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APPEALS WITHOUT BRIEFS: EVALUATION OF AN APPEALS EXPEDITING PROGRAM IN THE NINTH CIRCUIT

Federal Judicial Center

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This paper is a product of a study undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development on matters of judicial administration. The analyses, conclusions, and points of view are those of the author. This work has been subjected to staff review within the Center, and publication signifies that it is regarded as responsible and valuable. It should be emphasized, however, that on matters of policy the Center speaks only through its Board.

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Beginning in 1980, the United States Court of Appeals for the Ninth Circuit initiated an Appeals Without Briefs (AWB) Program intended to expedite disposition of civil appeals presenting relatively familiar and straightforward issues. The program was terminated in February 1982. Only about sixty cases were handled under the program during its existence, but this limited experience produced sufficient problems to persuade a majority of the court to halt the program. This report offers an evaluation of that program. Its objective is to investigate the problems encountered in the Ninth Circuit program and thus to suggest changes that might lead to more successful future incarnations of the AWB concept.

Nature of the Program

The planned treatment of cases in the AWB program differed from normal treatment in three ways. First, counsel in program cases were to file "preargument statements" rather than briefs, with one statement from each side and no reply statement. The preargument statement was intended to differ from a brief in two important respects: It was to be no more than five pages in length (as contrasted with the fifty-page limit imposed by rule 28(g) of the Federal Rules of Appellate Procedure), and it was not to contain an argument, but instead a list of citations to principal cases and to the pages of the record on which the party intended to rely at oral argument. Second, AWB cases were to be

given priority in calendaring, resulting in an argument date between four and fourteen months earlier than normal (depending on whether the case had statutory hearing priority). Third, there was to be no fixed maximum on the time allowed for oral argument, and each party was to be guaranteed at least half an hour to argue its case.[1]

Cases were selected for participation in the program in one of two ways. Most cases entered the program automatically, on the basis of a docketing statement filed with every civil appeal that revealed the nature of the issue and the nature of the disposition below. Thus, counsel in cases meeting specific requirements regarding nature of issue and of disposition were notified of the case's selection and were advised that either party could remove the case from the program by filing a statement of reasons within fourteen days. Ninety cases were placed in the program in this manner, and forty-three of those (47 percent) were removed by counsel. The requirements for automatic inclusion in the program were intended to identify cases most likely to present few and noncomplex issues and to involve a relatively limited record on appeal. The bulk of cases entering the program in this fashion were appeals from dispositions by summary judgment or dismis-

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1. This statement of requirements for the preargument statement, expedition of the argument date, and time allotted for argument is based on the letter sent to counsel upon a case's entry into the program. There is evidence that program cases were not argued earlier than they would have been under normal procedures (see note 8 <u>infra</u>), that not all participant judges understood the requirements for the preargument statement, and that not all preargument statements conformed to these requirements.

sal, and the majority presented issues involving social security or habeas corpus. In addition, cases not selected to participate on the basis of the docketing statement could enter the program upon stipulation of counsel. About 15 percent of the program cases entered in this manner.

Summary of Evaluation Results

The Federal Judicial Center conducted an evaluation of the AWB program on the basis of questionnaires completed by circuit judges and counsel participating in the program, who were asked to answer questions pertaining to the cases argued in the program. In addition, judges were asked to identify other cases they thought suitable for AWB treatment by checking a box on the form with which they regularly review the case weight assigned to cases heard under normal (briefed) procedure. Questionnaires were then sent to counsel in these other cases, asking their opinions of the desirability of AWB treatment in the identified cases. When the AWB program was abandoned by the court, a letter was sent to each active Ninth Circuit judge soliciting the judge's candid opinion of the program, the reasons for its abandonment, and the prospects for remedying the program's defects.

Because the focus of this report is on problems encountered with the AWB program, the questionnaire results are merely summarized here; detailed analysis of those results is presented in the appendix.

