

INTERNAL COMMUNICATION IN THE EIGHTH CIRCUIT COURT OF APPEALS*

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I. INTRODUCTION

People do not consider communication among judges of appellate courts to be a problem. Perhaps people think communication is simply a judge walking down the hall to talk to a colleague. Frequent face to face contact is possible if all the court's judges reside in the same area and work in the same building, as at the United States Supreme Court. The book, *The Brethren*,¹ which portrayed frequent meetings among at least some of the Justices, reinforced that picture. One must remember, however, Justice Powell's 1976 suggestion that informal interchange was "minimal," because the Justices operate, "perhaps as much as 90 per cent of our total time . . . as nine small, independent law firms."² More importantly, one must remember that in only two of the eleven United States Courts of Appeals—the Seventh and District of Columbia Circuits—do all the judges live at circuit headquarters and regularly work in the same courthouse. In the remaining circuits, judges reside in different locations throughout the circuit. This geographic dispersion should lead the observer to treat intracircuit judicial communication as problematic.

Only two prior studies addressed the question of communication among federal circuit judges. One study, based on interviews with

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1. B. WOODWARD & S. ARMSTRONG, *THE BRETHREN* (1979).

2. Powell, *What the Justices are Saying* . . . , 62 A.B.A.J. 1454 (1976). Attention to, and emphasis on, particularly controversial cases like *United States v. Nixon*, 418 U.S. 683 (1974) (Nixon tapes); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); and *New York Times v. United States*, 403 U.S. 713 (1971) (Pentagon Papers); in B. WOODWARD & S. ARMSTRONG, *supra* note 1, may help explain the discrepancy.

judges in the Fifth, Eighth, and Tenth Circuits, focused not on communication among appellate judges, but on communication among the circuits' district judges.³ The study paid particular attention to the process of socializing trial judges to their jobs. The other study was Marvin Schick's book length review of the Second Circuit during Learned Hand's tenure as Chief Judge, in which communication is included among the wide variety of topics considered. The judges' "physical dispersal"—even over the Second Circuit's relatively small geographic territory—"precluded their coalescing into a closely knit social group."⁴ The effect on the court's decisional process proved even more significant than the social effect because "when judges . . . meet face to face the likelihood for understanding of positions and resolution of conflict is enhanced."⁵ Geographical separation led to "reliance on more indirect forms of interaction such as intracourt memoranda and letters."⁶ For at least one judge, Charles Clark, reliance on written memoranda increased conflict within the courts because those judges who exchanged written communication tended "to indulge in extended exegetical analysis of collegial letters."⁷

This article, part of a study of intracircuit communication and consistency within the United States Courts of Appeals for the Eighth and Ninth Circuits, focuses on the Eighth Circuit's appellate judges' communication with each other, district judges, and judges from outside the circuit. The article concludes with specific attention to the effects on communication caused by geography and the number of judges on the court. Extended interviews, primarily open-ended, were conducted with all the court's active duty circuit judges and one of the two senior circuit judges.⁸ Along with previously reported material based on in-

3. Carp & Wheeler, *Sink or Swim: The Socialization of a Federal District Judge*, 21 J. PUB. L. 359 (1972). See also Carp, *The Scope and Function of Intra-Circuit Judicial Communication: A Case Study of the Eighth Circuit*, 6 LAW & SOC'Y REV. 406 (1972) (based on the papers of Judge William F. Riley (S.D. Iowa)).

4. M. SCHICK, *LEARNED HAND'S COURT* 74 (1970).

5. *Id.* at 75.

6. *Id.*

7. *Id.*

8. The interviews, with one longer exception, were roughly one hour in duration. They were conducted, in 1977, at circuit headquarters when the judges were there to hear oral argument. All interviews took place under conditions of confidentiality and anonymity, with the understanding that quotations drawn from the interviews would not be attributed to particular judges and that no one but the interviewer (the author) would see the interview transcripts.

terviews with circuit judges and district judges in the Ninth Circuit,⁹ the judges' views reported in this article provide a special opportunity to examine the inner workings of a federal appellate court.¹⁰

The Eighth Circuit extends from the Dakotas and Minnesota through Arkansas.¹¹ At the time of the interviews on which this study is based, the court had eight judgeships and two sitting senior judges.¹² Only one of the eight active duty judges—along with a senior circuit judge—sat in St. Louis, the circuit's headquarters.¹³ In only one city, Omaha, were there two active duty circuit judges. The other senior judge sat in Sioux City, which was without a resident district judge. Chief Judge Floyd Gibson was stationed at Kansas City.¹⁴ Other judges resided in Fargo, Duluth, Des Moines, and Harrison, Arkansas.

The geographic dispersion of judges in the Eighth Circuit is similar to that in the Ninth Circuit, although the Eighth Circuit has considerably fewer judges than the Ninth Circuit. Prior to the Judges Bill,¹⁵ the Ninth Circuit had fifteen judgeships and seven senior judges in 1977. Furthermore, the Eighth Circuit used far fewer "extra" judges—district judges and judges from outside the circuit—than did the Ninth Circuit. The Eighth Circuit, like the Ninth, sits at more than one location. The Eighth Circuit, however, unlike the Ninth, sits in only one location, St. Louis, in a given month, except twice a year when it sits in St. Paul. Ninth Circuit panels sit monthly in both San Francisco—circuit head-

9. Wasby, *Communication Within the Ninth Circuit Court of Appeals: The View from the Bench*, 8 GOLDEN GATE L. REV. 1 (1977); Wasby, *Inconsistency in the United States Courts of Appeals: Dimensions and Mechanisms for Resolution*, 32 VAND. L. REV. 1343 (1979).

