The Role of Staff Attorneys and Face-to-Face Conferencing in Non-Argument Decisionmaking

om the Tenth Circuit Court of Appeals

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a view from the
Tenth Circuit Court of Appeals

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Federal Judicial Center

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Chapter One
INTRODUCTION

In this paper we describe the non-argument decisionmaking procedures of the Court of Appeals for the Tenth Circuit. We focus in particular on the role of the staff attorneys, because the Tenth Circuit provides the staff attorneys more contact with judges, and more guidance from them, than is typical in the federal courts of appeals. We also look carefully at the procedure used by the judges to discuss and decide non-argument cases, a procedure that emphasizes the importance of face-to-face decisionmaking.

This case study was prompted by our earlier work on procedures for deciding cases without argument. The distinctive contribution of the non-argument procedures used in the Tenth Circuit can perhaps best be appreciated after a brief review of the procedures followed by most other federal appellate courts.

When we began studying non-argument decisionmaking, in 1985, our initial task was to identify the general approaches used by the courts of appeals for deciding cases without argument. We identified three such approaches, which differed from one another in the duties assigned to staff attorneys and in the methods the judges used to discuss and decide the non-argument cases.[1]

We found that nine of the courts use a procedure patterned after the practices of the Fifth Circuit Court of Appeals, the first federal appellate court to adopt a formal non-argument decisionmaking program. While these nine courts vary somewhat in their specific application of the procedure, they are similar in the significant role assigned to staff attorneys and to special screening panels.[2] In these courts, the non-argument process generally be-

1. J. Cecil & D. Stienstra, Deciding Cases Without Argument: A Description of Procedures in the Courts of Appeals (Federal Judicial Center 1985) (Cecil & Stienstra I). Our study found that all the federal courts of appeals, except those for the Second and District of Columbia Circuits, had developed formal programs for selecting and deciding cases without argument. Non-argument decisionmaking is authorized by Fed. R. App. P. 34. The rule gives the courts substantial discretion in designing procedures for selecting, preparing, and deciding non-argument cases.

2. In our 1985 study, we report that eight courts fit this category. Since then, the District of Columbia Court of Appeals has adopted a non-argument procedure

gins with staff attorney review of all or a portion of the briefed cases. Based on their review, the staff attorneys recommend some cases for disposition without argument.[3] For these cases, they usually prepare memoranda and/or proposed dispositions and then forward the cases to the screening panels.[4] Cases the staff attorneys do not recommend for non-argument disposition are assigned to argument panels or, in some courts, are sent to screening panel judges, who will assign the cases to the argument or non-argument track.

When the screening panels receive the cases and the staff attorneys' materials, the judges determine first whether the cases can be disposed of without argument; for those that can be, the judges make the final decision. Then the cases the judges think require or deserve argument are assigned for argument. Unlike the regular argument panels, the screening panels generally do not convene to make the screening or merits decisions, but instead use memoranda or the telephone. In most of the courts, the judges use the "round robin," or serial, decisionmaking procedure, in which the case-related materials are sent to each of the three judges in turn.[5] If the first judge thinks the case is suitable for non-argument disposition, he or she prepares a draft order or opinion (or re-works

similar to the one described here. To our knowledge, none of the other eight courts has substantially reduced the staff attorney role or suspended the use of special screening panels.

3. The responsibilities of the staff attorneys vary somewhat from court to court. In the Ninth Circuit, for example, the staff attorneys review all briefed cases, and each staff attorney makes an independent determination (later reviewed by a supervisory staff attorney) whether the cases he or she is reviewing meet the court's criteria for non-argument disposition. In contrast, in the Eleventh Circuit only certain types of cases are sent to the staff attorney's office, while other types are sent directly to the screening panels. The senior staff attorney then determines which of the cases received in her office might be suitable for non-argument disposition and assigns these to the staff attorneys for preparation.

4. There is some variation from court to court in the type of material prepared for the screening panels. In the Fifth Circuit, for example, the staff attorneys prepare only memoranda, in which they summarize the facts and issues in the cases and discuss the case law both for and against the arguments made by the parties. In the Seventh Circuit, the staff attorneys generally prepare only proposed dispositions, which include a proposed result accompanied by the reasoning for the decision. In the Ninth Circuit, the staff attorneys prepare both types of documents.

5. In the Ninth Circuit, each panel may choose whether to use the round robin procedure or the parallel procedure, in which the case materials are sent to all panel members simultaneously. The panel members may then discuss the cases before the designated lead judge prepares the disposition.

the staff attorney's proposed disposition) and passes the case on to the second judge. If the second judge agrees with the first, the case is sent on to the third judge. If this judge agrees with the previous two, judgment is entered. At any stage in this process, any of the judges may decide the case should be argued, and it is then assigned to an argument calendar.[6]

In the second type of non-argument procedure, used by the Courts of Appeals for the Sixth and Federal Circuits, the staff attorneys also play a significant role in reviewing briefed cases, identifying those that may be suitable for disposition without argument, and preparing materials for the judges' use. The non-argument cases are decided, however, by the courts' regular argument panels rather than by special screening panels. The argument panels decide the cases during the same conference at which they decide the cases that have been orally argued. Thus, in contrast to the courts described above, the judges in the Sixth and Federal Circuits decide the non-argument cases, like the argued cases, after a face-to-face discussion of each case.

The third type of non-argument procedure, used by the Third Circuit, relies on neither staff attorneys nor special panels. Rather, all cases are initially listed on the argument calendars, which are sent directly to the court's regular argument panels. Without assistance from staff attorneys, the judges identify the cases suitable for non-argument disposition as they review their calendars in preparation for argument. The non-argument cases are then discussed and decided during the face-to-face conference held to decide the argument cases.

The purpose of our 1985 project was to develop a picture of the principal methods used by the courts to decide cases without argument. In the course of a second study, in 1987, in which we looked more closely at the non-argument procedures of four courts considered representative of the approaches the federal courts of appeals have taken, we began to ask questions about the working relationship between judges and staff attorneys.[7] Our interest was prompted in part by our realization that in each of

6. Fed. R. App. P. 34 specifically states that any one judge on the panel may transfer a case to the argument calendar.

7. J. Cecil & D. Stienstra, Deciding Cases Without Argument: An Examination of Four Courts of Appeals (Federal Judicial Center 1987) (Cecil & Stienstra II).

the courts we examined, regardless of the type of procedure used, the staff attorneys were relatively isolated from the judges for whom they prepared the case-related materials. Unlike the law clerks, the staff attorneys, who work for the court as a whole, are not located in chambers, nor do they meet with the judges to discuss the non-argument cases. As a consequence, the staff attorneys have few opportunities for learning how their work is used by the judges and for obtaining guidance from them in the analysis of specific cases. The judges, likewise, have few opportunities for giving direction to the staff attorneys or for correcting their work and are dependent on written materials, rather than face-to-face contact, in evaluating the staff attorneys.

During our interviews, a number of judges and staff attorneys voiced concerns about the way in which the role of staff attorneys was structured in their courts. In the Sixth Circuit, for example, we found that a number of judges were dissatisfied by the legal analyses prepared by the staff attorneys. While some judges attributed the problem to the recent hiring of inexperienced staff, two judges thought the problems were due to the isolation of the staff attorneys and the absence of procedures for giving the staff attorneys instructions about the judges' expectations.[8] Several Fifth Circuit judges, too, expressed concern about the lack of contact between judges and staff attorneys. One judge described the court's failure to fulfill its educational responsibilities to the staff attorneys. Another spoke of the difficulty judges have in supervising the work of staff attorneys, noting that supervision is much more easily carried out when staff members are located in chambers, as law clerks are, than when they are located in a separate office.[9]

A director of staff attorneys pointed to some of the ways in which he thought his office and his court's non-argument procedures could be improved by more contact between staff attorneys and judges. If the judges knew the staff attorneys, he suggested, the judges would be more likely to call on the staff attorneys, rather than their own law clerks, when non-argument cases needed more research or re-drafting. This would be a more efficient use of court resources, he said, since the staff attorneys, not

8. Cecil & Stienstra II, p. 103.
9. Cecil & Stienstra II, pp. 57–59.

the law clerks, had already worked on the cases. He also thought he could recruit more highly qualified staff attorneys if he could demonstrate that contact with judges resulted in better career prospects for the staff attorneys, either through clerkships or through references provided by the judges.[10]

This director of staff attorneys had, in fact, attempted to facilitate contact by assigning staff attorneys to work with specified judicial panels. His hope was that this would encourage telephone contact and make communication easier. We found, however, that although half the judges said they believed that a greater degree of contact would help them assess the staff attorneys' views and capabilities and might make it easier to ask for changes in their work, most of the judges seldom called the staff attorneys. The judges preferred, instead, the convenience and efficiency of using chambers staff to resolve any questions they had about the non-argument cases.[11]

A number of respondents also expressed concerns about the challenge of making the position of staff attorney rewarding enough to attract highly qualified applicants and to forestall the boredom that may arise from the nature of the work itself. The role of the staff attorney is viewed by many as less attractive than the role of the law clerk. Compared with the law clerks, the staff attorneys work on cases that are thought to be easy, if not frivolous, and thus much less demanding intellectually. In addition, the staff attorneys do not have the benefit of the mentoring role the judges play for their law clerks. Some respondents suggested that, to compensate for these limitations, the courts should provide staff attorneys opportunities to work on more difficult cases and to work directly with judges. The Third and Ninth Circuits, in an effort to provide these opportunities, had adopted procedures that enabled the staff attorneys to assist judges periodically in chambers with cases on the argument calendars.

In the courts in our 1987 study, then, we found evidence of concern about the way in which the role of staff attorney is structured. These concerns focused primarily on the limited contact between judges and staff attorneys and the problems that could arise from such infrequent communication, such as inadequacies

10. Cecil & Stienstra II, pp. 46–48.
11. Cecil & Stienstra II, p. 58.

in the materials prepared by staff, lack of judicial oversight of the staff members' work, recruitment of qualified staff, and maintenance of morale in the staff attorneys' offices.

The respondents in that study are not alone in their concerns about the role of staff attorneys. Since the inception of non-argument decisionmaking procedures, questions have been raised by observers both inside and outside the courts about the use of staff attorneys. Some critics of the process have argued, for example, that in delegating to staff attorneys the selection of non-argument cases and the preparation of draft dispositions, the courts have given them responsibilities that are uniquely judicial. At the same time, staff attorneys, who are not members of judges' staffs, are neither directed nor supervised by the judges. When such broad responsibilities and limited supervision are combined with high caseloads, these observers argue, there is a great risk that cases that would benefit from argument will be placed on the non-argument track and that decisions in non-argument cases will, in effect, be made by staff attorneys rather than judges.[12]

As we were completing our 1987 study, we became aware of a non-argument procedure that seemed to provide an opportunity for a closer look at the role of staff attorneys in non-argument decisionmaking. We learned that in two courts of appeals, the Seventh and Tenth Circuits, the staff attorneys attend the conference at which the judges decide the non-argument cases. It seemed to us that this practice, which is not found in any other federal appellate courts, could give the staff attorneys substantially more frequent—and more substantive—contact with judges than the practices followed in other courts. Could this practice, we wondered, answer some of the concerns that had surfaced in our 1987 study and that had been raised by critics of non-argument decisionmaking? For example, do the staff attorneys in these two

12. These concerns have given rise to the phrase "hidden judiciary." Bird, *The Hidden Judiciary*, 17 Judges J. 4 (1978). For additional commentary on the role of staff attorneys, see Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 Iowa L. Rev. 871, 880–85 (1983); Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. Cal. L. Rev. 761, 774–75 (1983); and Thompson & Oakley, *From Information to Opinion in Appellate Courts: How Funny Things Happen on the Way Through the Forum*, 1986 Ariz. St. L.J. 1 (1986).

courts receive more instruction and supervision from the judges? If so, does this make a difference in the nature of the materials they prepare for the judges or in the level of satisfaction the staff attorneys have in their work? Does it give the judges greater confidence in the staff attorneys' work? Why would the judges have the staff attorneys present at a meeting that has never been open to anyone but the three judges on the panel?