The most striking feature of the questionnaire responses is the contrast between the surprising uniformity of opinion among

counsel and the rather extreme diversity of opinion among judges. Judges' experiences in specific cases varied in almost every way. There were roughly equal numbers of cases in which the judges rated the program very favorably, in which they rated the program very negatively, and in which two judges hearing a particular case rated the program in opposite ways (e.g., one judge rating the experience with the program as very positive or very negative, the other judge rating the experience in the opposite fashion or neutrally). In contrast, 70 percent of those counsel responding to the questionnaire (75 percent) rated the program favorably in regard to the case in which they participated, and more than 90 percent rated the program generally as a good or promising idea. A handful of cases fell into either of two extremes: one in which both judges and counsel participating in the case thought the program quite successful, the other in which both groups thought the program a clear failure.

Problems with the Program

From the questionnaire results, as well as from the letters provided by circuit judges after the program was terminated, a reasonably clear picture emerges of the perceived strengths and weaknesses of the program. Before these are recounted, however, it is important to take note of an analogous program undertaken by the Third District Court of Appeal in Sacramento, one of five intermediate courts of appeal in California.[2] After a year of

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2. All information regarding the Sacramento program is based on a report of an evaluation of that program conducted by

operation of the court's Expedited Appeal Program, and the disposition of 261 cases under the program, both judges and counsel were favorably impressed. It is particularly useful to refer to the Sacramento program as we examine the Ninth Circuit's AWB program, because the Sacramento program differs in approach in regard to many of the problems perceived in the Ninth Circuit program. The favorable perception of the Sacramento program implies that these differences in approach may be effective remedies for the problems encountered in the Ninth Circuit.

The Preargument Statement

Foremost among the judges' complaints about AWB cases was the absence of briefs. Humorous though this result may be, it does not necessarily suggest that the concept of the program is fatally flawed, for several reasons. First, the essence of the concept is not that the appeal proceed without briefs, but that oral argument be emphasized, with a concomitant de-emphasis on written argument. Second, the absence of conventional briefs was often (but not always) cited by judges only as an indirect problem--as the cause of inadequate preparation on the part of counsel. These judges expressed dissatisfaction because counsel were either poorly prepared or off-target in their arguments, and suggested that this problem would have been avoided had counsel gone

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the American Bar Association's Action Commission to Reduce Court Costs and Delay and on discussion with Joy Chapper, Esq., of the commission's staff. Chapper & Hanson, Expedited Procedures for Appellate Courts: Evidence from California's Third District Court of Appeal, 42 U. Md. L. Rev. 696 (1983).

through the thought process necessary to present written arguments. These judges thus seemed to be saying that problems arose because counsel had not written briefs, not because the judges had no briefs to read.

Nonetheless, a number of judges found the absence of briefs to be a direct problem, which, in many instances, can probably be attributed to poor case selection--some cases in the AWB program were simply not suited for it. (Poor case selection is discussed separately below.) Yet some judges expressed dissatisfaction with the absence of briefs even in cases that were arguably suited for hearing based on something less than the traditional full brief. The most serious objection made by these judges was that the AWB program significantly increased the amount of time the cases demanded of them, requiring them to do the work that is ordinarily and more properly done by counsel in the course of brief preparation. Correspondingly, an important advantage seen by counsel was that the program reduced the time the cases demanded of counsel.

It does not necessarily follow that briefs of the traditional kind are the only remedy to the problems presented by the preargument statement. The qualitative difference between the AWB program's preargument statement and a traditional brief is the absence of a written argument, which deprives the judge of two distinguishable aids for hearing and decision making. Written argument includes both allegations of the relevant principles embodied in case and statute law and the argument proper, which suggests how those principles apply to the facts of the case in

support of the result sought by the litigant. The preargument statement included only citations to relevant cases and statutes, which did not necessarily inform the judges about either the principles of the cases and statutes cited or the arguments counsel intended to advance on the basis of those principles.

Something more than a preargument statement but less than a full brief might be sufficient as a basis for judges' effective use of oral argument. Some judges suggested that the preargument statement should include an outline of counsel's arguments and brief summaries of the holdings of relevant cases. This is apparently similar to the practice in appellate review in Australia, where briefs are often no more than four or five pages. Another alternative suggested by both judges and counsel was to employ conventional briefs limited to relatively few pages.