10. See Howard, *Litigation Flow in Three United States Courts of Appeals*, 8 LAW & SOC'Y REV. 33 (1973); Howard, *Role Perceptions and Behavior in Three United States Courts of Appeals*, 39 J. POL. 916 (1977); Howard & Goldman, *The Variety of Litigant Demand in Three United States Courts of Appeals*, 47 GEO. WASH. L. REV. 223 (1978).

11. For an examination of the 1929 creation of the Tenth Circuit from the old Eighth Circuit, see D. BONN, *THE GEOGRAPHICAL DIVISION OF THE EIGHTH CIRCUIT COURT OF APPEALS* (1974).

12. The Omnibus Judgeship Act of 1978 added a ninth judgeship. Pub.L.No. 95-486, § 3(b), 92 Stat. 1629 (codified in scattered sections of 28 U.S.C.).

13. When Judge William Webster resigned to become Director of the Federal Bureau of Investigation, there was no active duty judge at St. Louis until Judge Theodore McMillian began his service.

14. On January 1, 1980, Judge Donald P. Lay became Chief Judge of the Circuit when Judge Gibson took senior status. The administrative structure of the court became bifurcated during the period of the study, with the circuit executive moving to Kansas City while the Clerk's Office remained in St. Louis. When Judge Lay became Chief Judge and a new circuit executive assumed office in March, 1980, the executive's office was returned to St. Louis.

15. The Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, § 3(b), 92 Stat. 1629 (codified in scattered sections of 28 U.S.C.).

quarters—and Los Angeles, with several sittings each year in Portland and Seattle, with annual visits as well to Alaska and Hawaii.

II. DIRECT CONTACT WITH OTHER CIRCUIT JUDGES

The circuit judges of the United States Court of Appeals for the Eighth Circuit communicate with each other by letter, memorandum, telephone, judicial conference, and through personal conversation and discussion. One judge called this latter form of communication "visiting." Communication prior to argument is limited. The post-argument conference, or "bench conference," is the principal means of face to face communication. Most communication takes place in the post-conference period. This pattern, and the judges' comments about it, are not unlike that in the Ninth Circuit.¹⁶

Most pre-argument communication is related to screening cases to determine whether there should be oral argument. A panel's senior active judge has the responsibility for initiating the removal of a case from oral argument. Because there is no "pre-assignment," however, all judges read all the briefs and participate in the decision, made by telephone to allow prompt notification of lawyers.¹⁷ At one time, only the judges performed screening for oral argument in all cases. Then a senior staff attorney was assigned the task of performing an initial screening of criminal cases, based on the length of trial, before sending them to a rotating screening panel of judges.¹⁸ A procedure evolved in which, if the staff attorney recommended "no oral argument" and the panel's lead judge agreed, the staff attorney sent memoranda with a "no oral argument" recommendation to all three panel members. (One judge noted that when there is any question on whether the court should hear argument, the cases are sent promptly to the judges for their decisions. This procedure is followed to avoid a case being removed from the calendar near argument time because of the difficulty of substituting another case). Most other communication among judges on the administrative panels—the screening and motions

16. See Wasby, *Communication Within the Ninth Circuit Court of Appeals: The View from the Bench*, 8 GOLDEN GATE L. REV. 1, 3-7 (1977).

17. The clerk of the court notifies the lawyers. The clerk determines the appropriate time limitation for oral argument, either twenty or thirty minutes per side.

18. For a study of screening in another circuit, see Flanders & Goldman, *Screening Practices and the Use of Para-Judicial Personnel in a United States Court of Appeals: A Study in the Fourth Circuit*, 1 JUST. SYS. J. pt. 2, at 1 (1975).

panels—is by correspondence. It is possible, however, that two panel members may confer in St. Louis to dispose of a set of cases. In motions practice, the third or tie-breaker judge is required only when two lead judges disagree.

There is little other communication before oral argument. One judge stated that the judges held no conferences in advance of argument, primarily because they were “pretty well pressed to keep up with the briefs.”¹⁹ One judge, however, if he thought an appeal frivolous, might write a per curiam opinion and circulate it to other members of the panel. Another said that judges would telephone to see whether a lawyer had “missed a case.” A judge with a useful memorandum might distribute it to the panel. One judge who circulated memoranda did so infrequently, and usually only if he had sat on an earlier branch of a pending case. “There is not too much volunteering of erudition in advance,” he noted, because judges “don’t like to have their options preempted.” Another judge, in addition to noting some discussions of upcoming cases when visiting with colleagues in St. Louis—but “very little” on his panels—said he might send a law clerk’s memorandum to a district judge “loaded with trial work” who would be sitting on the panel. Immediately prior to argument, the judges might engage in some “chit-chat.” This was “partly conversational,” but also served “to reassure the judge of his view that the case ought to have been brought” or, on the other hand, to inform the presiding judge that “too much time shouldn’t be spent on the case.” Such judicial conversation might avoid a long statement by the appellee when the court was “ready to go with him.”

Although oral argument can be a means by which judges communicate with each other, no Eighth Circuit judge referred to the oral argument communicative function of asking questions which are formally for counsel but really intended for colleagues.²⁰ One judge, who felt that “the single most important thing is to decide cases properly; the opinion is secondary,” noted, however, that he tried to allocate as much time as possible to preparation for oral argument because “the better prepared, the better the opinion and the more collegial” the court.

19. Material in quotation marks without attribution is drawn from the interview transcripts. The male pronoun will be used throughout, as all of the Eighth Circuit’s appellate judges at the time of the study were male.

20. See Wasby, D’Amato & Metrailler, *The Functions of Oral Argument in the United States Supreme Court*, 62 Q.J. SPEECH 418 (1976).