To seek an answer to these questions, we examined the procedures used in the Tenth Circuit court of appeals. As we proceeded, we realized that this court also presented a greater opportunity than we had had in our earlier work to look at the practice of convening to decide the non-argument cases. In two of the courts in our 1987 study the judges convened to decide the non-argument cases, and in two they used the round robin method. This latter procedure, which is a significant departure from the appellate tradition of face-to-face decisionmaking, has been criticized on several grounds. For example, some have worried that judges will be less thorough in their preparation of the non-argument cases when they do not have to demonstrate their familiarity with the cases or expose their analyses through debate with the other panel members. Others have suggested that hidden issues are much more likely to emerge in the give and take of face-to-face discussion. And others argue that where collegial discussion has been replaced by an exchange of memoranda, few safeguards remain to ensure that the decision will not be made by a single judge.[13] In the Tenth Circuit, the judges at one time used the round robin procedure to decide the non-argument cases. Now, however, they meet at the court to discuss and decide these cases. That history gave us an opportunity to ask the judges to compare the two decisionmaking methods.[14]

The primary objectives of this paper, then, are to examine—through a close analysis of the Tenth Circuit's non-argument pro-

13. See, for example, Thompson & Oakley, *supra* note 12, at 45–56. Several judges in the Sixth Circuit, where the panels convene to decide the non-argument cases, also expressed doubts about the adequacy of judicial attention when judges do not meet face-to-face to decide the cases (Cecil & Stienstra II, pp. 111–12).

14. This report does not address the question of whether cases should be decided without argument, nor whether the procedures for selecting non-argument cases are reliable. These are important questions that deserve more examination than they have received.

cedure—the role of staff attorneys and the significance of face-to-face decisionmaking in cases decided without argument. We also hope to describe the Tenth Circuit's non-argument procedures and its experience with these procedures in sufficient detail to permit other courts to assess whether such procedures would be useful to them.

Chapter Two
METHODOLOGY

Our study is based primarily on interviews with judges, staff attorneys, and several other key participants in the non-argument decisionmaking process. Most of the respondents were interviewed in person, and all were promised that their comments would be used without attribution.[15]

In March 1989, interviews were conducted in Denver with the director and deputy director of the staff attorney's office, four of the nine staff attorneys who work on non-argument cases, one of the two appeals expediters, the clerk and chief deputy clerk, all ten active judges, and two of the three senior judges.[16] During the interviews, several respondents noted that a number of visiting judges had participated in the court's non-argument procedure and suggested we interview these judges. From a list of names provided by the director of staff attorneys, telephone interviews were conducted with six visiting judges, two from other courts of appeals and four from district courts within the Tenth Circuit.[17]

The interview protocols, which focus on both the operational features of the court's non-argument decisionmaking procedure and the respondents' evaluations of the procedure, may be found in Appendix B. These protocols were not followed word for word, but were used as general guides to the issues we wanted to explore. With some respondents more time was spent on some issues than on others, depending on the respondent's knowledge of the issues or interest in them, and on the time available for the interview.[18] The interviews were intended to elicit the range of

15. All interviews were conducted by Donna Stienstra.

16. The Tenth Circuit refers to its central legal staff as "staff counsel." To avoid confusion, we will refer to them as "staff attorneys" and use the word "counsel" to refer to attorneys for the parties (as in "counseled" cases).

17. One of the two appellate judges prepared cases with the expectation of participating in the decisionmaking conference. In the end, however, he did not participate in decisionmaking, but he did attend the conference and observe the proceedings.

18. Because we interviewed the judges during the week they were at the court for oral argument, there were many demands on their time and we were not able to cover every question with every judge. We did, however, discuss with each

opinions held by the respondents on the questions raised rather than to obtain a quantitative assessment of the distribution of these opinions.

While this paper is based primarily on interview data, we will also rely on insights gained during a second trip to Denver. At the judges' invitation, the first author returned to the court to attend one of the conferences at which the non-argument cases were discussed and decided. This conference, like all judicial decisionmaking conferences, was a confidential session, so we will not discuss the substance of the discussion. We have the court's consent, however, to describe the nature of the conference and to discuss our impressions of it.

judge the purposes of convening to decide the non-argument cases and of having the staff attorneys present at the conference.

Chapter Three
PROFILE OF THE TENTH CIRCUIT'S RESOURCES AND CASELOAD

To assist the reader in understanding the context in which the non-argument cases are decided, we present a brief profile of the Court of Appeals for the Tenth Circuit. The court's ten active judges and three senior judges decide appeals that arise from Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. Only two active judges and one senior judge reside in Denver, the court's headquarters; the others reside in other cities throughout the circuit, making the court one of the more geographically dispersed among the federal courts of appeals. The court employs ten staff attorneys, all of whom work at the Denver office.[19]

The court convenes in Denver to decide all cases disposed of on the merits, both those that are argued and those that are decided on the briefs.[20] In each of the odd-numbered months, all the judges sit for a week to hear oral argument. Each judge sits for four days during the argument week, giving each judge a total of twenty-four court sessions a year. The court refers to the oral argument calendar as the "regular" calendar. In every even-numbered month, a panel meets for a day or two to decide cases on the "conference" calendar, which is the calendar of non-argument cases. Also in the even-numbered months, two panels sit for two days to hear oral argument in cases on the "accelerated" calendar, a recently created calendar for cases that need very brief argument. Altogether each judge makes approximately four additional trips to Denver each year for any combination of conference and accelerated calendars.

19. Staff attorney positions are allocated on a one-to-one ratio with judgeships. The Tenth Circuit, however, has increased the legal resources in the staff attorney's office through loans of two law clerk positions from senior judges and one lawyer position from the court library. Incumbents in the loaned positions have no responsibility for non-argument cases.

20. The court convenes primarily in Denver but holds one full argument term approximately once a year in another city of the circuit, rotating these terms among the other five states. For a definition of merits decisions, see the note to Table 1 in Appendix A.

The staff attorneys assist the court with a variety of matters, but the conference and accelerated calendar cases are their primary responsibility and take up most of their time.[21] The Tenth Circuit, unlike other federal courts, has a policy of hiring staff attorneys who have had one or two years of experience in practice rather than recently graduated attorneys. Also unlike most federal appellate courts, the Tenth Circuit hires its staff attorneys for indefinite terms, rather than for two-year terms. Most staff attorneys do not stay more than three or four years, however.

With ten active judges and filings of 2,066 cases in Statistical Year 1988, the Tenth Circuit is one of the smaller federal courts of appeals (see Table 2 in Appendix A for caseload data). In that year, it ranked tenth out of the twelve regional appellate courts in the number of cases filed per panel (where the highest number filed is rank one). It ranked just slightly higher—ninth—on the number of cases terminated per panel. Of the 1,229 cases decided on the merits in Statistical Year 1988, the court decided 708 (58%) without argument, which places the Tenth Circuit among the courts with the highest non-argument rates (see Table 1 in Appendix A).[22]

The court has labored for the past several years under a high pending caseload (705 cases per panel, or third rank among the federal courts). According to the court, the pending caseload developed from several years of reduced resources due to illnesses

21. In addition to their responsibility for the conference and accelerated calendar cases, the staff attorneys are assigned review of petitions for rehearing in cases on which they have worked. The staff attorney's office also has responsibility for preparation of predisposition memoranda for original proceedings, substantive motions, and emergency applications requesting stays, injunctions, and release pending appeal; and the office assists the court with in forma pauperis applications and certificates of probable cause. Most of the work not related to conference and accelerated calendar cases is done by the staff director.

22. The court's non-argument rate should be viewed with caution. The numbers reported here and in Table 1 were derived from the 1988 annual report for the federal courts. The annual report is based on data supplied by the courts to the Administrative Office of the U.S. Courts. As we explain in note 30, there is some discrepancy between the number of non-argument cases reported by the Tenth Circuit to the Administrative Office and the number of non-argument cases decided through the court's non-argument procedure. Therefore, we are uncertain of what the actual non-argument rate is and how it compares with that of other courts.

and an unusually large number of vacant judgeships.[23] The court has had substantial assistance in handling this caseload from visiting judges, who participate in both the argument and non-argument calendars.[24]

23. From Statistical Year 1985 through Statistical Year 1989, the court experienced 97.4 vacant judgeship months (Administrative Office of the U.S. Courts, Federal Court Management Statistics 1989, p. 23).

24. In Statistical Year 1989, 11.9% of the case participations were by visiting judges. The national average was 7.3%. *See* Administrative Office of the U.S. Courts, Federal Court Management Statistics 1989, p. 28. While the court has needed the assistance of visiting judges, the use of these judges is not solely a response to the backlog. The court believes it is of considerable importance that district judges have an opportunity to become familiar with appellate procedures and with the appellate judges and staff attorneys, and that the appellate judges have an opportunity for a collegial relationship with the district judges. Thus, the court has for a number of years followed a policy of inviting all district judges to sit with the court of appeals within a few months following their appointment.

Chapter Four
THE CONFERENCE CALENDAR

The title "conference calendar" conveys the key feature of the Tenth Circuit's non-argument decisionmaking procedure: the conference. Six times a year a panel of three judges and all the court's staff attorneys meet in Denver to discuss approximately sixty non-argument cases. Before the conference, the staff attorneys prepare memoranda and draft dispositions, and the judges review the cases and the staff materials. At the conference, the judges discuss each case in turn, calling on the staff attorneys when necessary either for additional information or for their view of the case. At the end of the discussion in each case, the judges decide the case. Around 400 cases—or about one third of the court's merits decisions—are disposed of each year by this method.

Selection of the Non-Argument Cases

The majority of the cases on the conference calendar belong to one of two types of cases the court has defined as presumptively not to be argued: pro se cases, and cases in which counsel for both parties have requested waiver of argument.[25] The court also selects for the conference calendar a small number of additional counseled cases in which there was no request for waiver of argument. The counseled non-argument cases, both those in which argument is waived and those selected by the court, are referred to as the "Rule 34" cases (in reference to Federal Rule of Appellate Procedure 34). The conference calendar, then, is made up of two types of cases: pro se cases and Rule 34—or counseled—cases. This distinction should be kept in mind because the two types of cases are treated somewhat differently by the court.

25. The Tenth Circuit follows the practice of most other courts in setting these cases for non-argument disposition. This practice does not suggest, however, that the court exercises no discretion in assigning these cases to disposition without argument. First, if the court believes a pro se case should be argued, counsel may be appointed. Second, if the court wants to hear argument in a case in which both parties have requested that it be waived, the court may order the parties to appear.

The conference calendar cases are identified through a joint effort by a resident active judge and the appeals expediters. The process begins with the appeals expediters, who review the docketing statements and briefs of all cases filed in the court.[26] As they review these materials, they identify not only the pro se cases and cases in which counsel for both parties have waived argument, but they also watch for additional counseled cases of the type the court has typically decided without argument.

The appeals expediters send the pro se cases directly to the staff attorney's office. The counseled cases, however, are referred to a resident active judge, who determines whether these cases are suitable for non-argument disposition.[27] Most of the cases he finds appropriate for decision on the briefs are sent to the staff attorney's office.[28]

According to the court, the process described above is the court's only formal method for selecting non-argument cases. A small group of additional cases are decided without argument by the panels to whom they were initially assigned for argument. The panel members themselves remove these cases from the calendar when they agree that argument is not necessary, and the cases are decided on the briefs when the panel convenes for argument in the remaining cases on the calendar; the staff attorneys are not involved in this procedure. The judges reported that they have been removing cases from the argument calendars with increasing frequency in the past year, though only a few cases are removed from each week's calendar.

26. The appeals expediters are attorneys assigned to the clerk's office. They review all cases, first after the docketing statement is filed and again after briefs are filed. In addition to suggesting cases for non-argument disposition, they screen for jurisdictional problems and for related cases.

As noted above, at any point in the selection and decisional process, a single judge may transfer the case to the argument calendar. *See* Fed. R. App. P. 34(a).

27. A single resident active judge has had this responsibility for a number of years.

28. A small number of Rule 34 cases are sent to a judicial panel composed of a senior judge who has chosen not to participate in the court's conference calendar and two other judges who are randomly assigned to serve with him. This procedure, which is used to accommodate the senior judge's preferences, is completely separate from the conference calendar procedure. While a significant number of cases were once decided by this panel, most Rule 34 cases are now routed to the staff attorney's office for placement on the conference calendar.

