas of disarray were not necessarily because of size of the court alone. Moreover, Professor Hellman concluded:

Finally, I believe that much of the concern about unpredictability in a large court of appeals rests ultimately on impatience with the case-by-case mode of adjudication that is the essence of our common law system. But over the years, our society has concluded that that approach, with all its open-endedness, is preferable to the more structured regime of codification, especially in view of the availability of the legislative *deus ex machina* whenever disarray or lacunae in decisional law become too much to bear. For that reason as well as the others, I think it is sound to concentrate on inconsistency, which I agree reflects a malfunction in the system, and not to worry overmuch about unpredictability, which is to a large extent unavoidable.³³

C. Opinions of Federal Judges on Court Size

On the other hand, judges on smaller courts tended to believe that smaller courts foster collegiality and consistency in the opinions of the court. Judge Harry Edwards, Circuit Judge for the Court of Appeals for the District of Columbia, defines collegiality as follows:

When I speak of a collegial court, ... what I mean is that judges have a common interest, as members of the judiciary, in getting the law right, and that, as a result, we are willing to listen, persuade, and be

³⁰Richman, *supra* note 22, at 307-314.

³¹*See id.* at 308.

³²*See* Arthur Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541 (Spring 1989).

³³*Id.* at 598-99.

persuaded, all in an atmosphere of civility and respect. Collegiality is a process that helps to create the conditions for principled agreement, by allowing all points of view to be aired and considered.³⁴

Judge Edwards believes that large courts cannot develop the type of collegiality necessary to function properly:

It stands to reason that the larger the court, the less frequently any two judges sit together and interact with each other. I have always believed that it is easier to achieve collegiality on a court with twelve members than on one with twenty or thirty. It is easier for judges to keep up and become familiar with each other. Smaller groups have the potential to interact more efficiently, making close and continual collaboration more likely.³⁵

Judge Gerald Tjoflat of the Eleventh Circuit concurs in Judge Edward's reasoning. A member of the Court of Appeal for the Fifth Circuit before the Eleventh Circuit was created in 1980, Judge Tjoflat believes that smaller courts are necessary to maintain consistency in the law. He states:

To maintain the clarity and stability of the rules of law of their circuit, the judges of a court of appeals having more than three judges must monitor the work of their colleagues. This is not a time consuming task for the judges on a small court, but it is for the judges on a jumbo court. As the size of the court increases, the time that must be devoted to this task increases exponentially (because the number of possible panel combinations increases exponentially); meanwhile, the time each judge devotes to his or her work decreases, again exponentially.³⁶

Judge Tjoflat considers a "jumbo" court as any court having more than nine judges.³⁷ As part of the "old" Fifth Circuit, Judge Tjoflat sat on a court of twenty-six judges prior to its split.

³⁴ Edwards, *supra* note 23, at 1644-45 (footnote omitted).

³⁵ *Id.* at 1675 (footnotes omitted).

³⁶ Tjoflat, *supra* note 23, at 875.

³⁷ *Id.* at n. 6.

Chief Judge Edward Becker of the Third Circuit also views large courts as impairing the “law of the circuit.” Because he does not believe that the judges on a large circuit, which issues a proportionately larger number of opinions, have the time to read and reflect on all of the issuing opinions, he concedes any one judge cannot have a complete understanding of the law of the circuit, and is therefore unable to sufficiently engage with his or her colleagues in analysis of the cases:³⁸

At least one Ninth Circuit judge agrees. Judge Diarmuid O’Scannlain writes:

Consistency and predictability of law are fundamental to the effective administration of justice. As the White Commission aptly recognized, consistency of law in the appellate context requires an environment in which a reasonably small body of judges has the opportunity to sit frequently together, thereby enhancing the understanding of one another's reasoning, decreasing the possibility of misinformation and misunderstandings, and increasing the tendency toward unanimous decisions. Collegiality results from close, regular, and frequent contact in joint decision-making. As the court and the caseload grow, maintaining the collegiality necessary for the court to do its job becomes increasingly difficult.³⁹

On the other hand, several judges disagree that the Ninth Circuit is any less collegial or incoherent in the law than other circuits. Judge David Thompson of the Ninth Circuit states that through the institution of progressive case management practices the court assures that inconsistent opinions are not published. Contact between the judges has been enhanced through technology and the use of e-mail to communicate; and judges sit together more frequently than the Commission suggests because of rotating motions and screening panels.⁴⁰ Also defending his court, former Ninth Circuit Chief Judge Procter Hug notes that: in 1996 the court’s median time to dispose of a case from submission on the merits to opinion was less than the national median; it wrote reasoned decisions on more cases than the national average; recent federal studies found that intra-circuit inconsistency was not a significant problem nor could it be correlated to circuit size; and that in his eighteen years of experience on the court a high level of collegiality has contributed to effective court performance.⁴¹

³⁸ Becker, *supra* note 23, at 344.

³⁹O’Scannlain, *supra* note 23, at 418 (footnotes omitted).

⁴⁰Judge David Thompson, Ninth Circuit Court of Appeals, *The Ninth Circuit Court of Appeals Evaluation Committee*, 34 U.C. DAVIS L. REV. 365, 371-74 (Winter 2000).

⁴¹Hug, *supra* note 24, at 296-301.

D. Commentary on Judicial Resistance to Expanding Court Size

Other commentators have looked at the position of not adding judges and keeping the court small as an elitist position taken by judges themselves. Professor William Richman writes:

The task of the federal courts, however, is not to provide status and a comfortable life to the judges; but, instead, to bring justice to our citizens. To quote Judge Wallace: "The federal courts do not exist for the benefit of judges. They exist . . . solely to serve and to meet the needs of the public. Judges are, fundamentally, public servants. Judiciary policy must be dictated by concerns for the judiciary's mission, not by the personal preferences of its members."⁴² Unfortunately, it is all too clear that concerns over comfort and status have driven much of the change in the way the circuit courts decide cases and much of the judiciary's advocacy for restricting its own size. Judge Reinhardt is brutal in his candor:

We federal judges are simply unable to abandon our notion of the appellate courts as small, cohesive entities operating in a pristine and sheltered atmosphere. It appears that, rather than surrender this wholly unrealistic and outdated vision of the federal judiciary, many of us are willing to ration justice, to eliminate some of the best qualities we once associated with appellate decisionmaking, and to shut the doors of the courts to the American people by severely restricting our jurisdiction.⁴³

It is not only unfortunate, but also ironic, that this advocacy should come from judges who have sworn to "administer justice without respect to persons, and do equal right to the poor and to the rich."⁴⁴

Such stinging criticism of the Commissions conclusion that small courts are necessary to maintain consistency, coherence, and collegiality in

⁴²Richman, *supra* note 22, at 338 (quoting J. Clifford Wallace, *The Case for Large Federal Courts of Appeals*, 77 JUDICATURE 288, 288 (May-June 1994)).

