PITFALLS AND PRATFALLS IN LITIGATING AWAY FROM HOME

U.S. Maritime Law Asia

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While explaining a loss to a respected and valuable client, the maritime lawyer said, "We just don't do it that way where I practice." He/she did not see the pitfalls, resulting in a pratfall.

I.

So, I have good news and bad news. The good news is that if you practice in the United States along the Pacific Coast, there is consistent Maritime law not experienced elsewhere. The maritime law along the Atlantic Coast is Balkanized by several federal circuits; that lack of uniformity continues into the Gulf of Mexico. This is an invitation to malpractice as well as a difficult area of rocks and shales for your large maritime clients.

But that good news for Pacific maritime practitioners is under siege. In nearly every Congress session, there is a bill to divide the Ninth Circuit into two or three circuits, leading to a Balkanization of maritime law – from Anchorage to San Diego, and extending to Honolulu, Guam, and Saipan.

So should you approve division of the Ninth Circuit? Proposals for breaking up the Ninth Circuit fail to meet their burden of proof. As identified in the Long Range Plan for the Federal Courts:

> Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload.

The proposals have simply not met their burden of proof. That should end any division attempt. I have earlier identified my reasons in a law review article ("The Ninth Circuit Should Not Be Split," 56 Ohio St. Law Journal, 941-45 (1995)).

For a few minutes today, I wish to discuss this issue on a national level. Indeed, the action requested here would change the United States' approach to the federal appellate structure as we have known it. The issue, I suggest, is more than the Ninth Circuit and whether it should be divided, but what type of federal appellate system is best for our country in the 21st century.

My interest in the larger picture of judicial systems started in 1976 when, as a scholar at the Woodrow Wilson International Center for Scholars at the Smithsonian Institute, I began my study of judicial administration. I continued my interest nationally and internationally: serving on the Judicial Conference of the United States and many of its committees, the Ninth Circuit Conference and circuit committees, the Judicial Council, and working with foreign judiciaries now numbering about 60 worldwide. It is from this broad experience that I point out that for now and the foreseeable future, our country will be better served by fewer large circuits.

Those who champion division seem to express a preference for a small court culture. Chief Judge Emeritus Gerald Tjoflat of the Eleventh Circuit, in an article in the *ABA Journal*, likened his vision of a small and collegial court to "life in a small town," which he contrasts with "a big city, [where] many

people do not even know, much less understand, their neighbors." This is indeed a romantic and appealing notion: a "small town" where everyone knows everyone intimately, and where the town is governed by consensus reached at occasional town meetings. Judge Tjoflat contrasts this vision with the faceless, impersonal, and bureaucratic "jumbo court," which he decries as less efficient and less predictable.

Some decline in collegiality usually accompanies growth in an organization. The amount of decline depends on what priority participants give to maintaining collegiality at the highest possible level. Life in a larger court is different; some aspects of the old relationship are lost as judges are added.

The ultimate test is not the comfort of judges, but what is best for the country. The federal courts do not exist for the benefit of judges. They exist, at taxpayer expense, solely to serve and to meet the needs of the public. Judges are, fundamentally, public servants. Judiciary policy must be dictated by concerns for the judiciary's mission, not by the personal preferences of its members.

Thus, I am not sure that the "life in a big city" versus "life in a small town" argument advances the debate very far. We would probably all like to return to the time of Learned Hand and enjoy the bygone days of a limited calendar with a great amount of available reflective time. But, as disputes in our society proliferate, sending case filing statistics skyward and creating greater demands than ever for judicial resources, I doubt this is a reasonable alternative.

The United States Court of Appeals for the Ninth Circuit, with 29 judgeships, is the largest in the United States. The fact is that large federal courts of appeals have many advantages and can better serve the public's needs. Large circuits like the Ninth can enhance stability, predictability, and efficiency in the law. This can be and is fundamental to those companies and practitioners who work on the Pacific shores.

Stability and predictability

Critics maintain that the law in a large court is inherently unstable and unpredictable. It is true that the number of possible panel permutations in a court increases exponentially as the number of judges increases and that one cannot predict which panel will hear one's appeal. It does not follow, however, that the law in such a court will be unpredictable or unstable.

Of course for lawyers and litigants, the best guide for predicting the outcome of any litigation is a case on point. When there is no case on point, they are left to shrug their shoulders and speculate as to how a court will rule. The more published decisions from which to work, the more guidance the lawyers—and the trial court judges—receive.