The conference calendar, then, is the primary method used by the court for deciding cases without argument.[29] Approximately 400 cases are decided on this calendar each year.[30] Unfortunately, we have no data that will permit us to determine either how many of these cases involved a waiver of argument or what kinds of cases make up the non-argument calendar. According to our respondents, the majority of the cases—possibly as many as 75% to 80%—are pro se cases; many of these are prisoner civil rights cases. The Rule 34 cases, in contrast, cover a wide range of case types, including Social Security, black lung, diversity (oil and gas, contracts, insurance, personal injury), employment discrimination, civil rights, criminal, federal agency, bankruptcy, and tax.[31]

While case type is a convenient way to characterize the non-argument cases, the judges tended to describe them in terms of the type of issue involved. "Issue is one way to identify a non-argument case," said one of the judges. "For example, is the issue something the circuit has already decided? Or is the district court decision in contradiction of circuit law? This can be easily over-

29. This was the case at the time we conducted our research. However, the court is currently setting up a new procedure that provides an additional method for disposing of non-argument cases. The new procedure, which will complement—not replace—the conference program, is briefly described at the end of Chapter 5.

30. At the time of our visits to the court, the conference calendar was characterized by the court as its primary non-argument procedure. We noted, however, that the calendar disposed of only around 400 cases each year while the annual report for the federal courts shows that the court decided 708 cases without argument in Statistical Year 1988 (see Table 1 in Appendix A). In response to our request for information that would clarify this 300-case discrepancy, the court found that around 230 cases could be accounted for by three other categories of non-argument disposition: (1) dispositions by three-judge panels of emergency writs of mandamus and other original proceedings; (2) three-judge dispositions by denials or dismissals of appeals in forma pauperis and appeals involving certificates of probable cause; and (3) dispositions made by three-judge panels that did not participate in the conference program. These panels, such as the one set up to accommodate a senior judge (see note 28), were in operation early in the reporting period discussed here (Statistical Year 1988) but no longer exist. The cases sent to these panels are now decided on the conference calendar.

31. Ordinarily we would use data compiled by the Administrative Office to develop a profile of the non-argument cases. However, since we cannot determine which of the 708 cases decided without argument in Statistical Year 1988 are conference calendar cases, we cannot develop such a profile for the Tenth Circuit non-argument cases.

turned." Another judge noted, "The non-argument cases are single-issue cases in which the court already has good precedent." And a third judge said, "Most cases are single-issue, relatively straightforward. Often we just have to figure out what the facts are. These are cases where you can immediately pinpoint the issue on appeal."

Review and Preparation of Cases Before the Conference

The process of pinpointing the issue and determining the facts involves both the judges and staff attorneys. Before each non-argument decisionmaking conference, they collect and review the information on which the decisions will be based. The rhythm of their work is closely linked to the schedule of the conferences.

Both the dates of the six yearly conferences and the identities of the three panel members who will sit at each conference are known a year in advance. The judges and staff attorneys can plan their time accordingly, and the staff attorneys know for which judges they will be preparing cases. Each staff attorney is expected to have six to eight cases ready for judicial review a month to two weeks before the conference. In addition, for at least some of the cases (as we will explain at pp. 22–23), the staff attorneys and judges are expected to work together in preparing memoranda and draft dispositions. Although all the staff attorneys participate in each conference calendar, only one panel of judges is involved. And because each panel usually has one senior judge or one visiting judge member, the active judges generally participate in no more than two—and often only one—conference calendar each year.

For most of the non-argument cases, the initial review of the case is done by a staff attorney rather than a judge (we will qualify this statement shortly when we discuss the Rule 34 cases). Cases are assigned to the staff attorneys by the director of staff attorneys, who gives each staff member a mix of case types. The staff director does not generally provide instructions about how to prepare a case, although he may note that another staff member recently had a similar case or that an appellant had previously filed the same complaint. The staff attorneys themselves reported that they frequently discuss their cases with one another. As we

will see shortly, the staff attorneys also are expected to consult the judges on some of the non-argument cases.

The staff attorneys in the Tenth Circuit are responsible for providing the judges the information they need to decide the non-argument cases. To carry out this responsibility, each staff attorney examines the briefs and record and conducts independent research and legal analysis for each case she is assigned.[32] She then prepares two documents: a draft disposition that presents a recommended decision on the merits, and a detailed memorandum that presents her analysis of the case and that provides support for the recommended decision. The draft disposition and memorandum, along with several case-related documents, are then submitted to the panel members.

The purpose of the draft disposition is to explain the court's decision to the parties. Thus, it provides a brief statement of the facts and contentions in the case, cites the controlling law, and concludes with a recommended decision. These decisions, which are generally two to three pages in length, are drafted as unpublished orders. If, however, a staff attorney believes the court's decision in a case should be published, she recommends this to the panel. If the panel agrees with the recommendation, or directs publication on its own initiative, the staff attorney, under the panel's guidance, will draft a per curiam decision for publication.

The purpose of the memorandum, in contrast to the draft disposition, is to describe the case to the judges and to explain why the staff attorney recommends the decision stated in the draft disposition. The memorandum therefore contains substantially more information about the case than the draft disposition and may be eight or ten pages long (and in some cases considerably longer). In the memorandum, the staff attorney first describes the case: its procedural history, the facts, and the outcome in the district court. She then outlines the positions of the parties and the issues on appeal. Next, she presents her analysis of each issue, discussing the arguments that might be made on each side of the issue. Finally, she states her decision and explains why she decided as she did.

32. Most of the staff attorneys are women and most of the judges are men, hence our choice of the personal pronouns "she" when referring to the staff attorneys and "he" when referring to the judges. This choice also protects the identities of the few male staff attorneys and female judges we interviewed.

The staff attorneys must recommend a decision about the outcome in each case, but they noted that on the rare occasions when they cannot, they draft two opposing dispositions for the judges' consideration. They also reported that they seldom recommend that a case be argued, but if they do, they provide a rationale for the recommendation in the memorandum.

The staff attorneys reported that their review and writing differ somewhat for the pro se cases compared with the Rule 34 (or counseled) cases. Pro se litigants have the option of filing full briefs or three-page form briefs on forms provided by the court. Frequently, pro se briefs are large and prolix, requiring considerable effort by the staff attorneys to accurately analyze and interpret the arguments made by the litigants. The staff attorneys have found, as well, that the information provided in pro se briefs—whether full briefs or form briefs—is very often not helpful in understanding the issues. To find the issues, the staff attorneys feel they must read the records carefully. Then, because the judges do not receive the records in pro se cases before the conference, the staff attorneys provide more information about these cases in their memoranda to the judges.

In Rule 34 cases, in contrast, the record is always sent to one panel member, who is responsible for reviewing it and alerting the other panel members to any significant material in the record.[33] In addition, the briefs in these cases, which are prepared by counsel, are likely to be more informative. The staff attorneys can therefore safely forgo including in the memoranda a discussion of facts and issues that are readily apparent in other documents. In fact, several staff attorneys said the judges, who read all the case materials themselves, do not want the staff attorneys to repeat in their memoranda information that is available in other documents in the case. The staff attorneys also spend less time trying to discern what the parties in these cases are contending. Because the cases have counsel, one staff attorney reported, the staff attorneys may properly rely more on the parties' own statements of the issues.

33. The record in counseled cases in not a full record. Tenth Circuit Local Rule 10.2 requires counsel to submit only the parts of the record referred to in the briefs.

Their role in all cases, according to the staff attorneys, is to provide the information judges need to decide each case. "It's my responsibility," said one staff attorney, "to alert the judges to every potential red flag." Another said, "My job is to bring to the court's attention everything that's there." In preparing this information, the staff attorneys know whom they are writing for, but they feel this does not affect their review of the cases. "I have never changed my recommendation because I know who will read it," said one staff attorney. Another commented, "The decision has to be based on the law, not the judges' views. The staff has an independent thinking process and the judges know the staff isn't trying to please them." This view was corroborated by the judges. "I don't want yes-men," said one judge. Another said, "We rely on the staff attorneys to think other thoughts."

At the same time, the staff attorneys are aware that the judges have particular preferences and needs. These preferences and needs may affect the way in which the staff attorneys present information to the panel. For example, if a staff attorney knows that a judge is unfamiliar with a certain type of case, she will provide more information in her memorandum. The staff attorneys noted, too, that some judges prefer a more extensive recitation of the facts and a more detailed explanation of the decision's rationale than others. The staff attorneys try to be sensitive to these preferences.[34]

After the staff attorneys have reviewed the cases and written the draft dispositions and memoranda, they send their work and the case materials to the judges. Slightly different materials are sent for the pro se cases and the Rule 34 cases. Since the judges have already received the briefs and the lead judge has received the record in the Rule 34 cases, only the staff attorneys' memoranda and draft dispositions are sent. For the pro se cases, the judges receive the staff attorneys' memoranda and draft dispositions as well as any other information the staff attorneys think may help the judges understand these cases. For example, when the form briefs of pro se litigants do not provide helpful informa-

34. Because there are three judges on the panel, however, the staff attorneys cannot always satisfy the varying preferences. In such situations, they must follow their own sense of what constitutes a complete explanation. The judges then work out the final text in the conference.

tion, the staff attorneys do not send them to the judges. Instead, they put together carefully selected extracts from the record and attach these to their memoranda. If the judges wish to see the form briefs or the full record before the conference, they can request these items from the staff attorneys.[35] For all pro se cases, the complete record is brought to the decisionmaking conference, where it may be discussed and reviewed by the judges.

Traditionally, the staff attorneys have had little contact with the judges during preparation of the memoranda and draft dispositions and have acquired their knowledge of the judges' preferences and reactions through the discussion at the decisionmaking conference. The court has followed this practice, according to one respondent, because the judges have felt that every decision should be a three-judge decision. They were concerned that if the staff attorneys talked with only one panel member, thereby getting only one judge's view of the case, the decision could essentially be formed by one judge.

Recently, however, the court has decided to set up procedures that would permit the judges and staff attorneys to consult one another during preparation of the Rule 34 cases. The impetus for this change came from the judges, who felt that the memoranda and orders in Rule 34 cases had become too long, requiring too much staff time for preparation and too much judge time for review. The judges have therefore adopted a procedure that will enable them to assist the staff attorneys in identifying the issues that must be dealt with in each case. The staff attorneys will then limit their research to these issues.

Under this new procedure, the judges and staff attorneys receive the briefs in Rule 34 cases simultaneously. Each panel member is designated lead—or "mentor"—judge for one third of these cases. The lead judge is responsible for reviewing the briefs and discussing each case with the assigned staff attorney before the staff attorney commits substantial effort to it. The record, unless requested by the lead judge, is initially retained in Denver for use by staff attorneys and then is sent to the lead judge at the same time the staff attorneys' work product is sent to the entire panel.

35. A staff attorney reported that newly appointed judges generally wish to see all case materials. After the judges have become more experienced, they tend to request the form briefs less frequently.

The lead judge may choose to review the staff attorneys' work products before they are circulated to the rest of the panel.

Although the court has not adopted a formal procedure for consultation during preparation of the pro se cases, the judges have encouraged the staff attorneys to call a panel member if they encounter difficulties in these cases. This is somewhat more difficult, however, because the judges do not have the case materials in hand when the staff attorneys call and no lead judge has been designated. The judges' goal, however, is to design procedures that will provide for judicial guidance of staff attorneys in the preparation of all non-argument cases, both the pro se and the counseled cases.

The new procedure for preparing the Rule 34 cases had been adopted just before we conducted our interviews, and the court had had little experience with it. Most of the staff attorneys expected, however, that the opportunity to talk with the judges would save the staff attorneys some preparation time. One staff attorney noted, for example, that occasionally a case presents procedural problems that might control how the case is prepared; by talking with a judge, she said, the staff attorney may be able to stop her analysis in such a case at a much earlier point.

The opportunity to consult the judges may also reduce anxiety sometimes felt by the staff attorneys. As one said, "The conference can be stressful when you know your case has problems. You're not going to be attacked, but you worry you may have missed an issue. It will be helpful to have a judge to talk to."

Although for the most part the staff attorneys welcome the accessibility of the judges and the recent move to more consultation, one staff attorney expressed concern that more guidance from the judges could have an undesirable impact on the substantive content of the memoranda and draft dispositions. This staff member feared that the lead judges might tell the staff attorneys what result to reach and that this instruction might be based on inadequate information. At the time she calls the judge to discuss the case, she said, the judge has just received the materials and has had time to form only a "reflexive opinion" about the case. She is concerned that this opinion may control the presentation of the case. In her view, the cases would be more fairly treated if the

staff attorneys could prepare them independently of the judges and present all sides of the issues.

