

**Oregon State Bar  
Special Meeting of the Board of Governors**

May 12, 2017  
8:30 a.m.  
Oregon State Bar Center  
Tigard, Oregon

*The mission of the OSB is to serve justice by  
promoting respect for the rule of law,  
improving the quality of legal services, and  
increasing access to justice.*

*The Special Open Session Meeting of the Oregon State Bar Board of Governors will begin at 8:30am on May 12, 2017.  
Items on the agenda will not necessarily be discussed in the order as shown.*

**Open Agenda**

- |  |  |        |         |
|--|--|--------|---------|
| 1.   | Call to Order  |        |         |
| <br>   |  |        |         |
| 2.   | Request to co-Sponsor ABA Resolution [ Mr. Levelle ] | Action | Exhibit |
| <br><i>The Board will decide whether to co-sponsor the ABA Standing Committee on the American Judicial System Resolution Opposing Restructuring of the Ninth Circuit</i> |  |        |         |
| <br>   |  |        |         |
| 3.   | Generative Discussion                                | Inform | Exhibit |
| <br><i>The Board will discuss the OSB core functions as advocates for diversity, equity, and inclusion and as champions for access to justice.</i>                       |  |        |         |

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April 18, 2017

Via Email: [mlevelle@sussmanshank.com](mailto:mlevelle@sussmanshank.com)

Michael D. Levelle  
President  
Oregon State Bar

Re: Opposition to Proposals to Split the United States Court of Appeals for the Ninth Circuit

Dear Michael:

I am writing to you in your capacity as President of the Oregon State Bar. As you know, Oregon is one of the states located within the federal Ninth Circuit. I have the privilege of chairing the Federal Courts Subcommittee of the Standing Committee on the American Judicial System (“Standing Committee”) of the American Bar Association (“ABA”). I also serve as the Pennsylvania State Delegate in the ABA’s House of Delegates and I previously served as President of the Pennsylvania Bar Association.

As you may know, various legislative proposals have been made recently to split the Ninth Circuit. The Standing Committee intends to request that the House of Delegates of the ABA reaffirm its existing policy opposing restructuring the Ninth Circuit because there is no compelling empirical evidence of adjudicative or administrative dysfunction in the existing structure. Enclosed herewith is a draft of the resolution that the Standing Committee will seek to have the House of Delegates adopt at the ABA’s Annual Meeting in New York, New York in August. Also attached is a copy of the draft report supporting the resolution.

The Standing Committee believes that it is important that the organized bar within the affected states be heard on this issue. We would welcome the support of your state as either a co-sponsor or a supporter of the resolution. As a co-sponsor, the name of your state would appear as such in the written materials submitted to the House.

Philadelphia	Boston	Washington, D.C.	Los Angeles	New York	Pittsburgh
Detroit	Berwyn	Harrisburg	Orange County	Princeton	Silicon Valley

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The deadline for submitting the resolution and report is May 9, 2017 and the deadline for adding co-sponsors to the resolution is May 31, 2017. I would greatly appreciate it if you would let me know at your earliest convenience whether your bar association is willing to join the Standing Committee as a co-sponsor or supporter of the resolution in the House of Delegates.

Sincerely,



Michael H. Reed  
Chair  
Federal Courts Subcommittee  
ABA Standing Committee  
on the American Judicial System

/mce

Enclosure

cc: Helen Hierschbiel, Executive Director  
Adrienne Nelson, ABA State Delegate  
William T. (Bill) Robinson III, Chair  
ABA Standing Committee on the American Judicial System

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bc: Nicole Vanderdoes

**AMERICAN BAR ASSOCIATION**  
**STANDING COMMITTEE ON THE AMERICAN JUDICIAL SYSTEM**  
**SECTION OF LITIGATION**  
**TORT TRIAL AND INSURANCE PRACTICE SECTION**  
**CRIMINAL JUSTICE SECTION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1    RESOLVED, That the American Bar Association opposes restructuring the United States Court  
2    of Appeals for the Ninth Circuit because there is no compelling empirical evidence of  
3    adjudicative or administrative dysfunction in the existing structure; and  
4  
5    FURTHER RESOLVED, That the American Bar Association supports ongoing efforts by the  
6    United States Court of Appeals for the Ninth Circuit and other federal courts to utilize  
7    technological and procedural innovations in order to continue to enable them to handle caseloads  
8    efficiently while maintaining coherent, consistent law in their respective jurisdictions.

## **REPORT**

### I. **Introduction**

The federal circuit courts of appeals were established by Congress in 1891.<sup>1</sup> Over time, the number of circuits has increased from the original nine circuits to the current 12 circuits. The federal circuits vary in size (i.e., the number of judges comprising the courts of appeals and the total number of judicial officers within the circuit), have differing caseloads and cover differing numbers of states, territories, residents and total geography. Proposals are occasionally made to divide the existing circuits,<sup>2</sup> and on a few occasions such proposals have been adopted, e.g., the division of the old Fifth Circuit into the current Fifth Circuit and the Eleventh Circuit. Like the emergence of cicadas from the soil, periodic proposals have arisen in recent decades to split the Court of Appeals for the Ninth Circuit. Characterized by one of its critics as a “supersized appellate court,”<sup>3</sup> the Ninth Circuit has been said to be in need of division for several reasons, including the oft-cited assertion that the circuit allegedly has a “high rate of reversal” by the United States Supreme Court. Current legislative proposals focus on the large geography of the circuit, promising that division of the circuit will “bring justice closer to the people.”<sup>4</sup>

The proponents of the Resolution have studied all of the legislative proposals for splitting the Ninth Circuit and the relevant factual record. The proponents urge the American Bar Association (ABA) to oppose these proposals because there is no compelling empirical evidence of either adjudicative or administrative dysfunction in the existing structure that would warrant a split. The proponents believe that adoption of the Resolution is necessary because the House of Delegates needs to articulate clear policy on this important issue based upon the current factual record. The proponents also ask the House to adopt policy supporting the ongoing efforts of the Ninth Circuit and other federal courts to utilize technological and procedural innovations

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<sup>1</sup> Fed. Judicial Ctr., The U.S. Courts of Appeals and the Federal Judiciary, <https://www.fjc.gov/history/courts/u.s.-courts-appeals-and-federal-judiciary> (last visited Apr. 4, 2017).

<sup>2</sup> While proposals to divide or restructure the circuits usually focus on the appellate court and the states that would be included in any new circuits, division would also result in the realignment of the lower courts and restructuring of the administrative and ancillary functions within the court system.

<sup>3</sup> *Bringing Justice Closer to the People: Examining Ideas for Restructuring the Ninth Circuit: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 115<sup>th</sup> Cong., 1<sup>st</sup> Sess. (Mar. 16, 2017) [hereinafter House Judiciary Subcomm. Hearing] (written statement of Dr. John C. Eastman, Professor, Chapman University Fowler School of Law).

<sup>4</sup> See the title of the House Judiciary Subcomm. Hearing, *supra* note 2. Some have suggested that the true objective of these recurring proposals to divide the Ninth Circuit is to “gerrymander” a circuit whose decisions are considered by some to be “too liberal.” See, e.g., House Judiciary Subcomm. Hearing, *supra* note 2, <https://www.c-span.org/video/?425486-1/ninth-circuit-court-appeals-judges-testify-court-restructuring> (transcript of opening statement at 6:25 by John Conyers, Jr., Ranking Member, House Comm. on the Judiciary, and transcript of statement at 15:34 by Jerrold Nadler, Ranking Member, Subcomm. on Courts, Intellectual Property, and the Internet). The authors take no position on this issue.

to enable the courts to handle caseloads efficiently while maintaining coherent, consistent law within their respective jurisdictions.

## II. **Past Congressional Inquiries and Legislative Proposals to Restructure the Ninth Circuit**

The federal courts of appeals have long been the subject of study, primarily because of concerns about the persistent growth in the appellate caseload.<sup>5</sup> The Ninth Circuit—the largest circuit in geographic size, population, judgeships, and annual caseload—has been the subject of numerous studies and proposals over the years.<sup>6</sup>

In 1972, Congress created the Hruska Commission, formally called the Commission on Revision of the Federal Court Appellate System, to study the federal appellate system. In 1975, the Hruska Commission issued its final report, which included recommendations for dividing both the Fifth and Ninth Circuits (then composed of 15 and 13 judges respectively) on the basis of an announced preference for smaller circuits.<sup>7</sup> The ABA endorsed those recommendations.

At that time, Congress declined to divide the circuits and instead implemented other Hruska Commission recommendations. These included substantially increasing the number of authorized judgeships in both circuits and authorizing any circuit with 15 or more judges to use limited en banc panels or to divide into administrative units to deal with rising caseloads.<sup>8</sup> The Ninth Circuit chose to adopt these new procedures; the judges of the Fifth Circuit preferred division.

In 1980, Congress divided the Fifth Circuit by placing Florida, Georgia, and Alabama into a new Eleventh Circuit.<sup>9</sup> This was the second (and last) time that Congress has

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<sup>5</sup> In 1960, almost 4,000 appeals were filed in the regional courts of appeals, which were composed of 68 judges. In 1970, almost 12,000 appeals were filed and the number of authorized judgeships increased to 97. By 1980, appeals almost doubled and authorized judgeships increased to 132. In 1990, there were 40,898 appeals filed and 156 judgeships. The number of authorized judgeships increased to 167 in 1991 as a result of an omnibus judgeship bill. No additional judgeships have been created since then, despite more growth in caseload. In 2016, over 61,000 appeals were filed.

<sup>6</sup> When it was established in 1891, the Ninth Circuit included California, Idaho, Montana, Nevada, Oregon and Washington. Hawaii, Arizona, Alaska, Guam and the Northern Mariana Islands were added subsequently. Fed. Judicial Ctr., History of the Federal Judiciary, [http://www.fjc.gov/history/home.nsf/page/courts\\_coa\\_circuit\\_09.html](http://www.fjc.gov/history/home.nsf/page/courts_coa_circuit_09.html). The total number of authorized court of appeals judgeships has increased from 2 in 1891 to 29 today. *Id.*

<sup>7</sup> Comm'n on Revision of the Fed. Court Appellate Sys., Structure and Internal Procedures: Recommendations for Change 57-59 (1975).

<sup>8</sup> Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629, 1633 (1978).

<sup>9</sup> Appellate Court Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (1980).

divided a circuit since 1891, when it created the system of regional circuit courts of appeals as we know them today.<sup>10</sup>

Although the ABA originally supported the Hruska Commission's recommendation to split both the Fifth and Ninth Circuits, it rescinded that position in 1990 with respect to the Ninth Circuit, on the basis that procedural changes and court management innovations allowed the circuit to manage its rising caseload without sacrificing quality or timeliness.