⁴³*Id.* at 338-39 (quoting Stephen Reinhardt, *Surveys Without Solutions: Another Study of the United States Courts of Appeals*, 73 TEX. L. REV. 1505, 1513 (May 1995)).

⁴⁴*Id.* at 339 (quoting 28 U.S.C. § 453 (1994)).

the federal courts reflects broad and strong divergence of opinions are on the issue.

E. Conclusions

A review of the literature regarding the size of the Ninth Circuit yields no empirical data supporting the proposition that large courts function less efficiently or effectively than small courts. A wide variety of opinion is expressed, however, on whether through their operation large courts can maintain consistency in the law of the circuit. Generally, judges on smaller courts advocate for courts of lesser size, believing from their own experiences that maintaining the collegiality necessary to produce coherent, consistent law is more achievable on small courts than big ones. On the other hand, judges who serve on the Ninth Circuit do not view its size as an impediment to developing a collegial, high performing court. Outside commentators generally find arguments for splitting circuits suspect because of the lack of empirical data, including any data showing the court is inconsistent.

The experience twenty-five years ago of the Fifth Circuit suggested at that time that a court of twenty-six judges was too large to resolve conflict effectively through a full court en banc. The limited court en banc process used by the Ninth Circuit presently resolves some conflicts but not all. A review of the Federal studies as well as the experience of the federal Fifth and Ninth Circuits suggests that large courts which rely on a full court en banc process to resolve conflict may have difficulty in maintaining consistency in the law, because of the cumbersome nature of a full court en banc process.

In short, the examination of the federal courts indicates that the maximum workable size of a court is not known. The Commission on Structural Alternatives for the Federal Circuit Courts suggests that a court not exceed seventeen judges, although the survey of federal circuit judges suggests a maximum of eighteen. Where a limited en banc procedure is provided, and not all the judges of the court participate on the en banc panel, a larger court can still be efficient and effective. However, a court of the size of the Ninth Circuit of twenty-eight judges has both substantial critics and many supporters as to its ability to produce consistency in its decisions.

III. Experience of Large State Intermediate Appellate Courts

Ten state appellate courts in the United States exceed the size of the largest Florida appellate court in number of active judges.⁴⁵ Interviews were conducted of the chief or administrative presiding judge of each of these courts to determine how they were structured and how they maintained collegiality and high court performance.⁴⁶ Although their organizational structures differed widely and many had no method of resolving conflicts, a common theme among all large courts was their continued collegiality and an ability to perform efficiently and effectively through strong leadership and good case management practices.

Large courts exist in both big and medium-sized states. The ten courts and their size are:

| | Judges | Jurisdiction | Chambers |
|---|--------|--------------|--|
| Arizona Division One | 16 | Regional | Phoenix |
| California First District | 20 | Regional | San Francisco |
| California Second District | 32 | Regional | 28 in Los Angeles; 4 in Ventura |
| California Fourth District | 25 | Regional | 10 in San Diego; 7 in Riverside; 8 in Santa Anna |
| Illinois First District | 24 | Regional | Chicago |
| Massachusetts Court of Appeals | 25 | Statewide | Boston |
| Michigan Court of Appeals | 28 | Statewide | 4 locations |
| Minnesota Court of Appeals | 16 | Statewide | St. Paul |
| New Jersey Superior Court, Appellate Division | 35 | Statewide | Various locations |
| New York Supreme Court, Second Department | 22 | Regional | Various, but most judges in Brooklyn |

⁴⁵ Pennsylvania Superior Court was excluded from this study, because although it functions with 22 judges, only 14 are active judges. Senior judges make up the remainder.

⁴⁶ All interviews were conducted by Judge Martha C. Warner. The judges interviewed were: Chief Judge Sheldon H. Weisberg (Ariz.); Administrative Presiding Justice William McGuinness (Cal. 1st District); Administrative Presiding Justice Roger Boren (Cal. 2d District); Administrative Presiding Justice Judith McConnell (Cal.4th Dist.); Judge Alan Greiman, Chair, Executive Committee (Ill. 1st Dist.); Chief Justice Christopher Armstrong (Mass.); Chief Judge William Whitbeck (Mich.); Chief Judge Edwin Toussaint (Minn.); Presiding Judge Sylvia B. Pressler (N.J.); Presiding Judge A. Gail Prudenti (N.Y. 2d Dept.).

A. Court Structure and its effect on Collegiality

The ten largest courts vary in court structure and jurisdiction. Four have statewide jurisdiction, and six have regional jurisdiction. As can be seen from the foregoing chart, some statewide courts sit in one location, while others are dispersed. Chambers dispersion occurs on two regional courts. Seven courts sit in divisions/panels which remain for a period of time, five being regional courts and two statewide, and three courts are unitary courts, with two being statewide courts and one a regional court.

1. Divisional Courts

The California courts all sit in divisions, but their divisional arrangements are not the same. All are legislatively controlled. The First and the Second Districts have permanent panels of four judges, each with a permanent presiding judge. Cases filed in the district are randomly assigned to the panels which operate semi-autonomously within the district, but all of the panels in the First and all but one in the Second have offices in one judicial building. Each division occupies a portion of the judicial headquarters. Thus, the judges and their staffs are in close contact. Both the First and the Second Districts attribute their collegiality and ability to work together to the small division unit. However, while all judges meet together, the First meeting once a month and the Second meeting three times a year, judges report that they frequently interact with other judges in the district.

The Fourth District in California also operates in three divisions, but the divisions are larger, as noted in the chart. These are also permanent divisions. Each division functions autonomously as its own small court. Within each division, there are no collegiality issues. There is little or no interaction between the judges of the various divisions, although the presiding judges of each division meet together frequently on administrative matters. The rest of the judges do not meet together. Essentially, the Fourth District operates as three smaller courts under an overall administrative/budget umbrella.

