STATEMENT

Submitted to The Commission on Structural
Alternatives for the Federal Courts of Appeals
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THE CONTEXT OF THIS STATEMENT

This statement responds to the February 27, 1998 notice from the Commission soliciting views "on whether each federal appellate court renders decisions that are reasonably timely, are consistent among the litigants appearing before it, are nationally uniform in their interpretations of federal law, and are reached through processes that afford appeals adequate, deliberative attention of judges." In particular, the Commission has requested comments on: (1) perceived problems that interfere with the ability of the courts to meet the above objectives; 2) ameliorative measures for overcoming these problems; and (3) what is working well in the federal appellate courts. In this statement, I will present my personal views based on my experience in the federal courts over the last sixteen years. In addition, I will convey some of the views expressed to me on this subject by others within and outside of my law firm.

I am Chair of the Appellate Practice Group of Holland & Knight LLP, a law firm of over six hundred lawyers with offices in California, Florida, Georgia, New York, Virginia and Washington, D.C. I am located in our Atlanta office. Because we view appellate work as a distinct practice area, our firm has established the Appellate Practice Group to assist in all of our firm's appellate matters. The Holland & Knight Appellate Practice Group includes three former appellate judges as well as other attorneys whose practices focus on appellate work. Collectively, we have handled matters in all of the federal courts of appeals. My personal experience has been mostly in the Eleventh Circuit with some exposure to the First, Third and Ninth Circuits. I also have handled matters in the Supreme Court. Additional information regarding my experience and the Holland & Knight Appellate Practice Group is available on the internet at www.hklaw.com.

In preparing this statement, I discussed the issues posed by the Commission's notice with a number of other people who, while sharing a common interest in the federal appellate process, have varying backgrounds. For example, I received comments from a former state appellate judge who now has an active federal appellate practice, two individuals who have experience as Chief of the Appellate Division of the U.S. Attorney's Office in their respective cities, two law professors, the lawyer who heads up the mediation program for the Eleventh Circuit, appellate practitioners throughout my firm, and lawyers who are active in professional appellate organizations such as the American Academy of Appellate Lawyers and the ABA Litigation Section's Appellate Practice Committee.

The views expressed to me are not uniform. Nonetheless, there are some common themes that I would like to share with the Commission. In doing so, however, I ask the readers of this

statement to keep in mind that unless a viewpoint is specifically attributed to another person, this statement reflects only my personal perception of the concerns of practitioners and not the actual views of any other particular individual or organization.

RESPONSE TO THE POSED QUESTIONS

I. Perceived Problems With The Current System.

A. Timeliness.

In general, the Eleventh Circuit seems to be handling its caseload to the satisfaction of many practitioners. With respect to commercial matters, however, the court can improve its timeliness. In my experience, the interval between the notice of appeal and the initial panel opinion in a commercial case can be two or sometimes three years. Other lawyers with commercial practices have told me of similar experiences. While these complex cases may not represent the bulk of the filings in the court, they usually involve significant issues. The delay can be quite damaging, for example, where a party is entitled to a reversal in an infringement case or where there is a large monetary award which must be reported in financial statements and public filings.

There are several factors that appear to have contributed to delays in the Eleventh Circuit. One is the Eleventh Circuit's heavy reliance on visiting senior and district court judges to fill the gaps in its panels caused by continuing unfilled vacancies. In recent years, it has been a rare thing to have three active Eleventh Circuit judges on a panel. While the contribution of our working senior judges is tremendous and should not be minimized, the degree to which the Eleventh Circuit has used designated judges appears to have contributed to delays simply because such judges do not have the same level of staff support as active judges, or they have their own regular dockets which take priority over their temporary responsibilities as fill-in Eleventh Circuit judges. Possibly, this problem will diminish with the recent confirmation of two additional judges to the Eleventh Circuit.

