

July 2015

Appellate Capacity and Caseload Growth

Thomas B. Marvell

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: <https://ideaexchange.uakron.edu/akronlawreview>



Part of the [Litigation Commons](#)

Recommended Citation

Marvell, Thomas B. (1983) "Appellate Capacity and Caseload Growth," *Akron Law Review*: Vol. 16 : Iss. 1 , Article 4.

Available at: <https://ideaexchange.uakron.edu/akronlawreview/vol16/iss1/4>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.

APPELLATE CAPACITY AND CASELOAD GROWTH

by

THOMAS B. MARVELL*

I. INTRODUCTION

THE VOLUME OF APPEALS has grown rapidly in virtually every state during the past three decades, and the rate of growth does not appear to be abating.¹ Statistics from the 1970's show that the average growth rate is about nine percent per year,² which represents a doubling of caseloads every eight years. Very few phenomena have sustained growth of that magnitude. Trial court caseloads, for example, have apparently increased at a much lower rate.³

There are three responses concerning this growing volume: 1) increasing backlog and delay; 2) increasing judicial capacity; and 3) reducing the volume of appeals. All have been common responses. Delay is a perennial problem. Appellate judgeships have more than doubled in the past 15 years, but they have grown much more slowly than the volume of appeals.⁴ Most appellate courts have attempted to increase judicial capacity by making substantial changes in appellate court internal operating procedures. These include curtailing oral arguments, deciding cases without published opinions, relying more on law clerks and staff attorneys, and using panels. The most drastic relief to supreme courts is the creation of intermediate courts. Thirty-two states have intermediate courts. Nineteen states created them in the past twenty-five years; several more states have greatly expanded the jurisdiction of existing intermediate courts.⁵

This article has two purposes. The first is to show that, indeed, the three categories of responses to caseload growth are the only feasible responses. This

*National Center for State Courts, J.D., University of Michigan, 1964; Ph.D., Sociology, University of Michigan, 1976.

¹S. WASBY, T. MARVELL, & A. AIKMAN, VOLUME AND DELAY IN STATE APPELLATE COURTS: PROBLEMS AND RESPONSES 12-16 (1979) [hereinafter cited as WASBY].

²Marvell & Kuykendall, *Appellate Courts — Facts and Figures*, 4 STATE CT. J. 9, 10 (Spring, 1980).

³A rough estimate is that trial court filings increased by twenty-five percent during the decade of the 1970's. E. McConnell, Sufficiently Funded Administrator — An Essentiality, (unpublished speech, National Center for State Courts) (1981). At least two states have published studies comparing the number of appeals to the number of trial court cases. In California, between fiscal years 1972 and 1981, civil appeals grew from 11 to 17 percent of the civil trial dispositions in the Superior Court during the same years, and the criminal appeals have grown from 45 to 90 percent of criminal trial dispositions. JUDICIAL COUNCIL OF CALIFORNIA, 1982 ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE 52 (1982). In Washington state, the comparable figures changed between 1976 and 1981 from 14 to 19 percent in civil cases and from 20 to 41 percent in criminal cases. OFFICE OF THE ADMINISTRATOR FOR THE COURTS, 1981 ANNUAL REPORT OF THE CASELOADS AND OPERATIONS OF THE COURTS OF WASHINGTON 27 (1982).

⁴Marvell & Kuykendall, *supra* note 2, at 35.

⁵M. OSTHUS & M. STEIGLER, STATE INTERMEDIATE APPELLATE COURTS 20-23 (1980). No states, to the best of my knowledge, have added intermediate courts since this volume was published.

article argues that case-management techniques, another popular response, is of little or no use in reducing the substantial backlogs that result from the caseload growth. Instead of focusing on case management techniques one should focus on the judges — their number and their productivity — as sources of appellate court delay.

The second purpose is to outline and, to the extent possible, evaluate the possible ways to increase appellate court capacity in the face of the rising caseloads. In so doing, I rely heavily on the general consensus among judges and scholars, particularly the *ABA Standards Relating to Appellate Courts*. Also considered are the various practices adopted by the courts and the trends towards and away from those practices. Formal evaluations are rare, but when applicable they will be discussed at length.

Before beginning, it is important to distinguish between three basic types of appellate courts: intermediate appellate courts, supreme courts above intermediate courts, and supreme courts not above intermediate courts. The methods used to increase capacity often differ between these three categories, especially because decisional consistency is more important in supreme courts and because discretionary jurisdiction is widespread only in supreme courts above intermediate courts. The discussion will be limited to state courts although much of the article also applies to the federal circuit courts of appeal.

II. CASELOADS AND DELAY

A. Location and Cause of Delay

The argument presented here is that judges are the cause of delay in the large majority of appellate courts that have substantial delay problems. "Substantial delay" is defined here as an average of one year or more from the notice of appeal to decision in ordinary appeals of right.⁶ (Discretionary appeals usually take much more or much less time, depending on whether the appeal is granted.) A year is more than twice as long as the time recommended by Standard 3.52 of the *ABA Standards Relating to Appellate Courts*. In the few courts where the average time approaches the ABA suggested limit, the issues concerning delay reduction become complex. The issues are simpler in the many courts with substantial delays.

A naive observer might think it obvious that judges are responsible for delay. More sophisticated observers, especially in recent years, have managed to find scapegoats elsewhere. The major problem here is a statistical anomaly. When one computes the average time for various stages in an appeal, one usually finds that the bulk of the delay occurs before the case is ready for consideration by the court. There is seldom much delay between oral arguments and

⁶Published delay statistics include less than half the appellate courts. Compilation of delay statistics can be found in Marvell & Kuykendall, *supra* note 2, at 14; WASBY, *supra* note 1, at 29-32; NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1976-77 (1980); J. MARTIN & E. PRESCOTT, APPELLATE COURT DELAY: STRUCTURAL RESPONSES TO THE PROBLEMS OF VOLUME AND DELAY (1981).

decision, and the time between briefing and arguments is usually moderate. The time required to complete the record and the briefs, on the other hand, often seems extreme. A typical example would be three months for the record and five months for the briefs, totalling eight months before a case is ready to be heard. The typical delay before argument is two months, with another two months from argument to decision.⁷ Armed with such figures, one is likely to argue that the reporters and attorneys are the major causes of delay since they are responsible for completing the records and briefs, and those are stages where most of the delay occurs.

One should be wary of statistics, however. There are two reasons why the judges are responsible even though most delay occurs before the case reaches them. The first, rather superficial reason, is that the judges have the power to control the pace of the reporters' and attorneys' work. Appellate judges make and enforce the appellate rules specifying time limits for record and brief preparation. They have the authority to establish time limits that would expedite appeals; they can monitor reporters and attorneys; and they can penalize those who do not comply with the rules. Perhaps one reason why appellate judges do not do this is a reluctance to inconvenience reporters and attorneys. But a far more important reason is that doing so would not reduce delay.

Whenever statistics show substantial delay during the record and briefing stages, that delay is typically caused by delays in later stages in the appellate process. Backlogged appeals tend to move from the later stages to the earlier stages of the appellate process, generally through the following procedure. As a result of increased caseload or decreased judicial productivity, the judges can no longer decide promptly all cases argued or submitted, threatening to create a long delay between argument and decision. Delay here undermines the efficiency of the court's internal decision-making procedures. Opinions are circulated so long after the argument that the judges remember little of the case when reviewing the drafts. Consequently, courts generally schedule for argument only so many cases as the judges can decide within one or two months.⁸ (There are a few exceptions to the rule: in 1981 the time between arguments and decision was almost nine months in the Pennsylvania Superior Court,⁹ and in 1946, five to seven months in the Alabama and Oklahoma Supreme Courts.¹⁰) Limiting the volume of cases scheduled for argument creates a backlog of cases briefed and awaiting argument. The attorneys, who notice that their appeals are not heard until long after the briefs are submitted, feel under no pressure

⁷See NATIONAL CENTER FOR STATE COURTS *supra* note 6; J. MARTIN & E. PRESCOTT, *supra* note 6.

⁸In a study of ten courts, it was found that at each court most cases were decided within two months of oral arguments. J. MARTIN & E. PRESCOTT, *supra* note 6, at 92. In forty-four supreme courts that replied to a 1946 survey, twelve said the median time from argument to decision exceeded two months, and seven said it exceeded three months. Note, *Judicial Statistics of State Courts of Last Resort*, 31, J. AM. JUDICATURE SOC'Y. 116, 117-18 (1947).

⁹Spaeth, *Achieving a Just Legal System: The Role of State Intermediate Appellate Courts*, 462 ANNALS 48 (1982).

¹⁰Note, *supra* note 8, at 117.

to give appellate work high priority in their offices so they routinely ask for extensions of time to file briefs. Because the court could not hear cases promptly if the briefs were to arrive within time limits, it freely grants requests for extensions, sometimes two or three requests per case. The reports, also noticing the growth of an appellate backlog, divert their energies from transcripts in appeals and are similarly granted extensions. Neither the judges nor the attorneys, who are all participating in the delay, desire to pressure the reporters.

Thus, even though the ultimate cause of delay is the judges' inability to handle the volume of cases, the result is that the greatest periods of delay occur in the briefing and transcript preparation stages of appeal.

B. Delay Reduction Efforts Should Concentrate on Judges

The obvious implication of these facts is that judges must be the central focus of a delay reduction effort. They must initiate the delay reduction efforts, and the efforts must be directed at their working habits and decision procedures. There is little use in initiating case-management procedures aimed at the early appeal stages and the working habits of reporters and attorneys, because that would only create a "hurry-up-and-wait" situation.

Moreover, the chief judge alone cannot initiate and direct a delay reduction effort as he could if case-management procedures were all that were required. The whole court must change its decision-making procedures to increase activity. This means, as a practical matter, that when a court has a substantial delay problem, delay reduction depends almost totally on the judges' feelings about delay. The amount of time judges spend on an appeal is flexible; judges have great discretion. They can spend more or less time listening to arguments, reading briefs, doing research, consulting with colleagues and law clerks, preparing opinions, or reviewing others' drafts. Judges on some courts give cases all the traditional elements of appellate review. These include scrutinizing briefs, hearing hour-long arguments, holding at least one conference discussion, doing in-depth research, closely reviewing colleagues' drafts, and publishing full opinions. The result is a lengthy and thorough study of each appeal. At the opposite end of the spectrum, judges on a few courts decide most appeals largely on the basis of memoranda by staff attorneys with scant firsthand knowledge of the attorneys' contentions and without giving counsel reasons for the decision.¹¹ Judges generally have discretion to select either procedure. It is not surprising, therefore, that the caseload per judge varies greatly among appellate courts. Each judge in the most productive intermediate courts decides about eight times as many cases per year as those in the least productive courts, and the differences are almost as extreme among supreme courts.¹² These differences highlight the considerable flexibility available to judges facing rising caseloads.

An obvious result of this flexibility is that there is little relation between

¹¹Bird, *The Hidden Judiciary*, 17 JUDGES J. 4 (1978). See also below at notes 39 to 51, and accompanying text.

¹²Marvell & Kuykendall, *supra* note 2, at 11-13.

a court's caseload or the caseload per judge and the amount of delay.¹³ The amount of delay depends mainly on how much the judges tolerate delay, not on caseload size. This is not to say that judges who tolerate delay are evil, or even misguided, because there is usually a trade-off between delay reduction and justice given to the litigants. The reaction of some courts to rising caseloads has been to continue the traditional, thorough decision procedures while accumulating a backlog. The reaction of other courts has been to increase productivity by chopping away at the traditional decision procedures (and often by working harder), thus giving less attention to each case.

This trade-off makes the judges' attitudes towards delay the most important element in delay reduction efforts. The judges' attitudes determine the answer to this questions: is delay such a great evil that judges should take short-cuts, such as curtailing arguments or written opinions, to ensure quick decisions? These steps are always possible (except in a few jurisdiction having constitutional requirements for written opinions) and are well-known among judges. Judges usually take an intermediate route, making some short-cuts, but not enough to prevent a large backlog.

One likely reason why judges typically do not make all-out efforts to reduce delay is that there are no hard facts to establish that delay causes litigants much harm. There is a dire need for information about which litigants are harmed by delay and about how much delay is harmful. There are plenty of aphorisms that delay is bad, and there is no shortage of people who outspokenly assert that delay is a terrible evil. Nevertheless, the saying "justice delayed is justice denied" is countered by the judge's common adage "justice rushed is justice crushed." Skeptical judges in constant contact with attorneys regularly seeking delay cannot be convinced in the absence of data of the disadvantages of delay.

The trade-off between accumulating backlogs and adopting expedient decisional procedures need not be faced, of course, if the legislature adds judgeships or, in the case of supreme courts, diverts some of the caseload to an intermediate court. In practice this solution is seldom more than partly realized. It is outside the control of the courts for it requires legislative action, and legislatures seldom give relief commensurate with the rising caseload. In recent decades, for example, appellate judgeships nationwide have increased only about one-sixth as fast as the growth in appellate court caseloads.¹⁴

Lawmakers, when they act, are likely to be persuaded by the amount of delay, a measurable indicator of the need for relief. Legislators do not realize that the amount of delay is almost totally within the judges' discretion. Hence, there is a great temptation for appellate judges facing rising caseloads to maintain their level of output, thus accumulating a backlog, to make sure that

¹³J. MARTIN & E. PRESCOTT, *supra* note 6, at 37-42.

¹⁴Marvell & Kuykendall, *supra* note 2, at 12-13.

lawmakers realize that relief is needed. It is disheartening to see legislatures balk at requests for help from overloaded courts simply because the judges have avoided delay problems through hard work and extreme efficiency measures. It is a brave court that tackles delay knowing that the effort will have this adverse impact on the chances of obtaining legislative relief. After seeing such travail in courts like the Louisiana and Virginia Supreme Courts, where the justices made this decision, one can sympathize with appellate judges who have simply turned higher caseloads into greater responsibility to cure the problem.

C. Methods to Reduce Delay

Because of the way delay is caused in appellate courts, delay reduction efforts should focus on the judges' decision procedures. In recent years, unfortunately, the emphasis in delay reduction has changed from the traditional concerns of judicial productivity to "modern case-management techniques." The classic scholarly and judicial writings on appellate delay concentrate on reducing the amount of judge-time devoted to each appeal by, for example, shortening oral arguments or using memorandum opinions.¹⁵ The fashion in recent years has been to look elsewhere for delay reduction mechanisms — especially by monitoring the performance of attorneys and court reporters. These procedures help only if the judges, by increasing output, can decide cases sooner if made ready sooner. In practice, this is possible only if the court already has little or no delay problem. Case-management methods are valuable techniques for squeezing the last ounce of delay out of an already efficient court, as was done in the U.S. Second Circuit Court of Appeals.¹⁶ Perhaps because of the Second Circuit's success, consultants and researchers are now advocating and applying similar case-management techniques to other courts.¹⁷ Such advice diverts attention from the fact that, unless given additional judges, courts faced with growing workloads must make a hard choice between continuing delay or adopting less thorough decision procedures.

Courts with substantial delay need not make elaborate preparations before embarking on delay-reduction efforts. Methods of increasing decision efficiency

¹⁵See especially, Curran & Sunderland, *The Organization and Operation of Courts of Review*, in THIRD REPORT OF THE JUDICIAL COUNCIL OF MICHIGAN 52 (1933); Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARVARD L. REV. 542 (1969); D. MEADOR, *APPELLATE COURTS, STAFF AND PROCESS IN THE CRISIS OF VOLUME* (1974).

¹⁶See Stecich, *Speeding Up Criminal Appeals in the Second Circuit*, 1 JUST. SYS. J. 43 (March 1975).

¹⁷See e.g., AM. JUDICATURE SOC'Y, PENNSYLVANIA'S APPELLATE COURTS (1978); L. FARMER, *APPEALS EXPEDITING SYSTEMS: AN EVALUATION OF THE SECOND AND EIGHTH CIRCUIT PROCEDURES* (FEDERAL JUDICIAL CENTER 1981); Martin & Prescott, *The Magnitude and Sources of Delay in Ten State Appellate Courts*, 6 JUST. SYS. J. 305 (1982). The latter article, for example, states:

[A]ppellate case processing time occurred prior to oral argument or judge consideration strongly suggest that efforts to reduce processing time in many courts will require solutions which focus directly on the predecision phases of the appellate process. In many appellate jurisdictions, control over materials preparation traditionally has not been exercised by the appellate court, but rather has been controlled by trial court judges, administrators, and litigants' attorneys. . . . Efficient case processing will thus likely require appellate court judges to assume a more active role in case management than that to which they often are accustomed.

A likely reason for such views by consultants is that the court administration profession has a far greater role in case management techniques than in increasing decision-making capacity.

are numerous. The most important ones are described later in this article. By and large, all a delay reduction effort needs is a commitment by the judges to conduct it and a consensus about which elements of the decision procedure to curtail.

Judges are responsible for delay no matter where it shows up in the statistics. As noted above, detailed statistics about delay at various stages often can mislead outside observers, and perhaps even the judges, into believing that the attorneys and reporters are responsible for the delay. Hence, the statistics may lead to scapegoating. On the other hand, overall statistics for the total decision time are valuable because they show the true extent of court delay without allowing the blame to be placed elsewhere. Detailed delay statistics, it should be added, are also expensive, requiring either a computer or many hours of calculation. This expense may be worthwhile if a court is current and has the capability to decide more cases than it presently does. In such a situation, the statistics would show where further increments of delay reduction are feasible. Not many appellate courts are in that enviable position, however, and the information they need is rather limited. Still, a court may wish to examine its decisional process to determine where the judges spend their time, and where major efficiencies are possible.¹⁸ Studies of this type, however, are extremely rare because they are burdensome to the judges and require considerable intrusion into the court's operations.

III. POSSIBLE SOLUTIONS: MORE JUDICIAL CAPACITY

The remainder of the article will discuss possible solutions to appellate court caseload problems. The solutions fall into three broad categories: 1) increasing the court's capacity by adding more judges or more staff; 2) decreasing the amount of judge time spent on each case; and 3) lowering the volume of appeals to the court. In general, this section discusses the first type of solution, Section IV the second, and Sections V and VI the third.

A. *More Judgeships*

An overloaded court, theoretically, can always handle its caseload and greatly reduce delay if given more judges. Assuming the disposition per judge remains roughly the same, a court, for example, should be able to double its output by doubling its size. The question to be addressed here is whether such a solution is advisable in a supreme court or intermediate court. The answer must be sought from the practices of courts and from the commentary of informed observers.

The general conclusion is that, although additional judgeships can help

¹⁸There probably exists only one full-fledged study of this type, FEDERAL JUDICIAL CENTER, A SUMMARY OF THE THIRD CIRCUIT TIME STUDY (unpublished report, Washington, D.C., 1974). There have been several suggestions, however, that other courts conduct similar studies. AMERICAN BAR ASSOCIATION COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS 3.50 at 80 (1977); [hereinafter cited as STANDARDS RELATING TO APPELLATE COURTS]; Hopkins, *Appellate Overload: Prognosis, Diagnosis, and Analeptic*, 3 APPELLATE CT. AD. REVIEW 35, 38 (1980).

supreme courts solve backlog problems, this solution quickly reaches an upper limit. Increasing the number of supreme court justices to nine or more suffers from a considerable weight of negative commentary and a lack of precedential models in the country. Intermediate courts, on the other hand, appear to have no upper limit in size although extremely large courts suffer from several practical problems. The following pages will first discuss supreme courts then intermediate courts.

All 53 state high courts¹⁹ have nine or fewer active judges. As seen in Table 1, nine have nine judges, twenty-four have seven, one has six, eighteen have five, and one has three.²⁰ More than nine judges seems to be out of the question for supreme courts. The available information indicates that during the nation's history only two state courts of last resort, New Jersey and Virginia, have ever had more than nine judges.²¹ Adding judgeships, moreover, has not been a favored means of increasing supreme court capacity in recent years; only 11 states have enlarged their top courts since 1950²² in spite of the tremendous caseload increase everywhere. The *ABA Standards Relating to Court Organization* support the existing state practices; Standard 1.13 (a) states that the highest court "should have not less than five nor more than nine members." The commentary to this Standard suggests seven as the preferred number.²³ Enlargement, therefore, is an advisable way to increase appellate capacity in supreme courts with five, and perhaps seven, members.

Judges and others advance many objections to large courts, especially courts with more than seven judges. The mechanics of internal decision procedure become overly cumbersome and time consuming. Communication becomes more

¹⁹The fifty-three courts include the supreme courts in the fifty states, plus the District of Columbia Court of Appeals and the Oklahoma and Texas Courts of Criminal Appeals, which are courts of last resort.