The Illinois First District in Chicago is organized into six divisions of four judges each. The composition of the divisions rotates every year. During the year judges sit only with members of their own division. When cases are filed, they are assigned to a division for handling motions, but when the case is perfected and ready for merits determination, it is assigned randomly to an individual judge. Then the remainder of the three judge panel is made up of judges from the same division. As in California, the judges work together in small groups, enhancing the

interaction of the judges. Collegiality issues do not exist because of size but can appear because of personality conflicts.

Arizona Division One also operates in five panels, but the five panels are assigned for a period of four months, and the chief judge is not assigned to a panel.⁴⁷ After four months, five new panels are assigned so that each judge sits with all of the other judges on the court. The judges believe this leads to a more collegial court and prevents a single panel from taking an extreme position on an issue and perpetuating it.

The Minnesota Court of Appeals, a court of statewide jurisdiction, has a modified divisional arrangement similar to Arizona. It sits in panels of three, randomly assigned each quarter. To enhance collegiality, the presiding judge of the panel rotates by seniority each month during the three month assignment.

The only statewide court which operates in panels/divisions is New Jersey. The court sits in eight panels of four or five on a panel, which the administrative presiding judge appoints and rotates annually, similar to the Illinois court. These panels are not assigned randomly but are balanced with the eight most senior judges as the presiding judge of each panel. The other panel membership is also balanced, with the eight second-most senior judges assigned to each panel, and the rest balanced to create panels reflecting political, racial and gender diversity as well as complementing the strengths of individual judges. Even though the judges are spread across the state, they have genuine affection and respect for each other. The court has a tradition of collegiality and close association.

2. Unitary Courts

The Massachusetts Court of Appeals sits as a unitary court with all judges having offices in Boston. Its panels of three are randomly chosen and sit together for the entire month, during which each will hear two days of oral argument cases and one day of conference dispositions. The court had only fourteen judges in 2000, when it was substantially backlogged. The legislature approved eleven new judges, which were appointed in groups over two years. To retain collegiality, each new judge sat with experienced judges and was assigned a judicial mentor who reviewed all opinions of the new judge before circulation to other panel members.

⁴⁷ The chief judge shoulders the entire administrative burden and will substitute on panels for sick judges, recusals, or to give judges relief.

In that way, the court was able to smooth the transition and retain its collegiality. The Chief Justice of the court reports that when the court started in 1972 with only six judges it was not so collegial, primarily because of a personality conflict among two judges. Since that time, the court has strived to maintain its collegiality which is demonstrated by the willingness of judges to help each other. For instance, when one judge is slow in writing opinions and developing a backlog, that judge may be relieved of an oral argument assignment which is then taken by a more current judge. The chief justice believes that the court has remained collegial despite its size because they all sit primarily in one place and the court does not operate in divisions. Thus, they have to interact with all members of the court.

In contrast, the Michigan Court of Appeals, another statewide court, has judges with chambers in several locations in the state and sits in randomly assigned panels of three so that all judges sit an equal number of times with all other members of the court over time. Older judges on the court say that as the court has grown there has been less personal interaction among judges. This may be as much a function of the prevalence of technology as it is of court size. Other impediments to interaction among judges are budgetary: the court used to meet quarterly at its headquarters in Lansing for dinner with court meeting the following morning, but budget constraints have caused the dinner gathering to be eliminated. Nevertheless, the judges do not think this has affected the quality of their opinions.

The only large court of regional jurisdiction to sit as a unitary court is the New York Supreme Court Second Department. It sits in randomly created panels of four or five. Each judge sits with every other judge. Although some of the judges have their offices in outlying districts, all judges meet once a week at the courthouse in Brooklyn Heights to discuss court business. The collegiality of the court has not suffered as it has grown, because of its traditions and the fact that the judges frequently interact both on panels and through weekly meetings.

B. Court Performance

All of the larger courts have developed various delay reduction methods as their caseload has grown. While many of the larger courts were very slow in the past, strong court leadership and the development of case management delay reduction programs have significantly improved their performance. As Chief Judge William McGuiness, Administrative Presiding Justice of the California First District, said, “The judges have come to understand that they have to step up and manage the courts effectively or someone else will manage it for them.”

Not all courts keep the same data on court performance, and some did not have data to provide. Limited data was obtained from court-maintained websites. However, given those limitations, the following chart provides information regarding court performance:

| | Cases / Judge | Opinions Written/ Judge | Time on Appeal: Filing-Disp. | Time on Appeal: Perf-Disp. |
|----------|---------------------|---|---|---|
| Ariz | 134 | ~100 | 11 mos-filing to Dis. Civ 7-9 months Crim. | |
| Cal. 1st | 123 ⁴⁸ | 85 ⁴⁹ | Median: Civ. 397 Crim. 401 Juv. 256 | Median: Civ. 153 Crim. 105 Juv. 66 |
| Cal. 2d | 163.93 | 119 | Median: Civ. 442 Crim. 361 Juv. 268 | Median Civ. 97 Crim. 78 Juv. 69 |
| Cal. 4th | 151 | 122 | Median: Civ. 560 Crim. 351 Juv. 218 | Median Civ. 248 Crim. 75 Juv. 56 |
| Ill. 1st | 160 ⁵⁰ | ~150 | ~one year average ⁵¹ | n/a |
| Mass. | 67 | n/a | | 9 mos (270 days) |
| Mich. | ~300 ⁵² | n/a | Average 439 ⁵³ | 295 |
| Minn. | 146.6 ⁵⁴ | ~100 | 250 ⁵⁵ | n/a |
| N.J. | 200 ⁵⁶ | ~120 | Median: 393 | Avg. 153 |
| N.Y. 2d | 509 ⁵⁷ | n/a, judges decided 204 on the merits per judge in 2003 | 95% of cases disposed of within one year | n/a |

⁴⁸ For Fiscal year 2001-02.

⁴⁹ Information on Performance Data of California courts is available online at www.courtinfo.ca.gov/reference/documents/csr2003.pdf.

⁵⁰ Illinois Court Statistics are available online at www.state.il.us/court/AppellateCourt. The figures used in the chart are for 2002.

⁵¹ As reported by Judge Greiman, Chair Executive Committee.

⁵² This was reported by Chief Judge William Whitbeck who stated that the caseload is rising. The latest information on the court's online report shows filings in 2001 as 253 per judge or 7,102 total filings. See Mich. Supreme Court Annual Report 2001, <http://courts.michigan.gov/scao/resources/publications/statistics/msc-coacaseloadreport2001.pdf>.