The judges, however, indicated that they do not intend to use the new procedure to guide the staff attorneys to a particular result. The judges' goal is simply to narrow the research to the important issues and thus to save time. After this, as one judge explained, the staff attorney has the same responsibility as a law clerk: to present all the arguments on the issue.[36] The judges believe that the role of the staff attorneys, like the role of law clerks, is not to take the judge's position on an issue but to lay out all points of view on the issues the judge has identified as germane. This is particularly important in the non-argument cases, where the staff attorneys are preparing draft dispositions and memoranda for three judges, each of whom may bring quite different points of view to the case.

After the staff attorneys have completed their review of the non-argument cases, the cases are sent to the judges, with half being sent a month before the conference and half about two weeks before the conference. Although the judges vary in the specific steps they use to prepare for the conference, the judges are similar to each other in their general approach to the non-argument cases.

First, all the judges rely on the staff attorneys' memoranda and proposed dispositions. The memoranda, said one judge, "tell the judges the range of difficulties in a case," and provide the judges with a guide to the essential information. The proposed dispositions provide the framework, if not the final words, of the court's order, thereby saving the judges a considerable amount of writing time. The judges emphasized the usefulness and high quality of these materials. Most would agree with the judge who said of the staff attorneys, "The court could not function without them."

Second, although the judges rely on the staff attorneys' materials for information about the cases, they also feel strongly that it is the judges' responsibility to read the briefs and records (or record extracts) in these cases. Nearly all the judges reported that they read all the materials they receive for the non-argument cases.

36. The judges frequently described the staff attorney role as similar to the law clerk role. As one judge said, "The staff attorneys serve essentially as elbow law clerks for a portion of the caseload."

Some of the judges, in fact, read the case material before the draft disposition and memorandum to form an initial impression of the case independent of the staff attorney's analysis. At the same time, several of the judges made a distinction between the pro se and Rule 34 cases, noting that they read more quickly and more selectively in the pro se cases because of the simplicity of the issues involved in these cases.

Third, most of the judges do not routinely use their law clerks for the non-argument cases. It is more typical for a judge occasionally to ask a law clerk to check a case that seems problematic than to ask the law clerk to review every non-argument case. The judges who do not use their law clerks for these cases think it is a waste of time to duplicate the staff attorneys' work. The judges who have their law clerks check out an occasional difficult point seem to do so more because it is convenient than because of any lack of trust in the staff attorneys. Only a few of the judges had their law clerks review all non-argument cases.

Fourth, most of the judges do not routinely discuss the non-argument cases with either the staff attorneys or other panel members before the conference. For most of the kinds of questions that arise, the judges make notes on the staff attorneys' materials or on the case documents and raise the questions at the conference. If the judges want to make editorial or substantive changes in the proposed disposition, they generally write their suggested changes on the draft, although in some cases they prepare a new disposition and bring it to the conference. Even when a judge thinks a case might be a candidate for oral argument, he usually waits until the conference to discuss this with the other judges. These practices are changing, however, because of the court's recent adoption of consultation with the staff attorneys in Rule 34 cases. The judges expect that in the future they will discuss most cases with the staff attorneys before staff workup of the cases. As one of the judges said, "The court is in flux, but it's moving toward contact at every stage. Everybody is afraid of sausage factory justice. Judicial input into the non-argument process is very substantial in this court."

Although at this point most cases are not discussed before the conference, several judges noted the importance of talking with the staff attorneys when there is a major problem in a case. As one

judge said, "We don't want to blind-side the staff attorneys at the conference." The judges, therefore, have generally alerted the staff members to difficulties that might arise at the conference, giving the staff members an opportunity to prepare for the questions.

The purpose of the judges' review is to enable them to go to the conference fully prepared to discuss and decide the non-argument cases. The judges themselves said they go to the conference with a thorough knowledge of the facts and issues in these cases. The judges' description of their level of preparation is confirmed by the staff attorneys and visiting judges, both of whom noted the judges' comprehensive understanding of the non-argument cases. This understanding becomes visible in the questions asked and comments made by the judges during the conference. In the words of one staff attorney, "The judges have really been over these cases."

We found that the visiting judges shared this view of the Tenth Circuit judges' work. We asked the visitors how they would respond to an outsider who asked how the judges could carefully decide as many as sixty cases in a conference of four to six hours. "I answer that question," said one of the district judges, "by describing the amount of preparation that went into it. The judges knew these cases." One of the appellate judges said, "The answer is preparation. The cases are prepared ahead of time. The judges come to the conference with notes on each case." One visitor commented as well on the staff attorneys' contribution. "The judges can be that well prepared," he said, "because of the work of the staff attorneys." With all this preparation, by both judges and staff, said one of the appellate judges, the court can "get right to the central question in the conference."

At the same time, several of the visiting judges noted that many of the non-argument cases are not especially difficult. One district judge said, "The cases are comparatively simple. They involve single issues and issues the court has often dealt with. They lend themselves to quicker disposition. But," he added, "I didn't for a minute feel that there was a rush to judgment."

By all accounts, then, during the period before the conference, the staff attorneys prepare comprehensive and helpful information about the non-argument cases, and the judges use this infor-

mation and the case materials to prepare thoroughly for the decisionmaking conference.

The Decisionmaking Conference

The conference itself is held in a courtroom around a large table that provides enough space to spread out the case materials the judges and staff attorneys bring with them. All the staff attorneys and one or two law clerks of the panel members attend the conference.

The most senior active judge of the panel presides. He follows an agenda that has been prepared by the director of staff attorneys and sent out to all participants beforehand. On the agenda are listed each of the cases, grouped by the staff attorneys who prepared them. The sessions themselves vary somewhat by which judge is presiding. Some judges move more quickly through the cases than others, although in every conference every case is called, an opportunity for discussion is given, and a vote is taken. Some cases provoke considerable discussion, which may go on for fifteen or twenty minutes. Other cases receive no more than a half minute, the time needed to call the case, invite discussion, and take a vote. The conference is usually completed in a single morning, although some have gone into the afternoon and a few even into the next day. No specific length of time is set because the purpose of the conference is to permit as much discussion as is necessary to resolve each case.

The role of the staff attorneys may vary, too, by which judge is presiding. Some judges have the staff attorneys introduce each of their own cases. The staff attorneys then briefly describe the cases, outline the issues, and state the recommended disposition. This usually takes only a minute or so. Other presiding judges introduce the cases themselves. But in every conference, the staff attorneys are available to discuss the cases with the judges, who regularly call on them for additional information or to explain the rationale for the recommended decision. While the staff attorneys reported that they do not frequently enter the discussion of one of their cases voluntarily, they noted that the judges encourage them to participate by asking for their reactions to the judges' discussion of the cases.

The purpose of the discussion is to enable the judges to come to a consensus on the disposition of the case and to permit them to formulate the language of the decision. Various options are available to the judges regarding that language. They can approve the disposition as drafted by the staff attorney, or they can approve the staff attorney's draft disposition with editorial or minor substantive changes provided by the panel. These re-drafts seldom require re-circulation to the panel members. The judges may, on the other hand, ask the staff attorney to make more significant substantive changes or to prepare an entirely new draft disposition according to instructions provided by the panel. If the judges choose either of these options, the staff attorney tries to prepare a revised draft of the disposition for circulation to the judges for their approval before they leave Denver. When major substantive changes are needed or the judges want the staff attorney to do additional research, the panel will ask the staff attorney to circulate a new draft disposition to the panel members at a later date, or the judges may take the case back to chambers and prepare a new disposition themselves. Finally, the judges may decide to transfer the case to the oral argument calendar.

The judges reported that about half the dispositions are changed during the conference, but that most of these changes are editorial and are completed while the judges are at the court. Only about a half dozen cases, they estimated, require a new draft disposition that has to be prepared by the staff attorneys and recirculated to the judges. If the court decides, for example, to publish a decision, a judge will usually go over the language of the decision very carefully. In only two or three cases on each calendar, the judges reported, do they come to a result completely different from that proposed by the staff attorney, therefore requiring a major re-drafting of the disposition. The staff attorney who initially prepared the case usually works with the judge on this re-drafting. Few cases are transferred to the argument calendar. Nearly all the non-argument cases, then, are disposed of during the conference.

The four-hour conference we attended fit very closely with the description the judges and staff attorneys had provided in the interviews. The panel was composed of two active Tenth Circuit judges and one visiting district court judge. The agenda listed

nearly sixty cases. All the staff attorneys were present, and each took her turn at the conference table. The presiding judge asked them to introduce each of their cases, and discussion followed in nearly every case. The amount of discussion varied greatly from case to case. In some, the discussion lasted only a minute because the judges agreed on the analysis of the case, the recommended disposition, and the form in which the decision was stated in the staff attorney's draft disposition. In a number of other cases, the discussion lasted for as long as twenty minutes as the judges sought agreement on the decision or on the language of the order.

The atmosphere of the conference was that of a collegial, working session. The judges did not seem hesitant to raise every question or problem that occurred to them. Even the slightest doubts were brought up, which in several cases appeared to have a significant effect on the outcome of the case. In one case, for example, two of the three judges had indicated that they agreed with the disposition as drafted by the staff attorney. The third judge said he too agreed with the disposition, but he added that he would like to pass by the others a question that had occurred to him. He noted that the question seemed "far-fetched," but that he would be more comfortable if he brought it up. After this judge described his doubts, one of the other panel members responded by saying that the question gave him quite a different view of the case. A lengthy discussion followed, and the judges finally decided to take the case back to chambers for more research on one of the issues.

The staff attorneys seldom volunteered information in the discussion, but they were frequently called on by the judges to answer questions, and at the end of many cases they were asked if they had additional comments. Their participation in a few cases appeared to lead to significant changes in the court's treatment of the case. For example, in discussing certification of a case to a state court, the judges asked the staff attorney if she "had any problems" with the case. Her comments led the judges to decide to certify an additional issue. At the end of a number of cases, the judges complimented the staff attorneys or pointed to something they had written that had been particularly helpful. The judges also used several cases as vehicles for speaking to the staff attorneys—as well as the visiting district judge—about issues of con-

cern to the appellate judges. With the district judge, for example, they discussed the difficulties of appointing counsel at the trial court level.

At the conclusion of the conference, most of the cases had been disposed of, with only twelve or so requiring further attention from the staff attorneys and judges. While the procedure seemed efficient, it also clearly provided an opportunity for collegial exchange among the judges and between the judges and the staff attorneys. As we will see in the next chapter, the first of these outcomes—efficiency—is a happy by-product of the procedure, whereas the second—collegial exchange among the participants—is precisely the outcome the procedure was designed to achieve.

Chapter Five
HISTORY AND GOALS OF THE CONFERENCE CALENDAR

The current non-argument procedure in the Tenth Circuit arose from needs felt in both the staff attorney's office and the judges' chambers. The initial outlines of the procedure were suggested by the director of staff attorneys in the early 1980s. More recently, the judges have added a number of details to the picture.

The Tenth Circuit, like many courts of appeals, initially used the round robin procedure for deciding cases designated for non-argument disposition. The non-argument cases were reviewed by the staff attorneys, who prepared memoranda and proposed dispositions. These documents, along with the case materials, were then sent to each of the panel members in turn. This procedure satisfied neither the judges nor the staff attorneys, but the first movement away from it started in the staff attorney's office.

The staff attorney's office had found that, with some frequency, judges would return cases to the staff attorney's office with a different outcome than had been recommended. They often did not understand why the judges had come to such a different decision, but because there was no opportunity for discussion, the staff attorneys had no way of learning why the judges' view of the case differed from theirs.

Because of this dissatisfaction, in the late 1970s, the staff attorneys asked the judges to meet with them during hearing weeks to provide general guidance. These meetings turned out to be ineffective because the judges were pressed by other responsibilities during these weeks, and because no case-specific advice or guidance was given.

In 1980 or 1981, the staff director learned that in the Seventh Circuit the staff attorneys were presenting the non-argument cases in person to each of the judges in their chambers. This procedure, he thought, might provide the kind of feedback from the judges that the staff attorneys were seeking. Although the Tenth Circuit judges were not all resident in Denver, as the Seventh Circuit judges then were in Chicago, the staff director and the chief

judge felt that a variant of the Seventh Circuit procedure might work in the Tenth Circuit.

