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Case Management in the Circuit Courts

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Twenty-five years ago, then-Chief Judge Wilfred Feinberg of the Court of Appeals for the Second Circuit wrote, "[T]he way that courts operate has a significant, possibly even dominant, influence on the quality of justice that can be obtained from them."[1] Yet despite the apparent importance of how courts manage their workload—for example, deciding which cases will receive oral argument or which cases will result in published opinions—little attention has been paid to this subject in the literature. This Article seeks to fill the scholarly void by documenting the case-management practices of five circuit courts and analyzing the critical ways in which those practices differ. It then provides an explanatory account of why practices have come to diverge and makes prescriptions for improving case management in the future.

The seismic increase in caseload that federal appellate courts have endured over the past sixty years is by now well documented. In 1950, the average number of annual filings per active federal appellate judge was just over seventy[2]—today that figure is 335.[3] To cope, judges have adopted a wide array of case-management techniques. Specifically, all of the circuits direct some portion of their civil cases into a mediation program, with the aim of settling—or at least reducing the number of claims at issue in—some of the cases. Of the cases that do not settle, the courts route a sizeable percentage to a nonargument calendar or panel, which means that these cases not only are decided without oral argument but also are reviewed primarily by staff attorneys to save judicial time. Finally, the courts have taken to publishing opinions in a low percentage of cases, disposing of the rest by unpublished opinion or order—again as a way to save court resources. In short, the courts of appeals have developed several key ways of limiting traditional appellate review in some cases to be able to review all of the cases that come before them.

Yet what is critical to appreciate—and what is often overlooked in the limited literature that exists on case management—is that the circuit courts have all developed their own unique responses to what has been dubbed the "caseload crisis." Between March 2010 and June 2011, I conducted a series of interviews with judges, clerks of court, chief circuit mediators, directors of staff attorney offices, and supervisory staff attorneys to gather information about the case-management practices of the D.C., First, Second, Third, and Fourth Circuit Courts of Appeals. This study, in conjunction with data provided by the Administrative Office of the U.S. Courts, reveals the great extent to which case-management practices vary among the circuits.

Beginning with settlement programs, significant differences exist in the number and kind of cases that are routed into mediation. Specifically, some of the circuits, including the First, Second, and Fourth, automatically send nearly all of their civil appeals to mediation, whereas in other circuits, including the D.C. and Third, only a subset of appeals are selected for mediation. With respect to the kinds of cases that go to mediation, most of the circuits preclude pro se litigants—who bring a sizeable number of appeals—from participating in their settlement programs, whereas the Third Circuit specifically allows pro se appeals to go through mediation.

Turning to screening, key differences exist in (1) how cases are screened for oral argument, (2) who makes that determination, and (3) the percentage of cases that are initially not placed on the argument calendar. Some of the circuits, including the D.C.,

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First, and Fourth, have staff attorneys review cases to make an initial determination about which ones will go to oral argument and which will be decided solely on the briefs. By contrast, in the Second Circuit, only immigration cases are directed to nonargument; the remainder of cases are placed on the argument calendar. Similarly, in the Third Circuit, certain categories of cases, including pro se and immigration appeals, are sent to special nonargument panels; the remainder of appeals are placed on an argument calendar, and the deciding panel determines which cases will ultimately be heard. Based in part on these differences in how and who screens the cases, the circuits send dramatically different percentages of their dockets to nonargument panels or onto a nonargument track. These figures vary from approximately 45 percent in the Second Circuit to nearly 88 percent in the Fourth Circuit.

As for oral argument, the circuits have substantial differences in the percentage of cases that actually receive oral argument and how that argument is structured. Of cases decided on the merits in Fiscal Year 2010, the D.C. Circuit held argument in 44.4 percent, the First Circuit in 28.9 percent, the Second Circuit in 37.7 percent, the Third Circuit in 13.9 percent, and the Fourth Circuit in 13.1 percent.[4] The time allotted for argument varied considerably as well—from as low as five minutes per side in many cases in the Second Circuit, to at least fifteen or twenty minutes per side in all cases in the Fourth Circuit.

Finally, the circuits have divergent figures when it comes to the percentage of opinions they do not publish. Of cases decided on the merits in Fiscal Year 2010, the D.C. Circuit decided 62.3 percent by unpublished opinion or order, the First Circuit 65.1 percent, the Second Circuit 88.3 percent, the Third Circuit 89.8 percent, and the Fourth Circuit 93.0 percent.[5] In short, from decisions about which cases to route to mediation to decisions about what percentage of cases to dispose of through unpublished opinions or orders, the circuit courts have dramatically different ways of managing their caseloads.

After noting these differences in how courts operate, the natural question to ask is why they have arisen. That is, why do different circuits have different ways of selecting cases for oral argument? Or why does one circuit publish opinions in a substantially higher percentage of cases than another? The answers lie in part in the different dockets each circuit faces and the different priorities each circuit possesses.