⁵³ Reported by chief judge.

⁵⁴ See Minn. State Courts 2003 Annual Report, <http://www.courts.state.mn.us/annualreport/2003>.

⁵⁵ Reported by Chief Judge Edward Touissant as an approximate number.

⁵⁶ Figures for 2003 reported by Presiding Judge Silvia Pressler.

⁵⁷ Reported by Administrative Presiding Judge Gail Prudenti. She indicated that a large number of cases are disposed of prior to submission on the merits with little judicial involvement, accounting for the very large case filings per judge.

Although some of the larger courts have significantly higher time on appeal than others, and accurate statistics are not available on all courts, some of the slower courts have actually significantly improved their performance while growing in size. For instance, the Massachusetts court was significantly backlogged in 2000. Cases would take two years from the time they were fully briefed simply to reach the oral argument calendar. Not only were eleven new judges added at that time, but the Chief Justice developed a summary disposition process. As a result, the time from briefing to oral argument has been reduced to five months, and most cases are disposed of within nine months from the completion of briefing.

Similarly, in Michigan the court was severely backlogged in 2001. Newly appointed Chief Judge William Whitbeck introduced a delay reduction program which reduced the average time from filing to disposition from 653 days average in 2001 to its current level of 439 days. The delay in issuing opinions has been reduced from an average of sixty-one days from argument to twenty-four days in 2004. Judge Whitbeck says that his efforts to reduce time on appeal continue. Thus, court size, which has increased, has not been an impediment to improving court performance in Michigan.

Administrative Presiding Justice Gail Prudenti of the New York Supreme Court Second Department established a case management group to oversee the progress of cases through the court two years ago. They have the responsibility of assuring that trial transcripts and briefs are timely filed, and the time on appeal has improved since then. The court is able to dispose of ninety-five percent of its case filings within one year.

California courts have also improved their performance. Although the overall time on appeal remains longer than most, the time on appeal of the First and the Second are actually more expeditious than the three smallest districts in California.⁵⁸ In addition, all three courts in California report a significant delay on appeal caused by the preparation of the trial transcript and record. While some progress had been made in reducing this delay, recent budget cuts in California have exacerbated the problem. However, comparing the California courts to the Florida courts on time from perfection of the case to disposition, the larger California courts are actually able to prepare, conference, and dispose of cases faster than many of the Florida courts.

⁵⁸ See online statistical report, *supra.*, note 49.

C. Consistency

A significant concern expressed by commentators and judges is the ability of large courts to remain consistent in their opinions so that a coherent and predictable body of law develops. Interestingly, many of the large courts do not maintain complete consistency, because most do not have a formal mechanism to retain consistency by reconciling or resolving inconsistent opinions, such as through an en banc process.

Arizona Division One has no conflict resolution procedure. Although they circulate opinions for comment prior to release, even if a majority of the judges on the court disagree with the panel opinion, it can still be released. If two panel opinions conflict, the Supreme Court must resolve the conflict. Because the Arizona appellate courts are creatures of statute, the legislature would have to confer the power to en banc cases on the court. That power has not been authorized.

In California there is no conflict resolution mechanism in the district courts, and conflicts between the divisions are resolved by the Supreme Court, if at all. It is not unusual to have division disagreements, and this is considered simply part of the process. The chief judge of the First District reports that he has never heard of lawyers complaining about this. However, the Second District's experience is that there are fewer conflicts than there were fifteen years ago. In the Fourth District panels generally defer to the opinion of another panel in the division out of respect, but there is no obligation to do so.

Likewise, Illinois has no conflict resolution procedure. Although generally when one division or panel renders an opinion, the other divisions will follow it, sometimes division opinions are in conflict. The Supreme Court actually proposed that the appellate courts have an en banc procedure, but the appellate courts rejected the proposal in favor of the Supreme Court continuing to resolve conflicts in opinions. Occasionally it is a frustration for lawyers and trial judges. Because the trial court is required to follow the opinion of the district, the trial court must decide which opinion to follow when decisions conflict.

Minnesota does not have a conflict review procedure because it considers the panel opinion to be the decision of the court. All opinions are circulated to the entire court for comment prior to release, and each judge is expected to read and comment on other judges' opinions. The panel is to take into consideration the comments of the other judges. Thus, because of the input of all judges prior to release, the panel decision is considered the court's decision. Once a decision is rendered, other panels follow. They simply do not recede from prior decision. They keep track of cases with similar issues

which are pending in cases. This then allows them to assign similar cases to the same panel, or at least each panel will know that another panel has a similar issue, so that two panels do not issue conflicting decisions.

New Jersey also does not have a method of resolving inconsistent opinions. Panels can and do conflict occasionally. Almost always the Supreme Court takes a case where another decision conflicts, and it resolves the conflict. However, panels do not disagree very often, and inconsistency is not a problem. Moreover, on their court they maintain that it is very important for co-equal members of the court to freely disagree, even though they rarely dissent.

Although not formal in nature, the New York Second Department does try to resolve conflicts. First, every opinion goes to a Decision Department which is responsible for reviewing the opinion for conflict or the need to clarify language. Once it passes through there, it is circulated to the court. If anyone has a question about an opinion, these are usually addressed to the Administrative Presiding Justice (APJ) who also reviews all opinions. If there is a true conflict, the APJ will go to the panel and see if she can resolve the conflict. If not, she may then bring the case to the entire court at a weekly meeting. After discussion, a vote may be taken, with all twenty-two judges voicing their position. The panel will accede to the majority. It has never occurred that a panel would disagree with the majority and still insist on the issuance of the opinion. Even taking an opinion to the full court is a very rare occurrence.

Judge Prudenti, however, does think that maintaining consistency is the biggest problem of court size. Because so many opinions are issued, it is hard to assure complete consistency even with the existence of the decision department.

Only two courts have formal conflict resolution procedures. The Massachusetts Court of Appeals first tries to resolve conflicts between panels through the circulation of all published opinions prior to release. Judges are expected to comment on the opinions, and the panels are expected to seriously consider the comments and make changes, if possible, to accommodate other judges' concerns. If the other judges question the result, the panel is expected to reconsider and attempt to reach an agreement in line with the thinking of the entire court. If the panel continues to feel differently than the rest of the court, the Chief Justice is authorized to add judges as panel members so that the opinion will reach the result favored by the court majority. This, however, happens only very rarely. At most, the Chief has had to add two justices to a panel. More commonly, the Chief Justice is able to get at least one member of the panel to change his/her view to create a result in keeping with the court majority. All of this happens before the opinion is issued. There is no provision for rehearing en banc.

