Sixth Circuit En Banc Decisions—2010

By John Ferroli

In 2010, the United States Court of Appeals for the Sixth Circuit issued only two opinions sitting en banc.[1] The opinions themselves are perhaps of less interest to practitioners than the fact that only two were issued during the entire year.

Are two en banc opinions in one year really out of line with historic precedent? Yes, if measured against averages and trends. During 1990–2000, the Sixth Circuit handed down an average of 6.4 en banc decisions a year.[2] The trend over the last three decades is decidedly upward; the court issued only seven en banc opinions during *all* of the 1970s.[3] The number of en banc opinions in recent years is consistent with this upward trend; for example, the court issued six en banc decisions in 2009 and ten in 2007.[4] Of course, averages being what they are, some years in the past decade have lower en banc opinion counts: 2006 (four decisions), 2005 (four decisions), and 2002 (one decision).

The fact that 2010 bucked the historical average and upward trend is easily explained by the standards that apply to en banc review. The Federal Rules of Appellate Procedure provide that en banc hearings are "not favored" and will typically not be ordered unless review is "necessary to secure or maintain uniformity of the court's decisions" or "the proceeding involves a question of exceptional importance."[5] The Sixth Circuit's rules emphasize that en banc review is "an extraordinary procedure intended to bring to the attention of the entire court a precedent-setting error of exceptional public importance or an opinion that directly conflicts with Supreme Court or Sixth Circuit precedent."[6]

Hon. Jeffrey Stuart Sutton of the Sixth Circuit recently provided practitioners with valuable insight into his approach to en banc rehearing petitions. In *Mitts v Bagley*,[7] the Sixth Circuit denied a petition for en banc review from a decision upholding a jury instruction given during the penalty phase of a death penalty case. In concurring with the denial, Judge Sutton explicitly acknowledged that "this case was not decided correctly" by the three-judge panel.[8] After describing in detail why he thought his colleagues had reached the wrong result, he explained why en banc review was not the proper remedy:

> Most of the traditional grounds for full court review are not "compelling" here.... That leaves one other possibility—that disagreement with the panel's decision on the merits warrants en banc review. In the run-of-the-mine case that ground rarely suffices, else many cases a year would be decided in panels of 16, a rarely satisfying, often unproductive, always inefficient process. No one thinks a vote against rehearing en banc is an endorsement of a panel decision, as other judges have said and as my explanation in this case confirms.
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> If the goal is to produce consistent and principled circuit law, moreover, it is fair to wonder whether a process that requires a majority of circuit judges to sit in judgment of two or three colleagues does more to help than to deter that objective, particularly when the central ground for review is mere disagreement on the merits. The judges of a circuit not only share the same title, pay and terms of office, but they also agree to follow the same judicial oath, making them all equally susceptible to error and making it odd to think of the delegation of decision-making authority to panels of three as nothing more than an audition. Saving en banc review for "the rarest of circumstances," particularly when the leading ground for review is disagreement on the merits, thus "reflects a sound, collegial attitude," one worth following here.[9]

Although it is uncertain whether Judge Sutton's attitude toward en banc petitions is shared by his colleagues, it appears consistent with the rules governing such petitions and is well worth noting for Sixth Circuit practitioners. His approach could explain in part the dearth of en banc opinions issued by the Sixth Circuit in 2010, and it could signal that we will see more en banc years like it. ■

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FOOTNOTES

1. *Awkal v Mitchell*, 613 F3d 629, 638–644 (CA 6, 2010) (affirming denial of writ of habeas corpus, finding, among other things, not unreasonable the trial court's rulings that defense counsel's decision to call a psychiatrist during the guilt and penalty phases was not prejudicial or deficient performance); *Guilmette v Howes*, 624 F3d 286, 292–293 (CA 6, 2010) (on appeal from a conditional grant of writ of habeas corpus, the court held that the state had failed to appeal the prisoner's claim of ineffective assistance of counsel and therefore could not establish that the prisoner had procedurally defaulted on the claim).
2. Bergeron, *En banc practice in the Sixth Circuit: An empirical study, 1990–2000*, 68 Tenn L Rev 771, 780 (2001).
3. *Id.* at 781.
4. The figures are based on electronic research. The Sixth Circuit does not keep data regarding the number of en banc decisions in a given year.
5. FR App P 35(a).
6. 6th Cir R 35(c).
7. 626 F3d 366 (CA 6, 2010).
8. *Id.* at 366 ("With all respect to the panel majority, this case was not decided correctly.").
9. *Id.* at 370 (citations omitted).