In 1993, at the request of the Federal Courts Study Committee, which had been established three years earlier by Congress, the Federal Judicial Center (FJC) undertook a 15-month examination of the appellate court system and issued a report titled *Structural and Other Alternatives for the Federal Courts of Appeals*. The FJC concluded that the expansion of federal jurisdiction without a concomitant increase of resources was creating a burden for the federal courts of appeals and that it did not appear to be a stress that would be significantly relieved by structural changes to the appellate system. Its report stated that it could not "conclude, as some assert, that the justness of appellate outcomes has been detrimentally affected by caseload volume."<sup>11</sup> It advocated for non-structural efforts to deal with the problem of increased volume.

In 1997, Congress created the Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by Justice Byron R. White (the "White Commission"), to study the structure and alignment of the federal appellate system, with particular focus on the Ninth Circuit, and to submit recommendations on changes in circuit boundaries or structure to the President and Congress.<sup>12</sup> The White Commission's report to Congress concluded that the Ninth Circuit should not be split:

There is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall. Furthermore, splitting the circuit would impose substantial costs of administrative disruption, not to mention the monetary costs of creating a new circuit. Accordingly, we do not recommend to Congress and the President that they consider legislation to split the circuit.<sup>13</sup>

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<sup>10</sup> The first split occurred in 1929, only after almost unanimous consensus was reached among members of Congress and judges on how to divide the circuit. A new Tenth Circuit was carved out of five contiguous western-most states of the existing Eighth Circuit. Tenth Circuit Act of 1929, ch. 363, 45 Stat. 1346 (1929). The ABA supported this division.

<sup>11</sup> Fed. Judicial Ctr., Structural and Other Alternatives for the Federal Courts of Appeals: Report to the United States Congress and the Judicial Conference of the United States 155 (1993).

<sup>12</sup> Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, 111 Stat. 2440, 2491 (1997).

<sup>13</sup> Comm'n on Structural Alternatives for the Fed. Courts of Appeals, Final Report 29 (1998).

The White Commission noted that there were benefits from the current makeup of the Ninth Circuit, including the development of a consistent body of law that applies to the entire western region of the United States and governs relations with the other nations of the Pacific Rim. It also noted financial and practical advantages of the circuit's administrative structure.

The White Commission nevertheless recommended that Congress restructure the Ninth Circuit into three regionally based adjudicative divisions. The ABA opposed this recommendation on the ground that the only rationale for the recommendation—a subjective preference for smaller decisional units—was an insufficient reason to restructure a judicial circuit.<sup>14</sup> Congressional reaction to the White Commission's report was tepid, and legislation introduced during the 106<sup>th</sup> Congress by Senator Frank Murkowski (R-AK) received minimal attention.

During the 107<sup>th</sup> Congress, bills were introduced in the House and Senate by Representative Simpson (R-ID) and Senator Murkowski to split the Ninth Circuit into two circuits, with Arizona, California, and Nevada remaining in the Ninth Circuit and Alaska, Hawaii, Oregon, Washington, Idaho, and Montana forming a new Twelfth Circuit.<sup>15</sup> Hearings were held, but no further action was taken.

During the 108<sup>th</sup> Congress, bills proposing three different ways to divide the Ninth Circuit were introduced. Representative Simpson reintroduced his previous bill; he and Senator Murkowski introduced bills with only California and Nevada remaining in the Ninth Circuit, and Representative Renzi (R-AZ) and Senator Ensign (R-NV) introduced bills containing a novel three-way split. Although the House Judiciary Committee had not held a hearing on the three-way circuit restructuring proposal, House members attempted to secure the bill's passage by attaching it to an omnibus judgeship bill that had already passed the Senate. The strategy succeeded in the House, but failed in the Senate.

During the 109<sup>th</sup> Congress, seven circuit restructuring bills were introduced. Three bills (introduced by Senators Murkowski and Ensign and Representative Simpson) proposed keeping California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit and placing the remaining states in the new Twelfth Circuit. A separate House bill (introduced by Representative Sensenbrenner (R-WI)) combined Representative Simpson's bill with the omnibus judgeship bill from the previous Congress. With 10 cosponsors—more than any other circuit-splitting bill has garnered to date—it was reported to the House, but never scheduled for a vote.

During the 110<sup>th</sup>–114<sup>th</sup> Congresses, similar bills were introduced by many of the same members, but none received any action.

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<sup>14</sup> The ABA House of Delegates adopted policy in August 1999 opposing the recommendations of the White Commission.

<sup>15</sup> See Appendix A and Appendix B for visual representations of the circuit realignments proposed by the bills discussed in this report.

### **III. Current Congressional Activity**

In the current 115th Congress, four circuit restructuring bills have been introduced. S. 295 and H.R. 196, introduced by Senator Daines (R-MT) and Representative Simpson respectively, share the same circuit reconfiguration but differ in other details. These bills would retain California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit and assign the other states to the new Twelfth Circuit. Representative Biggs (R-AZ) has introduced H.R. 250, which would retain Oregon and Washington along with California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit, and assign the other states to the new Twelfth Circuit. S. 276, introduced by Senator Flake (R-AZ), would tweak that arrangement a bit by assigning Washington to the new Twelfth rather than the Ninth Circuit. In addition to these realignment bills, legislation to establish a new Commission on Structural Alternatives for the Federal Courts of Appeals has been introduced by Senator Sullivan (R-AK).

### **IV. Existing ABA Policy**

One of the primary goals of the ABA is to promote improvements in the administration of justice. It is therefore not surprising that the ABA has examined the issue of restructuring the Ninth Circuit on multiple occasions over the past 50 years. Originally supportive of realignment of the Ninth Circuit in the 1970s, the ABA continued to examine the issue over the next several decades in light of the emergence of technological developments that increasingly bridged geographical distances, the successful use of limited *en banc* review panels, and the circuit's innovative use of case management techniques. This culminated in the ABA rescinding its earlier position and adopting policies in the 1990s opposing division of the Ninth Circuit.<sup>16</sup> Since then, the ABA has periodically reviewed new proposals to split the circuit.<sup>17</sup> On March 16, 2017, the ABA submitted testimony, based upon previously adopted policy, opposing the current legislative proposals to restructure the Ninth Circuit at a hearing of the Subcommittee on Courts, Intellectual Property and the Internet of the House Committee on the Judiciary.<sup>18</sup>

### **V. No Compelling Evidence Exists that the Ninth Circuit Needs Restructuring**

The ABA has found no compelling evidence to support claims that the Ninth Circuit is failing to deliver quality justice.<sup>19</sup> The perceived problems identified by supporters of

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<sup>16</sup> In 1998, the ABA Board of Governors adopted a resolution that opposed restructuring of the Ninth Circuit “in view of the absence of compelling empirical evidence to demonstrate adjudicative or administrative dysfunction.” A resolution adopted by the ABA House of Delegates in 1999 opposed enactment of legislation that mandated restructuring of the Ninth Circuit into “adjudicative divisions” in view of the “absence of compelling evidence to demonstrate adjudicative dysfunction.”

<sup>17</sup> The ABA last expressed opposition to circuit restructuring in a statement submitted to the Senate Judiciary Committee on September 20, 2006, for a hearing on proposals to split the Ninth Circuit.

<sup>18</sup> See House Judiciary Subcomm. Hearing, *supra* note 2.

<sup>19</sup> The ABA’s findings are consistent with recent analyses and studies conducted by the Ninth Circuit. *See* House Judiciary Subcomm. Hearing, *supra* note 2 (written statements of Sidney R. Thomas, Chief Judge, and Alex Kozinski and Carlos T. Bea, Circuit Judges, United States Court of Appeals for the Ninth Circuit).

the legislation do not justify restructuring and would not be remedied by any of the various proposed circuit divisions. Two examples will demonstrate this disconnect between perception and intent.

#### A. **Delay and Backlog**

Critics often complain that the circuit has a backlog of pending cases and is slow to process new cases. Even if true, neither of these concerns would be resolved by realignment. Circuit division does not reduce caseload or eliminate backlog; it only reallocates it. Circuit size is not the critical factor in appellate delay—too many vacancies, too few authorized judgeships, and national policy decisions that increase workload without providing concomitant resources are the prime causes of delay and backlog.

The Ninth Circuit does indeed have the slowest median processing time for cases terminated on their merits, but that one statistic does not convey very much about the way the Ninth Circuit is handling its caseload. Statistics compiled by the Administrative Office of the U.S. Courts (AO) for the 12-month period ending June 30, 2016<sup>20</sup> show that in recent years the Ninth Circuit has been getting ahead of the curve by terminating more cases than are commenced. It is also notable that the circuit's disposition times have steadily improved over the past decade. In fact, Judge Sidney R. Thomas, Chief Judge of the Ninth Circuit, reported that case processing time has been reduced by almost 35%. Furthermore, while the circuit may lag behind others in the median time from the date of filing to final disposition, once cases are ready for oral argument, they move expeditiously through the system and are closed in record time. The Ninth Circuit was the second fastest circuit in terms of median time from the date of the oral argument to final disposition with a rate of 1.1 months. It also shared with four other circuits the distinction of having the fastest median time from submission on the briefs to disposition—a record-breaking 0.2 months.

One of the reasons that the Ninth Circuit has been able to function so well despite its growing caseload is because it has been on the forefront of utilizing technology to enhance administrative efficiency. In fact, the Ninth Circuit was the first to institute automated docketing and electronic web-based filing. It also developed and uses to great advantage an automated issue identification system that inventories cases in a way that flags potential conflicts for early resolution and facilitates efficient resolution of cases that share the same central issue. The system also enables the court to issue pre-publication reports to court members to advise them in advance of the filing of every published opinion and to identify pending cases that might be affected by the lead opinion. In addition to using technology effectively, the Ninth Circuit has introduced case management solutions, such as the creation of the positions of Appellate Commissioner and Circuit Mediator, to help resolve cases that do not require resolution by an Article III judge. These programs, available to the circuit because of its aggregate resources, have produced administrative efficiencies that have improved case management and increased productivity.

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<sup>20</sup> The AO's statistical tables are available on its website at <http://www.uscourts.gov/statistics-reports>.

Moreover, dividing the Ninth Circuit would not be a likely cure for whatever delay problems exist. Wherever California goes, with or without any other states, the system will be overburdened unless and until new judgeships are created. Indeed, one of the primary academic proponents of dividing the Circuit admitted in his testimony before the Congress that the purported benefits that he believes would flow from splitting the Circuit could not be achieved without dividing California and placing the state in two circuits.<sup>21</sup> Because California has far fewer judges on the Ninth Circuit than its proportion of the cases in the Circuit, splitting off other states from California would effectively increase the caseload for the judges that remained in the Circuit with California.