The Michigan Court of Appeals adopted a rule in 1990 to permit resolution of conflicting panel opinions. If a second panel declares that its decision conflicts with a prior panel's decision on an issue of law, the case is submitted to the entire court for a vote on whether to resolve the conflict. If the majority of judges vote to resolve, the chief judge appoints a seven judge panel, all randomly selected but excluding the judges on the two conflicting panels. This seven judge panel determines the issue and renders the opinion of the court. In the seven years that the current chief judge has been on the court, there has been no noticeable increase or decrease in conflict panels, which average about one or two per quarter.

D. Conclusions

Review of the intermediate appellate courts in the ten largest states does not indicate that court size impedes collegiality, efficiency, or effectiveness. All courts expressed satisfaction with a high degree of collegiality even as they grow in size. Well performing courts in other states appear to enjoy strong leadership, good case management, and sufficient resources to handle their caseloads. This is apparent from the experience of almost every court studied, particularly the Michigan Court of Appeals and the Massachusetts Court of Appeals, two courts which grew significantly yet were able to substantially improve their performance when strong court leaders emerged. Chambers dispersion does not appear to be a significant problem to a well functioning court, largely due to advances in communications and document management technologies. In addition, most courts have developed methods, usually through the creation of divisions, to lessen the impact of court size. The use of divisions in larger courts allows for judges to interact closely with other judges for a period of time.

Less can be said regarding whether large courts can maintain consistency, because in most large state courts, the panels are not required to be consistent. Yet, where the courts strive to maintain a consistent body of law, they have developed mechanisms to assure consistency, such as Minnesota, and the New York Second Department. Where formal mechanisms to resolve inconsistencies are in place these courts are able to use them effectively, although in both cases the formal en banc panel to decide the case for the court is less than the entire court. This is different than the en banc practice in all Federal circuits except the Ninth, and also different than the Florida appellate courts. Whether full en banc is a viable method to maintain consistency in very large courts (e.g. twenty judges or greater) could not be determined. However, most courts which do try to maintain consistency, either through formal mechanisms or informally, do not view it as a significant problem given the volume of cases. Only New York expressed a concern for consistency.

IV. Analysis of Florida Court Data

Available data on the performance of Florida district courts of appeal does not seem to manifest a correlation between court size and overall performance. The Commission reviewed court performance data including number of cases filed, time on appeal, cases disposed by type of disposition, productivity, and rehearings en banc. Comparison shows that each court handles its workload within similar and acceptable time parameters. There is no significant difference in court performance between the smaller courts and the larger courts. Workload, indicated as cases per judge, varies considerably, but this variation does not correlate to court size. The Commission did no analysis on consistency of opinions beyond review of the numbers of en banc cases because it was without resources to perform the type of qualitative and content-based research necessary to properly analyze the issue.⁵⁹

A. Case Filings and Dispositions

| Court | Judges | Cases Filed | Cases per Judge | Cases Disposed | Cases Disposed per Judge |
|--------|--------|-------------|-----------------|----------------|--------------------------|
| First | 15 | 5579 | 371.93 | 5292 | 352.8 |
| Second | 14 | 5971 | 426.5 | 5938 | 424.14 |
| Third | 11 | 3401 | 309.18 | 3282 | 298.36 |
| Fourth | 12 | 5045 | 420.42 | 5266 | 438.83 |
| Fifth | 10 | 4196 | 419.6 | 4051 | 405.1 |

In calendar year 2003 the case filings per judge differed between the courts, ranging from approximately 310 to 426:

The largest court, the First DCA, did not have correspondingly the largest number of filings per judge. The smallest court in size, the Third, did have the lowest number of filings per judge. Three courts had filings in excess of 400 per judge and dispositions in excess of 400.

A generally accepted measure of court performance, required by the legislature, is the clearance rate, or the ratio of filings to dispositions. A clearance rate of 100% is considered current. A rate in excess of 100% means that the court is reducing backlog.

⁵⁹ Such analysis was conducted on Federal Ninth Circuit opinions. See Hellman, *supra* note 32.

In calendar years 2001-03 the clearance rates for Florida district courts of appeal were as follows:

| | 2001 | 2002 | 2003 |
|--------|------|------|------|
| First | 99% | 100% | 95% |
| Second | 98% | 102% | 99% |
| Third | 99% | 103% | 97% |
| Fourth | 96% | 93% | 104% |
| Fifth | 102% | 98% | 97% |

Generally stability in clearance rates is preferable, with a goal of averaging 100% over time. The data indicate that each Florida district court is performing well, neither falling behind nor compelled to adopt strategies to purge large numbers of aging cases. While the First District had a clearance rate in 2003 slightly less than the other courts, it was not appreciably smaller, and in 2002 its clearance rate exceeded the rate of two smaller courts. The Second District, the second largest court, had the second highest clearance rate in both 2002 and 2003. Thus, court size does not appear to correlate to court performance in terms of clearance rate. Rather, the clearance rate appears to be a function of the total number of cases filed per judge combined with case management decisions and the availability of support resources.

B. Time on Appeal

The courts measure time on appeal by calculating the median of several time periods, including the overall time from filing to disposition, and then three components of that overall time: the period from filing to perfection of the appeal, the period from perfection to oral argument or court conference, and the period from oral argument or conference to disposition of the case. The first component, from filing to perfection, is largely governed by the timeliness of other actors in the court system in the performance of their functions. (e.g., filing of briefs by attorneys, submission of transcripts by court reporters, transmittal of record by trial court clerk). Courts have varying practices on extensions of time allowed to the attorneys, court reporters and clerks that can affect these activities. These are more a function of case management practices than size of court.

The second period, from the date a case is perfected to when it is heard on a court calendar either for oral argument or for conference (or circulation to the judges if not conferenced), is generally a product of the internal operations of the court. How that time is managed is a function of case management practices and overall caseload of the court.

The final component, most relevant for purposes of this study, is the median time lapsed from the date of oral argument or court conference until the opinion is published or the case is otherwise disposed. This time can vary because of caseload per judge, difficulty of the cases, or the production of dissents and concurring opinions.