After oral argument in the morning, the judges convene at bench conference either immediately before or after lunch. The extensive discussion leads to a "tentatively firm" or "reasonably strong" agreement on disposition, as well as to assignment of cases for writing of opinions. Assignment takes place either on the day of argument or at week's end so one judge does not "get all the difficult cases." Bases for assignment vary and may include expertise and questions asked at argument that may present an indication of a judge's interest. A letter formalizing the assignments often follows.

The most extensive communication begins among the judges after the assignment. Even then, however, there may be relatively little contact—except perhaps for routine calls to obtain the transcript—until a judge drafts an opinion. One judge explained that unless he had trouble with a particular point, in which event he might seek advice from his colleagues, he would work things out with staff and clerks until the opinion was written. Another judge said that if he were troubled by a problem, he would telephone others on the panel or another judge with expertise in the particular legal areas under consideration. He said that in seventy-five percent of all cases, however, there was no oral communication except during oral argument and conference because the case was only a matter of reading briefs and record, attending oral argument and conference, writing the opinion, and "getting it out." Another judge said that after the panel heard a case, ninety percent of all communication was in writing. Nevertheless, earlier non-written contact is more likely if the writing judge finds he is departing from the general direction established at conference.

The judge writing the opinion thus initiates most post-conference communication among members of a panel. A letter is necessary if concurring or dissenting opinions are filed—an infrequent occurrence in the United States courts of appeals.²¹ If a judge wishes to suggest changes in another's opinion, he must exercise care in his means of communication. On the one hand, if the matter is complicated and the other judge is interested in receiving the comments, a memorandum may be preferable because changes may be more explicitly detailed. On the other hand, a telephone call "plays it down" so that the judge

21. See Goldman, *Conflict and Consensus in the United States Courts of Appeals*, 1968 Wis. L. REV. 461; Goldman, *Conflict in the United States Courts of Appeals, 1965-1971: A Quantitative Analysis*, 42 U. CIN. L. REV. 635 (1973); Goldman, *Voting Behavior on the United States Courts of Appeals, 1961-1964*, 60 AM. POL. SCI. REV. 374 (1966).

suggesting change “meets less intransigence.” Alternatively, a judge may precede a memorandum by a telephone call to inform the other judge that “something is coming.” A recognition also exists that each time one judge calls another, he has interrupted the latter’s work.

The Eighth Circuit’s practice of each judge giving priority to another judge’s opinions is also important to note. One judge explained that this does not mean halting work on one’s own opinion. After completing that opinion, however, the judge is to review other judges’ opinions promptly before writing more of his own.²²

Most judges (six of nine) agreed that the memorandum was the most frequently used means of communication. Another judge said that in two-thirds of the cases he simply wrote and distributed the opinion; the other two judges said that they used letters and telephone “about half-and-half.” One judge commented that a panel reconvened for further discussion of a case only once or twice a year; this clearly indicates that further face to face communication after the post-argument conference is rare. The Eighth Circuit is thus indeed a “writing court.” Variations in the basic pattern of communication, however, should not be ignored. Five of the nine judges indicated that the means of communication used most frequently varied with the stages of a case.²³ Some judges, moreover, altered the means of communication depending on the judge with whom they were dealing. A majority of the judges (six of nine), however, said they did not modify their choice of communication methods. One of those judges who found differences in communication strategies said some judges were “too good” with the written word; because they were “too blunt,” it was better to call and talk to them. Furthermore, a judge’s workload, as well as the judge with whom he was communicating, might affect the choice of memorandum or telephone.

Judges communicate with each other not only about cases assigned to their own panels, but also about other cases as well. Six of eight judges who responded said judges did communicate about these “off-panel” cases. Even so, such communication is not extensive. “At times” (an “exception”), “some will talk about an interesting case,” or a judge might “inquire at lunch about a striking case,” but even then he

22. One judge noted that he had reduced his work on other judges’ opinions, but nonetheless had his law clerks read those opinions against his bench conference notes.

23. Asked if the means of communication varied when there was no oral argument in a case, the only two judges who answered responded negatively.

is not likely to venture an opinion. Three of five judges who acknowledged off-panel communication found no difference in the means of communication used in discussion of off-panel cases. One said, however, that he “almost invariably” used the phone in that situation. Another stressed that he called when he wanted to contact a dissenting judge on a panel—“for clarification,” he stressed, “not to muster votes.”

At times, if a judge has a problem with a case, he will call a judge on a different panel if that judge has a similar problem or he may communicate with another panel if a comparable issue is before it. One judge suggested that, particularly in controversial cases where the court might be “fairly evenly divided,” he might contact a judge who had written an opinion on the issue “or has demonstrated strong philosophical views in the area.” Generally, one judge noted, “you usually do not learn anything about a case until you get the slip opinions”—and judges are not informed “officially” about them until then. At that point, however, if a judge feels an opinion is “shockingly wrong” he might telephone others. When litigants file petitions for rehearing, particularly for rehearing en banc, “some judges lobby,” but even then “most restrict themselves to writing a letter.” Letters are used when a judge is seeking a hearing en banc because he is “communicating with seven other judges.” When a judge might “want company” in writing a dissent for denying rehearing, however, a telephone call to individual judges might be more likely.

A question should be asked whether judges communicate more with some of their colleagues than with others. Six of nine judges answered “Yes.” Of the others, one claimed it was “largely a matter of who you are sitting with” and another said that contact “equalizes over time.” One of those who recognized some variation did indicate that this was not the case within the set of active duty judges; there was “somewhat less” communication between the court’s active duty judges and its senior judges. Two judges sitting in the same city tend to contact each other more frequently than judges who sit in different cities. One judge suggested that variations in communication patterns were partly attributable to some judges’ being “long talkers” while other judges used “brief but frequent” contacts. Another judge noted a very high frequency of interaction with the judge with whom he sat on an administrative panel (daily for three months).