The Sacramento program contrasts with the AWB program in that a condition of participation is attorneys' agreement to submit briefs not exceeding ten pages (as opposed to the fifty-page limit under state rules). Sacramento judges evidently are quite satisfied with these briefs, finding them shorter and perhaps more focused and concise than those filed under conventional procedures. More than half of the attorneys interviewed in the evaluation of the Sacramento program reported spending less time in brief preparation than under ordinary procedures (very few spent more time). It seems unlikely that this was a consequence of the selection of only simple cases for the program. Cases in that program accounted for fully half of the cases disposed of on

the merits, included few of the cases that the court ordinarily decides without argument (about 15 percent are ordinarily decided on the briefs), and yielded published opinions with higher frequency than normal (29 percent versus 20 percent), all of which suggests that these were not necessarily simple cases. On the other hand, it is curious that the actual reduction in brief length accomplished by the Sacramento program appeared rather modest.

The average brief length for cases in the Sacramento program was ten pages,[3] which can be contrasted with an estimated average length of fourteen pages for comparable cases not in the program and with a median length of between eleven and twenty pages for noncomplex cases in the Ninth Circuit.[4] At least two explanations can be suggested for this apparent discrepancy between perception and fact in the Sacramento experience--the perception that briefs were shorter, more concise, and more focused and that counsel spent less time preparing them, and the fact that briefs were not much shorter than usual. First, it is easy to see that a brief which is concise and well focused may seem shorter than a less concise and focused brief of equal length. Perhaps the dif-

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3. This figure presumably includes the length of the statement of facts as well as that of the argument. The ten-page limit in the Sacramento program excluded the statement of facts.

4. A survey of cases reviewed by Ninth Circuit staff attorneys during the first three weeks of January 1981 indicated a median brief length in this range (eleven to twenty pages) for the 251 cases assigned a weight of 5 or less (on the circuit's weighting scale of 1, 3, 5, 7, or 10). The remaining 30 cases, weighted 7 or 10, had a median brief length of between forty-one and fifty pages.

ference in page limitations--between ten pages and fifty pages--caused counsel to respond with more pointed briefs. Second, the invitation to participate in the Sacramento program was extended in the course of a settlement conference conducted by a judge. Such an invitation may constitute a convincing message that the judge regards the case as presenting few significant issues. This may have led counsel to focus their briefs on those few issues and therefore produce briefs in less time and that seemed shorter than usual.[5]

Selection of Cases

As mentioned above, another problem that occurred with significant frequency in the AWB program was the inclusion of cases ill-suited for argument based only on a short preargument statement. There are some striking examples. One case, which the court ordered briefed after AWB argument, involved a 10,000-page transcript. In another, the issue was the constitutionality of a state death penalty statute, which the court deemed too significant to be decided without full briefing. In a number of other cases, the judges clearly stated that the cases would have been much easier to handle had they been briefed.

At the same time, a number of AWB cases were handled with complete satisfaction in the opinion of both counsel and judges. Comments of judges and counsel in these cases noted that the un-

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5. It is unlikely that the settlement judge's invitation to participate was unduly influential, because that judge was never a member of the panel that heard and decided the case.

limited (but not necessarily lengthy) oral argument allowed them quickly to narrow discussion to the central issues and to explore these issues very satisfactorily. The briefs were not missed, either because the issue had been fully briefed in the court below or because the legal issues were straightforward and the factual circumstances simple. In addition, over a period of twelve months, judges identified 125 cases argued under normal procedures that they thought would have been suited for the AWB program.

The Sacramento program is again notable in contrast. Cases were selected for that program not by reference to any specific criteria, but on a case-by-case basis. Initially the selection was made by the judge presiding at a settlement conference held after receipt of the lower court record, but before briefing. Subsequently, however, the court instituted a requirement that the appellant submit a preargument statement in every case, and began to select cases for invitation to the expedited appeals program solely on the basis of those statements (but still without reference to specific selection criteria). Counsel accepted the invitation in about 80 percent of the cases. One of the reasons the court chose to select cases on an individual basis rather than by use of specific criteria was its concern that counsel might seek to participate in the program in inappropriate cases merely to obtain the expedited hearing (a target of seventy days from start of briefing to argument) that was a key element of the program.