Beginning with dockets, the circuits plainly face different workloads—both in terms of size and in terms of kinds of cases. The D.C. Circuit received 1,178 filings in Fiscal Year 2010 or 131 per active judge.[6] By contrast, the Second Circuit received over four times as many filings in the same period—5,371 or 537 per active judge.[7] Circuits with a lower volume of cases have the time to, say, hold oral argument and publish opinions in a higher percentage of cases than circuits with a higher volume of cases. Furthermore, the circuits receive different types of cases, which affects the kinds of time-saving mechanisms that make sense for each court. For example, because the Second Circuit receives well over one thousand immigration cases per year[8]—a sizeable portion of its docket—it can create a special nonargument calendar for these cases alone, a strategy that would not be practical for a court such as the D.C. Circuit, which receives only a handful of such cases per year.

Although differences in dockets account for many of the differences in the case-management practices of the circuits, they do not account for all of them. What emerged during my qualitative study of the courts is the fact that the judges of each circuit have different collective views about which components of appellate decisionmaking should be prioritized. Specifically, the Second Circuit has long valued oral argument, which is why that court offers argument to most litigants, outside of immigration appeals and appeals brought by incarcerated litigants. By contrast, the Fourth Circuit prizes efficiency, so that circuit tries to ensure that it has one of the lowest median disposition times among all of the courts. And the Third Circuit places significant weight on judges, not staff attorneys, screening cases for oral argument. These are just a few examples of the ways in which circuits have developed their own values when it comes to facets of the decisionmaking process, values that in turn affect the case-management practices these circuits adopt.

The final important question in this analysis is whether the different circuit practices can be justified. That is, are there sufficiently strong reasons to support the existence of disuniformity in how the federal courts of appeals manage their caseloads?

The brief answer is both yes and perhaps. Beginning with the affirmative response, the dramatic differences between the dockets of the circuits means that a uniform approach to managing cases simply would not be practicable. A nonargument calendar for immigration cases seems reasonable in the Second Circuit, which saw well over a thousand such cases in Fiscal Year 2010;[9] it quickly seems unreasonable in the D.C. Circuit, which only received one such appeal in the same period.[10] Given that each circuit has different case-

management needs—based on the number and types of cases in its docket—at least some disuniformity can be justified.

What is less clear is whether differences in case-management practices that exist not simply because of differences in dockets but because of differences in circuit priorities can be justified. That is, if one circuit decides to hold oral argument in a smaller percentage of cases than another not because it has a higher number of cases to contend with but because its judges simply value oral argument less, can this difference in practice be justified? This is a complex and important question that turns on the reasons why the circuits have developed such different priorities.

At base, a circuit's priorities come from underlying values. That is, a circuit that prioritizes oral argument does so because it truly values something deeper—say, perceived legitimacy or collegiality among its judges. What is relevant, then, is whether the circuits hold the same underlying values. If, ultimately, the circuits possess the same underlying values but diverge when it comes to which case-management practices best effectuate those values—say, whether oral argument or published opinions best effectuates perceived legitimacy—different case-management practices may be justifiable. The idea underlying the justification would be that circuits, just like states, should be able to serve as laboratories of experimentation—in this case, to see which practices do in fact best effectuate certain values. If, however, the circuits have different priorities because they actually hold different underlying values, or perhaps the same underlying values but in different measure, then differences in case management become less defensible. The idea here is that inasmuch as the foundation of the federal justice system is that courts are animated by the same basic principles, deep value disuniformity is highly problematic. Because information about the values held by the circuits is critical for evaluating the case-management practices of the circuits, circuit values is a topic deserving of greater research and consideration in the future.

Ultimately, how courts decide to manage their workload is a critical subject—one that affects the quality of justice litigants receive from these courts. Therefore, understanding how the individual courts operate, appreciating their differences, and assessing why those differences occur is necessary. Moving forward, legal scholars should more fully document and analyze the workings and values of the courts. The courts themselves can and should assist with these ends by making their practices more transparent and sharing more information about how they manage their caseloads with one another. Through careful study and analysis of court practice, we can hope to maintain, and even improve, the high quality of our justice system.❖

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1. Wilfred Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 Hofstra L. Rev. 297, 298 (1986) (footnote omitted) (quoting Note, *The Second Circuit: Federal Judicial Administration in Microcosm*, 63 Colum. L. Rev. 874, 874 (1963)) (internal quotation marks omitted).
2. Comm'n on Structural Alts. for the Fed. Courts of Appeals, Final Report 14 tbl.2-3 (1998).
3. Admin. Office of the U.S. Courts, Judicial Business of the United States Courts: Annual Report of the Director 16 tbl.1 (2010). It is important to note that these figures, unlike the previous figures from the Commission on Structural Alternatives for the Federal Courts of Appeals, exclude data for the U.S. Court of Appeals for the Federal Circuit.
4. *Id.* at 44 tbl.S-1.
5. *Id.* at 46 tbl.S-3.
6. *Id.* at 83 tbl.B.
7. *Id.*
8. *Id.* at 97 tbl.B-3.
9. *Id.*
10. *Id.* at 96 tbl.B-3.

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