Some judges felt that variation could be explained better in terms of

commonality of views. More frequent interaction exists among judges whose "views of the law and the direction it should take" were closer to one's own because, as another judge said, it was easier to talk with someone who "shares similar views." He observed that he would not be likely to call a "law and order judge" who did not share his views on the fourth amendment. On the other hand, one judge pointedly said that philosophy was not the basis for differences in contact. Friendship, respect, and expertise (if a judge had written opinions on a subject) all played a part in his feeling "more comfortable with some" than with others.

All judges had some contact with each other beyond their interaction when they decided cases and other judicial business, but agreed such nonjudicial contact arose infrequently. The exception occurred when the judges sat in St. Louis, where they had lunch and a "fair share" of their evening meals together. The judges cannot always dine together but they try to do so: "it is tradition." In earlier years, the judges often stayed in the same hotel, had dinner together, and "visited" afterwards. Now, they "have gotten away from that," in part because of the difficulty of getting hotel accommodations.²⁴ Other social visits appear limited to vacation visits with judges who have cabins "up north." Some judges also fish together.

This social contact, in which most judges (six of nine) see some colleagues more than others, has some effect on the court's product. Facilitation of communication was the main theme the judges mentioned. Social contacts "help you to get to know people" and "put you on a closer personal basis," so it is "bound to facilitate communication." Another judge stated that it is "easier to communicate with people you know or are friendly with." Talking shop, which takes place during social visits, also "makes it easier to work together." That shop talk includes discussion of recent Supreme Court cases rather than Eighth Circuit panel opinions "unless someone joshes someone else." One judge, who found social contact "somewhat helpful—it's bound to be," also expressed hesitancy by indicating that social contacts "can be overdone." A colleague also expressed reservations he would have if the court were "in a tight circle, where you saw no one else."

24. Resident judges, not on per diem, do not eat frequently with out-of-town judges, but occasionally entertain them at home.

III. CONTACTS THROUGH OTHER COURT PERSONNEL

As in the Ninth Circuit,²⁵ judges' direct contacts with each other substantially predominated over indirect contacts. Four judges of six responding²⁶ communicated only "a little" with other judges through their law clerks. (One said he "played it way down.") Judges considered that means of communication helpful only in relatively trivial matters; for example, "to make grammatical changes in opinions" or "to clear up the citing of cases." Judges communicated directly with each other for "important matters" such as the issue in a case.

Our picture of communication between clerks, perhaps fueled by *The Brethren*,²⁷ is based on one-city courts, not those with dispersed judges. Nevertheless, law clerks in the courts of appeals communicate with each other on their own, as confirmed by five of six judges responding to a question on the subject. One said specifically that they did so "not at my direction." Another judge, however, indicated his approval of the practice (because he had to approve the law clerks' travel) when he said that "they come to argument for that reason."²⁸ The judges believed that communication between clerks initiated on their own occurred infrequently. The judges have mixed views about even the limited communication of which they are aware. However, one judge's comment that he did not "know enough about it to know whether it is helpful" suggests that more inter-clerk communication occurs than the judges realize. One judge was "very chary" about such contact, but acknowledged that inter-clerk contact was helpful "when they find out about things."²⁹ One judge "supposed" such communication helpful "if one able clerk has done considerable research," but another judge, who had asked his clerk "not to discuss problems," said inter-clerk communication was helpful only "for the limited purpose of getting citations and finding out where memos are." The latter judge felt a serious problem would result if one judge thought another judge was attempting, through the clerks, to determine his decisionmaking in a

25. See Wasby, *supra* note 16, at 11-15.

26. Not all judges were asked all questions, because of time constraints in the interview situation. See note 8 *supra*.

27. B. WOODWARD & S. ARMSTRONG, *supra* note 1.

28. The FTS system is available to clerks as well as judges, thus permitting telephonic as well as face to face contact.

29. The judges' ambivalence is also demonstrated by the comments of two judges that there was enough such communication—at the minimal level they perceived to exist—while two others said there should be even less.

case. He mentioned an instance in which he had severely reprimanded another judge's clerk when the latter, disagreeing with the judge for whom he worked, contacted him. Another problem with clerk to clerk communication, cited by another member of the court, was the possibility that a judge's clerks would provide a "brainwashed rerun" from other law clerks, rather than their own evaluation of a case; he desired the latter. He added that the court did not want a "brief mill," in which only one clerk performed the work on a case, nor did the court "want them to be junior judges: they are not employed to decide cases."

Some minimal contact among judges occurred through other court personnel. Only a few judges used the court's staff attorneys to communicate with other judges. The judges who did use the staff attorneys found them helpful on "relatively routine" matters. One judge, however, noted that in a small percentage of cases, the "judge may not be on the same wavelength as the staff clerk," which would not happen with the judge's own "elbow clerks." Three judges also said that they communicated with other judges through other central court personnel, specifically, the clerk and circuit executive. Although all three judges found this channel of communication helpful, each used it sparingly, and never in connection with the process of deciding cases. Rather, it was used for work of court committees and for administrative matters. The circuit executive might, for example, be asked to contact the judges in connection with the Circuit Judicial Council.