Florida Rule of Judicial Administration 2.085 provides that the reasonable time for disposition of appellate cases is within 180 days of conference or oral argument. Cases not disposed within that period, known as “pending cases,” are reported. This provides a measure of the timeliness of court performance.

Because of the number of cases which settle or are dismissed during the appeal period, the median statistics kept by the courts do not adequately reflect time on appeal from filing to disposition. However, we can review the median number of days from perfection to conference/oral argument and the median number of days from conference/oral argument to disposition of the case as providing a more accurate reflection of court timeliness.

Time on Appeal, Calendar Year 2003

| | First | Second | Third | Fourth | Fifth |
|---|----------|----------|---------|----------|---------|
| Median Days from Perfection to Conf/OA | 176 days | 108 days | 47 days | 122 days | 77 days |
| Median Days from Conf/OA to Disposition | 16 days | 11 days | 26 days | 14 days | 30 days |

Percentage of Cases Disposed within 180 Days of Oral Argument, Calendar Year 2003

| | First | Second | Third | Fourth | Fifth |
|--|-------|--------|-------|--------|-------|
| Percentage of Cases disposed within 180 days | 99% | 96% | 97% | 97% | 96% |

Examination of the timeliness indicators for the district courts indicates that court size does not appear to correlate with timeliness. While the First District was the slowest last year in terms of the progress of cases to conference or oral argument, it was fastest in disposition and decided a greater percentage of its cases within 180 days of argument or conference than the other courts. The Second District, with only one less judge, was faster than both the First District and the Fourth District. The Second District and the Fourth District have similar caseloads per judge. This would suggest that the Second District has adopted case management practices which move the cases more expeditiously through the court. The Fifth District, also with a similar caseload as the Second District and the Fourth District, is the second most expeditious court in getting its

cases heard but the slowest in the median time from argument to disposition. Yet the Fifth District is the smallest court in terms of size.

C. Consistency

Florida Courts have both formal and informal methods to maintain consistency in the opinions of the courts. An informal mechanism which has worked successfully to maintain consistency in some of the large courts studied is the circulation of opinions prior to release. This circulation affords each judge on a court an opportunity to review the opinion and raise any concerns. Decisions can be “pulled” from release if any questions arise. Some courts permit any judge to pull an opinion. Other courts permit a panel member or the chief judge to pull an opinion, which could occur in response to a concern raised after circulation.

As courts increase in size the number of opinions that each judge is required to read might increase. However, the number of opinions can vary from court to court for many reasons, the number of opinions a judge must read is not dependant solely on the number of judges on the court. In 2003, the number of written opinions were: First District, 857; Second District, 952; Third District, 690; Fourth District, 1008; and Fifth District, 653.

The formal en banc procedure permits the court to maintain consistency of its opinions. Judges on the court can vote to en banc a case if enough judges desire to recede from a prior opinion or if a panel opinion conflicts with a prior precedent (referred to as En Banc Merit opinions). Litigants can also move for rehearing en banc if they believe that the issued opinion creates an intra-district conflict (referred to as En Banc Rehearing opinions). Thus, en banc opinions can either be issued in the first instance or subsequent to rehearing.

The incidence of en banc opinions is very low in all districts. Some judges maintain that en banc is more difficult as the court grows larger. The incidence of en banc on the Florida district courts does not reflect that the use of the en banc process use is governed by court size. The table on page 34 presents the number of en banc opinions issued each year by each district court from 1989 through March of 2004.

Examination of the historical use of en banc procedures does not appear to support the proposition that judges on larger courts in Florida are reluctant to engage in the en banc process. When the First District consisted of thirteen judges, they determined as many cases en banc as they did several years later when the court had increased to fifteen judges. For several years the court heard very few en banc cases, but recently those

numbers have increased. This temporary reduction in en banc cases may be related to the First District's experimentation with subject matter divisions during that period.

The Second District issued en banc opinions in more cases when the court increased to fourteen judges than when the court was smaller. This may indicate more of a need to resolve inconsistencies between panels, but it appears that the increase in the size of the court did not impede the use of the en banc process. The Third District has issued few En Banc Merit opinions but has issued more En Banc Rehearing opinions than the other larger courts.

Further indication that court size does not affect the use of the en banc process is seen in the Fourth District, which has had twelve judges since 1989. The court issued very few en banc opinions until 1999. Since that time they have issued a substantial number. The difference could involve the issues being raised by the parties or possibly may stem from changes in the makeup of the court rather than the number of judges. The Fifth District had a flurry of en banc activity from 1998-2000 when the court was nine judges, but the number has reduced since it became ten judges and had several retiring judges replaced.

In all, the incidence of en banc opinions is very small compared to the overall caseloads of the district courts, and the numerical evidence does not seem to reflect any consistent impact of court size on the ability or willingness of the courts to consider a case en banc. Thus, the evidence does not suggest that the law is unsettled in larger courts because the courts are reluctant to use the en banc process in a case to resolve a conflict or inconsistency.⁶⁰

D. Conclusions

The empirical evidence regarding Florida's district courts does not appear to indicate that court size, per se, impedes the efficient handling of cases. The size of the per judge caseload appears to have more impact on timeliness than the size of court. Time on appeal appears to be within normal ranges for all courts, and most cases are decided within the presumptively reasonable time parameters required by the Rules of

⁶⁰ The Commission did not consider the issue of per curiam opinions in this study. That issue was extensively examined in the JUDICIAL MANAGEMENT COUNCIL FINAL REPORT AND RECOMMENDATIONS OF THE COMMITTEE ON PER CURIAM AFFIRMED DECISIONS (May 2000) as to the current status and impact of these decisions on the district courts of appeal. The impact of increased court size on the issuance of PCA opinions could not be examined from a study of other courts, because no other courts studied dispose of cases on the merits without a written opinion or an order which designates a reason for summary disposition. All courts except New York have rules permitting opinions to be unpublished.

