"A WATCHDOG FOR THE GOOD OF THE ORDER": THE NINTH CIRCUIT'S EN BANC COORDINATOR*

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I. INTRODUCTION

Little is written about en banc sittings of the United States Courts of Appeals, and en banc decisions are often excluded from studies of their judges' voting. What is written tends to be based on outcomes and votes in en banc cases, with attention to factors affecting them. But what of the process leading to granting rehearing en banc? Understanding that process would be important in learning more about how the courts of appeals deal with their dockets, about which relatively little is known. Lawyers may not be much concerned about mechanisms of en banc rehearing so long as clients' cases proceed expeditiously, but they might want to know about activity, short of a full en banc decision, that takes place after a panel opinion when either

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* The tagline "A Watchdog for the Good of the Order" originated with Judge J. Blaine Anderson. *See* Memo. From J. Blaine Anderson, J., U.S. Ct. of App. for the Ninth Cir., to Alfred T. Goodwin, J., U.S. Ct. of App. for the Ninth Cir. (July 29, 1987) (available in the Alfred T. Goodwin Papers at the Oregon Historical Society, Portland, Oregon [hereinafter "Goodwin Papers"]). The author reviewed the Goodwin Papers while researching this article; the unpublished documents cited in these notes—including the memorandum from Judge Anderson to Judge Goodwin referred to earlier in this note and other internal Ninth Circuit memoranda—are available in the Goodwin Papers. The author has made every effort to ensure the accuracy of citations to, and quotations from, those documents, but the editors of *The Journal* have not had the opportunity to review documents from the Goodwin Papers cited or referred to in this article. In the interest of brevity, Judge Anderson, Judge Goodwin, and other judges of the Ninth Circuit, as well as Ninth Circuit law clerks, secretaries, and staff, are, after once being identified by title, referred to simply by name in later citations to internal Ninth Circuit memoranda.

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a panel rehearing is denied or an amended opinion is released, the latter a sure indication that some post-panel activity has taken place.

Our deficit of knowledge about en banc-ing of cases results in large measure from the fact that after a three-judge panel files its disposition, decisionmaking takes place in a black box until announcement that the panel opinion has been amended, rehearing is denied, or the case has been taken en banc. We know there is activity, although exactly *what* has taken place is not visible. Dissents from denial of rehearing en banc may also cast some light on judges' views, and some courts make public the judges' votes on whether to rehear en banc, but the resulting information remains fragmentary.[1]

Frequent misunderstanding of how en banc hearings originate shows why we need to know more. While it is often assumed that parties' petitions for rehearing en banc (PFREB) drive the en banc process,[2] and this is reinforced by media stories of losing parties "considering asking the full court to rehear the case," relatively few en bancs result from the petitions. Even when filed, they may not be the trigger for rehearing because a judge may have already made an en banc call or said one is forthcoming. Indeed, the initiation of the process that might lead to a positive vote to go en banc often originates not from a member of the panel but from another judge of the court. That judge, having monitored the panel's ruling, makes a *sua sponte* en banc call,[3] often because of dislike for the panel's decision,[4] although a dissenter on the panel may

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1. *But see* Arthur D. Hellman, *Getting It Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals*, 34 U. Cal. Davis L. Rev. 425 (2000) For a primer on en banc procedure, see Stephen L. Wasby, *The Supreme Court and Courts of Appeals En Bancs*, 33 McGeorge L. Rev. 17, 19–23 (2001).

2. While parties routinely file petitions for rehearing (PFRs), they do not always accompany them with suggestions for rehearing en banc, perhaps because they are concerned only with the results in their own cases, not with broader circuit precedent.

3. Hellman, *supra* n. 1, at 443; Douglas H. Ginsburg and Donald Falk, *The Court En Banc: 1981–1990*, 59 Geo. Wash. L. Rev. 1008, 1013 (1991). There is "no doubt that the judges of the Ninth Circuit Court of Appeals engage in a substantial amount of opinion monitoring." Arthur D. Hellman, *The Unkindest Cut: The White Commission Proposal to Restructure the Ninth Circuit*, 73 S. Cal. L. Rev. 377, 395 (2000).

4. As to why courts of appeals take cases en banc, see Stephen L. Wasby, *How Do Courts of Appeals En Banc Decisions Fare in the U.S. Supreme Court?* 85 Judicature 182, 183–84 (Jan.–Feb. 2002).

initiate the en banc call, and at times a panel itself does so prior to disposition upon identifying intra-circuit conflicts.[5] When a judge initiates the process, the parties may then be asked to comment on whether the case should be taken banc, thus reversing the order of events in which party petition precedes judicial action.

We know that each court of appeals has a chief judge—who is chief of the entire circuit, not only of the appellate court[6]—and non-judicial staff such as the clerk of court or court executive, and, for the circuit as a whole, the circuit executive. And they have governing bodies, a meeting of all the judges wearing their administrative hats or a smaller executive committee, and some appellate judges participate in the circuit council of both circuit and district judges. Yet only in the Ninth Circuit is there another important judicial position, the en banc coordinator.

In some courts of appeals, panels may circulate to the entire court all opinions to be published,[7] in an informal en banc process in which other judges can raise questions, with that circulation and any resulting revisions thought to decrease the likelihood of formal en banc consideration.[8] Yet, even where such practices exist, and more particularly where they do not, post-panel activity requires supervision to be kept within channels. If, after filing of a panel's disposition, the litigants file only a petition for panel rehearing (PFR) and no other judge suggests altering the opinion, the matter remains within the purview of the panel alone. When, however, an off-panel judge, with either an implicit or explicit threat to call for en banc consideration, seeks to have the panel amend its ruling, there

5. *See* Hellman, *supra* n. 1, at 455 n. 104; *see generally* Hellman, *supra* n. 3.

6. *See* Stephen L. Wasby, *The Work of a Circuit's Chief Judge*, 24 Just. Sys. J. 63, 63 (2003).

7. The D.C. Circuit makes particular use of procedures short of an official en banc sitting—perhaps we should call it a "quasi-en banc procedure"—in this situation. A panel recognizing that the Supreme Court's action has superseded circuit precedent can circulate its disposition to the whole court, and if the court agrees, a so-called "*Irons* footnote" is added to the pending opinion, indicating the full court's agreement to overturn circuit precedent. *See* Ginsburg & Falk, *supra* n. 3, at 1015 (referring to *Irons v. Diamond*, 670 F.2d 265 (D.C. Cir. 1981)).

8. *See generally* Hellman, *supra* n. 1; Ginsburg & Falk, *supra* n. 3; Michael S. Kanne, *The Non*-Banc En Banc*: Seventh Circuit Rule 40(e) and the Law of the Circuit*, 32 S. Ill. U. L.J. 611 (2008).

may be many communications among the judges, and it might be useful to have someone superintend the process. Perhaps in a small court of appeals, this en banc process can function without difficulty, operating with the invisible hand of implicit coordination, but, particularly in larger appellate bodies, a coordinating mechanism would seem to be necessary. For the Ninth Circuit, the en banc coordinator, directing the process by which the court considers whether to hear a case en banc, is that mechanism.

The position of en banc coordinator was created by a chief judge who believed that other judges should be reminded about deadlines not by court staff but by a judge, who, after the panel disposition was filed, would supervise matters leading to the vote on hearing a case en banc. The Ninth Circuit's Clerk of Court could monitor the process of deciding to rehear a case en banc, and more recently someone in that office has done so, but the Circuit has given to a judge the direction of the process up to and including the vote on whether to (re)hear the case en banc, including judges' "stop-clock" requests,[9] the exchange of memos supporting and opposing an en banc call, and the balloting on whether to proceed en banc.

We do not know very much about how the en banc coordinator's position might operate across many courts because it exists in only the Ninth Circuit. There one judge, Alfred T. Goodwin, served as en banc coordinator from the creation of the position in the early 1970s until the early 1990s, through his two-and-one-half year tenure as chief judge and until 1993, roughly two years after taking senior status.[10] His tenure thus extended from a smaller court with more informal procedures to a much larger one that perforce operated with greater formality. The length of his time in the position allows us to learn about the coordinator's position by examining Judge Goodwin's actions.

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9. A "stop clock" is a suspending of the time by which en banc rehearing must ordinarily be sought, used while a judge is seeking to persuade the panel to alter its result or amend its opinion.

10. Judge Goodwin joined the Ninth Circuit in 1972. He had served as a state trial judge, almost ten years as a member of a state supreme court, and two years as a federal district judge, during which time he sat with some frequency by designation with the Ninth Circuit. *See generally* Stephen L. Wasby, *Alfred T. Goodwin: A Special Judicial Career*, 15 W. Leg. History 9 (2002).

This article focuses on Judge Goodwin's service as en banc coordinator. It is based on his papers and on the author's interviews with him. The judge's papers include case files containing communications among judges on any activity related to possible en banc rehearing, that is, for the period after the filing of the panel's initial decision,[11] judges' calls to go en banc, and the votes on whether to do so, but also, short of that, messages when any off-panel judge asked the panel to reconsider its result and wording.[12] The article begins with treatment of the en banc coordinator's position itself, with its origins and development. Drawing on actual cases, it continues with what the en banc coordinator has in fact done, including his role in developing the court's formal en banc policy. The article ends with brief attention to operation of the en banc coordinating function since Judge Goodwin stepped down from the position.

II. THE EN BANC COORDINATOR

A. Origins and Continuation in Position

The position of en banc coordinator did not exist in the Ninth Circuit before the early 1970s. The court once had fewer than a dozen active judges and then only thirteen until 1978. Although memos were exchanged by mail,[13] the judges were able to discuss and vote on taking cases en banc at meetings of the Court and Council.[14] Moreover, there was little en banc traffic, in part because long-time Chief Judge Richard Chambers discouraged en bancs. He is said to have believed in the Second Circuit's view—that if a case was important enough for en banc rehearing, it was important enough for the Supreme Court to

11. The court used internal e-mail starting in the mid-1980s, but those transmissions are reduced to hard copy for the working file in a case. *See generally* Stephen L. Wasby, *Technology and Communication in a Federal Court: The Ninth Circuit*, 28 Santa Clara L. Rev. 1 (1988).

12. *See generally* Goodwin Papers, *supra* n. *.

13. Stephen L. Wasby, *Communication within the Ninth Circuit Court of Appeals: The View from the Bench*, 8 Golden Gate U. L. Rev. 1, 6–7 (1977); *see also* Wasby, *supra* n. 11.

14. The Council then was the court of appeals judges only; with the adoption of the new federal judicial discipline statute in 1980, circuit councils included district judges as well.

hear it, so the court of appeals should let the case go there without further delay.[15] No more than four en banc cases were decided each year between 1970 and 1980 except for 1974–76, with a record eighteen handed down in 1974, including half a dozen en banc rulings on border searches. During this period, calls to rehear cases en banc often resulted from other judges' unhappiness at decisions by the two most liberal judges, Walter Ely and Shirley Hufstedler, or from Judge Hufstedler as to rulings by the court's more conservative majority.

Even with relatively few en banc requests, "[e]ach time a call came, there was much paperwork."[16] This led Chief Judge Chambers, who, because he "had chief judge stuff to do" and "didn't have enough secretarial help" to manage en banc paperwork, to ask Judge Goodwin "to take care of shuffling cases—to make sure they didn't get delayed."[17] There were additional reasons why Chief Judge Chambers created the position:

> (1) He believed that Article III judges, not staff, should remind other judges of deadlines. ("Judges talk to judges.").
>
> (2) He thought Judge Goodwin might be the court's chief judge one day (as he was, from 1988-1991), and that undertaking the duties of coordinator "would be a training ground."
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> (3) He further believed that Judge Goodwin "had diplomatic skills and attention to detail."[18]

(Judge Goodwin has said, "What I had was Helen Murdock," referring to his long-time secretary, who was good on attention to detail and would keep track of matters.[19]) In short, "Chief Judge Chambers was outsourcing to someone he could work with."[20]

The en banc coordinator position remained separate from the chief judgeship throughout Chief Judge James Browning's

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15. Interview with Alfred T. Goodwin, J., U.S. Ct. of App. for the Ninth Cir. (June 22, 2009).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

long tenure (1976–88). Judge Goodwin did try to relinquish the position shortly before he became chief judge. During court discussion of not burdening one judge with the coordination task, he asked for volunteers to assume the position, but there were none, and his colleagues said, "Let him continue to do it," so he retained the position while chief judge.[21] And even after he stepped down and took senior status, his successor, Judge J. Clifford Wallace, asked him to be coordinator until Wallace was "comfortable in the chief judgeship."[22] It took until late 1993 before a new coordinator was selected—Judge Mary Schroeder, herself to become chief judge after Judge Proctor Hug, Jr.

Judge Goodwin's role as en banc coordinator was perhaps "largest" under Chief Judge Chambers, who was not a hands-on administrator and allowed Goodwin pretty much a free hand to develop the position.[23] Indeed, during Chambers' tenure, Judge Goodwin not only kept the tally of judges' votes on whether to hear a case en banc but also helped supervise the process *within* the en banc court, including keeping the tally on votes on the proposed majority opinion. He even sought colleagues' views of two competing panel opinions to see which judge might be assigned the en banc case. This, along with other aspects of the considerable early 1970s border-search case activity, for all purposes made the en banc coordinator the chief judge of the en banc court, as Chief Judge Chambers's hand was seldom to be seen in en banc matters.

Chief Judge Browning, in contrast, assumed supervision of cases to which en banc rehearing had been granted. This served to focus Judge Goodwin's work as en banc coordinator almost exclusively into the period when en banc hearing was being considered, including the vote on taking a case en banc, although there were some cases when Browning, as chief judge, made suggestions to the en banc coordinator, as when he asked to have included "as an option on the en banc ballot" holding a

21. *Id.*

22. *Id.*

23. This is not to say that Chief Judge Chambers played no part in the process leading to en banc hearing. For example, he suggested to two judges that they place on the agenda of the court's Council a case to be considered for en banc treatment. Memo. from Richard Chambers, J., U.S. Ct. of App. for the Ninth Cir., to several judges, *Re:* Wiren v. Eide (Oct. 16, 1975) (addressing *Wiren v. Eide*, 542 F.2d 757 (9th Cir. 1976)).

case for a Supreme Court ruling.[24] Judge Browning's chief judge role could hardly be said to diminish Judge Goodwin's position, as his involvement in cases taken en banc had not been part of what Judge Chambers had originally sought to give the coordinator. Put differently, starting with Chief Judge Browning, the exercise of the position was as it was thought it should be, which left plenty of work to be done. And there were some instances in which Judge Goodwin continued to operate as coordinator *within* the en banc. He was, for example, in charge of gathering votes and arranging opinions in *United States v. Loud Hawk*[25] during 1977–78. There were also cases in which Judge Goodwin handled all activity, including within the en banc court, even though Chief Judge Browning was participating,[26] and other cases in which he, not the en banc opinion's author, collected votes on rehearing of an en banc ruling.[27]

In 1980, with the Ninth Circuit's adoption of a limited en banc (LEB) panel composed of the chief judge and ten other judges drawn by lot,[28] Judge Goodwin still supervised the decision *whether* to go en banc but was not involved in en banc cases for which he was not drawn. This reinforced somewhat the separation of the en banc coordinator's work in the *pre*-en banc period and the chief judge's work supervising communication *within* the en banc courts. When he was chief judge, Judge Goodwin, because he sat in all en banc cases, carried out both the en banc coordinator's functions and those of the court's chief judge.