IV. PREFERENCES AND SATISFACTION

More judges (three) preferred the memorandum than preferred the telephone (one) as a means of communicating. The remainder said that the two were "equally useful." The advantage of written communication—given greater emphasis in the Ninth Circuit³⁰—appeared even in the comments of the judge who preferred the telephone, when he conceded that it was "unfair" to use the phone to discuss a complex issue or to make a number of changes in an opinion. A judge who felt the telephone the least useful method of communication said that it was "difficult to explain a complex matter" using that means of communication. Another judge also expressed preference for the written mode when he said that he "likes to put down exactly how he wants an

30. See Wasby, *supra* note 16, at 15. Some Ninth Circuit judges stressed post-argument conference. No Eighth Circuit judge did.

opinion changed," so that another judge "will know exactly what he wants." This practice makes "for more rapid handling." He added, however, that he may "talk philosophy" with a judge he is "closer to." One judge mentioned the conference call as one other means of communication, but he said that conference calls were "not helpful" and simply "won't work" except for a vote on a case—as in the continuing *Reserve Mining* litigation,³¹ which had been before the court several times.

Only one of nine judges was not satisfied with his communication with the court's other judges. One of the satisfied judges, however, felt that council meetings warranted a greater allocation of time. We "need to deal with those items in a more relaxed manner." It was "difficult to do at the end of a long day." The timing problem could be solved only if the council convened on a day when court was not sitting for argument. That, in turn, could not be arranged unless the judges were together more often, so that they "could have a meeting to deal with one or two problems." The dissatisfied judge, recognizing that "from a practical sense, we can't do it," said he "would like to communicate more." "Time is limited," he added; "we are rushed to get our cases out." The court has "time priorities," and communication "isn't one of them." In communicating more with other members of the court, moreover, a judge is occupying his own time and that of another judge who may not be able to help. The judge concluded that he was satisfied with the opportunities for communication: "There are no impediments. I'm not hampered [or] constrained."

Seven judges were questioned as to whether, despite their satisfaction, communication nonetheless might be improved. Three responded in the affirmative, while the remaining four said present levels of communication could not be improved. One of the latter said that "with the FTS, it's just as good as [having the judges] next door." Moreover, he preferred geographic separation from his colleagues with easy access by telephone because he did not "want someone dropping in when I'm doing my work." Another judge who felt improvement in communica-

31. The Eighth Circuit has addressed the *Reserve Mining* case in the following instances: *United States v. Reserve Mining Co.*, 543 F.2d 1218 (8th Cir. 1976); *Reserve Mining Co. v. Ford*, 529 F.2d 181 (8th Cir. 1976); *Reserve Mining Co. v. Environmental Protection Agency*, 514 F.2d 492 (8th Cir. 1975); *United States v. Reserve Mining Co.*, 498 F.2d 1073 (8th Cir. 1974); *Steel Corp. v. United States*, 490 F.2d 688 (8th Cir. 1974).

tion not possible warned against "too much of a good thing": "I don't want to talk to other judges every morning."

One judge did not see "anything specific" he could suggest to improve the system even though it was "difficult to say that nothing could be improved." Others, however, made a few suggestions. One was "to improve the speed of the mail," admittedly an area "impossible to do anything about." Another judge simply thought the court should "supply more occasions for the judges to get together." Another suggested that communication would be improved if members of the court would convene once a year, over a weekend when "we are not faced with busy court work to discuss not more than one or two of the long-term problems facing the court." This solution would, he said, be different from a council meeting, which has a specific agenda after a long court day. This suggestion was similar to the annual "symposium" held in the Ninth Circuit and attended by the judges' families.

V. CONTACTS WITH OTHER JUDGES

District judges and judges from other circuits sit by designation on the court of appeals.³² Circuit judges frequently come in contact with district judges at their own home bases, perhaps sharing library facilities or jointly attending lectures or bar association functions. They also see St. Louis and Minneapolis-St. Paul district judges when the court sits in those locations. Three judge district courts provided an additional source of contact before those courts were largely eliminated in 1976. Otherwise, the circuit's Judicial Conference is the prime source of contact for at least some judges. Yet, because the circuit is small, the circuit judge may know most of the district judges personally. One said he knew eighty percent on a first name basis. Four circuit judges indicated that they did not communicate with district judges in ways different from those used with their appellate court colleagues. Three circuit judges said, however, that they did communicate differently with district judges. One noted that a lack of a common caseload means that we "don't discuss cases," leading to "very limited discussion" with the district judges.

Contacts with district judges do not involve much court of appeals

32. See S. Wasby, 'Extra' Judges in 'The Court Nobody Knows': Some Aspects of Decision-Making in the United States Courts of Appeals (paper presented to the American Political Science Association, Washington, D.C., September 2, 1979).

business. One Eighth Circuit judge said that contacts touched on caseload concerns rather than case substance. District judges did “nothing about seeking advice to solve problems,” because “court of appeals judges are to district judges as umpires are to second basemen.” However, another circuit judge, a former district judge,³³ said that two or three district judges with whom he had served would call about an opinion regarding cases on which they were working: “They’re asking for help,” he stressed, “not looking for an advisory opinion.”³⁴ As Carp and Wheeler have suggested, “There is the feeling among trial judges that there may be an impropriety in discussing a judicial problem with an appellate judge.”³⁵ The district judges’ view is “that their appellate judges were simply not competent to help them with their day-to-day problems.”³⁶

If district judges initiate some contact with appellate judges, some circuit judges—both former district judges and circuit judges who had not been district judges—also attempt to gain an understanding of the district judges’ situation by sitting as district judges. This is particularly important for circuit judges without previous experience as trial judges. One circuit judge, who had not been a district judge, noted that it was important to “hear evidence rather than just read it” when he sat on the trial court. Another judge observed that it would be better if circuit judges sat as district judges in other circuits to avoid being reversed by a panel of their brethren, as had happened recently in the Eighth Circuit.