Several people have expressed the view that procedures designed to streamline the appellate process actually have the reverse effect. For example, it is thought that the denial of oral argument might increase the processing time for an appeal because, without having to conform to the argument timetable, the judges might not be as diligent about scheduling the conferences necessary for issuing a decision. Some people have the view that an expedited appeal in the Eleventh Circuit means expedited for the lawyers only, with the usual delay in receiving a decision after the abbreviated briefing and argument schedule. Although not a problem in the Eleventh Circuit, I have been told that the procedure for a summary affirmance in the District of Columbia Circuit can add time to an appeal because the chances of obtaining a summary affirmance are slim, the procedure can take as much as a year to result in a denial, and then after the denial the case starts back at the beginning of the regular briefing track.

Similarly, deferring jurisdictional issues can extend the time for an appeal. I have had appellate courts request briefing on a jurisdictional issue, then order that the jurisdictional issue was "carried with the case," only to ultimately dispose of the case on the jurisdictional issue a year or

so later after the parties and the judges have spent the time involved in a full briefing and argument on the merits.

Another concern is the perception that a massive number of frivolous *pro se* prisoner filings bogs down the system and effects a jaundiced attitude towards all appellants in court personnel. It has been suggested that there is a need for additional measures for processing these matters.

B. Internal consistency.

The prevailing view is that the level of internal conflicts in the law of a circuit corresponds to the circuit's size. The Ninth and the Fifth Circuits are usually cited as examples of the internal consistency problem. It is hard to tell, however, whether the lack of criticism of the Eleventh Circuit on the conflict issue is the result of true internal consistency or the result of the court's policy of not releasing its "unpublished" opinions for inclusion in the databases used by the public for electronic research.

The usual rule in the Eleventh Circuit is that "[a]n opinion shall be unpublished unless a majority of the panel decides to publish it." 11th Cir. R. 36-2. As a result, a high percentage of Eleventh Circuit opinions are unpublished. Unlike the Ninth Circuit's unpublished opinions which can be researched on Westlaw or Lexis, however, the unpublished Eleventh Circuit opinions cannot be accessed electronically by the public.

In my view, the goal of achieving even-handed justice would be better served by making all of the court's opinions public. The unpublished opinions could retain their current status as nonbinding persuasive authority while providing some guidance to the litigants and judges as to results rendered in similar cases. Further, while statistics on requests for *en banc* review provide some basis for assessing the consistency of circuit law, the ability to research all Eleventh Circuit opinions would make this data more meaningful.

C. National uniformity.

One problem that has consistently surfaced loud and clear in my conversations with lawyers who practice in more than one circuit is the lack of uniformity in the local rules of the federal appellate courts. In fact, as Co-chair of the Appellate Rules Subcommittee of the ABA Litigation Section's Appellate Practice Committee, I have been formally investigating this problem in the past several months.

A good analysis of the difficulties resulting from the discrepancies in the local rules can be found in an article by Professor Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 University of Colorado Law Review 1 (1997). The *Report and Recommendations on the Lawyer Advisory Committees to the U.S. Courts of Appeals*, issued in February, 1997 by the American Academy of Appellate Lawyers, also provides a useful guide to the internal rulemaking procedures of the different circuits. As pointed out in these works, the federal appellate courts have adopted their local rules largely independent of each other.

The lack of uniformity in local rules is not just an academic problem, tangential to the concerns of this Commission. To the extent that these local rules deviate from the Federal Rules of Appellate Procedure, they impede the uniform application of federal law. Further, there is a strong feeling among practitioners that the proliferation of highly technical local rules has created an expensive bureaucratic process that frustrates the efficient and timely handling of appeals.

D. The extent of the deliberative attention of judges.

The flip side of the timeliness problem in commercial cases is that, in my experience, the Eleventh Circuit judges by and large devote "adequate, deliberative attention" to complex commercial appeals. On the other hand, with respect to the more routine cases, there is a general concern over a perceived increased reliance by the courts on staff attorneys and law clerks for screening and preliminary determinations. Further, the cutting back on oral argument has caused some concern that the court does not always give adequate judicial attention to the cases before it. Of course, this concern does not apply to all judges. Many judges are known to conscientiously delve into every appeal that comes before them.