After three judges agreed to experiment with the procedure, thirteen cases were prepared for their review. The judges suggested they decide the cases while in Denver for an argument session, and that instead of going from chambers to chambers, the staff attorneys meet with all the judges at once.

The three judges who participated in this first session found it very effective. While they recognized that it was unusual to have staff attorneys attend the decisionmaking conference, they believed there were two compelling reasons for having the staff attorneys present. First, it permitted the judges and staff to interact, providing the staff attorneys more guidance in their work and the judges more oversight of the staff office. Second, the procedure saved time because the judges were able to decide the cases in a single session and to give the staff attorneys instructions orally instead of in writing.

These judges recognized, as well, that the procedure solved a problem that had been raised by several members of the court, who had become convinced that decisions made by the round robin procedure were essentially one-judge decisions. The conference procedure seemed to provide an answer to this concern because it provided a method for face-to-face decisionmaking in the non-argument cases. Thus, as it turned out, the staff director's suggestion that the staff attorneys meet with the judges to discuss the non-argument cases led to the development of a procedure that met both the judges' concerns and the staff attorneys' needs.

Although only three judges participated in the procedure initially, over time all but one judge moved from the round robin procedure to the conference procedure.[37] At the outset of the program, the judges met to decide the cases during argument weeks. This arrangement had the advantage of fewer trips to Denver, but the judges soon found that argument weeks were too demanding because the judges had to prepare and decide both the argument and non-argument cases. So the director of staff at-

37. As mentioned in note 28, one of the senior judges does not participate. The chief judge also does not participate, because he is exempted from the non-argument calendar by virtue of his administrative responsibilities.

torneys began to schedule the non-argument conferences in months when the judges did not convene for argument.

For several years the conferences were held as needed—that is, when the staff attorneys had enough cases ready for decision. The staff director would then find three judges who had time to take the cases. The court eventually found that this scheduling method had several negative effects. First, it was difficult on short notice to find three judges who had time to review the cases; second, the workload was unfairly distributed among the judges; third, it was hard to find visiting judges at the last minute; and fourth, there was little pressure on the staff attorneys to prepare cases.

In 1987, this ad hoc scheduling practice was replaced with the current every-other-month schedule in which both the dates and the panel assignments are known a year in advance. The judges are now able to predict when they will receive the sixty or so cases to be decided at the conference, and they can adjust their work plans as necessary. Because all the judges are included in the schedule, the demands of the non-argument cases now fall evenly on all the judges. The clerk's office, too, can predict when it will need additional resources and has sufficient lead time to seek the assistance of visiting judges. Finally, the productivity of the staff attorney's office, measured in numbers of case dispositions, has increased substantially since adoption of a regular schedule.

There has been one other major change in the conference calendar: more cases, and a greater variety of cases, are now placed on it. The first conference involved thirteen cases with simple issues; many, in fact, were motions. Over time, the court shifted all pro se cases to the calendar, and over the past year it has begun to move counseled cases onto the calendar as well. This change has come about for two reasons. Because the staff attorneys have become more productive, they can now handle more cases. But more significant, through the conference procedure itself the judges have come to trust the staff attorneys and are willing to assign them cases that are outside the range of their traditional expertise.

Given the serious backlog in the Tenth Circuit, we might expect that the court would look to the conference program and the staff attorneys as a mechanism for disposing of more cases. The court does not, however, view the conference program as primarily an

expediting procedure. Rather, the court adopted and continues to use the procedure because the judges believe it leads to better decisions and because both the judges and staff attorneys have benefited from the collegial interaction the conference provides. At the same time, the procedure has also proved to be expeditious, and it may therefore offer a method for disposing of more cases. Nearly all the judges think that a significant portion of the cases on the argument calendars (the estimates ranged from 10% to 50%) could be decided without argument. If the court were to adopt screening, the judges said they themselves, rather than the appeals expediters or the staff attorneys, should review the caseload to find cases suited to non-argument disposition, but they said they would find it appropriate to assign the screened cases to staff attorneys for preparation of memoranda and draft dispositions.

Two difficulties would have to be overcome, however. First, the staff attorney's office does not have enough resources to handle an increase in its caseload. The judges agreed that the staff attorneys are already working at their maximum capacity. Second, the judges said they would expand the staff office only to the extent that it would permit the same level of judge involvement with the staff attorneys as the conference procedure currently permits.[38] These issues would have to be resolved before the judges would expand the conference calendar further.

In recent conversations with the court, we have learned that the court began in the fall of 1989 to address some of these questions by putting into place a new screening procedure, in which all briefed cases are screened by judicial panels. Now when the judges travel to Denver to convene for the accelerated and conference calendars, they stay an extra day to screen the briefed cases. After review, each case is referred to one of four decisional tracks: argument calendar, accelerated calendar (renamed the "short argument" calendar under the new screening procedure), conference calendar, or prompt decision by the three screening judges.

Under the new screening procedure, cases that are obviously proper for immediate disposition are decided at the time the

38. To expand the office, the judges would either have to loan more law clerk positions to the staff attorney's office, or the court would have to persuade Congress to change the one-to-one staffing ratio. See the Appropriations Act for Fiscal Year 1989 (Pub. L. No. 100-459) for congressional action on the staffing ratio.

screening panel meets or, when a point needs research, are taken by one of the judges to chambers and decided shortly after the screening session. These cases are disposed of by a brief order, which is prepared by one of the judges, reviewed by the other panel members, and entered as the judgment of the court. Many pro se cases, as well as a number of other less complicated cases, are now decided by the screening panels.

All other cases designated for non-argument decision, most of which are counseled cases, are referred to the conference calendar. These cases are handled according to the procedures described in pp. 18–30; that is, the staff attorneys prepare a memorandum and draft disposition for each case, and the judges decide the cases at a face-to-face conference attended by the staff attorneys.

These changes have had a number of significant consequences. Because the judges now dispose of many of the pro se cases without staff attorney assistance, the staff attorneys' time has been freed up for work on more difficult cases. Their caseload, consequently, is now composed almost entirely of counseled cases. To ensure close judicial supervision in these cases, a mentor judge is now assigned to every staff attorney case. Furthermore, the judges have the assurance that they, rather than staff, are making the decision about which track each case should be on. Finally, it appears that these procedures permit the court to dispose of the pro se cases more expeditiously, to provide the staff attorneys a more interesting caseload, and to bring more fully briefed cases to final disposition, while at the same time preserving both collegial decisionmaking and a close working relationship with the staff attorneys.

Chapter Six
THE PARTICIPANTS' EVALUATIONS

The Tenth Circuit created its conference procedure to provide the staff attorneys access to the judges and to provide the judges a method by which a more careful decision could be reached in the non-argument cases. Has the conference procedure met these goals? In this section, we report the judges' and staff attorneys' evaluations of the procedure, focusing first on the meaning of face-to-face decisionmaking and then on the significance of the staff attorneys' attendance at the conference. Both the judges and the staff attorneys have found the conference calendar entirely successful, providing benefits beyond those it was designed to achieve.

While their views are helpful in evaluating the procedure's effectiveness, we might question whether participants can present an unbiased view of their own procedure. We are fortunate, therefore, to also have the assessments of the two appellate and four district court visiting judges. As we will see, their assessments are very similar to those of the Tenth Circuit judges and staff attorneys.

The Benefits of Face-to-Face Decisionmaking

The judges' comments about the conference procedure were frequently framed as a comparison with the round robin procedure. It was, after all, their discontent with the round robin method that led them to adopt the conference calendar. The judges were emphatic in their preference for the conference procedure. The most important outcome of this decisionmaking method, in their view, is that it produces a much more carefully considered decision than the round robin procedure does. For them, this means that the decision is made by three judges, not one, and that every issue in the case is explored. Several different features of the conference calendar contribute to this outcome; all

are linked to the fact that it brings the judges together face to face.[39]

First, the judges noted that they, like most other persons, are susceptible to the disapproval of their peers. At the conference, their work becomes visible to their colleagues. This motivates them, they said, to prepare the cases carefully before convening. Most of the judges spoke of this effect. We quote two of them:

> There's a risk in busy courts that the first judge to review the case doesn't fret over it and the next two judges do even less. There's so much work to do, and it would be tempting to do less if you weren't responsible for the cases. But you can't be ignorant, you can't be unprepared, when you're face to face.

> We pick up twice as many significant flaws as if the cases were done round robin. Each judge is reading the case knowing the other judges are reading it, too. You would look foolish to your colleagues if you said you had no problems with any of the cases. So everybody prepares before arriving. I've been astounded that I sometimes notice no problem, but another judge does. I feel good that at least one of the judges will catch a problem if there is one.

The conference procedure, then, helps the judges keep one of the promises of traditional appellate procedure: that three judges independently read and study each case.

The second way in which the conference procedure leads to a better decision, according to the judges, is that it creates a situation in which the judges can challenge one another's ideas, and in which completely new ideas may emerge. One judge, describing the give-and-take of the conference, said,

> Convening is the critical factor, both for argument and non-argument cases. Dialogue is important, and it must be face to face. You have to see the eyes. Then you can say, "Come on, Joe, you can't really believe that." It produces a more honest decision.

39. The conference procedure also enhances the quality of decisionmaking by enabling the staff attorneys to prepare reliable and thorough memoranda. We discuss this outcome below.

A number of judges described as well the experience of coming to the conference committed to a particular view of a case, only to find that the discussion led them to think of something that had not occurred to them while working on the case alone. As one judge said, "When we sit around a table, dynamics happen, new ideas spring up. One question leads to another." The conference procedure, then, permits the judges to realize a second promise of traditional appellate procedure: that the decision will be made by three judges deliberating together.

There is a third way in which the conference procedure leads to a more careful decision. Several judges described the ease of bringing up a point in the conference that they might have hesitated to raise if they had had to write it in a memorandum. Writing takes time, they said, and if an idea is only half formulated or hard to articulate, the judge might choose to omit it. By discussing the cases face to face, these hesitations are overcome. One judge described this as follows:

> The benefit of convening is that you're willing to bring up a pickier point than if you were sending it through the mail. You may have just the embryo of a thought and you might not say it in writing, but it's so easy to do face to face. And it may lead to something important.[40]

Finally, several judges believe the conference leads to a better decision because the judges rely on a disposition prepared by the staff attorneys rather than one prepared by a judge. In the words of one judge, "In the round robin procedure, the lead judge gets locked into a position before the other two judges have looked at the case, and you can't move the judge off that position. A judge is more flexible when he's not committed to a piece of paper he's written." In this judge's view, the staff attorneys provide a neutral decision in which no judge is invested; that decision then becomes the basis for debate among the judges.

For a number of reasons, then, the judges think the conference procedure helps them reach a more carefully reasoned decision in each non-argument case. This, in their view, is the procedure's most important benefit. But the conference offers a second benefit

40. A nice example of this point was observed in the conference we attended. See the description on p. 29.

to the judges, and that is the collegiality it fosters. "The round robin lacked collegiality," said one judge. "It's important that judges talk to each other." This view was widely shared among the judges, many of whom spoke of the high level of collegiality in the Tenth Circuit.

Collegiality signified more to the judges than simply a pleasant working environment and friendly relationships with colleagues. Collegiality, several said, is essential to the quality of the judicial decision itself:

> Open and free exchange is critical. You can't reach the best result without it. But you are more reticent with strangers. To reach a good decision, you have to have a basis of understanding with those you work with. The court is interdependent, like a family, and you have to know how far you can go without offending someone.

> Conferencing permits an accommodation of views, which is what judging and the law are about. The court is a law-making body, and the judges must accommodate. There must be understanding and good will for quality decisionmaking. This comes in face-to-face decisionmaking.

> Collegiality is absolutely essential to decisionmaking. The judges have an awareness that they are a court, not just individuals. You respect each other's views and you comprise yourselves as a body.

Collegiality, then, is valued not only for its own sake, but also because of the role it plays in decisionmaking. And collegiality is enhanced by the practice of convening.

The final benefit of convening, according to one judge, is that the conference provides the judges a greater sense of pleasure in their work. "The conference is a lot more fun," he said. "It makes these cases come alive."