²⁰The information in Table 1 was taken from COUNCIL OF STATE GOVERNMENTS, *THE BOOK OF THE STATES, 1982-1982* 254-255 (1982). The number of New York judges is taken from R. MACCRATE, J. HOPKINS, AND M. ROSENBERG, *APPELLATE JUSTICE IN NEW YORK* 33 (1982). Other compilations of the number of appellate judges differ slightly from that in Table 1. See, U.S. DEPARTMENT OF JUSTICE, *STATE COURT ORGANIZATION 1980* 6-11 (1982); COUNCIL OF CHIEF JUDGES OF COURTS OF APPEALS, *INTERMEDIATE APPELLATE COURT SURVEY QUESTIONNAIRE* 33-36 (1981), and *INTERMEDIATE COURT SURVEY, 14 IJA REPORT* 5, 7 (Spring, 1982).

²¹A history of the number of state supreme court judges to 1933 in 34 states can be found in Curran & Sunderland, *supra* note 15, at 52, 61-62. Comprehensive historical information is apparently not available about the other fourteen states. It is unlikely that the number of judges increased between 1933 and the early 1950's because caseloads decreased greatly during that period. Nation-wide surveys of the number of judges were made in COUNCIL OF STATE GOVERNMENTS, *THE COURTS OF LAST RESORT OF THE FORTY-EIGHT STATES* 4 (1950), and in successive editions of *BOOK OF THE STATES*, published biannually by the Council of State Governments. These indicate that no state court of last resort has had more than nine judges since 1950. The Virginia court of last resort had eleven judges from 1779 to 1788 when the Court was mainly a trial court. Note, *The Virginia Special Court of Appeals: Constitutional Relief for an Overburdened Court*, 8 WM. & MARY L. REV. 224, 248 (1967). The New Jersey Court of Errors and Appeals had fifteen to sixteen judges from 1844 until 1948. See, Harrison, *New Jersey's New Court System*, 2 RUTGERS L. REV. 60, 65 (1948). Several appellate courts have employed commissioners, who as explained below were quasi-judges, and the number of judges plus commissioners has exceeded nine in only a few high courts.

²²This information was obtained by comparing the Council of State Governments publications cited in the previous two footnotes. Four of the eleven states, Alabama, Minnesota, Mississippi, and Texas, increased the size of courts of last resort to nine judgeships during this period.

²³STANDARDS RELATING TO COURT ORGANIZATION 32, 34 (1974).

difficult, and dissenting and concurring opinions may well proliferate unnecessarily.²⁴ Perhaps the most frequent argument against enlarging high courts is that there are diminishing returns in a court's capacity to handle its caseload. The addition of two judges to a seven-judge court, for example, may not increase productivity by a full two-sevenths. The relief afforded lies in writing majority opinions, because this work can be apportioned among the judges. But, additional judges do not necessarily relieve each judge of other decisional tasks, such as reading the briefs, hearing arguments, studying draft opinions, and discussing cases in conference. The time required to maintain a collegial climate increases.²⁵

An exception occurs when the court sits in panels. Additional judges can be employed to form more panel sittings, and the output per judge should remain constant as long as decisions are not regularly reviewed by nonpanel members. En banc hearings are more unwieldy and time-consuming in larger courts; but, if en bancs are infrequent, the additional workload is relatively small compared with the relief accorded because panel sittings and opinion writing would be apportioned to a larger number of judges.

Consequently, the advisability of enlarging a court is closely connected with the advisability of the panel system. As will be discussed, routine decision-making by panels, especially three-judge panels, is commonly considered objectionable in a high court. One major disadvantage is the possibility of inconsistent decisions. The probability of this result would increase proportionally with the enlargement of the court; the numeric basis for variation increases with the enlarged number of possible panel compositions.

The great majority of intermediate courts, on the other hand, sit in panels, generally of three judges.²⁶ Consistency of decision is not as important in intermediate courts as in supreme courts because conflicts between panel decisions can be resolved upon further review. As a result, the number of intermediate court judgeships has increased substantially, more than doubling in the past fifteen years²⁷ although increasing at a rate far slower than the caseload in-

²⁴See e.g., Stuart, *Iowa Supreme Court Congestion: Can We Avert A Crisis?* 55 IOWA L. REV. 594, 597 (1970); Lilly & Scalia, *Appellate Justices: A Crisis in Virginia?*, 57 VIRG. L. REV. 3, 21, 27-28 (1971).

²⁵An often quoted comment about the diminishing returns from additional judges is this statement by Judge Dethmers of the Michigan Supreme Court in Dethmers, *Delay in State Appellate Courts of Last Resort*, 328 ANNALS 153, 158 (1960):

The time-saving advantage of increasing court membership is that it reduces the number of opinions each judge must write. It does not lessen the work of each judge necessary for the study of records and briefs, legal research, and examination of opinions in cases which the other members write. This he must do, of course, in order to decide whether he agrees and will sign such opinions or write dissents. Enlarging a court does not decrease the amount of time required for listening to oral arguments of counsel and for conference, consultation, and discussion by the judges. In fact, increase of numbers increases the man-hours thus consumed and, perhaps, the number of court hours as well, because of a resultant increase in the number of questions addressed to counsel from the bench and more arguments and discussion by the larger number of judges in conference. Enlargement of court membership is, therefore, not necessarily one hundred percent gain.

²⁶Marvell & Kuykendall, *supra* note 2, at 13.

²⁷*Id.* at 12, 35.

crease. The cost of new judgeships is probably the major factor limiting the expansion of intermediate courts. There may also be an upper limit at which the multiplicity of intermediate court panels would exceed the supreme court's ability to monitor the consistency of rulings below. The largest intermediate court systems are now in Texas, California, Ohio, Florida, New York, and Louisiana with 79, 59, 52, 45, 48, and 48 judges respectively. These intermediate court systems are still considerably smaller than the federal system, where the issue of monitoring intermediate court decisions has been long debated.²⁸

B. Retired and Temporary Judges

Most appellate courts are helped by retired judges and temporarily assigned lower court judges. These judges typically participate in appellate decision-making along with active judges, but they often do not review writs or perform administrative tasks that comprise a large portion of a judge's work on most appellate courts.

About two-thirds of the state supreme courts use extra judges,²⁹ but the use is typically very limited. Only a few courts make substantial use of extra judges.³⁰ Usually these judges are used only to fill vacancies rather than supplement the full court.

Use of extra judges, if frequent, can lead to the same problems encountered when adding judgeships. There are two other problems with using trial court judges to help solve appellate court caseload problems. First, the lower courts themselves are often congested; more assignments to the appellate courts would, in effect, rob Peter to pay Paul. Second, no matter how competent trial judges are, they have little appellate experience and, thus, are less likely to prepare appellate opinions as proficiently as appellate judges.³¹

C. Commissioners

One solution to appellate court congestion, common in earlier eras, is the employment of quasi-judicial personnel. This took a bewildering variety of

²⁸See e.g., COMMISSION OF REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975).

²⁹Marvell & Kuykendall, *supra* note 2, at 13. See also Lilly & Scalia, *supra* note 24, at 22-26.

³⁰This statement is based on the descriptions in Lilly and Scalia, *supra* note 24, at 22-26 and on discussions in several court annual reports. Typical information from the latter is that extra judges wrote five of 197 opinions in the New Mexico Supreme Court, and nine of 227 opinions in the Tennessee Supreme Court. JUDICIAL DEPARTMENT OF THE STATE OF NEW MEXICO, 1979 ANNUAL REPORT 33 (1980); EXECUTIVE SECRETARY, TENNESSEE SUPREME COURT, 1979 ANNUAL REPORT 33 (1980). Oregon and Mississippi made the greatest use of extra judges. Extra judges wrote almost a fifth of the Oregon Supreme Court opinions in 1977, but that court stopped using extra judges when its discretionary jurisdiction was expanded in 1978. STATE COURT ADMINISTRATOR, TWENTY SIXTH ANNUAL REPORT RELATING TO JUDICIAL ADMINISTRATION IN THE COURTS OF OREGON, 1979 9 (1980). Twenty-eight trial judges heard 101 (or 15 percent) of the cases decided by the Mississippi Supreme Court in 1978. SUPREME COURT OF MISSISSIPPI, THIRTEENTH ANNUAL STATISTICS REPORT 1978 2 (1979).

³¹For example, several years ago a Missouri intermediate court made a concerted, and successful, effort to decrease its backlog. But one strategy that did not work was the use of temporarily assigned trial judges during 1977, a year in which the court's output dropped. A study by the National Center for State Courts states:

forms. Periodically from 1848 until 1928 the Virginia Supreme Court of Appeals was relieved by a Special Court of Appeals composed of temporarily assigned trial judges. It heard cases backlogged in the Supreme Court, and no further appeal was allowed.³² Similarly, a New York Commission of Appeals, comprised mainly of judges voted off the state's high court, decided cases taken from the court's backlog during the 1870's. Its decisions were also final.³³ These extreme remedies for congestion deprive the jurisdiction of a single authoritative jurisdictional law-making body. They are not remedies suitable to modern judicial systems.

A half dozen states, however, established commissions of bar members to hear cases pending before the supreme court and to make suggested decisions and write opinions.³⁴ The decisions were final only upon the approval of the supreme court. These commissions were usually short-term attempts to relieve congestion. With two recent exceptions they apparently have not been used since the 1930's when caseloads declined due to the Depression. The first exception is a current effort by the Oklahoma Supreme Court to relieve its backlog in civil appeals by assigning cases to panels of attorneys.³⁵ Three attorneys are selected from a pool of hundreds who volunteered for this duty. The panel attorneys read the briefs, hear oral arguments, decide the case, and issue an opinion. Review by the Supreme Court is possible but as a practical matter not often sought.

The second exception is in the Washington Court of Appeals. In 1982 the court gave a staff attorney authority to make tentative decisions in substantive motions, including motions to dismiss for lack of merit. The attorney's decision can be appealed to a panel of the court. The procedure is too new to determine whether such appeals will be frequent.³⁶

The hiatus in the 1977 dispositions resulted from a daring but unsuccessful experiment during the summer of having trial judges take some cases and write opinions on them. Due to the unfamiliarity of the trial judges with the process, the opinions were late in coming and most had to be redone. It is estimated that the experience set the court back approximately fifty cases for the year.

M. Hudson, *Current Status of Appellate Innovations and Case Expediting Procedures* (unpublished report, National Center for State Courts, August 18, 1978).

The Washington Supreme Court, according to one of its justices, has experienced similar problems with temporarily assigned trial judges. Rosellini, *Crisis in the Supreme Court*, 3 GONZ. L. REV. 8, 14-15 (1968). Information elsewhere about this topic, however is not available, perhaps because appellate judges are reluctant to criticize their lower court colleagues.

³²See note, *supra* note 21, *passim*.

³³Curran & Sunderland, *supra* note 15, at 52, 65. In addition, Curran and Sunderland note that Texas in 1879 established a two-year commission that made final rulings in appeals submitted to the Supreme Court, but the commission received cases only upon agreement of the parties.

³⁴The various uses of commissioners are discussed in Curran & Sunderland, *supra* note 15, at 65-95. Nineteen state supreme courts had used commissioners in one form or another by 1933, the time of that study, but at that date they were being used by only four courts. For a more recent description of the commissioner system see R. LEFLAR, *INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS* 82-83 (1976).

³⁵Phone conversations with Charles Ferrell, Administrative Office of the Courts, May, 1982 (available from National Center for State Courts).

³⁶Telephone conversations with Judge Ray C. Munson, Court of Appeals of the State of Washington, May, 1982.

A more common use of commissioners was the assignment of attorneys to sit as judges alongside the regular judges. They heard oral arguments, discussed appeals in conference and wrote opinions. But only the judges could vote. The only part of the decisional process not delegated was the making of the ultimate decision. This commission system, then, was essentially a way to add more judges to a court without actually creating more judgeships. This system has disappeared from state high courts; the last two holdouts discontinued its use in the late 1970's.³⁷

ABA Appellate Standard 3.01 states that a supreme court should not "delegate its deliberative and decisional functions to officers such as commissioners." The commentary to the standard gives the following reasons for this position:

Because the commissioners are subordinate to the court's judges, employing them to prepare tentative decisions for consideration by the court involves little risk of inconsistency in decision. On the other hand, use of commissioners deprives the litigants of the opportunity for full consideration of their contentions by members of the court. Moreover, if the commissioners have the experience, ability, and staff assistance which they should have to perform their functions as auxiliary judges, they are in effect subordinate judges. Their functions can ordinarily be performed as efficiently, and with greater authority, by an intermediate appellate court.³⁸

The commissioner system is not now a favored solution to appellate congestion and appears to constitute primarily a footnote to appellate court history.

D. *Staff Aides*

The capacity of a court can be expanded by adding attorney aides rather than adding judges. One advantage is cost; attorney aides receive lower salaries than judges and they do not require large offices. Another advantage is that the danger of inconsistent decisions is less than that caused by adding more judges. But there is an upper limit to the amount of staff help commonly thought advisable. This section will 1) describe the functions of staff aides in appellate courts; 2) compare the number of aides in the different courts; and 3) consider the advisability of enlarging a court's staff. Final determination of whether an enlarged staff is a viable solution to caseload problems depends mainly on a concurrent decreased attention given each case by the judges. This will be the topic of the next section.

³⁷The latest relevant survey, COUNCIL OF STATE GOVERNMENTS, STATE COURT SYSTEMS 29 (1978), lists twelve courts employing commissioners. In all but two instances, they are not what are traditionally called "commissioners." Most are regular staff attorneys or retired judges. The two exceptions are the Missouri Supreme Court and the Texas Court of Criminal Appeals. A 1970 constitutional amendment states that the six Missouri commissioners will be phased out when they retire. MO. CONST. art. V § 27 (11) (1979). In 1977, the five judge Texas Court of Criminal Appeals used four full-time and three part-time commissioners. All but two, however, were retired judges or intermediate court judges. A 1977 constitutional amendment enlarged the court to nine judges, and the clerks office has informed us that the court discontinued the use of commissioners. TEX. CONST. art. V § 4 (1978).

³⁸STANDARDS RELATING TO APPELLATE COURTS *supra* note 18, at 9.

1. Functions of Staff Aides

Appellate court attorney aides fall into two basic categories, law clerks and staff attorneys. A law clerk is the personal employee of a judge and is under his or her direct supervision. A staff attorney works for the whole court as a member of a central staff. Typically the chief judge hires and supervises the central staff, often with the help of a staff supervisor. Most staff attorneys and nearly all law clerks are recent law graduates and remain at the court for one year or, occasionally, two years. A number of courts, on the other hand, prefer experienced attorneys on their central staff, and many courts employ an experienced attorney as staff supervisor.

Law clerks and staff attorneys perform much the same duties.³⁹ In fact, courts that have central staffs essentially transfer to the staff attorneys' duties often performed by law clerks in other courts. The overall function of law clerks and staff attorneys is to supply information to the judges by condensing and analyzing the parties' arguments and often by reading the record and conducting independent research. Typically, this involves writing memoranda or draft opinions. Staff attorneys' work is usually performed before the case is argued or submitted, and their memoranda or opinion drafts are circulated to all judges hearing the appeal. Law clerks at some courts perform this same function; at other courts they do not work on a case until after the argument stage, and their memoranda and draft opinions are not circulated to other judges.

Other duties of staff attorneys and law clerks are usually offshoots of the basic function just described. They may prepare memoranda on motions, original writs, or petitions to appeal. They may, in the process of studying cases, advise the court whether the case should be given summary treatment, such as by eliminating oral argument or by issuing an unpublished opinion. In addition, they may help the court in administrative matters by monitoring appeals or drafting court rules. A valuable function of law clerks, but rarely of staff attorneys, is to discuss cases with their judges and to criticize draft opinions before circulation to the court.

2. Number of Staff Aides

Increased employment of staff aides is a major long-term trend in appellate

³⁹Law clerks duties are described in J. OAKLEY & R. THOMPSON, *LAW CLERKS AND THE JUDICIAL PROCESS* (1980); Sheldon, *Law Clerking with a State Supreme Court: Views from the Prospective of the Personal Assistants to the Judges*, 6 JUST. SYS. J. 346 (1981); and T. MARVELL, *APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM 86-97* (1978). Available evidence indicates that most law clerks prepare draft opinions, and almost all others prepare memoranda. Duties of the staff attorneys are described in D. MEADOR, *APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME* (1974); Lesinski & Stockmeyer, *Prehearing Research and Screening in the Michigan Court of Appeals: One Court's Method for Increasing Judicial Productivity*, 26 VAND. L. REV. 1211 (1973); NATIONAL CENTER FOR STATE COURTS, *THE CALIFORNIA COURTS OF APPEAL 71-119, 168-194* (1974); Cameron, *The Central Staff: A New Solution to an Old Problem*, 23 U.C.L.A. L. REV. 465 (1976); R. LEFLAR, *supra* note 34, at 83-94; FEDERAL JUDICIAL CENTER, *CENTRAL LEGAL STAFFS IN THE UNITED STATES COURTS OF APPEALS, A SURVEY OF INTERNAL OPERATING PROCEDURES* (1978); Ubell, *Report on Central Staff Attorneys' Office in the United States Courts of Appeals*, 87 F.R.D. 253 (1980); NATIONAL COMMITTEE OF APPELLATE COURT STAFF COUNSEL, *DIRECTORY OF APPELLATE CENTRAL STAFF COUNSEL* (APPELLATE JUDGES CONFERENCE, AMERICAN BAR ASSOCIATION, (1982).

courts. Law clerks were first used in the late 19th century, and their number has steadily increased, rapidly so in recent years. State supreme courts, as a whole, now employ at least fifty percent more law clerks than they did ten years ago.⁴⁰ Central staff attorneys were seldom used until the mid-1960's; two-thirds of the nation's appellate courts have established central staff offices, varying in size from one attorney in some courts to forty-six in the Michigan Court of Appeals. (*See*, Table 2, *infra*, page 100.)

In spite of the recent growth, use of staff aides is still quite limited in both supreme courts and intermediate courts. A 1980 study found that judges have more than one clerk in less than a third of the courts and more than two clerks only in the California Supreme Court, the Indiana Court of Appeals, and all three Pennsylvania appellate courts.⁴¹ A 1982 study of staff attorneys, the results of which are in Table 2, found that even in the two-thirds of the courts where they are used, the size of the staff is small.⁴² Among the supreme courts the highest number is ten, in California, Louisiana, and Michigan. The supreme court staff exceeds the size of the court in only four other states, Nevada, South Carolina, Virginia, and West Virginia. Among the intermediate courts, two stand out as having large staffs in relation to the size of the courts, Michigan with eighteen judges and forty-six staff attorneys, New York with forty-four judges and eighty-six staff attorneys. The Michigan staff serves the whole court, whereas in New York the four divisions of the intermediate court have separate offices. California also has a sizeable number of staff attorneys, but there, as in the remaining intermediate courts, the proportion of staff to judges is considerably less than one.

In all, the ratio of staff aides, including both law clerks and staff attorneys, ranges between a low of one to high of two in most appellate courts. Only a dozen courts have three times as many staff aides as judges.

What is the optimum, and what is the maximum sized attorney staff? The foregoing discussion suggests that appellate courts are reluctant to create (or perhaps that legislatures are reluctant to finance) large staffs. There is no limit in theory to the maximum feasible size. But, judges and commentators fear too large a staff leads to too much reliance on staff aids. Carrington, Meador and Rosenberg state:

As a sound rule of thumb, we propose that no central staff be enlarged to include more professionals than there are judges to be served by the

⁴⁰Information about the number of law clerks in 1968 is found in COUNCIL OF STATE GOVERNMENTS, STATE COURT SYSTEMS 77-81 (1968). Information for recent years is found in Marvell & Kuykendall, *supra* note 2, at 37; COUNCIL OF CHIEF JUDGES OF COURTS OF APPEAL, INTERMEDIATE APPELLATE SURVEY QUESTIONNAIRE 36-38 (APPELLATE JUDGES' CONFERENCE, AMERICAN BAR ASSOCIATION, 1981). *See Also*, W. KRAMER, COMPARATIVE OUTLINE OF BASIC APPELLATE COURT STRUCTURE AND PROCEDURES IN THE UNITED STATES, *passim* (1978) and P. BARNETT, LAW CLERKS IN THE UNITED STATES COURTS AND STATE APPELLATE COURTS (AM. JUDICATURE SOC'Y.) (1973). The latter study found that the number of law clerks in all state appellate courts increased by about seventy-five percent since a similar study done in 1969, but this increase probably includes staff attorneys in a few courts.