The Ninth Circuit is also the only federal circuit that currently has live streaming of its video arguments. In commenting on the leadership role that the circuit has taken in allowing cameras in the courtroom, Chief Judge Thomas recently remarked that “[t]he more transparent we are the more confidence people will have in our judicial institutions.”<sup>22</sup>

## B. Reversal Rate

Contrary to often-repeated statements, the rate of reversal of Ninth Circuit decisions by the Supreme Court is not the highest of all the circuits and, even if it were, there is no evidence that size has any bearing on reversal rates.<sup>23</sup>

The Supreme Court, not surprisingly, reverses more cases than it affirms. According to an analysis by Politifact, between 2010 and 2015, the Supreme Court reversed about 70% of the cases it reviewed.

During the same time period, 79% of the Ninth Circuit cases were reversed, and the Sixth Circuit, with a reversal rate average of 87%, had the highest reversal rate.<sup>24</sup> Our review of reversal rates, as reported by SCOTUSblog, confirms these statistics.<sup>25</sup> Further proof that reversal rate has nothing to do with the size or volume of cases decided by a circuit is readily

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<sup>21</sup> House Judiciary Subcomm. Hearing, *supra* notes 2 and 4 (transcript of testimony at 1:57:28 by Professor Brian T. Fitzpatrick).

<sup>22</sup> Bonnie Eslinger, *9<sup>th</sup> Circ. Chief Favors Cameras To Promote Trust in Courts*, Law360 (Mar. 27, 2017), [https://www.law360.com/trials/articles/906731/9th-circ-chief-favors-cameras-to-promote-trust-in-courts?utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=trials](https://www.law360.com/trials/articles/906731/9th-circ-chief-favors-cameras-to-promote-trust-in-courts?utm_source=newsletter&utm_medium=email&utm_campaign=trials).

<sup>23</sup> Indeed, one academic proponent of splitting the Ninth Circuit conceded in recent written testimony submitted to Congress that “the existing studies are inconclusive” on whether the “size of the Circuit [is] one of the causes of the high reversal rate.” House Judiciary Subcomm. Hearing, *supra* note 2 (written statement of Brian T. Fitzpatrick, Professor, Vanderbilt Law School).

<sup>24</sup> See Lauren Carroll, *No, the 9th Circuit isn’t the ‘most overturned court in the country,’ as Hannity says*, Politifact (Feb. 10, 2017), <http://www.politifact.com/punditfact/statements/2017/feb/10/sean-hannity/no-9th-circuit-isnt-most-overturned-court-country-/>.

<sup>25</sup> See SCOTUSblog, Statistics, [www.scotusblog.com/statistics](http://www.scotusblog.com/statistics) (last visited Apr. 4, 2017).

apparent when one reviews reversal rates year-by-year; there simply is no discernable correlation.

## VI. Views of Judges and Lawyers of the Ninth Circuit Count

We believe that the views of judges and the lawyers who practice daily before the courts in the Ninth Circuit should be accorded great deference. In his testimony before Congress, Ninth Circuit Chief Judge Sidney R. Thomas stated: “I oppose division of the Ninth Circuit. Circuit division would have a devastating effect on the administration of justice in the western United States. A circuit split would increase delay, reduce access to justice, and waste taxpayer dollars. Critical programs and innovations would be lost, replaced by unnecessary bureaucratic duplication of administration. Division would not bring justice closer to the people; it would increase the barriers between the public and the courts.”<sup>26</sup> In his testimony, former Chief Judge Alex Kozinski of the Ninth Circuit stated: “Our geographic size has forced us to experiment and innovate. The size of our judicial corps has given us the resources to develop and deploy innovative techniques. Because circuits are funded based on the number of judicial positions they have, we have the resources with which to hire staff and purchase equipment that will bring our courts closer to the people we serve.”<sup>27</sup> In his testimony, Judge Carlos T. Bea of the Ninth Circuit stated: “In conclusion, I think you should take into consideration . . . the views [of] people on the ground—the litigants practitioners and judges in the circuit. The overwhelming majority of the people directly involved is against a split of the Circuit. Talk to the people who deal with the issue daily, and I think you will come around to agreement with them.”<sup>28</sup>

As the Ninth Circuit judges who appeared before the Congress testified, there are substantial advantages to the region being under a consistent body of case law. Technology companies present a good example. The tech corridors in Seattle, Silicon Valley, Los Angeles and Phoenix are presently under a consistent regime that promotes understanding and balance for the players in each location. Settled laws promote economic growth. Balkanized or disparate interpretations are not good for commerce.

In the past, Congress has agreed that the views of the affected legal community carry great weight and has refrained from using its power to restructure a circuit unless there was consensus within Congress and the affected legal community that it was absolutely necessary, and there was agreement over how best to reconfigure the circuit. There are, of course, some judges in the circuit who support division, but we surmise that they comprise a scant minority. While we do not know the exact number of judges of the Ninth Circuit that oppose division, we do know that the past three chief judges of the Ninth Circuit, spanning back to 2000, have strongly opposed division and have been vocal in their support for the benefits derived from the circuit’s size. We also know that neither the Judicial Council of the Ninth Circuit nor the Judicial Conference of the United States supports restructuring. These facts strongly suggest that

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<sup>26</sup> House Judiciary Subcomm. Hearing, *supra* note 2 (written statement of Chief Judge Thomas).

<sup>27</sup> *Id.* (written statement of Judge Kozinski).

<sup>28</sup> *Id.* (written statement of Judge Bea).

there is no groundswell of support among the judges of the Ninth Circuit or elsewhere in the legal community for division.

In addition to the ABA and its thousands of members who practice daily before the courts of the Ninth Circuit, many other segments of the organized bar have also spoken out in opposition to splitting the circuit. In 2006, all but one of the state bar associations that had adopted a policy position on the issue opposed division, and several specialty bars, including the Federal Bar Association, likewise opposed division. We do not have statistics with regard to the current positions of the organized bar in the Ninth Circuit but we are in the process of updating our information and will share the results as soon as possible.

Critics often mention that large circuits suffer from a loss of collegiality and cite it as a reason to divide the Ninth Circuit. While one could just as easily argue that collegiality is fostered by the diversity of voices in a large circuit, the judges of the Ninth Circuit are in the best position to comment on their working relationships.

## VII. **Circuit Restructuring Is a Costly Proposition**

This is not a minor point, especially at a time when budgets continue to be slashed and the national deficit continues to grow. Splitting the circuit would not only result in the loss of efficiencies mentioned earlier, it would also result in steep startup costs (especially if new courthouses needed to be constructed) and duplicative overhead costs. In 2006, the AO estimated that startup costs for a two-way split could run as much as \$96 million, with recurring annual costs ranging from \$13–\$16 million, and that a three-way split could cost as much as \$134 million initially and an additional \$22 million annually thereafter. The potential cost of circuit restructuring alone counsels against division, absent verifiable compelling evidence of dysfunction.

## VIII. **Conclusion**

In conclusion, we respectfully request that the House of Delegates adopt the Resolution, thereby (i) opposing restructuring of the United States Court of Appeals for the Ninth Circuit because there is no compelling empirical evidence of adjudicative or administrative dysfunction in the existing structure and (ii) supporting ongoing efforts of the United States Court of Appeals for the Ninth Circuit and other federal courts to utilize technological and procedural innovations in order to continue to enable them to handle caseloads efficiently while maintaining coherent, consistent law in their respective jurisdictions.

Respectfully submitted,

William T. (Bill) Robinson, III  
Chair, Standing Committee on the American Judicial System  
August 2017

## APPENDIX A

### Current Proposals to Divide the 9<sup>th</sup> Circuit



**115<sup>th</sup> Congress**  
H.R. 250  
(Biggs, R-AZ)

**114<sup>th</sup> Congress**  
H.R. 4457  
(Salmon, R-AZ)  
S.2490  
(Flake, R-AZ)



**115<sup>th</sup> Congress**  
S. 276  
(Flake, R-AZ)



**115<sup>th</sup> Congress**  
S. 295 (Daines, R-MT)  
20/14 Judgeships split  
H.R. 196 (Simpson, R-ID)  
25/9 Judgeships split

**114<sup>th</sup> Congress**  
H.R.166 (Simpson, R-ID)  
S. 2477 (Daines, R-MT)

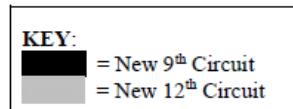
**113<sup>th</sup> Congress**  
H.R.144 (Simpson, R-ID)

**112<sup>th</sup> Congress**  
H.R.162 (Simpson, R-ID)

**111<sup>th</sup> Congress**  
H.R.191 (Simpson, R-ID)  
S. 1727 (Ensign, R-NV)

**110<sup>th</sup> Congress**  
H.R.221 (Simpson, R-ID)

**109<sup>th</sup> Congress**  
H.R.3125 (Simpson, R-ID)  
S. 1845 (Ensign, R-NV)  
S. 1296 (Murkowski, R-AK)



## Earlier Proposals to Divide the 9<sup>th</sup> Circuit



109<sup>th</sup> Congress  
H.R. 212  
(Simpson, R-ID)

108<sup>th</sup> Congress  
H.R. 2723  
(Simpson, R-ID)

107<sup>th</sup> Congress  
H.R. 1203  
(Simpson, R-ID)  
S.346  
(Murkowski, R-AK)



108<sup>th</sup> Congress  
H.R. 1033  
(Simpson, R-ID)

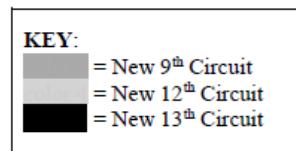


108<sup>th</sup> Congress  
S. 562  
(Murkowski, R-AK)



109<sup>th</sup> Congress  
H.R. 211 (Simpson, R-ID)  
S. 1301 (Ensign, R-NV)

108<sup>th</sup> Congress  
H.R. 4247 (Renzi, R-AZ)  
S. 2278 (Ensign, R-NV)



## **GENERAL INFORMATION FORM**

Submitting Entity: Standing Committee on the American Judicial System  
Section of Litigation  
Tort Trial and Insurance Practice Section  
Criminal Justice Section

Submitted By: Wm. T. (Bill) Robinson III, Chair  
Laurence Pulgram, Chair  
Sam H. Poteet Jr., Chair  
Matthew Redle, Chair

1. Summary of Resolution(s).

This Resolution opposes restructuring the United States Court of Appeals for the Ninth Circuit because there is no compelling empirical evidence of adjudicative or administrative dysfunction in the existing structure. It further supports ongoing efforts by the Ninth Circuit and other federal courts to utilize technological and procedural innovations in order to continue to enable them to handle caseloads efficiently while maintaining coherent, consistent law in their respective jurisdictions.