The six visiting judges we interviewed echoed many of the comments of the Tenth Circuit judges. They noted especially the extensive amount of discussion that took place at the conferences they attended. "By doing it this way," said one district judge, "the cases got a thorough going-over." The views of the two appellate judges are especially revealing, since both of these judges serve on courts that use the round robin procedure:

> There was more attention to individual cases than in most summary procedures, including our own. If cases just flow through chambers one by one, you give deference to the writing judge. But summary calendar cases do benefit from discussion. Then you can be confident there's nothing there. You're less hesitant to dispatch with the case. And then the litigants know the judges looked at the case.

> I was tremendously impressed. It was much better than my court. The value of convening is that the judges look each other in the eye. You have a greater tendency to say "what about this?," to stop and reconsider, to probe. You might stop at a tender spot in your theory if you were deciding by yourself, but a judge will ask, "How does this apply in *X* case?" It improves the product and it's more satisfying personally.

According to all the judges who have participated in the procedure, then, the Tenth Circuit conference procedure has met at least one of the goals for which it was established: It has provided the judges a method for making a carefully considered decision in each case decided without argument.

The Benefits of Staff Attorney Attendance at the Decisionmaking Conference

The Judges' Views

The benefits described above could, it seems, be realized without the attendance of the staff attorneys at the conference. In fact, their attendance was initially proposed for their benefit rather than the judges'. Are there any advantages to the judges in having the staff attorneys present, or do the judges simply tolerate their presence? Why, given the confidentiality of the decisionmaking conference, are the staff attorneys permitted to attend?

When we asked the judges this question, one said he had worried initially that the staff attorneys' attendance at the conference would affect the confidentiality of decisionmaking or that it would inhibit the judges. "That," he said, "is a red herring." He, like the other judges, gave many reasons why the staff attorneys' attendance at the decisionmaking conference is beneficial for the

court. The reasons we report here were mentioned by many of the judges.

Most important, the conference has generated greater judicial confidence in the staff attorneys. Two features of the conference procedure appear to have led to this result. First, the conference provides a vehicle through which the staff attorneys learn more about the law and about legal analysis. A number of judges noted both the direct and indirect ways in which the conference performs this function. For example, the judges frequently use the conference—or a specific case—to instruct the staff attorneys in a point of law or to explain how they want the draft dispositions written. Equally as important are the many indirect ways in which learning takes place. As one judge said, "The conference gives staff an opportunity to hear the judges think and to engage in dialogue. This expands their professional skills." Another said, "They see in the conference with their own eyes and ears what judges do. They're better lawyers afterward." As a result of this exposure to judicial thinking, the staff attorneys not only prepare better analyses of the non-argument cases, but they have learned as well how to recognize and present the information that will be useful to the judges' deliberations. The judges consequently find the staff attorneys' work more helpful and reliable.

Second, judicial confidence in the staff attorneys has increased because through the conference the judges get to know the staff attorneys. "Working with staff is a matter of trust," said one judge, "but to trust them you have to know them. You can't use paper to judge their ability or to get to know them." Another said, "It's like discussing the cases with the law clerks. The judges wouldn't be able to evaluate the staff members as well if they had to rely on paper. They have to be able to probe personally." Because of their frequent discussions with the staff attorneys, the judges said, they know the staff attorneys' individual strengths and limitations. This helps the judges in evaluating the staff attorneys' work and in knowing where to place their trust.

The conference has also, according to one judge, led to more neutral memoranda from the staff attorneys. "The staff attorneys," he said, "don't write for a particular judge anymore. They see in the conference that a decision represents the view of the court, so they write their memos and orders to reflect the court, not a

particular judge. This procedure reduces the danger of staff bias substantially." Consequently, this judge felt he could place more trust in the work of the staff attorneys.

Not only does the conference generate better staff materials and greater opportunities to develop trust in the staff, but the conference is also seen as a mechanism for motivating the staff attorneys, as it does the judges, to careful preparation of the non-argument cases. "The staff attorneys," one judge said, "have to be prepared. It would be embarrassing not to be." Another said, "The staff attorneys find it very important to appear wise to the judges, because they have no other contact with lawyers. They're very careful."

While trust and reliability are, for the judges, clearly the most important benefits of the staff attorneys' attendance at the conference, the judges also find that the staff presence makes it easier to get the court's work done. "The conference," said one judge, "is an opportunity for the judges and staff attorneys to get to know each other. Then they work together more efficiently." Another said, "It's easier to talk on the telephone because of the personal relationship. It helps a lot to know who you're talking to on the other end of the line." In addition, at the conference itself the judges are able to ask questions about the record, receive immediate answers, and make changes in the draft disposition, all within a few minutes. Staff involvement, nearly all the judges said, saves both the judges and the staff attorneys a great deal of time that would otherwise be spent writing and responding to memoranda. Consequently, the judges feel that both they and the staff attorneys are noticeably more productive under the conference procedure than under the round robin procedure.

For many of the judges, the conference also provides an opportunity to supervise the staff attorneys and to instruct them in the limits of their role. This explains, in part, why the judges believe the court has not created a risk that staff attorneys will take on judicial functions. "The conference procedure," said one judge, "answers the concern of the 'hidden judiciary.' The judges are intimately involved in the decisional process. They direct the procedure, and they direct revisions by staff." The newly introduced procedure for consultation in Rule 34 cases will further extend the judges' oversight of the staff attorneys. As one judge said, "Some

might raise a concern that staff attorneys put the first stamp on a case and that it becomes cast in concrete. This won't occur when there's initial contact between the judge and staff attorney, when there is guidance from the judge." The conference also permits the judges to speak to the staff attorneys about the scope of their authority, according to one of the judges, who said, "We have talks with the staff. We tell them, 'We're the judges, we'll decide. Your job is to provide a neutral memo.'"

While the judges believe that the conference procedure helps mitigate the risk that staff attorneys will have too great an influence on the non-argument decisions, several judges also noted that no procedure can prevent staff attorneys from stepping across boundaries nor judges from abdicating responsibility. Whatever procedure is used, they said, the responsibility continues to lie with the judges, who must make certain that they and not their staff—either staff attorneys or law clerks—make the decisions. This means, according to one judge, that "the judges must not leave to the law clerk or staff attorney the responsibility for all reading and writing. The judge must read and write oneself." Another judge noted, "It's real important to read the briefs. If the judges read only the memos, the staff does become a 'hidden judiciary.'"

Finally, the judges noted that by having the staff attorneys attend the conference, the court has realized several significant improvements in the staff attorney's office. First, the conference procedure has resulted in much higher morale in that office. "They're lawyers," said one judge, "and they want to be recognized. They're very conscientious people, and it's not right that they be unknown. The conference provides recognition. It's a morale booster." Another said, "The conference is the single most important factor in keeping the staff attorneys interested in their jobs." The conference is also an attractive job feature that has helped the court recruit higher qualified staff attorneys. "When you're doing only pro se cases, it's dull and boring," said one judge, "and the court doesn't get the level of people it needs for the level of reliance the judges place on them. The conference attracts better staff."

The conference then, according to the judges, offsets some of the less attractive features of the staff attorney role, particularly

the lack of intellectual challenge inherent in working on a caseload made up primarily of only a few case types. Some of the judges noted that the same goal could be accomplished by assigning the staff attorneys more difficult cases and a greater variety of case types, but there are limits on the number of cases staff attorneys can prepare. Their first duty, the judges agree, should be the pro se cases. "There is so much routine work to be done," said one judge. Another added, "We need the staff attorneys to provide a balance between getting the work of the court done versus the judges pursuing some issues in depth."[41]

However, the judges also have begun to assign the staff attorneys a greater variety of case types and cases that are more intellectually demanding. The judges have been able to take this action for at least two reasons. First, the staff attorneys have become more productive since the court adopted a regular schedule for the conference calendar, which increased the capacity of the staff attorney's office. Second, because the conference procedure permits more judge involvement with the staff attorneys and more exchange between the judges, the judges feel confident that cases placed on that calendar receive careful preparation by staff and close scrutiny by the judges. Therefore, they are comfortable placing some of the more demanding cases on that calendar. In the absence of the conference procedure, however, it is unlikely that the judges would have assigned staff attorneys any cases other than the pro se and waiver cases. Because of the conference calendar, then, the role of the staff attorneys in this court is significantly more varied than it might otherwise have been.[42]

41. Recent changes in the court's procedures (see pp. 34 and 35) suggest that the judges have decided that much of the court's routine work (that is, the pro se cases) can be handled by the judges without staff attorney assistance. Thus, the staff attorneys have been freed up to work on the court's more difficult cases.

42. This may be seen as well in the court's adoption two years ago of the "accelerated calendar," a calendar of cases requiring very brief argument. The staff attorneys assist the judges with this calendar, preparing both memoranda and draft dispositions before argument and working with the judges in preparing the final disposition after argument. The judges chose to have the staff attorneys assist with this calendar because, as one judge explained, "A judge can produce a finite number of cases using only law clerks. Productivity can be increased geometrically with staff attorneys. Each year, 120 extra cases are decided with the accelerated calendar." A second judge pointed to another advantage of this calendar, saying that the court hopes it will enrich the staff attorneys' work by providing them with more challenging legal questions. These new responsibilities for the

The Staff Attorneys' Views

When the conference procedure was first proposed, it was presented as a method for helping the staff attorneys understand how the judges used their work. Has the procedure met their needs? Do they find it as beneficial as the judges do? The staff attorneys with whom we spoke had not worked under a round robin procedure, so they could not make the comparisons the judges could. Yet they noted many of the same advantages cited by the judges.

Several of the staff attorneys described the collegiality of the conference and the intellectual excitement of the exchange that occurs in that setting. "It's an opportunity for everyone to get together," said one staff attorney. "Just watching the decisional process is intriguing and special," said another. A third staff attorney noted, "In the conference you can argue with the judge. It's one of the joys of the job."

The staff attorneys also described the importance of the educational function of the conference. The conference is particularly valued because through it the staff attorneys expand their knowledge of the law, which helps them in their work on later cases. "When I see what the judges' thoughts are on a case," said one staff attorney, "I get a better understanding for future cases. And the conference gives me a chance to talk about my thinking on a case and to get the judges' responses." Another said, "In many cases, there's no problem, but when there is, you get the guidance you need for the next time around. Also, you can discuss with the judges why you went a certain way, and you can measure your evaluation against the judges'. Without the conference, the staff would be sending stuff into a black hole, with no understanding of the consequences." The staff attorneys also pointed out that the judges use the conference, in the words of one staff attorney, "to play a general mentoring role." They may, for example, discuss an apparently conflicting opinion in another circuit or a recent Supreme Court decision.

The staff attorneys also use the conference to learn about the judge's personal preferences. "You learn," said one, "which things

staff would not have been possible, however, had the judges not already developed confidence in the staff attorneys' work through the conference calendar.

bother which judges. Then you're aware of it the next time and you'll point it out to the judge." The judges differ, for example, in their preferences for how the draft disposition is written, which the staff attorneys have learned through the conference. The staff attorneys try to accommodate these preferences when preparing the dispositions.

The conference also provides the staff attorneys an efficient and reliable method for handling practical matters related to the cases on the calendar. As one staff attorney said, "The judges can tell the staff attorneys directly what they want, so the process is efficient. But it also prevents confusion, because the staff attorneys can ask for clarification when the instructions aren't clear."

While the conference provides an opportunity for the staff attorneys to pick up specific information about the law, the judges, and the cases on the calendar, it also gives them more general insight into the process of judicial decisionmaking. This was described by one staff attorney, who said, "It's important to understand how the panel process works. I've seen judges wrestle with problems. Now, when I read opinions, I understand how the judges got there."

By attending the conference, the staff attorneys also come to understand their own role in the decisionmaking process. First, they are reassured that a rejection of their work is not to be taken personally. "You realize," said one staff attorney, "that you've got really different judges who want really different things. Now I know why a decision was reached, and I realize it may have had nothing to do with me." Another said, "Sometimes you could take the judges' revisions as personal attacks, but seeing them in action you realize their sole attention is on the case." This understanding is an important factor in creating rapport between the judges and staff attorneys.