The growth in the court's size, which led to its adoption of the LEB, changed the context in which the en banc coordinator worked. Over time, the en banc process in general, and monitoring time limits in particular, became more formalized. For example, where earlier, judges would indicate their votes on

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24. Memo. from James Browning, C.J., U.S. Ct. of App. for the Ninth Cir., to Associates, *Re:* Saenz v. I.N.S. (Sept. 9, 1986) (addressing *Saenz v. I.N.S.*, 792 F.2d 144 (9th Cir. 1986) (tbl.), *opinion withdrawn*, 814 F.2d 1493 (9th Cir. 1987)).

25. 628 F.2d 1139 (9th Cir. 1979) (en banc).

26. *See e.g. id.*

27. *See e.g. U.S. v. Cook*, 608 F.2d 1175 (9th Cir. 1979); *Harris v. Super. Ct.*, 500 F.2d 1124 (9th Cir. 1974), *overruled, Luce v. U.S.*, 469 U.S. 38 (1984).

28. In 2005, there was an expansion to fifteen judges for two years before reversion to eleven judges.

en banc in memos arguing for or against rehearing, they then began to use ballot forms. And procedures became "a little more complicated," as a result of "[t]he increase in judges [to twenty-three and then twenty-eight], the increase in number of stop clocks and calls for en banc votes, plus . . . new rules."[29]

Judges who filled positions created by the Judgeship Bill of 1978[30] more frequently called for en banc rehearing. Indeed, the new judges were barely on the court before they spoke out against an en banc decision made by the "old" court[31] in a case involving the emotional issue of a search in which police had bribed a small child to reveal drugs, leading to his mother's conviction.[32] A judge who had just joined the court asked for an opportunity to comment, while another even sought a rehearing of the ruling, although the request was defeated. Judge Goodwin proposed that the matter be discussed at the next court meeting, but almost immediately a number of judges, including Chief Judge Browning, responded individually by indicating that it would be inappropriate as well as at odds with the court's new rules for the limited en banc court. The action by these judges saved the en banc coordinator the onus of resolving the problem, but at its meeting, the court agreed to allow any judge to call for rehearing the court's en banc decision. Such a call was made but did not receive a majority.

B. En Banc Coordinator and Judge

Through Judge Goodwin's entire service as en banc coordinator, he remained a full-time court of appeals judge, who, like anyone else, had assignments to three-judge panels and participated in the court's en banc cases as only one judge among many. He received no calendar relief—no equivalent of an academic's "course reduction"—for his administrative work,

29. Memo. from Adell Johnson, Secretary, to Alfred T. Goodwin (July 17, 1987).

30. Pub. L. No. 95-486, § 3, 92 Stat. 1629 (1978) (providing in section 3(a) that "[t]he President shall appoint . . . ten additional circuit judgeships for the ninth circuit" and further providing in section 3(c) that "the table contained in [28 U.S.C. 44] will . . . reflect the changes in the number of judgeships made by this Act," and amending that table to show this change in the number of judges on the Ninth Circuit).

31. The en banc court for this case initially contained eleven judges, but only nine judges remained after two took senior status during its consideration.

32. *U.S. v. Penn*, 647 F.2d 876 (9th Cir. 1980).

nor did he seek it: "Our case load was much smaller than that of today's active judges, and it never occurred to me to ask for a reduction in calendars."[33] Like all the other judges, with his law clerks' aid he monitored other judges' rulings to see if they were en banc-worthy. At times his clerks advised whether he should call for an en banc rehearing, something he seldom did, and they would comment on off-panel judges' memos stopping the clock or supporting an en banc call. They would also make suggestions on how he should vote on such calls.

When Judge Goodwin served on a panel that became involved in activity directed toward en banc hearing, it was particularly obvious that he had dual roles—as a judge with a vote, and as en banc coordinator. In one case, he wrote a message to his panel colleagues "[a]s en banc coordinator as well as a member of the . . . panel."[34] In a case where there was a question whether a panel should seek en banc hearing before filing its disposition, he suggested modifying the panel's published opinion rather than creating an en banc situation, but the panel did make a *sua sponte* en banc call.[35]

Judge Goodwin attempted to keep his judge and coordinator roles separate. In one instance, in a case in which he had written an en banc dissent, rehearing of the ruling was sought, so he asked Chief Judge Browning to serve in his stead in calling for the vote.[36] And in most matters, the coordinator role and his role as a member of the court did not bleed into other. As en banc coordinator's role, he was almost invariably a neutral transmitter of requests or information, including rules interpretations. That he did not often stop the clock in cases or call for en banc served to minimize the blurring or conflict of roles.[37] And he was well aware that he held two related roles. In

33. Email from Alfred T. Goodwin to author (Mar. 1, 2010, 6:03 p.m. EST).

34. Memo. from Alfred T. Goodwin to Panel, *Re:* Pettibone v. Cupp, (June 4, 1982) (addressing *Pettibone v. Cupp*, 666 F.2d 333 (9th Cir. 1982)).

35. Memo. from Alfred T. Goodwin to Panel, *Re:* U.S. v. Zolin (Sept. 15, 1987) (addressing *U.S. v. Zolin*, 809 F.2d 1411 (9th Cir.), *vacated & set for rehearing en banc*, 832 F.2d 127 (9th Cir. 1987), *vacated*, 842 F.2d 1135 (9th Cir. 1988) (noting that rehearing had been improvidently granted), *cert. granted*, 488 U.S. 907 (1988), *aff'd in part & vacated in part*, 491 U.S. 554 (1989)).

36. Memo. from James R. Browning to Associates, *Re:* Penn (June 26, 1980).

37. In one of these cases, Judge Goodwin's first four memos to his colleagues were from him as a regular member of the court; they related to his stopping the clock. Only late

one case with many memos exchanged, on some days he sent two memos, one in each capacity, and as en banc coordinator, he was careful to refer to "Judge Goodwin" in describing his actions as a member of the court, but, more than that, he specifically noted that he held both roles.[38] When he continued to serve as en banc coordinator once he was chief judge, he handled all matters in the en banc court itself, as the chief judge would normally do, and his communications to his colleagues were from "Chief Judge Goodwin."[39]

At times, however, the roles as judge and en banc coordinator did blur, as when, after the Supreme Court's remand of the *Bowen* border search case,[40] Judge Goodwin circulated his proposed panel opinion to the full court, leading to scattered votes for hearing en banc before the panel itself called for an en banc vote, and this opinion served as the memorandum supporting the call.[41] In another case also indicating the melding of roles, he called for an en banc vote without panel action and then set the time for the exchange of memos;[42] he also recommended against recalling the mandate in another case, action that would have allowed an en banc vote, and said he could live with the present opinion until a better case came along.[43] In another case he took a position on the issue at the heart of an en banc call: whether the panel or an en banc court should proceed when the Supreme Court had undermined past cases.[44] In yet another case, he said an off-panel judge's

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in the process that led to an amended opinion did he send a memo as en banc coordinator, saying that the panel could deny rehearing if there was no en banc call by a certain date. *See U.S. v. Castiglione*, 876 F.2d 73 (9th Cir. 1988).

38. Memo. from Alfred T. Goodwin, to Associates, *Re:* U.S. v. Giese (Jan. 12, 1979) (addressing *U.S. v. Giese*, 569 F.2d 527 (9th Cir. 1978), *superseded*, 597 F.2d 1170 (9th Cir. 1979) (noting that the original opinion had been withdrawn to allow for a vote on hearing the case en banc)).

39. In one case during this period, another judge referred to Judge Goodwin as "our beleaguered en banc coordinator" without mentioning his chief judge status. Memo. from J. Blaine Anderson to Associates, *Re:* Cook (May 16, 1979).

40. *U.S. v. Bowen*, 500 F.2d 960 (9th Cir. 1974) (en banc) (on remand).

41. *See* Memo. from Alfred T. Goodwin to Associates, *Re:* Bowen (Sept. 10, 1973).

42. Memo. from Alfred T. Goodwin to Active Judges, *Re:* In re Gustafson (Feb. 1, 1980) (addressing *In re Gustafson*, 619 F.2d 1354 (9th Cir. 1980)).

43. Memo. from Alfred T. Goodwin to Associates, *Re:* U.S. v. Robinson (Nov. 15, 1976) (addressing *U.S. v. Robinson*, 536 F.2d 1298 (9th Cir. 1976)).

44. Memo. from Alfred T. Goodwin to Associates, *Re:* Le Vick v. Skaggs Cos., Inc., (May 24, 1983) (addressing *Le Vick v. Skaggs Cos., Inc.*, 701 F.2d 777 (9th Cir. 1988)).

memorandum "has caused me to reexamine our opinion" and to respond with a suggestion that the panel substitute some language.[45]

There were also times when he inserted his own views into communications and took a position relating to en banc process, as when he suggested that the court should "not try to vote on something as important as the adoption of a uniform standard [of 'mismanagement by defense counsel'] by the circuit without hearing argument or at least having a collegial discussion around the conference table."[46] At times he even put his thumb on the scales about taking a case en banc, as when he suggested that a panel reconsider its disposition in view of the Supreme Court's decision in a related case, to preclude the need for en banc activity.[47] In a more obvious instance, when a panel, upon issuing its opinion, sought en banc hearing, Judge Goodwin, while acknowledging that such a request "ordinarily . . . is more or less cheerfully ratified by a majority of the judges," stated that he was "in doubt about the purpose of the proceeding," which he found "unclear from the memo" so "the panel should provide further enlightenment why they wish to have this case reheard en banc" and should supply a list of "a specific group of cases it would like to see overruled." With that list in hand, he "continue[d] to question whether this case is the appropriate vehicle for getting us back on one track."[48] And in another instance where he did not remain fully above the fray and clearly exercised something more than a mere coordinating function, he indicated his preference as to which of two cases should be taken en banc. Injecting his choice was even more clear when, in the substantial en banc activity concerning border searches, he set out several options for disposition of a case and, showing the agenda-setting in which he could engage, selected

45. Memo. from Alfred T. Goodwin to Panel, Stephen Reinhardt, *Re:* U.S. v. Neal, (Oct. 29, 1992) (addressing *U.S. v. Neal*, 976 F.2d 601 (9th Cir. 1992)).

46. Memo. from Alfred T. Goodwin to Panel, *Re:* Cooper v. Fitzharris (July 12, 1977) (addressing *Cooper v. Fitzharris*, 551 F.2d 1162 (9th Cir.), 586 F.2d 1325 (9th Cir. 1978) (en banc) (affirming panel)).

47. Memo. from Alfred T. Goodwin to Associates, *Re:* Saenz (Mar. 11, 1987).

48. Memo. from Alfred T. Goodwin to Panel, *Re:* Bates v. Sullivan (Jan. 26, 1990) (addressing *Bates v. Sullivan*, 894 F.2d 1059 (9th Cir. 1990)); Memo. from Alfred T. Goodwin to Panel, *Re:* Bates (Feb. 6, 1990) (reminding recipients that Arthur Hellman, a law professor who follows the Ninth Circuit's en banc activity, "is watching").

one option "for the pragmatic reason that this is the one the author would vote for." He did, however, recognize that his suggestion "will not meet with unanimous approval," and he said further that he was "merely trying to place something before the court upon which we can express our individual views."[49]

He could also be seen inserting his views when, in the border search cases, he argued that the question of retroactivity should be separated "from the other compound questions involved in the 'functional equivalent' cases,"[50] although he may have offered this comment only to facilitate the court's work. It is also possible that he was stating his own views when he noted "two complications" to a clean resolution of the retroactivity question in the same set of cases.[51] His comments clearly went to the substance of a case when the panel author was considering revision of an opinion on an Indian tribe's assertion of criminal jurisdiction over an individual when neither that individual nor the crime victim were members of the tribe. There he suggested, "I believe it is important to look at the local (tribal, etc.) ordinance in each case," because, while he did not "know whether Indian tribal ordinances are federal legislation or not, . . . [t]hey present federal questions," and he talked of the theory under which he and his Oregon district court colleagues had operated and provided examples with respect to native Americans in Oregon.[52]

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49. Memo. from Alfred T. Goodwin to Associates, *Re:* U.S. v. Grijalva-Carrera (May 16, 1974) (addressing *U.S. v. Grijalva-Carrera*, 500 F.2d 592 (9th Cir. 1974) (en banc) (*per curiam*)).

50. Memo. from Alfred T. Goodwin to All Active Judges, Others, *Re:* Grijalva-Carrera (Dec. 14, 1973).

51. Memo. from Alfred T. Goodwin to Associates, *Re:* Grijalva-Carrera, (Mar. 28, 1974) (available in Goodwin Papers as part of *Bowen* materials). In a later case, he drew on that earlier experience in writing to his colleagues: "Members of the court will recall that a good deal of paperwork was occasioned by the failure of our court to deal with the retroactivity problems in the slipstream of *Almeida-Sanchez*," he wrote, and then expressed the hope "that we can avoid some of this by focusing on these problems on a pre-need basis." Memo. from Alfred T. Goodwin to Associates, *Re:* Cooper (Sept. 9, 1977).

52. Memo. from Alfred T. Goodwin to Melvin T. Brunetti, J., U.S. Ct. of App. for the Ninth Cir., *Re:* Duro v. Reina (Apr. 7, 1988) (addressing *Duro v. Reina*, 821 F.2d 1358 (9th Cir.), *vacated*, 851 F.2d 1136 (9th Cir. 1987), *rev'd.*, 495 U.S. 656 (1990), and including a "cc: Associates").

1. Assistance

Judge Goodwin had assistance in carrying out his coordinator's tasks. The General Orders permitted another judge to perform the coordinator's duties during the latter's absence, and in such a situation, Chief Judge Browning granted an extension of time for a memorandum.[53] But Judge Goodwin's staff handled much of the day-to-day work. He relied on his chief secretaries,[54] who kept records as to relevant dates and would "ticker" cases to as reminders to take action or to ask the judge what they or he should do, but their role was far greater than that of time-keeper. They would initiate inquiries to the judge, as when one asked if en banc voting should be deferred until a related en banc case was decided, and, if so, whether counsel should be told.[55] They might enlist other judges' secretaries, asking them to remind their judges of certain acts. They might also respond directly to other chambers' inquiries, for example, when another judge (or the judge's secretary), not having heard about a case, would ask for its status,[56] or, on a more important matter, they might tell another judge's clerk when a stop-clock would be timely.[57] The secretaries would draft memoranda for the judge's signature, and he would edit these only lightly, even on matters such as whether a panel seeking en banc hearing should ask for briefs from the parties about conflict with another case or if the response time for

53. *See* Memo. from Alfred T. Goodwin to All Active Judges, *Re:* Scott v. Machinists Automotive Trades Dist. Lodge No. 190 (Nov. 30, 1987) (addressing *Scott v. Machinists Automotive Trades Dist. Lodge No. 190*, 815 F.2d 1281 (9th Cir.), *aff'd in part, vacated in part & remanded*, 827 F.2d 589 (9th Cir. 1987)).

54. For a discussion of the function and responsibilities of an appellate judge's secretaries, see Stephen L. Wasby, *A Judicial Secretary's Many Roles: Working with an Appellate Judge and Clerks*, 7 J. App. Prac. & Process 151 (2005).

55. Memo. from Adell Johnson to Alfred T. Goodwin, *Re:* Jeffers v. Ricketts (undated) (handwritten) (addressing *Jeffers v. Ricketts*, 832 F.2d 476 (9th Cir. 1987), *reversed*, 497 U.S. 764 (1990)); Memo. from Alfred T. Goodwin to Panel, *Re:* Jeffers (Mar. 1988).