⁴¹Marvell & Kuykendall, *supra* note 2, at 37.

staff. To place this rule in relation to one previously suggested, we propose as a rule that not less than one professional of four serving in a high volume court should be a full-fledged judge; such a judge may be appropriately assisted by as many as two personal law clerks and the equivalent of one additional clerk serving in the central staff. To surround a judgeship in such a court with more supporting personnel would create risks we regard as excessive to the imperatives of appellate justice. As long as this rule is observed, there need be little concern about staff usurpation or the "bureaucratization" of the judiciary.⁴³

The *ABA Appellate Standards* are more liberal in this regard, stating that busy appellate judges should be authorized as many as three law clerks⁴⁴ in addition to a centralized staff of unspecified size. But the Standards warn that the court "must be continually alert to the risk of internal bureaucratization and against any tendency to rely on staff for decisions that should be made only by judges personally."⁴⁵

3. Forms of Major Reliance on Staff

If a court considers joining the small number of appellate courts with large staffs, the next issue is how that staff can best help the court. This issue will be addressed by describing the staff system used until recently in the Michigan Court of Appeals, the most extreme model, and the system in the Minnesota Supreme Court, a more typical use of staff attorneys.

The Michigan Court of Appeals judges decided in 1968 that their productivity was increased little by the addition of a second law clerk; so they pooled the second clerks into a central research staff headed by a seasoned lawyer.⁴⁶ The court believed that this change permitted the Court to keep abreast of its greatly increasing caseload.⁴⁷ The duty of the central staff, which now numbers 46 attorneys, is to prepare prehearing reports in all cases submitted to the court. These reports are lengthy memoranda that fully discuss the facts and analyze the legal arguments. Staff attorneys go beyond briefs; they read the record and usually conduct a great deal of independent legal research. They may even raise and discuss issues not brought forth by counsel.

After a quick review by a supervisor, the report is circulated to the three panel members hearing the case. The judges read the report before oral

⁴³NATIONAL COMMITTEE OF APPELLATE COURT STAFF COUNSEL, *supra* note 39. The United States Courts of Appeals tend to use more staff aides than state intermediate courts. A 1978 study found that these courts employ from one to about twenty-four staff attorneys. However, staff attorneys outnumbered active judges only in the Fifth and Ninth Circuits. Each circuit judge, in addition, has two or three law clerks. FEDERAL JUDICIAL CENTER, *supra* note 39, *passim*.

⁴⁴P. CARRINGTON, D. MEADOR, AND M. ROSENBERG, *JUSTICE ON APPEAL* 48 (1976).

⁴⁵STANDARDS RELATING TO APPELLATE COURTS, *supra* note 18, at 96-97 (1977).

⁴⁶*Id.* at 86.

⁴⁷The Michigan Court of Appeals staff system is described in D. MEADOR, *supra* note 39, at 198-208 and in Lesinski & Stockmeyer, *supra* note 39, *passim*.

⁴⁸Lesinski & Stockmeyer, *supra* note 39, at 1215.

arguments (whether they also read the briefs is not known), and use it as a basis for deciding whether the case will be decided by a published or unpublished opinion. Since the Court allows argument in all cases, the report is not used, as it is in some other courts, as a basis for determining whether argument will be allowed. In routine cases, the staff attorney also prepares a brief per curiam opinion for possible acceptance by the Court. If a full opinion is to be written, the assigned judge and his law clerk use the prehearing report as a starting point for their research and opinion drafting.

The benefits claimed for the central staff in Michigan, as opposed to increasing the number of law clerks, are that staff attorneys can prepare the prehearing reports without interference from other demands on their time and that the judges are spared the duty of supervising preparation of the reports.⁴⁸ In addition, staff attorneys can more easily establish important central files. The Michigan staff office maintains and indexes a file of points covered in past memoranda, expediting research whenever issues recur. Also, the office maintains a pending issue file, which allows the Court to assign cases with similar issues to the same panel, preventing duplication of effort by different panels and decreasing the danger of conflicting panel decisions.

Most other courts with central staffs do not receive staff memoranda in all cases. A typical example is the Minnesota Supreme Court,⁴⁹ one of the busier supreme courts without discretionary jurisdiction. Under a procedure established in 1972 and then abandoned in 1981, all appeals were forwarded to the staff and screened by the head staff attorney. He recommended whether the cases should be decided without argument, should be argued before a three-judge panel, or should be argued before the full Court. His recommendations were usually accepted, but any judge could order a case placed on the en banc calendar. A staff memorandum was prepared only in cases submitted without oral argument, and it was accompanied by a recommended per curiam opinion. The full Court discussed these cases in conference and often used the staff's per curiam opinion.

If a court adopts a central staff system for appeals, the number of attorneys employed must, of course, depend on the number of cases they handle. Experience in other courts suggest that each staff member can prepare about eight memoranda a month, or about 100 a year, if assigned mainly routine cases.⁵⁰ The potential staff size in large states, where caseloads number in the several thousands, is tremendous.

⁴⁸Reasons given for use of staff attorneys as opposed to additional law clerks can be found in D. MEADOR, *supra* note 39, at 112-14; Lesinski & Stockmeyer, *supra* note 39, *passim*; and Cameron, *supra* note 39, at 467-68.

⁴⁹The functions of the Minnesota Supreme Court staff are described in D. MEADOR, *supra* note 39, at 225-29, and in MINNESOTA STATE COURT REPORT 7 (1977). The combination of screening cases for argument or submission on the briefs and preparing memoranda in more routine cases seems to be the most common staff function.

⁵⁰Discussions of staff productivity can be found in D. MEADOR, *supra* note 39, at 84-89, and NATIONAL CENTER FOR STATE COURTS, *supra* note 39, at 168-73.

This section has described the use of law clerks and staff attorneys in appellate courts. Few courts use sizeable staffs, so no matter what the feasible or recommended limit for the number of staff aides, there is considerable room for increasing that number to help solve backlog problems at most courts. This section has not discussed how the additional staff would actually enable a court to improve efficiency. In fact, a large staff in itself cannot solve the caseload problem. That can be accomplished only if judges use the staff in ways that increase their productivity. Which is to say that each judge must, on the average, spend less time on each case by delegating to the staff some of the duties now performed by judges.⁵¹ That will be one of the major topics of the next section, which describes means of eliminating traditional elements of the appellate process.

IV. DEVIATIONS FROM THE TRADITIONAL APPELLATE PROCESS

In appellate decision-making, the amount of time a judge spends on each case is flexible. Appellate decisions theoretically can be, although they should not be, based on a cursory review of the parties' contentions or on presentations by the court's staff. Thus, an appellate court facing an increasingly large caseload with no major relief through jurisdictional changes or increased judicial capacity can select among several strategies. The judges can continue to expend the traditional effort on each appeal and thereby permit a large backlog to accumulate, or they can spend less time on each case by eliminating some of the traditional elements of the appellate process. Most such appellate courts adopt efficiency measures that somewhat increase the court's output per judge but do not enable it to keep abreast of its workload. Some courts, however, do dispose of huge caseloads by adopting extreme departures from traditional appellate procedure.

The traditional appellate decision-making process includes lengthy study of the issues by all judges hearing the case. The judges read the briefs and relevant portions of the record, and they listen to and question counsel during hour-long oral arguments. After arguments the judges discuss the case at length, reaching a tentative conclusion. Thereafter, the assigned judge and his clerk carefully study the record and briefs, conduct independent research for legal authority missed by counsel, and write an opinion fully explaining the reasons for the court's ruling on each issue raised. The non-assigned judges closely read the draft opinion and frequently suggest changes. The opinion is then published in the state reports.

This description is an ideal seldom reached in most appellate courts, but it is a good approximation of how courts traditionally operated until the recent caseload increases.⁵² Courts with wide discretionary jurisdiction, which are able to limit their caseloads, still generally follow this procedure in cases heard on

⁵¹This is the general conclusion of Professor Meador's research. See, D. MEADOR, *supra* note 39, at 97-107.

⁵²See AMERICAN BAR ASSOCIATION, *METHODS OF REACHING AND PREPARING APPELLATE COURT DECISIONS* (1942), and AMERICAN BAR ASSOCIATION, *INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS* (1961).

the merits. But most other appellate courts have cut back important elements of the traditional procedure.

This section will outline changes that high-volume courts, generally intermediate courts, have made in recent years. Two common examples are limitations on oral argument and restrictions on opinions writing and publication. Other possible changes include the following: decision by single judges or two-judge panels, limits on the volume of appellate papers, and decisions based on limited attention by judges to the parties' presentations. All of these deviations from the traditional appellate process necessarily risk lowering the quality of justice provided by the court. Nevertheless, it is clear that some of the changes would increase the judges' productivity greatly and could quickly end congestion in a court.

A. Restrictions on Oral Argument

One of the first workload reduction measures often taken by intermediate courts and supreme courts with mandatory jurisdiction is limiting the number of oral arguments. Typically, judges or staff attorneys screen all cases and recommend that some be decided on the basis of the papers submitted, although any judge on the court (or panel deciding the case) can require that arguments be held if the issues appear more complicated than was first assumed. Some procedures for limiting arguments give attorneys a chance to request oral arguments, but other courts allow attorneys no input in the matter.

A typical example of oral argument limitation is the summary calendar procedure in the District of Columbia Court of Appeals.⁵³ The summary calendar was adopted in November 1974 to eliminate or shorten oral argument in cases that, according to the Court's internal rules, "do not appear to present any new question of law and in which oral argument is deemed neither helpful to the Court nor essential to a fair consideration of the case."⁵⁴ Summary calendar cases are not orally argued unless counsel promptly requests arguments. If a request is made, each side is allowed only fifteen minutes, rather than the thirty minutes in regular calendar cases. Roughly two of every five appeals are placed on the summary calendar, and about eighty percent of them are decided without oral argument. In all, the court hears arguments in about seventy percent of all appeals decided. A staff attorney or a retired judge screens appeals for placement on the summary calendar, scheduling six summary calendar cases and three regular calendar cases for panel hearing in one morning or afternoon. The panels are rotated to apportion each active judge an equal number of summary calendar sessions. Counsel in summary calendar cases are notified of the calendar placement and are told that oral arguments will not be held unless requested in writing within ten days of the notification. The court's practice is to grant virtually all such requests, which are received in about one case

⁵³SUBCOMMITTEE ON THE WORKLOAD OF THE DISTRICT OF COLUMBIA COURT OF APPEALS, DISTRICT OF COLUMBIA COURT OF APPEALS: WORKLOAD PROBLEMS AND POSSIBLE SOLUTIONS 17-20 (1979).

⁵⁴DISTRICT OF COLUMBIA COURT OF APPEALS, INTERNAL OPERATING PROCEDURES, VI (B).

in five. Summary calendar sessions are, of course, shorter than regular calendar sessions, both because most cases are not argued and because the arguments held are, with few exceptions, limited to fifteen minutes per side. Occasionally, argument is waived in all six cases and no argument session is held. In any event, the panel meets to discuss the cases, and further procedures are conducted in the same way as a traditional appeal.

The advisability of placing restrictions on oral arguments, as the District of Columbia Court of Appeals has done, depends primarily on two factors: the amount of time saved by judges and the value of oral argument to judges and to lawyers. The time savings depends primarily on the location of the judges' offices. If they live and work near the court seat, then the savings from oral arguments is rather slight since the time spent is mainly on the bench. In the District of Columbia the actual time savings resulting from fewer and shorter arguments is only about two hours a week per judge. The major time savings traditionally resulting from limiting arguments is the travel time of judges with offices far from the court seat. The travel time, as well as the disruption of work schedules due to travel, can easily exceed the actual time on the bench.

No matter what the time savings, one must address the question whether discouraging oral arguments through the summary calendar procedure is advisable. In other words, has the court been forced by its workload to sacrifice an important and traditional element of the appellate process? *ABA Appellate Standard 3.35* states that parties should be permitted oral argument unless the court concludes "that its deliberation would not be significantly aided by oral argument." Language in the commentary to this standard, however, suggests that arguments should generally be allowed.

Oral argument is normally an essential part of the appellate process. It is a medium of communication that is superior to written expression for many appellate counsel and many judges. It provides a fluid and rapidly moving method of getting at essential issues. It contributes to judicial accountability, enlarges the public visibility of appellate decision-making, and is a safeguard against undue reliance on staff work. Oral argument should not ordinarily be allowed on applications for discretionary review or on motions or other procedural matters. When an appeal is considered on its merits, however, oral argument should never be discouraged routinely and should be denied only if the court is convinced that the contentions presented are frivolous or that oral argument would not otherwise be useful. The court should recognize that discouraging oral argument can lead counsel to underestimate its importance.⁵⁵

⁵⁵STANDARDS RELATING TO APPELLATE COURTS *supra* note 18, and 56. Similar guidelines were set forth by the Advisory Council for Appellate Justice, a group of thirty-three judges and scholars. The Council states that arguments are "an important part of the appellate process" because they contribute to judicial accountability, guard against too much reliance on staff aides, and help the judges understand the issues presented. The Advisory Council, nevertheless, said that arguments may be eliminated in a minority of cases, where the appeal is frivolous, where the issues have recently been authoritatively decided, or where "the facts are simple, the determination of the appeal rests on the application of settled rules of law,

This passage adequately summarizes the function of oral argument and the reasons why curtailing it is not a favored means of increasing appellate court efficiency.⁵⁶ State courts seldom discourage oral arguments.⁵⁷ Decisions without oral argument are common in state supreme courts only in the exercise of discretionary jurisdiction. They are slightly more common in intermediate courts.

B. *Opinion Publication and Preparation*

Studies have shown that a large proportion of appellate judges' time is consumed in preparing opinions.⁵⁸ Therefore, this aspect of the appellate process is a prime candidate for changes that could lead to major relief. Three possible changes are discussed here: 1.) restrictions on publication of opinions; 2.) decisions without opinions; and 3.) staff-written opinions.

Restrictions on publication save judges' time mainly because the opinion need not be as polished as opinions published because, in general, the audience is limited to the parties, their lawyers, the trial judge, and the judges deciding the appeal. In writing unpublished opinions the facts need not be as thoroughly stated, and the writing style need not be as polished. Further, there is no need to check as thoroughly for nonsubstantive mistakes, such as inexact citations. One appellate court expert has estimated that unpublished opinions take about half the judicial time published opinions take.⁵⁹ *ABA Appellate Standard 3.37* recommends that opinions be published only if they meet specific, quite restrictive, criteria.⁶⁰

Nevertheless, unpublished opinions are the subject of considerable criticism. The major reason is the lack of accountability. A blunt statement of this position is found in the following passage from a synopsis of an A.B.A. conference discussion:

and no useful purpose would be served by oral argument." Advisory Council on Appellate Justice, *Report and Recommendations on Improvements of Appellate Practices* APPELLATE JUST. VOL. V. 127 (1975).

⁵⁶See Wasby, *Functions and Importance of Appellate Oral Argument*, 65 JUDICATURE 340 (1982) and T. MARVELL, *supra* note 39, at 73-80.

⁵⁷Only six or seven supreme courts hear arguments in less than two-thirds of the appeals on the merits. See, T. MARVELL, *supra* note 39, at 75-76; McConkie, *Decision-making in State Supreme Courts*, 59 JUDICATURE 337, 340-41 (1976); Marvell & Kuykendall, *supra* note 2, at 36.

⁵⁸A 1974 questionnaire survey of appellate judges found that more than three quarters of the state supreme court judges responding believed that they spent at least twenty percent of their time writing opinions, and over a third believed they spent more than thirty percent of their time. The figures for intermediate court judges are very similar. M. OSTHUS & R. SHAPIRO, *CONGESTION AND DELAY IN STATE APPELLATE COURTS* 25 (American Judicature Society, 1974). Similarly, a more exact study of the time spent by judges on the U.S. Court of Appeals for the Third Circuit found that forty-eight percent of the judges time spent on cases (and about twenty-nine percent of their total working time) was devoted to opinion preparation. FEDERAL JUDICIAL CENTER, *SUMMARY OF THE THIRD CIRCUIT TIME STUDY 4* (1974).

⁵⁹Comment, *A.B.A. Midyear Meeting Wrap Up: Do Unpublished Opinions Hamper Justice?* 64 A.B.A.J. 318 (1978). Justice Smith, of the Arkansas Supreme Court, gives a lengthy description of the reasons why time is saved in Smith, *The Selective Publication of Opinions: One Court's Experience*, 32 ARK. L. REV. 26, 29-30 (1978). Arkansas is one of the few states that greatly limits publication.

⁶⁰STANDARDS RELATING TO APPELLATE COURTS, *supra* note 18, at 62-63. See also ADVISORY COUNCIL FOR APPELLATE JUSTICE, *STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS* (1973). Both sources also have good discussion of the reasons why opinion publication should be limited.

Some appeals judges duck difficult rulings or try to hide faulty logic by ruling in secret, said (Arizona Chief Justice) Cameron. Even when those factors are not present, he said, the practice encourages the growing public mistrust of the courts.⁶¹

Professors Carrington, Meador and Rosenberg also believe that unpublished opinions reduce visibility of appellate decision-making and may undermine the integrity of the legal process. They state that such opinions may well lead to inconsistent panel decisions also.⁶²

By and large, state high courts have continued to publish their opinions in the face of rising caseloads. Only about ten courts of last resort publish less than eighty percent of their opinions, and these are generally high volume courts not above intermediate courts.⁶³ Judging from the available evidence, intermediate courts usually publish less than half of their opinions, and several publish very few opinions.⁶⁴

A second way to decrease the time judges spend on opinions is simply to decide many cases without written opinions, either by giving oral opinions at the conclusion of the arguments or by issuing orders without any reason for the decision. Both practices are used in a few very busy courts, apparently enabling them to handle huge caseloads expeditiously. Oral opinions are common in the United States Court of Appeals for the Second Circuit and the Oregon Court of Appeals.⁶⁵ The parties, or at least their attorneys, are informed of the judges' reasoning. Decisions are made with the minimum of delay, and the time required to write opinions is saved.

Decisions without opinions of any sort are rarely a common practice. The United States Court of Appeals for the Fifth Circuit has long decided a sizeable number of cases with orders that inform the parties of the disposition but give

⁶¹Comment, *supra* note 59, at 318.

⁶²P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 43, at 35-41. A number of other scholars have questioned the unpublished opinion practice, especially because of the danger of inconsistent decisions. See e.g., Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?* 61 A.B.A.J. 1224 (1975).

⁶³Marvell & Kuykendall, *supra* note 2, at 36.

⁶⁴*Id.* Information, however, is far from complete concerning intermediate court publication policies.

⁶⁵These are probably the only two American courts that have substantial experience with oral opinions (English appellate courts, however, have long decided cases from the bench), and they are two of the most efficient courts. The Second Circuit in 1974 disposed of almost half its appeals by oral decision at the conclusion of oral arguments or by a summary order rendered shortly after the arguments. COMMITTEE ON FEDERAL COURTS, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, APPEALS TO THE SECOND CIRCUIT 45 (1975). The Court's median time from notice of appeal to decision in 1977 was 4.5 months in criminal cases and 6.4 months in civil cases; both times are much lower than elsewhere in the federal system. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 309 (1977). The court, however, has adopted many procedures, other than oral decisions, designed to reduce delay. In 1979 the Oregon Court of Appeals disposed of 497 cases by "bench decisions," or 24 percent of the 2,056 cases decided on the merits. TWENTY-SIXTH ANNUAL REPORT RELATING TO JUDICIAL ADMINISTRATION IN THE COURTS OF OREGON, 1979, 17-18 (1980). This court received 346 filings per judge in 1979 and its average time from notice of appeal to decision was about seven months, far less time than most other state appellate courts. Whether the bench decisions are a major reason for this great efficiency is not known.

no reason for the decision.⁶⁶ Probably only three state high courts, the Delaware, Louisiana and Mississippi Supreme courts, decide many cases without opinions. In 1981 the Louisiana Supreme Court decided forty-two percent of its 869 cases without opinion;⁶⁷ the Mississippi Court in 1979 decided thirty-four percent of its 603 cases without opinion;⁶⁸ and the Delaware Supreme Court now decides more than half its cases with orders.⁶⁹ Among the intermediate courts, probably the only two that decide large numbers of cases without opinions are in Florida (about half) and Michigan (about one-fifth).⁷⁰

A third way to save opinion-writing time is to issue opinions written by law clerks or the central staff. Law clerks often draft opinions, but time savings for judges are limited because they direct the clerks' research and writing.⁷¹ In some courts, as was described in the preceding section, staff attorneys prepare draft memorandum opinions that are routinely accepted by the judges. It is possible for judges similarly to rely on staff aides, delegating all facets of opinion drafting to the aides, but there is very little public information about this procedure.