2. Approval by Submitting Entity.

The Standing Committee on the American Judicial System approved this Resolution by email on April 25, 2017. The Section of Litigation approved this Resolution at its Council meeting on May 6, 2017. The Tort Trial and Insurance Practice Section approved this Resolution at its Council meeting on April 29, 2017. The Criminal Justice Section approved this Resolution at its Council meeting May 6–7, 2017. The Judicial Division Council provided notice on May 3, 2017 that it voted to formally support this Resolution.

3. Has this or a similar resolution been submitted to the House or Board previously?

A similar resolution has not been submitted previously.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

This Resolution would build upon and enhance existing ABA policy, but would not change any current ABA policy.

Originally supportive of realignment of the Ninth Circuit in the 1970s, the ABA continued to examine the issue over the next several decades in light of the emergence of technological developments that increasingly bridged geographical distances, the successful use of limited en banc review panels, and the Ninth Circuit's innovative use of case management techniques. This

culminated in the ABA rescinding its earlier position<sup>1</sup> and adopting policies in the 1990s opposing division of the Ninth Circuit.<sup>2</sup>

Since then, the ABA has periodically reviewed new proposals to split the circuit.<sup>3</sup> On March 16, 2017, the ABA submitted testimony, based upon previously adopted policy, opposing the current legislative proposals to restructure the Ninth Circuit at a hearing of the Subcommittee on Courts, Intellectual Property and the Internet of the House Committee on the Judiciary.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A

6. Status of Legislation. (If applicable)

In the current 115th Congress, four circuit restructuring bills have been introduced. S. 295 and H.R. 196, introduced by Senator Daines (R-MT) and Representative Simpson (R-ID) respectively, share the same circuit reconfiguration but differ in other details. These bills would retain California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit and assign the other states to the new Twelfth Circuit. Representative Biggs (R-AZ) has introduced H.R. 250, which would retain Oregon and Washington along with California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit, and assign the other states to the new Twelfth Circuit. S. 276, introduced by Senator Flake (R-AZ), would tweak that arrangement a bit by assigning Washington to the new Twelfth rather than the Ninth Circuit. As of the date of filing this Form, the Senate bills have been read twice and referred to the Committee on the Judiciary and the House bills have been referred to the Subcommittee on Courts, Intellectual Property, and the Internet.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The adoption of this Resolution will enhance the ability of the ABA to oppose the restructuring of the Ninth Circuit and to support technological and procedural innovations by the federal courts.

8. Cost to the Association. (Both direct and indirect costs)

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<sup>1</sup> 1990 MY 123.

<sup>2</sup> In 1998, the ABA Board of Governors adopted a resolution that opposed restructuring of the Ninth Circuit “in view of the absence of compelling empirical evidence to demonstrate adjudicative or administrative dysfunction.” Resolution 110A, adopted by the ABA House of Delegates at the Annual Meeting in 1999, opposed enactment of legislation that mandated restructuring of the Ninth Circuit into “adjudicative divisions” in view of the “absence of compelling evidence to demonstrate adjudicative dysfunction.”

<sup>3</sup> The ABA last expressed opposition to circuit restructuring in a statement submitted to the Senate Judiciary Committee on September 20, 2006, for a hearing on proposals to split the Ninth Circuit.

None.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

Business Law Section  
Criminal Justice Section (Co-Sponsor)  
Government and Public Sector Lawyers Division  
Judicial Division (Supporter)  
Judicial Division Appellate Judges Conference  
Judicial Division Lawyers Conference  
Judicial Division National Conference of Federal Trial Judges  
Law Practice Division  
Section of Administrative Law and Regulatory Practice  
Section of Intellectual Property Law  
Solo, Small Firm and General Practice Division  
State and Local Government Law Section  
Tort Trial & Insurance Practice Section (Co-Sponsor)  
Young Lawyers Division  
Standing Committee on Election Law  
Standing Committee on Legal Aid and Indigent Defendants  
Standing Committee on Legal Assistance for Military Personnel  
Commission on Immigration

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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Chair, SCAJS Subcommittee on Federal Courts  
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18<sup>th</sup> and Arch Streets  
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Office: (215) 981-4416  
reedm@pepperlaw.com

12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address)

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## **EXECUTIVE SUMMARY**

### **1. Summary of the Resolution**

This Resolution opposes restructuring the United States Court of Appeals for the Ninth Circuit because there is no compelling empirical evidence of adjudicative or administrative dysfunction in the existing structure. It further supports ongoing efforts by the Ninth Circuit and other federal courts to utilize technological and procedural innovations in order to continue to enable them to handle caseloads efficiently while maintaining coherent, consistent law in their respective jurisdictions.

### **2. Summary of the Issue that the Resolution Addresses**

There is no compelling empirical evidence of either adjudicative or administrative dysfunction in the existing structure of the United States Court of Appeals for the Ninth Circuit that would warrant a split. Nevertheless, members of Congress continue to propose splitting the Ninth Circuit without justification.

### **3. Please Explain How the Proposed Policy Position Will Address the Issue**

This Resolution clarifies the ABA's position and enhances the ABA's ability to oppose restructuring of the United States Court of Appeals for the Ninth Circuit absent compelling evidence justifying restructuring.

### **4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified**

None known at the time this Summary was prepared.

**AMERICAN BAR ASSOCIATION**  
**STANDING COMMITTEE ON THE AMERICAN JUDICIAL SYSTEM**

**RESOLUTION**

- 1     RESOLVED, That the American Bar Association opposes restructuring the United States  
2     Court of Appeals for the Ninth Circuit because there is no compelling empirical  
3     evidence of adjudicative or administrative dysfunction in the existing structure; and  
4  
5     FURTHER RESOLVED, That the American Bar Association supports ongoing efforts by  
6     the United States Court of Appeals for the Ninth Circuit and other federal courts to utilize  
7     technological and procedural innovations in order to continue to enable them to handle  
8     caseloads efficiently while maintaining coherent, consistent law in their respective  
9     jurisdictions.

## **REPORT**

### **I. Introduction**

The federal circuit courts of appeals were established by Congress in 1891.<sup>1</sup> Over time, the number of circuits has increased from the original nine circuits to the current 12 circuits. The federal circuits vary in size (i.e., the number of judges comprising the courts of appeals and the total number of judicial officers within the circuit), have differing caseloads and cover differing numbers of states, territories, residents and total geography. Proposals are occasionally made to divide the existing circuits,<sup>2</sup> and on a few occasions such proposals have been adopted, e.g., the division of the old Fifth Circuit into the current Fifth Circuit and the Eleventh Circuit. Like the emergence of cicadas from the soil, periodic proposals have arisen in recent decades to split the Court of Appeals for the Ninth Circuit. Characterized by one of its critics as a “supersized appellate court,”<sup>3</sup> the Ninth Circuit has been said to be in need of division for several reasons, including the oft-cited assertion that the circuit allegedly has a “high rate of reversal” by the United States Supreme Court. Current legislative proposals focus on the large geography of the circuit, promising that division of the circuit will “bring justice closer to the people.”<sup>4</sup>

The proponents of the Resolution have studied all of the legislative proposals for splitting the Ninth Circuit and the relevant factual record. The proponents urge the American Bar Association (ABA) to oppose these proposals because there is no compelling empirical evidence of either adjudicative or administrative dysfunction in the existing structure that would warrant a split. The proponents believe that adoption of the Resolution is necessary because the House of Delegates needs to articulate clear policy on this important issue based upon the current factual record. The proponents also ask the House to adopt policy supporting the ongoing efforts of the Ninth Circuit and other federal courts to utilize technological and procedural innovations to enable the courts to handle caseloads efficiently while maintaining coherent, consistent law within their respective jurisdictions.

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<sup>1</sup> Fed. Judicial Ctr., The U.S. Courts of Appeals and the Federal Judiciary, <https://www.fjc.gov/history/courts/u.s.-courts-appeals-and-federal-judiciary> (last visited Apr. 4, 2017).

<sup>2</sup> While proposals to divide or restructure the circuits usually focus on the appellate court and the states that would be included in any new circuits, division would also result in the realignment of the lower courts and restructuring of the administrative and ancillary functions within the court system.

<sup>3</sup> *Bringing Justice Closer to the People: Examining Ideas for Restructuring the Ninth Circuit: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 115<sup>th</sup> Cong., 1<sup>st</sup> Sess. (Mar. 16, 2017) [hereinafter House Judiciary Subcomm. Hearing] (written statement of Dr. John C. Eastman, Professor, Chapman University Fowler School of Law).

<sup>4</sup> See the title of the House Judiciary Subcomm. Hearing, *supra* note 2. Some have suggested that the true objective of these recurring proposals to divide the Ninth Circuit is to “gerrymander” a circuit whose decisions are considered by some to be “too liberal.” See, e.g., House Judiciary Subcomm. Hearing, *supra* note 2, <https://www.c-span.org/video/?425486-1/ninth-circuit-court-appeals-judges-testify-court-restructuring> (transcript of opening statement at 6:25 by John Conyers, Jr., Ranking Member, House Comm. on the Judiciary, and transcript of statement at 15:34 by Jerrold Nadler, Ranking Member, Subcomm. on Courts, Intellectual Property, and the Internet). The authors take no position on this issue.

## **II. Past Congressional Inquiries and Legislative Proposals to Restructure the Ninth Circuit**

The federal courts of appeals have long been the subject of study, primarily because of concerns about the persistent growth in the appellate caseload.<sup>5</sup> The Ninth Circuit—the largest circuit in geographic size, population, judgeships, and annual caseload—has been the subject of numerous studies and proposals over the years.<sup>6</sup>

In 1972, Congress created the Hruska Commission, formally called the Commission on Revision of the Federal Court Appellate System, to study the federal appellate system. In 1975, the Hruska Commission issued its final report, which included recommendations for dividing both the Fifth and Ninth Circuits (then composed of 15 and 13 judges respectively) on the basis of an announced preference for smaller circuits.<sup>7</sup> The ABA endorsed those recommendations.

At that time, Congress declined to divide the circuits and instead implemented other Hruska Commission recommendations. These included substantially increasing the number of authorized judgeships in both circuits and authorizing any circuit with 15 or more judges to use limited en banc panels or to divide into administrative units to deal with rising caseloads.<sup>8</sup> The Ninth Circuit chose to adopt these new procedures; the judges of the Fifth Circuit preferred division.