Confusion about the Program

Another problem that occurred with some frequency in AWB cases is more in the nature of an administrative problem than of any systematic flaw in the program. In at least two cases, questionnaires received from counsel alleged that the judges were not aware of the existence of preargument statements until those statements were mentioned in the course of oral argument (these attorneys' statements were buttressed by the fact that no questionnaires were received from judges in those cases, although it was the duty of court personnel to supply questionnaires to the judges). If the judges were in fact not aware of the preargument statement, a serious lack of understanding on the part of at least some judges about the nature of the program is suggested. There were also a number of instances in which counsel and judges clearly did not have the same view about what a preargument statement was supposed to be. In one case, the attorney was surprised when a judge chastised him for citing cases in the preargument statement. In another case, counsel apparently tried (without success) to compress a traditional brief into the five-page limitation. These incidents suggest that the potential success of the program was in several cases undermined by misunderstandings.

Circumstances in Which the Program Was Tested

Although not bearing on the success of the program for specific cases, the circumstances in which the AWB program was adopted may well have limited its chances of overall success.

Comments of some Ninth Circuit judges suggest that the decision to abandon the program may have been due in part to the rather difficult circumstances of the court in recent years. At the time the AWB program began, the Ninth Circuit was experiencing severe problems of delay and a rising caseload. The court had undertaken a number of innovations to try to gain control of its caseload problems, not the least of which was an agreement simply to work harder and meet higher productivity targets. Under these circumstances, it is not surprising that some judges were particularly impatient with the AWB program when some AWB cases seemed to require more work than they would have under normal circumstances. In addition, some of the judges made it clear that they had disliked the AWB idea from the outset and did not agree that it was worth testing.

The circumstances surrounding the program's adoption afford still another contrast between the AWB and the Sacramento programs. At the time the Sacramento program was adopted, the Third District's caseload statistics compared well with those of other courts, and the court was fully current with its argument calendar (oral argument was not delayed because of excessive caseload). The goal in undertaking the program was simply to reduce elapsed time for processing civil appeals, without increasing the judge time consumed by individual cases.[6] In addition, the

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6. The evaluation report mentions that the court was "looking for ways to enhance its ability to keep abreast of its increasing caseload" (Chapper & Hanson, _supra_ note 2, at 701). But, as discussed at note 9 _infra_, the Sacramento program served that goal by virtue of increased productivity by support staff, not by reducing the average judge time consumed per case.

Sacramento court is smaller than the Ninth Circuit, with only seven judges and a compact geographic area. It does not appear that any of the Sacramento judges opposed the program, before or after its implementation. The only significant administrative challenge posed by the Sacramento program was that of ensuring that the court could prepare for argument within the target of thirty days after briefs were filed. This was accomplished in part by assigning one of the court's thirteen staff attorneys to work exclusively on program cases. The attorney read the briefs, did additional research where needed, and prepared a memorandum for the judges, delivering all materials to the panel about one week before argument. Though the judges had but one week to prepare for argument, they reported that this was sufficient.

Benefits and Burdens of a Revised AWB Program

If the problems encountered in the AWB program can be corrected, what benefits and burdens are likely to ensue from such a program? The tentative and general answer seems to be that such a program can benefit litigants by increasing speed of case disposition and reducing costs, but that it is less likely to produce clear savings for the courts and is fairly certain to impose some administrative burdens on court personnel.

The feature of these programs that counsel most often mentioned as valuable is that they permitted cases to be decided considerably faster than would occur under normal procedures. But this increased speed was accomplished at least in part by artificial means: The cases were simply given prompter hearing

dates. In the Ninth Circuit, this expedition was accomplished principally by giving program cases priority in calendaring as an incentive for participation.[7] These cases could just as well have been heard faster than normal if they had been fully briefed. In the Sacramento program, the expedition was accomplished partly as a result of counsel's agreeing to prepare briefs in less time than normal and partly as a result of the court's scheduling these cases for earlier-than-normal argument and deciding them more promptly after argument.[8]

Another very important benefit of both the Ninth Circuit and the Sacramento programs is that counsel thought the programs caused a reduction in the time they expended on the appeal, resulting in cost savings for litigants. In the Ninth Circuit program, this benefit was characterized by a number of judges and

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7. It is not clear from the data that these cases were in fact calendared more promptly than they would have been under normal procedures. When one looks at the time from filing of briefs to oral argument, no difference appears between program cases and either of two groups of comparison cases: those that were selected for the program but then removed by counsel and those heard under normal procedures that the judges identified as suited for AWB treatment. But even if the program cases were not expedited, it is nonetheless important that counsel thought they were and regarded the apparent expedition as valuable. On the other hand, even though the AWB program did not reduce the time allowed for briefing, the average time between receipt of the complete record and filing of the last brief was about 50 days shorter for AWB cases than the norm of 130 days for the comparison cases.