Three of seven judges said that participation in three judge district courts had helped them learn about district judges’ views of the appeals court and its work. One of the three said such contact produced a “little more visiting,” but otherwise the effect was minimal because he already had been a district judge and knew the district judge’s perspective on the appellate court. Exposure to the three judge court allowed a colleague to learn district judges’ dissatisfaction about procedure “or a case they think decided particularly wrong,” but this information was only rarely revealed. Another judge, however, thought that three judge

33. At the time of the study, four of the Eighth Circuit’s active duty judges—Chief Judge Gibson and Judges Henley, Stephenson, and Webster—had been district judges.

34. Because they are friends and former colleagues, he said, he has lunch with them a couple of times a month, and on occasion they drop in on each other.

35. Carp & Wheeler, *supra* note 3, at 378.

36. *Id.*

court situations provided the district judges their “best chance to woodshed” circuit judges except for the opportunities presented at the Circuit Judicial Conference. Those who felt the contact did not reveal district judges’ views of the court of appeals explained: “We take care of business and are on our way,” with discussion “confined to the particular case in hand.” Carp observed that, while “the importance of special three judge courts for bringing together judges of the same circuit is considerable,” most discussion was between district judges themselves rather than between them and the court of appeals judge on the panel.³⁷

All the circuit judges felt the placement of district judges on the appellate court was advantageous, but all also thought certain problems stemmed from that participation.³⁸ The Eighth Circuit judges cited the following advantages to having district judges sitting on the appellate court: the district judges’ ability to help with the appellate workload; the opportunity to allow the district judges to see the inner workings of the court of appeals; the opportunity for the two types of judges to become familiar with each other; the increased circuit judge knowledge of district judges’ perspectives; and the resulting increased awareness by the circuit judges of district judges’ problems. The assistance of district judges with the workload was particularly important “if one of the active judges is ill, can’t sit, or gets behind.” Another judge found very little additional advantage but conceded that sitting with the appellate court familiarized district judges “with how the circuit works and with people on it.” Another judge made clear he would have the district judges sit on the appellate court only “once” because it “could be overdone.” These learning experiences also exist for circuit judges who sit as district judges.

One particularly important reason for district judges to sit with the court of appeals is related to Carp and Wheeler’s comment that “there is a noticeable feeling of distance—sometimes verging on actual ill will—between the circuit’s trial and appellate judges.”³⁹ The experience is said to provide not only a “realization of the place the court of appeals plays,” but also a “friendly feeling toward the courts.” The role switching allowed district judges to “view more professionally” an

37. Carp, *supra* note 3, at 411.

38. There was similar unanimity among the Ninth Circuit’s appellate judges on both points. See Wasby, *supra* note 16.

39. Carp & Wheeler, *supra* note 3, at 378.

appellate reversal of their rulings. Another former district judge echoed this observation. He said district judge participation helps them “understand what we do” and get over the feeling experienced by some “that we are not here except to provide annoyance for them.” “Some judges,” he added, “feel circuit judges go out of their way to reverse them.” District judge participation “gives us [appellate judges] impact from someone trying cases,” with luncheon discussions and other contacts making it appear to district judges that the appeals court would not “impose impractical requirements on them.”

The appellate judges, nevertheless, noted more disadvantages than advantages from district judge participation. Some problems centered on district judges’ experiences, perspectives, and interests, which differ from those of appellate court judges. The district judges’ workload and their perceived reluctance to reverse their colleagues caused other problems. One judge said that introducing a district court judge into the court of appeals’ decisional process “impairs the fabric of a collegial court by introducing a new person,” with the potential result that “decisions may not be quite as consistent.” This problem may occur partly because they “don’t approach problems as we do.” District judges view evidence differently, another judge noted, and write “different types of opinions” (“action-oriented orders”) without sufficient analysis for the circuit court’s needs.

Where the court of appeals is faced with “new questions of law,” the court is apparently reluctant to let a district judge shape the law. One judge noted, “If a case is controversial and the two circuit judges on the panel split, the result would not be a definitive ruling and the case would have to go en banc.” Moreover, the district judges are “very protective of [other] district judges” and have a “built-in bias against reversing other district judges.”⁴⁰ The problem of the “built-in bias” could be resolved, however, by not assigning the district judges “reversing responsibility.” This solution would be particularly effective in a reversal of a nonjury case or when the district judge agreed that reversal was the proper result.

District judges’ caseloads caused further problems. One Eighth Circuit member said it is “unfair to the circuit judge who draws a district judge on a panel [because] you can’t expect district judges to take real

40. The judge making this comment said it also applied to circuit judges who had been district judges, at least for a time after their elevation to the appellate court, “but it goes away.”

tough cases or ones with a lot of work.” Consequently, each circuit judge receives more work than when he sits on a panel composed entirely of circuit judges. Since most district judges found it “more difficult to get their opinions out,”⁴¹ one had to be careful to avoid district judges who were “head over heels in their own work.” One judge, however, observed that “it depends on the district judge. . . . If he’s from a district with an adequate supply of judges, the problem is not as great.”

Only one Eighth Circuit judge thought that whether a district judge was in active duty or senior status did not make a difference with respect to problems caused by district judge participation. Some judges felt that participation did not “encroach on the calendar” of senior district judges as much, but their training and discipline remained different from that of appellate judges. Another Eighth Circuit judge said they “have more flexibility” because “their caseload is less demanding,” and they do “not have the same obligation to their district” unless they keep a heavy load in the district court. The court could treat a senior judge the same as a circuit judge because senior judges found it “easier to take on different cases.”⁴²

Despite circuit judges’ greater emphasis on problems in district judges’ appellate participation, six of the nine judges interviewed would continue to seat district judges with the court even when the court received more appellate judgeships. Continued district judge participation, however, should involve “greater selectivity.” District judges could be called to sit less often so “it would make it more of an honor to be picked.” One judge pointed out that assistance from district judges would remain necessary because the circuit’s caseload would increase after the new district judges were named. This would make the Eighth Circuit busier with the “new circuit judge not enough to take up the slack.” Furthermore, some district judges still could “afford” to spend time with the court of appeals. “Keeping up the dialogue” and “interrelationship” would represent advantages of having district judges sit on the appellate court, even if, as one judge suggested,

41. The Clerk of Court faced the separate problem of avoiding assignments for district judges on cases from their own districts.