In 1980, Congress divided the Fifth Circuit by placing Florida, Georgia, and Alabama into a new Eleventh Circuit.<sup>9</sup> This was the second (and last) time that Congress has divided a circuit since 1891, when it created the system of regional circuit courts of appeals as we know them today.<sup>10</sup>

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<sup>5</sup> In 1960, almost 4,000 appeals were filed in the regional courts of appeals, which were composed of 68 judges. In 1970, almost 12,000 appeals were filed and the number of authorized judgeships increased to 97. By 1980, appeals almost doubled and authorized judgeships increased to 132. In 1990, there were 40,898 appeals filed and 156 judgeships. The number of authorized judgeships increased to 167 in 1991 as a result of an omnibus judgeship bill. No additional judgeships have been created since then, despite more growth in caseload. In 2016, over 61,000 appeals were filed.

<sup>6</sup> When it was established in 1891, the Ninth Circuit included California, Idaho, Montana, Nevada, Oregon and Washington. Hawaii, Arizona, Alaska, Guam and the Northern Mariana Islands were added subsequently. Fed. Judicial Ctr., History of the Federal Judiciary, [http://www.fjc.gov/history/home.nsf/page/courts\\_coa\\_circuit\\_09.html](http://www.fjc.gov/history/home.nsf/page/courts_coa_circuit_09.html). The total number of authorized court of appeals judgeships has increased from 2 in 1891 to 29 today. *Id.*

<sup>7</sup> Comm'n on Revision of the Fed. Court Appellate Sys., Structure and Internal Procedures: Recommendations for Change 57-59 (1975).

<sup>8</sup> Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629, 1633 (1978).

<sup>9</sup> Appellate Court Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (1980).

<sup>10</sup> The first split occurred in 1929, only after almost unanimous consensus was reached among members of Congress and judges on how to divide the circuit. A new Tenth Circuit was carved out of five contiguous western-

Although the ABA originally supported the Hruska Commission's recommendation to split both the Fifth and Ninth Circuits, it rescinded that position in 1990 with respect to the Ninth Circuit, on the basis that procedural changes and court management innovations allowed the circuit to manage its rising caseload without sacrificing quality or timeliness.

In 1993, at the request of the Federal Courts Study Committee, which had been established three years earlier by Congress, the Federal Judicial Center (FJC) undertook a 15-month examination of the appellate court system and issued a report titled *Structural and Other Alternatives for the Federal Courts of Appeals*. The FJC concluded that the expansion of federal jurisdiction without a concomitant increase of resources was creating a burden for the federal courts of appeals and that it did not appear to be a stress that would be significantly relieved by structural changes to the appellate system. Its report stated that it could not "conclude, as some assert, that the justness of appellate outcomes has been detrimentally affected by caseload volume."<sup>11</sup> It advocated for non-structural efforts to deal with the problem of increased volume.

In 1997, Congress created the Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by Justice Byron R. White (the "White Commission"), to study the structure and alignment of the federal appellate system, with particular focus on the Ninth Circuit, and to submit recommendations on changes in circuit boundaries or structure to the President and Congress.<sup>12</sup> The White Commission's report to Congress concluded that the Ninth Circuit should not be split:

There is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall. Furthermore, splitting the circuit would impose substantial costs of administrative disruption, not to mention the monetary costs of creating a new circuit. Accordingly, we do not recommend to Congress and the President that they consider legislation to split the circuit.<sup>13</sup>

The White Commission noted that there were benefits from the current makeup of the Ninth Circuit, including the development of a consistent body of law that applies to the entire western region of the United States and governs relations with the other nations of the Pacific Rim. It also noted financial and practical advantages of the circuit's administrative structure.

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most states of the existing Eighth Circuit. Tenth Circuit Act of 1929, ch. 363, 45 Stat. 1346 (1929). The ABA supported this division.

<sup>11</sup> Fed. Judicial Ctr., Structural and Other Alternatives for the Federal Courts of Appeals: Report to the United States Congress and the Judicial Conference of the United States 155 (1993).

<sup>12</sup> Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, 111 Stat. 2440, 2491 (1997).

<sup>13</sup> Comm'n on Structural Alternatives for the Fed. Courts of Appeals, Final Report 29 (1998).

The White Commission nevertheless recommended that Congress restructure the Ninth Circuit into three regionally based adjudicative divisions. The ABA opposed this recommendation on the ground that the only rationale for the recommendation—a subjective preference for smaller decisional units—was an insufficient reason to restructure a judicial circuit.<sup>14</sup> Congressional reaction to the White Commission’s report was tepid, and legislation introduced during the 106<sup>th</sup> Congress by Senator Frank Murkowski (R-AK) received minimal attention.

During the 107<sup>th</sup> Congress, bills were introduced in the House and Senate by Representative Simpson (R-ID) and Senator Murkowski to split the Ninth Circuit into two circuits, with Arizona, California, and Nevada remaining in the Ninth Circuit and Alaska, Hawaii, Oregon, Washington, Idaho, and Montana forming a new Twelfth Circuit.<sup>15</sup> Hearings were held, but no further action was taken.

During the 108<sup>th</sup> Congress, bills proposing three different ways to divide the Ninth Circuit were introduced. Representative Simpson reintroduced his previous bill; he and Senator Murkowski introduced bills with only California and Nevada remaining in the Ninth Circuit, and Representative Renzi (R-AZ) and Senator Ensign (R-NV) introduced bills containing a novel three-way split. Although the House Judiciary Committee had not held a hearing on the three-way circuit restructuring proposal, House members attempted to secure the bill’s passage by attaching it to an omnibus judgeship bill that had already passed the Senate. The strategy succeeded in the House, but failed in the Senate.

During the 109<sup>th</sup> Congress, seven circuit restructuring bills were introduced. Three bills (introduced by Senators Murkowski and Ensign and Representative Simpson) proposed keeping California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit and placing the remaining states in the new Twelfth Circuit. A separate House bill (introduced by Representative Sensenbrenner (R-WI)) combined Representative Simpson’s bill with the omnibus judgeship bill from the previous Congress. With 10 cosponsors—more than any other circuit-splitting bill has garnered to date—it was reported to the House, but never scheduled for a vote.

During the 110<sup>th</sup>–114<sup>th</sup> Congresses, similar bills were introduced by many of the same members, but none received any action.

### **III. Current Congressional Activity**

In the current 115th Congress, four circuit restructuring bills have been introduced. S. 295 and H.R. 196, introduced by Senator Daines (R-MT) and Representative Simpson respectively, share the same circuit reconfiguration but differ in other details. These bills would retain California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth

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<sup>14</sup> The ABA House of Delegates adopted policy in August 1999 opposing the recommendations of the White Commission.

<sup>15</sup> See Appendix A and Appendix B for visual representations of the circuit realignments proposed by the bills discussed in this report.

Circuit and assign the rest to the new Twelfth Circuit. Representative Biggs (R-AZ) has introduced H.R. 250, which would include Oregon and Washington along with California, Guam, Hawaii, and the Northern Mariana Islands in the new Ninth Circuit. S. 276, introduced by Senator Flake (R-AZ), would tweak that arrangement a bit by assigning Washington to the Twelfth rather than the Ninth Circuit. In addition to these realignment bills, legislation to establish a new Commission on Structural Alternatives for the Federal Courts of Appeals has been introduced by Senator Sullivan (R-AK).

#### **IV. Existing ABA Policy**

One of the primary goals of the ABA is to promote improvements in the administration of justice. It is therefore not surprising that the ABA has examined the issue of restructuring the Ninth Circuit on multiple occasions over the past 50 years. Originally supportive of realignment of the Ninth Circuit in the 1970s, the ABA continued to examine the issue over the next several decades in light of the emergence of technological developments that increasingly bridged geographical distances, the successful use of limited en banc review panels, and the circuit's innovative use of case management techniques. This culminated in the ABA rescinding its earlier position and adopting policies in the 1990s opposing division of the Ninth Circuit.<sup>16</sup> Since then, the ABA has periodically reviewed new proposals to split the circuit.<sup>17</sup> On March 16, 2017, the ABA submitted testimony, based upon previously adopted policy, opposing the current legislative proposals to restructure the Ninth Circuit at a hearing of the Subcommittee on Courts, Intellectual Property and the Internet of the House Committee on the Judiciary.<sup>18</sup>

#### **V. No Compelling Evidence Exists that the Ninth Circuit Needs Restructuring**

The ABA has found no compelling evidence to support claims that the Ninth Circuit is failing to deliver quality justice.<sup>19</sup> The perceived problems identified by supporters of the legislation do not justify restructuring and would not be remedied by any of the various proposed circuit divisions. Two examples will demonstrate this disconnect between perception and intent.

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<sup>16</sup> In 1998, the ABA Board of Governors adopted a resolution that opposed restructuring of the Ninth Circuit “in view of the absence of compelling empirical evidence to demonstrate adjudicative or administrative dysfunction.” A resolution adopted by the ABA House of Delegates in 1999 opposed enactment of legislation that mandated restructuring of the Ninth Circuit into “adjudicative divisions” in view of the “absence of compelling evidence to demonstrate adjudicative dysfunction.”

<sup>17</sup> The ABA last expressed opposition to circuit restructuring in a statement submitted to the Senate Judiciary Committee on September 20, 2006, for a hearing on proposals to split the Ninth Circuit.

<sup>18</sup> See House Judiciary Subcomm. Hearing, *supra* note 2.

<sup>19</sup> The ABA’s findings are consistent with recent analyses and studies conducted by the Ninth Circuit. *See* House Judiciary Subcomm. Hearing, *supra* note 2 (written statements of Sidney R. Thomas, Chief Judge, and Alex Kozinski and Carlos T. Bea, Circuit Judges, United States Court of Appeals for the Ninth Circuit).

### A. **Delay and Backlog**

Critics often complain that the circuit has a backlog of pending cases and is slow to process new cases. Even if true, neither of these concerns would be resolved by realignment. Circuit division does not reduce caseload or eliminate backlog; it only reallocates it. Circuit size is not the critical factor in appellate delay—too many vacancies, too few authorized judgeships, and national policy decisions that increase workload without providing concomitant resources are the prime causes of delay and backlog.

