§ 3.30 Sample of Written Statement: Statement Prepared for House Judiciary Subcommittee on Courts and Intellectual Property in Opposition to the Split of the 9th Circuit Court of Appeals

This document is an example of a formal written statement submitted to a subcommittee prior to a hearing. It utilizes a cover page. Note how the statement is laid out by topic with the use of Roman numerals and capital letters. Notice also how recommendations for action are included in the final paragraphs of items I and II. Preceding the official statement is an executive summary that provides a "quick look" at the statement's basic content for those who do not have or take the time to read the entire formal statement. (See § 3.16, Important Documents: Drafting the Statement and Making the Record -- Executive Summary and the Famous One-Pager.) Finally this document is the basic text from which was crafted the actual witness statement presented at the hearing - the literal words actually uttered by the witness to the committee. To see that document, go to § 3.34, Sample of Oral Statement - Written Document Used to Deliver Oral Statement.

STATEMENT OF

WILLIAM N. LAFORGE

CHAIRMAN
COMMITTEE ON GOVERNMENT RELATIONS
FEDERAL BAR ASSOCIATION

BEFORE THE
SUBCOMITTEE ON COURTS
AND INTELLECTUAL PROPERTY
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

CONCERNING
THE FINAL REPORT OF THE
COMMISSION ON STRUCTURAL ALTERNATIVES
FOR THE FEDERAL COURTS OF APPEALS

JULY 22, 1999

EXECUTIVE SUMMARY

The Federal Bar Association is vitally interested in the proposed reorganization of the Court of Appeals for the Ninth Circuit because it is the only national bar association that has as its primary focus the practice of federal law. Of the 15,000 attorneys in private and government practice across the nation who belong to the FBA, over 2,700 practice in the Ninth Circuit. With such a regional and national constituency, the FBA has its feet in both camps -- as the beneficiary of direct experience with the structure and operation of the Ninth Circuit, and as a stakeholder in the well-being of the entire federal court structure and the uniform administration of justice.

The FBA applauds the recommendation of the Commission on Structural Alternatives for the federal Courts of Appeals (White Commission) against splitting the Ninth Circuit into two or more circuits. In our prior comments and testimony before the White Commission, the FBA strongly argued against such a split. Instead the FBA favors increased innovation and experimentation by the Ninth Circuit to arrive at solutions that advance the court's efficiency and effectiveness. As the White Commission Report acknowledges, the Ninth Circuit long has been a crucible for experimentation in management and disposition of a growing federal court caseload. Many of the innovations employed by the ninth Circuit in the past have proven successful, and thus, are proven mechanisms for other circuits to implement as they encounter problems associated with growth of caseload and court size.

The FBA believes that the White Commission's proposed division of the Circuit into three semi-autonomous adjudicative units, and corresponding *en banc* revision, is not in the best interests of the Circuit, its adjudicatory processes, litigants appearing before it, and the interests of justice. It is not likely to increase the uniform application of federal law, and certainly not within the state of California. It is not likely to make the law more predictable. It is not likely to speed the court's decision-making or create cost-savings for litigants. It is not likely to lead to fewer conflicts in decisional law. It is not likely to enhance the integrity of or the respect for the federal courts. Furthermore, it is not likely to ease the weight of the Ninth Circuit's caseload, nor enhance or simplify litigation. Indeed, the proposal would in many respects accomplish the contrary. The structure and processes of a court are not its ends. They are the means to the end of serving the administration of justice. Rather than passing structure-oriented legislation that may or may not prove desirable with experience, the FBA recommends that Congress encourage and charge the Ninth Circuit to proceed with continued innovation and flexibility.

The FBA believes that the well-being of the Ninth Circuit and the federal court system are best served by increased Congressional attention to two other concerns: the assurance of timely filling of judicial vacancies; and the reversal of the trend to federalize crimes in areas traditionally reserved to the states. Both of these concerns relate directly to the capacity of courts to render justice fairly and swiftly. Indeed, we recommend that Congress, prior to the passage of any further federal criminal legislation, procedurally require of itself the generation of a "judicial impact statement" that projects the additional caseload and costs that such legislation may create.

FORMAL STATEMENT

Good afternoon, Mr. Chairman and Members of the Subcommittee. The Federal Bar Association (FBA) thanks the House Judiciary Committee, Subcommittee on Courts and Intellectual Property for the opportunity to offer comments concerning the Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals (White Commission). We testified before the White Commission at its San Francisco hearings in May, 1998, and we offered written comments to the Commission concerning its draft report last fall.