56. Memo. from Adell Johnson to Harry Pregerson, J., U.S. Ct. of App. for the Ninth Cir., *Re:* Scott (July 13, 1987).

57. *See* Memo. from Jeff [no last name indicated], Law Clerk, to Alfred T. Goodwin, *Re:* Gutierrez v. Mun. Ct. (May 16, 1988) (addressing *Gutierrez v. Mun. Ct.*, 838 F.2d 1031 (9th Cir.), 861 F.2d 1187 (9th Cir. 1988) (denying petition for rehearing and rejecting suggestion for rehearing en banc)).

memos among the judges should be started.[58] At times they provided the judge with options. When, after a judge had accommodated a panel author by withdrawing a stop clock and the panel's delay in revising its opinion bordered on a "pocket veto,"[59] the secretary wrote alternate messages to be sent and asked if Judge Goodwin should let the judge get away with it or should simply start responsive time for memoranda and notify the judge.[60]

The secretaries would also prod the judge to take necessary action, on matters both simple, such as saying it was time for a judge to make a call for an en banc vote, and more complex, as when a secretary's comment about a possible "pocket-veto"[61] led Judge Goodwin to call the tardy judge, and when the secretary suggested a memo reminding the offending judge of the new General Orders.[62] With nothing forthcoming, she then said he had to act even if it made him a "common scold," and he restarted the time for exchange of memos as if the panel had not sought to revise its opinion.[63] The secretaries might even act directly themselves, for example, extending time for memoranda, or telling the Clerk to hold up filing a denied petition for rehearing.[64] When a stop clock was filed at the last

58. *See e.g.* Memo. from Alfred T. Goodwin to Associates, *Re:* Landreth v. Commr., (Oct. 13, 1987) (addressing *Landreth v. Commr.*, 859 F.2d 643 (9th Cir. 1988)); Memo. from Alfred T. Goodwin to Associates, *Re:* Landreth (Sept. 22, 1987).

59. A "pocket veto" occurred when a judge said a panel opinion would be revised but then consumed an extended time without producing the revision.

60. Memo. from Adell Johnson to Alfred T. Goodwin, *Reminder Memo Re:* Walker v. Endell (May 5, 1988) (addressing *Walker v. Endell*, 828 F.2d 1378 (9th Cir.), *superseded*, 850 F.2d 470 (9th Cir. 1987); Memo. from Adell Johnson to Alfred T. Goodwin, *Re:* Walker v. Endell (Dec. 30, 1987).

61. Memo. from Adell Johnson to Alfred T. Goodwin, *Tickler Memo Re:* Duro (May 5, 1988).

62. *See* Memo. from Alfred T. Goodwin to Betty Binns Fletcher, J., U.S. Ct. of App. for the Ninth Cir., *Re:* U.S. v. Whitney (Dec. 11, 1987) (addressing *U.S. v. Whitney*, 785 F.2d 824 (9th Cir. 1986), *amended*, 838 F.2d 404 (9th Cir. 1988)). The secretary's language to Judge Goodwin about the delaying judge was direct: "[U]nless we send her something like the [proposed] memo she can delay this indefinitely." *See* Memo. from Adell Johnson to Alfred T. Goodwin, *Re:* Whitney (undated).

63. Memo. from Adell Johnson to Alfred T. Goodwin, *Re: Whitney* (Dec. 30, 1987); Memo. from Alfred T. Goodwin to Associates, *Re: Whitney* (Dec. 30, 1987) (incorporating Johnson's suggestions).

64. Consider, for example, the situation in which Adell Johnson told Judge Norris how long he could call for en banc rehearing and reported that she had told the Clerk not to file the PFR in the case, which the panel had denied. *See* Memo. from Law Clerk [not

minute—after the panel's presiding judge sent an order denying rehearing to be filed—Goodwin's chief secretary placed a hold on that filing, causing the panel judge to ask that the hold be released.[65] And secretaries were involved in en banc policy matters. Adell Johnson regularly suggested recommendations to be made to the court's Executive Committee and, in an important instance of staff input, drafted a rewrite of the General Order provisions on the time for responsive memos. Showing her continued awareness of the coordinator's role *vis à vis* his colleagues, she said that allowing the coordinator "automatically [to] start the time after a given number of days . . . would reduce the times the en banc coordinator must play the court's 'common scold' in trying to get the panel to do its work."[66]

Judge Goodwin's law clerks also provided assistance. He did not use all of them for work on en banc matters, as they had their regular load of cases for which to prepare bench memoranda, draft and/or edit opinions, and monitor other judges' opinions,[67] but he might designate one clerk to help with en banc matters, and when he became chief judge, he transformed a secretary's position into a fourth clerk position for this purpose. A staff attorney who spent time in the judge's chambers as a law clerk exercised some duties related to the coordinator's position, dealing particularly with deadlines, and, when Judge Goodwin was absent from chambers, answered another judge's question about the form of an order.[68] The clerks would prepare memos for the judge, pose questions as to what

identified by name] to Adell Johnson, *Re:* U.S. v. Eagon (Feb. 2, 1983) (addressing *U.S. v. Eagon*, 707 F.2d 362 (9th Cir. 1982), and confirming Johnson's communication).

65. Memo. from Stephen J. Reinhardt, J., U.S. Ct. of App. for the Ninth Cir., to Alfred T. Goodwin, *Re:* Gutierrez (May 25, 1988); Memo. from Eileen Engett, Secretary, to Alfred T. Goodwin, *Re:* Gutierrez (May 13, 1988).

66. Memo. from Adell Johnson to Alfred T. Goodwin (July 17, 1987).

67. For an extended discussion of the work of clerks in the courts of appeals that is based on Judge Goodwin's clerks, see Stephen L. Wasby, *Clerking for an Appellate Judge: A Close Look*, 5 Seton Hall Cir. Rev. 19 (2008).

68. *See* Memo. from William A. Norris to Panel & Alfred T. Goodwin, *Re:* Hollinger v. Titan Capital Corp. (Sept. 6, 1989) (addressing *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564 (9th Cir. 1990) (en banc) (as amended): "In Judge Goodwin's absence, I have checked with his law clerk Paul Keller and he assured me the proposed order as originally drafted was consistent with past orders."). Keller later took a senior position in the Clerk's office, where he became the primary staff person for en banc work under later en banc coordinators. *See* pp. 141-42, *infra.*

should be done,[69] send standard directives and draft orders, and would even provide advice, as when one suggested how to head off a spat between two judges.[70] A clerk might be in direct contact with other judges' clerks about en banc matters. Called by another judge's clerk about procedure for calling for a full court en banc, Judge Goodwin's clerk developed an interpretation of the rules, spelling out uncertainty in them and indicating options.[71]

Assistance also came from both court staff—the Clerk's office and staff attorneys—and judges. When parties moved for initial en banc hearing, staff attorneys prepared memoranda and made recommendations as to why such a hearing was not necessary, so that, in one case, Judge Goodwin could tell the court's active judges, "I have reviewed the record and agree with the staff attorney's memo . . . that the request for an initial hearing en banc should be denied."[72]

While much post-panel communication went through the en banc coordinator, judges at times prodded each other directly or picked up on matters, saving the coordinator from having to do so, as when Judge (later Justice) Kennedy acted on another judge's suggestion to request that staff attorneys prepare a memorandum on standards for ineffective counsel.[73] And a judge on a panel calling for en banc, rather than waiting, even

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69. *See* Memo. from Alfred T. Goodwin to Panel, Associates, *Re:* Shedelbower v. Estelle & Endell v. Smith (Jan. 24, 1989) (clerk drafted; addressing *Shedelbower v. Estelle*, 859 F.2d 727 (9th Cir 1988), *withdrawn and superseded*, 885 F.2d 570 (9th Cir. 1989), and *Endell v. Smith*, 860 F.2d 1528 (9th Cir. 1989)); Memo. from Alfred T. Goodwin to Panel, Associates, *Re:* Shedelbower & Endell (Dec. 9, 1988) (same); Memo. from David G. Little, Law Clerk, to Alfred T. Goodwin, *Re:* Shedelbower & Endell (Dec. 6, 1988).

70. Memo. from Jeff [no last name indicated] to Alfred T. Goodwin, *Re:* Gutierrez (May 16, 1988).

71. Memo. from David G. Little to Alfred T. Goodwin, *Re:* Gutierrez (Jan. 17, 1989). In this matter, Judge Goodwin, by then Chief Judge, took the problem to the Executive Committee, which agreed that the call was untimely, at which point Judge Goodwin indicated that the judge could seek to suspend the rules.

72. Memo. from Alfred T. Goodwin to Active Judges, *Re:* Draper v. Coombs (Aug. 10, 1982) (addressing *Draper v. Coombs*, 703 F.2d 574 (9th Cir. 1983) (tbl.)). When no judge made an en banc call, Judge Goodwin so informed the motions attorney. Memo. from Alfred T. Goodwin to Joseph Schlesinger, Motions Atty., U.S. Ct. of App. for the Ninth Cir., *Re:* Draper (Sept. 13, 1982) (replying to Mr. Schlesinger's memo of August 3, 1982).

73. Memo. from Anthony M. Kennedy, J. U.S. Ct. of App. for the Ninth Cir., to Associates, *Re:* Cooper (July 27, 1977).

asked that votes be sent to Judge Goodwin, who sent his own follow-up memo.[74] A judge pointing up a rule violation said that because another judge had taken a week longer than allowed for a stop-clock memo, he was going to file the order denying rehearing, but then he gave the offending judge two weeks more.[75] Likewise, without waiting for Judge Goodwin, other judges might make suggestions about the process: During consideration of whether to take a case en banc, they might, for example, identify problems in the process that they thought should be addressed and suggest that the rules be revised. In the normal course of events, court colleagues would call attention to missed deadlines, although they might have done so less out of altruistic concern than to protect opinions they had written.

The en banc coordinator's colleagues played a more formal role as to en banc rules when the court as a whole considered amending them and, more particularly, by serving on committees to consider major revisions. In 1987, an En Banc Committee of Judges Stephen Reinhardt, Joseph Sneed, and Goodwin proposed amendments to the rules, in the course of which they sought guidance and feedback, particularly from the court's Executive Committee and from other judges as well, and they did receive commentary from some.[76] And at the very end of his tenure as en banc coordinator, Judge Goodwin served on another such committee, chaired by Judge Ferdinand F. Fernandez, which made recommendations to the court's Executive Committee, particularly concerning altering some deadlines. It is of interest that these recommendations, in which Judge Goodwin appears to have concurred, included abolishing the coordinator's authority to extend time limits, but the court did not act on it.

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74. Memo. from Shirley M. Hufstedler, J., U.S. Ct. of App. for the Ninth Cir., to Associates, Senior Judges, *Re:* Riser v. Craven (May 10, 1974) (addressing *Riser v. Craven*, 501 F.2d 381 (9th Cir. 1974)); Memo. from Alfred T. Goodwin to All Active Judges, *Re:* Riser (May 13, 1974).

75. Memo. from J. Clifford Wallace, J., U.S. Ct. of App. for the Ninth Cir., to Associates, *Re:* Hoptowit v. Ray (May 4, 1982) (addressing *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982)).

76. For example, Judge Thomas Tang, as chair of the court's State Habeas Committee, communicated to the Executive Committee on proposals made by Judge Goodwin. *See* Memo. from Thomas Tang, J., U.S. Ct. of App. for the Ninth Cir., to Court Exec. Comm. (Apr. 6, 1988).

III. THE COORDINATOR'S WORK

What does the en banc coordinator do? He *coordinates*, establishes, and administers deadlines; exercises discretion; identifies problems; establishes policy through decisions; and aids in development of rules. The en banc coordinator's primary function has been to set deadlines for the circulation of memos in support of—or in opposition to—an en banc call or a vote on whether to take a case en banc, and to ensure that judges carry out tasks such as filing orders asking for a response to an en banc rehearing petition.

The coordinator's position has been defined in the court's General Orders as "an active or senior judge appointed by the Chief Judge to perform the duties set forth in this chapter."[77] Those orders include this rather brief formal statement of duties:

> The en banc coordinator shall supervise the en banc process, including time schedules provided in this chapter; shall circulate periodic reports on the status of each case under en banc consideration; may, for good cause, extend, suspend, or compress the time schedules provided in this Chapter; may designate another judge to perform all or part of the en banc coordinator's duties during the coordinator's absence; may suggest, for any particular case, the modification or suspension of the provisions of this chapter; and may for good cause suspend en banc proceedings.[78]

Here we see supervisory and reporting functions and the discretion to manage the en banc process.

The General Orders contain some other, more specific items, such as one directing the Clerk to file an order rejecting a petition for en banc,[79] and certain procedures to be followed. Thus when a party seeks en banc hearing before a case is heard by a panel, or there is a panel's *sua sponte* en banc call before disposition, the en banc coordinator, in addition to notifying all

77. United States Court of Appeals for the Ninth Circuit, *General Orders* (updated Dec. 13, 2010) at 5.1(a)(5) (available at http://www.ca9.uscourts.gov/datastore/uploads/rules/general_orders/general_orders.pdf) [hereinafter "G.O."] (accessed Apr. 20, 2010; copy on file with Journal of Appellate Practice and Process). The word "senior" was added to allow Judge Goodwin to continue after he took senior status.

78. *Id.* at 5.1(b)(2).

79. *Id.* at 5.2(a).

active judges of the "suggestion," is given the authority to "distribute an independent evaluation of the matter."[80] The rules also specify the number of days for the exchange of memoranda and the time within which voting on en banc calls shall take place.[81]

The basic matters to which the en banc coordinator must attend are the following:

- When a judge "stops the clock" to seek revision of the panel opinion or calls for en banc rehearing, see to it that the supporting memo is circulated by the appropriate date.

- Upon a stop-clock, set an appropriate date for the panel's response.

- When a response to a rehearing petition is requested, ask the panel's author to see that a response is requested from the parties.

- When that response is received, set dates for the exchange of memoranda.

- Upon an en banc call, indicate the date by which memos are to be circulated.

- In situations where, upon a stop clock or en banc call, the panel revises an opinion, ask whether the calling judge renews en banc call.

- Send a ballot and set the date for the end of voting.

- Indicate whether en banc vote fails, with panel to resume control, or succeeds, with the chief judge to enter an order withdrawing the case from panel.

80. *Id.* at 5.2(a).

81. *Id.* at 5.5(a), 5.5(b).

Petitions for rehearing (PFRs) are handled within the panel, but a panel deciding an accompanying petition for rehearing en banc (PFREB) is to inform the full court, in a notice that an off-panel judge might have requested, if it is about to deny the petition. Such a notice or an earlier stop-clock would trigger the en banc coordinator's duty to see if any judge made a timely en banc call. Even without a PFREB, a judge's *sua sponte* en banc call would likewise trigger the monitoring function, as would inquiries from a motions attorney about a litigant's request for en banc hearing prior to panel ruling.[82]

For many cases, the coordinator's post-panel communications to "Associates" are few and solely routine, doing no more than applying the General Orders. Requests that the coordinator vary deadlines, usually to extend time to send memos, are generally also routine, but whether a judge should be held to a missed deadline could become contentious, with the coordinator having to try to resolve the situation. And difficulties could arise if a judge tried to test the limits, as one judge did in sending a stop-clock memo at 11:58 p.m. on the last possible day, after the Clerk's office had released the mandate during business hours on the same day. The judge then took the position that the Clerk's action was premature and asked the panel to recall the mandate or, if no recall was to be forthcoming, asked for a ruling "from the en banc czar." Because the panel granted the request to recall the mandate, Judge Goodwin did not have to issue a ruling.[83]

A judge once also tested limits by asking for several time extensions—first so the panel could ask parties for a response, then pressing the coordinator for a quick reply, then asking for more time on the last day for memoranda as well as a week later,

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82. When a party makes a request to a motion panel that a case be heard en banc, in the normal course, the matter of deciding whether this initial en banc call is warranted is left for decision to the merits panel before which the case is then placed. *See* Memo. from Beth Levine, Motions Atty., U.S. Ct. of App. for the Ninth Cir., to Alfred T. Goodwin, *Re:* Machinists & Aerospace Workers, Dist. Lodge No. 751 v. Boeing Co. (Apr. 28, 1982) addressing *Machinists & Aerospace Workers, Dist. Lodge No. 751 v. Boeing*, 694 F.2d 723 (9th Cir. 1982) (tbl.)).