The Ninth Circuit does indeed have the slowest median processing time for cases terminated on their merits, but that one statistic does not convey very much about the way the Ninth Circuit is handling its caseload. Statistics compiled by the Administrative Office of the U.S. Courts (AO) for the 12-month period ending June 30, 2016<sup>20</sup> show that in recent years the Ninth Circuit has been getting ahead of the curve by terminating more cases than are commenced. It is also notable that the circuit's disposition times have steadily improved over the past decade. In fact, Judge Sidney R. Thomas, Chief Judge of the Ninth Circuit, reported that case processing time has been reduced by almost 35%. Furthermore, while the circuit may lag behind others in the median time from the date of filing to final disposition, once cases are ready for oral argument, they move expeditiously through the system and are closed in record time. The Ninth Circuit was the second fastest circuit in terms of median time from the date of the oral argument to final disposition with a rate of 1.1 months. It also shared with four other circuits the distinction of having the fastest median time from submission on the briefs to disposition—a record-breaking 0.2 months.

One of the reasons that the Ninth Circuit has been able to function so well despite its growing caseload is because it has been on the forefront of utilizing technology to enhance administrative efficiency. In fact, the Ninth Circuit was the first to institute automated docketing and electronic web-based filing. It also developed and uses to great advantage an automated issue identification system that inventories cases in a way that flags potential conflicts for early resolution and facilitates efficient resolution of cases that share the same central issue. The system also enables the court to issue pre-publication reports to court members to advise them in advance of the filing of every published opinion and to identify pending cases that might be affected by the lead opinion. In addition to using technology effectively, the Ninth Circuit has introduced case management solutions, such as the creation of the positions of Appellate Commissioner and Circuit Mediator, to help resolve cases that do not require resolution by an Article III judge. These programs, available to the circuit because of its aggregate resources, have produced administrative efficiencies that have improved case management and increased productivity.

The Ninth Circuit is also the only federal circuit that currently has live streaming of its video arguments. In commenting on the leadership role that the circuit has taken in

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<sup>20</sup> The AO's statistical tables are available on its website at <http://www.uscourts.gov/statistics-reports>.

allowing cameras in the courtroom, Chief Judge Thomas recently remarked that “[t]he more transparent we are the more confidence people will have in our judicial institutions.”<sup>21</sup>

## B. Reversal Rate

Contrary to often-repeated statements, the rate of reversal of Ninth Circuit decisions by the Supreme Court is not the highest of all the circuits and, even if it were, there is no evidence that size has any bearing on reversal rates.<sup>22</sup>

The Supreme Court, not surprisingly, reverses more cases than it affirms. According to an analysis by Politifact, between 2010 and 2015, the Supreme Court reversed about 70% of the cases it reviewed.

During the same time period, 79% of the Ninth Circuit cases were reversed, and the Sixth Circuit, with a reversal rate average of 87%, had the highest reversal rate.<sup>23</sup> Our review of reversal rates, as reported by SCOTUSblog, confirms these statistics.<sup>24</sup> Further proof that reversal rate has nothing to do with the size or volume of cases decided by a circuit is readily apparent when one reviews reversal rates year-by-year; there simply is no discernable correlation.

## VI. Views of Judges and Lawyers of the Ninth Circuit Count

We believe that the views of judges and the lawyers who practice daily before the courts in the Ninth Circuit should be accorded great deference. In his testimony before Congress, Ninth Circuit Chief Judge Sidney R. Thomas stated: “I oppose division of the Ninth Circuit. Circuit division would have a devastating effect on the administration of justice in the western United States. A circuit split would increase delay, reduce access to justice, and waste taxpayer dollars. Critical programs and innovations would be lost, replaced by unnecessary bureaucratic duplication of administration. Division would not bring justice closer to the people; it would increase the barriers between the public and the courts.”<sup>25</sup> In his testimony, former Chief Judge Alex Kozinski of the Ninth Circuit stated: “Our geographic size has forced us to experiment and innovate. The size of our judicial corps has given us the resources to develop

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<sup>21</sup> Bonnie Eslinger, *9<sup>th</sup> Circ. Chief Favors Cameras To Promote Trust in Courts*, Law360 (Mar. 27, 2017), [https://www.law360.com/trials/articles/906731/9th-circ-chief-favors-cameras-to-promote-trust-in-courts?utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=trials](https://www.law360.com/trials/articles/906731/9th-circ-chief-favors-cameras-to-promote-trust-in-courts?utm_source=newsletter&utm_medium=email&utm_campaign=trials).

<sup>22</sup> Indeed, one academic proponent of splitting the Ninth Circuit conceded in recent written testimony submitted to Congress that “the existing studies are inconclusive” on whether the “size of the Circuit [is] one of the causes of the high reversal rate.” House Judiciary Subcomm. Hearing, *supra* note 2 (written statement of Brian T. Fitzpatrick, Professor, Vanderbilt Law School).

<sup>23</sup> See Lauren Carroll, *No, the 9th Circuit isn’t the ‘most overturned court in the country,’ as Hannity says*, Politifact (Feb. 10, 2017), <http://www.politifact.com/punditfact/statements/2017/feb/10/sean-hannity/no-9th-circuit-isnt-most-overturned-court-country-/>.

<sup>24</sup> See SCOTUSblog, Statistics, [www.scotusblog.com/statistics](http://www.scotusblog.com/statistics) (last visited Apr. 4, 2017).

<sup>25</sup> House Judiciary Subcomm. Hearing, *supra* note 2 (written statement of Chief Judge Thomas).

and deploy innovative techniques. Because circuits are funded based on the number of judicial positions they have, we have the resources with which to hire staff and purchase equipment that will bring our courts closer to the people we serve.”<sup>26</sup> In his testimony, Judge Carlos T. Bea of the Ninth Circuit stated: “In conclusion, I think you should take into consideration . . . the views [of] people on the ground—the litigants practitioners and judges in the circuit. The overwhelming majority of the people directly involved is against a split of the Circuit. Talk to the people who deal with the issue daily, and I think you will come around to agreement with them.”<sup>27</sup>

In the past, Congress has agreed that the views of the affected legal community carry great weight and has refrained from using its power to restructure a circuit unless there was consensus within Congress and the affected legal community that it was absolutely necessary, and there was agreement over how best to reconfigure the circuit. There are, of course, some judges in the circuit who support division, but we surmise that they comprise a scant minority. While we do not know the exact number of judges of the Ninth Circuit that oppose division, we do know that the past three chief judges of the Ninth Circuit, spanning back to 2000, have strongly opposed division and have been vocal in their support for the benefits derived from the circuit’s size. We also know that neither the Judicial Council of the Ninth Circuit nor the Judicial Conference of the United States supports restructuring. These facts strongly suggest that there is no groundswell of support among the judges of the Ninth Circuit or elsewhere in the legal community for division.

In addition to the ABA and its thousands of members who practice daily before the courts of the Ninth Circuit, many other segments of the organized bar have also spoken out in opposition to splitting the circuit. In 2006, all but one of the state bar associations that had adopted a policy position on the issue opposed division, and several specialty bars, including the Federal Bar Association, likewise opposed division. We do not have statistics with regard to the current positions of the organized bar in the Ninth Circuit but we are in the process of updating our information and will share the results with the Committee as soon as possible.

Critics often mention that large circuits suffer from a loss of collegiality and cite it as a reason to divide the Ninth Circuit. While one could just as easily argue that collegiality is fostered by the diversity of voices in a large circuit, the judges of the Ninth Circuit are in the best position to comment on their working relationships.

## **VII. Circuit Restructuring Is a Costly Proposition**

This is not a minor point, especially at a time when budgets continue to be slashed and the national deficit continues to grow. Splitting the circuit would not only result in the loss of efficiencies mentioned earlier, it would also result in steep startup costs (especially if new courthouses needed to be constructed) and duplicative overhead costs. In 2006, the AO estimated that startup costs for a two-way split could run as much as \$96 million, with recurring annual costs ranging from \$13 - \$16 million, and that a three-way split could cost as much as

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<sup>26</sup> *Id.* (written statement of Judge Kozinski).

<sup>27</sup> *Id.* (written statement of Judge Bea).

\$134 million initially and an additional \$22 million annually thereafter. The potential cost of circuit restructuring alone counsels against division, absent verifiable compelling evidence of dysfunction.

### **VIII. Conclusion**

In conclusion, we respectfully request that the House of Delegates adopt the Resolution, thereby (i) opposing restructuring of the United States Court of Appeals for the Ninth Circuit because there is no compelling empirical evidence of adjudicative or administrative dysfunction in the existing structure and (ii) supporting ongoing efforts of the United States Court of Appeals for the Ninth Circuit and other federal courts to utilize technological and procedural innovations in order to continue to enable them to handle caseloads efficiently while maintaining coherent, consistent law in their respective jurisdictions.

Respectfully submitted,

William T. (Bill) Robinson, III  
Chair, Standing Committee on the American Judicial System

August 2017

## APPENDIX A

### Current Proposals to Divide the 9<sup>th</sup> Circuit



**115<sup>th</sup> Congress**  
H.R. 250  
(Biggs, R-AZ)

**114<sup>th</sup> Congress**  
H.R. 4457  
(Salmon, R-AZ)  
S.2490  
(Flake, R-AZ)



**115<sup>th</sup> Congress**  
S. 276  
(Flake, R-AZ)



**115<sup>th</sup> Congress**  
S. 295 (Daines, R-MT)  
20/14 Judgeships split  
H.R. 196 (Simpson, R-ID)  
25/9 Judgeships split

**114<sup>th</sup> Congress**  
H.R.166 (Simpson, R-ID)  
S. 2477 (Daines, R-MT)

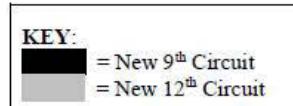
**113<sup>th</sup> Congress**  
H.R.144 (Simpson, R-ID)

**112<sup>th</sup> Congress**  
H.R.162 (Simpson, R-ID)

**111<sup>th</sup> Congress**  
H.R.191 (Simpson, R-ID)  
S. 1727 (Ensign, R-NV)

**110<sup>th</sup> Congress**  
H.R.221 (Simpson, R-ID)

**109<sup>th</sup> Congress**  
H.R.3125 (Simpson, R-ID)  
S. 1845 (Ensign, R-NV)  
S. 1296 (Murkowski, R-AK)



## Earlier Proposals to Divide the 9<sup>th</sup> Circuit



109<sup>th</sup> Congress  
H.R. 212  
(Simpson, R-ID)

108<sup>th</sup> Congress  
H.R. 2723  
(Simpson, R-ID)

107<sup>th</sup> Congress  
H.R. 1203  
(Simpson, R-ID)  
S.346  
(Murkowski, R-AK)

108<sup>th</sup> Congress  
H.R. 1033  
(Simpson, R-ID)

108<sup>th</sup> Congress  
S. 562  
(Murkowski, R-AK)

109<sup>th</sup> Congress  
H.R. 211 (Simpson, R-ID)  
S. 1301 (Ensign, R-NV)

108<sup>th</sup> Congress  
H.R. 4247 (Renzi, R-AZ)  
S. 2278 (Ensign, R-NV)

**KEY:**  
= New 9<sup>th</sup> Circuit  
= New 12<sup>th</sup> Circuit  
= New 13<sup>th</sup> Circuit

## **Limitations on the Use of Mandatory Dues**

Often during BOG meetings reference is made to "Keller," generally in the context of whether an action under consideration is or would be "a violation of Keller." "Keller" refers to a decision of the US Supreme Court that limits the use of mandatory dues.