Judicial Administration. The courts can resolve conflicts between panels through the en banc process, contributing to the stability of the law of the district. The evidence suggests that size of courts in Florida is not an impediment to hearing cases en banc, and thus does not contribute to inconsistency of the law.

| | #Judges | First DCA | | #Judges | Second DCA | | #Judges | Third DCA | | | #Judges | Fourth DCA | | #Judges | Fifth DCA | | |
|--------------|---------|---------------|-------------------|---------|---------------|-------------------|---------|---------------|-------------------|-----------------|---------|---------------|-------------------|---------|---------------|-------------------|-----------------|
| | | En Banc Merit | En Banc Rehearing | | En Banc Merit | En Banc Rehearing | | En Banc Merit | En Banc Rehearing | En Banc hearing | | En Banc Merit | En Banc Rehearing | | En Banc Merit | En Banc Rehearing | En Banc hearing |
| 1989 | 12 | 1 | 1 | 12 | 0 | 1 | 10 | 0 | 7 | 0 | 12 | 0 | 0 | 7 | 0 | 0 | 0 |
| 1990 | 13 | 0 | 1 | 12 | 0 | 1 | 11 | 1 | 3 | 0 | 12 | 1 | 0 | 9 | 0 | 0 | 0 |
| 1991 | 13 | 3 | 1 | 12 | 0 | 0 | 11 | 2 | 6 | 3 | 12 | 1 | 1 | 9 | 0 | 0 | 0 |
| 1992 | 13 | 4 | 0 | 12 | | 1 | 11 | 0 | 3 | 1 | 12 | 3 | 7 | 9 | 0 | 0 | 0 |
| 1993 | 13 | 5 | 1 | 12 | 0 | 0 | 11 | 0 | 3 | 0 | 12 | 0 | 0 | 9 | 0 | 0 | 0 |
| 1994 | 15 | 0 | 0 | 14 | 0 | 0 | 11 | 0 | 5 | 0 | 12 | 2 | 0 | 9 | 0 | 0 | 0 |
| 1995 | 15 | 3 | 1 | 14 | 0 | 1 | 11 | 0 | 3 | 4 | 12 | 0 | 0 | 9 | 0 | 0 | 0 |
| 1996 | 15 | 4 | 2 | 14 | 0 | 0 | 11 | 0 | 2 | 0 | 12 | 0 | 0 | 9 | 0 | 0 | 0 |
| 1997 | 15 | 5 | 0 | 14 | 0 | 0 | 11 | 1 | 0 | 0 | 12 | 1 | 1 | 9 | 0 | 0 | 0 |
| 1998 | 15 | 1 | 1 | 14 | 0 | 0 | 11 | 0 | 2 | 2 | 12 | 0 | 0 | 9 | 5 | 0 | 0 |
| 1999 | 15 | 1 | 0 | 14 | 1 | 0 | 11 | 1 | 3 | 1 | 12 | 4 | 0 | 9 | 3 | 2 | 0 |
| 2000 | 15 | 1 | 1 | 14 | 2 | 2 | 11 | 0 | 3 | 1 | 12 | 14 | 3 | 9 | 6 | 1 | 1 |
| 2001 | 15 | 4 | 0 | 14 | 5 | 0 | 11 | 0 | 0 | 3 | 12 | 7 | 1 | 10 | 2 | 4 | 0 |
| 2002 | 15 | 4 | 0 | 14 | 2 | 0 | 11 | 1 | 9 | 1 | 12 | 5 | 0 | 10 | 3 | 1 | 0 |
| 2003 | 15 | 1 | 2 | 14 | 3 | 1 | 11 | 1 | 3 | 3 | 12 | 5 | 0 | 10 | 0 | 0 | 0 |
| 2004 | 15 | 0 | 0 | 14 | 1 | 0 | 11 | 0 | 0 | 3 | 12 | 1 | 0 | 10 | 1 | 1 | 0 |
| Total | | 37 | 11 | | 14 | 7 | | 7 | 52 | 22 | | 44 | 13 | | 20 | 9 | 1 |

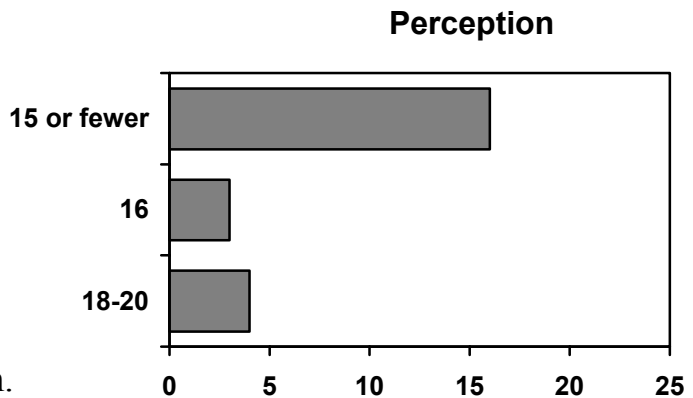
V. Judicial Survey

To explore perceptions judges may have on the impact of court size and workload on collegiality on Florida's district courts, a survey instrument was developed and transmitted to all current district court of appeals judges.⁶¹ Responses to the survey were received from twenty-nine of the sixty-two district court judges, a response rate of forty-seven percent. Because of the small size of the entire group, and given the numerically small number of responses, the results cannot be taken as being statistically valid but as simply expressing the opinion of those who answered the survey.

A. Collegiality

Judges generally do not perceive a collegiality problem on their courts.

- 86% (25 of 29) indicate that they do not think there is a general problem of diminishing collegiality among Florida's DCAs; 3% (1 of 29) indicate such a perception; and 10% (3 of 29) do not express an opinion.



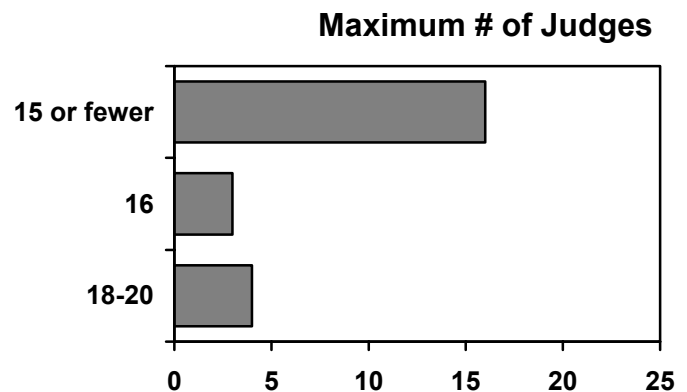
- 97% (28 of 29) of judges feel that they generally understand and respect the views of their colleagues.
- 83% (24 of 29) of judges indicate that they feel free to provide comments on a draft opinion regarding a case when they are not on the panel.
- 80% (23 of 29) of judges do not agree that longer-tenured judges are more collegial among each other than with junior judges.

⁶¹ The survey instrument was prepared by Judge David Gersten and Steve Henley of the Office of the State Courts Administrator.