83. *See* Memo. from Alex Kozinski to J. Clifford Wallace & All Judges, *Re:* Outdoor Systems, Inc. v. City of Mesa & Whiteco Metrocom, Inc. v. City of Tucson, (July 22, 1993) (addressing *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604 (9th Cir. 1993) (opinion after reargument), and *Whiteco Metrocom, Inc. v. City of Tucson*, 997 F.2d 604 (9th Cir. 1993) (same)).

after which he made comments four days later, apparently during voting.[84] One judge responding claimed no criticism of this judge for the lateness of his memorandum but said that the time available led him to a briefer response than he would have preferred in light of the serious questions posed in it, and another judge, while commenting on the problem of comments during the voting period, then made some himself.[85] Situations like these test not only limits of the rules but also the court's norms of collegiality and the en banc coordinator's patience.

Once the en banc process was set in motion, the task of reminding colleagues of certain necessary actions might become less routine and more variable, but, on the whole, nothing would be out of the ordinary. Moreover, the number of communications in some cases is minimal: An en banc call is made; a response by the parties to the PFREB is ordered; upon receipt of the response, the caller and the panel send memos; and a vote is taken. In such situations, the en banc coordinator is rarely involved beyond sending routine notices and reminders. One can find many such simple cases, with minimal activity by the coordinator, as when the panel dissenter calls for en banc rehearing, there are no responses, and there is a vote, which fails.[86] In these mine-run situations, the en banc coordinator is simply *there*, "above the fray." Even with other judges sending memos back and forth, the coordinator may not be much involved, as in one case when Judge Goodwin's only memo did not come until after six memos among other judges,[87] a further indication that the post-panel process may at times have

84. These communications were made in the following series of memos: Memo. from Alex Kozinski to Associates, *Re:* U.S. v. Goland (May 22, 1992) (addressing *U.S. v. Goland*, 959 F.2d 1449 (9th Cir. 1992), *reh. denied*, 977 F.2d 1359 (9th Cir. 1992) (Pregerson, Tang, Kozinski,& Kleinfeld, JJ., dissenting)); Memo from Alex Kozinski to Alfred T. Goodwin, *Re:* Goland (May 26, 1992); Memo. from Alex Kozinski to Alfred T. Goodwin, Associates, *Re:* Goland (Aug. 20, 1992); Memo. from Alex Kozinski to Alfred T. Goodwin, Associates, *Re:* Goland (Aug. 27, 1992); Memo. from Alex Kozinski to Associates, *Re:* Goland (Aug. 31, 1992).

85. *See* Memo. from William A. Norris to Associates, *Re:* Goland (Sept. 2, 1992); Memo. from Andrew J. Kleinfeld, J., U.S. Ct. of App. for the Ninth Cir., to Associates, *Re:* Goland (Sept. 3 1992).

86. *See e.g. Hallstrom v. Tillamook County*, 831 F.2d 889 (9th Cir.), *amended and superseded after reh. denied*, 844 F.2d 598 (9th Cir. 1987); *Zimmerlee v. Keeney*, 831 F.2d 183 (9th Cir. 1987); *Merritt v. Mackey*, 827 F.2d 1368 (9th Cir. 1987).

87. *See Perez v. I.N.S.*, 643 F.2d 640 (9th Cir. 1981) (per curiam).

functioned virtually without him,[88] like "the machine that would run of itself."[89] In another case, without Judge Goodwin doing more than sending reminder memos, one judge called for en banc rehearing but then, on the panel's opinion revision, withdrew the call, and another judge made her own call because the revisions did not solve the problem to her satisfaction, and judges, having circulated supporting memos, went directly to a vote.[90] In another case in which two judges serially asked for changes in the panel's opinion and over a dozen memoranda were exchanged before the call was withdrawn, none were from Judge Goodwin.[91] Even when the en banc coordinator sends several messages, all may be routine, setting dates and moving things along, with the en banc call and response(s) proceeding easily through several iterations.[92]

In contrast, other cases have voluminous communications, with much substantive argument and procedural complexity: perhaps a "stop clock"; several exchanges as the panel decides whether to amend its opinion; a revision not satisfying the questioning judge, who then makes an en banc call; multiple exchanges on whether to take the case en banc; extensions of time for responses; and even procedural difficulties. Yet not even in all such instances is there considerable coordinator involvement, as when, in one case, judges sent twenty-seven

88. That there can be frequent response in a short time through e-mail is shown by five memos about a single case having been exchanged in one day, with no involvement by Judge Goodwin. *See* Memo. from Dorothy W. Nelson, J., U.S. Ct. of App. for the Ninth Cir., to Associates, *Re:* Kreisner v. City of San Diego (June 15, 1993) (addressing *Kreisner v. City of San Diego*, 988 F.2d 883 (9th Cir.), *amended and superseded after reh. denied*, 1 F.3d 775 (9th Cir. 1993)); Memo. From Alex Kozinski & Diarmuid F. O'Scannlain, J., U.S. Ct. of App. for the Ninth Cir., to Associates, *Response re: Kreisner* (June 15, 1993); Memo. from Betty Binns Fletcher to Associates, *Re:* Kreisner (June 15, 1993); Memo. from Robert Boochever, J., U.S. Ct. of App. for the Ninth Cir., to Associates, *Re:* Kreisner (June 15, 1993); Memo. from Alex Kozinski to Associates, *Re:* Kreisner (June 15, 1993).

89. *Cf.* Michael Kammen, *A Machine that Would Go of Itself: The Constitution in American Culture* 18 (Alfred A. Knopf, Inc. 1986) (attributing to James Russell Lowell the statement that "[a]fter our Constitution got fairly into working order it really seemed as if we had invented a machine that would go of itself").

90. *U.S. v. Facchini*, 832 F.2d 1159 (9th Cir. 1987), *opinion on rehearing*, 874 F.2d 638 (9th Cir. 1989) (en banc).

91. *See Hale v. Norton*, 437 F.3d 892 (9th Cir.), *withdrawn & superseded*, 461 F.3d 1092 (9th Cir. 2006), *superseded*, 476 F.3d 694 (9th Cir. 2007).

92. *See e.g. Smith v. Noonan*, 992 F.2d 987 (9th Cir. 1993); *Price v. I.N.S.*, 941 F.2d 878 (9th Cir. 1991), *withdrawn & superseded*, 962 F.2d 836 (9th Cir. 1992).

memos but only three were from the coordinator.[93] However, the greater the complexity, the greater likelihood that the en banc coordinator will play a role because of greater likelihood that problems will arise, as one could also see in a case with extensive communication, a panel slow to amend its opinion, and questions posed about the process.[94] And it would be difficult for the court to proceed smoothly without the coordinator when faced with two overlapping cases involving the same issue, a dispute as to the priority of filing, and en banc calls in both after stop clocks.[95]

When multiple cases are being considered for possible en banc treatment—together or almost simultaneously[96]—the coordinator's role is likely to become crucial. Matters may also become quite contentious. In one example, several judges went at each other hammer and tongs about the underlying issues and about whether a case should be heard en banc. Included were exchanges as to a district court's having allowed filing of a supplemental complaint, interpretations of the Federal Rules of Civil Procedure, disputes over what sort of issue makes a case en banc-worthy (about which one judge joined in to chide another[97]), and comments on judicial assignments in the district court.[98]

If judges follow the rules for the most part, even when testy at times about the underlying dispute (as to the merits and en banc-worthiness), the coordinator's task is not difficult. And when one judge "calls out" another for action outside the rules, the judge who erred may well understand the error. Thus, when

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93. *Balistreri v. Pacifica Police Dept.*, 855 F.2d 1421 (9th Cir. 1988), *superseded*, 901 F.2d 696 (9th Cir. 1990).

94. *See Duro*, 821 F.2d 1358.

95. *See Shedelbower*, 859 F.2d 727.

96. *See e.g. Plazola v. U.S.*, 487 F.2d 157 (9th Cir. 1973); *U.S. v. Hudson*, 479 F.2d 251 (9th Cir. 1972).

97. Memo. from Cecil F. Poole, J., U.S. Ct. of App. for the Ninth Cir., to Stephen Reinhardt, Associates, *Re:* Keith v. Volpe (Dec. 15, 1988) (addressing *Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988)).

98. Memo. from Cynthia Holcomb Hall J., U.S. Ct. of App. for the Ninth Cir., to Associates, *Re:* Keith (Nov. 15, 1988); Memo. from Mary M. Schroeder to Associates, *Re:* Keith (Nov. 29, 1988); Memo. from William A. Norris to Associates, *Re:* Keith (Dec. 1, 1988); Memo. from Stephen Reinhardt to Associates, *Re:* Keith (Dec. 2, 1988); Memo. from Cynthia Holcomb Hall to Associates, *Re:* Keith (Dec. 12, 1988); Memo. from Stephen Reinhardt to Associates, *Re: Keith* (Dec. 14, 1988).

one judge, while disagreeing on substantive grounds, pointed out that another had called for en banc hearing before panel opinion-revision, there was an apology for jumping the gun.[99] However, if judges get annoyed with each other and use the rules as a weapon, matters become more difficult for the coordinator. That some judges are sticklers about the rules makes this quite likely to happen, as in a case in which one judge complained about another's missing a deadline for the panel's response, upon which the latter complained that the former had not acted in a timely fashion in raising questions about the panel opinion. This problem temporarily dissolved when no en banc call was made,[100] but matters can progress, as when two strong-willed judges got into a spat about whether one's last-minute stop-clock had been timely filed, with the panel initially refusing to give in. After the stop-clock judge said he had acted in good faith and cited custom and the court's collegiality, the panel judge removed his objection.[101] And, in other situations, the judges themselves may exercise discretion, for example, waiving a deadline to avoid difficulty[102] or working out an allotment of additional time.[103]

IV. THE COORDINATOR'S FUNCTIONS

While the en banc coordinator's basic function is to *facilitate* the court's en banc-related work without taking it over himself, the coordinator performs a number of more specific

99. *See* Memo. from Mary M. Schroeder to Associates, *Re:* Balistreri (Jan. 6, 1990); Memo. from Stephen S. Trott, J., U.S. Ct. of App. for the Ninth Cir., to Associates, *Re:* Balistreri (Jan. 17, 1990).

100. *See Johnston v. Koppes*, 850 F.2d 594 (9th Cir. 1988).

101. Memo. from Stephen Reinhardt to Alex Kozinski, Alfred T. Goodwin, Associates, *Re:* Gutierrez (May 19, 1988); Memo. from Alex Kozinski to Panel, *Re:* Gutierrez (May 31, 1988) (showing cc to Alfred T. Goodwin); Memo. from Stephen Reinhardt to Panel, Alfred T. Goodwin, Alex Kozinski, *Re:* Gutierrez (May 31, 1988); Memo. from Alex Kozinski to Panel, Alfred T. Goodwin, *Re:* Gutierrez (June 1, 1988)).

102. *See e.g.* Memo. from J. Clifford Wallace to All Active Judges, *Re:* Kanekona v. City & County of Honolulu (Aug. 17, 1989) (addressing *Kanekona v. City & County of Honolulu*, 879 F.2d 607 (9th Cir. 1989)); Memo. from J. Clifford Wallace to Active & Senior Judges, *Re:* Kanekona (Mar. 7, 1990).

103. *See e.g.* Memo. from Mary M. Schroeder to Alfred T. Goodwin, Panel, *Re:* Greenhow v. Dept. of HHS (Sept. 27, 1980) (addressing *Greenhow v. Dept. of HHS*, 863 F.2d 633 (9th Cir. 1988), *overruled, U.S. v. Hardesty*, 977 F.2d 1347 (1992)).

functions. One is to *prod* colleagues, for example, when a judge or panel did not respond to an en banc call. In one case, the prod was a message saying he assumed that the panel, from which he had not heard, was willing to have things go forward as they were, and an amended opinion resulted.[104] In another, when, after memos between two judges, there was no en banc call, Judge Goodwin sent a memo assuming his function was over; this led one judge to ask for more discussion, and, after the judge's suggestions were rejected, there was an en banc call.[105]

To coordinate judges' en banc activity, the coordinator must *monitor* his colleagues' actions. In doing so, the coordinator might note a slip-up, as when, after learning that an order (requesting a party's response) had not been received by the Clerk's Docketing Unit, he asked a judge to re-send the order.[106] Or he might flag that a PFR had not been timely filed, which could lead to the panel's asking about allowing a motion for late filing.[107] The coordinator's monitoring would not be possible if his colleagues failed to send him copies of relevant messages or did not write to (or call) him directly with updates and questions. Of course this sometimes occurs: Panel judges do not always consult the coordinator but proceed on their own, at times causing problems that must later be untangled.[108]

The en banc coordinator regularly *inquires* of his colleagues about the status of matters. Thus after one judge had made a "protective" en banc call and another judge had noted

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104. Memo. from Alfred T. Goodwin to Associates, *Re:* LeMaire v. Maass (Sept. 7, 1993) (addressing *LeMaire v. Maass*, 12 F.3d 1444 (9th Cir. 1993)).

105. Memo. from Alfred T. Goodwin to William A. Norris & Panel, *Re:* ACT UP! v. Bagley (Oct. 7, 1992) (addressing *ACT UP! v. Bagley*, 971 F.2d 298 (9th Cir. 1992), *withdrawn & superseded*, 988 F.2d 868 (9th Cir. 1993), and including Judge Goodwin's expression of dissent from denial of rehearing: "I assume that my function as coordinator is discharged and you are free to negotiate with the panel any way you wish. If you have a different view, please advise."); Memo. from William A. Norris to Panel, *Re:* Bagley (Oct. 8, 1992); Memo. from Cynthia Holcomb Hall, Diarmuid O'Scannlain, & Edward Leavy, J., U.S., Ct. of App. for the Ninth Cir., to William A. Norris, *Re:* Bagley (Nov. 20, 1992); Memo. from William A. Norris to Associates, *Re:* Bagley (Dec. 11, 1992).

106. Memo. from Alfred T. Goodwin to Stephen Reinhardt, Associates, *Re:* Gutierrez (July 5, 1988).

107. Memo. from Walter R. Ely, Jr., J., U.S. Ct. of App. for the Ninth Cir., to Panel, *Re:* U.S. v. King (Oct. 13, 1978) (addressing *U.S. v. King*, 587 F.2d 956 (9th Cir. 1978), and including a bcc to Alfred T. Goodwin).