### **The Keller Decision**

In *Keller v. State Bar of California*, 499 US 1,111 S.Ct 2228 (1990), the US Supreme Court held that an integrated bar's use of compulsory dues to finance political and ideological activities violates the 1<sup>st</sup> Amendment rights of dissenting members when such expenditures are not "necessarily or reasonably incurred" for the purpose of regulating the legal profession or improving the quality of legal services.

The activities complained of by the petitioners (21 members of the bar) included lobbying for or against state legislation,<sup>1</sup> filing amicus briefs in various cases,<sup>2</sup> holding an annual conference of delegates at which resolutions were approved,<sup>3</sup> and engaging in a variety of educational programs. The California Supreme Court had rejected the petitioners' challenge, holding that the State Bar was a state agency and, as such, could use the dues for any purpose within its broad authority.

The Supreme Court reversed, holding that the State Court's determination as to the bar's status was not binding when the determination was essential to the decision of a federal question. The Supreme Court found that the bar's role in governance of the legal profession was essentially advisory in nature, since final authority to establish rules of conduct and discipline lawyers for violating them rested with the State Court. The Supreme Court concluded that the relationship between a state bar and its members was analogous to that of a union and its members. The Court pointed to its decision in *Abood v. Detroit Bd. Of Education*, 431 US 209,97 S.Ct 1782 (1977), holding that the use of compulsory union dues to express political views or advance ideological causes not germane to the union's collective-bargaining duties infringed on the dissenting members' constitutional rights.

Applying the *Abood* analysis to the California State Bar, and finding that the "compelled association and integrated bar are justified by the State's interest in regulating the legal

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<sup>1</sup> The legislation for or against which the bar lobbied covered such topics as compelling state employees to take polygraph tests; prohibiting possession of armor-piercing ammunition; criminalizing the sale or display of drug paraphernalia to minors; imposing life without parole on minors tried as adults and convicted of murder; and creating an unlimited right of action to sue anyone causing air pollution.

<sup>2</sup> The cases involved the constitutionality of a victim's bill of rights; the power of the worker's compensation board to discipline attorneys; and a requirement that attorney-public officials disclose the names of clients.

<sup>3</sup> The resolutions endorsed gun control; disapproved the statements of a senatorial candidate regarding court review of a victim's bill of rights; endorsed a nuclear weapons freeze initiative; and opposed federal legislation limiting federal court jurisdiction over abortions, school prayer and busing.

profession and improving the quality of legal services,<sup>4</sup> the Supreme Court held that the California State Bar could therefore constitutionally fund activities germane to those goals, but could not fund activities of an ideological nature that fall outside of those areas. The Court recognized that it was not drawing bright lines:

The difficult question, of course, is to define the latter class of activities....Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisers to those ultimately charged with regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. 499 US 1 at14.

However, the Court suggested that the extreme ends of the spectrum are clear. Compulsory dues may not be spent to endorse a gun control or nuclear freeze initiative, but there is no basis to object to the use of dues for activities connected with lawyer discipline or the development of ethical codes for the profession.<sup>5</sup>

### **The Purposes of the Oregon State Bar**

ORS 9.080(1) charges the Board of Governors to "direct its power to the advancement of the science of jurisprudence and the improvement of the administration of justice."<sup>6</sup> Article 1.2 of the OSB Bylaws describes the purposes of the OSB as:

- (A) We are a professional organization, promoting high standards of honor, integrity, professional conduct, professional competence, learning and public service among the members of the legal profession.
- (B) We are a provider of assistance to the public seeking to ensure the fair administration of justice for all and the advancement of the science of jurisprudence, and promoting respect for the law among the general public.
- (C) We are a partner with the judicial system, seeking to ensure a spirit of cooperation between the bench and the Bar.
- (D) We are a regulatory agency providing protection to the public, promoting the competence and enforcing the ethical standards of lawyers.
- (E) We are leaders helping lawyers serve a diverse community.

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<sup>4</sup> The State Bar of California's statutory mission is to promote "the improvement of the administration of justice."

<sup>5</sup> The case was remanded with instructions that the State Bar could remedy its problem by developing procedures for dissenting members to challenge expenditures.

<sup>6</sup> Webster's Dictionary defines jurisprudence as the "philosophy of law or the formal science of law." 'The "administration of justice" has been defined in case law variously as the "systematic operation of the courts," the "orderly resolution of cases," the existence of a "fair and impartial tribunal," and "the procedural functioning and substantive interest of a party in a proceeding."

(F) We are advocates for access to justice.

Pursuant to OSB Bylaw 12.1 the bar's legislative and policy activities must be reasonably related to any of the following:

1. Regulating and disciplining lawyers;
2. Improving the functioning of the courts, including issues of judicial independence, fairness, efficacy and efficiency;
3. Making legal services available to society;
4. Regulating lawyer trust accounts;
5. The education, ethics, competence, integrity and regulation of the legal profession;
6. Providing law improvement assistance to elected and appointed government officials;
7. Issues involving the structure and organization of federal, state and local courts in or affecting Oregon; issues involving the rules of practice, procedure and evidence in federal, state or local courts in or affecting Oregon; or
8. Issues involving the duties and functions of judges and lawyers in federal, state and local courts in or affecting Oregon.<sup>7</sup>

**Post-Keller Developments**

Most of the cases involving the use of mandatory dues since Keller relate to the challenge procedures established by state bars in the wake of Keller. There are a few cases, however, that offer some guidance in determining what are proper expenditures.<sup>8</sup>

*A. Schnieder v. Colegio de Abogados de Puerto Rico, 917 F2d 620 (1<sup>st</sup> Cir. 1990).*

This case was brought by five members of the Colegio (the bar organization) who objected to the use of their dues to espouse views and support causes which they contended were controversial and far removed from the concerns of lawyers, including supporting the Sandinista Front for National Liberation in Nicaragua, opposing the draft, and amending Puerto Rico's election laws. The Colegio argued that these activities were permissible under its articulated purposes, which included "the creation of a strongly pluralistic society" and "contributing to the betterment of the administration of justice."

The 1<sup>st</sup> Circuit rejected this as too broad a definition of the Colegio's purposes to justify mandatory financial support. Instead, it endorsed the district court's list of permissible purposes for which financial support may be compelled: monitoring attorney discipline, ensuring attorney competence, increasing the availability of legal services and improving court operations. Activities that promote one or more of those purposes could include continuing

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<sup>7</sup> Prior to 2003, numbers 1-5 were articulated in *former* BOG Policy 11.800(A). A sixth category was "other activities where the issue is recognized as being of great public interest, lawyers are especially suited by their training and experience to evaluate and explain the issue; and the subject matter affects the rights of those likely to come in contact with the judicial system."

<sup>8</sup> Last updated 2009

legal education, legal aid services, public education on substantive areas of law, and public commentary on such matters as rules of evidence and attorney advertising. The 1<sup>st</sup> Circuit recognized that these purposes revolve around the "role of the lawyer as lawyer, rather than relying on the lawyer's more generic role as an informed and perhaps influential member of a complex society."

The 1<sup>st</sup> Circuit then went further, finding that the district court's list fell at the extreme end of the spectrum of permissible activities and that neither *Keller* nor any of the union cases that begot *Keller* required such a narrow interpretation of "germane" activities that could be funded with mandatory dues. Lobbying is permissible on "target issues...narrowly limited to regulating the legal profession or improving the quality of legal service" such as appropriations for new judicial positions, increased salaries for government attorneys, certification of legal specialists, or restrictions on lawyer advertising. Participation in efforts to amend technical, non-ideological aspects of the substantive law is also a permissible use of mandatory dues. By contrast, mandatory dues could not be used to lobby upon "partisan political views rather than on lawyerly concerns" such as the legal status of Puerto Rico, promotion of no-fault insurance, endorsement of pro-life amendments to the constitution or support for the death penalty.<sup>9</sup>

The court also cautioned against mixing permissible and impermissible activities:

[W]here the permissible and impermissible are intertwined beyond separation, the objector should be entitled to a full rebate for the cost of the function.

*B. The Florida Bar v. Frankel, 581 So2d 1294 (Fla. 1991).*

In 1989, in *The Florida Bar v. Schwarz*, 552 So2d 1094 (Fla. 1989), the Florida Supreme Court adopted guidelines for the Florida bar's lobbying. The guidelines were essentially identical to those in *former OSB Policy 11.800(A)*.<sup>10</sup> The first five subject areas (regulation of attorneys, improving the functioning of the courts, increasing the availability of legal services, regulating attorney trust accounts, and education and competence of the legal profession), were determined to fall clearly within the bar's mission relating to the administration of justice and the advancement of the science of jurisprudence. Florida's sixth category (other issues of great public interest about which lawyer are especially suited to evaluate and explain, and which affect the rights of those likely to come into contact with the judicial system) was justified as consistent with the purposes of an integrated bar.<sup>11</sup> When the guidelines were adopted, the court commented:

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<sup>9</sup> Looking to the specific complaints of the plaintiffs, the court found that the Colegio's involvement in the following activities was outside the narrow categories for which financial support could be compelled: studying the constitutional development of Puerto Rico and issuing a report on procedures for decolonization; developing a code of ethics to regulate public debate by political candidates; and nuclear disarmament.

<sup>10</sup> See fn. 7.

<sup>11</sup> At the time *Schwarz* was decided, *Keller* was pending before the United States Supreme Court. The Florida court noted the position taken by the California Supreme Court in *Keller* and concluded it was not authorizing such broad legislative authority (as was eventually limited by the US Supreme Court).

It appears that the bar has an obligation, grounded upon the mandate of the integration rule setting forth the Bar's very purpose for existence, to speak out on appropriate issues concerning the court and the administration of justice and advise the legislative and executive branches of government of its collective wisdom with respect to these matters.