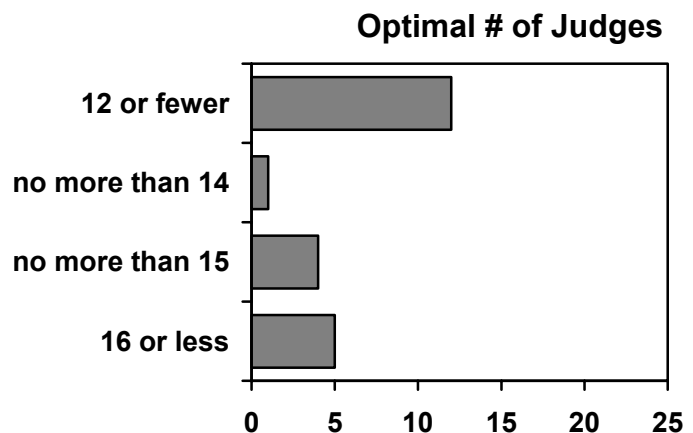
B. Court Size

Judges generally do not perceive that collegiality is negatively affected by the current size of the district courts. Judges generally perceive that the temperament of personality of individual judges on a court is an important factor affecting collegiality, and that temperament has an impact regardless of the size of a court. Several judges perceive that to some degree collegiality is affected by the dispersion of judges into branch courts or where all judges do not work together in a single location.

- 70% (16 of 23) of judges responding to a question asking the maximum size of a DCA indicate a number not higher than 15. 3 respondents indicated that 16 should be the maximum, and 4 respondents indicated the maximum should be 18-20.



- 55% (12 of 22) of judges responding to a question about the optimal number of judges for any DCA indicate a number not higher than 12. 1 judge indicated a number not higher than 14, 4 indicated 15 or less, and 5 indicated 16 or less.



C. Workload

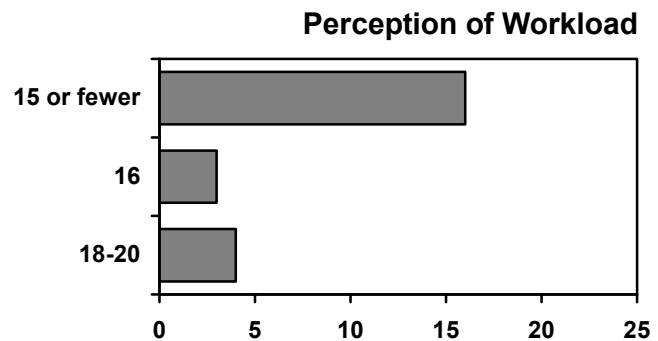
Actual Workload

FY 2002-02

| DCA | Judges | Filings | Filings Per Judge | Dispositions |
|-------|--------|---------|-------------------|--------------|
| 1 | 15 | 5,394 | 359.6 | 5,012 |
| 2 | 14 | 6,020 | 430.0 | 6,255 |
| 3 | 11 | 3,428 | 311.6 | 3,482 |
| 4 | 12 | 5,077 | 423.1 | 5,114 |
| 5 | 10 | 4,195 | 419.5 | 4,089 |
| Total | 62 | 24,114 | 388.9 | 23,952 |

Perceived Workload: Judges generally perceive that the current workloads of their courts are somewhat heavy, but manageable with current levels of support resources.

- 76% (22 of 29) indicate that the current workload is manageable; 15% (3 of 20) indicate the workload is “overwhelming;” 10% (2 of 20) indicate it is “light.”

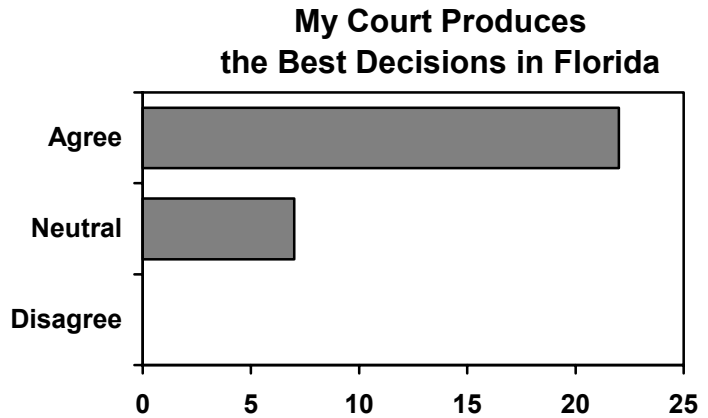


- 70% (14 of 20) of judges indicate that they have enough time to adequately consider each case, but 30% (6 of 20) indicate that they do not.
- 70% (14 of 20) of judges indicate that they presently have enough support personnel, but 25% (5 of 20) indicate that they do not.

D. Court Processing of Cases

Judges generally perceive the district courts are performing well.

- 76% (22 of 29) of judges agree that their court produces the best appellate decisions in Florida. 24% (7 of 29) indicate a neutral response, and no judges disagree.



- 55% (16 of 29) agreed that their courts issue about the right number of dissenting opinions. 35% (10 of 29) were neutral, and 3 disagreed somewhat.
- 86% (25 of 29) of judges perceive that their court disposes of cases in a timely manner. Only 10% (3 of 29) perceive that their court is too slow and 1 perceives that his or her court disposes of cases too quickly.
- 59% (17 of 29) feel that their court does not have too many or too few en banc proceedings.

E. Court Management

Florida’s district court judges are satisfied with the governance of their courts, which includes the selection of the chief judge and their level of participation in operational and administrative decisions.

- 70% (20 of 29) agree that the practice on the respondent’s court has been for chief judges to appropriately engage all of the judges in administrative and management matters; 13% (4 of 29) disagree and 15% (5 of 29) are neutral on the question.

F. Other Comments:

Judges expressed that their job satisfaction comes from reading briefs, doing legal research, attending OA, and writing opinions.

They generally view themselves as appellate judges and part of the system as opposed to members of a particular district court.

Individual judges had opinions on areas of dissatisfaction such as handling administrative matters, losing regular contact with attorneys, being away from the courtroom, etc..

There were no common themes of dissatisfaction.

G. Conclusions

Responses to the judicial survey indicate that current district court of appeal judges do not perceive a present collegiality problem. Judges feel that their courts are performing well. Regarding optimal and maximum court sizes, the judges indicate a preference for relatively small courts, consistent with present sizes