108. *See e.g. Watkins v. U.S. Army*, 837 F.2d 1428 (9th Cir.), *superseded*, 847 F.2d 1329 (9th Cir. 1988), *opinion withdrawn*, 875 F.2d 699 (9th Cir. 1989) (en banc).

the possibility that the questioned case might settle, Judge Goodwin asked whether the case would be dismissed and also asked when a judge would be sending suggested amendments to the panel; he was later to ask again about the status of the case.[109] He also asked whether a judge's memo "is suggesting that we defer voting . . . pending a Supreme Court decision . . . or whether she is just flagging the question for consideration by the en banc court if the case is taken en banc."[110] Other inquiries included one when a panel *sua sponte* proposed en banc hearing, with Judge Goodwin asking if counsel should be asked whether the case should be taken en banc or if he should start the time for responsive memoranda; he shifted from inquiring to nudging when the panel did not initially respond.[111] In yet another situation, when a judge called for en banc hearing, Judge Goodwin asked if that judge were willing to wait to make the call because the parties were likely to file a PFREB, to which a response could then be sought.[112] And he also asked whether a senior judge's memo could be incorporated as the memorandum in support of an en banc call.[113]

Most of the time the en banc coordinator's inquiries are just inquiries, but at other times they may be intended to jab or prod a reluctant or resistant judge into action. Thus in one case, when a judge did not promptly respond to Judge Goodwin's routine request that a party be asked to respond to a suggestion for rehearing en banc, and Judge Goodwin learned from the clerk

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109. Memo. from Alfred T. Goodwin to Mary M. Schroeder, Panel, Associates, *Re:* Love v. Thomas (July 20, 1988) (addressing *Love v. Thomas*, 838 F.2d 1059 (9th Cir.), *superseded*, 858 F.2d 1347 (9th Cir. 1988); Memo. from Alfred T. Goodwin to Panel, Associates, *Re:* Love (Sept. 9, 1988).

110. Memo. from Alfred T. Goodwin to All Active Judges, *Re:* Woratzeck v. Ricketts (Jan. 30, 1987) (addressing *Woratzeck v. Ricketts*, 808 F.2d 1322 (9th Cir. 1986), *withdrawn & superseded*, 820 F.2d 1450 (9th Cir. 1987), *vacated & remanded*, 486 U.S. 1051 (1988)). *Woratzeck* is reported on remand at 859 F.2d 1559 (9th Cir. 1988).

111. Memo. from Alfred T. Goodwin to Panel, All Active Judges, *Re:* Landreth (Aug. 16, 1987); Memo. from Alfred T. Goodwin to Panel, All Active Judges, *Re:* Landreth (Sept. 22, 1987).

112. Memo. from Alfred T. Goodwin to J. Jerome Farris, Associates, *Re:* Coleman v. Risley (Feb. 18, 1988) (addressing *Coleman v. Risley*, 839 F.2d 434 (9th Cir. 1988), *opinion withdrawn, sub nom. Coleman v. McCormick*, 847 F.2d 1280 (9th Cir. 1989)).

113. Memo. from Alfred T. Goodwin to J. Clifford Wallace, Joseph T. Sneed, III, Herbert Y. C. Choy, *Re:* Pitrat v. Garlikov (Jan. 6, 1982) (addressing *Pitrat v. Garlikov*, , 947 F.2d 419 (9th Cir. 1991) (opinion withdrawn Dec. 21, 1992), *superseded*, 992 F.2d 224 (9th Cir. 1993)).

that no such order had been received from the judge, he asked pointedly, "As author, do you oppose my . . . suggestion that a response be filed?"[114] At that point, the judge did file the order.

While the en banc coordinator *makes* inquiries, a significant portion of his work comes from *responding* to them. Judge Goodwin's colleagues at times asked about the status of particular matters when they had not received expected memoranda, or judges new to the court might seek to learn whether they were, for example, eligible to vote on en banc rehearing. More specific was a request about the form of an order denying en banc rehearing after an en banc failed, because Judge Kennedy, who had been on the panel, had left for the Supreme Court.[115] Also specific was coordination of the dates for supporting memoranda when en banc activity in two related cases overlapped.[116] Similarly, a judge who had "jumped the gun" in calling for en banc before the panel had filed a revised opinion asked Judge Goodwin, after the revised opinion was filed, whether he could renew his call.[117]

In one situation, a judge who was prepared to send a tart memorandum about an out-of-time stop-clock asked the en banc coordinator about the wisdom of that action while simultaneously asking the same question of the panel on which he sat.[118] In a more complex situation, a panel had issued an amended opinion after an en banc call had been made, and a judge asked how he should deal with an amended petition for rehearing. Asking for interpretive guidance, and addressing the en banc coordinator as "ye All Knowing One," a judge had found that "[t]wo days after renewing my en banc call, I have received an 'amended petition for rehearing,'" and noted that he was "not sure how to proceed." Asking about two possible

114. Memo. from Alfred T. Goodwin to Alex Kozinski, *Re:* U.S. v. Olsowy, (Oct. 8, 1987) (addressing *U.S. v. Olsowy*, 819 F.2d 930 (9th Cir.), *superseded*, 836 F.2d 439 (9th Cir. 1987) (amended and republished opinion)).

115. Memo. from David R. Thompson, J., U.S. Ct. of App. for the Ninth Cir., to Thomas Tang, Alfred T. Goodwin, *Re:* Scott (Feb. 25, 1988).

116. Memo. from Diarmuid F. O'Scannlain to Alfred T. Goodwin, *Re:* Shedelbower (Mar. 14, 1990).

117. Memo. from Stephen S. Trott to Associates, *Re:* Balistreri (Mar. 2, 1990).

118. Memo. from Stephen Reinhardt to Alfred T. Goodwin, *Re:* Gutierrez (May 16, 1988).

options, the judge said, "I seek your guidance in solving these mysteries."[119]

After Judge Goodwin indicated that "[t]he amended opinion started a new time line" and suggested what the panel should do[120] and the author of the panel opinion had written to the court about the amended opinion, the judge initially seeking assistance made another request for guidance. This time he wished to know whether the new 5.4(b) notice required a response to the amended rehearing petition, as he thought the rules required, although he was willing to dispense with the response and proceed directly to his en banc call.[121] Exercising his discretion, Judge Goodwin cut through matters, noting that "[n]either the panel nor [the other judge] appear to want another response," and he immediately set the time for exchange of memoranda for or against hearing the case en banc.[122]

One of the en banc coordinator's major functions was to *interpret* the court's rules on the en banc process, with rule interpretation particularly entailing the exercise of discretion.[123] Many rule interpretations were made in response to inquiries from judicial colleagues,[124] as when Judge Goodwin stated the rule about senior judges asking for an en banc vote.[125] The interpretive function includes deciphering ambiguous communications, for example, saying that a judge's memo to the panel should be treated as a "stop clock"[126] or that another judge

119. Memo. from Alex Kozinski to Alfred T. Goodwin, Associates, *Re:* Duro (July 21, 1988).

120. Memo. from Alfred T. Goodwin to Alex Kozinski, Associates, *Re:* Duro (July 22, 1988).

121. Memo. from Alex Kozinski to Alfred T. Goodwin, Associates, *Re:* Duro (July 26, 1988) ("I therefore ask for more advice . . . .").

122. Memo. from Alfred T. Goodwin to Associates, *Re:* Duro (July 29, 1988).

123. For a more complete discussion of the Coordinator's discretion, see section V, *infra*.

124. There could even be an explanation of procedure to an attorney, as Judge Goodwin indicated to the clerk after a misstep occurred with respect to issuance of the mandate in a case. *See* Memo. from Alfred T. Goodwin to Dennis R. Mathews, Clerk of the Ct., U.S. Ct. of App. for the Ninth Cir., *Re:* Garner v. U.S (Jan. 23, 1973) (addressing *Garner v. U.S.*, 501 F.2d 228 (9th Cir. 1972) (en banc), *aff'd*, 424 U.S. 648 (1976), and suggesting contents of a letter to an attorney in that case).

125. Memo. from Alfred T. Goodwin to Associates, *Re:* Walker v. Loggins (Feb. 15, 1978) (addressing *Walker v. Loggins*, 608 F.2d 731 (9th Cir. 1979)).

126. Memo. from Alfred T. Goodwin to Law Clerk [not identified by name], *Re:* Greenhow (Mar. 7, 1989).

had misread a stop clock as an en banc call.[127] The coordinator must often rule on timeliness, as when, in a situation involving several cases were under scrutiny, Judge Goodwin indicated that one was available for en banc consideration and another might be if the panel would recall the mandate.[128] And he might also have to determine who is eligible to vote in a specific case by, for example, determining who had not entered service in time to be eligible under the court's rules.[129]

The en banc coordinator was the rules interpreter particularly when the rules did not seem to cover a particular situation; there he had to fill in gaps and thus ruled interstitially. For example, in setting the time for renewal of an en banc call, a situation for which the rules did not then provide, Judge Goodwin analogized from the General Orders to set the date for circulation of an amended opinion, in order to avoid cutting off a judge's attempt to respond.[130] Interpretation of the rules might also entail extending them. For example, Judge Goodwin applied a *proposed* Ninth Circuit rule (on not ordering an en banc court without allowing parties to speak to whether the case should go en banc) to a situation in which he thought the case a good one in which to ask for a response to the petition for rehearing en banc. He said there that "[u]nless there is objection by one or more judges who wish to get on with the voting," he would ask the panel to call for a response. In this death penalty case, he also editorialized: "If the court votes in this case without hearing from the other side, the voting is more likely to reflect individual views about the desirability of capital

127. Memo. from Alfred T. Goodwin to Panel, Dorothy W. Nelson, Associates, *Re:* Garnett v. Renton Sch. Dist. (Mar. 7, 1989) (addressing *Garnett v. Renton Sch. Dist.*, 865 F.2d 1121 (9th Cir. 1989), *superseded*, 874 F.2d 608 (9th Cir. 1989), *vacated & remanded*, 496 U.S. 914 (1990)).

128. Memo. from Alfred T. Goodwin to Associates, *Re:* Hudson (May 7, 1973).

129. *See e.g. U.S. v. Fernandez-Angulo*, 863 F.2d 1449 (9th Cir. 1988), *aff'd in part, vacated in part, & remanded*, 897 F.2d 1514 (9th Cir. 1990) (en banc); *U.S. v. Aguilar*, 994 F.2d 609 (9th Cir. 1993), *superseded*, 21 F.3d 1475 (9th Cir. 1994) (en banc), *aff'd in part, rev'd in part*, 515 U.S. 593 (1995). There were a number of recusals in *Aguilar* because the defendant, Judge Robert P. Aguilar of the Northern District of California, had contact with some Ninth Circuit judges. The question of the date of eligibility was debated within the court and different rules for determining that date were discussed.

130. Memo. from Alfred T. Goodwin to Associates, *Re:* Duro (Mar. 28, 1988); Memo. from Alfred T. Goodwin to Associates, *Re:* Duro (July 5, 1988).

punishment than about any of the legal questions lurking in the case."[131]

If the coordinator could use discretion to extend a proposed rule's reach, he could also refuse to bend the rules. In the same death penalty case, after en banc voting had started, a judge suggested that all judges take the time to read the penalty phase transcript, not yet in all the judges' hands. That prompted Judge Goodwin to say that "[u]nless overruled by a majority of the judges, I will not interrupt the voting at this time," and to comment that "[i]f we interrupt voting after all memos have been exchanged, we will have to amend the General Orders." [132]

The en banc coordinator might *advise* on specific matters, as judges acknowledged he had done, and he would *suggest* certain actions. Some suggestions came in the form of reminders. In one instance, in setting the date for circulation of memoranda, Judge Goodwin reminded his colleagues of the effect of not doing so in a timely fashion.[133] And in reporting a telephone vote on whether to hear a case en banc, he reminded them that the results of en banc voting were confidential.[134] There were many suggestions on simple procedural matters, as when he suggested that correspondence carry the date of decision, to cover the situation when slip opinions had not circulated and en banc correspondence arrived before the slips.[135] Or the matters might be procedural but somewhat more complex, as when a judge had sent a "stop-clock" with a memo but did so during the extension of time that had been granted for a party to file a PFR; here Judge Goodwin indicated what to do if a petition for rehearing en banc was or was not filed.[136] In some instances, he might even suggest that additional cases be

131. Memo. from Alfred T. Goodwin to All Active Judges, *Re:* Woratzeck (Jan. 30, 1987).

132. Memo. from Alfred T. Goodwin to All Active Judges, *Re:* Woratzeck (June 4, 1987).

133. Memo. from Alfred T. Goodwin to Active Judges, *Re:* U.S. v. Beale (June 17, 1982) (addressing *U.S. v. Beale*, 674 F.2d 1327 (9th Cir. 1982), *vacated*, 463 U.S. 1202 (1983); *on remand*, 736 F.2d 1289 (9th Cir. 1984) (en banc)).

134. Memo. from Alfred T. Goodwin to Active Judges, *Re:* U.S. v. Sasway (Sept. 16, 1982) (addressing *U.S. v. Sasway*, 686 F.2d 748 (9th Cir. 1982)).

135. Memo. from Alfred T. Goodwin to Associates, *Re:* U.S. v. Brock (Apr. 22, 1982) (addressing *U.S. v. Brock*, 667 F.2d 1311 (9th Cir. 1982)).

136. Memo. from Alfred T. Goodwin to Panel, Alex Kozinski, Associates, *Re:* U.S. v. Phelps (July 24, 1989) (addressing *U.S. v. Phelps*, 877 F.2d 28 (9th Cir. 1989)).

considered for en banc hearing, as he did after an en banc call on two cases.[137]

Mixing an inquiry with a suggestion, after a call for en banc hearing, he asked if judges wanted further discussion of the issue, and suggested that another panel circulate an opinion. Saying that he was unsure how to phrase the question for an en banc vote, he indicated possible options before the court, which included one that there be another opinion in circulation before a vote.[138] And, in another situation, he referred to the "slipstream of *Almeida-Sanchez*" to call attention to what his colleagues had dealt with in the border-search cases and suggested that, in en banc treatment of a new standard for ineffectiveness of counsel, the en banc court also deal with the retroactivity of the new rule that would be developed, in order to avoid the problems with which the court had suffered earlier.[139]

The coordinator's suggestions might even bear on the substance of an en banc ruling, as when—writing as coordinator and not as a member of the en banc court—Judge Goodwin proposed a vote on submitting to Chief Judge Chambers several judges' suggestion about a statement to be placed in an order of remand to the district court, with Judge Chambers's order then "dispos[ing] of all the issues in the case except the point to be reconsidered on remand." (Then, as a member of the court, he voted yes.)[140] At the same time, another judge asked, "[W]ould it not be better to have our en banc coordinator formulate a proposition upon which we can vote?"[141] After judges agreed to Judge Goodwin's suggestion, the chief judge circulated his proposed order of remand, in which members of the court concurred.

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137. Memo. from Alfred T. Goodwin to Associates, *Re:* U.S. v. Jacobs & U.S. v. Dachsteiner (Mar. 24, 1975) (addressing *U.S. v. Jacobs*, 513 F.2d 564 (9th Cir. 1974), and *U.S. v. Dachsteiner*, 518 F.2d 20 (9th Cir. 1975)).

138. Memo. from Alfred T. Goodwin to Associates, *Re:* Plazola (Mar. 30, 1973).

139. Memo. from Alfred T. Goodwin to Associates, *Re:* Cooper (Sept. 9, 1977); *see also* Stephen L. Wasby, *Court of Appeals Dynamics in the Aftermath of a Supreme Court Ruling*, 42 Golden Gate U. L. Rev. ___ (2011) (forthcoming).

140. Memo. from Alfred T. Goodwin to Active Judges, John F. Kilkenny, J., U.S. Ct. of App. for the Ninth Cir., *Re:* U.S. v. Suarez Del Valle (Feb. 25, 1975) (addressing *U.S. v. Suarez Del Valle*, 1974 U.S.App. Lexis 9556 (9th Cir. Mar. 21, 1974)).