In sum, there are three ways to free judges of opinion-writing duties — use of oral opinions, decisions without opinions, and staff-written opinions. These tactics can potentially save a great deal of time, but there are many objections.⁷² If judges do not give reasons for decisions, losing parties may not be satisfied that sufficient attention was given to their contentions. The court, in other words, may seem arbitrary. This belief may spread beyond those immediately connected with the case and reach the legal community and even the general

⁶⁶Thirty-five percent of the Fifth Circuit's decisions in 1974, and thirty-nine percent in the first nine months of 1975, were "affirmances without opinion." COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, HEARING AND SECOND PHASE, VOLUME II (1975). The Fifth Circuit, in general, went as far as any appellate court in abandoning traditional appellate procedures. Most of its cases are placed on summary calendar, after screening by the court's central staff and are decided without oral argument and without a conference of the panel members. Any one judge, however, can order oral arguments, and arguments are allowed if the panel is not unanimous. See Rahdert & Roth, *Inside the Fifth Circuit: Looking at Some Of Its Internal Procedures*, 23 LOY. L. REV. 661, 667-75 (1977). A good summary of the arguments against decisions without opinions in the Fifth circuit, and in several other circuit courts, can be found in Reynolds & Richman, *The Non-Precedential Precedent — Limited Publication and No-Citation Rules in the United States Court of Appeals*, 78 COLUM. L. REV. 1167, 1173-76 (1978).

⁶⁷THE JUDICIAL COUNSEL OF THE SUPREME COURT OF LOUISIANA, ANNUAL REPORT 1981, 34 (1982). This practice of deciding cases without opinions will most certainly change. In 1982 jurisdiction over initial appeals in criminal cases was transferred from the supreme court to the intermediate court, relieving the former of most of its caseload.

⁶⁸MISSISSIPPI SUPREME COURT, FOURTEENTH ANNUAL STATISTICAL REPORT 1979 6 (1980).

⁶⁹Address by D. HERTMANN, *State of the State Judiciary Address*, (Joint Bar and Bench Conference, University of Delaware, 1982).

⁷⁰W. KRAMER, COMPARATIVE OUTLINE OF BASIC APPELLATE COURT STRUCTURE AND PROCEDURES IN THE UNITED STATES, *passim* (1978).

⁷¹See T. MARVELL, *supra* note 39, at 87-93. Some have severely criticized the use of law clerks or staff attorneys to draft opinions, especially opinions with precedential value. R. LEFLAR, *supra* note 34, at 93-94; Edwards, EXERCISING THE DEVIL OF APPELLATE COURT DELAY, 58 A.B.A.J. 149, 153 (1972).

⁷²STANDARDS RELATING TO APPELLATE COURTS, *supra* note 18, at 60. P. CARRINGTON, D. MEADOR, AND M. ROSENBERG, *supra* note 43, at 9-10, 31-32 (1976); COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 49-51 (1975).

public. The act of writing opinions is also an important part of the decision-process since tentative ideas may not survive the test of putting them in writing. Finally, opinions are an absolute necessity under the common law tradition whenever the decisions create new law or change existing law. Here, especially, the statement of the law and the reasons behind it must be those of the judge and court rather than the staff.

C. Use of Panels in Supreme Courts

As was discussed earlier, decision by panels permits court expansion without drastic loss of productivity per judge. Almost all intermediate courts sit in three-judge panels.⁷³ Panels are far less common in supreme courts, with about one dozen states employing them.⁷⁴ When used, supreme court panels often are a temporary expediency abandoned after other relief, such as creation of an intermediate court, is given. Panel size varies from three to five. Usually the panel is larger than half the court since the case is heard en banc whenever those concurring in the panel decision do not constitute a majority of the whole court. For example, a seven-judge court may sit in five-judge panels with en banc review whenever two panel members dissent. On the other hand, two nine-judge supreme courts, in Mississippi and the District of Columbia, sit in three-judge panels permitting decision by substantially less than half the judges.⁷⁵

Panels in supreme courts are the subject of considerable commentary.⁷⁶ Panels certainly increase a court's efficiency. The judges hear fewer arguments, read fewer briefs, and review fewer draft opinions. Panel hearings do not, however, reduce the number of majority opinions written by each judge. The drawbacks of the panel system in a court of last resort are substantial. The court's decisions may not be consistent, leading to uneven justice to litigants and to disharmonious law in the jurisdiction. The panel judges may make overly fine distinctions to avoid precedent created by prior panel decisions. The knowledge and experience of all the court's judges are not available when the court performs its law-making function. The probability of a panel representing all significant points of view that the full court would consider in a complex case is small. This narrow viewpoint presents major problems in the court's law-making function. As a practical matter, the full implications of the panel system cannot be measured accurately. Much damage, however, results from

⁷³COUNCIL OF CHIEF JUDGES OF COURTS OF APPEAL, *supra* note 20, at 33-35; Marvell & Kuykendall, *supra* note 2, at 13. Exceptions are that the six judge Arkansas and the five-judge Iowa and Alabama intermediate courts sit en banc and the Oregon and New York intermediate courts sit in four-judge or five-judge panels.

⁷⁴The major discussions about the use of panels in state courts of last resort are: CURRAN & SUNDERLAND, *supra* note 15, at 116-47; Wolfram, *Notes from a Study of the Caseload of the Minnesota Supreme Court: Some Comments and Statistics on Pressures and Responses*, 53 MINN. L. REV. 939, 964-75 (1979); Lilly & Scalia, *supra* note 24, at 22-25, 34-42; R. SHAPIRO & M. OSTHUS, *supra* note 58 at 48-54; C. HUIE, *SITTING IN DIVISION — HELP OR HINDRANCE?* (ARKANSAS JUDICIAL DEPARTMENT, 1975); STANDARDS RELATING TO APPELLATE COURTS, *supra* note 18, at 7-9. SUBCOMMITTEE ON THE WORKLOAD OF THE DISTRICT OF COLUMBIA COURT OF APPEALS, *supra* note 53, at 21-24, 157-72.

⁷⁵The operation of panel systems are described in SUBCOMMITTEE ON THE WORKLOAD OF THE DISTRICT OF COLUMBIA COURT OF APPEALS, *supra* note 53.

⁷⁶See the literature cited in note 74.

the suspicion that the problems occur, lessening public respect for appellate justice in the jurisdiction.

ABA Appellate Standard 3.01 states absolutely that high courts should not sit in panels. Commentary to this section explains the matter in terms pertinent to this report:

In some states having no intermediate appellate court, the supreme court sits in divisions in order to cope with a caseload that would be too large to handle if the court were to sit *en banc* in every case. This arrangement has often been used as a means of transition to the establishment of an intermediate appellate court. The result of such an arrangement is that the court functions simultaneously as a court of intermediate review when it sits in divisions and as a court of subsequent review when it sits *en banc*. If the court's docket in such a system is carefully administered, so that important or difficult cases are identified before being heard and assigned directly for *en banc* hearing, a single supreme court can handle the system's appellate responsibilities in an effective way. Experience indicates, however, that such an arrangement may persist long after the point has been reached when an intermediate appellate court should have been established. Moreover, internal inconsistency in the court's decisions may be ignored or tolerated to an excessive degree in the hope of avoiding the cost of establishing an intermediate court.⁷⁷

The panel procedure noted in the above passage as an effective answer to large caseloads is not the procedure generally used. High courts using panels usually hear the great majority of cases initially in panels and schedule extremely few for later review by the full court.⁷⁸ The procedures outlined in this passage are, in practice, very similar to those sometimes used in states with intermediate courts. As will be seen later, supreme courts in several states screen all cases and assign some to themselves and others to the intermediate courts for decision by three-judge panels. Thereafter the supreme court has discretionary review of the intermediate court decision. Hence, as stated earlier, the use of panels within a supreme court immediately raises the question whether the state needs an intermediate court.

D. *Decisions by One or Two Judges*

Appellate court decisions on the merits traditionally have been made by at least three judges, even in intermediate appellate courts.⁷⁹ Recently, however, two intermediate courts have departed from this general rule. The New Jersey intermediate court now sits in two-judge panels, except when the presiding judge orders a three-judge panel.⁸⁰ Nevertheless, two-judge panels are still not used

⁷⁷STANDARDS RELATING TO APPELLATE COURTS, *supra* note 18, at 8-9.

⁷⁸SUBCOMMITTEE ON THE WORKLOAD OF THE DISTRICT OF COLUMBIA COURT OF APPEALS, *supra* note 53.

⁷⁹A 1978 survey of appellate courts found that all appellate court panels contained at least three members (although information was not obtained for a very few courts). W. KRAMER, *supra* note 70.

⁸⁰N.J. CT. R. GOVERNING APP. PRAC., Rule 2:13-2(b) (1978).

if the issues are of public importance, of special difficulty, or of precedential value. Of course, a third judge also must be brought in when the two judges disagree. In the Wisconsin Court of Appeals, a single judge hears appeals in several categories of minor cases.⁸¹ In Wisconsin a party can request a three-judge panel, but the chief judge has the discretion to grant or deny the request.

These rather extreme measures obviously increase appellate court productivity, because only one or two judges need review the parties' contentions in each case. But the arguments against their use are substantial. Decisions by one or two judges increase the danger of inconsistent decisions. The decisions also may not be made with sufficient deliberation. *ABA Appellate Standard* 3.01 states that decisions should be made by at least three judges in intermediate courts: "The basic concept of an appeal is that it submits the questions involved to collective judicial judgment, and does not merely substitute the opinion of a single appellate judge for that of a single trial judge. A panel of three performs this function without entailing the costs involved in panels composed of a larger number of judges."⁸²

E. *Limiting the Volume of Appellate Papers*

Under traditional decision procedures, much of a judge's time is spent reading the briefs and records. Often a judge spends a larger time reading the necessary papers than is needed to supply the information required for the decision. Various schemes have been proposed to require parties to limit the papers presented. The most common is court rules that ask parties to produce only those parts of the record, including the transcript, relevant to the issues raised. By and large, these rules are unsuccessful.⁸³

A few innovative courts, however, have established procedures that allow production of only those parts of the record which the court, acting through staff advice, deems necessary. The transcript is not brought to the appellate court unless one party requests it by designating portions to be prepared. The court staff reviews these requests and advises the court whether the designated portions of the transcript are needed, and the judges rule on the attorneys' request.⁸⁴ These procedures are still experimental; whether they actually reduce a court's workload has yet to be determined.

Suggestions have also been made to shorten briefs below the limit of fifty pages set by most states. But, studies have shown that the vast majority of briefs are far shorter than page limits anyway.⁸⁵ A New Jersey rule that may prove

⁸¹Wis. STAT. § 752.31 (1980); Wis. R. OF APP. P. § 809.41 (1980).

⁸²STANDARDS RELATING TO APPELLATE COURTS, *supra* note 18, at 7.

⁸³See *e.g.*, Whittaker, DIFFERENTIATED CASE MANAGEMENT IN UNITED STATES COURTS OF APPEALS, 63 F.R.D. 457, 459 (1974); Martin, KENTUCKY'S NEW COURT OF APPEALS, 42 KY. BENCH & BAR 8, 12 (April, 1977).

⁸⁴See CBA JUDICIARY SECTIONS' PROPOSED EXPEDITED APPEALS PROCESS, 6, COLO. LAW 1132, 1135-36 (1977); N.H. R. APP. P. 7, 11

⁸⁵This data is from unpublished studies of 10 courts by the National Center. See J. MARTIN & E. PRESCOTT,

valuable in this area permits counsel to file informal letter briefs of fewer than twenty pages.⁸⁶ Because these briefs are less costly, the rule may tempt counsel to shorten their presentations.

A second technique to reduce briefing is to encourage, in lieu of briefs, motions by appellants for summary reversal and motions by appellees for summary affirmance. Most courts probably permit these motions now. They do not encourage them, however, and their use is infrequent. Nevertheless, summary decisions may well be the wave of the future as they represent the ultimate in reducing judicial resources applied to a case. An extreme example can be found in New Mexico where a large percent of the criminal appeals are summarily dismissed *i.e.*, affirmed.⁸⁷ When filing an appeal, defendants must submit docket statements that contain brief outlines of the facts and issues. Before the record or briefs are prepared, the prosecution then commonly files a motion to dismiss based on information in the docket statement and these motions are regularly granted. Frequent use of summary procedures can significantly reduce the judges' workload; however, the amount of relief depends on how often the motions are granted because those refused actually require additional work by the court.

Another procedure that could relieve the judges of time required to read briefs and records is the Arizona experiment. In this experiment, which will be described more fully in the next section, decisions were made without transcripts or full briefs. The judges' information came mainly from oral argument, supplemented by a short staff memorandum. This procedure has not been adopted by any other court, and it is seemingly predicted on the assumption that full-scale review is possible in a higher level appellate court, a possibility not available in states without intermediate courts.

F. Less Judge Attention to the Briefs and Records

This section concerns the final departure from the traditional appellate process: judicial decisions with only a cursory review of the parties' presentations. This topic is elusive. Judges, as one would expect, do not often acknowledge that they decide cases without reviewing the briefs or records.

The potential shortcuts are numerous, and many depend greatly on the use of staff attorneys or law clerks. Some or all of the judges deciding a case could refrain from reading the briefs or the record. Probably the only common practice in this regard is leaving study of the record to the judge assigned to write the opinion.⁸⁸ The obvious threat is that the court's supposedly col-

⁸⁶N.J. CT. R. GOVERNING APP. PRAC Rule 2:6-3(b).

⁸⁷This procedure is authorized by Rules 208 and 403 of the New Mexico Rules of Appellate Procedure for Criminal Cases. Information about the frequency of the procedures was obtained in conversations with staff of the New Mexico Administrative Office of the Courts. Another court that has increased reliance on summary procedures is the Rhode Island Supreme Court. See Weisberger, *Appellate Courts: The Challenge of Inundation*, 31 AMER. U. L. REV. 237, 245-46 (1982).

⁸⁸A 1957 questionnaire survey of appellate courts (including Federal and intermediate courts) found that

legal decisions are actually made by one person. Study of the record might be left solely to the law clerks or staff attorneys, or all study of the parties' presentations could be left to staff aides, whose memoranda would then be the judges' sole source of information about the issues. Any of these procedures could be moderated somewhat by reliance on the staff or the assigned judge in the first instance, supplemented by a quick review of the briefs or by attendance at oral arguments by the remaining judges. These procedures can be combined with those described in earlier sections involving the limitation of the record, brief, arguments, or written opinions.

There are, of course, objections to these shortcuts. *ABA Appellate Standard* 3.34 states that "Each judge who is to participate in an appeal should read the briefs and become familiar with the record, the parties' contentions, and the principal authorities relevant to the questions presented."⁸⁹ Excessive reliance on staff is a special source of anxiety among students of the appellate courts. There are constant warnings against bureaucratization of the courts and delegation of decisions traditionally made only by judges.⁹⁰ Perhaps the most spirited warning is this statement by Professor Leflar:

In no case should the availability of memoranda, whether prepared by staff or another judge, serve as an excuse for a judge to fail to read briefs before cases are submitted either with or without oral argument. It is the responsibility of each judge to read the briefs; the memorandum is a supplement, affording additional and independent analysis. In his part of the decisional process, each judge should be able to take into account all the relevant material, both adversary and from other sources, that will aid him in reaching a sound conclusion. Only a lazy or badly overburdened judge will rely on staff memoranda without checking them. To use a staff memorandum as a basis for decision without such a checkup would be an abdication of judicial responsibility.⁹¹

Consideration of these sentiments leads to the conclusion that the addition of massive staff help as described in the preceding section probably cannot greatly increase the productivity without severely affecting the thoroughness of judicial review. The staff may improve the court's decisions by supplementing counsel as a source of information, but if the judges continue the traditional practice of reviewing thoroughly the parties' presentations, rather than relying on memoranda, it is unlikely that additional staff help can appreciably lighten the work required of each judge in each case.

16 of the 93 courts responding stated that not all the judges read the briefs in every case. INSTITUTE OF JUDICIAL ADMINISTRATION, APPELLATE COURTS. INTERNAL OPERATING PROCEDURES. 1959 SUMMARY AND SUPPLEMENT 3 (1959)."

⁸⁹STANDARDS RELATING TO APPELLATE COURTS, *supra* note 18, at 54.

⁹⁰*See*. P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 43, at 9-10, 48; STANDARDS RELATING TO APPELLATE COURTS, *supra* note 18, at 90.

⁹¹R. LEFLAR, *supra* note 34, at 92-93.

G. Conclusion

Appellate courts, as has been stressed, have almost total discretion concerning the amount of judge time spent on appeals. They can summarily decide cases without briefs and records, or with greatly abbreviated briefs and records, and they can decide cases on the basis of staff-written memoranda. They can even decide without giving reasons for their decisions, except in a few states where the law requires written opinions. These procedures increasingly are being adopted throughout the country in response to the caseload increase. There is, of course, strong criticism that the quality of review is deteriorating.⁹² But, again, the choice is usually between increased delay and more cursory decision procedures (or more effort by the judges) because caseloads have grown much faster than judicial capacity. It is difficult to determine whether delay or limited attention to cases is worse from the litigants' point of view since no one has surveyed litigants to determine the answer. One can expect, however, that the litigants' desires differ. A new growing response to this dilemma is to let litigants or their lawyers select which route they wish: a "fast track" where cases are accelerated but are given limited attention by the judges or the regular route with at least most of the traditional procedures of record preparation, briefing, argument, and written opinion.⁹³ More often than not, litigants would probably consider this a choice between two evils.

V. DECREASING THE NUMBER OF APPEALS

The preceding sections have discussed means to increase the number of judges and to reduce the time each judge spends on a case. The third broad type of solution to an appellate court's caseload problem is to reduce the number of cases it must decide. One such method, which will be discussed in the next section, is to create an intermediate court. The present section will outline several other strategies that are employed. These include dissuading some litigants from appealing, increasing the court's discretionary jurisdiction, routing appeals to the trial court, and using prehearing settlement conferences.

A. Discouraging Appeals

In recent years there have been several proposals designed to limit the number of appeals, especially what are often called "meritless appeals," by reducing incentives to appeal. None has been shown to be effective, but they do merit serious consideration.

The first suggestion is that appellate courts routinely apply monetary sanctions to attorneys or litigants in civil cases for bringing appeals that have little

⁹²See especially, Carrington, *Ceremony and Realism: Demise of Appellate Procedure*, 66 A.B.A.J. (1980).

⁹³For a description of some of these procedures, see Chapper, *Fast, Faster, Fastest: Appellate Courts Develop Special Tracks to Fight Delay*, 20 JUDGE'S J. 50 (Spring, 1981). See also, Perry, *The Fast Track: Accelerated Disposition of Civil Appeals in the Oklahoma Supreme Court*, 6 OKLA. CITY U. L. REV. 452 (1981); Gilbert, *Court of Special Appeals Announces Invocation of Expedited Appeals*, 15 MD. B.J. 2 (June, 1982). An important question is whether the appellant, appellee, or both by agreement determine whether the fast track will be used.

chance of success.⁹⁴ Provisions for sanctions such as granting the appellee damages or double costs are rather common, but the sanctions have been seldom used.⁹⁵ Probably the most important objection to the routine application of such sanctions is that they may be awarded, or appear to be awarded, arbitrarily. The standards for applying them are, and probably must be, imprecise since the judgment is based on hindsight and not on the viewpoint of an attorney deciding whether to appeal. Hence, awarding of costs or damages will depend much on the varying predilections of judges and panel members. Another objection is that the proposals probably cannot greatly reduce the court's workload. The number of appeals forestalled by the possibility of sanction has not been determined, but the appeals dissuaded by the sanctions ordinarily would contain only issues with clear-cut answers and, thus, would require relatively little court time. Further, the great bulk of meritless appeals are criminal cases, which are not affected by the proposed monetary sanctions.

