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Lawyers and Judges and Profs: A Rare Chance to Talk

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The press of business, ethical concerns, and inadequate opportunities conspire to prevent judges, lawyers, and law professors from having meaningful interactions outside the courtroom. The difficulty of interaction results in several problems that might be improved if these groups could talk, and talk frankly. Judges sometimes become frustrated that rules aren't always followed, lawyers become frustrated with rules, and law professors become frustrated with the lack of audiences for what they write.[1] Additionally, practitioners and judges rarely get to discuss the practical implications of newly decided cases in a non-adversarial setting.

The 2000 Tenth Circuit Judicial Conference, which convened in Santa Fe, New Mexico, June 29 through July 1, was perhaps the most ambitious practitioner's conference the circuit has held. Responding to suggestions from individual judges and the Attorneys' Advisory Committee, as well as the academy and the bar, the Program Committee tried to provide something for everyone. The conference resulted in much needed dialogue in formal and informal settings. It was calculated to allow the bench and bar to discuss frustrations, suggest improvements, and in general to get to know one another better. Candid discussions between practitioners and judges gave each group a better idea of what the other expects and why. Apart from practice, brief presentations in the Renaissance tradition provided a sampling of exciting developments in other law-related areas.

To extend the blessings—and important suggestions—of this event to ourselves and our posterity, the Program Committee obtained the invaluable participation of the University of New Mexico School of Law. The *New Mexico Law Review* assisted with the logistics of recording the conference and agreed to publish much of the conference, and this issue fulfills that latter commitment. In the article below, we will try to explain the history and the purpose of the circuit conference and why it is beneficial for lawyers to attend.

A PAGE OF HISTORY

The Tenth Circuit, carved out of the Eighth Circuit in 1929, consists of the court of appeals, district courts, bankruptcy courts, and magistrate courts that serve the six western states of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. The Tenth Circuit Judicial Conference is a creature of statute. Originally, 28 U.S.C. § 333 was mandatory, directing each circuit to have a conference. Although the statute was subsequently amended in 1996 to be discretionary, all the circuits continue to host conferences. Some circuits have "closed" conferences where

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** Circuit Judge, United States Court of Appeals, Tenth Circuit. Judge Kelly and Judge Henry were the co-chairs of the Tenth Circuit Judicial Conference Program Committee.

1. *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191 (1993). Judge Edwards presented a program on this topic at the 1998 Tenth Circuit Judicial Conference in Keystone, Colorado.

attendance is by invitation only; our circuit has a more open policy, although members of the circuit bar who have attended previous conferences get first notice of the conference. As enrollments are sometimes limited, previous attendees do have an advantage.

By statute, the conference is convened "for the purpose of considering the business of the courts and advising means of improving the administration of justice within [the] circuit."[2] In addition to participating in various internal circuit executive meetings, all judges meet with conference members to discuss the administration of justice within and without the Tenth Circuit. Past conferences have tended to align themselves around a basic theme and have been titled in line with that theme. But as of late, the conference has evolved into a practice-oriented mode. Some presentations, like Professor Erwin Chemerinsky's[3] fabled review of the most recent Supreme Court term, have become highlights of the program. This conference was planned to appeal to the district court practitioner, but various programs also discussed appellate practice.

The Program Committee, with the help of the Attorneys' Advisory Committee[4] and others,[5] decided to focus primarily on trial and appellate practice in our circuit. We felt, however, that the *big* issue in the Supreme Court of late, the so-called "New Federalism," had a big impact on that practice.

THE FEDERALISM REVOLUTION

The conference began with Professor Erwin Chemerinsky's lecture on "The Federalism Revolution," during which he updated us on specific Supreme Court opinions that demonstrate the Court's emerging approach to federalism. Within the confines of this doctrine, he identified both civil and criminal components, which often fit under the aegis of wanting either to "get into or stay out of" the federal courts. Underscoring the recency of the revolution, Professor Chemerinsky noted that all of the cases he discussed in his presentation were decided after 1992, and most in the last four years.

Professor Chemerinsky's speech was followed by various breakout panel discussions focusing on the trends in federal civil litigation and federal criminal litigation he identified in his lecture. As to civil litigation, Professors Michael B. Browde, Erwin Chemerinsky, and Ruth Kovnat were panel members discussing "Suits Against the States—The Changing Law of Immunities." The revitalized Eleventh Amendment, as Professor Kovnat observed, is "at a time of a true

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2. 28 U.S.C. § 333.

3. Professor Erwin Chemerinsky is the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science at the University of Southern California.