141. Memo. from J. Clifford Wallace to Associates, *Re:* Suarez Del Valle (Feb. 25, 1975).

At times the coordinator would go further to *recommend* action. On hearing from a judge about a concern he shared, Judge Goodwin wrote to his colleagues about a provision of the General Orders "which requires that if the panel decides to amend its disposition it 'shall notify all members of the court.'"[142] After explaining the rule's rationale ("to advise judges who are following the case, but who have not circulated a memorandum, to know what changes are being made in the opinion" because such "[c]hanges may affect further responses"),[143] he made a specific request:

> In the interest of keeping everyone informed and not moving the target without notice, all judges should ask their secretaries to make the extra effort to copy all judges when an amendment is made either in response to a suggestion by a judge or because the petition for rehearing has called to the panel's attention a need to correct its opinion."[144]

He added, "When in doubt, spread the word. Even redundant information does no harm, and it may keep the process running more smoothly."[145]

His advice *beyond* particular cases was often prompted by what had happened *in* a specific case. For example, faced with a party's request for en banc hearing before panel action, about which the motions attorney had suggested that en banc hearing was premature, Judge Goodwin recommended to the active judges that, based on the motions attorney's memorandum, they deny a motion for en banc hearing. In another instance, he attempted to avoid confusion by providing advice about filing "stop clocks" before a panel had issued a G.O. 5.4(b) notice of its vote on a petition for rehearing. In a talk at the annual Symposium that the court held for its judges, he further advised his colleagues, particularly the newest ones, that they should not seek to stop the clock when an en banc call was "almost inevitable."[146]

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142. Memo. from Alfred T. Goodwin to Associates (Oct. 26, 1987).

143. *Id.*

144. *Id.*

145. *Id.*

146. *See* Alfred T. Goodwin, *Notes* (undated) (consisting of preparation for the Ninth Circuit Symposium held on April 20–23, 1988).

V. THE COORDINATOR'S EXERCISE OF DISCRETION

Formal position descriptions do not always accurately capture the actual operations of a position's incumbent, and many instances thus far reported involve the exercise of discretion or the refusal to exercise that discretion when insisting on a firm application of the rules, itself also an exercise of discretion. Discretion was built into the General Orders provisions about the coordinator. While the set of rules on the time for actions to be taken did establish parameters within which the coordinator was to work, making much of his work "ministerial," discretion was certainly still possible—and was exercised. For example, seeing that a panel's author was somewhat behind in revising part of an opinion, Judge Goodwin used a G.O. provision flexibly so that a twenty-eight-day period supposed to run from circulation of the parties' response about whether the case should be heard en banc, instead would be measured "from [the judge's] . . . notice of intent to amend."[147] He also proposed that he "stop all en banc proceedings and [have all judges] send [the judge] all helpful suggestions."[148] The panel dissenter responded to that message with the rejoinder that, rather than take more time revising the opinion, in turn requiring a revision of the dissent, "everyone would be better if this case were either taken en banc immediately or sent on its way to the Supreme Court where it is likely to end up in any event."[149]

The exercise of discretion most often involves *time*—extending time in which to circulate memoranda and suspending or holding in abeyance the en banc process. The coordinator also uses his discretion to un-snarl difficulties and put a partly derailed process back on track. He might even, for example, extend matters to slow down en banc activity. When the court seemed to be getting ahead of itself because there were no cases before it through which to consider an important issue, Judge Goodwin asked a panel to recall the mandate in a case and later

147. Memo. from Alfred T. Goodwin to Melvin Brunetti, Associates, *Re:* Duro (Mar. 28, 1988).

148. Memo. from Alfred T. Goodwin to Melvin Brunetti, *Re:* Duro (Apr. 7, 1988) (including "cc: Associates").

149. Memo. from Joseph T. Sneed, III, to Associates, *Re:* Duro (Apr. 11, 1988).

communicated with the panel about initiating the mandate recall.[150]

The coordinator's most frequent exercise of discretion as to time was to extend the period for circulation of memoranda, with Judge Goodwin seldom if ever denying a judge's request that he do so. When a judge was away from chambers (including out of the county) or sitting on a panel, Judge Goodwin would allow such requested extensions, and he also allowed them because of the annual turnover in law clerks.[151] Holidays or the court's Symposium meeting or the circuit's judicial conference would lead to blanket extensions. In individual situations, he extended time so a panel could consider revising its opinion, doing so even after the panel's author had regularly missed deadlines for submitting an amended opinion.[152] He deferred proceedings in another case to allow a panel to circulate a revised opinion.[153]

The coordinator might put matters in abeyance to help out individual judges. Judge Goodwin did so when a judge involved in exchanges about taking a case en banc became ill, even though it led to a two-month delay in exchange of memoranda.[154] And in a major exercise of discretion, he granted "a special dispensation"—although only a day was necessary—requested by a judge who had left the country on the day a response to the PFR in a case had been filed and was still out of the country when an off-panel judge had sent his memorandum. This absence, coupled with the judge's not becoming or being made aware of the deadline to respond, meant that he had missed the deadline, leaving the court "with nothing but silence

150. Memo. from Alfred T. Goodwin to Associates, *Re:* U.S. v. Grajeda (Aug. 4, 1978) (addressing *U.S. v. Grajeda*, 570 F.2d 872 (9th Cir.), *withdrawn*, 587 F.2d 1017 (9th Cir. 1978)); Memo. from Alfred T. Goodwin to Anthony Kennedy, J. Blaine Anderson, *Re:* Grajeda (Oct. 20, 1978).

151. In one instance, he delayed a vote because Judge Sneed was on vacation. Memo. from Alfred T. Goodwin to Associates, *Re:* Harmsen v. Smith (Sept. 2, 1976) (addressing *Harmsen v. Smith*, 542 F.2d 496 (9th Cir. 1976)).

152. Memo from Alfred T. Goodwin to Associates, *Re:* Whitney (Jan. 5, 1988).

153. Memo. from Alfred T. Goodwin to Associates, *Re:* Facchini (Apr. 25, 1988).

154. Memo. from Alfred T. Goodwin to Associates, *Re:* Kanekona (Dec. 6, 1989); Memo. from William A. Norris to Associates, *Re:* Kanekona (Feb. 6, 1990).

from the author of the opinion."[155] As coordinator, Judge Goodwin also put a case in abeyance to help a judge who was slow in producing an opinion, putting a stop to proceedings to allow the judge to rework it, and went so far as to send the judge suggestions so as to move matters along[156]—actions that would seem to be outside a narrow "coordinating" function. When a judge's internal court e-mail system crashed, Judge Goodwin extended the time for the memo necessary to support the judge's stop clock and then allowed additional time for a panel response to the stop clock, because the panel was internally circulating a possible revised opinion and considering whether to respond to the clock-stopping judge.[157]

At other times, the coordinator suggested deferring the voting process or holding it in abeyance, sometimes to allow further exchange of memoranda[158] but also when the Supreme Court had just handed down a case relevant to the issue about which en banc rehearing was being sought;[159] this was also done when en banc rehearing was sought in a case likely to be affected by a case then in the en banc process.[160] Judge Goodwin also delayed a vote because of uncertainty about the procedural history of an issue, asking the author of the panel opinion to send an outline of the matter to other judges.[161] He could also decide, however, that voting should proceed, as when a party's PFREB was not received until voting had begun on a sua sponte en banc call.[162] Likewise, when a judge made an out-of-time en

155. Memo. from William C. Canby, Jr., J., U.S. Ct. of App. for the Ninth Cir., to Alfred T. Goodwin, Associates, *Re:* U.S. v. X-Citement Video (June 17, 1993) (addressing *U.S. v. X-Citement Video*, 982 F.2d 1285 (9th Cir. 1992), *rev'd*, 513 U.S. 64 (1994)).

156. Memo. from Alfred T. Goodwin to Melvin Brunetti, Associates, *Re:* Duro (Apr. 7, 1988).

157. Memo. from Alfred T. Goodwin to All Active Judges, *Re:* Duck v. Munn (Sept. 4, 1987) (addressing *Duck v. Munn* (*In re Mankin*), 823 F.2d 1296 (9th Cir. 1987)); Memo. from Alfred T. Goodwin to All Active Judges, Panel, *Re:* Duck (Sept. 30, 1987).

158. Memo. from Alfred T. Goodwin to Associates, *Re:* Giese & U.S. v. McCrea (Dec. 7, 1978) (addressing *Giese* and *U.S. v. McCrea*, 583 F.2d 1083 (1978)).

159. Memo. from Alfred T. Goodwin to Associates, *Re:* Scott (Jan. 26, 1988).

160. Memo. from Alfred T. Goodwin to Panel, All Active Judges, *Re:* Jeffers (Jan. 3, 1999).

161. Memo. from Alfred T. Goodwin to Associates, *Re:* Watkins (May 19, 1988).

162. Memo. from Alfred T. Goodwin to J. Clifford Wallace, All Active Judges, *Re:* Partington v. Gedan (Oct. 17, 1990) (addressing *Partington v. Gedan*, 880 F.2d 116 (9th Cir. 1989), *vacated*, 497 U.S. 1020 (1990), *on remand*, 914 F.2d 1349 (1990) (per curiam)

banc call, Judge Goodwin made clear his view that it was not justified.[163]

To avoid problems in one situation, the coordinator suspended en banc activity until he heard from two panels with related cases, both of which had post-panel activity. He asked the panels to coordinate their dispositions of responses to stop clocks and PFREBs, and wrote to them again to seek further coordination.[164] Judge Goodwin also sometimes exercised discretion to put matters back on track *after* a problem had developed. Thus in one case, a judge had stopped the clock before the time to do so was supposed to start running—there had been no G.O. 5.4(b) notice from the panel—so Judge Goodwin suggested that the panel consider the would-be stop-clock judge's concerns.[165]

In another situation, two cases from different panels were the subject of an en banc call, but the two cases did not move on the same track—in one, the opinion with withdrawn and reassigned—so the en banc coordinator was faced with having to coordinate the timing. The judge calling for en banc rehearing abided by the deadlines but proposed a delay, to which there was agreement.[166] In these cases, a judge raised the problem that a response to the PFREB had not been requested and he suggested suspended voting, but the panel's new author instead proposed

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(reaffirming and adopting earlier holding), *reversed & vacated in part*, 923 F.2d 686 (1991) (en banc) (per curiam)).

163. Memo. from Alfred T. Goodwin to Associates, *Re:* Midkiff v. Tom (Jan. 21, 1986) (addressing *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), *rev'd., sub nom. Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984)). The call for en banc hearing in *Midkiff*, Judge Goodwin noted, "was made after the time had run for calling for a vote and after the parties had moved to dismiss the [PFR]." As he then stated it, "[i]n the ordinary course the mandate would have gone down and the case would have been on its way to the Supreme Court." Thus he found "[a]ny further delay" to be "probably burdensome for the litigants" and noted that it "does not appear to be justified by any exigent circumstances." *Id.*

164. Memo. from Alfred T. Goodwin to Panels, *Re:* Shedelbower & Endell v. Smith (Dec. 9, 1988); *see also* Memo. from Alfred T. Goodwin to Various Judges, Associates, *Re:* Shedelbower & Endell (Jan. 24, 1989); Memo. from Alfred T. Goodwin to Associates, *Re:* Shedelbower & Endell (Mar. 5, 1990); Memo. from Alfred T. Goodwin to Diarmuid O'Scannlain, *Re:* Shedelbower & Endell (Mar. 23, 1990).

165. Memo. from Alfred T. Goodwin to Associates, *Re:* Garnett (Feb. 22, 1989).

166. Memo. from William A. Norris to Associates, *Re:* U.S. v. Sanchez (Oct. 13, 1992) (addressing *U.S. v. Sanchez*, 967 F.2d 1383 (9th Cir. 1992) & *U.S. v. Harrison-Philpot*, 978 F.2d 1520 (9th Cir. 1992)); Memo. from J. Clifford Wallace to Panel, *Re:* Sanchez (Oct. 20, 1992).

completing voting.[167] Judge Goodwin then, in an example of handling competing values through the exercise of discretion informed by a consideration of costs and benefits, agreed with the calling judge about the rule but agreed with the opinion author on how to proceed.[168]

The exercise of discretion might entail skirting the rules. Thus Judge Goodwin might allow memo exchange to begin even without a formal 5.4(b) notice of the panel's position on denying rehearing en banc;[169] likewise, he allowed an untimely en banc request because the panel order denying rehearing had not been entered.[170] And in another case, when he had not received an answer to whether counsel's views should be sought on having an en banc hearing based on the panel's call, he pushed a bit, stating the advantages for the other judges of hearing such views, and he again asked the panel about seeking counsel's views—something not required by the General Orders in the situation of a panel's en banc call.[171] With only a stop clock and no en banc call, he asked the panel to seek a response from the parties, in order to move things along—another instance of skirting the rules.[172] In a case in which a panel lost a member upon then-Judge Kennedy's appointment to the Supreme Court, and another panel member's electing senior status, Judge Goodwin allowed an en banc call to be made without panel action.[173] And in still another instance, in a situation for which the General Orders had no provision—for an en banc call by a second judge when the first judge who had called then withdrew the call—he informed his colleagues that he was proposing language to allow for a second call in such situations. He then suggested both that the panel in the

167. Memo. from Alex Kozinski to Alfred T. Goodwin, *Re:* Harrison-Philpot (Nov. 23, 1992); Memo. from Robert R. Beezer, J., U.S. Ct. of App. for the Ninth Cir., to Alfred T. Goodwin, *Re:* Harrison-Philpot (Nov. 23, 1992).

168. Memo. from Alfred T. Goodwin to Associates, *Re:* Sanchez & Harrison-Philpot (Nov. 20, 1992) (apparently mis-dated).

169. Memo. from Alfred T. Goodwin to Panel, Associates, *Re:* Watkins (Mar. 29, 1988).

170. Memo. from Alfred T. Goodwin to Associates, *Re:* Campbell v. Kincheloe (Apr. 8, 1988) (addressing *Campbell v.Kincheloe*, 829 F.2d 1453 (9th Cir. 1987)).

171. Memo. from Alfred T. Goodwin to Panel, Associates, *Re:* Landreth (Sept. 22, 1987) (based on a draft by Adell Johnson edited by Judge Goodwin).

172. Memo. from Alfred T. Goodwin to Betty Binns Fletcher, *Re:* Walker v. Endell (Jan. 20, 1988).

173. No specific citation for this case is available in the Goodwin Papers.

immediate case wait seven days before filing its denial of rehearing en banc, should a second judge want to call, and that another panel in a similar situation also delay until a pending amendment was adopted.[174]

If the en banc coordinator is willing to exercise discretion to placate his colleagues and to keep the process moving, what happens when a beneficiary of that discretion nonetheless continues to pose a problem? In one case, Judge Goodwin had granted a panel additional time to respond to a stop-clock but it did not do so within the allotted time. He then told the judge seeking the stop clock and the panel that if the panel provided no response by a certain time, an en banc call could be made without waiting further. That effectively served as a nudge, as the judge who had stopped the clock and the panel worked out matters.[175]

A. Constraints

Is the coordinator's exercise of discretion constrained? Most definitely. When a panel had added a footnote to an opinion and the question arose whether this made it a new opinion, thus triggering certain procedures, we can see Judge Goodwin limiting the exercise of his authority, as he stated that he didn't evaluate footnotes for substance.[176] Some constraints on the coordinator come from his own role conception,[177] but he is also accountable to the court as a whole. For one thing, he regularly *reports* to his colleagues. Reports are made at meetings like the court's annual Symposium on the actions taken in a calendar year, such as stop clocks, including those withdrawn and those proceeding to a vote, and the number of en banc

174. Memo. from Alfred T. Goodwin to Associates, *Re:* Fernandez v. Brock (Feb. 25, 1988) (addressing *Fernandez v. Brock*, 840 F.2d 622 (9th Cir. 1988), and based on a draft by Adell Johnson edited by Judge Goodwin).