The FBA remains vitally interested in this matter because we are the only nation-wide bar association that has, as its primary focus, the practice of federal law. Of our 15,000 members across the United States, over 2,700 of them practice in the Ninth Circuit. With those demographics, the FBA has its feet in both camps. We are the beneficiary of direct experience

with the structure, caseload, adjudication and operation of the Ninth Circuit and of that Circuit's own continuing efforts to address its circumstances. At the same time, we occupy a perspective that necessarily embraces the well-being of the entire Federal Court system. In that capacity, we appreciate the opportunity to continue to help shape solutions to problems associated with growth of caseload management and adjudication as they affect the due administration of justice in the federal appellate judiciary.

At the outset, we will address the report's proposals concerning division of the Ninth Circuit and, in the future, other circuits as they continue to grow. We also propose that Congress take certain broad actions, apart from structural initiatives, that we believe will reduce the stress on the circuit courts, regardless of their structure.

I. Division of the Ninth Circuit

The FBA applauds the Commission's recommendation against splitting the Ninth Circuit into two or more circuits. Both in our written statement and in our testimony before the Commission at its San Francisco hearing in May 1998, the Federal Bar Association -- like the state officials, the U.S. Department of Justice, the American Bar Association, and most of the state and local bar associations that have addressed the issue -- strongly argued against such a split.

Although eschewing splitting the Ninth Circuit, the Commission report proposes adjudicative division of the circuit, with specific and detailed suggestions for implementing that division, including a "circuit division" for resolving inter-division conflicts and a revised *en banc* procedure. As well, the report recommends certain experimental efforts, such as two judge panels and district court appellate panels, to relieve decisional pressure.

As the report acknowledges, the Ninth Circuit long has been a crucible for experimentation in management and disposition of the growing federal court caseload. Many of the innovations of the Ninth Circuit have proven successful, and thus, are proven mechanisms for other circuits to implement as they encounter problems associated with growth of caseload and court size.

Indeed, even as these hearings are held, the Ninth Circuit is reexamining many of its procedures in order to experiment with innovations that might lead to greater efficiency and effectiveness. In order to do so, the Circuit has constituted a 10-memher Evaluation Committee that is chaired by Senior Circuit Judge David R. Thompson and includes representatives from that court, its district courts, the bar, and academia. The committee will examine the Circuit's limited *en banc* process, the monitoring of panel opinions, regional considerations, and disposition times, among other issues.

The White Commission's report proposes several creative structural approaches and additional mechanisms for grappling with many of these same issues. They seem to serve three overarching principles that the Commission has concluded are desirable in conceiving a circuit structure and operation.

- First, an appeal should be decided largely by circuit judges who reside in the region from which the appeal emanates.

- Second, the judges who reside in a particular region of the circuit, where there are relatively homogenous interests and culture, are best able to work together to develop the body of law particularly applicable to that region.

- Finally, a smaller body of judges, all from a particular region of the circuit, would be better able to monitor the panel decisions from within that region and to adopt procedures for doing so.

In our view, however, the proposals that are designed to implement these principles create issues that suggest caution and flexibility. For instance, it well might be that legal issues of unique regional concern within a circuit can be resolved more satisfactorily by judges from within that region, though that would not seem to be a given. The much larger portion of appellate issues and caseload, however, are not regionally unique. Experience with the specific division structure proposed in the report might well reflect some achievement of greater sensitivity in resolution of essentially regional issues. At the same time, experience also might demonstrate that the price of achieving this -- occasioned by lack of inter-division *stare decisis* and of meaningful *en banc* review -- is a significant compromise of jurisprudential integrity of the circuit as an institutional structure.

In an effort, at least in part, to accommodate regionalism, the White Commission's report, and now the implementing bill in the Senate, S.253, propose a system that is convoluted and unwieldy. A circuit structure of multiple, semi-autonomous adjudicative units with their separate *en banc* processes and an appellate division to resolve potential "square conflicts" actually seems to go in the wrong direction.

A sound proposal for reform should countenance swifter administration of justice, uniform decisions and application of federal law, fewer conflicts, less cost to the litigants, and increased predictability. Splitting the decisional function within the circuit -- with little intra-circuit accountability for uniformity and precedent and with a concomitant layering of additional intra-circuit review in an effort, though likely futile, to correct these flaws -- does none of this.

We will not burden these comments with exhaustive discussion of these and other concerns. Neither will we reiterate the numerous significant criticisms of the division approach that others -- including the large majority of chief judges of the other circuits -- have addressed. Suffice to say at this point that, at a minimum, they raise yellow flags that signal caution.

The White Commission report offers Congress a vision that looks beyond the present and well into the future. Such a vision, however, must recognize and reflect on the risk of significant adverse harm, not just the possibility of improvement in certain areas. Congress must take care to acknowledge that, as creative and positive as any particular scheme or structure might seem to be, only experience will prove the point.