A similar suggestion is to increase the interest rate on civil judgments appealed. The assumption here is that some civil defendants appeal because the interest rate on judgments is lower than the cost of money elsewhere.⁹⁶ The present interest rate in many states is well below the prime rate. Very little is actually known about the effect of such a differential on the rate of appeal, but it seems unlikely that raising interest on judgments would discourage more than a small portion of the total caseload of an appellate court.

Disincentives to criminal appeals are more difficult since an indigent defendant is provided free counsel and transcripts irrespective of the merits of the case. Professors Carrington, Meador, and Rosenberg have suggested that convicted defendants be given the estimated cost of an appeal should they choose not to appeal.⁹⁷ It is unlikely, however, that legislators would look favorably upon any such attempt to "buy off" defendants.

B. Discretionary Jurisdiction

In this section, discretionary jurisdiction upon first appeal, either in appeals

⁹⁴Several years ago the United States Department of Justice circulated a proposal that United States Court of Appeals tax attorney fees should be included as costs in civil appeals when affirmed, unless a judge certifies that the appellant had a significant likelihood of success. Additionally, it was suggested that a circuit court give the appellee damages or double costs if it determines that the appeal is frivolous or was brought for purposes of harassment or delay. Office for Improvements in the Administration of Justice, United States Department of Justice, *Proposal for Improvements in the Federal Appellate Courts 1-5* (unpublished memorandum, June 21, 1978). Similar proposals were made a year earlier by the American Bar Association Task Force in Appellate Procedure. These proposals are reprinted in Note, *Disincentives to Frivolous Appeals: An Evaluation of the ABA Task Force Proposal*, 64 VA. L. REV. 605, 625-28 (1978). These proposals were apparently never adopted.

⁹⁵See Note, *supra* note 94, at 613-14; Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and National Law*, 82 HARV. L. REV. 542, 569-70 (1969). A typical example is the District of Columbia Court of Appeals Rule 38, which provides: "If this court shall determine that an appeal is frivolous it may award just damages and single or double costs to the appellee." In fiscal year 1978 there were only five motions for award of counsel fees or costs. SUBCOMMITTEE ON THE WORKLOAD OF THE DISTRICT OF COLUMBIA COURT OF APPEALS, *supra* note 53, at 235.

⁹⁶See Note, *supra* note, 94, at 616-18. The Department of Justice and the ABA Task Force reports also suggested increasing interest rates.

⁹⁷P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 43, at 93-96.

from trial court rulings or appeals from administrative agency rulings, will be discussed. Later sections discuss the possibility of discretionary jurisdiction after initial appellate review in the trial court or intermediate court.

There are essentially two models for expansion of discretionary jurisdiction upon first review. The first is a limited expansion proposed by the *ABA Standards* and the second is the virtually complete discretion now exercised by the Virginia and West Virginia Supreme Courts. Intermediate degrees of discretionary jurisdiction are possible, but as a practical matter these two models point out the principal alternatives.

ABA Appellate Standard 3.80 and *Trial Court Standards 2.74* and *2.75* call for appellate review of certain minor civil cases only if certified for review by the trial judge and if granted leave by the appellate court.⁹⁸ Generally, these provisions apply to cases involving an amount in controversy of less than \$2,500, although an upper limit as high as \$10,000 is considered permissible for large urban areas.⁹⁹ The major purpose of this restriction on appellate review is reduction of litigant expense, but it would also reduce appellate court workload, because some appeals would be allowed only if the appellant obtains permission from both the trial judge and the reviewing court. The relief available under this recommendation, however, is slight. For example, a study of the District of Columbia Court of Appeals found that eleven percent of the Court's civil appeals in 1975 and 1977 involved \$2,500 or less,¹⁰⁰ and a study of the Kansas Supreme Court found that ten percent of the total caseload had an amount in controversy of less than \$10,000.¹⁰¹ Fewer than fifty cases in each court would fall under this cut off. Hence, the relief would not be extensive.

Similarly, review of administrative agency decisions could be made discretionary, especially if the appellant has been given a quasi-judicial appellate review within the agency. The Michigan Court of Appeals, for example, has discretionary jurisdiction over many appeals from administrative agencies.¹⁰²

The more extreme model for discretionary jurisdiction upon first review is found in Virginia and West Virginia where there are virtually no appeals of

⁹⁸STANDARDS RELATING TO APPELLATE COURTS, *supra* note 18, at 109-11; STANDARDS RELATING TO TRIAL COURTS 129-38 (1976). Since then, it should be noted, inflation would lead these figures to be raised by at least 50 percent.

⁹⁹There has been no recent nation-wide study of the extent of discretionary jurisdiction upon first appeal. A 1950 survey found that nine state supreme courts not above intermediate courts (and not having general discretionary jurisdiction) had discretionary jurisdiction in appeals involving small sums; the pecuniary limits varied from \$100 to \$300. It is doubtful that this picture has changed substantially since 1950; and probably very few states have dollar limits similar to those suggested in the *ABA Standards*. One exception is Iowa where appeals are discretionary in any case, not involving real estate, where the amount in controversy is less than \$300.00. IOWA R. CIV. P. 333 (1943).

¹⁰⁰THE DISTRICT OF COLUMBIA COURT OF APPEALS AND THE ABA STANDARDS OF JUDICIAL ADMINISTRATION, A STUDY REPORT Appendix C, 122.

¹⁰¹Kansas Judicial Study Advisory Committee, *Recommendations for Improving the Kansas Judicial System*, 13 WASHBURN L.J. 271, 329 (1974).

¹⁰²MICH. GEN. CT. R., Rule 806 (1978).

right. These two supreme courts have very high caseloads per judge.¹⁰³ The Virginia Supreme Court is a much studied court and much is known about its procedures.¹⁰⁴ Requests to exercise discretionary review, called “petitions for appeal,” are given a cursory merits review by three-judge panels which decides whether to grant or deny review without stating its reasons. The petitions are granted for full scale en banc review whenever the panel believes that the lower court decision is wrong or that the appeal presents major questions of law. Each petition is accompanied by short briefs and a full record. The appellant, but not the appellee, is allowed a fifteen-minute oral argument before a panel. In a large portion of criminal cases, the attorneys do not argue before the judges; rather, staff attorneys study the briefs and records and make a short oral presentation to a three-judge panel. The judges then grant or deny review solely on the basis of this ten to fifteen minute presentation. Granted cases are given the full appellate procedure, with full oral arguments, review of the briefs and records by judges, and published opinions.

The Virginia experience shows that appellate courts can manage huge caseloads with ease if they adopt procedures that give limited attention to each case. Nevertheless, there are severe drawbacks. The primary drawback to discretionary jurisdiction is that, quoting Professor Leflar, “It is almost axiomatic that every losing litigant in a one-judge court ought to have a right of appeal to a multi-judge court.”¹⁰⁵ *ABA Appellate Standard* 3.10 also recommends appeal of right from trial court decisions except in the limited category of cases described earlier. The commentary to this Standard, however, appears at first glance to permit the Virginia procedure:

In some jurisdictions, appellate review is provided through a procedure in which the applicant seeking leave to appeal presents a petition that is considered by a panel of the appellate court; the case is heard by the court as a whole only if the panel grants the petition. So long as the procedure for application involves the essential elements of the opportunity to be heard, this type of procedure in substance resembles that in which a matter on appeal is first heard by a division of a court and then considered *en banc*. The essential elements of the opportunity to be heard in appellate litigation are the rights to: (1) present the record of the proceedings below, (2) submit written argument in the form of briefs, (3) present oral argument except in cases where it has so little utility that it may justly be denied, and (4) thoughtful consideration of the merits of the case by at least three

¹⁰³With 266 and 202 appeals per judge in 1979 the Virginia and West Virginia Supreme Courts ranked first and third among the state supreme courts not above intermediate courts, excluding criminal courts of appeal in Texas and Oklahoma. Marvell & Kuykendall, *supra* note 2, at 11.

¹⁰⁴See Lilly & Scalia, *supra* note 24; NATIONAL CENTER FOR STATE COURTS, FINAL REPORT: VIRGINIA COURT ORGANIZATION STUDY, 237-85 (1979); T. MORRIS, THE VIRGINIA SUPREME COURT: AN INSTITUTIONAL AND POLITICAL ANALYSIS (1975); G. LILLY, THE APPELLATE PROCESS AND STAFF RESEARCH ATTORNEYS IN THE SUPREME COURT OF VIRGINIA, A REPORT OF THE APPELLATE JUSTICE PROJECT OF THE NATIONAL CENTER FOR STATE COURTS, 1972-73 (1974).

¹⁰⁵R. LEFLAR, *supra* note 24, at 4.

judges of the court. Procedures for appellate review that lack these elements do not provide a true appeal of right.¹⁰⁶

The four essential elements virtually amount to the decision-making process in a regular appeal, hence, discretionary jurisdiction under such guidelines would not substantially increase the capacity of an appellate court. In fact, the productivity of the Virginia court very likely results because the three-judge panels do not have the time to give thoughtful consideration to most petitions for appeal. "While this system has enabled Virginia to manage with but one appellate court, 'the efficiency' has been achieved at a price to litigants in the quality of appellate justice which most Americans and their lawyers would or should be unwilling to bear."¹⁰⁷ Moreover, many have contended that the Court is so overburdened that the state needs an intermediate court.¹⁰⁸ As a practical matter the question whether discretionary jurisdiction at the first level of appeal is a viable solution to caseload problems involves the same issues as the questions in the previous section concerning how far a court should enhance efficiency by deviating from the traditional components of appellate decision-making, such as not writing opinions. In the end, the issue involves how far the judges can go in reducing attention to each case.

C. Appeals to the Trial Court

A further form of relief — potentially quite substantial relief — is to route many first appeals to the trial court. The trial court could receive appeals from administrative agencies, or a panel of trial court judges could review trial decisions of that court. Further review in both cases would be by discretionary jurisdiction in the appellate court. A major initial objection to both procedures is that most trial courts are also heavily congested; therefore, workload shifted from the appellate court should be accompanied by the addition of more judgeships to the trial court. The following discussion will assume some trial court expansion.

1. Agency Appeals

A first means of transferring appeals to the trial court is to give it initial appellate jurisdiction over appeals from administrative agencies (assuming that it does not already have such review). In states where appeals are taken from an agency to the appellate court, the latter's caseload consist of about ten to fifteen percent of such appeals.¹⁰⁹ Many agency appeals are simple cases from such agencies as the workman's compensation or unemployment compensa-

¹⁰⁶See STANDARDS RELATING TO APPELLATE COURTS *supra* note 18, at 14-15. The STANDARDS also state that each judge should read the briefs. *Id.* at 54.

¹⁰⁷P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 43, at 133.

¹⁰⁸Lilly & Scalia, *supra* note 24, at 42-58; REPORT OF THE COURT STUDY SYSTEM TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA 11-16 (1971); NATIONAL CENTER FOR STATE COURTS, *supra* note 104.

¹⁰⁹Agency appeals constitute 13 and 19 percent of the appeals in the District of Columbia and New Jersey. DISTRICT OF COLUMBIA COURTS, 1981 ANNUAL REPORT 23 (1982); ADMINISTRATION OFFICE OF THE COURTS, NEW JERSEY, STATISTICAL SUPPLEMENT TO THE ANNUAL REPORT OF THE ADMINISTRATIVE DIRECTOR OF THE COURTS 1978-1979, at B-8 (1981).

tion boards. Many others, however, contain long records and important questions of law; zoning cases are particularly difficult. Hence, initial review of agency cases by the trial court might relieve the appellate court. However, agency review is typically an appellate function based on the agency record; the appellate courts, therefore, are more suited to hear these cases. Trial court review is likely to be followed by an appeal, especially when important issues are involved. If an appeal follows, the litigants would not receive prompt resolution of their disputes, and agency operations may be hampered because the extended appellate process would leave major issues affecting administrative procedure unresolved for long periods.

2. Appellate Panels

A second, and quite different, type of appellate review that can be assigned to the trial court is appellate panels, most likely three-judge panels, that hear appeals from decisions of their colleagues. This situation must be differentiated from that where state courts of general jurisdiction hear appeals — generally *de novo* appeals — from courts of limited jurisdiction. The judges would rotate on and off the panels or would sit permanently on panels while also participating in trial duty. If panel members are permanent, full-time appellate judges, the panels would constitute an intermediate court,¹¹⁰ the topic of the next section. Such a procedure is rare in this country.¹¹¹

The idea of review panels is an old one. Roscoe Pound recommended in 1940 the following provision for review of court of general jurisdiction decisions:

Rules should provide for regional or local appellate terms according to the requirements of the court's business. Thus there would be no need of intermediate tribunals of any sort. . . . Three judges assigned to hold the term would pass on a motion for a new trial or judgment on or notwithstanding a verdict, or for modification or setting aside of findings and judgment accordingly (as at common law upon a special verdict). If, as I assume would be true, it proved necessary to limit the cases which

¹¹⁰The intermediate courts in New Jersey and New York are such courts, composed of trial judges permanently assigned to appellate duty.

¹¹¹The Connecticut procedure is an exception. Before 1978 the Appellate Session of the Superior Court received appeals from the state's limited jurisdiction court. The trial courts were unified in that year, and the Appellate Session has continued to operate as a reviewing body for cases decided that formerly would have been decided in the lower court, but are now decided by the Superior Court. See CONN. GEN. STAT. § 51-197 (1957). There are several types of review that should be distinguished from the system in Connecticut and that are described in the text. Because further review is not discretionary, these systems have little or no effect on the volume of appeals. The first is motions for new trial, filed by the trial loser and heard by the trial judge before appellate review begins. In a few states motions for new trials are prerequisites to filing appeals, and they may even be heard by a panel of trial judges. But they do not restrict further review. See NATIONAL CENTER FOR STATE COURTS, POST-ADJUDICATION PROCEDURES IN PENNSYLVANIA COURT OF COMMON PLEAS (1982). Second, many supreme courts once consisted of trial court judges who sat part of the year as supreme court judges. This system was abolished in all jurisdictions as appellate caseloads become large enough to support full-time courts. Third, the STANDARDS RELATING TO TRIAL COURTS, No. 2.74, which applies to civil cases of intermediate amount, suggests review by a single trial judge. The reason for review, however, is to satisfy the need for jury trial or for a trial on the record, when demanded, after a more informal judge trial. The review is not a substitute for an appeal that would ordinarily go to an appellate court.

could go thence to the supreme court, rules could restrict review to those taken by the highest court on certiorari. . . . But heard before three judges at an appellate term it would not be a mere prefatory step in review but a real hearing of the questions raised which should enable the case to stop there unless the points of law were serious enough to warrant certiorari.¹¹²

One benefit of such a procedure is that appeals can be decided quickly. Another is that as long as the trial court is not overburdened, sufficient appellate capacity is ensured because more judges can be assigned to appellate work as the volume of appeals increases.

A similar proposal, called the "Arizona experiment," has received much attention lately.¹¹³ In order to demonstrate the feasibility of a quick, simple review in cases not presenting substantial questions of law, the experiment simulated review, using attorney volunteers instead of judges. A panel of attorneys heard oral argument almost immediately after the conclusion of the trial. The record and transcript were not prepared, but the panel received the motion for new trial and the answering motion. Also a law student prepared a short memorandum describing the case. The panel's information, therefore, came mainly from oral arguments. The panel attorneys then filled out questionnaires, which sought to determine if they could reach a decision on the basis of the information received and, if so, what the basis for the decision was. (They did not actually decide the case; this was purely an experiment.) The results, based on seventy-five cases, were that in only a quarter of the cases the panels felt that they could not decide the issues, generally because they felt they needed the transcript.

This idea for expeditious and inexpensive review is not based on the assumption that trial judges would hear the appeals, but that could easily be the case. A three-judge panel could hear the appeal immediately after the initial decision by the trial judge or jury. If the panel felt it could decide without transcript, it would do so. Further review to the appellate court would be by allowance of appeal. If the panel contends that it cannot decide on the basis of the information before it, or if it believes the case involves a significant legal issue, appeal to the appellate court would be by right.¹¹⁴

¹¹²Pound, *Principles and Outline of a Modern Unified Court Organization* 23 J. AM. JUDICATURE SOC'Y 225, 228 (1940). See also R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 389-92 (1941).

¹¹³Jacobson & Schroeder, *Arizona's Experiment with Appellate Reform* 63 A.B.A.J. 1226 (1977); Jacobson, *The Arizona Appellate Project: An Experiment in Simplified Appeals*, 23 U.C.L.A. L. REV. 480 (1976). The initial idea for the Arizona experiment arose from a suggestion by Judge Hufstedler of the Ninth Circuit Court of Appeals. The panel reviewing the case would consist of the trial judge who decided the case plus two intermediate court judges, and further review would be at the discretion of the next higher appellate court. See Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901, 910-11 (1971).

¹¹⁴The Arizona experiment was limited to civil cases. The main disadvantage to this procedure in criminal cases is that defendants may routinely request further review after adverse panel rulings. Much depends on whether indigent defendants are provided counsel at this stage.

There are several objections to appellate panels composed of trial judges, including both the procedure suggested by Pound and the modification based on the Arizona experiment. Because most trial courts have heavy workload problems, the appellate panels would necessarily require a significant increase in trial judgeships. Also, if, as suggested, rotating panels of judges are used, any one judge would spend only a small proportion of his time on appellate panels and, thus, would not gain the experience needed for efficient appellate decision-making. Even if panel assignments are long enough to permit development of this expertise — for example, a one-year tour — that expertise would be largely dissipated upon reassignment to trial duty and the subsequent multi-year performance of trial responsibilities. Also, there is the further problem that litigants and lawyers may not view the panel decisions, especially if based on neither full briefs nor a record, as an adequate appellate review.¹¹⁵ Such decisions are more likely to be followed by applications for allowance of appeal in many cases.¹¹⁶ Finally, the panel judges would review decisions of their colleagues on the trial court. Reversal may hamper the judges' working relationships. Or the panel judges may (or, equally bad, may appear to) be prone to affirm out of desire, probably subconscious, to preserve working relationships.

D. Pre-Hearing Settlement Conferences

The pre-hearing settlement conference (PHSC) is a much-discussed innovation designed to reduce judges' workloads in civil appeals. A judge or a staff attorney meets with opposing counsel to attempt to settle the appeal before consideration by the court. The conferences, it is theorized, foster settlement because parties are often reluctant to initiate settlement discussions on their own for fear of damaging their bargaining positions, and a respected mediator should be able to induce settlements that would not otherwise occur. PHSC are used in a growing minority of appellate courts, especially intermediate courts.¹¹⁷

This section will describe the variations in PHSC procedures, and it will discuss several attempts to determine their effectiveness.

1. The Operation of PHSCs¹¹⁸

The common elements among PHSC procedures are few. Basically

¹¹⁵The procedure would "provide minimal adequate conformity to the imperatives of appellate justice in all routine cases." P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 43, at 165.

¹¹⁶An Iowa Supreme Court justice recommended against trial court appellate panels largely on this ground, saying: "There would probably be considerable objection to this procedure if the decision were final. If intermediate only, it could result in more work for the trial judges without decreasing the load on the appellate court." Stuart, *Iowa Supreme Court Congestion: Can We Avert a Crisis?*, 55 IOWA L. REV. 594, 602 (1970).

¹¹⁷Information about how many courts use PHSCs is not available, I would guess about 20 to 30 courts are now using them for at least some cases. In 1976 it was estimated that about 18 courts were undertaking to establish PHSCs. Johnson, *Appellate Judges' Conference*, 15 JUDGES' J. ii (Fall, 1976).

¹¹⁸For additional discussions of the PHSC, see: J. GOLDMAN, *INEFFECTIVE JUSTICE, EVALUATING THE PREAPPEAL CONFERENCE* (1980); J. GOLDMAN, *AN EVALUATION OF THE CIVIL APPEALS MANAGEMENT PLAN: AN EXPERIMENT IN JUDICIAL ADMINISTRATION* (Federal Judicial Center 1977); Benjamin & Morris, *The*

attorneys in civil cases meet with a court mediator who attempts to arrange a settlement. Otherwise the courts have experimented with numerous variations. The proceedings are usually, but not always, confidential so as to foster free discussion and to eliminate bias in the decision caused by activities in the settlement conference. If settlement is not reached, the judges hearing the appeal may or may not have knowledge about what was said at the conference. The mediator is usually not involved in the later substantive consideration of the appeal although in a few courts the PHSC judge later sits on the appeal if not settled.