42. Indeed, two senior district judges who sat regularly with the Eighth Circuit—one from inside the circuit, one from outside—were regularly mentioned by name, with an indication that those judges preferred to sit as circuit judges.

participation was restricted to exposing new district judges to the flavor of the appellate court.

The circuit judges had a very different view of the utilization of senior circuit judges. The Eighth Circuit, as well as the Ninth Circuit, reacted very positively to their presence, which indicates that they were not considered "extra" judges in the same way as district judges or out-of-circuit visitors. All Eighth Circuit judges felt there were advantages to the use of senior circuit judges and all but one judge thought there were no problems in their participation.⁴³ The only judge who suggested that there might be a problem said it was in connection with senior circuit judges presiding over panels, because they were "not always aware of the caseload problem among active judges." The senior circuit judges "make our workload light" by helping with the caseload. They make a "real contribution" and "are happy in what they are doing." Moreover, the senior circuit judges gave the newer judges "a sense of the past."

In addition to contacts with district judges from within their own circuit, all the appellate judges had out-of-circuit judicial contacts and all agreed that those contacts affected their Eighth Circuit work. Most of those contacts resulted from service on committees of the Judicial Conference of the United States or through seminars sponsored by the Federal Judicial Center. One judge had regular working contacts with judges from other circuits as a member of the Temporary National Emergency Court of Appeals. American Bar Association activities accounted for other contacts with out-of-circuit judges.

Those contacts provided Eighth Circuit judges with a source of information. One said, "If a problem arises where [the contacts] have information, I don't hesitate to call them." In general, however, the receipt of ideas about how other courts perform their duties provided the greatest benefit. One judge said, "Visiting informally helps get suggestions about how they do things." Another judge said he and his colleagues had observed "practices that seem desirable that one could adopt." The judge added, however, "Some practices I liked, some I didn't." A "broadening perspective on problems" provided by such

43. The Eighth Circuit active judges had agreed among themselves that when they took senior status they would not preside, but they chose not to enforce that against the present seniors.

Another judge did add that difficulties might arise if a senior exercised his right—available under statute at that time—to sit en banc if he had been on the original panel, because the senior judge might provide the deciding vote in what was otherwise an eight judge court.

contacts was most significant. One judge said it gave him a "broader scope" when he had to formulate national policy questions. He added, however, that while each judge had an obligation "to aid in overhauling and re-evaluating rules and practices," one "shouldn't do too much of it," as some did, because it would interfere with the work of one's own court.

The Eighth Circuit judges all saw advantages in allowing visiting judges to sit with their court. All but two, however, also saw problems in the use of visiting judges. This pattern was somewhat different from the Ninth Circuit, where only a few judges observed any problems in allowing visiting judges to serve with the court. Several Eighth Circuit judges thought the only advantage from visiting judges was additional manpower, but other members of the court saw other advantages: the "broader, national point of view" they brought to the court and a valuable "cross-fertilization" that ameliorated the process of "seeing the world through our own knotholes." The use of "experienced judges who have worked with the same problems" permits us to "get something from them," particularly in the way their circuits approach cases and use "administrative techniques." Learning of new mechanisms "gives you an opportunity to experiment" in order to "increase output without lowering the product."

Visiting judges' participation produced several problems, including their lack of familiarity with "customs, practices, and policies," which "inhibits the judging process." Another Eighth Circuit judge noted, "It is more difficult to deal with a strange judge—who lacks knowledge of our operational patterns—than with a person you're familiar with." The circuit "doesn't always know what it's getting" in a visiting judge, and some arrive "not expecting their fair share of cases" and thus leave a heavier load for the regular judges. Judges from the Court of Claims and Court of Customs and Patent Appeals drew particular comment from one judge. Because "we have a completely different type of case, it takes them a longer time to do the research and make up their minds," so they "have a lesser load."

The circuit court hesitates, as with district judges, to assign an opinion to a visiting judge on a close question "or one which may divide the court." A visiting judge "does not speak with quite the same authority," making it difficult if two active duty judges on the panel disagree. The result is "no opinion of this court as such," or an opinion with "not the same degree of force behind it." This justifies, if not requires, an en

banc sitting of the court. One judge commented, however, that an outside judge, because he is not as familiar with a circuit's holding as someone from within the circuit, is "more likely to yield" than he would in his own circuit "except on vital problems." The judge who made this comment, who had sat in several other circuits, added "as a visitor, it is not up to me to upset the applecart," but he would dissent if he "strongly disagreed."