8. The actual time consumed by briefing was reduced by about 75 percent, from an average of 120 days to an average of 30 days. The time from filing of briefs to argument was cut in half, from 90 to 45 days. However, because it takes an average of 160 days to obtain the complete record from the court below, the average time from filing to disposition was reduced only by about 35 percent, from 410 to 260 days.

some attorneys as a shift of work from counsel to judges, and was thus regarded on balance as the most significant failing of the program. The Sacramento program, requiring short briefs rather than preargument statements, resulted in no apparent increase in time required of judges. Although the judges in that program did not think the program resulted in reduced demands on their time,[9] they did like the program, thinking the briefs generally shorter and more concise and focused. In light of the evidence that the briefs were not, in fact, much shorter than they would have been under normal procedures (see text at note 3 *supra*), it seems likely that reduced limits on brief length and on time for filing briefs may actually have led to more focused briefs, to the benefit of judges and at reduced cost to litigants.

Recommended Elements of a Successful Appeals Expediting Program

Our evaluation suggests that it would be possible to construct a program involving reduced reliance on written argument and greater reliance on oral argument that would function well in handling some portion of the civil caseload in a U.S. court of

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9. The evaluation report (Chapper & Hanson, *supra* note 2) raises some doubt about this point. Although it says, "The judges' impressions suggest that the total time spent on a case was not reduced," it also says that "[j]udges see the program as enabling them to dispose of additional cases" (p. 708). The ability to dispose of additional cases appears to be attributable to an increase in the ability of support staff to prepare cases for the judges' attention. The court obtained an additional staff attorney to handle program cases, and that attorney was able to prepare preargument memorandums for these cases promptly enough to permit argument about one month after the briefs were completed.

appeals. This conclusion follows not only from the attitudes and suggestions of a number Ninth Circuit judges but also from the fact that the Sacramento program, similar to that of the Ninth Circuit but with differences that address problems encountered in the Ninth Circuit, has been well received by both judges and counsel.

Should the Ninth Circuit or another U.S. court of appeals choose to engage in further experimentation with this kind of program, the evidence reviewed here suggests that such a program should differ from the AWB program in two fundamental ways:

1. The program should require counsel to submit either summary briefs (which outline the argument to be advanced and briefly summarize the holdings in cases relied upon) or conventional briefs, with a page-length limitation of no more than ten or fifteen pages.

2. Cases should be selected for invitation to participate in the program on a case-by-case basis, without reliance on any specific eligibility criteria, by a judge or experienced staff attorney who has a fair understanding of the case based on either a preargument conference with counsel or a docketing statement submitted by the appellant.

It seems unlikely that such a program can succeed, however, unless certain additional requirements are met. First, the volume of cases to be handled in the program must be significant. During the life of the AWB program, the average number of such cases heard by an individual Ninth Circuit judge was fewer than four; several judges heard only one or two cases, some heard

none. Infrequency of experience with a novel procedure can preclude effective adjustment to the novelty. Many Ninth Circuit judges must have felt uncomfortable approaching argument without the accustomed briefs, and the rarity of the experience may have prevented relief from that discomfort. In addition, the cost associated with the special administration of any novel procedure may not be justified when prorated over a mere handful of relatively straightforward civil appeals. Second, because there will always be some risk of including ill-suited cases in such a program, the judges of the court should be in a position and of a disposition to tolerate occasional failures. At least initially, the appropriateness of selecting certain cases for inclusion in the program will be uncertain. The circumstances must be such that the court can allow adequate time for working out the kinks that are inevitable in a selection process of this kind.

Conclusion

The conclusions we draw, from admittedly limited evidence and necessarily tentative analysis, are these: Although the Ninth Circuit's Appeals Without Briefs project encountered significant problems in many cases, it was well received in others, and the problems appear to be remediable. Combining the results of the Ninth Circuit program with the success of a comparable program established in the Third District Court of Appeal in California, there is reason for optimism that this kind of program can function satisfactorily, affording important benefits to litigants. Additional experimentation with this type of program

can therefore be recommended. If additional experiments are undertaken, however, it may be best to proceed with an objective of discovering the range of cases for which such a program is suitable rather than with an assumption that the program will be applicable only to a relatively limited class of cases.