The mediator is usually an active judge. In several courts he is a trial judge, a retired appellate judge, or a staff attorney. The typical reason for using judges instead of attorneys is that counsel probably give judges' views greater respect. The time spent by appellate judges as mediators, however, represents time lost from other judicial duties although some judges absorb the extra workload while maintaining their regular case assignments. The conferences average about an hour, but the length varies greatly and judges may shorten or prolong discussion depending on circumstances. Mediators may be passive or active. Some infrequently guide the discussion or suggest compromises. Others forcefully, even harshly, state their view about the parties' arguments. Mediating is a fine art. The skill of the particular judge is likely to be an important factor in the success of a PHSC.

PHSCs are generally held before briefing is begun. They may be held before the transcript is ordered, while it is being prepared, or after it is completed. The parties are probably more likely to settle if doing so would save transcript expenses. But some courts fear that PHSCs without any cost to appellants may attract appeals that would not have been filed otherwise solely to initiate settlement negotiations.

Some mediators prepare thoroughly for PHSCs while others learn about the issues almost solely from counsel's presentations at the conference. One would expect better prepared mediators to be more effective, but evidence is

Appellate Settlement Conference: A Procedure Whose Time Has Come 62 A.B.A.J. 1433 (1976); Birnbaum & Ellman, *Pre-Argument Settlement Process in an Intermediate Appellate Court: The Second Department Experience*, 43 BROOKLYN L. REV. 31 (1976); Committee on Federal Courts of the Association of the Bar of the City of New York, *The Pre-Argument Conference Experiment of the Second Circuit Court of Appeals: A Report on a Sampling of Attorney's Assessments of the Pre-Argument Procedure*, 174 N.Y.L.J. 1 (July 7, 1975); Crouch, *The New Maryland Appellate Pre-Argument Conference*, 14 MD. B.J. 7 (April, 1981); Goldman, *A Randomization Procedure for 'Trickle-Process' Evaluations*, 1 EVALUATION Q. 493 (1977); Goldman, *The Appellate Settlement Conference: An Effective Procedural Reform?*, 2 ST. CT. J. 3 (Winter, 1978); Goldman, *The Civil Appeals Management Plan: An Experiment in Appellate Procedural Reform*, 78 COLUM. L. REV. 1209 (1978); Janes, Paras, & Shapiro, *The Appellate Settlement Conference Program in Sacramento*, 56 CAL. ST. B.J. 110 (1981); Johnson, *Appellate Judges' Conference*, 6 JUDGES' J. 14 (Winter, 1977); Kaufman, *The Pre-Argument Conference: An Appellate Procedural Reform*, 74 COLUM. L. REV. 1094 (1974); Kramer, *Appellate Settlement Conferences* 1 APP. CT. AD. REV. 21 (1978); Mack, *Settlement Procedures on the U.S. Courts of Appeals: A Proposal*, 1 JUST. SYS. J. 17 (March, 1975); Otis, *Prehearing Conferences — A Help or A Hindrance to Appellate Litigation*, 46 HENNEPIN LAW. 18 (Sept.-Oct., 1977); Scott & Moskal, *The Prehearing Conference — Perhaps Your Only Opportunity to Present Oral Argument to the Minnesota Supreme Court*, 7 WM. MITCHELL L. REV. 283 (1981); Note, *The Minnesota Supreme Court Prehearing Conference — An Empirical Evaluation*, 63 MINN. L. REV. 1221 (1979).

lacking on this point. Courts generally require that the appellant file a “pre-conference memorandum” or “docket statement” before the conference. This short outline of the issues and arguments advanced by the appellant provides rudimentary information about the case. Other sources of information sometimes available are the transcript, briefs submitted to the trial court, or the pleadings and other papers filed below.

Some courts hold PHSCs only when requested by one or both parties. Others hold PHSC's in all civil appeals. Still others order PHSCs in selected civil appeals, chosen by a judge or staff attorney on the basis of information provided in the pre-conference memoranda. Appeals from monetary judgments, or from denial of monetary claims, are often considered prime candidates for settlement. In these situations, judgment about which cases have the potential to be settled is probably an important factor behind the success of a court's PHSC.

Some courts also use PHSCs to restrict the issues in appeals that are not settled. The mediator tries to persuade counsel to narrow the issues, to delete insubstantial arguments, to restrict the size of the transcript, or to submit an agreed statement of facts. PHSCs are also used in some courts to establish time schedules for briefing and arguments.

There are many other variations in PHSC procedure. Counsel may or may not be required to enter the conference with the clients' permission to settle. The court may require that clients be present or, at least, be readily accessible by telephone. Settlements are probably more likely, and certainly speedier, when one of these arrangements is required. If settlement is not reached at the PHSC, the court may or may not stay transcript production and briefing while settlement seems likely. Even though such stays delay disposition if settlement is not reached, they probably foster settlement by the parties.

Most PHSCs are held at the court. PHSCs are, thus, more likely when counsel are located nearby. However, the Colorado Court of Appeals is one court that holds PHSCs throughout the state. While this encourages the use of PHSCs and reduces attorneys' travel expenses, it also entails a considerable loss of judge time.

2. Evaluating the Effectiveness of PHSCs

Unlike other aspects of appellate procedure, PHSCs have been the subject of several formal evaluation attempts. But gauging the effectiveness of PHSCs involves so many thorny problems that little has actually been learned about the subject. What evidence there is, however, does suggest that the PHSCs might be effective.

The major benefit derived from PHSCs is the reduction of the judges' workload by reducing the number of appeals that must be decided and, in some courts, by narrowing the issues presented. This also benefits litigants because

settlements often mean less delay and expense.

These benefits must be weighed against substantial drawbacks. The time spent by the mediator is time that could be spent elsewhere. When the mediator is an active appellate judge, his PHSC work is at the expense of regular decision-making work. Another drawback is delay when cases are not settled. For example, the transcript might be postponed several weeks while settlement negotiations continue unsuccessfully. A third drawback is the time and expense of attorneys and clients who participate in the conferences. Finally, there is a chance that PHSCs may prompt more appeals by litigants seeking to avail themselves of the mediation service.

Effectively evaluating PHSCs is especially difficult because numerous aspects of PHSC procedures vary from court to court. If it were found that PHSCs at one court are or are not effective, the findings are not likely to apply to PHSC operations at any other court.

In addition, peculiar characteristics of a court's milieu may have an impact. One court may receive appeals more amenable to settlement than another. Lawyers in one community may discuss settlement without court impetus more readily than lawyers elsewhere. There may be differing proportions of new counsel on appeal who know little about a case without obtaining transcripts and are probably less likely to settle than trial counsel. The extent of delay and backlog, which varies from court to court, may also affect settlement rates. These considerations, again, make the application of findings from one court to another impracticable.

Nonetheless, several attempts have been made to evaluate state court PHSCs by judges or staff at the courts. The Federal Judicial Center (FJC) has evaluated the PHSCs at the United States Court of Appeals for the Second Circuit. The results of this and other studies suggest that the PHSCs are sometimes an effective way to settle cases.

3. Decreased Workload

The focus of these studies has been on how much PHSCs reduce the volume of appeals reaching the decision-making stage. The major issue is how many more appeals are settled as a result of the PHSC than would otherwise be settled. The first study was the FJC evaluation of the Second Circuit PHSC. The mediator, a staff attorney, selected civil appeals he thought amenable to PHSC procedures, and the FJC randomly selected about three-quarters of these for PHSCs and one-quarter for ordinary processing. Fifty-four percent of the PHSC cases and sixty-two of the "control cases" were adjudicated by the court (*i.e.*, not settled or dropped).¹¹⁹ This indicates that the PHSCs had some effect, but

¹¹⁹J. GOLDMAN (1977) *supra* note 118, at 36. An eight percent difference was also found for "appeals terminated after briefing and oral arguments," and a three percent difference was found for "appeals terminated after briefing and oral argument." *Id.* at 38-39. The composition of these categories is unclear. In later publications, Goldman used only the three percent figure, and he claimed that the research showed

not a very large one. However, considerable uncertainty remains because the sample was rather small, only 302 appeals. As a result the random selection may have placed a disproportionate number of appeals likely to settle in either the PHSC group or the control group. There is a substantial chance that the PHSC resulted in no additional settlements or that it resulted in many more settlements than the eight percent difference indicates.

The first evaluation of a state court PHSC involved the California Third District Court of Appeal. The conferences, which were initiated at the beginning of 1975, are held by judges after the record is prepared, and over half the conferences ultimately result in settlements.¹²⁰ Of the cases in which records have been filed, sixteen percent were dismissed or settled in the year before the program began, and from thirty-five to forty-six in the six years afterwards.¹²¹ The real gains were probably not that dramatic, however, because the settlement rate rose in the other four California District Courts of Appeal from nineteen percent the year before to between twenty-four and twenty-nine percent in later years.¹²² Nevertheless, the evidence strongly suggests that a sizeable portion of civil cases, roughly about eighteen percent, were settled because of the settlement conference. Because many thousands of cases are involved, the percentages are not susceptible to the chance variation that renders the FJC study inconclusive.

Another persuasive study is a similar before-and-after comparison in the Minnesota Supreme Court. The percent of civil cases settled or dismissed rose from twenty-eight percent for cases filed the year before the courts PHSC program, to forty percent for cases filed in the first year of the program.¹²³ Although

that the settlement conference did not work without addressing the more ambiguous results in the original publication and without explaining what "after briefing and oral argument" means or why it should be used as an outcome measure. Goldman (1978); Goldman (1979), *supra* note 118. Two other evaluations of the Second Circuit settlement conference have proclaimed it a success. Committee on Federal Courts, *supra* note 118; Second Circuit Research Advisory Committee, *Evaluation of the Civil Appeals Management Plan* (unpublished report, Second Circuit Court of Appeals, 1982). The latter found that 51 percent of the PHSC cases reached the argument stage, while 60 percent of a control group did so in a sample of 450 cases. The results, therefore, are very similar to those in the Federal Judicial Center study.

¹²⁰Janes, Paras & Shapiro, *supra* note 118, at 112.

¹²¹The following statistics were calculated from JUDICIAL COUNCIL OF CALIFORNIA, 1981 ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE, 80 (1981), and JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 3, at 58.

Percent settled or dropped

Fiscal Year	3rd district	1st, 2nd, 4th, & 5th districts
1972-73	12	21
1973-74	16	19
1974-75	29	21
1975-76	35	24
1976-77	35	29
1977-78	46	26
1978-79	40	27
1979-80	43	28
1980-81	45	28

¹²²*Id.*

¹²³See Note, *supra* note 118, at 1239.

there was no comparison group of similar courts, the evidence strongly suggests that the gains from the conferences were about the same as that obtained in the California Third District. Another important characteristic of the Minnesota study is that conferences were mediated by either a judge or a staff attorney. The judge's settlement rate was about six percentage points higher than the staff attorney's.¹²⁴ Greater effectiveness of judges as mediators, it should be added, is a possible explanation why the percentage of additional cases settled after the PHSC in the Second Circuit was a little lower than that in the California and Minnesota courts.

The remaining evaluation of PHSCs also claims favorable results, but they are less persuasive. At the New York State Supreme Court, Appellate Division, Second Department, a retired appellate judge and a trial judge conducted PHSCs. Fifty percent of the 468 cases mediated by the first judge were settled, and forty-three percent by the second judge were settled.¹²⁵ However, there was no comparison group of cases, and one can speculate that this many cases would have been settled without the conferences.

4. Other Factors

There are many issues not addressed in these analyses of effects on caseloads. First, the lawyers' and judges' time and effort vary greatly from appeal to appeal. The statistics presented above underestimate the effectiveness of PHSCs if the settlements produced are mainly in more time-consuming appeals (*e.g.*, appeals with long records), where one would expect mediators to concentrate their efforts. Attorneys may be more willing to settle appeals that require more work from them. On the other hand, the statistics would overestimate the effectiveness of PHSCs if settlements induced by PHSCs are in appeals that can be decided with little effort. Indeed, one would expect more settlements when the sums involved are small (and presumably the cases less complex) because the cost of transcribing and briefing is likely to consume much of the potential recovery. Indeed, the study of the Minnesota PHSCs found that the settlement rate in cases where trial judgement was for less than \$10,000 rose from fifteen to forty-five percent after the PHSC was initiated, whereas there was little change in cases involving larger sums.¹²⁶

Second, PHSCs may prompt more appeals. Almost all discussions of PHSCs express concern that parties losing at trial may appeal because they believe that the required settlement negotiations will lead to some relief at minimum expense. Several courts, including the California Third District Court of Appeal, require a transcript before PHSCs are held, largely to dissuade such appeals. In a survey conducted by the Third District, the attorneys in PHSC cases were asked: "Did the availability of settlement conference affect the deci-

¹²⁴*Id.* at 1247.

¹²⁵Birnbaum & Ellman, *supra* note 118, at 44-45.

¹²⁶*See Note, supra* note 118, at 1244.

sion to appeal?" Eighteen percent said yes, eighty-two percent said no.¹²⁷ An increase in appeals as large as this result indicates can virtually eliminate the effectiveness of the PHSCs. But civil appeals in the Third District have not increased at a substantially greater rate than in the other California intermediate courts.¹²⁸

Third, judges' workloads can be alleviated by PHSCs even if the appeal is not settled. Mediators often attempt to persuade the parties to limit or refine the issues and to agree about what facts are submitted to the court. One PHSC judge in the New York Second Appellate Division persuaded attorneys to limit facts or issues in about half the cases not settled.¹²⁹ But there is not information about the actual time savings for judges hearing the cases.

Fourth, PHSCs may benefit litigants as well as the courts through earlier disposition and lower cost. In the Second Circuit and in the Minnesota Supreme Court, it was found that settled cases are terminated in less than half the time as ordinary appeals, and settled PHSC cases are terminated substantially sooner than other cases settled.¹³⁰ The cost savings are speculative. Settled appeals probably require less attorney time on the average than appeals decided on the merits. But whether this represents savings to the litigants depends on the attorney fee arrangements and on whether the record must be produced before the PHSC.

5. The Drawbacks of PHSCs

The settlement conferences have several drawbacks, which have been given little attention by researchers. Among these drawbacks are the resources drained from the regular appellate process and the delay, inconvenience, and expense in cases not settled.

The major court resource consumed in PHSCs is the mediator's time, along with the time of his secretary and, perhaps, the time of the law clerks or other staff. At some courts, such as the Minnesota Supreme Court, the judges' time spent in PHSCs is at the expense of time that would otherwise be used deciding appeals. At the California Third District, the conference judge continued most of his normal duties while donating extra time to the court, although that time could theoretically have been donated for other activities. If the mediator is someone who is not authorized to sit on appeals — such as a staff attorney or a retired or trial judge who cannot under state law hear appeals — judge-time is not drained from the decision-making phase of the court. Again, the mediator's effort could be spent on other staff activities, such as screening

¹²⁷Paras, *Supplemental Report on Settlement Conference Program*, (unpublished report, available from 3d District Court of Appeals, California, Sacramento, California).

¹²⁸Since the late 1960's, the number of civil appeals filed in the Third District has increased steadily at the rate of about 10 percent a year. Civil appeals in two of the other Districts increased at lower rates, about six or seven percent, and two increased at the rates of 11 and 13 percent a year. JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 3, at 54.

¹²⁹Birnbaum & Ellman, *supra* note 118, at 44-45.

¹³⁰J. GOLDMAN (1977), *supra* note 118, at 47-51; Note, *supra* note 118, at 1238.

appeals or preparing pre-hearing memoranda. No study has attempted to determine how much the resources used in PHSCs have detracted from other operations of a court.

A second drawback is delay in cases not settled. The FJC study of the Second Circuit PHSC found little difference in the time to final decision between PHSC cases and control cases.¹³¹ The time required to decide cases actually decreased slightly in the Minnesota Supreme Court for cases filed during the first year of the PHSC.¹³² The results in Minnesota are particularly important because, unlike in the Second Circuit, transcript preparation was delayed until after the conference.¹³³ However, the Minnesota Court has such a large backlog that the transcript preparation delay could be absorbed without affecting total processing time. Similar procedures in a more current court would probably result in the addition of several weeks to the processing time of cases decided.

The last major drawback is the time and expense incurred because attorneys, and litigants themselves in some jurisdictions, must attend the PHSC. If settlement results, the effort is probably worthwhile. The absence of settlement, however, may or may not mean extra time and expense, for settlement negotiations may well have taken place anyway. As of now no attempt has been made to calculate these costs.

6. Conclusion

It is difficult to say anything definite about the effectiveness of PHSCs and about which type of PHSC procedure works best. The numerous procedures have not been adequately evaluated. The evidence strongly suggests that PHSCs greatly increase settlements, and thus may reduce the workload and backlog of appellate courts. The PHSC in the California Third District has been credited with reducing the court's backlog from twenty to three months.¹³⁴ There is also some indication that judges are more effective as mediators than staff attorneys although it can be expected that the variation within each category is substantial. Also, the conferences probably do not contribute substantially to delay and may even speed up the procedures. Beyond this, however, there is little information about the effectiveness of the various procedures, especially concerning such issues as whether the benefits are worth the time of judges and staff required for the conference procedures.

VI. RELIEF OF SUPREME COURTS THROUGH INTERMEDIATE COURTS

The major form of relief for a congested high court is the creation of an intermediate court or the expansion of the jurisdiction of an existing intermediate court. At present thirty-two states have intermediate courts, and several more

¹³¹J. GOLDMAN (1977), *supra* note 118, at 50-51.

¹³²Note, *supra* note 118, at 1241.

¹³³*Id.* at 1225.

¹³⁴Benjamin & Morris, *supra* note 118, at 1436.

are actively considering whether to create them.¹³⁵ This section will discuss in detail the many arguments advanced for and against intermediate courts. The major argument for them is the relief afforded the high court. The major drawbacks are the delay and litigant expense resulting when an appeal is subjected to a second review as well as the expense of additional judgeships.

This section will also describe the various arrangements possible in a two-tiered appellate system. Intermediate courts vary greatly in size, jurisdiction, and other features. While under the most common arrangement, the supreme court receives some appeals directly from the trial court, most appeals are filed initially in the intermediate court. The decisions of the intermediate court can then be reviewed by the supreme court through its exercise of discretionary jurisdiction. Within this general model there are many features peculiar to only one or a few states, and several states have intermediate court systems quite unlike the general model. Some supreme courts must accept many appeals from the intermediate court. A few states have separate courts for criminal and civil appeals. Finally, supreme court justices in a few other states apportion the appellate caseload between the supreme court and the intermediate court. Some of these arrangements can become quite complex.

A. *Benefits of Intermediate Courts*¹³⁶

The major reason for having an intermediate court is to reduce supreme court backlog and delay and to allow the justices to spend more time on cases important to the law making function of a supreme court. The extent of relief depends greatly on how appeals are divided between the two courts. Relief is minor if the intermediate court is small and the supreme court continues to receive most appeals from the trial court. Typically, the great bulk of appeals from the trial court are directed to the intermediate court, reducing the volume in the supreme court to a small fraction of its earlier level, excluding requests to appeal (that is, requests for the supreme court to exercise discretionary jurisdiction over intermediate court rulings). More will be said later about these jurisdictional arrangements.

The extent of immediate relief depends on whether appeals pending in the supreme court can be transferred to the intermediate court. Supreme court congestion can be eliminated overnight if almost all pending cases are transferred to a new court. But if the supreme court must retain jurisdiction over appeals already filed, it may need several years to eliminate its backlog.

There is no doubt that supreme court judges consider intermediate courts

¹³⁵The States with intermediate courts are listed in the Appendix at Table 1. States in which at least some members of the supreme court are seeking an intermediate court are Connecticut, Delaware, District of Columbia, Minnesota, Nevada, North Dakota, South Carolina, Utah, and Virginia.

¹³⁶A great many writings have discussed the arguments for and against intermediate courts. Several have been published by the AMERICAN JUDICATURE SOCIETY: INTERMEDIATE APPELLATE COURTS (1968); M. OSTHUS & R. SHAPIRO, *supra* note 58, at 41-48; M. OSTHUS & M. STEIGLER, *supra* note 5, at 4-8. Other valuable discussions can be found in: R. LEFLAR, *supra* note 34, at 65-66; Lilly & Scalia, *supra* note 24, at 45-56; Curran & Sunderland, *supra* note 15, at 152-04.

an important way to reduce delay and backlog. A 1974 survey by the American Judicature Society found that about seventy percent of the appellate judges in states without intermediate courts believed that an intermediate court would reduce delay within courts, and most believed that the reduction would be significant.¹³⁷ Eighty percent of the supreme court judges in states with intermediate courts said that the intermediate court had "very significantly" reduced the supreme court caseload, and only four percent said that no reduction had resulted.¹³⁸

Exact information about the reduction of supreme court workload and delay is difficult to obtain. No comprehensive study has attempted to measure caseloads before and after jurisdictional changes. The information available from a few states uniformly shows substantial decreases in the volume of appeals to be decided on the merits¹³⁹ although total filings, including requests to appeal, tend to increase over the long run.¹⁴⁰ But these statistics are difficult to interpret because one cannot easily measure the increased difficulty of the average appeal decided on the merits after a court is given discretionary jurisdiction or measure the effort required to decide requests to appeal. Above all, as was said earlier, the amount of relief afforded by the creation of intermediate courts depends substantially on the particular jurisdictional arrangement, which is unique to each state.