Attorneys who practice law in small jurisdictions, where there is little precedent, know how difficult it is to plan or to predict. It is the small court that leaves lawyers and litigants guessing. A larger court is capable of having sufficient case law to provide truly useful precedent; it is precisely in such a court where one can find a case on point.

But will these added cases lead to conflict and inconsistency? In *Restructuring Justice* (Cornell University Press, 1990), Professor Arthur Hellman published a collection of articles analyzing the Ninth Circuit and commenting on the future of the judiciary. Hellman's empirical study found that the feared inconsistency in the decisions of a large court simply has not materialized. Professor Daniel J. Meador of the University of Virginia School of Law described Hellman's study as "the most thoroughgoing, scholarly attempt that has yet been made" on the issue, and concluded that it "goes far toward rebutting the assumption that such a large appellate court, sitting in randomly assigned three-judge panels, will inevitable generate an uneven body of case law." The contrary view, though popular, is unsupported by evidence, and is really nothing more than a seat-of-the-pants assumption.

Efficiencies

Certain inefficiencies are introduced as a court grows. It does not follow, however, that individual judge efficiency declines each time a new judge joins the court. This is borne out by comparative statistics among the circuits. Often, the Ninth Circuit is second or third best in judges promptness as measured by median time from hearing to disposition; and the Ninth Circuit is usually tied for first for submission to disposition. It is clear that although there is disparity in the relative efficiencies of the different courts, such differences cannot be attributed to the size of the courts.

Indeed, there are corresponding efficiencies that come with growth, although these are often overlooked in the current debate. An example is in solving the problem of panel conflicts. The Ninth Circuit uses an automatic issue coding system, which apprises the court as to what panels are working on what issues. This serves to lessen intracircuit conflict by permitting the panel to which the issue is first assigned to decide the case.

Congress has not been oblivious to the need to work differently in a large court. Pursuant to the Omnibus Judgeship Act of 1978, federal appellate courts of 15 or more judgeships may, by local rule, divide into administrative units and conduct en banc hearings with less than the full court.

In the Ninth Circuit, a court of 11 judges is designated when an en banc hearing is required. The full court may overrule the en banc court, but we have never voted to do so. Why? Because the court is willing to rely on 11 of its judges for purposes of finality. Thus, unless judges believe they must have their hands on every en banc pencil, there is an alternative to full-court en bancs in a large court. Is it wrong? No, just different. It magnifies the efficiencies of a large court and eliminates what might be one of its inefficiencies. As stated in the 1990 Report of the Federal Courts Study Committee:

> The limited en banc appears to allow more efficient use of court of appeals resources and should be available to the other courts

of appeals, even those that do not regularly have fifteen active judges. The growth in the number of circuit judges is likely to continue, increasing the potential for en banc courts of unwieldy size.

Although growth carries with it certain inherent challenges, it simultaneously opens the door to new and exciting possibilities. The large court is a cumbersome animal indeed if one persists in operating as if it were a small court. Although adaption and innovation are often difficult for tradition-bound judges, judges should answer the call. The opportunities are there, and the world will not wait for us.

The alternative

If large circuits are rejected, division is inevitable. Many concerns could be addressed by further subdivision of the twelve general jurisdictional federal circuits. Certainly courts could be more collegial, with less need to sit en banc, if we had 20 mini-circuits of just nine judges each, and no large courts. But this would fragment the federal law much more than multiple panels within a large circuit. Under this alternative, continuing growth would mandate continuing division. How would the litigants cope with 30 circuits—with 40 circuits? Yet if you adopt the principle of division to keep circuit courts small, you must eventually confront the balkanization of federal law. What then happens to the Pacific maritime law?

A network of smaller circuits would ensure that no circuit had a large volume of case law. Lawyers and litigants would routinely be forced to search the law of neighboring circuits for guidance—knowing full well that their circuit had no obligation to follow out-of-circuit law. Their choices would expand substantially, with increased intercircuit conflicts. At least in the large court, the parties know their panel is bound by the prior-panel rule.

Dividing larger circuits into smaller circuits will exacerbate the problem of the prior-panel rule because it is without binding force when the prior panel is from a neighboring circuit. Thus, the primary concerns about large courts—instability and unpredictability in the law—can only be

worsened by dividing them into smaller circuits. In fact, this presents a compelling case for consolidating existing circuits to create fewer, larger federal appellate courts.