APPENDIX

DATA FROM THE EVALUATION OF THE NINTH CIRCUIT'S APPEALS WITHOUT BRIEFS PROGRAM

Evaluation data were collected from several sources:

1. The office of the clerk of court supplied us each month with copies of the docketing statements required to be filed by appellants in all civil appeals. These statements identified those cases that were included in the AWB program on the basis of information revealed in the docketing statement, identified the subset of cases in which counsel chose to remove the case from the program, and identified cases brought into the program upon stipulation by counsel.

2. The staff attorneys' office sent us copies of the case weight review forms completed by judges after oral argument in each case. These forms served to notify us of both (a) the occurrence of argument in program cases and (b) the identity of cases heard under normal procedures that the judges indicated would have been suitable for handling under the AWB program.

3. Questionnaires were sent by the evaluation team to counsel in program cases immediately upon notice that the case had been argued.

4. Questionnaires were sent to counsel in cases identified by the judges as having been suitable for AWB treatment.

5. Questionnaires were provided by court personnel to judges hearing AWB cases.

The AWB program was terminated by the court during the course of the evaluation effort, when many cases that had entered the program were still awaiting hearing. Components of the data collection effort thereafter terminated in a less-than-disciplined manner, which very likely resulted in some loss of information (lack of questionnaires from judges, lack of notice that a program case had been argued or had reverted to normal procedures, etc.). Our counts of cases entering and proceeding through the program are therefore likely to be somewhat inaccurate. Nonetheless, it is very unlikely that incompleteness of the data has resulted in any distortion of the statistical picture they reveal.

Description of the Cases

During the pendency of the AWB program, from July 1, 1980, to February 1982,

90 cases were placed in the program on the basis of the docketing statement,
43 of these were removed upon request by counsel, and
8 cases entered the program upon stipulation, leaving
55 cases that actually participated in the program.

The fifty-five program cases were distributed by nature of issue as follows:

19 social security
14 habeas corpus
5 immigration
3 civil rights
2 labor
4 miscellaneous (1 each: Federal Tort Claims Act, jurisdiction, securities, tax)
8 unknown ("other" checked on form).

The breakdown by nature of disposition below was as follows:

23 summary judgment
15 dismissal (4 for failure to prosecute, 2 for failure to obey court order, 2 for failure to state a claim, 1 for jurisdiction, 6 "other")
5 agency order
4 default judgment
8 unknown ("other" checked on form).

Questionnaires from Judges

Forty questionnaires pertaining to twenty-three program cases were received from judges. This brief questionnaire asked six questions: how much time argument consumed, and how the judge would rate the AWB program, as applied to the instant case, according to five criteria. The mean and median of the reported length of oral arguments were each forty minutes. The high and low reported times were seventy and fifteen minutes. The judges rated five aspects of the AWB program on a 5-point numerical scale, where 5 was a strongly affirmative response to the question (and favorable to the program), 3 was neutral, and 1 was a strongly negative response to the question (and the program). Each question is listed below. The percentage of responses at each of the five numerical levels is shown below the corresponding number.

(a) Are cases of this type suitable for the without-briefs procedure?

Affirmative--	5	4	3	2	1	--Negative
	(20%)	(23%)	(18%)	(25%)	(15%)	

(b) Was your experience with the without-briefs procedure in this case satisfactory?

Affirmative--	5	4	3	2	1	--Negative
	(18%)	(18%)	(23%)	(30%)	(13%)	

(c) Did the without-briefs procedure result in better preparation by counsel than would normal procedures?

Affirmative--	5	4	3	2	1	--Negative
	(8%)	(10%)	(45%)	(25%)	(13%)	

(d) Will the total time you spend on this case be less than it would be under normal procedures?

Affirmative--	5	4	3	2	1	--Negative
	(5%)	(15%)	(28%)	(23%)	(30%)	

(e) If a future case presented similar issues, would you prefer the without-briefs procedure?