Scattered information is available from a few states about supreme court delay before and after creation of an intermediate court. Delay reductions have been fairly large. The time from docketing to decision in the Maryland Court of Appeals decreased from 9.4 months in fiscal year 1966-67 to 7.6 months in 1968-69 after the intermediate court was established in 1967. The time from receipt of transcript to decision in the New Mexico Supreme Court decreased from 14.5 months to 10.5 months between 1966 and 1968. In Colorado the time from filing to disposition for criminal cases decreased from twenty-seven to fifteen months. The time from notice of appeal to decision in the Oregon Supreme Court actually increased from 418 days in 1968 to 468 days in 1970 after an intermediate court was created in 1969, but after 1970 the decision times rapidly declined to below 300 days by 1975. Finally, Iowa Supreme Court

¹³⁷M. OSTHUS & R. SHAPIRO, *supra* note 58, at 42.

¹³⁸*Id.* at 43.

¹³⁹A study of caseload trends in selected courts showed a decrease in filings after intermediate courts were created in Maryland (904 filings in 1966 to 569 filings in 1967); Oregon (629 in 1968 to 458 in 1969); and Washington (673 in 1969 to 376 in 1970). Clark, *American Supreme Court Caseloads: A Preliminary Inquiry*, 26 AM. J. COMP. L. 217, 218 (Supp. 1978). Also, Arizona Supreme Court filings decreased from 672 in 1964 to 311 in 1965 due to the creation of an intermediate court, and Kentucky Supreme Court filings decreased from 1,299 in 1975 to 819 and 454 in the following two years after an intermediate court was created in 1976. ARIZONA COURTS SUMMARY REPORT, HISTORY, STRUCTURE AND OPERATION 11 (1976); KENTUCKY, ANNUAL REPORT, 1977 100 (1978).

¹⁴⁰Flango and Blair, *Creating an Intermediate Court: Does It Reduce the Caseload of the State's Highest Court* 64 JUDICATURE 75 (1980). The increase in caseload does not mean an increase in workload because the bulk of the caseload rise is caused by requests to appeal which take far less time to dispose of than appeals decided on the merits.

delay from the time appeals were ready for submission to decision decreased from a 12.2 month average in 1977 to 6.5 months the following year after an intermediate court was created in 1976.¹⁴¹

A major portion of relief that a supreme court derives from an intermediate court is the difference between the work required to decide appeals on their merits and the work required to decide requests to appeal from the intermediate court. The difference is probably very large, but information is scant and subject to dispute among judges. As far back as 1957, Justice Traynor said that the "consideration of these petitions is a major task" in the California Supreme Court.¹⁴² Justice England of the Florida Supreme Court, however, estimates that the petition for review process requires less than one-tenth of his time. He estimated that an average of roughly twenty minutes is required for each petition, or less than five percent of the time needed for a case decided on the merits.¹⁴³ This latter estimate suggests that discretionary jurisdiction can provide enormous relief, but whether this is true of other judges or other courts is not known.

An important additional benefit from an intermediate court is that the high court judges can focus on their law-making function. Only a minority of appeals have law-making significance, as is attested by the small portion of cases with published opinions when the state limits publication to opinions that modify the law of the jurisdiction. Correction of error can be left to the intermediate court when the issues involved have no precedential importance. Presumably, then, high court justices can produce a wiser and more coherent body of law. As a practical matter, the actual effects here are all but impossible to document. Not much is known about whether the justices actually attempt to concentrate on law-making, as opposed to error correction, after an intermediate court is created.¹⁴⁴ Even less is known about whether the additional time available for law-making actually results in better law, but this is true only because the quality of law is difficult to measure. Nevertheless, there is nothing

¹⁴¹ADMINISTRATIVE OFFICE OF THE COURTS, MARYLAND, ANNUAL REPORT 1968-1969 26; ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE COURTS, STATE OF NEW MEXICO 19 (1969); ANNUAL STATISTICAL REPORT OF THE COLORADO JUDICIARY 11 (1977); 1978 ANNUAL STATISTICAL REPORT, IOWA JUDICIARY 24 (1979). It is not clear what is meant by "ready for submission" in Iowa and "docketing" in Maryland. These five states are the only states for which delay statistics before and after the establishment of an intermediate court could be located. It should be noted that the decision time for cases decided in the year a new court is created, and often for the following year also, may remain very high because the supreme court is clearing its backlog of long delayed appeals.

¹⁴²Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 214 (1957).

¹⁴³England & McMahon, *Quality Discounts in Appellate Justice*, 60 JUDICATURE 442, 446-49 (1977). Justice England's time figures are estimates of the minimum time various tasks should require; they are not intended as the actual times expended. The average time for cases decided on the merits is estimated from other figures presented in the article.

¹⁴⁴An attempt has been made to determine whether the North Carolina Supreme Court concentrated on law-making activities to a greater extent after the creation of an intermediate court. The conclusion, based on many criteria, was that the court did so to a limited extent. Groot, *The Effects of an Intermediate Appellate Court on the Supreme Court Work Product: The North Carolina Experience*, 7 WAKE FOREST L. REV. 548 (1971).

that might counter the common sense presumption that more attention by judges to law-development will greatly benefit the jurisprudence of a state.

The establishment of an intermediate court, in practice, is a way to increase the number of appellate judges without enlarging the court of last resort. Such an enlargement, as was discussed in earlier sections, may well endanger the consistency of the court's decisions and the law of the jurisdiction. Intermediate court decisions, especially if the court sits in many three-judge panels, may also conflict; but the inconsistencies can be resolved by the top court.

B. *Drawbacks of Intermediate Courts*

These benefits must be weighted against a rather extensive list of drawbacks. Probably the most important is the delay and expense of a second appeal. That problem, of course, does not exist when a second review is not sought. Generally, further review is sought in less than half of the cases decided by an intermediate court. For the nineteen states with available information, research has shown that petitions for review follow about forty percent of intermediate court decisions.¹⁴⁵ The reason why most litigants who lose in the intermediate court do not seek further review is probably the lack of any major issue that might prompt the supreme court to accept review.

Second, only a small minority of cases in which further review is sought are accepted by the supreme court. The percentages vary from eight percent to twenty-five percent, although information is not available for several states.¹⁴⁶ The median is about fifteen percent. The infrequent acceptance of review means that very small percentages of intermediate court decisions are given a second full-scale review, five percent or less in most states.¹⁴⁷ In addition, the absolute numbers are small; rarely are two hundred appeals given a second review in a year, and in some states the number is astonishingly small (for example, under twenty in Indiana, Kansas, and Massachusetts).¹⁴⁸ The number of second appeals depends on the particular jurisdictional arrangement in the state, a topic that will be discussed at length later.

The problems of delay and expense due to a second appellate level are substantial only in cases granted review by the high court. The extra expense is typically slight when requests for review are denied, as they are in the vast majority of cases. In many state courts, as opposed to the United States Supreme Court, counsel submit the briefs that were filed earlier in the intermediate court or slightly revised versions of them. Oral arguments are extremely rare in requests to appeal. The additional delay, likewise, is not great. Supreme courts, because they do not hear arguments or write opinions concerning requests to appeal, probably dispose of most requests within a few months. This is supported by

¹⁴⁵T. Marvel, *The Problem of Double Appeals*, 2 APP. CT. AD. REV. 23, 24 (1979).

¹⁴⁶*Id.* at 25.

¹⁴⁷*Id.*

¹⁴⁸*Id.*

the little statistical information that is available on the point. In the early 1970's the time from intermediate court final decision to grant or denial of requests for review averaged about two months in Louisiana and about five weeks in Alabama.¹⁴⁹ Assuming the intermediate court is current, the total time to final decision on appeal is probably less than the time in an overburdened high court if no intermediate court existed.

A second major problem that might be caused by an intermediate court is the uncertainty created whenever questions of law have been decided by the intermediate court but not by the high court. Several years may pass between an intermediate court decision announcing a new law and an authoritative ruling on the issue by the high court. Similar problems can arise if the high court does not diligently search for and resolve conflicting decisions in the intermediate court. Much attention has been given to these problems in the federal judicial system,¹⁵⁰ but no study has attempted to determine the extent of these problems in the states. The problems are mitigated where intermediate panels must follow precedent created by an earlier panel decision. Also, the problems of potential panel conflicts are less troublesome if the jurisdictional arrangement permits direct hearing of novel law issues by the supreme court.

A third major drawback to intermediate courts is government expense. The creation or expansion of an intermediate court necessarily requires more judges, more staff, and more office space. But, this expense is also required by some other solutions to a supreme court's workload problem, especially enlarging the court or routing appeals to the trial court. The exact expense would depend on the size of the intermediate court, which in turn depends largely on the jurisdictional arrangement in the appellate system, which will be discussed later.

A fourth drawback is the possible unattractiveness of intermediate appellate court judgeships. Their prestige seems to be less than that of supreme court judgeships, but the extent of this problem is impossible to document. When establishing a new court, lawmakers should keep this problem in mind and compensate by providing salaries comparable to those of supreme court justices. The judiciary and bar should foster an active search for potential candidates, especially when a large number of judgeships are created when the intermediate court begins operations or is substantially expanded. Frequent promotion from the intermediate to supreme court could help attract competent judges to the former.¹⁵¹

¹⁴⁹INSTITUTE OF JUDICIAL ADMINISTRATION, A STUDY OF THE LOUISIANA COURT SYSTEM, 199 (1972). NATIONAL CENTER FOR STATE COURTS, REPORT ON THE APPELLATE PROCESS IN ALABAMA 49 (1973).

¹⁵⁰See *e.g.*, COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 5-40, 71-168 (1975).

¹⁵¹Biographical information in REGINALD BISHOP FORSTER & ASSOCIATES, INC. THE AMERICAN BENCH: JUDGES OF THE NATION (1979) indicates that approximately one quarter of the state supreme court judges, in states which have had intermediate courts for at least five years, were previously intermediate court judges.

The last major drawback arises whenever the high court continues to have substantial mandatory jurisdiction after the creation of an intermediate court. The division of jurisdiction between appellate courts, as delineated by statute or constitution, may be unclear for many appeals, leading to confusion among the bar and to additional issues that must be decided by the supreme court. More importantly, the jurisdictional division very likely causes uneven distribution of workload between the supreme court and the intermediate court. Except in the largest states, the intermediate court is usually rather small, about the same size as the supreme court. As a result, the latter must receive a sizeable portion of the initial appeals to prevent excessive backlog in the intermediate court. Statutory or constitutional jurisdictional alignments based on the composition of appellate caseloads in one period may not be suitable a decade or so later since some types of appeals (for example, felony convictions in recent decades) may increase at a much faster rate than others, leading to disproportionate backlogs in the appellate courts.

C. *Jurisdictional Arrangements*

The magnitude of these many benefits and drawbacks depends largely on the jurisdictional arrangement selected. There are several such arrangements, and the variety of models available makes this a complex topic. The major questions addressed in this section are: a) Should some appeals from the trial court continue to be filed directly in the high courts? If so, what types of appeals? b) Should the high court be required to review, or be precluded from reviewing, some intermediate court decisions? c) Should there be a specialized criminal appellate court? d) Should appellate jurisdiction be delineated by constitution, statute, or court rule?

1. Direct Appeals to the High Court

There are three basic systems for apportioning first appeals between an intermediate court and a court of last resort: 1) all, or virtually all, appeals are filed initially in the intermediate court; 2) initial appeals are filed either in the intermediate court or in the high court according to the subject matter of the case; and 3) the high court screens appeals and apportions them between itself and the intermediate court. The second and third are not mutually exclusive, but the first is inconsistent with the other two. The three are discussed in turn below.

ABA Appellate Standard 3.10 favors the first system. It states that all appeals, with the possible exception of appeals from death sentences, should lie initially in the intermediate court.¹⁵² The reason is, "Provisions conferring a right of direct review before a supreme court . . . have invariably resulted

¹⁵²STANDARDS RELATING TO APPELLATE COURTS, *supra* note 18, at 13. The same position was taken earlier in STANDARDS RELATING TO COURT ORGANIZATION 33 (1974). Professors Carrington, Meador, and Rosenberg disagree with the STANDARDS stating that in medium-sized states some appeals should go directly to the supreme court in order to decrease the number of double appeals. P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 43, at 151-52. A similar position is also taken by LEFLAR, *supra* note 34, at 70-71.

in inappropriate allocations of the supreme court's resources and sometimes in distortion of procedural rules in the attempt to extend or contract the scope of such provisions."¹⁵³ The inappropriate allocation results when the high court must decide many cases without substantial legal issues. The *Standards* emphasize that high courts should concentrate on the law-making function, and intermediate courts on the dispute-deciding function.¹⁵⁴ That goal is best reached if the supreme court can select, through the exercise of discretionary jurisdiction, the cases it hears.

On the other hand, there are substantial problems with the ABA suggestion. An intermediate court that receives all appeals from trial courts must be larger (and more expensive) than one that hears only some first appeals while other cases are filed in the high court. A newly created intermediate court, under the ABA suggestion, must be at least as large as the supreme court and perhaps a good deal larger because when a new court is needed, the supreme court cannot manage the appellate volume.¹⁵⁵ In addition, there may not be enough cases with important issues to fully occupy the high court.

A second, and obvious, objection is that there are more second appeals if all first appeals go to the intermediate court. The number of second appeals depends on how efficiently cases with major issues are routed to the high court for initial review. As will be seen later, proper allocation of cases between appellate courts can nearly eliminate second appeals.

A growing number of states have adopted the ABA model. There are now eleven states where virtually all first appeals are filed in the intermediate court and decided there before review is considered by the supreme court. These states are California, Florida, Louisiana, Michigan, New Jersey, New York, Ohio, Oregon, Pennsylvania, Texas, and Wisconsin.¹⁵⁶ Oregon and Wisconsin joined this list in 1978, Florida and Pennsylvania in 1981, and Louisiana in 1982. Most of these are large states, with appellate caseloads far larger than average.

The second basic type of appellate organization is to divide initial appeals between the intermediate court and the supreme court on the basis of subject matter jurisdiction. This is the most common arrangement, existing in a dozen states. Typically, initial appeals comprise the bulk of the high court's workload.¹⁵⁷ The types of cases appealed directly to the high court vary greatly from state to state.¹⁵⁸ Direct appeals from death sentences (permissible under

¹⁵³STANDARDS RELATING TO APPELLATE COURTS, *supra* note 18, at 16.

¹⁵⁴*Id.* at 4, 15-16.

¹⁵⁵But an intermediate court should handle more cases per judge than the supreme court because the judges could sit in panels more often, they would have fewer administrative duties, and the cases are less complicated.

¹⁵⁶See M OSTHUS & M. STIEGLER, *supra* note 5, *passim*. SUBCOMMITTEE ON THE WORKLOAD OF THE DISTRICT OF COLUMBIA, *supra* note 53, at 174-209.

¹⁵⁷See M OSTHUS & M. STIEGLER, *supra* note 5, *passim*.

¹⁵⁸*Id.*

the ABA standards) are the most common category found in most of these states. Many states also provide direct appeal from sentences of life imprisonment and occasionally in any murder conviction. Direct supreme court review is infrequently required in other criminal cases although defendants in certain major felony cases have appeal of right to the Indiana, Kansas, and Kentucky supreme courts.

Several states provide direct supreme court review whenever the constitutionality of a statute is questioned and several more whenever the trial court rules a statute unconstitutional. Approximately six supreme courts have direct review of specified types of agency cases, especially utility regulation appeals. A few states provide for direct review in election cases, and a few more in cases involving the right to public office. In addition, supreme courts in several states must review various odd types of trial court rulings, for example, equity cases in Alabama and certain water cases in Colorado.

Dividing jurisdiction in initial appeals along subject matter lines has several major drawbacks. The jurisdictional alignments, although typically based on judgments about the importance of various types of appeals, can only imperfectly route the important issues, especially law-making issues, to the court of last resort. Thus, some appeals with important issues are initially filed in the intermediate court, requiring double appeals. Another problem is that a jurisdictional alignment based on a state's appellate caseload in one period very often leads to an overburdened supreme court several years later. As caseloads rise, the supreme court must hear more appeals of right, many of which do not contain important questions and could be decided by the intermediate court. The supreme court's caseload may continue to increase drastically and overwhelm the court. Jurisdictional adjustment, by statute or constitutional amendment, often comes many years or even decades after relief to the supreme court becomes necessary.¹⁵⁹ One way to alleviate this problem is to give the supreme court the authority to adjust jurisdiction by rule. This will be discussed later.

In the third type of appellate system, the justices apportion all or a sizeable portion of the cases between the two appellate courts. There are two ways that this can be done. Under the first, all appeals are filed initially in the supreme court which retains some and transfers the rest to the intermediate court. Typically, the court retains the law-making appeals and as many others as are necessary to balance the caseloads of the two courts. This system is used in Hawaii, Idaho, Iowa, and Oklahoma.

The second variation is the frequent use of a supreme court's bypass authority. Probably most supreme courts above intermediate courts have the

¹⁵⁹Examples of such states can be found by looking at the statistics in Marvell & Kuykendall, *supra* note 2, at 12. They include Alabama, Florida, Georgia, Louisiana, New York, and Pennsylvania. The Florida, Louisiana, and Pennsylvania Supreme Courts recently received relief through increased intermediate court jurisdiction. Maryland is one of the few states where the legislature has frequently and promptly changed supreme court jurisdiction in response to rising caseloads. See Reynolds, *The Court of Appeals of Maryland: Roles, Work and Performance — Part I*, 37 MD. L. REV. 1, 4-5 (1977).

authority to transfer appeals pending in the intermediate court so that there is, in effect, a direct review from the trial court to the supreme court. The *ABA Appellate Standard* 3.10 recommends that this authority be used only if the supreme court “determines that the matter involves a question that is novel or difficult, is the subject of conflicting authorities applicable within the jurisdiction, or is of importance in the general public interest or in the administration of justice.”¹⁶⁰ These criteria suggest that bypass authority should seldom be used and that appears to be the policy of most supreme courts with bypass authority. Nevertheless, a few do transfer many cases pending in the intermediate courts and, thus, go far beyond the ABA recommendations. These include the supreme courts of Arizona, Colorado, Maryland, Massachusetts, and Washington. Presumably (although there is little information available on this point) these courts attempt both to relieve the workload of the intermediate court and to transfer cases that would probably be granted discretionary jurisdiction after the intermediate court decision, thus decreasing the likelihood of double appeals. Also, presumably, use of the bypass authority decreases considerably as the volume of appeals increases and as the intermediate court judgeships increase.¹⁶¹

The advantages of these flexible procedures are that the caseloads of the supreme court and the intermediate court can be regularly adjusted so that neither court has more backlog or unused capacity than the other. Also, second appeals can be kept to a minimum by carefully selecting cases for direct review in the supreme court. The major drawbacks to these procedures are that the high court may overburden the intermediate court in order to keep its own caseload light and that the screening procedures add to the appellate process an extra step that may contribute to delay and require extra work by the supreme court justices. However, the screening decisions should not require the time needed for a thorough review and fully informed decision because a case mistakenly sent to the intermediate court can be reviewed again after the decision at the intermediate level.

2. Review of Intermediate Court Decisions

Another important issue is whether the high court should have complete discretionary jurisdiction over appeals from the intermediate court. In some states the supreme court must grant review of certain types of intermediate court decisions, and in a few states the supreme court is precluded from reviewing restricted categories of intermediate court decisions.

ABA Appellate Standard 3.10 recommends that there be no appeal of right

¹⁶⁰STANDARDS RELATING TO APPELLATE COURTS, *supra* note 18, at 13-14.