VI. SPECIFIC PROBLEMS: NUMBERS AND GEOGRAPHY

During the interviews, the judges were specifically asked whether the small number of judges and the circuit's geographical dispersion affected communication among the judges. All but one Eighth Circuit judge said that the number of judges affected communication. This response was similar to the feeling of a large majority of the Ninth Circuit. Yet, two Eighth Circuit judges said numbers affected only the court's en banc sittings, because the court regularly sat in three judge panels, which would not change even if more judges were added. "We sit three at a time and communicate with them," said one judge. He and several of his colleagues also pointed out, however, that the Eighth Circuit was a "small" court. Indeed, he specifically compared the Eighth to the Ninth Circuit, where he had sat as a visiting judge: that court "can't keep up with its opinions to keep a good 'check flow.'" One of his colleagues, noting the then impending addition of another judgeship to the Eighth Circuit, said that beyond the ninth judge, "we will cease to be the same kind of court"; the phenomenon is "like the expansion of a law office." He said, echoing his colleagues, that the court was "very collegial and reasonably close," particularly "considering the divergent geographical backgrounds" of the judges. On the issue of size, another judge suggested that one "can go up to twelve without there being a problem," but he seemed to prefer nine as a maximum: "over nine, it begins to get difficult."

If the judges thought that numbers affected communication, they did not believe that geography did. In fact, seven of nine judges said geography did not affect communication. One of two other judges said, however, that he did not know "how significantly" geography affected communication, but "with the FTS, it doesn't make much difference." The other judge was somewhat more definite and pointed out that the court does not convene "as often as a court which sits in one place." He noted that the Eighth Circuit formerly sat two weeks at a session,

but “that’s torture with an increased number of cases.” Among those who felt communication was not affected by geography, only one judge commented. He said geography could affect communication, but “you pick up the phone, just as if you are across the hall,” which also eliminates the potential negative effects of geographic dispersion. Two judges said frequent contact among judges would increase internal consistency, one stated it would decrease consistency, and two said more contact would have no effect.

Not only did judges feel little effect from the geographic dispersion, they definitely did not want to relocate to circuit headquarters. All but one judge, who was neutral, opposed such a move. Six of nine also did not think that stationing all judges at headquarters would affect communication. Some judges, however, felt that the move would “definitely improve” communication or “make it a lot easier.” Yet those who anticipated an effect on communication from a relocation were also ambivalent. One said, “I don’t know whether it would improve it,” and another judge was not sure “whether it would be for good or bad.” The latter called attention to stories he had heard about friction in other circuits where all the judges were stationed together. Indeed, “more personal contact” might be “more abrasive contact.”

Among judges who thought being together would not affect communication, one noted that, with FTS, communication was much like that which occurred when judges were together. One of his colleagues, who had earlier expressed a preference for not encouraging other judges to drop in during his work day, said that most of each day would be the same whether judges were together or not. “At least two-thirds” of each day was taken up by court work. There was “very little time to sit together and talk about cases”—“virtually zilch,” he said, “that isn’t the same when they’re not here.”

While no judge supported the idea of moving judges to one location, most judges were able to name advantages of a move. The judges thought that communication could be improved, cases could be disposed of in less time, and some small savings in transportation costs would result. A move would permit judges to sit down and talk with each other about problems they encountered in case resolution. It would be easier, said one judge, to sit down and work out a disagreement about wording or get another judge’s reaction on wording if one did not have to write in order to communicate.

Not surprisingly given the judges’ opposition, all commented at

greater length about the disadvantages of a move. Some judges said simply that they “don’t want to move to St. Louis” or leave their social contacts and friends in their home communities. One judge suggested that some judges would not have accepted appointment if they had known that they would have to move to St. Louis. This comment must be taken with a grain of salt, however, given the prestige of an appointment to the United States Court of Appeals.⁴⁴ Additional comments focused on the possibility of increased friction if judges were together all the time. Factions and cliques might develop and “inner arguments which affect our overall relationship” would occur.

The most significant justification for geographic dispersion—volunteered by a majority of judges—was a strong commitment to diversity. The judges, by living in various states, brought different perspectives to the court through their backgrounds. These varied perspectives were reinforced by staying in their home territories “even if the pulse of the nation beats closer than it used to.” Another judge said regional attitudes need to be brought to the attention of the court and “divergent views” maintained. “If all the judges were at St. Louis, all would think alike,” he added. Beyond “thinking alike,” judges might become “self-centered in the work of the court” if they lived at headquarters. “We’re removed enough as it is from the mainstream of American life” and need “the opportunity for contact” provided by judges being in their own communities. Judges also expressed a fear that they would “lose” by “uprooting” themselves from an area where they have lived. The loss would be exaggerated because a judgeship is a “pretty reclusive job anyway,” whereby one “gets removed from bar and public.” Removal from one’s own circle of acquaintances would create an even more isolated situation. By remaining in one’s own community, a judge can continue contact with district judges and with members of the bar.

The most important part of this theme was the overall effect on the court, which “maintains a broader perspective.” The judges have a “better balance by being spread out; each gets something of a local flavor by being in different parts of the country.” Another judge said that the judges’ dispersal creates “more of a tendency to reflect the viewpoint of the entire circuit,” rather than a “St. Louis-flavored circuit.” In a most extended comment, a judge compared the Eighth with the Second and Seventh Circuits, where many cases come to the court

44. See Wasby, *supra* note 16, at 24 n.65.

from the city where the court sits. He believed that, particularly in a large circuit, it is commendable to have judges from different areas, such as the Iron Range or Indian territory: one "needs the flavor of problems in the particular part of the world." In addition, the dispersal of judges has "symbolic significance." A report that "the court in St. Louis says . . ." produces a negative reaction, and people would more likely call the Eighth Circuit "a court in St. Louis" if all the judges resided there. Moreover, the court's visibility is raised by having the community see a judge and know that he exists.⁴⁵ In the Ninth Circuit, while there is division over whether judges should be at circuit headquarters, one feels that personal concerns are uppermost. In comparison to the Ninth Circuit, the responses of the Eighth Circuit judges evidence a serious commitment to regionalism through dispersion of judges in that court.

45. Showing that the personal and the larger arguments are never far apart, however, the judge noted that he "wanted to be able to control his own life."

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