175. Memo. from Alfred T. Goodwin to Mary M. Schroeder, Panel, *Re:* Greenhow (Sept. 26, 1988). Slightly earlier, when another judge had not timely responded to a stop clock, he also let a judge, who wanted to make an en banc call, proceed. Memo. from Alfred T. Goodwin to Betty Binns Fletcher, Alex Kozinski, Associates, *Re:* Walker v. Endell (Dec. 30, 1987).

176. Note from Alfred T. Goodwin on memo. from Jeff [no last name indicated] to Alfred T. Goodwin, *Re:* Gutierrez (May 16, 1988).

177. *See* Section V(A)(1), *infra*.

ballots taken, failed, or terminated short of a final vote. In the shorter run, Judge Goodwin sent messages to his colleagues about the status of particular cases. He indicated which would require discussion at the next meeting of Court and Council and noted activity in some pending cases.[178] He also sent them messages summarizing actions taken when the judges had discussed a series of cases in which either en banc opinions were being prepared, a vote on taking a case en banc was scheduled, or such a vote had occurred.[179]

Another constraint is that colleagues might dispute or question his actions. When Judge Goodwin exercised his discretion quite broadly, his colleagues pushed back. In a partial en banc that posed the question of how to handle a multi-issue case in which only one issue raised an en banc matter, Judge Goodwin had been the author of the panel opinion.[180] He seemed to pursue an informal en banc (circulation to all members of the court, but no formal en banc discussion) to resolve the question of an intra-circuit conflict that had been raised. Quite quickly one judge questioned the proposal, another chimed in,[181] and even some senior judges objected to this departure from the process, a clear indication that the en banc coordinator had exercised his discretion too broadly. (The regular en banc process was used for the contested issue.)

And there were other times when the coordinator's colleagues stood up to each other, not easily accepting each other's authority, and were immovable.[182] They were not hesitant to question rule interpretations if they believed that the coordinator had stretched a rule too far. For example, when Judge Goodwin treated a belated stop-clock memo as an en banc call and set time for circulation of memos, this was questioned as premature, with the panel having to consider the stop clock memo first.[183] In another case, a judge who said the rule on

178. *See* Memo. from Alfred T. Goodwin to Associates (Dec. 22, 1978).

179. See Memo. from Alfred T. Goodwin to Associates, *Re: "Minutes" of January 12, 1979, Meeting* (Jan. 15, 1979).

180. *See Cook*, 608 F.2d 1175.

181. Memo. from J. Clifford Wallace to Associates, *Re:* Cook (May 8, 1978); Memo. from Herbert Y. C. Choy to Associates, *Re:* Cook (May 9, 1978).

182. It is often said that one "Article III" (a lifetime-appointment judge) cannot tell another "Article III" what to do.

183. Memo. from J. Clifford Wallace to Active Judges, *Re:* Hoptowit (May 24, 1982).

calling for the parties' responses should be more flexible pushed back against Judge Goodwin's request to seek a response,[184] and Judge Goodwin acceded. While the en banc coordinator may—indeed, must—at times press for adherence to the rules, rigid application of them would upset enough colleagues to make it difficult for the coordinator to function effectively.

Discretion is also constrained by the coordinator's seeking feedback from, and consulting with, his colleagues. After the court had set a schedule for circulation of memoranda in one case, Judge Goodwin consulted with some judges and then indicated that there would be no vote as originally scheduled, because the target was not stationary. He also consulted with a judge who had raised a concern about what the coordinator would propose,[185] and he had a colleague review some proposed rule changes before he sent them to Chief Judge Browning.[186] And in one situation, he consulted by asking for a vote so that he would not be acting unilaterally.[187]

Not only did the en banc coordinator communicate regularly with his colleagues as individual cases moved through the process, but, in his role as a problem-solver, he also sent matters to the court's Executive Committee and thence to the full court.[188] While the coordinator could play a role, even a large one, in rule revision, it was the *court* that could revise the rules. The coordinator could refer an issue to his colleagues (who would expect him to present analysis and a recommendation) or to the circuit's Advisory Committee on Rules, and he might prepare proposals and supporting

184. Memo. from Betty Binns Fletcher to Alfred T. Goodwin, All Judges, *Re:* Balistreri (Mar. 6, 1990).

185. Memo. from Alfred T. Goodwin to J. Clifford Wallace (Oct. 23, 1987) (relating to having all panel members, when amending dispositions, notify all members of the court); Memo. from J. Clifford Wallace to Alfred T. Goodwin (Oct. 27, 1987) (same, and stating that "I think that your memorandum . . . will do the job"); Memo. from Alfred T. Goodwin to Associates, (Oct. 28, 1987) (same).

186. Memo. from Alfred T. Goodwin to James R. Browning (May 28, 1987) (noting that "Judge Schroeder has reviewed the proposed changes and we think they take care of" the matter).

187. Memo. from Alfred T. Goodwin to Associates, *Re:* Khalsa v. Weinberger (Jan. 21, 1986) (addressing Khalsa v. Weinberger, 779 F.2d 1393 (9th Cir. 1985) (as amended 1986)).

188. *See* Section V(A)(2), *infra.*

documentation, with language for amended rules or new rules. But he could not change the rules unilaterally.

1. Discretion and Role

How the en banc coordinator exercises discretion in specific instances is one of the best indicators of the coordinator's perception of that role. How colleagues saw the coordinator also helped define that role. Some judges showed him deference or referred to the coordinator as an umpire, with final authority; in that vein a judge invoked the possibility that the coordinator exercise "binding arbitration."[189] And another judge sent him a proposed order in another case for his approval as en banc coordinator.[190]

Administering rules might be straightforward in most circumstances, but the existence of discretion to excuse missed deadlines and to grant extensions raises the question of how active a role the en banc coordinator should play and how discretion should be exercised. Judge Goodwin's chief secretary raised this question when she thought he needed to obtain direction from the Executive Committee to take a matter to the full court.[191] One of "two approaches to monitoring" by an en banc coordinator she called the "passive approach" (the judge later called it the "responsive approach"), in which the coordinator "would be responsible only for starting the time for responsive memoranda . . . , sending the ballot, and reporting the result."[192] This would rely more on the panel or the judge who called for en banc to notify others that certain events had occurred. By contrast, the "aggressive approach" would entail the coordinator's "monitor[ing] the dates on which responses are due and start[ing] the memoranda time when the response has been circulation," in addition to asking panel authors for

189. Memo. from Alex Kozinski to Panel, *Re:* Gutierrez (May 31, 1988) (including "cc: Alfred T. Goodwin").

190. Memo. from Ozell M. Trask, J., U.S. Ct. of App. for the Ninth Cir., to Alfred T. Goodwin, *Re:* Giese (Mar. 22, 1979).

191. Memo. from Adell Johnson to Alfred T. Goodwin (July 17, 1987). This memorandum became the basis for a memorandum from Judge Goodwin to the court's Executive Committee. *See* n. 195, *infra.*

192. Johnson Memo, *supra* n. 191.

"monthly status reports on any stop clock cases or cases where en banc procedures have been held pending panel action."[193]

The secretary felt that the former "will result in more en banc delay and possibly some cases falling through the cracks" but would take the coordinator "off the hook for any enforcement of time limits,"[194] while the judge himself said that the latter approach would entail "the risk of being seen as advocating a particular outcome."[195] One judge, "emphatically endors[ing]" the aggressive approach "even though it admittedly adds to your burdens," did not think that its use would make colleagues see the coordinator as advocating one side over another. Instead, "[i]t really is just a neutral method to keep the business of the court flowing properly and expeditiously," because the court "as an institution, 'looks bad' when things fall through the cracks."[196] Three months later, Judge Goodwin, in nudging a judge to comply with a deadline, said that the court's judges had "seemed to agree that I should take an assertive position in enforcing the revised rules orders regarding en banc proceedings."[197]

Related to the coordinator's role conception is that judge's personal style, with which it is intermeshed. That Judge Goodwin was of moderate ideology and temperament, with a dislike of bureaucracy, helps explain his performance as en banc coordinator. Particularly noteworthy is that, although he could be tart in private about some judges who routinely delayed matters, he generally did not complain when writing to colleagues. One problem about which he quietly signaled his unhappiness was that judges continued to send memos about taking a case en banc *after* the deadline for such memos had passed, which in at least one instance required re-starting the voting. He began by saying that, "[i]n the interest of keeping peace in the family," he was making a suggestion "that all judges who wish to send late memoranda on en banc matters

193. *Id.*

194. *Id.*

195. Memo. from Alfred T. Goodwin to Executive Committee, U.S. Ct. of App. for the Ninth Cir. (July 27, 1987).

196. Anderson memorandum, *supra* n. *. It was in this memorandum that Judge Anderson said that "[w]e, all of us, need a watchdog for the good of the order," which I have borrowed as title of this paper.

197. Memo. from Alfred T. Goodwin to Associates, *Re:* Landreth (Oct. 13, 1987).

after the time has expired publicly request an extension of time for that purpose (copies to all judges) before the time has expired and the ballot has gone out." He also said that "[c]ompliance with these deadlines will be appreciated." Yet he ended with the following not-too-veiled message about the difficulties caused when rule violations blind-sided him:

> I am reminded of the death of the great Houdini. He used to amaze visitors by letting professional pugilists hit him in the stomach. On the day that his terminal illness began, a visitor in his dressing room popped him in the stomach when he was not expecting it. I envy anyone who can, by an act of will, harden the muscles of his stomach to withstand a piledriver blow. As en banc coordinator I could use such strength.[198]

2. Problem-Solving.

In addition to dealing with individual cases, the en banc coordinator is also a problem-solver for the longer term, although problem-solving activity, including consideration of rule revision, *outside* of cases often stemmed from what had taken place *in* particular instances. Not simply waiting for a colleague to identify a problem, the coordinator might spot a problem in memoranda that came across his desk, or his secretary or law clerk might call his attention to one. An example would be that a judge's stop clock or en banc call didn't "fit" because a PFREB had not been filed or a response has not been sought or received; having identified the problem, the coordinator would specify the proper course(s) of action. Going beyond the immediate issue, Judge Goodwin might propose rules changes, requiring consideration of the necessity of new rules and then their form.

Just as constituents' concerns often give rise to policy questions for legislators, judge-identified policy issues about en banc practices came to the coordinator as problems for which a solution was necessary. These might stem from an unclear provision in the General Orders or from a lacuna in the rules. Thus a judge questioned the timing of circulating memoranda in relation to the response to the rehearing petition, complained

198. Memo. from Alfred T. Goodwin to Associates (Oct. 26, 1987).

about what he saw as "a dumb rule," and asked the coordinator for a waiver, also saying that "the rules committee should revise it ASAP."[199] When the same judge complained that an en banc court had returned its case to the initial three-judge panel, thus undoing the whole court's decision to take a case en banc, Chief Judge Browning referred the matter to the court's Executive Committee,[200] and one judge developed the notion of a "Hop To It" memo to get judges tardy in taking actions to do what they were supposed to do.[201]

Problem-identification might reveal apparent animosity between judges, as occurred when two disputed an interpretation of the General Orders, with one saying a stop clock was not timely.[202] However, most problems were pointed out to the en banc coordinator without rancor—or at least without aiming at another judge. Thus when confusion as to when responses should be sought resulted from several requests to file amicus briefs, Judge Reinhardt said that the situation was "out of hand" and showed why the court should return to not requiring responses.[203] Another judge, responding to colleagues' observations in a different case, asked that a staff person prepare a paper so the issue involved could be discussed.[204]

Some problems were specific to a particular situation, as when en banc rehearing was being considered in two related cases and the question was which case had priority. As both cases were taken en banc, this also illustrates that in some problem situations, ultimately nothing needed to be done to

199. Memo. from Alex Kozinski to Alfred T. Goodwin, Associates, *Re:* U.S. v. Vasquez-Chan (Mar. 25, 1993) (addressing *U.S. v. Vasquez-Chan*, 978 F.2d 546 (9th Cir. 1992), *overruled, U.S. v. Nevils*, 598 F.2d 1158 (9th Cir. 2010)).

200. Memo. from James R. Browning to All Active Judges, *Re:* Zolin, (May 9, 1988). The Ninth Circuit's decision on remand is reported at 905 F.2d 1344 (9th Cir. 1990). Judge Browning later found minutes of a 1982 Symposium that were on point. *See* Memo. from James R. Browning to Associates (Aug. 9, 1988).

201. Coined by Judge Farris after *Hoptowit*, 682 F.2d 1237.

202. *See Johnston*, 850 F.2d 594. The problem evaporated when no en banc call was made.

203. Memo. from Stephen Reinhardt to Panel, *Re:* Hocking v. Dubois (June 20, 1988) (addressing *Hocking v. Dubois*, 839 F.2d 560 (9th Cir.), *withdrawn pending rehearing en banc*, 863 F.2d 654 (9th Cir. 1988 (mem.), 885 F.2d 1449 (9th Cir. 1989) (en banc)).

204. Memo. from James R. Browning to Cecil F. Poole, *Re:* Ronwin v. St. B. of Ariz., (Nov. 10, 1982) (addressing *Ronwin v. St. B. of Ariz.*, 686 F.2d 692 (9th Cir. 1981), rev'd., *sub nom. Hoover v. Ronwin*, 466 U.S. 558 (1984)).

resolve the specific issue.[205] When a judge requesting both a stop clock for another unavailable judge and a response had been misinformed of a missed deadline because of case name similarities, that specific problem was solved by waiving a deadline.[206] An unusual set of problems arose in the aftermath of the Loma Prieta earthquake, which damaged the circuit's San Francisco headquarters courthouse and, in the short run, led to delays in filing of documents.[207] When a judge wanted to stop the clock to protect a party's ability to file a PFREB, Judge Goodwin said that an order holding deadlines in abeyance would take care of the problem.[208]

Some more general problems were relatively minor and did not require rule changes, as when a judge suggested that someone stopping the clock or calling for en banc rehearing should indicate the case's filing date and whether it had been a published opinion or an unpublished memorandum,[209] or when a party filed only three copies of a response to an en banc suggestion, leading Judge Goodwin to say that the Orders should show that "an original and forty copies" should be supplied.[210] Other problems had broader impact, as when one judge who had filed a stop clock and wanted assistance from litigant's counsel as to whether he should make an en banc call claimed another glitch in the rules after Judge Goodwin had said no response need be sought from the parties when there was only a stop

205. Memo. from Procter Hug, Jr., to Alfred T. Goodwin, Panels, *Re:* Shedelbower & Endell v. Smith (Aug. 31, 1989).

206. Memo. from Stephen Reinhardt, for Dorothy W. Nelson, to Alfred T. Goodwin, Associates, *Re:* U.S. v. Martinez (Oct. 18, 1989) (addressing *U.S. v. Martinez*, 883 F.2d 750 (9th Cir. 1989), *vacated*, 929 F.2d 1470 (9th Cir. 1991)).

207. *See generally* Stephen L. Wasby, *The Loma Prieta Earthquake and the Ninth Circuit Court of Appeals*, 11 W. Leg. History 41 (1998).