¹⁶¹The New Jersey Supreme Court for many years transferred cases pending in the state's intermediate court in order to relieve that court; these cases constituted the bulk of the Supreme Court's caseloads. See Vanderbilt, *Improving the Administration of Justice — Two Decades of Development*, 26 U. CIN. L. REV. 155, 270 (1957). However, the number of cases heard upon review of the intermediate court has increased steadily; they now dominate the court's calendar, and only a few cases are transferred from the intermediate court prior to decision there.

from the intermediate court, with the possible exception of death sentence appeals. Commentary to the Standard states:

Limiting successive appeals gives recognition to the authority and responsibility of intermediate courts of appeal, to the difference in function between such courts and a supreme court, and to the principle that litigation must be brought to conclusion without undue protraction. The purpose of successive review by a higher appellate court is primarily that of resolving questions of law of general significance. Affording the parties a further opportunity for correction of error is at most a secondary objective.¹⁶²

This policy is followed by the great majority of states with intermediate courts. Seldom is there a second appeal of right based on the subject matter jurisdiction of the case. Ohio is the major exception.¹⁶³ If there is appeal of right to the supreme court based on subject matter, the appeal should be from the trial court so as to lessen the likelihood of a double appeal. An exception to this statement arises when a major issue arises for the first time as a result of the intermediate court decision. The court may, for example, rule a statute unconstitutional after it was upheld at the trial level.

Review of intermediate court decisions is also mandatory in a few states if the intermediate court certifies the case to the supreme court or if the intermediate court decision is not unanimous. Certification is a procedure whereby the intermediate court determines that the issues in a case require supreme court attention. In many states, the supreme court can refuse to accept cases certified, and the procedure is simply a method by which intermediate court judges can advise the higher court that the issues are important. Only about five supreme courts, including the Ohio Supreme Court, must take cases certified from intermediate courts.¹⁶⁴ The *ABA Appellate Standards* approve of the certification as long as it does not lead to an appeal of right.¹⁶⁵

A similar procedure, also existing in about four states, is appeal of right when there is a dissent in the intermediate court. Except in New Jersey and North Carolina, this requirement applies only to certain categories of cases. For example, the appeal of right in Missouri exists only when the dissenting judge certifies that the majority decision is contrary to an earlier decision of

¹⁶²STANDARDS RELATING TO APPELLATE COURTS, *supra* note 18, at 15-16.

¹⁶³M OSTHUS & M. STIEGLER, *supra* note 5, at 40. The Ohio Supreme Court must review several categories of appeals from intermediate court decisions, including those involving constitutional questions. The Alabama and Illinois Supreme Courts must also accept appeals containing certain issues from intermediate court, but the categories are rather narrow.

¹⁶⁴Georgia, Illinois, Massachusetts, Ohio, and New York appear to be the only states in which certification creates an appeal of right in the absence of a dissent in the intermediate court. M. OSTHUS & M. STIEGLER, *supra* note 5.

¹⁶⁵STANDARDS RELATING TO APPELLATE COURTS, *supra* note 18, at 13-14. The reasons against appeal of right, given in the commentary at page 17, are that the intermediate court may shift its decisional responsibilities to the supreme court and that the supreme court should have the final authority to determine which cases merit its attention.

the supreme court or intermediate court.¹⁶⁶ In general, however, appeal of right from split decisions is objectionable because the dissent may stem from a disagreement over the facts or from some other factor not relevant to the importance of the legal issues.¹⁶⁷

A different sort of issue is whether supreme court review of intermediate court decisions should be precluded in certain cases. Such a preclusion is a drastic means of avoiding second appeals and the resulting delay and expense, and jeopardizes the supreme court's ability to develop and regulate the state's jurisprudence. Florida is the only state that has attempted to make intermediate court rulings final in more than limited categories of appeals, and the state's supreme court has expended much effort to define the limitations of its review.¹⁶⁸

3. Specialized Criminal Appellate Courts

Five states have specialized criminal appellate courts. Alabama and Tennessee have separate intermediate courts for criminal and civil appeals; Oklahoma and Texas have separate courts of last resort; the sole intermediate court in Alaska has criminal jurisdiction only. Specialized appellate courts might be more efficient because the judges obtain specialized knowledge, but criminal appellate courts have often been criticized.¹⁶⁹ Studies of the Alabama and Tennessee appellate systems have strongly recommended merger of their civil and criminal intermediate courts.¹⁷⁰ Exhaustive studies of the federal appellate system

¹⁶⁶Mo. SUP. CT. R. 83.01 (1972). New York is probably the only other state providing for appeal of right from split decisions; but the appeal lies in only very restricted circumstances: the dissent must be over a question of law, as opposed to fact, and the majority decision must reverse or modify the trial court decision. N.Y. CIV. PRAC. § 5601(a) (McKinney 1963). A recent study has recommended that these appeals be abolished. R. McCRATE et. al., *supra* note 20, at 117. In 1979 Washington abolished a similar provision for appeal of right when the intermediate court reversed the trial court with less than an unanimous vote. STATE OF WASHINGTON, JUDICIAL COUNCIL, 28th ANNUAL REPORT, 1979 21 (1980).

¹⁶⁷"[T]he existence of a dissent in the court below may indicate nothing about the importance of the issue involved." STANDARDS RELATING TO APPELLATE COURTS *supra* note 18, at 17. See also LEFLAR, *supra* note 35, at 76.

¹⁶⁸See Note, *The Eroding of Final Jurisdiction in Florida's District Courts of Appeal*, 21 U. FLA. L. REV. 375 (1969). ABA *Appellate Standard* 3.00 advises against precluding review by the supreme court, and the commentary states, "Attempts to foreclose such review categorically, by making an intermediate appellate court's decisions unreviewable in specified circumstances, tend to result in forced or hypertechnical reasoning in the application of hypertechnical reasoning in the application of the criteria that determine whether further review may be had." STANDARDS RELATING TO APPELLATE COURTS *supra* note 18, at 5.

Besides Florida probably only two other states, New York and Texas, prevent supreme court review of some intermediate court decisions. The New York Court of Appeals cannot, with some exceptions, review a decision by the Appellate Division of the Supreme Court when the latter's ruling is based on review of facts, as opposed to an interpretation of the law. The Texas Supreme Court cannot review intermediate court decisions in several categories, including some reviews of county court decisions, some slander cases, and some divorce cases. See Karger, *The New York Court of Appeals: Some Aspects of the Limitations on its Jurisdiction*, 27 RECORD 370, 376-77 (1972); Sales & Cliff, *Jurisdiction in the Texas Supreme Court and Courts of Civil Appeals*, 26 BAYLOR L. REV. 501, 509-17 (1974).

¹⁶⁹The major recent writings on this subject, besides those in the following two footnotes, are: STANDARDS RELATING TO COURT ORGANIZATION No. 1.13; STANDARDS RELATING TO CRIMINAL APPEALS No. 1.2; P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 43, at 168-72; Carrington, *supra* note 15, at 604-12; Labbe, *The Case Against a Separate Court of Criminal Appeals*, 27 LA. B. J. 94 (1979); Guittard, *Unifying the Appellate Courts* 14 JUDGES' J. 18 (January, 1975); Lilly & Scalia, *supra* note 24, at 37-39.

¹⁷⁰NATIONAL CENTER FOR STATE COURTS, REPORT ON THE APPELLATE PROCESS IN ALABAMA 86-92 (1973); INSTITUTE OF JUDICIAL ADMINISTRATION, THE JUDICIAL SYSTEM OF TENNESSEE 24-26 (1971). In addition, the

and the appellate systems of several states have considered the possibility of creating specialized criminal appellate courts, and all of the studies recommended not creating them.¹⁷¹ In fact, almost no recognized authority has advocated these courts.¹⁷²

The arguments against criminal appellate courts are numerous. First, the division of an appellate system prevents the even distribution of appellate work among the judges. One court, typically the criminal court, is likely to be overburdened while the other remains current without difficulty.¹⁷³ Second, specialized appellate courts, especially criminal courts, have lower prestige than general jurisdiction appellate courts. Hence, they may not attract the best judges. Third, the judges' interests may become too narrow. They may lose touch with overall trends in legal thought and develop arcane language and overly technical rules. Fourth, a specialized judge may believe that his knowledge of the area entitles him to establish policy without due regard to legislation and to rules developed by other courts. Finally, the appointment of judges to specialized courts, it is sometimes contended, may be overly influenced by special interest groups. For instance, prosecutors or defense attorneys may take an exceptionally strong interest, and play strong role, in the selection of judges on a court of criminal appeals.

4. Jurisdiction by Statute or by Rule

A last major issue addressed here is whether appellate jurisdiction should be regulated by constitution, statute, court rule, or a combination of these. Delineating appellate court jurisdiction in the state's judicial article is probably a mistake. The jurisdictional alignment between courts should vary with caseload trends, and the process of amending a state constitution is usually so difficult that changes are not made until the supreme court has become extremely

Institute of Judicial Administration studied the Maryland courts when the intermediate court was a criminal court and recommended that the court be given civil jurisdiction also. INSTITUTE OF JUDICIAL ADMINISTRATION, SURVEY OF THE JUDICIAL SYSTEM OF MARYLAND 26 (1967).

¹⁷¹See COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, *supra* note 28, at 28-30; *Report of the Kansas Judicial Study Advisory Committee*, 13 WASHBURN L.J. 271, 343-44 (1974); COLORADO LEGISLATIVE COUNCIL, INTERMEDIATE COURT OF APPEALS FOR COLORADO 40-44 (1968); COURT STRUCTURE AND JURISDICTION SUBCOMMITTEE, REPORT, OCTOBER, 1972, TO THE CITIZEN STUDY COMMITTEE ON JUDICIAL ORGANIZATION, WISCONSIN 80-81 (1972); SUBCOMMITTEE ON THE WORKLOAD OF THE DISTRICT OF COLUMBIA COURT OF APPEALS, *supra* note 53, at 132-33, 154.

¹⁷²Probably the only writings of any importance arguing for a specialized criminal court are those by Judge Haynsworth of the United States Court of Appeals for the Fourth Circuit. See Haynsworth, *A New Court to Improve the Administration of Justice*, 59 A.B.A.J. 841 (1973).

¹⁷³Delay statistics are available for criminal and civil intermediate courts in Alabama and Tennessee. In 1970-1972 the median time to decision in the Alabama Court of Civil Appeals was 203 days, and the time in the Court of Criminal Appeals was 287 days. NATIONAL CENTER FOR STATE COURTS, *supra* note 170, at 46. The time in the Tennessee civil court was 24 weeks in 1970 and that in the criminal court 38 weeks, INSTITUTE OF JUDICIAL ADMINISTRATION, *supra* note 170, at 21, 23. But the gap between the two Tennessee courts narrowed; the times were 192 and 217 days in 1975. RESOURCE PLANNING CORPORATION, TENNESSEE COURT STUDY; PROFILE OF THE TENNESSEE COURTS 2-15, 3-11 (1977). The caseloads in the nation's other two courts of criminal appeals, the Texas and Oklahoma courts have long ranked among the highest in the nation. See Marvell & Kuykendall, *supra* note 2. The Texas court, however, was relieved in 1980 by transforming jurisdiction over initial appeals to the court of appeals.

overburdened.¹⁷⁴ Statutory jurisdiction presents similar, but less severe, problems.

In a sizeable minority of the states, the supreme courts have authority to regulate appellate jurisdiction through their rule-making powers.¹⁷⁵ The authority, however, is usually accompanied by a statutory or constitutional requirement that there be appeal of right to the supreme court in certain categories of cases, and the rule-making authority is limited to establishing additional categories of appeals of right to the top court. The benefit of jurisdictional rule-making authority is that the high court can adjust the appellate workload between itself and the intermediate court so that neither becomes more congested than the other. On the other hand, there is the danger that the supreme court will overburden the intermediate court, and the legislature may be wary of delegating this important authority.

D. Size and Expense of an Intermediate Court

The final questions to be addressed by this article are the size and expense of an intermediate court. In general, the expense depends almost totally on the number of judgeships. Standards for determining the number of judges on an intermediate court are almost entirely lacking. The major exception is a recommendation by Carrington, Meador, and Rosenberg that one hundred decisions per judge is the upper limit.¹⁷⁶ One way to estimate the optimum size is by calculating the total number of appellate judges needed in the state. If initial appeals are to be divided between the two courts, and there are very few second appeals, then a good way to determine the judgeships needed is to use the median number of appeals per judge in state supreme courts not above intermediate courts. That number is about one hundred appeals filed per year.¹⁷⁷ (This figure is slightly lower than the one hundred decisions suggested as a maximum by Meador et al. because roughly a third of the filings do not reach the decision stage in the typical court.) A typical overloaded supreme court with seven judges might have, for example, twelve hundred filings. This suggests that an intermediate court with five judges would be appropriate.

¹⁷⁴Examples are Florida and Louisiana. See England & Williams, *Florida Appellate Reform: One Year Later*, 40 FLA. B.J. 704 (1981); Dennis, *Use of Our Courts of Appeal for Speedier Criminal Justice*, 28 LA. B.J. 39 (1980).

¹⁷⁵Examples of states where the Supreme Court has appellate jurisdictional rulemaking authority are Arkansas (ARK. CONST. AMEND. 58); Georgia (Collins v. State, 239 Ga. 40, S.E.2d 759 (1977)); Illinois (ILL. CONST. art. VI § 4); Indiana (IND. CONST. art. VII § 4); Iowa (IOWA CODE ANN. § 684.18 (1941)); Kentucky (KY. CONST. § 110(2)(b)); Michigan (MICH. CONST. art. VI § 10) Pennsylvania (PA. CONST. art. V § 10(c)). Also the American Bar Association Model Judicial Article, Section eight, provides that state supreme courts should have rule-making power over appellate jurisdiction. Dodge & Cashman, *The ABA Model Judicial Article*, 3 STATE CT. J. 8, 43 (Winter, 1979).

¹⁷⁶P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 43, at 143-46 (suggest one hundred dispositions on the merits per year per judgeship as "the most efficient number" in a state intermediate court. This assumes that the court sits in three-judge panels (and, therefore, that each judge rules on three hundred cases a year, that one-third of the cases are decided without oral argument, and that about three-quarters of the cases are decided by memorandum opinions (and about one-quarter by full opinions).

¹⁷⁷See Marvel & Kuykendall, *supra* note 2, at 11. The median for the 25 courts listed is 94 filings per judge in Nebraska; the figure of 100 is used because caseloads have probably risen in the two years after that

The cost of creating a five-judge court would closely approximate the cost of five supreme court judgeships. The intermediate court judges would receive about the same salary as the high court judges, would probably be given the same number of law clerks and secretaries, and would have similar office quarters. Other costs would be negligible. The intermediate court can usually share the present appellate courtroom with the supreme court. The present supreme court clerk can serve as clerk to both courts (supreme courts and intermediate courts located in the same city usually share clerks). Not only would a unified clerk's office save expenses, but it would facilitate coordination of the two courts, especially in the division of jurisdiction. The present clerk's office would need only a few additional personnel because of the creation of an intermediate court, because the gross volume of appeals is not affected by adding a new court.

VII. CONCLUSION

Many mechanisms are available to help appellate courts meet the rising caseloads. Case management systems, however, are not one of these, and such systems have been inappropriately stressed by many studying the appellate courts as the most effective answer to major backlog problems. Instead, the possible ways to reduce large backlogs include the following: 1) increasing the capacity of the court; 2) devoting less judicial resources to each appeal; or 3) reducing the volume of appeals. State governments and appellate courts have adopted a wide variety of changes in each of the three areas. Many such changes are clearly helpful, while the benefits of others are speculative. All, however, involve major drawbacks either in the quality of justice provided litigants or in the expense to the state government. By and large, the major options are to increase the number of judges in intermediate courts or to reduce drastically the amount of consideration that judges give to each appeal. The third option, limiting the number of cases to be decided, is not likely to be useful. Settlement conferences, for example, may reduce the number of cases to be decided, but the size of the reduction is small in comparison with the number of appeals and with the growth rate of appellate volume. Jurisdictional changes that limit the number of appeals in one court simply shift the cases to another court, requiring an increase in judgeships there. Discretionary jurisdiction on first appeal is, as a practical matter, only an example of summary procedures and is, thus, actually a mechanism to reduce the judge-time spent on appeals. In sum, because the appellate volume is continuing to expand at a fast pace, the state and judicial policy makers must decide which is the lesser of several evils: mammoth backlogs and delays, substantial increases in judgeships, or decisions after superficial review by judges often relying largely on input from attorney staff aides. The states and courts, although their responses have varied greatly, have generally selected all three in moderate amounts rather than concentrate on a single response.

APPENDIX

TABLE 1
JUSTICES IN STATE APPELLATE COURTS

	Courts of last resort		Intermediate appellate courts		Courts of last resort		Intermediate appellate courts		
	1966	1982	1966	1982	1966	1982	1966	1982	
Alabama	7	9	3	8	New Jersey	7	7	12	21
Alaska	3	5	—	3	New Mexico	5	5	4	7
Arizona	5	5	4	15	New York	7	7	26	48
Arkansas	7	7	—	6	North Carolina	7	7	—	12
California	7	7	33	59	North Dakota	5	5	—	—
Colorado	7	7	—	10	Ohio	7	7	34	52
Connecticut	6	6	—	—	Oklahoma	9	9	—	6
Delaware	3	5	—	—	Criminal	3	3		
Dist. of Columbia	6	9	—	—	Oregon	7	7	—	10
Florida	7	7	15	45	Pennsylvania	7	7	7	24
Georgia	7	7	9	9	Rhode Island	5	5	—	—
Hawaii	5	5	—	3	South Carolina	5	5	—	—
Idaho	5	5	—	3	South Dakota	5	5	—	—
Illinois	7	7	24	34	Tennessee	5	5	9	21
Indiana	5	5	8	12	Texas	9	9	39	79
Iowa	9	9	—	5	Criminal	3	9		
Kansas	7	7	—	7	Utah	5	5	—	—
Kentucky	7	7	—	14	Vermont	5	5	—	—
Louisiana	7	7	20	48	Virginia	7	7	—	—
Maine	6	7	—	—	Washington	9	9	—	16
Maryland	7	7	—	13	West Virginia	5	5	—	—
Massachusetts	7	7	—	10	Wisconsin	7	7	—	12
Michigan	8	7	9	18	Wyoming	4	7	—	—
Minnesota	7	9	—	—					
Mississippi	9	9	—	—					
Missouri	7	7	9	31					
Montana	5	7	—	—					
Nebraska	7	7	—	—					
Nevada	3	5	—	—					
New Hampshire	5	5	—	—					

TABLE 2

APPELLATE COURT CENTRAL STAFF ATTORNEYS

State	Number of Staff Attorneys		Type
	Supreme Court	Intermediate Court	(Permanent (P) Temporary (T))
Alabama	0	0-3*	P
Alaska	1	1	P
Arizona	5	13	P+
Arkansas	0	0	—
California	10	38	P+
Colorado	0	4	P
Connecticut	1	—	P
Delaware	0	—	—
District of Columbia	3	—	T
Florida	0	26	T
Georgia	0	0	—
Hawaii	1	0	P
Idaho	1	?	P
Illinois	3	20	P
Indiana	4	0	P
Iowa	7	0	P+
Kansas	0	5	T
Kentucky	3	8	T+
Louisiana	10	14	P+
Maine	0	—	—
Maryland	0	3	P+
Massachusetts	4	9	P+
Michigan	10	46	T+
Minnesota	9	—	P
Mississippi	0	—	—
Missouri	6	12	T+
Montana	0	—	—
Nebraska	0	—	—
Nevada	9	—	T
New Hampshire	0	—	—
New Jersey	0	16	P
New Mexico	0	4	P
New York	7	86	P+
North Carolina	0	8	P
North Dakota	1	—	P
Ohio	5	0	?
Oklahoma	3-?*	0	P
Oregon	1	4	P
Pennsylvania	0	0	—
Rhode Island	3	—	T+
South Carolina	8	—	T
South Dakota	2	—	P
Tennessee	2	0	P
Texas	6-5*	22	P+

APPELLATE COURT CENTRAL STAFF ATTORNEYS

State	Number of Staff Attorneys		Type (Permanent (P) Temporary (T))
	Supreme Court	Intermediate Court	
Utah	3	—	P
Vermont	0	—	—
Virginia	8	—	T
Washington	3	4	T +
West Virginia	8	—	P +
Wisconsin	4	8	P
Wyoming	0	—	—

* Civil-criminal

+ Majority; a sizeable proportion are in the other category