Therefore, it is no solution to stick with "small town" courts and just have a lot of them. Also, the Pacific Ocean does not run in artificial lines – it touches all Pacific shorelines; and it is not wise to accept the ostrich-like approach, insisting that a few small courts really can contain this swelling stream of litigation, and stubbornly cling to the smaller courts we have known. The judiciary should confront the challenges inherent in growth and deal with them productively.

Of course, there are growing pains and a certain awkwardness as a court learns to function with larger numbers. These are challenges to confront, not challenges from which to retreat. Large courts are not wrong—just different. In the long run, fewer larger circuits may be the better structure for litigants. That is certainly true for maritime law in the Pacific.

II.

The bad news is that the Pacific touches not only its Eastern boundary along the same maritime law in the United States, it touches many west boundaries, all having differing legal philosophies and maritime law application.

As distinguished from the United States experience, there will be differences in maritime law and its application in court proceedings. Thus, to represent a maritime client properly, lawyers are required to be aware of these differences wherever the Pacific waters touch land.

I have worked with nearly all of the judiciaries in the Asian-Pacific countries. While I do not claim to be a maritime expert, I have a fair understanding of Asian-Pacific law, processes and procedures. From this background, I will identify some of the pitfalls in the hope that it will assist you in circumventing pratfalls.

When I first went to China in the 1970s, the then-vice president of the Supreme People's Court asked me essentially one question: "How can we change the courts to attract Western investment?" He understood the importance of opening the door to investment of capital to develop the economy of China. Much of what has occurred in improvements in the Chinese judiciary can be traced back to this initial query.

Indeed, I had no problem providing such assistance because it was a rational governmental goal.

Because the judges were then not law trained and there were no lawyers, it was clear that a specialized court was necessary. Thus, the "Economic Court" was formed and still exists today. Maritime law was designated as one of the jurisdictional subjects of the court.

A maritime lawyer might then feel comfortable that maritime laws, as he or she understood them, would be applied in the Economic Court. But establishing jurisdiction for maritime cases does not necessarily mean a lawyer could practice the same way as in his/her home court.

In China, the civil system is followed which means that there is no case precedent. This has always worked to the disadvantage of a foreign lawyer – how do you tell your client what the China law is?

I do not recall how many international seminars I have attended over the last 40 years regarding the proper role of court opinions. Recently, there has been an indication that cases in China will be considered of "persuasive" value. But one must be careful not to treat cases from civil jurisdictions as stare decisis. That could lead to a pratfall.

Another problem in relying on cases is the size of the highest court in a civil jurisdiction country. All cases can be appealed to the highest court. The more the cases, the more the judges, resulting in a large number of Supreme Court deciding panels. For example, there are over 100 Supreme Court justices in Thailand and Vietnam, and over 200 in China. With so

many panels writing decisions, upon which interpretation of maritime law do you rely?

There can be no rational way to solve the problem so long as any litigant can appeal to the highest court in the land. Recently, Thailand's constitution was changed to allow the Supreme Court to set its own calendar. But even this advance is difficult to implement – and what do you do with the remaining 15,000 cases which now constitute the backlog in the Thailand Supreme Court?

If this were not enough, a maritime practitioner may find to his/her amazement that it takes a long time to secure a result. For example, in the Philippines, cases are tried with a witness or so at a hearing, and then the case is continued. I witnessed the conclusion of one that lasted seven years and the final trial judge was the third who took evidence – one prior judge was transferred and the second died.

There has been improvement in some countries. In Malaysia, maritime cases are assigned to the commercial court – but it had a very large backlog. The Chief Justice established a new commercial court and had the judges taught the use of court-annexed mediation and case management. He required a final disposition within nine months. He has now achieved that goal, and only a few lingering cases remain in the "old commercial court."

Other countries are employing case management and mediation training that has sped up the process for earlier disposition. Until that training is completed, maritime lawyers will need to guess when asked by a client "How long will it take?"

These are just a few of the pitfalls in practice on the other side of the Pacific. Nevertheless, it is important to understand them in advising your maritime clients.

III.

Hopefully, by understanding the court systems in the Western Pacific and working to preserve the unity of maritime law in the Eastern Pacific, you can minimize, if not eliminate, embarrassing pratfalls.