II. Suggestions For Ameliorative Measures.

In contrast to the comments that I received regarding perceived problems, the suggestions for improvement to the system greatly diverged, and, in some instances directly conflicted. For example, one of my partners who is a former appellate judge agrees with the opinions expressed by J. Harvie Wilkinson in his article, *We Don't Need More Federal Judges*, Wall St. J., Feb. 9, 1988, at A19. He believes that adding judges will not solve any problems, only defeat collegiality and consistency. On the other hand, Professor Michael Wells thinks that adding judges and dividing circuits where necessary makes sense. Indeed, Professor Wells has expressed the view that the federal judiciary suffers from an elitist attitude. See Wells, *Against An Elite Federal Judiciary: Comments On The Report Of The Federal Courts Study Committee*, 1991 B.Y.U.L.Rev. 923 (1991).

Many practitioners have expressed to me agreement that the Eleventh Circuit and other appellate courts might function better with some more judicial posts. No one, however, has expressed the view that the alignment of the Eleventh Circuit needs improvement. Personally, I believe that, while consistency is important, there also is value to the additional perspective and diversity that can come with some extra judicial posts. On the other hand, I would not attack the federal appellate courts for being elite. Part of the value of the appellate system is the assurance that there is a higher, more select judicial body available to review errors occurring in the lower tribunals.

One unavoidable concern over unrestrained growth of a circuit is that, as the court becomes bigger, conflicting panel decisions will appear with more frequency yet the large number of judges will render *en banc* review time consuming and unmanageable. The Georgia Court of Appeals recently dealt with the difficulties associated with *en banc* review in a busy court by adopting a procedure for resolving conflicting panel decisions by less than a full court under some circumstances. Under § 15-3-1(d) of the Official Code of Georgia Annotated, a prior

decision of less than all ten judges of the court can be overruled by a majority of a seven judge panel comprised of the three judge division to which the matter under review was assigned, the next division in line in rotation, and an additional seventh judge. A case will be heard by all ten judges only if a sufficient number of judges request a full court hearing or if the decision in the matter under review would overrule or materially modify a prior decision of the full court. It may be too early to tell whether the new Georgia procedure will be effective. It may be worthwhile, however, to investigate the concept of less than full court procedures for resolving conflicts as the federal courts grow larger. Further, an analysis of the state appellate systems might reveal some other useful innovations for dealing with similar problems in the federal courts.

Another suggestion for dealing with the heavy caseload of the courts is to expand and pursue innovations in the mediation programs of the courts. I believe that the Eleventh Circuit's mediation program is exemplary, and is well regarded by most practitioners who have found themselves mediating an appeal with its assistance. The program takes a flexible, "user friendly" approach. It is even in the process of adding branch offices to increase accessibility. Because the Eleventh Circuit program often provides services to the complex commercial cases that require more judicial resources to resolve, its savings to the court in time and money are probably more than the simple number of settled cases reflects.

Obviously, the trend of incorporating technologies into the federal appellate system will enhance its efficiencies. The use of briefs filed on CD Rom could help promote efficiency and the deliberative attention of judges by providing instant authority and record citations without the time and hassle of digging through piles of paper. Our New York office recently filed such a brief in the Second Circuit and has been impressed with the process.

Other suggested measures for dealing with some of the problems discussed above include the reduction of technical local rules and the adoption of internal time frames for issuing opinions. I would caution against any artificial deadlines, however, to preserve the interest in having the "adequate, deliberative attention" of the judges.

III. What Is Working Well.

As mentioned above, the Eleventh Circuit mediation program appears to be a great success. The circuit judges make themselves available for seminars and conferences so that the bar can learn much about the internal workings of the court. The clerks are generally helpful. The court's calendar clerk in particular tries hard to accommodate scheduling conflicts. The general feeling is that the Eleventh Circuit is functioning well overall.

Respectfully submitted,

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