Two years later, in *Frankel*, the Florida court was called upon to apply the guidelines it adopted in *Schwarz*. A bar member challenged the bar's adoption of a lobbying position supporting various legislative measures involving children including expansion of the WIC program, extending Medicaid coverage for pregnant women, development of sex education I and teen pregnancy prevention programs, increasing AFDC payments and enhancing child care funding and standards.<sup>12</sup>" The court held that the challenged lobbying positions did not fall within the first five areas "which clearly justify bar lobbying activities."

At the same time, the court rejected Frankel's claim that the additional *Schwarz* criteria were inconsistent with the US Supreme Court's decision in *Keller*, holding that the additional criteria were relevant to the bar's purpose of improving the administration of justice and advancing the science of jurisprudence. The court concluded there is no measurable difference between allowing lobbying for the purpose of regulating the profession or improving the quality of legal services, and allowing lobbying for the purpose of improving the administration of justice or advancing the science of jurisprudence.

Applying The Florida Bar's lobbying criteria for "other issues" the court agreed that children's issues are of great public interest, but disagreed that lawyers are especially suited to evaluate and explain the issues. "The merit of the position or the unanimity in its support is not the standard by which to determine the propriety of bar lobbying activities on that position."

*C. Popejoy v. New Mexico Bd. of Bar Comm'rs, 887 FSupp 1422 (D. N.M. 1995).*

New Mexico bar members objected to certain expenditures for construction of the State Bar Center, creation of a task force to assist Gulf War military personnel and their families, and lobbying.<sup>13</sup> The court upheld the bar's expenditures in each area. The Bar Center construction did not infringe the 1<sup>st</sup> Amendment rights of the dissenters beyond that already countenanced by permitting a mandatory bar. It had no communicative value and expressed no ideological or political viewpoint and did not "implicate the core 1<sup>st</sup> Amendment principle of preventing compelled ideological conformity." Providing educational information to members and pro bono legal services to military personnel in relation to deployment for Operation Desert Storm enabled lawyers to better serve their affected clients and improved the quality of legal services available to a segment of the public. All of the lobbying activities were found to either improve

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<sup>12</sup> The bar also supported the following lobbying positions to which no objection was made: creation of family court divisions, termination of parental rights when infants are exposed to cocaine, appointment of guardians ad litem in divorce and custody cases, and development of juvenile offender rehabilitation and treatment programs.

<sup>13</sup> The lobbying activities at issue included support of the following: funding for three new appellate judges and judicial staff salary increases, changing the compensation packages for state-employed lawyers and their staff, and increased funding for court-appointed representation in child abuse and neglect cases.

the courts of New Mexico, the lawyers who served them, or the people served by them, thus improving the delivery of legal services.

In reviewing the criteria used to determine if challenged activities are permissible, the court cautioned:

All other things being equal, an expenditure with a strong political or ideological coloration is less likely to be germane to the practice of law, less likely to be related to or justified by the state's interest in regulating the legal profession or improving the quality of legal services, and more likely to add to the existing burden of First Amendment rights.

However, the court agreed that even activities possessing communicative content of a political or ideological nature may be reasonably related to the practice of law, to the regulation of the legal system, or to the improvement of legal services:

It is impossible to allow mandatory state bars to pursue such broad objectives as regulating the legal profession or improving the delivery of legal services (or to permit activities that are 'germane to the practice of law'), without at the same time approving of activities that will inevitably carry some ideological or political baggage... [C]ompulsory financial support of some activities with at least a modicum of ideological content is inevitable.

## **Summary**

The "rule" of *Keller* is quite simple: mandatory dues cannot be used to advance political or ideological positions that are not germane to the bar's purposes. *Keller* identifies the purposes of the integrated bar as regulating the legal profession and improving the quality of legal services; other decisions describe the purposes of a mandatory bar to include advancing the science of jurisprudence and improving the administration of justice.

The challenge is in applying the *Keller* standard to specific activities and issues. Existing case law doesn't provide perfect or complete guidance. Some things are clear, however:

- *Keller* is not a rule of prohibition. It does not prohibit the advocacy of purely political or ideological positions that are not germane to the bar's purposes.
- *Keller* requires that members who disagree with non-germane activities must have a process for challenging the use of their dues for those activities and are entitled to demand a refund of the portion of their dues expended on those activities.
- The use of mandatory dues for activities that have a political or ideological element or nature is not a *per se* violation of *Keller* if the activities are reasonably related to the bar's purposes.

## **Article 12 Legislation and Public Policy**

### **Section 12.1 Guidelines**

Bar legislative or policy activities must be reasonably related to any of the following subjects: Regulating and disciplining lawyers; improving the functioning of the courts including issues of judicial independence, fairness, efficacy and efficiency; making legal services available to society; regulating lawyer trust accounts; the education, ethics, competence, integrity and regulation of the legal profession; providing law improvement assistance to elected and appointed government officials; issues involving the structure and organization of federal, state and local courts in or affecting Oregon; issues involving the rules of practice, procedure and evidence in federal, state or local courts in or affecting Oregon; or issues involving the duties and functions of judges and lawyers in federal, state and local courts in or affecting Oregon.

### **Section 12.2 Initiation of Legislation**

#### ***Subsection 12.200 House of Delegates and Membership***

The Bar must sponsor legislative proposals approved by the House of Delegates or through a membership initiative to the Legislative Assembly directly following the House or membership action. Legislation not enacted may not be sponsored in the following session unless resubmitted by one of the methods set forth above or by action of the Board.

#### ***Subsection 12.201 Board of Governors***

The Board may sponsor legislative proposals to the Legislative Assembly on its own initiative. The Board and its Public Affairs Committee has the authority between meetings of the House of Delegates to act on legislative and public policy matters pursuant to the guidelines established.

### **Section 12.3 Legislative Process**

Because of the nature of the legislative process, the Board or its Public Affairs Committee retains the right to set priorities regarding the enactment of legislation, to propose amendments or consent to amendments to legislation and to sponsor or take positions on appropriate legislation. In so doing, the Board will make a reasonable effort to do the following:

Encourage as wide a participation of the membership as possible in formulating positions on legislative issues; inform members, especially sections and committees, of the Bar's legislative positions; respect divergent opinions of subgroups within the legal profession; provide assistance to bar sections and committees; avoid committing bar funds to issues that are divisive or result in creating factions within the profession; present major issues to the House of Delegates for approval; ensure that the Public Affairs Committee encompasses a balance of interest within the Bar and ensure that the Public Affairs Committee consults frequently with the Board.

### **Section 12.4 Committees and Sections**

Any committee or section wishing to sponsor legislation or take a position on any rule or public policy issue will inform the Public Affairs Program, and through that office, the Board, of the exact nature of the legislation proposed. A copy of the bill, proposed rule or policy will be presented for consideration and approval of the Board. A committee or section of the Bar may not represent to the legislature or any individual, committee or agency thereof, a position or proposal or any bill or act, as the position of that committee or section of the Bar without the majority approval of the members of that committee or, in the case of a section, the executive committee and the prior approval of the Board, except as follows. During a legislative session or during the interim, a bar committee or the executive committee of any section must contact the Bar's Public Affairs Program before taking any position on a bill, rule or public policy issue within its general subject area. The chair of the Board's Public Affairs Committee will determine, within 72 hours of notice of the issue, whether it is appropriate for the Bar to take an official position or to allow the section or committee to take a position as requested. The full Public Affairs Committee or the full Board may be consulted before a final decision is made. Bar staff and the Public Affairs Committee of the Board will make every effort to accommodate committees and sections that wish to express positions on relevant issues. The Public Affairs Program shall be kept informed about the status of such positions and related activities.

## **OSB Board of Governors**

### **STATUTORY CHARGE**

The OSB Board of Governors (BOG) is charged by the legislature (ORS 9.080) to "at all times direct its power to the advancement of the science of jurisprudence and the improvement of the administration of justice."<sup>1</sup> The Oregon State Bar (OSB) is also responsible, as an instrumentality of the Judicial Department of the State of Oregon, for the regulation of the practice of law.<sup>2</sup> As a unified bar, the OSB may use mandatory member fees only for activities that are germane to the purposes for which the bar was established.<sup>3</sup>

### **MISSON**

The mission of the OSB is to serve justice by promoting respect for the rule of law, by improving the quality of legal services, and by increasing access to justice.

### **STRATEGIC FUNCTIONS**

The BOG has translated the statutory charge and mission into five core functions that provide overall direction for OSB programs and activities:

#### **FUNCTION #1 – REGULATORY BODY**

**GOAL:** Protect the public by ensuring the competence and integrity of lawyers.

#### **FUNCTION #2 – PARTNER WITH THE JUDICIAL SYSTEM**

**GOAL:** Support and protect the quality and integrity of the judicial system.

#### **FUNCTION #3 – PROFESSIONAL ORGANIZATION**

**GOAL:** Promote professional excellence of bar members.

#### **FUNCTION #4 – ADVOCATES FOR DIVERSITY, EQUITY AND INCLUSION**

**GOAL:** Advance diversity, equity and inclusion within the legal community and the provision of legal services

#### **FUNCTION #5 – CHAMPIONS FOR ACCESS TO JUSTICE**

**GOAL:** Foster public understanding of and access to legal information, legal services, and the justice system.

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<sup>1</sup> Webster's Dictionary defines jurisprudence as the "philosophy of law or the formal science of law." 'The "administration of justice" has been defined in case law variously as the "systematic operation of the courts," the "orderly resolution of cases," the existence of a "fair and impartial tribunal," and "the procedural functioning and substantive interest of a party in a proceeding."

<sup>2</sup> The OSB's responsibilities in this area are clearly laid out in the Bar Act, ORS Chapter 9.

<sup>3</sup> In *Keller v. State Bar of California*, 499 US 1,111 S.Ct 2228 (1990), the US Supreme Court held that an integrated bar's use of compulsory dues to finance political and ideological activities violates the 1st Amendment rights of dissenting members when such expenditures are not "necessarily or reasonably incurred" for the purpose of regulating the legal profession or improving the quality of legal services.

## **FIDUCIARY ROLE**

In order to advance the mission and achieve its goals, the BOG must ensure that the OSB is effectively governed and managed, and that it has adequate resources to maintain the desired level of programs and activities.

## **AREAS OF FOCUS FOR 2017**

1. Provide direction to and consider recommendations of Futures Task Force.
2. Develop and adopt OSB Diversity Action Plan.
3. Continue review of sections and make policy decisions about how to proceed on the following issues:
  - a. Section Fund Balances
  - b. Number of Sections
  - c. CLE co-sponsorship policy
4. Address House of Delegates quorum issues.
5. Review new lawyer programs (NLMP, ONLD, other?) for adherence to mission, value to members.