Second, through the conference the staff attorneys see clearly that the judges, not the staff attorneys, are the decisionmakers. "Having contact with the judges," said one staff attorney, "puts you more in the position of providing information to the judges. Seeing them there certainly reminds you that you're not the judge." The staff attorneys, like the judges, felt there was little risk that they might usurp judicial functions. They are reminded, by the conference and by occasional talks from the judges, that their

role is to provide information to the judges. The staff attorneys' assessment was echoed by one of the visiting appellate judges, who said, "Anyone who sat with the Tenth would not have any doubt who the judges were."

The staff attorneys were enthusiastic about their job and said they would recommend it to other young lawyers. The conference is clearly the most stimulating and satisfying part of their position, providing not only the opportunities for intellectual development noted above but also a strong sense of collegiality and common purpose with the judges. Furthermore, the staff attorneys appreciate the confidence and respect shown them by the judges. Altogether, the many benefits cited by the staff attorneys appear to contribute to a high level of individual satisfaction in their work and high morale in the office as a whole.

At the same time, the staff attorneys pointed out that their role has certain limitations. As one said, "I'd recommend this job, but not for a career. There's only research and writing, no litigation. You need more contact with others." Another noted, "It doesn't have the give and take of the courtroom. I'd recommend it only to certain types of people, to those who like to think and write." A third said, "The repetition of the work and the fact that there's no opportunity for advancement lead people to stay only a few years."

While a relatively brief stay at the court may be a rational choice on the part of the individual staff attorney, from the point of view of the institution early departures can be seen as costly to the court. One of the judges, who had originally been opposed to terms longer than three years, said, "I now believe the court needs long-term staff because of the expertise they develop." Another judge said, "I can't emphasize enough that you can't have a relationship between the judges and staff without long-term staff. They need to know the judges and there has to be continuity. It's a matter of trust. You have to have closeness with the staff, which is generated by longer terms." Yet the nature of the work prompts most staff attorneys to leave the position after a few years, even in a court that has given substantial attention to making the role of staff attorney an attractive one. It remains to be seen whether the court's decision to place more challenging cases on the non-argument calendar—and the expansion of the staff attorneys' respon-

sibilities through the accelerated calendar—will provide sufficient incentives to retain staff members for longer terms.

The Voice of the Skeptic

While the many benefits cited by the judges and staff attorneys are noteworthy, the skeptic might ask how much time the conference procedure requires, especially when compared with the round robin procedure, which does not require additional travel. The judges believe, however, that for several reasons the conference procedure is substantially more efficient than the round robin procedure. They point out, first, that by discussing the cases and revising the draft dispositions at the conference, they save a great deal of time that would otherwise be wasted preparing memoranda and answering those sent by other panel members and the staff attorneys. "The beauty of this procedure," said one judge, "is that you don't take the case home. It's done on the spot."

The judges also believe that by convening they have to handle most cases only once, rather than having to re-acquaint themselves with a case when, as in the round robin, it is returned for reconsideration because the second or third judge disagrees with the draft disposition. As one judge said, "The case is done while it's in focus."

The judges have found, too, that under the conference procedure the staff attorneys prepare better memoranda and draft dispositions. Thus less time is spent in additional research and in redrafting the dispositions. Finally, because the non-argument cases appear in chambers on a predictable schedule, rather than sporadically, the judges can plan their own schedules better.

Although each judge must make one or two additional trips to Denver each year, the judges believe the conference calendar is still more efficient than the round robin. As one said, "In the round robin procedure, travel time was saved but the judge spent more time on the cases in chambers." Another said, "The time I spend on these cases would double if I had to write and send memos around."

The staff attorneys also noted the efficiency of the conference. "The advantage of the conference," said one staff attorney, "is that the judges can ask questions on the spot. They don't have to write

letters to the others involved in the case. The interaction takes place all at once and the decisions are made promptly." Another noted that the conference saves time because "it's easier to keep track of a bundle of cases that move through the court together." A third added that the advantage to the judges is "speed, because they can tell the staff attorneys directly what they want."

The skeptic might also ask whether the non-argument cases are the easy, maybe even frivolous, cases. If so, do they warrant all the attention the judges and staff attorneys appear to be giving them? For two reasons, the judges would quickly answer yes. First, many of the judges expressed surprise at the number of cases in which the conference discussion altered their view of the case. The result is sometimes changed, but more often the rationale or the emphasis in the disposition is changed, with significant consequences for how the court handles future cases. Second, the conference procedure protects the cases from the label "easy." One of the judges explained the value of the conference procedure as follows:

> Screening involves the characterization of the case. When one says, "This is a pro se case," it's part of the psychology of decisionmaking that the tendency is to say "oh, no" and to give the case less attention. This tendency is balanced by a procedure that gives these cases careful consideration. The screening process labels the case, but convening makes up for it.

Why not, then, hear argument in all cases? Since the panel is convening anyway, why not permit argument in the few counseled cases in which argument has not been waived and in the pro se cases in which the litigant is not incarcerated? The judges would respond, first, that they do not need to hear argument in many of these cases because the issues are clear and the legal precedent well established. Furthermore, the judges can—and do—transfer cases to the argument calendar when they think argument is needed. As one said, "If even one judge disagrees as to the importance of a point and if that judge feels the point hasn't been adequately treated, the case is reclassified to argument." Another judge explained that a case can be reclassified for reasons that stop far short of disagreement. "Any one judge," he said, "can remove a case from the non-argument calendar. There

doesn't have to be disagreement. The judge may just want the participation of the advocates. This is a safeguard. And counsel can be appointed if necessary." Because of these safeguards, the judges are confident that the cases that remain on the conference calendar are those in which the issues can be thoroughly addressed without the benefit of argument.

Chapter Seven
DISCUSSION

The Tenth Circuit appears to have designed an effective procedure for deciding non-argument cases. Most important, in the judges' view, the conferencing calendar provides an opportunity for face-to-face decisionmaking, which considerably enhances the quality of the decision. Nearly as important, the conferencing calendar provides an opportunity for judges and staff attorneys to work together more closely, with benefits for both. The judges have found the staff attorneys' presence at the conference useful because it permits closer judicial supervision of the staff attorneys, provides an occasion on which the judges can discuss the cases and the law with the staff, increases the judges' knowledge of and confidence in the staff, and makes the decisionmaking process more efficient. The staff attorneys, in turn, have been able to write memoranda and draft dispositions that better meet the judges' needs because the conferences provide the staff an opportunity to seek specific guidance in cases they have been assigned, to see how their work is used, and to learn about the law and the judges. The conferencing calendar has thus enhanced morale in the staff attorney's office and increased the appeal of the staff position, permitting the court to attract highly qualified applicants. Altogether, the participants expressed a high level of satisfaction with the procedure, and their evaluations were buttressed by the positive assessments of outside judges who have sat with the Tenth Circuit to decide non-argument cases. Furthermore, the procedure appears to answer many of the doubts that others have raised about non-argument decisionmaking and the role of staff attorneys: doubts about inadequate judicial review of non-argument cases, about one-judge decisionmaking, about the quality of information relied on by judges, about staff attorneys taking on judicial functions, and about recruitment of qualified staff.

Why has the Tenth Circuit's conferencing procedure been so successful in meeting the goals the court set for it? The judges' willingness to make one or two additional trips to Denver each year must be counted as one of the primary reasons. Because of this willingness, the conferences can be scheduled during non-

argument weeks, which allows sufficient time at each conference for in-depth discussion of the non-argument cases. This satisfies the judges' desire for collegial exchange and the staff attorneys' need for discussion with the judges.

A second factor in the success of the conferencing procedure is the judges' accessibility and willingness to work with the staff attorneys. In fact, the judges believe it is their responsibility to work with the staff. One judge, in describing this aspect of his role, said, "It is the responsibility of each judge to get to know the staff attorneys, to visit with them, to talk, to have lunch. Judging is still very much a people-to-people business. And they are our staff, after all. We must take the initiative." The judges' willingness to work with the staff attorneys is seen, first, in the fact that the staff attorneys attend the decisionmaking conference, second in their participation in the discussion at the conference, and third in the discussions between judges and staff attorneys while preparing the cases. By working closely with the staff attorneys at all stages of the process, the judges have ensured that the information provided by the staff attorneys is useful and reliable and that the staff attorneys are integrated into the work of the court. These practices have been important in maintaining high morale in the staff attorney's office and in recruiting highly qualified staff.

The staff attorneys themselves are also a factor in the procedure's success. Several of the judges noted the importance of hiring staff attorneys who have had experience in practice. "I would always choose experience," said one judge. "They aren't snowed. They understand what's going on. The new lawyer wants to change the world. Experience is more productive." Several judges also pointed out that the staff attorneys generally stay at the court for several years, which not only increases their efficiency but also permits the judges, once they have established confidence in a staff attorney, to build a stable working relationship, rather than having to adjust to new staff attorneys every year.

Finally, this court is characterized by two attitudes that must be important in the success of the conferencing procedure. First, there is a high level of collegiality and cooperation, which are important factors in the success of any procedure but seem especially important for the conferencing calendar with its requirements for frequent and sometimes sustained contact. Second,

there is an attitude of respect, not only for colleagues, but also for the cases on the conferencing calendar. These cases, with their often confusing pleas and arguments, could easily be shunted aside, along with the staff attorneys who work on them. The judges, however, guard against this attitude and through their serious attention to the non-argument cases provide a model for the staff attorneys.

While there is much to recommend the Tenth Circuit's conferencing procedure, we may ask whether there is anything about the procedure that would make it unsuitable or impractical for other appellate courts. The Tenth Circuit's experience suggests that the conferencing procedure works best when the decision-making conference is scheduled independently of oral argument sessions. When there are no other demands on the judges' time, the conferences can be relatively open-ended, providing sufficient time for discussion of each case and for meaningful exchange between the staff attorneys and the judges. This arrangement, however, requires additional travel, which may be burdensome in courts that sit for argument more frequently than the Tenth Circuit does.[43] The question of travel, then, is likely to be a threshold question for any court considering adoption of a procedure like the conferencing calendar.

The Tenth Circuit has overcome the travel problem in part by limiting the number of conferences to six a year. This has two outcomes other courts may not find acceptable. First, each conference calendar is very lengthy, with as many as sixty cases decided at a single sitting. Some judges may find the preparation of such a large number of cases in a short span of time too demanding. The second outcome of the Tenth Circuit's scheduling arrangement is that the non-argument cases must wait until the next calendar for a decision, even though they may be ready for a decision sooner. Some courts may find this delay unacceptable. The court has also been able to reduce travel demands on its active judges by having senior and visiting judges sit on the non-argument panels. Other

43. Although the Tenth Circuit convenes for argument only six times a year, the judges sit four days during those weeks, for a total of twenty-four oral argument sittings. In addition, each judge sits approximately five to seven additional days a year for the accelerated calendar. The judges sit for argument, then, approximately thirty days each year.

courts, however, may not have recourse to senior judges or may not find the use of visiting judges acceptable.

We may also question whether the procedure can work in courts that are geographically dispersed. One of the visiting appellate judges suggested that the procedure would not work in his court because its judges are scattered over a large region. The Tenth Circuit's experience suggests, however, that geographical dispersion should not prevent a court from successfully using the conferencing procedure. The Tenth Circuit is very dispersed, in both the area covered by the circuit and the number of judges residing in other states. Furthermore, geographical proximity seems not to be a prerequisite for close working relationships between judges and staff attorneys. Staff attendance at the conference appears to be an effective substitute, along with the telephone contact that is made easier by interaction at the conference.

While courts considering adoption of a conferencing procedure must address the issues of travel and argument schedules, they must also consider what kind of relationship the judges will have with the staff attorneys. Some of the benefits of the conferencing procedure—for example, the higher morale of the staff attorneys and the judges' increased confidence in the staff—depend on the judges working closely with the staff. The judges, then, must see themselves as responsible for the work and job satisfaction of the staff attorneys. Some judges, however, may believe that their first responsibility is to supervise the work of their own staff in chambers. Where judges do not wish to work closely with staff attorneys, the conferencing procedure is less likely to provide the satisfactions and oversight opportunities it has provided in the Tenth Circuit.

Those courts that wish to consider adopting a procedure like the conferencing calendar may also question whether the procedure is transferable to larger courts. The Tenth Circuit is a relatively small court. Would the procedure work in, say, the Ninth Circuit, with its twenty-eight judges and approximately fifteen staff attorneys who work on non-argument cases?[44] It would probably be difficult to hold a conference in which fifteen staff attorneys participated. Yet, would the benefits of the conference—

44. The remaining staff attorneys in the Ninth Circuit are either motions attorneys or have administrative responsibilities.

such as the development of collegiality—be as readily obtained if small groups of staff attorneys met with the judges?