Based on this realization, we urge that Congress build upon the Ninth Circuit's tradition as a crucible for change and experimentation and transform it into a laboratory that will illuminate for itself and other circuits the rocky roads, as well as the smooth and promising ones. Congressional

focus on the Ninth Circuit over the last five years seems to have provided appropriate stimulus for that circuit to be ever bolder in its rulemaking to respond to the need for sound reform. These continuing efforts and the work of the Evaluation Committee should be given a fair opportunity to succeed before a potentially wrenching structural approach is embraced.

To the extent that Congress may feel compelled to legislatively ensure continuing focus on reform within the circuit, we suggest that Congress enact legislation that will authorize the Ninth Circuit to implement sensible initiatives, including reform of the *en banc* process, in an effort to determine, in practice, what does and does not work.

The structure and processes of a court are not the ends. They are the means to the end of serving the principles identified by the White Commission that are implicit in its recommendations. Rather than pass legislation that would pour concrete around a new structure that may or may not prove desirable with experience, the FBA recommends that Congress permit -- even charge -- the Ninth Circuit to blaze the trail through experiment and flexibility. In this manner, the judges and practitioners of the Ninth Circuit can discover the most efficient and effective appellate structure and procedure, for the sake not just of the Ninth Circuit but of those that follow. Make no mistake -- it is the future of' the entire federal judiciary and the citizens that it serves that is at stake.

II. Other Relief on Circuit Stress

A. Judicial Vacancies

In our written and oral presentations to the White Commission the Federal Bar Association urged the Commission to note for the attention of the Congress and the President the vital importance to the health of the federal judiciary and the well-being of all our citizens in promptly filling judicial vacancies. No structural innovation will work if judges are not appointed to already-existing, Congressionally approved judicial seats (to say nothing of reasonable expansion of those seats on certain courts).

Although the House of Representatives institutionally does not play a role in that process, we recognize that Members of this chamber provide important input into both the nomination and confirmation of individual judges. In that context, we respectfully urge that Members of the House exert all available influence to ensure timely filling of judicial vacancies. Empty seats on the bench ill serve our Nation just as surely as vacant seats in the Congress.

B. Federalization of State Crimes

Additionally, in our testimony before the White Commission, the Federal Bar Association discussed with the Commission the importance of focusing attention on the impact on the judiciary of the proliferation of new federal criminal statutes. Surely, there are appropriate occasions for federalization of a crime -- occasions in which a federal statute would not merely duplicate a state statute, but where some additional aspect makes federal treatment appropriate. But crimes that adequately are addressed in state courts do not belong in federal courts.

In the course of considering the issues involved in the White Commission's report, we urge Congress to acknowledge the substantial impact that its actions in this regard have on federal court caseloads. Before Congress passes another single new criminal statute, we urge Congress to require of itself a "judicial impact statement" that projects the additional caseload and costs that such legislation will create.

CONCLUSION

The Federal Bar Association offers these comments and suggestions in the spirit of assisting Congress in grappling with these important questions. We remain available to be of service to the Subcommittee on this and other matters concerning the courts and the administration of justice. Thank you for the opportunity to appear before you today.

Source: Personal and professional files of William N. LaForge

§ 3.34 Sample of Oral Statement - Written Document Used As Reference to Deliver Oral Testimony

As explained above in § 3.18, Important Documents: Drafting the Statement and Making the Record - Narrative, Outline or Notes Used for Oral Presentation, it is helpful for a witness to utilize a written document from which to deliver oral testimony before a committee. This written document, quite often different from the official written statement provided a committee, but nevertheless containing all the pertinent points to be covered, can be in the form of a narrative statement, topic outline, or notes.

For more information on the importance, development and use of an oral statement script, see § 4.11, Preparation and Use of Oral Statement Script or Outline; § 4.13, Delivering the Statement: To Read or Not to Read; § 3.18, Important Documents: Drafting the Statement and Making the Record - Narrative, Outline or Notes Used for Oral Presentation; § 4.21, Witness Rehearsal of Oral Testimony and Answers to Questions: Relying on the Oral Statement Script to Deliver Testimony; and § 5.30, Organization and Use of Written Text to Deliver the Oral Testimony.

The following statement is a sample of a narrative outline actually used in the delivery of oral testimony before a House Judiciary Subcommittee. Above, at § 3.30, Sample of Written Statement: Statement Prepared for House Judiciary Subcommittee on Courts and Intellectual Property in Opposition to the Split of the 9th Circuit Court of Appeals, see the accompanying formal written statement prepared for submission to the committee in advance of the hearing. Review, compare and contrast it with the narrative below, which was taken from that original written statement and actually used to present the testimony.