4. The Attorney's Advisory Committee consisted of District Judge Monti L. Belot; U.S. Attorney Jackie N. Williams; U.S. Attorney David D. Freudenthal; Federal Public Defender David J. Phillips; Steven J. Merker, Esq.; Thomas C. Seawall, Esq.; John J. Jurcyk, Jr., Esq.; Paul J. Kennedy, Esq.; John H. Tucker, Esq.; Francis M. Wikstrom, Esq.; Catherine MacPherson, Esq.; Robert L. Hoecker (Secretary); Richard P. Murphy (Reporter); and U.S. Circuit Judge Robert H. Henry (Chair).

5. Contributors included Professor Michael Browde of the University of New Mexico law faculty, U.S. Circuit Judge David M. Ebel, and Christine Lighthall, Circuit Executive's Office, who also assisted the Program Committee.

revolution." The contours of that revolution were outlined by the opening lecture and further filled in by this panel.

James A. Parker, now the Chief Judge for the U.S. District Court for the District of New Mexico, New Mexico Chief Justice Pamela B. Minzner, and Professor Ted Occhialino led the simultaneous discussion on "Certification and Removal Practices and Procedures." Attendees were advised of practical problems in proving the amount in controversy required for diversity removal, and then presented with a frank discussion about certification procedures including certifications to tribal courts.

In the criminal area, a different perspective from that offered by Professor Chemerinsky's opening remarks was provided by the Honorable Dick Thornburgh, former Attorney General of the United States; Charles W. Daniels, Esq.; and Robert J. Gorence, Esq., in the discussion, "The Growing Federalization of Criminal Law." U.S. Supreme Court Chief Justice William H. Rehnquist, the American Bar Association, and numerous other critics have decried the recent "explosion" of federal criminal law. Attorney General Thornburgh explained how the lack of a coherent federal criminal "code" compounds this seemingly intractable problem. Some years ago, creative law clerks on our court printed a set of T-shirts entitled, "Travel Tips for the Tenth Circuit." The shirts humorously suggested a certain tension in our Fourth Amendment jurisprudence in a way that only law clerks can get away with. Professors Barbara Bergman, Arthur G. LeFrancois, and Marianne Wesson tried to deal with these tensions and others as they updated us on "New Developments in Fourth, Fifth, and Sixth Amendment Law." Finally, no area of law has changed more of late than the laws relating to federal review of state criminal matters. Professors Randall Coyne and David Gottlieb charted the course with "Habeas Corpus Practice in State and Federal Court."

A "BLOCKBUSTER" YEAR IN THE COURT

The conference's second day began with Professor Chemerinsky's comprehensive update on the just completed October 1999 Supreme Court Term. (Indeed, the good professor made a series of four presentations at our conference, including working with the children's program that introduces the children of attendees to legal reasoning.) Professor Chemerinsky's seemingly effortless presentation revealed his mastery of a term completed a scant two days before his speech. In fact, U.S. Supreme Court Associate Justice Steven Breyer facilitated by bringing a fresh set of advance sheets from the Court. Professor Chemerinsky noted that he was going to toss out his previous copies and retain those specifically brought, as "I've never had a Supreme Court Justice hand carry me advance sheets before."

Describing the term as a "blockbuster," Professor Chemerinsky concluded it was perhaps the most far-reaching term in his twenty years of teaching. As his article following shows, he is still the master at summarizing trends from the Court.

TRIAL AND APPELLATE PRACTICE IN THE TENTH CIRCUIT

The focus of the first day and opening of the second was the practical application of the theories and rules currently driving federal law. The rest of the morning

session dealt with even more practical issues: brief writing, discovery, and trial and appellate advocacy.

Of late, federal courts have come to rely ever more on briefs and other written submissions. By bringing Dr. Stephen V. Armstrong, Director of Professional Development for Paul, Weiss, Rifkind, Wharton and Garrison to the conference, we brought perhaps the foremost expert on legal writing in America. Dr. Armstrong urged us to reconsider organization by putting focus before details, making the structure of a piece explicit, avoiding default organizations, and putting familiar information before new. Dr. Armstrong's handouts and examples offer substantial assistance to those who want to advocate clearly.

The conference also had a series of interactive panels involving trial and appellate judges and lawyers discussing their likes and dislikes about what the other does in the course of litigation. These sessions offered a remarkable give and take and were highly praised by attendees.

RENAISSANCE LUNCHEON

During Friday's lunch, we tried a new program to introduce some less practice-oriented but equally exciting developments in law-related subjects. We selected four nationally and internationally known experts from various fields to introduce the interdisciplinary aspects of their specialties. After brief ten-minute presentations from each of the four, the conference split into breakout groups in order to meet the speakers and discuss the topics in more detail.