Affirmative--	5	4	3	2	1	--Negative
	(23%)	(3%)	(15%)	(25%)	(35%)	

No relationships were apparent between the judges' questionnaire responses and the characteristics of the cases reported on the docketing statement (i.e., nature of issue and nature of disposition). The extent of judges' agreement about the success of the AWB program in specific cases is based on seventeen cases for which we obtained questionnaires from two judges. For the question, "Was your experience with the without-briefs procedure in this case satisfactory?" the responses for these seventeen cases were as follows:

In 4 cases, both judges responded positively.
In 1 case, both responded neutrally.
In 3 cases, both responded negatively.
In 3 cases, one judge responded positively and one negatively.
In 3 cases, one judge responded neutrally and one positively.
In 3 cases, one judge responded neutrally and one negatively.

Thus the judges' ratings agreed in eight of the seventeen cases and disagreed in nine of the seventeen cases.

The one reasonably evident trend in the data was an inverse relationship between length of oral argument and the judges' rat-

ings on the five scaled questions. Favorable ratings correlated with short argument time, unfavorable ratings with long argument time. Caution is needed in interpreting this trend, however, since it can be explained in two distinct ways: Extended time for argument may have produced judges' dissatisfaction with the process, or cases that were poorly prepared or inappropriate to the program may have resulted in both extended argument time and dissatisfaction with the program.

Questionnaires from Counsel in Program Cases

Forty-seven questionnaires pertaining to thirty-two cases were received from counsel participating in AWB cases. Of principal interest are answers to eight questions, five of which asked counsel to compare the without-briefs procedure with normal procedures in regard to its anticipated consequences for the argued case. The other three questions sought counsel's general views of the program. The questions and answers are shown below, with the percentage of respondents selecting each answer shown in parentheses.

(a) As to its success in allowing you to make your arguments effectively, was the without-briefs oral argument in this case:

Very Good (53%) Satisfactory (32%) Unsatisfactory (15%)

(b) And, in this respect, was the without-briefs oral argument:

Better than would be expected in traditional, briefed argument (11%)

About the same as would be expected in traditional, briefed argument (77%)

Worse than would be expected in traditional, briefed argument (13%)

(c) As to its success in enabling the judges to understand the issues on appeal, was the without-briefs procedure, including argument and abbreviated written submissions:

Very Good (36%)   Satisfactory (38%)   Unsatisfactory (26%)

(d) And, in this respect, was the without-briefs procedure:

Better than would be expected in traditional, briefed argument (15%)

About the same as would be expected in traditional, briefed argument (57%)

Worse than would be expected in traditional, briefed argument (28%)

(e) As to the time you had to devote to the appeal, including argument and all preparation time, did the without-briefs procedure require:

Less time than would normal procedures (89%)

About the same time as would normal procedures (9%)

More time than would normal procedures (2%)

(f) What is your general opinion of the Appeals Without Briefs procedure as implemented in the Ninth Circuit?

A good idea (68%)

A promising idea, which may or may not prove valuable (25%)

An idea of no particular merit or demerit (4%)

A bad idea (2%)

(g) Do you believe that there are cases before the Ninth Circuit for which oral argument with relatively limited written submissions would be a reasonable procedure?

Yes (96%)   No (4%)

(h) Do you believe that cases suitable for without-briefs argument can be accurately identified by classifications based on subject matter of the action below, nature of the issues pre-

sented on appeal, and/or nature of the judgment from which the appeal is taken?

No (9%)   Probably Not (13%)   Yes (79%)

As positive as these questionnaire results appear, one must assume that given counsel's unfettered ability to remove a case from the program, participants chose to participate because they did not anticipate adverse consequences. Moreover, the respondents' favorable views do not appear to be based on a perception that the program was generally better than normal procedures (the program in general seemed to be regarded as good, as are normal procedures), but rather on the perception that it offered the particular advantage of requiring less time expenditure by counsel.

Only the answers to question (d) contain any hint of significant discontent on the part of counsel. Thirteen of the forty-seven respondents rated the program worse than the traditional procedure in its ability to enable "the judges to understand the issues on appeal," and fewer respondents rated the program "very good" in this regard than in any other area of inquiry.