ORAL STATEMENT OF

WILLIAM N. LAFORGE

CHAIRMAN
COMMITTEE ON GOVERNMENT RELATIONS
FEDERAL BAR ASSOCIATION

BEFORE THE
SUBCOMMITTEE ON COURTS
AND INTELLECTUAL PROPERTY
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

CONCERNING
THE FINAL REPORT OF THE
COMMISSION ON STRUCTURAL ALTERNATIVES
FOR THE FEDERAL COURTS OF APPEALS

JULY 22, 1999

Mr. Chairman and Members of the Subcommittee:

My name is William LaForge, and I appear today on behalf of the Federal Bar Association - the FBA.

The Federal Bar Association has a major stake in the issues articulated in the White Commission Report and before this subcommittee today because we are the only nationwide bar association with its primary focus on the practice of federal law.

The FBA's 15000 members nationwide have a direct stake in the well-being, independence and integrity of the Federal judiciary.

At the same time, our 2700 members practicing in the 9th Circuit have direct experience with the structure, caseload, adjudication, and operation of the 9th Circuit - as well as with that Circuit's own continuing efforts to address its problems.

The Federal Bar's position on the 9th Circuit per se and on the White Commission Report was developed over a period of thorough consideration, including testimony before the commission itself.

Today, I am pleased to represent FBA's national president, Adrienne Berry of Kentucky, and our membership across the country, in highlighting 3 basic areas of concern:

Reorganization of the 9th Circuit;

the filling of judicial vacancies; and,

the federalization of state crimes.

The FBA supports the recommendation of the White Commission against splitting the 9th Circuit into 2 or more circuits. Instead, the FBA favors increased innovation and experimentation by the 9th Circuit to arrive at solutions that advance the court's efficiency and effectiveness.

As the commission's report acknowledges, the 9th Circuit long has been a crucible for experimentation in management and disposition of a growing federal court caseload. Many of the innovations employed by the 9 Circuit in the past have proven successful, and, thus, are proven mechanisms for other circuits to implement as they encounter problems associated with growth of caseload and court size.

However the FBA believes that the Commission's proposed division of the Circuit into 3 semi-autonomous adjudicative units, and corresponding *en banc* revisions, are NOT in the best interest of the Circuit, its adjudicatory processes, litigants appearing before it, and the interests of justice.

That remedy is not likely to increase the uniform application of federal law - certainly within California. It is not likely to make the law more predictable, nor speed the court's decision-making. It will not create cost-savings for litigants. It is not likely to lead to fewer conflicts in decisional law, nor ease the weight of the 9th Circuit's caseload. It will not enhance or simplify litigation. Indeed, the proposal would in many respects accomplish the opposite effects by haplessly layering, dividing and isolating.

A special comment on the politics of this issue:

Splitting the 9th Circuit - legislatively or adjudicatively - to remedy the problem of political or ideological differences or disapproval with the opinions emanating from the 9th Circuit, is inappropriate in the view of the Federal Bar Association.

Altering basic judicial structure on political grounds is shortsighted and misguided, and would, in the opinion of the Federal Bar, violate the basic tenets of judicial independence and integrity.

To those in the Congress who may advance or hide behind a political motivation on this issue, beware of that for which you ask, because the political winds are bound to change. To the extent that Congress may feel compelled legislatively to ensure continuing focus on reform within the circuit, the FBA recommends that Congress enact legislation that will authorize the 9th Circuit to implement sensible initiatives, including reform of the *en banc* process, in an effort to determine, in practice, what does and does not work.

Rather than pass legislation that would pour concrete around a new structure that may or may not prove desirable with experience, Congress should permit - even charge - the 9th Circuit to blaze the trail through experiment and flexibility - and create a model to be used by other circuits in the future.

For my final 2 points, I would note that the FBA believes the best interests of the 9th Circuit and the entire federal court system would be served by increased Congressional attention to 2 major concerns:

- the assurance of timely filling of judicial vacancies, and,

- the reversal of the trend to federalize crimes in areas traditionally left to the states.

As we commented before the White Commission, the prompt filling of judicial vacancies is critical to a healthy federal judiciary. NO structural innovation will work if excessive vacancies continue.

While you as House members do not play an institutional role in advice and consent, your state and regional delegation influence - and especially your political party input - are sure ways you can help the process.

Regarding the problem with federalization of state crimes, the FBA recommends that Congress require of itself the generation of a "judicial impact statement" before the passage of any further federal criminal legislation.

Viewing your legislative actions through a prism such as this would enable you to forecast and guard against unnecessary additional caseloads and costs that new legislation might create.

We ask that this committee implement a judicial impact review and analysis procedure before reporting out your next piece of criminal legislation.

Mr. Chairman, thank you for affording the Federal Bar Association this opportunity to appear today and contribute to this oversight and discussion.

Source: Personal and professional files of William N. LaForge