208. Memo. from William A. Norris to Alfred T. Goodwin, Betty Binns Fletcher, *Re:* Planned Parenthood of S. Nev., Inc. v. Clark Cty. Sch. Dist. (Oct. 27, 1987) (addressing *Planned Parenthood of S. Nev., Inc. v. Clark Cty. Sch. Dist.*, 887 F.2d 935 (9th Cir. 1997), *modified*, 941 F.2d 817 (9th Cir. 1991) (en banc)); Memo. from Alfred T. Goodwin to William A. Norris, *Re:* Planned Parenthood (Oct. 31, 1989).

209. Memo. from J. Blaine Anderson to Associates, *Re:* Duck (Aug. 18, 1987).

210. Memo. from Alfred T. Goodwin to Associates, *Re:* U.S. v. Wicks (Jan. 26, 1988) (addressing *U.S. v. Wicks*, 833 F.2d 192 (9th Cir. 1987)).

clock, as responses were to be sought only after an en banc call.[211]

A problem with serious implications arose when a judge wanted to stop the clock in a death-penalty case after the panel had ordered a limited remand and had rejected an en banc suggestion as premature. The judge took the position that he had been deprived of the opportunity to seek en banc hearing as to the remand order but then suggested that the panel "unpublish" the order.[212] Here the coordinator weighed in to note the practice of using unpublished orders for such remands and to say that the better practice would be to publish the order to avoid the claim that matters were being swept under the rug; he hoped that the two sides "could work out their differences . . . without mobilizing the energy involved in en banc behavior."[213] An en banc call was not avoided, but the calling judge did indicate how the problem he had raised would ultimately be obviated, if somewhat awkwardly.[214]

The presence of "pocket vetoes" illustrates proceeding from a problem to proposals for change. In several cases, Judge Goodwin had encountered the situation in which the judges on a panel, asked by an off-panel judge to reconsider their disposition, would say that they were "considering revising their opinion" and then sit on it,[215] thus blocking the off-panel judge's request and resulting in "inordinate delay" because there was no time limit for panel opinion revision. Noting to the Executive Committee that "concerns expressed that the General Orders do not provide a time limit in which a panel, in response to a

211. Memo. from Alfred T. Goodwin to Alex Kozinski, *Re:* Jeffers (Feb. 8, 1988); Memo. from Alex Kozinski to Alfred T. Goodwin, *Re:* Jeffers (Feb. 9, 1988).

212. Memo. from Alex Kozinski to Panel, *Re:* Fetterly v. Paskett (Aug. 4, 1993) (indicating that Judges Kozinski, Hall, and Wiggins dissented from the order rejecting the suggestion for rehearing en banc in *Fetterly v. Paskett*, 997 F.2d 1295 (9th Cir. 1993), *reh. denied*, 15 F.3d 1472 (9th Cir. 1994), and publishing their dissenting opinion); Memo. from Alex Kozinski to Stephen S. Trott, Associates, *Re:* Fetterly (Aug. 5, 1993).

213. Memo. from Alfred T. Goodwin to Alex Kozinski, Stephen S. Trott, Associates, *Re:* Fetterly (Aug. 6, 1993) (noting that "panels have so far avoided confrontational en banc traffic by means of unpublished dispositions" and suggesting that, "if it is not possible to avoid the charge that we are sweeping something under the rug, the better practice is to publish").

214. Memo. from Alex Kozinski to Alfred T. Goodwin, *Re:* Fetterly (Sept. 20, 1993).

215. Memo. from Alfred T. Goodwin to Executive Committee, U.S. Ct. of App. for the Ninth Cir. (July 27, 1987).

request for an en banc vote, must circulate an amended opinion if the panel has advised that it is reconsidering its decision," Judge Goodwin pointed to two specific cases within the preceding year as "examples of inordinate delay because no time limit has been set," one in which the panel had considered the matter for seventeen months and another in which a ballot was circulated over three months after the en banc call, only after the coordinator had inquired and the panel "indicated no panel action."[216] (The court adopted the suggestions.)

Revision of rules derived from rulings in a case involved the possibility of an en banc proceeding before the full twenty-eight-judge court. An eleven-judge limited en banc panel (LEB) had not yet completed its work on a case when a judge sought full-court en banc review.[217] As en banc coordinator, Judge Goodwin ruled the call inappropriate. The calling judge took the matter to a meeting of the court. "After much discussion," in a situation another judge called "stressful," the court decided not to put the matter off and "then voted to overrule Judge Goodwin's ruling," thus allowing the call if the judge wished to proceed.[218] This resulted only after an exchange of long memos between Judge Kozinski, who had made the call for the full court en banc, and Judge Schroeder. Recognizing the need for revision of the rules in such situations, the court both made clear that it had "voted with the understanding that the action was sui generis to the instant case and would not indicate general policy towards allow[ing] a call for full en banc" and instructed the En Banc Committee, of which Judge Goodwin was a member, to propose changes to the relevant General Order.[219]

Judge Goodwin shortly initiated communication with committee members, sending a rough draft of a proposal to revise two provisions of the General Orders. One was on withdrawal of three-judge panel opinions when a case was taken en banc, and the other concerned the matter on which he had

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216. *Id.*

217. The case was *Arguelles-Vasquez v. I.N.S.*, 786 F.2d 1433 (9th Cir. 1986), *vacated*, 844 F.2d 700 (9th Cir. 1988).

218. Later, the judge who had spoken of the "stressful court meeting" said that "we reached a compromise through the good efforts and willingness of many to reach some accommodation with respect to that case." Memo. from Mary M. Schroeder to Associates, *Re:* Arguelles-Vasquez (Mar. 30, 1988).

219. U.S. Ct. of App. for the Ninth Cir., Minutes: Meeting of Oct. 5, 1987.

been overruled, as to which he noted that while the court had not taken a case away from a panel prior to the panel's filing its disposition, some provision for doing so in unusual circumstances might be needed.[220] After hearing from his fellow committee members,[221] he suggested specific language, noting that he and Judge Sneed favored one version of the rule on removing a case from an en banc panel while Judge Reinhardt favored another.[222] At the same time, he made a suggestion on a related matter, of en banc hearing on emergency motions, as there "is now no provision for a vote to go en banc and overrule the granting of [a] stay"—although there could be one if a stay were denied.[223]

Changes in one set of rules might also reveal the need for yet other changes. Soon after rules changes, the coordinator might face colleagues' statements, even complaints, about difficulties. For example, after one panel had sought initial en banc, Judge Goodwin inquired of the panel about seeking the parties' views on taking the case en banc. The panel's presiding judge complied but groused, asking if additional briefs were not overkill. Citing the rule on which he based his request and the rule's rationale, Judge Goodwin offered an explanation for his action. He said that the new rules were in a shakedown period, so the court should discuss judges' views on asking for briefs in that situation, and he went on to indicate that he would also be asking his colleagues to approve a rule requiring a panel to circulate an opinion before asking for hearing en banc.[224]

In one instance of a new circuit rule leading to the consideration of changes to the court's General Orders, Judge Goodwin, after consulting with another judge, sent proposals to the chief judge to be considered by the court's Executive

220. Memo. from Alfred T. Goodwin to Joseph T. Sneed, III, Stephen Reinhardt (Oct. 28, 1987).

221. Memo. from Joseph T. Sneed, III, to Alfred T. Goodwin, Stephen Reinhardt (Oct. 29, 1987); Memo. from Stephen Reinhardt to Alfred T. Goodwin, Joseph T. Sneed, III Oct. 30, 1987).

222. Memo. from Alfred T. Goodwin to Joseph T. Sneed, III, Stephen Reinhardt (Nov. 3, 1987).

223. *Id.*

224. Memo. from Alfred T. Goodwin to Associates, *Re:* Landreth (Oct. 13, 1987).

Committee.[225] That fixing one problem could lead to another also became apparent when the court set the amount of time in which parties were asked to file responses on whether to take a case en banc. The result of the interlocking rules was that a judge seeking en banc rehearing had to circulate a supporting memo before the parties' responses were received. Calling this difficulty to his colleagues' attention, Judge Goodwin suggested re-sequencing matters.[226]

VII. EPILOGUE: AFTER JUDGE GOODWIN

Judge Goodwin was to continue as en banc coordinator until 1993, some time after he had stepped down as chief judge. After Judge J. Clifford Wallace had begun to acclimate to being chief judge, Judge Goodwin was finally able to relinquish the en banc coordinator position to Judge Mary M. Schroeder. When Judge Schroeder succeeded Judge Procter Hug, Jr., as chief judge, Judge Sidney R. Thomas became the coordinator, and he has continued to serve under Chief Judge Alex Kozinski. While the court has retained the en banc coordinator position, it created a separate structure for en banc activity in death penalty cases, with another judge, David R. Thompson, initially designated to coordinate that process.[227] After Judge Thompson gave up the position, Judge Thomas served for a while as coordinator of both the regular and death penalty en banc processes. After Judge Michael Daly Hawkins's brief tenure as death penalty en banc coordinator, Judge Thomas again added the death penalty en banc coordinator duties to those of the en banc coordinator.

The separate position of death-penalty coordinator was created because of the need for extremely prompt action in capital cases, particularly as to stays of execution, although having separate processes is in part "a matter of administrative

225. *See* Memo. from Alfred T. Goodwin to James R. Browning (May 28, 1987) (sending proposals for three changes to General Orders).

226. Alfred T. Goodwin, *Report as En Banc Coordinator, U.S. Court of Appeals for the Ninth Circuit* (prepared for Ninth Circuit Symposium in Blaine, Wash., Apr. 20–23, 1988).

227. Judge Goodwin had handled some death-penalty cases, which did not necessarily entail more work for the coordinator than non-capital cases, but the cases were not ones arriving at the court on last-minute stay requests.

convenience."[228] The death penalty en banc process is shorter than that for other cases. While the vote on taking non-capital cases en banc extends over two weeks, the comparable period for death penalty cases is extremely short. Moreover, whereas a judge's not voting in the regular en banc process is the equivalent of a "no" vote because a majority of all non-recused active judges must vote "yes" for a case to be taken en banc, a judge's not voting in the death penalty en banc situation is considered a "yes" vote.

Otherwise, except for "some fine-tuning of administrative procedure," the processes for handling activity related to en banc rehearing have "remain[ed] by and the large same."[229] The processes, having become regularized during Judge Goodwin's long tenure in the position, are now institutionalized, and thus are not dependent on a single judge. And it appears to be the case that the en banc coordinator will be either the judge next in line to be chief judge ("the crown prince[ss]") or the judge next on the seniority list.

One noticeable change from the "Goodwin regime" was moving the responsibility for most coordination work from the coordinator's chambers to the hands of Paul Keller in the Clerk's Office. Keller, who had briefly served as a clerk to Chief Judge Goodwin on loan from the Staff Attorney's Office and had later returned to the court as a staff attorney, in 2000 was asked to be the Clerk's Office "point person" for en banc matters. Keller was asked to take on these duties because of his prior work on en bancs for Chief Judge Goodwin and his unlimited-tenure position with the court. As he put it, "I had institutional knowledge and would be around for a while." He thus provides continuity, which is important because, especially with law clerks changing each year, "judicial assistants, law clerks, and even judges have questions about procedural steps with pending petitions for rehearing en banc," questions Keller generally answers "where the court Rules and the General Orders are clear." He also maintains an internal website indicating the procedures and steps in each case.[230] One might

228. Telephone interview with Paul T. Keller, Supervisory Staff Atty., U.S. Ct. of App. for the Ninth Cir. (Oct. 8, 2009) [hereinafter "Keller Interview"].

229. *Id.*

230. *Id.*

speculate that the institutional support that Keller provides would make it easier to persuade a judge to become en banc coordinator, contrary to the situation when there were no "takers" when Judge Goodwin sought to relinquish the position on becoming chief judge.

Keller's work includes informing judges of deadlines and circulating ballots, memoranda about which now are sent over Keller's signature rather than Judge Thomas's. However, any key or important decisions have been and are made by the en banc coordinator, not Keller. Although Keller provides staff assistance to Judge Thomas who "may ask what I think," Keller refers matters to Judge Thomas "when the issue is not resolved by circuit court Rules or the General Orders" and is "anything involving discretion," such as waiving or extending deadlines when a judge seeks additional time to submit a request or circulate a memo—in short, any "grey area."[231] Judge Thomas himself "settles questions over filing deadlines, and the timeliness of en banc calls."[232]

In view of Chief Judge Chambers's initial rationale for the en banc coordinator position—that a judge, not someone in the Clerk's Office, should remind judges of deadlines—it is interesting that Keller feels he has "not encountered any resistance" from judges, but that is because he is "only dealing with unambiguous matters."[233] His work generally extends "only to the point where en banc fails or goes." However, Chief Judge Kozinski appears to rely more on Keller for the drafting of orders and memos than did Judge Schroeder, and so, under the present chief judge, Keller has also drafted memos about deadlines within the en banc court. The result is an arrangement that seems to have some parallels to Judge Goodwin's greater role under Chief Judge Chambers.

VIII. CONCLUSION

The en banc activity of a federal court of appeals—not only the activity that takes place after en banc hearing is granted, but

231. *Id.*

232. Dan Levine, *Potential High Court Nominee Thomas Would Fit Obama Narrative*, Recorder (May 5, 2010).

233. Keller Interview, *supra* n. 228.

the activity while a court decides whether to hear a case en banc—is quite important, both in resolving inconsistencies within circuit jurisprudence and in engaging more members of the court than participate in the three-judge panels that decide most of the court's cases. When the communication relating to taking a case en banc becomes voluminous, it may be necessary to have someone superintend the process, reminding judges of deadlines and enforcing the court's rules. Only one federal circuit, the Ninth, has decided to have a judge fill a position denominated en banc coordinator. In this article, the work of the en banc coordinator is demonstrated through the actions of Judge Alfred T. Goodwin, who held the position for roughly twenty years.

An en banc coordinator does not act alone, but has assistance from secretaries and law clerks, and other judges cooperate in moving cases through the en banc process or in raising questions about problems and then helping resolve them. The en banc coordinator can be seen to inquire of his colleagues and to respond to their inquiries, interpret the rules, suggest actions to fellow judges, and advise them how to proceed, and also to recommend courses of action. The en banc coordinator often exercises discretion, although there are also constraints on that discretion. At least the en banc coordinator draws from the particulars of specific cases to take a larger view of the court's en banc rules, which he assists in refining.

We do not know the effect of the Ninth Circuit's position of en banc coordinator on other courts of appeals, but we have not seen any diffusion of this innovation in judicial administration. Certainly a number of the other courts of appeals have attained the number of judges that the Ninth Circuit had when Chief Judge Chambers asked Judge Goodwin to assume the new position and thus have the same need for coordination of post-panel communication about cases.[234] However, perhaps the pre-filing circulation of published opinions used by some

234. For example, the Fourth Circuit has had fifteen authorized judgeships since 1990 and the Fifth Circuit has had seventeen. *See* Federal Judicial Center, *History of the Federal Judiciary: The U.S. Courts of Appeals and the Federal Judiciary*, http://www.fjc.gov/history/home.nsf/page/courts_of_appeals.html (click "Select a Circuit" from the menu on the left margin to reach individual-circuit information) (accessed May 18, 2011; copy on file with Journal of Appellate Practice & Process).

other circuits and their "informal en banc processes"[235] lessen the need for such a position, and it may be possible that the Ninth Circuit's interest in institutional innovations made it more likely to establish such a position and to continue to be the only court to have done so.[236]

235. *See e.g.* Michael S. Kanne, *The 'Non-Banc En Banc': Seventh Circuit Rule 40(e) and the Law of the Circuit*, 32 S. Ill. L. J. 611 (2007); *see generally* Ginsburg & Falk, *supra* n. 3, at 1015–16 (1991).

236. *See Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts* (Arthur D. Hellman ed., Cornell U. Press 1990).