First, acclaimed author and attorney Scott Turow presented his thoughts on Law and Literature and his efforts to bring the realities of the legal system to laypersons and to explain to them how law is applied. Next, Dr. J. Donald Capra, M.D., President and Scientific Director of the Oklahoma Medical Research Foundation, speaking to Law and Science, offered a startling perspective about the advances in the scientific process and how we continue to be handicapped by them. Third, Professor and Deputy Dean Elizabeth Garrett's synopsis of Law and Economics emphasized the overlap of the political process and the law, possibly presaging their intertwining in the November 2000 election. Finally, Julian B. Knowles, a British barrister specializing in extradition and human rights law, remarked on his experience defending General Augusto Pinochet and upon that case's unique implications for international law.

OTHER EVENTS

The conference was also peppered with structured yet informal social gatherings that gave conference members further opportunities to interact with conference panelists, including receptions, state luncheons, and even the ever popular circuit sing-along. The Circuit's History Committee sponsored a "Fireside Chat" with then-Chief Judge Stephanie K. Seymour. Host U.S. Circuit Judge Monroe G. McKay provided the questions and conversation that allowed Judge Seymour to describe her remarkable career as one of the early female figures in the circuit's judiciary. As indicated earlier, the conference program also included activities for young children, focusing on particular Supreme Court opinions from the October 1999 Term.

The conference concluded with greetings and remarks from the President of the American Bar Association, William G. Paul. He was followed by our own Circuit Justice, Justice Steven Breyer. Justice Breyer is a superb speaker, and his comments about the last legal year were sprinkled with wit and wisdom. His presentation remains one of the most popular events.

The formal conference closed with the presentation of the official portrait of U.S. Circuit Judge John C. Porfilio. The presentation ceremony served as an opportunity to recognize and honor Judge Porfilio's great contributions as a public servant. Judge Porfilio's service has encompassed private practice, as well as service as a state attorney general, a bankruptcy judge, trial judge, and appellate judge. Judge Henry concluded his introduction of Judge Porfilio by playing a tape of Judge Porfilio singing the humorous song presented at the musical program dedicating the Byron White U.S. Courthouse in Denver, Colorado, in 1994:

Judge Porfilio's Lament
(sung to the tune of *"O Sole Mio"*)
My secret dream is–to be Pavarotti,
To have a million–loyal fans adoring–
Instead I am judging–and it gets so boring.
If only I could–just be Pavarotti.
No more o-pin-ions–all day I'd croon.
My fans and minions–would simply swoon–
My life–is not the worst–
But opera tenors–don t get re-versed!
Res judicata–forum non conveniens,
Stare decisis–status quo ad nauseum,
Caveat emptor–in rem et personam,
Corpus delicti–quare clausum fregit.
Certi-o-ra-ri-alter e-go
Nolo contendere–ex post fac-to.
Ex parte–non bona fide–
My fav'rite words–are "cert. denied!"

WHY DON'T MORE LAWYERS ATTEND?

As the following speeches and discussions show, a vast quantity of useful information is conveyed to conference attendees. In addition, continuing legal education (CLE) hours are offered. And, beyond the substantive material, the conference offers much opportunity for discussion among participants in convivial as well as more formal settings. The biennial conference will next be held on June 27 to June 29, 2002.[6] Because so many participants favored Santa Fe with its constantly renewed plays, operas, and educational and cultural events, we are returning. In addition to more programs related to practice issues, we are anticipating a "mentoring" program that will allow interested participants to have

6. Information about the next judicial conference can be obtained from Christine Lighthall in the Circuit Executive's Office by phone 303-335-2823; fax 303-335-2838; or email: Christine_Lighthall@ca10.uscourts.gov.

small group gatherings with individual judges to discuss advocacy. Along with the very popular "regulars" like Professor Chemerinsky's review and Justice Breyer's address, we will once again have some broadening programs discussing the intersection of law and science, art, and other disciplines.

We are indebted to the *New Mexico Law Review* for its creation of this special issue that offers much of what the conference sought to offer to a wider audience. But the benefits of conference attendance cannot be conveyed other than by attending. It remains surprising to us that more lawyers do not take advantage of this remarkable biennial gathering. Speaking, as we rarely do, for our colleagues, the conference truly is an effort by federal judges to reach out to lawyers and assist their advocacy. The judges and staff of the circuit spend many months planning the judicial conference. It presents a unique opportunity for lawyers, judges, and academics to come together to discuss the practice of law and the important legal issues of the day. The Planning Committee received very positive responses from the attendees at this year's conference. As a circuit, we believe all lawyers and academicians should attend so that they can share in this important dialogue that we hope, ultimately, will result in a more well informed bench and bar.