Questionnaires from Counsel in Nonprogram Cases Identified by Judges as Appropriate for the Program

By checking a box adjacent to the weighting scale on the calendar inventory form, judges identified 125 cases (all of which had been handled under normal procedures) as being appropriate for the Appeals Without Briefs Program. It was apparent, however, that for some period of time some judges had not recognized the purpose of the box. So the figure of 125 is probably

an understatement of the number of cases heard during the life of the AWB program that might have been deemed suitable for the program. Questionnaires were sent to counsel in these 125 cases, generating responses from 114 attorneys pertaining to 72 cases.

Since the questionnaire was sent to counsel who could not be assumed to be familiar with the AWB program, the general nature of the program was described in the cover letter, and some of the questions put to the respondents were necessarily more general than those put to counsel in program cases. Three of the questions were tailored as closely as possible to ones used on the questionnaire to counsel in program cases (f, g, and h in the preceding section). These questions and the percentage of respondents selecting each answer are as follows:

(f') What is your general opinion of the concept of appeals without briefs? (Note: The questionnaire elsewhere explained the general concept by reference to limited written submissions, extended oral argument, and expedited hearing, not particularly to the concept as implemented in the Ninth Circuit.)

A good idea (21%)

A promising idea, which may or may not prove valuable (47%)

An idea of no particular merit or demerit (13%)

A bad idea (20%)

(g') Do you believe that there are cases before the Ninth Circuit for which oral argument with relatively limited written submissions would be a reasonable procedure?

Yes (83%) No (17%)

(h') Do you believe that cases suitable for without-briefs argument can be accurately identified by classifications based on subject matter of the action below, nature of the issues pre-

sented on appeal, and/or nature of the judgment from which the appeal is taken?

No (24%)   Probably Not (36%)   Yes (40%)

In contrast to the counsel who participated in without-briefs argument, these respondents were decidedly less optimistic about the AWB concept. Their responses were nonetheless generally favorable to the concept. The one clear contrast is that counsel in the "suitable candidate" cases were generally dubious of the idea that suitability for without-briefs argument could be determined in a manner like that employed in the AWB program (and reflected on the docketing statement). The "dubious" responses could possibly be explained as resistance to the idea of automatic and mandatory assignment of cases to the program, a possibility to which the question has obvious relevance. The general difference in responses from the two groups of attorneys should seem unsurprising to one who accepts the common wisdom that unfamiliarity breeds fear or doubt.

Earlier on the questionnaire, we had asked counsel in these candidate cases, "Do you think that in this case you might have wanted a procedure involving limited written submissions, extended oral argument, and expedited hearing?" The answers were: yes, 36%; no, 64%. As logic would almost dictate they must, those answering "yes" also gave positive answers to questions (f') and (g') (with two exceptions, all negative answers to these two questions came from the sixty respondents who answered "no" to the question just quoted). There is no apparent relationship,

however, between the responses to question (h') and the "yes" and "no" answers to the above question.

Both "yes" and "no" answers to the question quoted above were followed by "why?" and a list of possible reasons. The respondent was invited to check all reasons that applied. The responses are as follows:

WHY YES (34 respondents):

Would have resulted in faster disposition of the case (74%)

Would have decreased amount of my time consumed by case (47%)

I am effective in oral argument (26%)

Other (26%)

WHY NO (60 respondents):

Issues too complex or unfamiliar, briefing necessary (53%)

I am more comfortable relying on written, rather than oral, argument (32%)

Expedition not desirable in this case (20%)

Other (35%)

It is notable that the frequencies with which the various explanations were chosen conform closely to the perceptions of counsel participating in the program (in the case of the thirty-four "yes" answers) and to the general aim of the program (in the case of the sixty "no" answers). The respondents who would have wanted their cases to be handled by without-briefs argument were lured by the promise of expedited argument, and often expected that the procedure would have required less of their time than normal procedures. The predominant reason for not wanting to ex-

pose the identified case to without-briefs argument was that the issues were complex or unfamiliar.

Finally, it should be noted that the predominance of "no" answers to this question, combined with the most common explanation of "why not," stands in apparent contrast to the views of the various judges who regarded these cases as appropriate for without-briefs argument (and presumably did not think the issues were complex or unfamiliar). Although it may not be surprising that judges and counsel would disagree about the complexity or familiarity of issues presented by a given case, this disagreement presents a potential impediment to including significant numbers of cases in a future AWB program. If participation were to be voluntary on the part of counsel, these questionnaire results warn that the court's invitation to participate in such a program might be declined in a substantial proportion of cases.

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