Finally, other courts may question whether staff attorneys spend more time on cases on the conferencing calendar than they would on cases using a round robin procedure. If they do, courts considering a conferencing procedure would have to think about where to reassign duties currently performed by the staff attorneys.

It is clear from the preceding discussion that adoption of the conferencing procedure would require a court to make adjustments in the decisionmaking procedures it currently uses, foremost among them the way in which argument is scheduled and the type of working relationship judges have with staff attorneys. Such adjustments require, in turn, that attention be given to the broader question of the manner in which an appellate court provides effective review. For example, how should judge time be allocated between argument and non-argument calendars? How much judicial time should be spent supervising the work of staff attorneys? What risks are involved in deciding cases without a face-to-face discussion?

In a time of growing caseloads, each federal court of appeals faces a dilemma in developing decisionmaking procedures that are consistent with the values and preferences of the members of the court. The conferencing calendar appears to maximize many of the values that are important to members of the Tenth Circuit. By convening to decide the non-argument cases and by having the staff attorneys present at the decisionmaking conference, the court has found that neither quality nor efficiency need be sacrificed to the demands of the rising caseload.

Appendix A
TABLES

TABLE 1
Percentage of Cases Disposed of Without Argument in Each Federal Court of Appeals, Statistical Year 1988

Appellate Court	Total Number of Merits Decisions	Number Without Argument	Percentage Without Argument
D.C.	903	443	49
First	666	250	38
Second	1,107	203	18
Third	1,572	1,038	66
Fourth	1,910	1,092	57
Fifth	2,343	1,635	70
Sixth	2,337	1,132	48
Seventh	1,142	429	38
Eighth	1,183	530	45
Ninth	2,700	1,008	37
Tenth	1,229	708	58
Eleventh	2,086	1,112	53
All Courts	19,178	9,580	50

Note: Statistical Year = twelve-month period from July 1 to June 30. Statistical Year 1988 runs from July 1, 1987, to June 30, 1988.

Includes only lead and single cases decided on the merits. Lead cases are the first case of a set of consolidated cases. A merits decision is one in which the judges decided the merits of the appeal, in contrast to a procedural termination, in which the case is terminated by an action short of a determination of the merits. About half the cases in the courts of appeals are decided on the merits.

Source: Table B-1, Appendix I, Detailed Statistical Tables, for the Twelve Month period ended June 30, 1988, in the Annual Report of the Director of the Administrative Office (1988).

TABLE 2
Workload of the Tenth Circuit, Statistical Year 1988

	Number	Rank
Cases Filed		
Number	2,066	
Prisoner	507	
All Other Civil	1,189	
Criminal	260	
Administrative	110	
Cases Terminated		
Number	1,991	
Procedural	625	
Merits	1,229	
Consolidations	137	
Actions Per Panel		
Cases Filed	620	10
Cases Terminated	597	9
Merits Terminations	369	6
Cases Pending	705	3
Median Time, Notice of Appeal to Disposition (in months)	15.3	12

Note: Statistical Year = twelve-month period from July 1 to June 30. Statistical Year 1988 runs from July 1, 1987, to June 30, 1988. Rank = the court's standing in relation to the twelve regional courts of appeals (not counting the Court of Appeals for the Federal Circuit). Actions Per Panel is considered a more accurate profile of each judge's workload because appeals are decided by panels of three judges.

Source: Administrative Office of the U.S. Courts, Federal Court Management Statistics, 1988, pp. 16–17 and 22–23.

Appendix B
INTERVIEW PROTOCOLS

Interview Protocol for Judges

TOPIC 1: PREPARATION OF CASES FOR NON-ARGUMENT DISPOSITION

1. Would you describe how you prepare for the decision in the non-argument cases?
2. How do you work with the staff attorneys during preparation of the non-argument cases?
3. What is the purpose of their memorandum and proposed order? How do you use them?
4. What other materials do you review?
5. Do your law clerks participate in the preparation of the non-argument cases?
6. What kinds of cases are decided on the conference calendar?

TOPIC 2: THE DECISIONMAKING CONFERENCE

7. How is the conference conducted?
8. What role do the staff attorneys play in this conference?
9. How often are changes made in the draft dispositions? What prompts these changes?
10. How often are cases returned to the argument calendar? What prompts this re-routing of a case?
11. Are more cases eligible for non-argument disposition than are currently placed on this track?
12. If the court were to screen more cases for non-argument disposition, would the current procedure be used?

TOPIC 3: PURPOSE AND ADVANTAGES OF THE PROCEDURE

13. Why did the court adopt the practice of convening to decide the non-argument cases? Why did the judges decide to have the staff attorneys attend the decisional conference?
14. What are the advantages of convening to decide the non-argument cases?
15. What are the advantages of having the staff attorneys attend the conference?

16. How is time saved by non-argument calendars?

TOPIC 4: THE ACCELERATED CALENDAR

17. What is the purpose of the accelerated calendar?
18. What kinds of cases are decided on this calendar?
19. What role do staff attorneys play?

TOPIC 5: ROLE OF STAFF ATTORNEYS

20. Some worry that staff attorneys will become a "hidden judiciary." Do you share this concern? What procedures could a court adopt to mitigate the risk that staff attorneys will take on judicial functions?
21. In some courts, staff attorneys are hired after they have several years of practice experience, and in some courts they are hired right out of law school. Some courts hire staff attorneys for indefinite terms and some for two-year terms. What are the advantages of your court's practice?

TOPIC 6: ROLE OF ORAL ARGUMENT

22. What is the role of oral argument?
23. Increases in case filings force courts to make difficult choices. If the number of submitted cases per judge were to increase by 20%, this court would have to decide how to handle that larger caseload.
    a. Which of the following options would be the most desirable response to the caseload increase?
        _____ Hear oral argument in fewer cases.
        _____ Publish fewer dispositions.
        _____ Prepare more dispositions without reasons stated.
        _____ Encourage settlement by preappeal conferences conducted by nonjudicial personnel.
        _____ Rely more heavily on visiting judges.
        _____ Permit the time to disposition to increase.
        _____ Other _____.
    b. Which option would be least desirable response?
24. With adoption of submission on briefs and decisions without reasons stated, courts risk becoming less visible to the bar. What means are available to assure the bar that their cases are receiving full consideration?

Interview Protocol for Staff Attorneys

TOPIC 1: PREPARATION OF THE NON-ARGUMENT CASES

The staff attorneys perform several functions for the court, including preparation of cases for non-argument disposition and assistance with the accelerated calendar. I'd like to begin by asking you about the non-argument cases.

1. How are these cases referred to you?

   PROBES: By whom?

   What material do you receive with the case?

   What instructions are you given?

2. What kinds of cases are they?
3. How do you go about preparing a case for the judges' review?

   PROBES: What guidelines do you follow?

   Whom do you consult for assistance?

4. Do you have contact with judges during preparation of the non-argument cases?
5. What do you include in the memorandum? Do you present all the possible arguments? How long is it, generally?
6. What do you include in the proposed disposition? How long is it, generally? Is the disposition ever published?
7. What do you do when you think a case ought to be argued? What is it about the case that makes you think it should be argued?
8. Is your work reviewed before it goes to the judges? By whom?
9. After your memorandum and proposed disposition go to the judges but before the conference, do the judges call you to discuss the case or to ask for additional work? Do the law clerks call you about these cases?
10. How much of your time is spent on non-argument cases? About how many do you prepare each month?

TOPIC 2: THE NON-ARGUMENT CONFERENCE

From time to time you meet with the judges when they decide a group of non-argument cases.

11. Would you describe how the conference is conducted?
12. What is your role in this conference?
13. Are the judges familiar with the cases or do they rely on the staff attorneys to tell them what the cases are about?

14. What procedure is followed when the judges want to have a proposed disposition revised?

    FOLLOWUP: What usually prompts a request for revision?

    How often does this happen?

15. Sometimes the judges may decide that a case should be transferred to the argument calendar.
    a. What is it about the case that prompts this transfer?
    b. How often does this happen?
    c. Do you continue to work on the case after it's transferred to the argument calendar?
16. In only one other court do the staff attorneys meet with the judges when the non-argument cases are decided. What are the advantages of this arrangement for the staff attorneys? For the court?

TOPIC 3: OTHER DUTIES

17. What do you do for the accelerated calendar?
18. How is your participation in this calendar different from your participation in non-argument cases?
19. What other duties are assigned to you?

TOPIC 4: THE ROLE OF STAFF ATTORNEYS

20. Some of the people who write about appellate courts have expressed concern that staff attorneys will become a "hidden judiciary." How would you respond to someone who expressed this concern?

TOPIC 5: HIRING AND TRAINING

21. How did you learn about this job?
22. What training did you receive when you arrived?

    PROBES: Are there manuals or guidelines for staff attorneys?

    How did you learn what to put in the memo?

23. Would you recommend this job? What do you particularly like about it? What do you dislike?
24. What do you hope to do after this job? Do you think being a staff attorney will help or hinder your prospects?

Interview Protocol for Visiting Appellate Judges

State purposes of study and for contacting visiting judges
Ask how often the judge has participated in the procedure

A. I'd like to start by talking about the process of preparing the cases to be decided on the briefs.

1. First, would you tell me how you prepared for the decisionmaking conference?

   PROBES: materials reviewed
   contact with staff attorneys
   type of guidance given staff attorneys
   use of memoranda and orders

2. How did this work out for you as a judge sitting by designation?

B. Now I'd like to ask a couple questions about the decisional conference.

3. How was the conference conducted?

   PROBES: amount of discussion
   role of staff attorneys
   role in recirculation of draft orders

4. Fifty or sixty cases may be decided at this conference. How would you answer an outsider's question whether so many cases can be carefully considered and decided in such a short time?

5. Are the cases decided on the briefs in the Tenth Circuit different from the cases decided on the briefs in your court?

6. Did you benefit from the opportunity to convene to decide the non-argument cases?

C. You've seen at least two different models of staff attorney use. I'd like to ask you a few questions about the staff attorney role in general.

7. How did your role vis-à-vis the staff attorneys in the Tenth Circuit differ from your role in your court?

8. Is it beneficial to have the staff attorneys attend the conference?

9. Staff attorneys have been referred to as the "hidden judiciary." Do you share this concern? What procedures mitigate the risk?

10. The experience and tenure of staff attorneys varies among the courts. Your court and the Tenth Circuit differ in this regard.

a. Are there advantages in hiring staff who have practiced law?

b. Are there advantages in designing the staff position as a career position?

E. Expediting procedures, such as deciding cases on the briefs, raise questions about both efficiency and the quality of justice.

11. Does the Tenth Circuit procedure use judge time efficiently? Staff attorney time?

12. Does this procedure affect the quality of the judicial decision?

Interview Protocol for Visiting District Judges

State purposes of study and for contacting visiting judges
Ask how often the judge has participated in the calendar

A. I'd like to start by talking about the process of preparing the cases to be decided on the briefs.

1. Would you tell me how you prepared for the decisionmaking conference?

   PROBES: materials reviewed
   contact with staff attorneys
   type of guidance given staff attorneys
   use made of memoranda and orders

2. How did this work out for you as a judge sitting by designation?

B. Now I'd like to ask a couple questions about the decisional conference.

3. How is the conference conducted?

   PROBES: amount of discussion
   role of staff attorneys
   own role in recirculation of draft orders

4. Fifty or sixty cases may be decided at this conference. How would you answer an outsider's question whether so many cases can be carefully considered and decided in such a short time?

C. Now I'd like to ask a few general questions about the Tenth Circuit procedure, as seen by a district court judge.

5. Was the procedure used by the Tenth Circuit an appropriate method for disposing of the cases on this calendar?

6. What did you like about this method of deciding appeals? What didn't you like about it?

7. Staff attorneys have been referred to as the "hidden judiciary." Do you share this concern? What procedures mitigate this risk?

8. Expediting procedures, such as deciding cases on the briefs, raise questions about both efficiency and the quality of justice.
   a. Does the Tenth Circuit procedure use judge time efficiently?
   b. Does this procedure affect the quality of the judicial decision?

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